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I. THE HISTORICAL FRAMEWORK

Rodney Mott, a pioneer in the study of judicial personnel, commented in 1933 that "in the long heritage of literature on the perennial question of the selection of judges, the practical question, what kind of judges are actually selected, has been very generally ignored." More recently, J. Willard Hurst and David Rothman have echoed similar themes, stressing the need to scrutinize the business and the character of the lower federal and state courts and judges.[1] While historians have persistently neglected lower court judges, scholars in other disciplines, particularly in political science, have intensively investigated judicial backgrounds and career paths.[2] Two distinct purposes have characterized these studies. First, scholars have endeavored to relate attributive background characteristics to judicial decisions. These efforts stem from the often criticized assumption that judicial behavior derives, at least partially, from prior social conditioning.[3] Secondly, scholars have studied judicial

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1. Mott, Albright & Semmerling, *Judicial Personnel*, 167 ANNALS 143 (1933). *See also* J. HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 143 (1950); Rothman, *The Promise of American Legal History*, 2 REVS. IN AM. HIST. 16 (1974).

2. *See, e.g.*, E. BASHFUL, THE FLORIDA SUPREME COURT: A STUDY IN JUDICIAL SELECTION (1958); R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN (1969); S. Goldman, Politics, Judges and the Administration of Justice (unpublished thesis, Harvard University, 1965); Hoopes, *An Experiment in the Measurement of Judicial Qualifications in the Supreme Court of Ohio*, 18 U. CIN. L. REV. 417 (1949); Mott, Albright & Semmerling, *supra* note 1, at 143-55; Vines, *The Selection of Judges in Louisiana*, in K. VINES & H. JACOB, STUDIES IN JUDICIAL POLITICS (1962). *See generally* H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 3-47, 110-19 (1972); S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM 49-76 (1971).

3. *See* G. SCHUBERT, QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR (1959); Goldman, *Voting Behavior on the United States Courts of Appeals, 1961-1964*, 60 AM. POL. SCI. REV.

backgrounds and career characteristics in an attempt to discern the interaction of legal and partisan values and the distribution of political influence. They assert that changing judicial backgrounds and recruitment patterns offer a distinct perspective on a political system that allows for comparison over time.[4] These studies and the accompanying literature on the twentieth century federal judicial recruitment process emphasize the dual role of the courts as both legal and political institutions and the interconnection between the judiciary and the remainder of the political culture and legal order.[5] Such an approach offers the possibility of relating the judiciary and the recruitment process to stated assumptions about the character of politics and law during a particular era.

During the period from 1829 to 1861 the first mass two-party system in the United States grew, matured, and disintegrated. Scholars generally agree that this antebellum two-party system witnessed increased voter participation, newer and seemingly more democratic forms of political expression, intensive organizational

374, 380 (1966); Nagel, *Ethnic Affiliations and Judicial Propensities*, 24 J. POL. 92 (1962); Nagel, *Judicial Backgrounds and Criminal Cases*, 53 J. CRIM. L.C. & P.S. 333 (1962); Schmidhauser, *Judicial Behavior and the Sectional Crisis of 1837-1860*, 23 J. POL. 614 (1961); Schmidhauser, *Stare Decisis, Dissent, and the Background of Justices of the Supreme Court of the United States*, 14 U. TORONTO L.J. 9 (1962); Vines, *Federal District Judges and Race Relations Cases in the South*, 26 J. POL. 337 (1964). Note also the criticisms leveled at these and a legion of other studies in Grossman, *Social Backgrounds and Judicial Decision-Making*, 79 HARV. L. REV. 1551 (1966), and Goldman, *Voting Behavior on the United States Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491, 495 (1975).

4. *See* J. GROSSMAN, LAWYERS AND JUDGES: THE ABA AND THE POLITICS OF JUDICIAL SELECTION 7-48, 196-207 (1965) [hereinafter cited as LAWYERS AND JUDGES]; Glick, *Political Recruitment in Sarawak: A Case Study of Leadership in a New State*, 28 J. POL. 81 (1966); Goldman, *Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts*, 18 W. POL. Q. 755 (1965); Goldman, *Johnson and Nixon Appointees to the Lower Federal Courts: Some Socio-Political Perspectives*, 34 J. POL. 934 (1972); Goldman, *Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts*, 1974 ARIZ. ST. L. REV. 211; Hall, *101 Men: The Social Composition and Recruitment of the Antebellum Lower Federal Judiciary, 1829-1861*, 6 RUTGERS-CAMDEN L.J. 199 (1976); Hall, *Social Backgrounds and Judicial Recruitment: A Nineteenth Century Perspective on the Federal Lower Judiciary*, 29 W. POL. Q. 243 (1976); Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MW. J. POL. SCI. 1 (1959); Tate, *Paths to the Bench in Britain: A Quasi-Experimental Study of the Recruitment of a Judicial Elite*, 38 W. POL. Q. 108 (1975).

5. S. GOLDMAN & T. JAHNIGE, THE FEDERAL COURTS AS A POLITICAL SYSTEM (1971); S. GOLDMAN & T. JAHNIGE, THE FEDERAL JUDICIAL SYSTEM: READINGS IN PROCESS AND BEHAVIOR 1-6 (1968); LAWYERS AND JUDGES, *supra* note 4; J. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS (1955); R. RICHARDSON & K. VINES, THE POLITICS OF FEDERAL COURTS (1970). Although literature treating the pre-Civil War lower federal courts is limited, see D. HENDERSON, COURTS FOR A NEW NATION (1971); M. Tachau, The Federal Courts in Kentucky, 1789-1816 (unpublished thesis, University of Kentucky, 1972); Blume & Brown, *Territorial Courts and Law: Unifying Factors in the Development of American Legal Institutions*, 61 MICH. L. REV. 39, 39-107, 467-521 (1963); Surrency, *A History of Federal Courts*, 28 Mo. L. REV. 214 (1963).

efforts, and a tenacious sense of party identification.[6] They disagree, however, over the basis of party cleavage. Some discern social and economic differences separating Whigs and Democrats;[7] others argue the reverse;[8] and still others acknowledge the presence of cleavages between Whigs and Democrats, but stress ethno-cultural differences.[9]

In exploring this antebellum party system scholars have emphasized the participatory aspects of politics. Other corners of the nineteenth century political universe, including the federal patronage, remain uncharted. Political scientist Frank Sorauf has speculated that the federal patronage during the nineteenth century apparently affected parties in two ways. First, in the absence of an integrated bureaucracy, parties organized the national government through the allocation of appointive offices. Secondly, these same parties relied on the patronage as a tool of internal party discipline. As a consequence of its dual role the patronage undoubtedly generated tension between a party's need to further its goals and the requirement to fill public offices with qualified servants.[10] Federal lower court judgeships comprised a small portion of the antebellum federal patronage, but the selection of judicial officers amplified the tensions inherent in all patronage decisions. Since the federal courts were a coequal branch of the government with power to shape public policy, the selection of a judge was a political matter. The technical nature of the judicial function, however, required individuals pos-

6. On the Second American Party System generally see R. McCORMICK, THE SECOND AMERICAN PARTY SYSTEM 327-56 (1966); McCormick, *Political Development and the Second Party System*, in W. CHAMBERS & W. BURNHAM, THE AMERICAN PARTY SYSTEMS 90-116 (1967). On legislative behavior during the era see T. ALEXANDER, SECTIONAL STRESS AND PARTY STRENGTH (1967); J. SILBEY, THE SHRINE OF PARTY: CONGRESSIONAL VOTING BEHAVIOR, 1841-1852, at 18-34, 142-47 (1967); Ershkowitz & Shade, *Consensus or Conflict? Political Behavior in the State Legislatures during the Jacksonian Era*, 58 J. AM. HIST. 591 (1971).

7. On the historiography of the Jacksonian era generally see Sellers, *Andrew Jackson versus the Historians*, 44 MISS. VALLEY HIST. REV. 615, 627-30 (1958). On the economic interpretation see D. COLE, JACKSONIAN DEMOCRACY IN NEW HAMPSHIRE, 1850-1851 (1970); A. SCHLESINGER, THE AGE OF JACKSON (1945); Gatell, *Money and Party in Jacksonian America: A Quantitative Look at New York City's Men of Quality*, 82 POL. SCI. Q. 235 (1967).

8. *See, e.g.*, R. McCORMICK, THE SECOND AMERICAN PARTY SYSTEM (1966); R. NICHOLS, THE INVENTION OF AMERICAN POLITICAL PARTIES 315-25 (1967); E. PESSEN, JACKSONIAN AMERICA: SOCIETY, PERSONALITY, AND POLITICS 256-57 (1969).

9. *See, e.g.*, L. BENSON, THE CONCEPT OF JACKSONIAN AMERICA: NEW YORK STATE AS A TEST CASE 165-85 (1961); R. FORMISANO, THE BIRTH OF MASS POLITICAL PARTIES: MICHIGAN, 1827-1861, at 165-94 (1971).

10. F. SORAUF, POLITICAL PARTIES IN THE AMERICAN SYSTEM 88, 90-91, 93, 95, 96, 123 (1964); Sorauf, *Patronage and Party*, 3 MW. J. POL. SCI. 115 (1959). The enduring but wholly unsatisfactory study of the nineteenth century federal patronage remains C. FISH, THE CIVIL SERVICE AND THE PATRONAGE (1905).

sessed of legal skills. The selection process, therefore, demanded a blending of party, legal, and public interests.

Between 1829 and 1861 antebellum presidents nominated 200 judges to the federal lower courts. Earlier administrations had appointed another forty jurists who held their positions during part or all of the era. Of these judges, 108 served in the federal district courts, 126 in the territorial courts, five in the Court of Claims, and one in a special circuit court established in 1855 for the northern district of California. The number of appointments available to an administration involved fate and the pace of territorial expansion; thus, during the first eight years of the period, Jackson nominated thirty-two judges, while in the last eight years, Pierce and Buchanan nominated eighty-seven judges.[11]

This article seeks to investigate this neglected aspect of antebellum politics by examining the result of the selection process as mirrored in the collective backgrounds of judicial nominees. In so doing, the answers to three questions will be explored. First, what were the social bases of the selection process? Secondly, how well prepared by education and experience were antebellum lower court judges? Thirdly, what was the role of partisanship in the process and did the Whigs and Democrats differ in the kinds of judges they recruited?

II. Social Origins

The concepts of social origin and social-class position embody the most elusive of historical phenomena. For this study, social origins indicate the relative position in the social order attained by a judge's father and family. These origins divide on a systematic basis into three levels: elite, prominent, and modest. Such categories represent gradations in the upper three-quarters of the social order. Men from the humblest and most deprived social origins simply did not become federal judges. Social-class position refers to

11. All judges whose names were presented to the Senate or who were sitting on the bench during the era were considered in this study. The list was compiled from Journal of the Executive Proceedings of the Senate of the United States of America (1887). Lists of district and territorial judges who actually served can be found in 1 The Federal Cases xxix-xxxvi (1894); 30 The Federal Cases 1361-1403 (1897); 1 The Territorial Papers of the United States 4-33 (C. Carter ed. 1934); 40 F.R.D. 139. On the uses and limitations of collective biography see Stone, *Prosopography*, 100 Daedalus 46 (1971), and especially in American history see Folsom, *The Collective Biography as a Research Tool*, 54 Mid-America 108 (1972). For its application to legal elites see Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 Comp. Studies in Soc'y & Hist. 203 (1965). A somewhat different strategy is employed in Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 Am. J. Legal Hist. 306 (1968).

a judge's adult status before nomination. As with social origin, social-class position divides into elite, prominent, and modest.[12]

The judges' social origins indicate they began life with special advantages. Over three-fourths (76.2%) (Table 1) emerged from either elite or prominent social origins; less than one-fourth (23.8%) were from modest backgrounds. At a time when roughly four-fifths (80.0%) of the male labor force engaged in agricultural activity, one-third (34.7%) of the judges' fathers were farmers or planters.[13] Nearly two-fifths (38.1%) had professional callings; nevertheless, only one-sixth (15.5%) (Table 2) of all fathers were lawyers, suggesting that the judges' decisions to enter the legal profession constituted a break from paternal occupational patterns. The judges' fathers possessed wealth in excess of the average white adult male. Estimates of wealth for the pre-1850 period are sketchy at best, but studies of the years 1850 and 1860 indicate the national average for adult white males was about $2,580. The mean wealth of judges' fathers was $10,490. At a time when approximately one-tenth of the population held $5,000 or more in property, estate or census records indicate that one-half (53.3%) (Table 3) of the judges' fathers possessed wealth of $5,000 or more, and one-fifth (21.2%) had holdings between $25,000 and $50,000.[14] A few possessed extraordinary wealth. David McCaleb, the father of district court judge Theodore Howard McCaleb of Louisiana, Charles Biddle, a prominent Philadelphia merchant and father of a nominee of the same name to the Florida territorial court, and General Thomas Cadwalader, father of district court judge John Cadwalader of Philadelphia, were all worth an estimated $100,000.[15] Such spectacular

12. For a fuller discussion of these problems see the Appendix.

13. S. BLODGET, ECONOMIA: A STATISTICAL MANUAL FOR THE UNITED STATES OF AMERICA 89 (1806). *But see* Fabricant, *The Changing Industrial Distribution of Gainful Workers: Comments on the Decennial Censuses, 1820-1840*, in 11 CONFERENCE ON RESEARCH IN INCOME AND WEALTH, STUDIES IN INCOME AND WEALTH 1, 31-32 (1949); Whelpton, *Occupational Groups in the United States, 1820-1920*, 21 J. AM. STATISTICAL ASS'N 335, 342 (1926).

14. L. SOLTOW, MEN AND WEALTH IN THE UNITED STATES 1850-1870, at 65 (1975). For the earlier period of the late colonial era and the early republic the figure is undoubtedly too high; thus, the estimates of fathers' wealth is conservative. Unfortunately the absences of data comparable to that of the census years of 1850, 1860, and 1870 makes difficult firm national estimates. *But see* E. PESSEN, RICHES, CLASS AND POWER BEFORE THE CIVIL WAR 9 (1973) [hereinafter cited as PESSEN]; Gallman, *Trends in the Size Distribution of Wealth in the Nineteenth Century: Some Speculations*, in L. SOLTOW, SIX PAPERS ON THE SIZE DISTRIBUTION OF WEALTH AND INCOME 1 (1969). On the late eighteenth century see Jones, *Wealth Estimates for the American Middle Colonies, 1774*, 18 ECON. DEVELOPMENT & CULTURAL CHANGE i (1970).

15. Personal Tax Roles, Claiborne County, Miss., 1841, 1849, Miss. Dep't of Hist. & Archives; Manuscript Census Returns, 7th Census of the U.S., 1850, Claiborne County, Miss., Schedules 1 (free population) & 2 (slave population), Nat'l Archives; Case 1714, July 1821,

wealth was unusual. The fathers of future appointees tended to be more affluent than the general public, but the sons of the exceptionally rich had no special claim to position on the federal bench.

TABLE 1

FATHERS' OCCUPATIONAL CATEGORY
BY JUDGES' SOCIAL ORIGINS
(Adjusted Percent)*

Occupational Category	Percent in Category	Estimated Percent in Male Labor Force - 1805	Origins		
			Elite I	Prominent II	Modest III
Professional	38.1	2.0	56.7	45.1	5.7
Commercial	15.6	6.0	16.7	19.5	5.7
Agricultural	34.7	80.0	26.6	25.6	62.9
Manufacturing	10.2	6.0	—	8.6	22.9
Other	1.4	6.0	—	1.2	2.8
Percent in Origins			20.4	55.8	23.8
Total Percent			100.0	100.0	100.0
Total Number	(147)		(30)	(82)	(35)
Total Missing Cases	(93)				

* Unknowns have been excluded from all percentages in tables labeled "adjusted percent."

Probate Ct., Philadelphia County, Pa., Genealogical Soc'y of the Church of Jesus Christ of Latter-Day Saints; Estate Records, Charles E. Cadwalader Family Notes, Thomas Cadwalader Papers, Hist. Soc'y of Pa. On Cadwalader note also WEALTH AND BIOGRAPHY OF WEALTHY CITIZENS OF PHILADELPHIA 7 (1845).

TABLE 2

FATHERS' PROFESSIONAL OCCUPATIONS
(Adjusted Percent)

Occupations	Number	Percent of All Occupations	Percent of Professional Occupations
High Ranking Professional			
Doctor	10	5.7	14.3
Lawyer	27	15.5	38.6
Minister	16	9.2	22.8
Army-Navy Officer	4	2.3	5.7
Surveyor	5	2.9	7.1
Low Ranking Professional			
Teacher	2	1.1	2.8
Other	6	3.4	8.7
Non-Professional	104	59.9	—
Total	174	100.0	100.0
Total Missing Cases	66		

TABLE 3

FATHERS' HIGHEST LEVEL OF WEALTH
(Percent)

Level of Wealth (in dollars)	Number	Adjusted Percent
Less than 1,000	12	8.0
1,000-5,000	58	38.7
5,000-25,000	40	26.7
25,000-50,000	32	21.2
50,000-100,000	4	2.7
100,000 or more	4	2.7
Unknown	90	—
Total	240	100.0

Exposure to politics formed an integral part of the judges' early lives. Approximately three-fifths (59.7%) (Table 4) of the fathers participated in politics through either election or appointment to all levels of government. Elite and prominent fathers engaged most readily in political activity, but modest fathers occasionally filled local governmental posts. Holding a judicial office comprised part of a father's governmental service. While only one-sixth (15.5%) of the fathers were lawyers, two-fifths (39.8%) (Table 5) filled judicial posts, overwhelmingly on the local level as justices of the peace or county judges. Often such positions required little if any formal legal training, allowing fathers untrained in the law to participate in a restricted form of judicial service. Beyond the local level, the fathers' judicial service was distinctly limited; only one-sixth (16.6%) held state or federal posts. In only four cases did both father and son sit on the federal bench. Judges John Glenn of Baltimore, Joseph Hopkinson of Philadelphia, Victor Monroe of Washington territory, and Rensselaer R. Nelson of Minnesota territory followed their fathers to the federal courts.[16] About three-fifths (60.0%) of the federal lower judiciary lacked a paternal connection to the legal profession or judicial service. Politics rather than law characterized the judges' social origins.[17]

16. John Glenn was the son of Elias Glenn who also held the district court judgeship in Maryland. Joseph Hopkinson was the son of Francis Hopkinson, the first district court judge for the eastern district of Pennsylvania. Victor Monroe's father was Thomas Bell Monroe, appointed by Jackson to the district court for Kentucky. Rensselaer R. Nelson was the son of Associate Justice Samuel Nelson of the United States Supreme Court. In addition, three other federal judges, William Fell Giles of Maryland, John J. Dyer of Iowa, and John F. Kinney of Nebraska and Iowa territories had near relatives on the federal bench. Giles was the nephew of William Paca, the first district court judge for Maryland. Dyer was the brother-in-law of Isaac Pennybacker, judge of the western district of Virginia. Kinney was the brother-in-law of Augustus Hall of Nebraska territory.

17. The judges were homogeneous in their ethnic origins; less than one-tenth (7.8%) (Table 20) of them were of other than English, Scottish, or Irish ancestry. Furthermore, their ancestoral roots within the nation were invariably longstanding; seven-tenths (70.3%) were from a third or later generation born in the nation.

The dominance of English immigrants reflected the migration patterns of previous generations that arrived before the era of the Second American Party System. The influx of Irish and German Catholics which began in the late 1830's and mushroomed in the 1840's and early 1850's had its most direct impact on electoral politics. In the Pierce and Buchanan administrations, the absolute number of Irish and non-English appointees increased from past administrations, with Pierce appointing 8 and Buchanan 6. This increase was paralleled, however, by an expansion in the number of federal judgeships. Thus, as a percentage of all appointees there was little difference from past administrations. On immigration patterns see M. JONES, AMERICAN IMMIGRATION 92-116 (1960).

TABLE 4

JUDGES' SOCIAL ORIGINS BY FATHERS' POLITICAL ACTIVITY
(Adjusted Percent)

Highest Level of Political Activity	Percent in Category	Origins			Total Percent
		Elite I	Prominent II	Modest III	
Local	18.9	4.2	66.7	29.1	100.0
State	31.5	40.0	60.0	—	100.0
Federal	10.2	69.2	30.8	—	100.0
None	39.4	—	54.0	46.0	100.0
Percent in Origin		20.5	55.9	23.6	100.0
Total Number	(127)	(26)	(71)	(30)	
Total Missing Cases	(113)				

TABLE 5

FATHERS' PRIMARY OCCUPATION BY
HIGHEST LEVEL OF JUDICIAL SERVICE
(Adjusted Percent)

Occupational Category	Percent in Category	Level of Judicial Service				Total Percent
		Local	State	Federal	None	
Professional	40.6	9.3	27.8	9.2	53.7	100.0
Commercial	15.1	40.0	5.0	—	55.0	100.0
Agricultural	32.3	32.6	2.3	—	65.1	100.0
Manufacturing	10.5	28.6	—	—	71.4	100.0
Other	1.5	—	—	—	100.0	100.0
Percent in Level		23.3	12.8	3.8	60.1	100.0
Total Number	(133)	(31)	(17)	(5)	(80)	
Total Missing Cases	(107)					

Despite the disparity between the territorial and district courts, the social origins of their respective judges diverged only to a limited extent. About four-fifths (80.3%) (Table 6) of the district judges and seven-tenths (71.4%) of the territorial judges emerged from elite or prominent backgrounds. Thus only one-tenth (8.9%) more of territorial judges grew to adulthood in modest origins.

TABLE 6

JUDGES' SOCIAL ORIGINS BY TYPE OF JUDGESHIP
(Adjusted Percent)

Type of Judge	Percent in Category	Origins			Total Percent
		Elite I	Prominent II	Modest III	
District	50.7	22.4	57.9	19.7	100.0
Territorial	46.6	20.0	51.4	28.6	100.0
Court of Claims	2.7	—	75.0	25.0	100.0
Percent in Origin		20.7	55.3	24.0	100.0
Total Number	(150)	(31)	(83)	(36)	
Total Missing Cases	(90)				

The social origins of most antebellum lower court judges varied significantly from the larger population. They grew to maturity in environments in which fathers engaged in non-agricultural occupations, held sufficient wealth to insure financial security, and pursued politics. Nevertheless, diversity existed. While judges from impoverished beginnings did not balance the elite, men of modest socio-economic origins did reach the federal bench.

III. Social-Class Positions

Social origins only partially illuminate the social bases of the selection process and indicate little about a judge's preparedness for federal judicial service. Adult status did not necessarily correspond to social origins; mobility up or down the hierarchy was possible.[18] Career patterns indicate whether jurists serving on the different lower federal courts shared similar or divergent qualifications for office. Lawrence Friedman and others have characterized the terri-

18. For a discussion of social-class position see the Appendix.

torial judiciary as a "mixed, controversial breed . . . [of] political hacks . . . ill-prepared for their jobs. . . ."[19] Such assertions, however, have not been put to any systematic test. Career patterns also afford an opportunity to assess the importance of pre-appointment political activity in gaining a position on the federal lower bench.

Precise and immutable criteria by which to establish qualification for judicial office do not exist; nor did they exist during the pre-Civil War era. Maurice Rosenberg has observed the inherent difficulty in determining what attributes and experiences provide the surest guide to success on the bench, noting that the judicial role in a democratic society requires the blending of certain technical legal abilities with less readily discernible qualities such as honesty and moral courage.[20] Certainly de Tocqueville noted the ambiguity of the judicial role in the nineteenth century United States and the attendant problem of finding suitable judges, concluding that "in a democratic regime" a judge "must be at once upright and subtle," possessed of "legal education, civil rectitude, and political adroitness."[21] Academic and legal education as well as judicial and public legal service offer the most obvious manifestation of a nominee's preparedness.[22]

In comparison with antebellum society, the federal lower judiciary constituted an educated elite. Nearly three-fifths (56.4%) (Table 7) of the nominees graduated from (44.1%) or attended (12.3%) a college or university. Throughout the era college attendance never exceeded one percent of the population.[23] Of those judges with college experience, nearly one-sixth (15.8%) went to an Ivy League school, but future judges also attended thirty-eight other colleges. Obtaining a college education was closely linked to social

19. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 326 (1973). For the opposite view taken for the post-Civil War era see J. GUICE, THE ROCKY MOUNTAIN BENCH: THE TERRITORIAL SUPREME COURTS OF COLORADO, MONTANA, AND WYOMING, 1861-1890, at 60-80 (1972).

20. Jones, *The Trial Judge—Role Analysis and Profile*, in H. JONES, THE COURTS, THE PUBLIC, AND THE LAW EXPLOSION 124 (1965); Rosenberg, *The Qualities of Justice—Are They Strainable?*, 44 TEXAS L. REV. 1063 (1966).

21. As cited in Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 128, 155.

22. LAWYERS AND JUDGES, *supra* note 4, at 196-207.

23. Reliable statistics on college education are not available before 1840. *See* 2 AMERICAN ALMANAC FOR THE YEAR 1831, at 167 (1830). Determining whether or not a judge had actually graduated from or attended a college presented serious difficulties since many of the institutions or their records no longer exist. In those instances, county histories, genealogies, and obituaries were relied upon. Errors undoubtedly exist, but it seems as potentially misleading to remove a judge from the list of attendees when other sources indicate his presence, because the records are no longer available to confirm attendance. Judges attending or graduating from law schools were not included in totals for academic education.

origins; over four-fifths (85.7%) (Table 8) of the judges of elite origin attended college compared with one-third (34.2%) of modest origin. Differences also existed between judges in the various federal courts; about one-half (51.0%) of the territorial judges had been to college compared with three-fifths (59.2%) of the district court judges. While not great, these differences in educational preparation denote some divergence in the quality of the two federal judiciaries. Although slightly more than two-fifths (43.6%) of the antebellum judges lacked any college training, their level of academic preparation compared favorably with the educational backgrounds of district court judges appointed before the early 1950's.[24]

TABLE 7

NATURE OF JUDICIAL SERVICE BY HIGHEST LEVEL OF EDUCATION
(Adjusted Percent)

Judicial Service	Number in Category	Highest Level of Education: College Graduate	Attended College	Academy	Common School	Tutor	Total Percent
District	98	49.0	10.2	19.4	18.4	3.0	100.0
Territorial	92	37.0	14.1	26.1	20.6	2.2	100.0
Court of Claims	5	80.0	20.0	—	—	—	100.0
Percent in Category		44.1	12.3	22.0	19.0	2.6	100.0
Total Number	(195)	(86)	(24)	(43)	(37)	(5)	
Total Missing Cases	(45)						

24. In the early twentieth century the figure on college graduates was about two-fifths (40.7%), but it remained the same through Truman's administration (48.9%) for district court judges. Through the Eisenhower and subsequent administrations it rose, reaching 100 percent by Nixon's first term. *See* LAWYERS AND JUDGES, *supra* note 4, at 201; Goldman, *Judicial Backgrounds, Recruitment, and the Party Variable: The Case of the Johnson and Nixon Appointees to the United States District and Appeals Courts*, 1974 ARIZ. ST. L. REV. 211, 212; Mott, Albright & Semmerling, *supra* note 1, at 149.

TABLE 8

JUDGES' HIGHEST LEVEL OF EDUCATION BY SOCIAL ORIGINS
(Adjusted Percent)

Level of Education	Percent in Educational Level	Origins		
		Elite I	Prominent II	Modest III
College Graduate	47.3	64.3	51.8	22.8
Attended College	8.9	21.4	3.6	11.4
Academy	22.6	14.3	25.3	22.9
Common School	17.8	—	16.9	34.3
Tutor	3.4	—	2.4	8.6
Percent in Origins		19.2	56.9	23.9
Total Percent		100.0	100.0	100.0
Total Number	(146)	(28)	(83)	(35)
Total Missing Cases	(94)			

The judges' varied academic backgrounds converged in their common decision to pursue a legal career of which training in the law was the initial step. Throughout most of the nineteenth century, reading law and clerking in the office of a practicing attorney was the typical means of acquiring a legal education. The antebellum federal lower judiciary was no exception; almost nine-tenths (85.7%) (Table 9) of the future judges pursued such a course.[25] The remainder either enrolled in one of the few law schools for a brief course or read privately. Only one nominee, Orson Hyde of Utah territory, lacked any legal training.[26] Territorial and district court judges underwent the same level and kind of legal education.

While all antebellum federal lower court judges shared a commitment to the legal profession, their status as lawyers may have varied. Gerard Gawalt and Maxwell Bloomfield have noted the diffuse and often ill-defined nature of the profession.[27] Edward Pessen

25. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 278-92 (1973); A. REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 107-89 (1921).

26. Letter from John M. Bernhisel to Brigham Young, Aug. 13, 1852, Brigham Young Papers, Church Archives, Church of Jesus Christ of Latter-Day Saints.

27. G. Gawalt, Massachusetts Lawyers: A Historical Analysis of the Process of Professionalism, 1760-1840, at 254-59 (unpublished thesis, Clark University, 1969); Bloomfield,

TABLE 9

JUDGES' HIGHEST LEVEL OF LEGAL EDUCATION
(Percent)

Level of Education	Number	Adjusted Percent
Graduated Law School	6	3.0
Attended Law School	15	7.4
Read in Law Office	174	85.7
Read Privately	6	2.9
None	2	1.0
Total	(203)	100.0
Total Missing Cases	(37)	

discovered for four major northeastern cities during the pre-Civil War era that "fair natural abilities" unaccompanied by wealth and family prestige rarely sufficed to guarantee a prospective lawyer legal fame, wealth, or social distinction.[28] Nevertheless, the notion persisted that lawyers occupied a crucial position in the social order, that they, more than any other profession, "were responsible for conducting the whole operations of society."[29] While de Tocqueville may well have correctly described the bench and bar as America's only true "aristocracy," the existence of pettifoggers and Philadelphia lawyers along side one another indicates that not all lawyers enjoyed equal prestige or success.[30]

supra note 11, at 312. There were also efforts to bring order to the profession, as Bloomfield notes. *See also* D. CALHOUN, PROFESSIONAL LIVES IN AMERICA: STRUCTURE AND ASPIRATION, 1750-1850, at 45-102 (1965).

28. PESSEN, *supra* note 14, at 52-58. Pessen's argument is sound when it deals with the elite, but the fact that men of upper class origins ruled the legal profession in the major northeastern cities does not mean that nationally the profession was closed to men from lower origins; indeed, as Gary Nash argues, the contrary may have been the case in Philadelphia. *See* Nash, *The Philadelphia Bench and Bar, 1800-1861*, 7 COMP. STUDIES IN SOC'Y & HIST. 203, 214-29 (1965), which argues that "great inroads had been made by the middle-class" in the socially top-heavy legal structure of Philadelphia.

29. *See The Prospects of the American Lawyer*, 10 YALE LITERARY MAGAZINE 1, 3 (1844). Note also these extended discussions of the legal profession: *Law and Lawyers No. I*, 19 DE BOW'S REV. 301 (1855); *Law and Lawyers No. II*, 19 DE BOW'S REV. 389 (1855); *Law and Lawyers No. III*, 19 DE BOW'S REV. 507 (1855); *Law and Lawyers No. IV*, 19 DE BOW'S REV. 637 (1855); *The Utility, Studies, and Duties of the Profession of Law*, 2 DE BOW'S REV. 142 (1846). *See generally* Bloomfield, *supra* note 11, at 312-14.

30. 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (H. Reeve trans. 1945).

The professional stature of the men recruited to the federal bench provides an indication of their social-class position and the success of the selection process in attracting capable judges. While the lower federal bench attracted lawyers and judges with prominent pre-appointment careers, few possessed national legal reputations. Of the eight nominees or judges who attained national legal reputations before nomination, only three, Philip P. Barbour of Virginia, Isaac H. Bronson of Florida, and Isaac Newton Blackford of the Court of Claims, accepted appointment during the era of the Second American Party System. Horace Binney, Joseph H. Lumpkin, and Judah P. Benjamin, among the most distinguished lawyers and jurists of the era, declined appointment. Their motivation in doing so involved financial, personal, and political considerations, but as Binney concluded in 1842 when he rejected John Tyler's offer of a district judgeship, the post "was not equal to" his "professional merits."[31] The district courts generally attracted lawyers of statewide reputation; three-quarters (75.0%) (Table 10) enjoyed prominence in state legal practices before nomination. Nominees to the territories possessed distinctly less prestige; three-fifths (60.2%) either lacked any prominence or were known only in their immediate communities.[32] While not indicative of future judicial performance, little doubt exists that territorial judges emerged from a different strata of the legal profession.

Prospective judges pursued other callings besides the law. At some time before nomination about one-half (48.1%) (Table 11) of them held secondary occupations; almost nine-tenths (86.0%) of these were in the professions (43.1%) or agriculture (42.0%). Judges with secondary agricultural pursuits tended to persist in them throughout their careers.[33] Secondary occupations supplemented incomes from legal practices.

31. Autobiography of Horace Binney, Horace Binney Papers, Hist. Soc'y of Pa.; Nat'l Intelligencer, March 5, 1855; Letter from Judah P. Benjamin to Daniel Webster, Oct. 18, 1850, Resignation & Declination File, General Records of the Dep't of State, R.G. 59, Nat'l Archives; Letter from Millard Fillmore to Daniel Webster, Oct. 23, 1850, Millard Fillmore Papers, Buffalo & Erie County Hist. Soc'y.

32. For discussion of the method employed to determine prominence in profession see the Appendix.

33. Along witb agricultural pursuits in the states below the Mason-Dixon line went slaveholding. Southern federal jurists and nominees to the territorial courts from that region were invariably slaveholders. Only 6 of the 83 slave state nominees to the federal lower courts were not slaveholders. Only a few of the jurists, William Crawford of Alabama, Henry Boyce of Louisiana, and Alexander M. Clayton of Arkansas territory and Mississippi held more than 100 slaves during any period of their career. On Crawford (130 slaves) see MCR-6, Washington County, Ala., Schedule 1; on Boyce (321 slaves in 1860) see MCR-8, Rapides Parish, La., Schedule 2; on Clayton (140 slaves in 1860) see MCR-8, Northern Div., Marshall County, Miss., Schedule 2.

TABLE 10

NATURE OF JUDICIAL SERVICE BY JUDGES' PROMINENCE IN LEGAL PROFESSION
(Adjusted Percent)

Judicial Service	Percent in Category	Level of Prominence			None	Total Percent
		National	State	Local		
District	104	6.7	75.0	17.3	1.0	100.0
Territorial	108	—	39.8	53.7	6.5	100.0
Court of Claims	6	16.7	83.3	—	—	100.0
Percent in Category		3.7	57.8	34.8	3.7	100.0
Total Number	(218)	(8)	(126)	(76)	(8)	
Total Missing Cases	(22)					

TABLE 11

NATURE OF JUDICIAL SERVICE BY JUDGES' SECONDARY OCCUPATIONAL CATEGORY BEFORE APPOINTMENT
(Adjusted Percent)

Judicial Service	Number in Category	Secondary Occupational Category					Total Percent
		Professional	Commercial	Agricultural	Mining and Manufacturing	None	
District	103	15.5	3.9	24.3	3.9	52.4	100.0
Territorial	103	24.3	5.8	16.5	1.9	51.5	100.0
Court of Claims	6	50.0	—	—	—	50.0	100.0
Percent in Category		20.8	4.7	19.8	2.8	51.9	100.0
Total Number	(212)	(44)	(10)	(42)	(6)	(110)	
Total Missing Cases	(28)						

Whether through the law or a secondary occupation, antebellum federal judges often accumulated considerable wealth. During an era when the mean level of wealth for adult white males was $2,580, the antebellum federal judiciary averaged $28,870. In 1860 less than one-twentieth of the population held $25,000 or more, but nearly one-half (48.2%) (Table 12) of the jurists possessed more than that amount and over one-tenth (13.5%) had real and personal property holdings in excess of $100,000 at some time during their lives. These extraordinary levels of wealth derived only partially from the generational passage of family fortunes; about one-fifth (21.7%) of the judges inherited their great wealth.[34] In at least eleven instances judges who amassed large fortunes did so through legal practice, timely marriages, secondary occupations, or a combination of these.[35] Orville C. Pratt, for example, was the son of a New York state farmer of modest means. James K. Polk in 1849 appointed Pratt to Oregon territory where he speculated successfully in lumber, mercantile goods, and Oregon and California lands. A reputed millionaire, Pratt's personal and real property holdings in 1870 amounted to $200,000, a dramatic increase over the $7,000 in cash that he brought originally to the Pacific Northwest.[36] In a few instances judges experienced an opposite fate. Perhaps the most spectacular of these was William Drummond, who was appointed by Franklin Pierce to Utah territory. Drummond became an alcoholic, sewing machine salesman, thief, and finally a pauper, dying

34. These were John K. Kane, Thomas Bradford, and John Cadwalader of Philadelphia, Jeremiah LaTouche Tyler of Georgia; and James Dunlop of Georgetown. *See* H. DARRACH, BRADFORD FAMILY 1660-1906, at 7, 14 (1906); MCR-7, Lombard Ward, Philadelphia County, Pa., Schedule 1; Leach, *Philadelphia of Our Ancestors—Old Philadelphia Families*, Philadelphia North American, June 16, 1907, Nov. 29, 1908; Charles E. Cadwalader Family Notes, Cadwalader Papers; MCR-8, 5th Ward, Philadelphia, Pa., Schedule 1; MCR-7, Bristol township, Philadelphia County, Pa., Schedule 1; H. CUYLER, THE EARLIEST CUYLERS IN HOLLAND AND AMERICA 29; Inventory of Estate of Jeremiah L. Cuyler, Case #207, May 1839, Wills, Estates & Admin. Bonds, Volume C, Chatham County, Ga.; C. HUBBARD, HISTORIC HOUSES OF GEORGETOWN AND WASHINGTON CITY 10, 110-12 (1958); Tax Box, 1825, A-2, Corp. of Wash., Wards 1 & 2; City of Georgetown Assessment Records, 1808-1813, General Records of D.C., R.G. 351; MCR-9, Georgetown, D.C., Schedule 1. The wealth of fathers of 6 other judges with holdings ahove $100,000 could not be located. The judges were Henry Boyce and James G. Campbell of Louisiana; Joseph Buffington of Pennsylvania; John Y. Mason of Virginia; and Samuel Stokely and Hiram V. Willson of Ohio.

35. They were Alexander M. Clayton and Samuel J. Gholson of Mississippi; John Glenn of Maryland; Willard Hall of Delaware; Charles Mason of Iowa; Cyrus Olney and Orville C. Pratt of Oregon territory; Robert W. Wells of Missouri; William Wilkins of Pennsylvania; Thomas S. Wilson of Iowa; and William Woodbridge of Michigan.

36. Teiser, *First Associate Justice of Oregon Territory: O.C. Pratt*, 49 ORE. HIST. Q. 171 (1948); MCR-7, Washington County, Ore. Terr., Schedule 1; Assessment Roll, Clackamas County, Multnomah City, Ore., 1856, Ore. Hist. Soc'y; MCR-9, Ward 7, San Francisco, Calif.

TABLE 12

NATURE OF JUDICIAL SERVICE BY HIGHEST FOUND VALUE OF ALL PROPERTY
(Adjusted Percent)

Type of Judge	Number in Category	Highest Value of Property (in dollars)							
		Less Than 1,000	1,000 - 5,000	5,000 - 25,000	25,000 - 50,000	50,000 - 100,000	100,000 Plus	Listed No Values	Total Percent
District	80	—	5.0	35.0	15.0	23.8	18.7	2.5	100.0
Territorial	85	2.4	10.6	45.9	17.6	11.8	9.4	2.3	100.0
Court of Claims	5	—	—	40.0	20.0	40.0	—	—	100.0
Percent in Category		1.2	7.7	40.6	16.5	18.2	13.5	2.3	100.0
Estimated Percent in U.S. Population - 1860		65.0	20.0	10.0	4.0	.75	.25	—	100.0
Total Number	(170)	(2)	(13)	(69)	(28)	(31)	(23)	(4)	
Total Missing Cases	(70)								

on Chicago's skid row.[37] Inequality characterized the distribution of wealth between territorial and district court judges: nearly two-thirds (57.5%) of the district court judges possessed wealth greater than $25,000, but less than two-fifths (38.8%) of the territorial jurists attained a similar level. The territorial judiciary was less successful than their district court counterparts in accumulating unusual wealth.

The judges' social positions and qualifications for federal judicial office also involved pre-appointment political activity, public legal service, and judicial experience.[38] The incidence of public legal and judicial experience among the antebellum judiciary approximated that of judges on the mid-twentieth century federal district courts.[39] Almost three-fifths (58.8%) (Table 13) of the antebellum judiciary had prior public legal or judicial service, but district and territorial court judges differed. Slightly less than one-half (45.2%) of district court judges had previous judicial service compared with less than one-third (30.8%) of the territorial judiciary. The pre-appointment careers of the two judiciaries in government legal service were distributed more equally; about one-half (49.0% of district judges and 45.5% of territorial judges) of each group had such exposure. The office of federal district attorney figured prominently in the careers of district court judges; about one-sixth (15.6%) of them were former federal district attorneys.[40] A career in law, however, led not only to the bench and public legal service, but also to politics.

37. Desert Evening News, Salt Lake City, Utah, Jan. 29, 1881, July 10, 1885, Nov. 24, 1888; Salt Lake Herald, Nov. 21, 1888. Drummond was not located in census or estate records.

38. Studies of the twentieth century federal lower courts have stressed the fundamental conflict in the selection process between the demand for preappointment political activity to secure nomination and the need for judges with previous public legal and judicial experience. Critics argue that too often the selection process rewards lawyers' party services, thereby diminishing the quality of the hench. But others assume a contrary position, stressing that the presence of political considerations in the process allows for at least an indirect expression of popular will. The advent of the American Bar Association's Standing Committee on Federal Judiciary has afforded private legal interests a voice in the selection process which has apparently succeeded in decreasing the number of judges with elected political activity and increasing the number of college graduates on the federal bench, but has failed to alter the level of appointees' judicial or public legal service. In the antebellum era the legal profession lacked such a voice. *See, e.g.*, H. CHASE, FEDERAL JUDGES: THE APPOINTING PROCESS 186-208 (1972); LAWYERS AND JUDGES, *supra* note 4, at 214-21; Bloomfield, *supra* note 11, at 314-23.

39. Available data on the Johnson and Nixon administrations indicate that nearly one-half (47.2%) of district court judges had some form of prosecutorial service. About one-third (32.4%) of district court judges bad judicial experience in the Truman through Nixon administrations. *See* LAWYERS AND JUDGES, *supra* note 4, at 200, 203; Goldman, *supra* note 4, at 220.

40. For two of the many instances in which service as a district attorney was stressed see Letter from William B. Miller, William M. Gwin, & Milton S. Latham to Franklin Pierce, Jan. 17, 1854, Box 91, Records Relating to the Appointment of Federal Judges, Attorneys and

TABLE 13

NATURE OF JUDICIAL SERVICE BY PREVIOUS JUDICIAL AND PUBLIC LEGAL SERVICE
(Adjusted Percent)

	Nature of Service					
	Judicial			Public - Legal		
Type of Judge	Number in Category	Yes	No	Number in Category	Yes	No
District	104	45.2	54.8	102	49.0	51.0
Territorial	107	30.8	69.2	101	45.5	54.5
Court of Claims	6	100.0	—	6	16.7	83.3
Percent in Category		39.6	60.4		46.4	53.6
Total Number	(217)	(86)	(131)	(209)	(97)	(112)
Total Missing Cases	(23)			(31)		

In the first half of the nineteenth century, as throughout most of American history, a legal career offered ready access to politics. Political activity formed an integral and often dominant feature of the careers of judicial nominees; three-fourths (75.9%) (Table 14) of the judges held elective public office before appointment, with district court judges slightly more active.[41] Two-fifths (41.2%) of the federal lower judiciary had obtained this elective experience in state legislative bodies, although one-fifth (20.9%) had been members of Congress. Such intensive political activity meant that most nominees to the federal lower courts had exposure to the elective political

Marshals, Calif., Records of the Dep't of Justice, R.G. 60; Letter from William Christy to Martin Van Buren, July 21, 1837, Phillip K. Lawrence folder, Letters of Application & Recommendation during the Admin. of Martin Van Buren, General Records of the Dep't of State, R.G. 59.

41. The percentages for elective public office tend to understate the actual level of political participation since not all men who ran for office succeeded at the polls. Four-fifths (81.2%, 80.8%, and 83.3% respectively) of district, territorial, and Court of Claims judges had run for public office before appointment. The judges had also been active in holding appointive office. Three-quarters (74.7%) of the district judges had held such office versus about two-thirds (59.1%) of the territorial judges. As with elective office holding, district court judges (37.9%) showed a higher incidence of appointment to federal offices than did territorial judges (22.1%).

TABLE 14

NATURE OF JUDICIAL SERVICE
BY NATURE OF PREVIOUS ELECTIVE EXPERIENCE
(Adjusted Percent)

Type of Judge	Number in Category	Nature of Elective Experience									
		Legislative	Judicial-Legal	Executive	Legislative and Judicial-Legal	Legislative and Executive	Judicial-Legal and Executive	Legislative, Judicial-Legal, and Executive	Total	None	Total Percent
District	104	49.0	5.8	1.9	9.6	8.7	1.0	2.9	78.9	21.1	100.0
Territorial	106	34.0	11.3	—	16.0	6.6	2.8	2.9	73.6	26.4	100.0
Court of Claims	6	33.3	—	—	33.3	—	—	—	66.7	33.3	100.0
Percent in Category		41.2	8.3	.9	13.4	7.4	1.9	2.8	75.9	24.1	100.0
Total Number	(216)	(89)	(18)	(2)	(29)	(16)	(4)	(6)	(164)	(52)	
Total Missing Cases	(24)										

process. Especially at the district court level, since their place of residence and area of previous elective experience invariably coincided, the nominees had undergone intensive scrutiny at the polls by at least a portion of their judicial constituencies. The recruitment process rewarded such activity and along with legal occupation unified the judges' careers.

Intensive partisan commitment accompanied these extraordinary levels of political activity. Almost four-fifths (79.4%) (Table 15) of the judges engaged in non-elected partisan activity before appointment, serving as local party organizers, members of committees of correspondence or state conventions, and in a few instances as presidential electors or delegates to their party's national convention. David A. Smalley, for example, was chairman of the Vermont State Democratic committee and in 1856 was a member of the Democratic national committee before Franklin Pierce appointed him to the federal district court.[42] Simply stated, the selection process rewarded partisan activism.

TABLE 15

NATURE OF JUDICIAL SERVICE BY HIGHEST LEVEL OF PARTISAN ACTIVISM
(Adjusted Percent)

Type of Judge	Number in Category	Highest Level of Party Activity: Local Party Organizer	Presidential Elector or National Convention Delegate	None	Total Percent
District	89	57.3	14.6	28.1	100.0
Territorial	94	72.3	16.0	11.7	100.0
Court of Claims	6	33.3	16.7	50.0	100.0
Percent in Category		64.0	15.4	20.6	100.0
Total Number	(189)	(121)	(29)	(39)	
Total Missing Cases	(51)				

42. Burlington Free Press, Vt., Mar. 12, 1877.

The jurists' political activity, legal and judicial experience, education, wealth, secondary occupations, and legal prominence converged to form their social-class positions. The distributions of social-class positions paralleled the judges' patterns of social origins; between one-sixth and one-fifth (14.7% and 19.7% respectively) (Table 16) of the judges attained either elite or modest positions, while the remaining two-thirds enjoyed prominent status. Differences existed, however, between territorial and district court judges; one-third (34.0%) of the territorial judiciary compared with less than one-tenth (7.1%) of the district court judges were of modest social-class positions. The elite more often included district court judges. Territorial judges tended to be less prosperous, less well-educated, less experienced as judges and public legal servants, and less active in holding elective political office than district court judges. The differences, however, were not sufficient to conclude that territorial judges were a "mixed controversial breed;" but they do suggest that the character of the federal judiciary was far from uniform and that the recruitment process diverged in selecting judges for the territorial and district courts.

TABLE 16

NATURE OF JUDICIAL SERVICE BY SOCIAL-CLASS POSITION AT APPOINTMENT
(Adjusted Percent)

Type of Judge	Number in Category	Social-Class Position			Total Percent
		Elite	Prosperous	Modest	
District	98	22.5	70.4	7.1	100.0
Territorial	94	6.4	59.6	34.0	100.0
Court of Claims	6	16.7	83.3	—	100.0
Percent in Category		14.7	65.6	19.7	100.0
Total Number	(198)	(29)	(130)	(39)	
Total Missing Cases	(42)				

Variations in social-class positions of the two judiciaries derived from the attractiveness of their respective courts and the judges' age differentials. The salaries accompanying district and territorial judgeships presented a significant impediment to recruiting a highly qualified judiciary. For example, Millard Fillmore in

1850 and 1851 consumed six fruitless months attempting to attract a candidate willing to occupy the district court bench in the northern district of California on a salary of $3,500 per year. Finally, he resorted to the appointment of twenty-nine year old Ogden Hoffman, Jr., a San Francisco resident and the son of a prominent New York state Whig politician.[43] Elisha M. Huntingdon of Indiana, Peter V. Daniel of Virginia, and Alfred Conkling of New York continually complained of inadequate salaries.[44] Tenure during good behavior compensated for the district court judges' financial remuneration, but territorial judges during the era, except in Wisconsin, served four-year terms and by the 1850's they were susceptible to summary presidential removal. Joseph Buffington of Pennsylvania, who declined appointment to Utah territory in 1851, succinctly summarized the problem: "The smallness of the salary, the shortness of the tenure, and the fates and exposure of journeying to that distant region with a family are the prominent reasons that have impelled me to that decision."[45]

The relative difference in the attractiveness of the two federal courts resulted in judiciaries of different ages. About two-thirds (61.1%) (Table 17) of the territorial judges received nomination before age forty compared with about one-third (32.7%) of district court judges. At appointment, territorial judges averaged 36.3 years, while district court judges averaged 46.1 years. This decade of difference in judges' ages meant that on the average territorial judges had ten years less to acquire the attributes associated with social-class position or to gain experience.[46] The district courts attracted older and more experienced lawyers than did the territorial courts.

43. Letters from Daniel Webster to Millard Fillmore, Oct. 19, 1850 & Oct. 29, 1850, Fillmore Papers; The California Courier, San Francisco, Nov. 30, 1850; The California State Gazette, Benicia, Apr. 5, 1851.

44. Letter from Elisha M. Huntington to John McLean, Dec. 10, 1854, John McLean Papers, Library of Congress; Letter from Peter V. Daniel to William C. Rives, Sept. 7, 1837, William C. Rives Papers; Letter from Alfred Conkling to Hamilton Fish, Apr. 14, 1851, Hamilton Fish Papers. In 1846 the salary scale of district and territorial judges ranged from $1,000 to $3,000. *See* H.R. REP. No. 113, 29th Cong., 1st Sess., Ser. No. 488 (1846).

45. Letter from Joseph Buffington to Millard Fillmore, Jan. 23, 1851, Letters of Resignation & Declination, R.G. 59.

46. On the critical relationship of age to the accumulation of wealth and status see S. SOLTOW, MEN AND WEALTH IN THE UNITED STATES 1850-1870, at 9-19, 27-32, 69-74, 105-08, 174-83 (1975).

TABLE 17

NATURE OF JUDICIAL SERVICE BY AGE AT APPOINTMENT
(Adjusted Percent)

Type of Judge	Number in Category	Age at Appointment: Below 30	30-35	36-40	41-45	46-50	51-55	56 and Above	Total Percent
District	107	1.9	12.1	18.7	21.5	14.0	19.6	12.2	100.0
Territorial	113	10.6	20.4	30.1	20.4	8.8	5.3	4.4	100.0
Court of Claims	6	—	—	16.7	—	33.3	—	50.0	100.0
Percent in Category		6.2	15.9	24.3	20.4	11.9	11.9	9.4	100.0
Total Number	(226)	(14)	(36)	(55)	(46)	(27)	(27)	(21)	
Total Missing Cases	(14)								

IV. The Partisan Dimension of Selection

Neither the judges' party affiliation nor presidential appointment practices indicate any systematic relationship between party and social origins. Whig and Democratic judges (Table 18) came from all levels of the social order. While in the broader context of electoral politics connections may have existed between an individual's particular party preference and his social origins, this was not the case with the federal lower judiciary. Nor did Whig and Democratic administrations systematically select judges from differing backgrounds; indeed, both parties selected nominees of remarkably similar social origins (Table 19). Although the Democratic party held control of the presidential office throughout most of the era, it did not overwhelmingly bring judges of modest origin to the bench. Martin Van Buren, a Democrat, failed to appoint an elite judge, but so did Zachary Taylor, a Whig. Presidents Jackson and Polk, both Democrats, made three-quarters (76.0% and 75.0%) of their nominations from judges of elite or prominent origins.

TABLE 18

JUDGES' POLITICAL AFFILIATION BY SOCIAL ORIGINS
(Adjusted Percent)

Party	Percent in Category	Number in Category	Origins			Total Percent
			Elite I	Prominent II	Modest III	
Jacksonian Democrat	66.9	99	22.2	50.5	27.3	100.0
Whig	14.2	21	14.3	61.9	23.8	100.0
Jeffersonian Democrat	9.5	14	21.4	71.4	7.2	100.0
Democratic-Republican	7.4	11	18.2	72.7	9.1	100.0
Federalist	1.3	2	50.0	50.0	—	100.0
None	.6	1	—	—	100.0	100.0
Percent in Origin			20.9	55.4	23.7	100.0
Total Number		(148)	(31)	(82)	(35)	
Total Missing Cases		(92)				

TABLE 19

APPOINTING PRESIDENT BY JUDGES' SOCIAL ORIGINS
(Adjusted Percent)

President	Percent in Category	Origins			Total Percent
		Elite I	Prominent II	Modest III	
John Q. Adams and Before	18.7	21.4	64.3	14.3	100.0
Jackson	16.7	28.0	48.0	24.0	100.0
Van Buren	6.7	—	70.0	30.0	100.0
Harrison-Tyler	5.3	25.0	75.0	—	100.0
Polk	5.3	25.0	50.0	25.0	100.0
Taylor	4.7	—	57.1	42.9	100.0
Fillmore	7.3	18.2	54.5	27.3	100.0
Pierce	20.7	22.6	51.6	25.8	100.0
Buchanan	14.7	22.7	54.4	22.9	100.0
Percent in Origin		20.7	55.3	24.0	100.0
Total Number	(150)	(31)	(83)	(36)	
Total Missing Cases	(90)				

While ethnic differences may have divided Democrats and Whigs in the electorate during the era of the Second American Party System, the social origins of the federal lower judiciary failed to display such cleavages. Judges of Irish, German, and French ancestry appeared in Whig as well as Democratic administrations (Table 20). The absence of sharp ethnic cleavages suggests that the recruitment process was insulated from broader demographic changes that apparently stirred the electorate.

The judges' origins probably assisted more in acquiring an education, fostering useful contacts, and promoting legal careers than in determining party affiliation or gaining presidential favor. Advantage undoubtedly begat advantage; but the limited diversity in judges' social origins and the absence of a clear relationship between origins and party affiliation suggests that the selection process was at least partially open to men of legal talent, political acumen, or both.

TABLE 20

APPOINTING PRESIDENT BY JUDGES' ETHNIC ORIGINS
(Adjusted Percent)

President	Percent in Category	Ethnic Origins: English-Welsh	Scottish, Scots-Irish	Irish	Non-English	Total Percent
John Q. Adams and Before	22.3	75.7	10.8	5.4	8.1	100.0
Jackson	16.3	74.1	11.1	11.1	3.7	100.0
Van Buren	6.6	90.9	—	—	9.1	100.0
Harrison-Tyler	6.0	70.0	10.0	20.0	—	100.0
Polk	5.4	77.8	11.1	11.1	—	100.0
Taylor	4.2	42.9	14.3	28.6	14.2	100.0
Fillmore	6.0	70.0	20.0	—	10.0	100.0
Pierce	21.1	62.9	14.3	11.4	11.4	100.0
Buchanan	12.1	55.0	15.0	20.0	10.0	100.0
Percent in Origin		69.3	12.1	10.8	7.8	100.0
Total Number	(166)	(115)	(20)	(18)	(13)	
Total Missing Cases	(74)					

The distribution of nominees' social-class positions and legal and judicial experience among different administrations affords another view of the bases of the selection process. The nominees' predominately elite and prominent social-class positions meant Whig and Democratic administrations drew from similar levels of the social order. Judges of modest social position appeared (Table 21) in all administrations.[47] John Tyler and Zachary Taylor, both Whigs, appointed one-quarter (25.0%) (Table 22) of their judges from elite positions—the largest percentage of any administrations. Nevertheless, the Whig administrations of Taylor and Fillmore

47. This, of course, begs the question of inter-generational mobility between fathers and sons, and whether some administrations gave greater attention to more upwardly mobile sons than did others. Analysis of this aspect of the study is not complete, hut it is apparent that, on the whole, sons appeared to be more successful at accumulating wealth and public offices than their fathers regardless of their social origins.

TABLE 21

JUDGES' POLITICAL AFFILIATION BY SOCIAL-CLASS POSITION AT APPOINTMENT, 1829-1861
(Adjusted Percent)

Political Affiliation	Number in Category	Social-Class Position			Total Percent
		Elite I	Prominent II	Modest III	
Jacksonian Democrat	131	10.7	71.0	18.3	100.0
Whig	29	20.7	48.3	31.0	100.0
None	2		50.0	50.0	100.0
Percent in Category		12.3	66.7	21.0	
Total Number	(162)	(20)	(108)	(34)	
Total Missing Cases	(38)				

TABLE 22

APPOINTING ADMINISTRATION BY JUDGES' SOCIAL-CLASS POSITION AT APPOINTMENT
(Adjusted Percent)

President	Percent in Category	Social-Class Position			Total Percent
		Elite I	Prominent II	Modest III	
J. Q. Adams	18.2	27.8	58.3	13.9	100.0
Jackson	14.6	17.2	58.7	24.1	100.0
Van Buren	6.1	16.7	66.7	16.6	100.0
Harrison-Tyler	6.1	25.0	58.3	16.7	100.0
Polk	6.1	8.3	83.4	8.3	100.0
Taylor	4.0	25.0	37.5	37.5	100.0
Fillmore	7.6	6.7	53.3	40.0	100.0
Pierce	22.2	4.5	72.8	22.7	100.0
Buchanan	15.2	10.0	80.0	10.0	100.0
Percent in Position		14.6	65.7	19.7	100.0
Total Number	(198)	(29)	(130)	(39)	
Total Missing Cases	(42)				

nominated almost two-fifths (37.5% and 40.0% respectively) of their judges from modest social-class positions. If differences existed in the social composition of the party's constituencies, they failed to appear in the judicial selection process.

Partisan affiliation played the most fundamental role in identifying nominees for judicial position. Administrations systematically rewarded the nominees' active political and party efforts. Only the Presidencies of Tyler and Fillmore (Table 23) witnessed the inter-

TABLE 23

PRESIDENTIAL ADMINISTRATION BY JUDGES' PARTISAN AFFILIATION AT APPOINTMENT
(Adjusted Percent)

President	Number in Category	Political Affiliation				Total Percent
		Jacksonian Democrat	Whig	Other	None	
Jackson	32	100.0	—	—	—	100.0
Van Buren	17	100.0	—	—	—	100.0
Tyler	12	16.7	66.7	8.3	8.3	100.0
Polk	12	100.0	—	—	—	100.0
Taylor	8	—	100.0	—	—	100.0
Fillmore	21	9.5	85.7	—	4.8	100.0
Pierce	52	100.0	—	—	—	100.0
Buchanan	35	100.0	—	—	—	100.0
Percent in Category		81.5	16.9	.5	1.1	100.0
Total Number	(189)	(154)	(32)	(1)	(2)	
Total Missing Cases	(11)					

ruption of consistent partisan appointments. Tyler retained strong ties with states' right Democrats. His appointments reflected that connection as well as his ostensible Whig affiliation. Fillmore appointed two Democrats to Utah territory: Perry E. Brocchus of Alabama and Zerubabel Snow of Ohio. Secretary of State Daniel Webster advocated the appointment of the former in return for earlier personal favors.[48] These exceptions aside, partisan affiliation more

48. Letter from John M. Bernhisel to James Gordon Bennett, June 22, 1852, John M. Bernhisel Papers, Church Archives, Church of Jesus Christ of Latter-Day-Saints. Of course,

than any other attribute unified the selection of antebellum lower court judges during the era of the Second American Party System.

Despite partisanship, nominees brought judicial and legal experience to the federal bench. The antebellum legal subculture lacked a unified voice in the recruitment process, but during the era nearly three-fifths (63.2%) (Table 24) of the judges possessed either

TABLE 24

APPOINTING ADMINISTRATION BY JUDGES' PREVIOUS JUDICIAL AND PUBLIC LEGAL SERVICE
(Adjusted Percent)

President	Judicial Experience	Legal Experience	Both	Either
Jackson	28.1	43.8	12.5	59.4
Van Buren	23.5	52.9	11.8	64.7
Harrison-Tyler	50.0	44.4	22.2	60.0
Polk	58.3	75.0	33.3	100.0
Taylor	55.6	37.5	37.5	55.6
Fillmore	11.8	29.4	5.9	29.4
Pierce	42.0	41.3	19.6	58.0
Buchanan	45.5	54.8	19.4	78.8
Percent in Category	39.4	47.4	20.8	63.2
Total Number in Category	(68)	(80)	(31)	(141)

judicial experience or public legal service. Administrations gave different emphasis to such experience; all of Polk's nominees had prior service, but less than one-third (29.4%) of Fillmore's did. Experience unaccompanied by political or partisan activity seldom sufficed to win a place on the federal bench.

the political affiliation of a few judges changed during their careers before, during, or after appointment. In the case of former Whigs the 1850's witnessed a shift into the Democratic party of Pierce and Buchanan. Recruiting by the Democrats of these men who had lost their party afforded one means by which to obtain old Whig supporters for the Democratic cause. For example, see the case of William Boone, a former Whig, appointed by Buchanan to New Mexico territory. Philadelphia Public Ledger, Jan. 13, 1860; William F. Boone Folder, Boone, Kennedy, Klots Papers, Md. Hist. Soc'y.

V. Conclusion

A collective portrait of the antebellum federal lower judiciary suggests that the judges were a privileged middle class that participated actively in politics. Their backgrounds reflected the intensive partisan and political culture associated with the era of the Second American Party System. More than their mid-twentieth century counterparts, the antebellum judiciary underwent direct pre-appointment exposure to the democratic processes of elective government. Their partisan backgrounds tend to confirm Sorauf's speculation that antebellum parties fulfilled a crucial function in organizing the patronage generally and the judicial selection process specifically. Within this partisan context, the judges' backgrounds failed to exhibit the fundamental ethnic, social, or economic cleavages often associated with the Whig and Democratic parties. While the judges possessed broad exposure to democratic processes, they in most cases had elite or prominent social origins or class positions. The social bases of the selection process were such that judges most often came from a narrow section of the social spectrum. Nonetheless, diversity did exist, and for a number of men of modest origins, political and party activism paved the way to position on the federal bench. Furthermore, while all of the judges were lawyers and derived some special status from holding that occupation, differences did exist in their occupational prominence and in previous judicial and public legal experience. An older and more prestigious group of lawyers was attracted to the district courts while younger and less well-known lawyers accepted positions in the territories. These differences stemmed from the nature and characteristics of service on the two federal benches. As a whole, the two parties of the era succeeded in manning the federal lower bench with judges having judicial and public legal experience similar to that of the mid-twentieth century federal judiciary.

The implications of this connection among partisanship, social status, and judicial and legal experience for the conduct of the federal lower courts cannot be understood through collective biography. In terms of democratic tradition and judicial accountability the judges' backgrounds suggest the richness of judicial selection as a part of the broader political process. Viewing the judges as a privileged middle class offers one means by which to understand not only the selection process but to begin to understand their courtroom behavior and the way in which the lower courts shaped public policy.

APPENDIX

Social Origins and Social-Class Positions

Few historical phenomena are more illusive than social status. The ambiguity of the concept stems from a host of conditions that include scholarly disagreement over what socio-economic and other conditions contribute to an individual's status, how best to measure status, and how most effectively to relate specific finds to society as a whole. While the customary separation of men into the "better, middling, and inferior" sorts undoubtedly holds for the late colonial and antebellum eras, delineating class levels often is difficult.[49] The historical investigation of status has relied heavily upon occupation. Social origin has been viewed as the consequence of a father's occupational pursuits and social-class position has been deemed the product of a son's particular calling. Occupational differences, if any, between father and son have been used to detect social mobility. Ralph Dahrendorf and Edward Pessen, among others, have argued persuasively that occupation, while useful, is an uncertain guide to status. Both social origins and social-class positions are multidimensional, involving other individual attributes such as wealth, tradition of family importance, level of education, public service, and spouse's status.[50] This study acknowledges, within the bounds of collectable data, the multifaceted character of social status. Tables A-1 and A-2 present the indicators relied upon to discern the social origins and social-class positions of the antebellum lower federal judiciary.

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49. C. BRIDENBAUGH, THE COLONIAL CRAFTSMAN 156 (1950).

50. R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY 118-222 (1959); PESSEN, *supra* note 14, at 47, 49-52, 74-75.

TABLE A-1

INDICATORS OF JUDGES' SOCIAL ORIGINS

INDICATOR	RANK	VALUE
Father's Occupation	High Ranking	10
	Middle Ranking	5
	Low Ranking	1
Father's Wealth	Great — $25,000 plus	10
	Impressive — $5000 - $25,000	8
	Modest — $1000 - $5000	6
	Little — Less than $1000	4
Father's Political Activity	National Office	8
	State Office	6
	Local Office	4
Father's Highest Level of Education	College Graduate	8
	Attended College	6
	Secondary	4
Prominence of Father in Occupation	National	6
	State	3
	Local	1
Family's Generational Level in North America	5 or More Generations	3
	3 - 4	2
	1 - 2	1
Tradition of Family Importance	National	3
	State	2
	Local	1
Father's Military Service	Field Officer	3
	Junior Officer	2
	Enlisted	1

TABLE A-2

INDICATORS OF JUDGES' SOCIAL-CLASS POSITIONS

INDICATOR	RANK	VALUE
Prominence in Legal Profession	National	10
	State	8
	Local	4
Judge's Wealth	Great — $25,000 plus	10
	Impressive — $5000 - $25,000	8
	Modest — $1000 - $5000	6
	Little — Less than $1000	4
Political Activity	National Office	8
	State Office	6
	Local Office	4
Education	College Graduate	8
	Attended College	6
	Secondary	4
Secondary Occupation	High	6
	Middle	3
	Low	1

I. Social Origins

Eight separate indicators were considered in estimating social origins. These were drawn from the works of Sidney Aronson, Edward Pessen, and Charles Westoff, Marvin Bressler, and Philip C. Sagi.[51] The specific weights assigned to each indicator of social status derived partially from the rank order developed by Westoff, Bressler, and Sagi. This article, however, includes a number of variables that those authors did not stipulate and gives more emphasis to paternal occupation and wealth than they believe is justified. Political activity was deemed a manifestation of the public trust and respect accorded a father. Efforts to estimate a father's occupational prominence were undertaken in order to differentiate between men holding the same occupation.

A father's occupation and wealth were considered important but not definitive indicators of a judge's social origins. When fathers held multiple occupations, the highest ranking occupation was

51. S. Aronson, Status and Kinship in the Higher Civil Service: Standards of Selection in the Administrations of John Adams, Thomas Jefferson, and Andrew Jackson 56-83 (1964) [hereinafter cited as Aronson]; Pessen, *supra* note 14, at 74 *passim*; Westoff, Bressler & Sagi, *The Concept of Social Mobility: An Empirical Inquiry*, 25 Am. Sociological Rev. 375 (1960).

used. The ranking of occupations is presented in Table A-3 and is closely tied to the scheme developed by Aronson.[52] Data on father's wealth was gleaned from a variety of sources, including estate records, tax lists, state censuses, and the federal decennial censuses of 1850 and 1860. Although invaluable, these sources are not without significant shortcomings. Estate inventories are perhaps the most accurate, but they come at the end of a man's life and often deal only with personal instead of real property holdings. Tax lists invariably understate the actual value of property and it is often impossible to determine the degree of underestimation.[53] The federal manuscript census offers the most comprehensive source of wealth data, but it is concentrated at the end of the antebellum period. Recent studies by Lee Soltow and Robert Gallman provide the most explicit statements of wealth distribution, especially for the mid-century years. The work of Alice Hansen Jones on the late eighteenth century is helpful but not as easily translated for the period 1800 to 1849 as is the work of Soltow and Gallman. Thus their estimates, while undoubtedly high for satisfactory use in the early national period, are the best available. In all but two cases, the data taken from these sources were used at face value. First, estimates of the real property holdings of individuals in the 1850 census were assumed to constitute 80% of total wealth. An additional 20% was added to arrive at a figure for total wealth. Secondly, when fathers held slaves at any time who were not included in the specific wealth record, such as a tax list, an additional $500 for each slave was added to the value of a man's holdings.[54] The $500 figure was considered to be an average of the value of a prime field hand and the worth of children, the sick, and the aged. When multiple values were found in one or several sources, the highest value was used to determine the father's wealth.

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52. ARONSON, *supra* note 3, at 56-66 discusses the ranking of these occupations. *But see* S. BLODGET, ECONOMIA: A STATISTICAL MANUAL FOR THE UNITED STATES 89 (1806); Fabricant, *supra* note 13, at 31-32; Whelpton, *supra* note 13, at 342.

53. Wealth data was largely collected at the Genealogical Library of the Church of Jesus Christ of the Latter-Day-Saints in Salt Lake City, Utah. On their holdings see Wimmer & Pope, *The Genealogical Society Library of Salt Lake City: A Source of Data for Economic and Social Historians*, 8 HIST. METHODS NEWSLETTER 51 (1975).

54. On the 80% estimate see L. SOLTOW, PATTERNS OF WEALTHHOLDING IN WISCONSIN SINCE 1850, at 9 (1971) [hereinafter cited as PATTERNS]. On estimates of slave values see K. STAMPP, THE PECULIAR INSTITUTION 201-02, 388, 402, 414-17 (1964). On the value of the census for the historians see Lathrop, *History from the Census Returns*, 51 SW. HIST. Q. 293 (1948). On its limitations see S. WARNER, STREETCAR SUBURBS 169-78 (1962), and PATTERNS, *supra* at 15-19. Patterns of wealthholding in the mid-nineteenth century United States are discussed in L. SOLTOW, MEN AND WEALTH IN THE UNITED STATES 1850-1870 (1975). For the late colonial period and the era of tbe early republic see Gallman, *supra* note 14; Jones, *supra* note 14.

TABLE A-3

RANKING OF OCCUPATIONAL CATEGORIES

High Ranking		
Landed Gentry	—	Living on estate but holding no slaves, so described in secondary source.
Planter	—	Living in agricultural setting with 20 or more slaves.
Merchant	—	Conducting business beyond limits of a single store.
Professional	—	Doctor, lawyer, minister, military or naval officer, professor, surveyor.
Middle Ranking		
Artisan	—	Skilled tradesman.
Proprietor	—	Owner of manufacturing or mining enterprise.
Large Farmer	—	Owned 100 acres or more, or indicated in secondary literature as a "prosperous" farmer.
Teacher	—	
Sea Captain	—	
Shopkeeper	—	Sells goods but does not manufacture them.
Tavern/Innkeeper	—	
Clerk	—	
Low Ranking		
Small Farmer	—	Farms less than 100 acres or described as lacking signs of prosperity.
Laborer - Seaman	—	Works for wage doing manual labor on land or sea.

Estimates of occupational prominence and family importance were based on four sources: genealogies, obituaries, county histories, and the voluminous letters of application and recommendation in the National Archives. Although often uneven in the quantity and accuracy of the information they provided, these sources offered invaluable clues to a father's occupational prominence and the importance of a judge's family that in justice could not be excluded.[55] If a source or sources identified a father's occupation but failed to identify his prominence in it, the father was arbitrarily deemed to

55. Genealogies must be used with caution. *See* Nichols, *The Genealogist and the Historian*, 14 PUB. OF THE GENEALOGICAL SOC'Y OF PA. 1, 2 (1942).

have been of local importance. This judgment was predicated on the assumption that if a man's calling were known to a county historian, genealogist, obituary writer, or supporter of an applicant, then the father must have been *at least* locally prominent.

In an effort to bring some systematic order to the various elements comprising social origins they were ranked on a scale from one to ten with one the lowest. The ranking attempted to take account not only of internal differences within a variable, but also the relative importance of each variable in relation to one another. Such ranking is fraught with hazards since it assumes a continuity among variables in social status that is beyond historical confirmation at this time. This technique has the value of making implicit assumptions about status explicit, but the numbers themselves are, and should be treated as, approximations. The values assigned to a judge's father in each category were summed, providing a cumulative score for social origins. Elite fathers had between thirty-five and fifty-one points, prominent fathers between eighteen and thirty-four, and modest fathers between four and seventeen. The breaking points in these divisions represented the sums of the high, middle, and low values for each indicator. No father scored under four points. When information was missing, an arbitrary rule specified that two conditions had to be met in order to estimate social origins. First, at least four of the eight indicators had to be known. Secondly, of these four indicators one had to be either father's wealth or occupation. When some variables could not be established, a score was obtained by dividing the number of known variables into total points. The quotient was then compared with the quotient obtained by dividing the total number of indicators (eight) into the sums of the highest and lowest values for each indicator.

Elite, prominent, and modest social origins assigned to the judges are not intended to equate with high, middle, and low status. Modest probably corresponded to the bulk of the population in the late colonial and early national eras. Certainly, the evidence leaves no doubt that the lowest elements of that era's social order—slaves, free blacks, Indians, and white laborers—did not contribute offspring to the antebellum lower federal courts. Elite and prominent origins suggest that a judge's background offered exceptional advantages, although often significant differences existed between the two categories. If the lowest elements of society provided no judges, there were also few from the very top of the social order. Until historians know more about the specific contours of early American

society, efforts to relate precisely the social origins of the judiciary to the broader social context necessarily must remain speculative.[56]

II. Social-Class Positions

Social origins and adult social status may vary. In order to understand the social bases of the recruitment process, the relative positions of appointees within society must be established. The five indicators of social-class position presented in Table A-2 were derived primarily from Aronson and Pessen. Wealth and occupation were assumed to be the most critical indicators of social-class position with secondary occupation, political activity, and education given less emphasis. Because of a lack of data, no effort was made to analyze the impact of marriage arrangements on the judges' social positions. Wealth records, however, often reveal a wife's contribution to her husband's financial position.

Wealth estimates were obtained primarily from the federal manuscript censuses of 1850, 1860, and 1870, and to a lesser extent from tax and estate records. Wealth data gleaned from the 1850 federal census and incidences of slaveholding were treated in the same fashion as described under Social Origins. While useable wealth data was obtained on seven-tenths (70.3%) of the judges, most of this information was for the period *after appointment*; evidence of pre-appointment wealthholding could be found for only one-third (33.3%) of the judges. Three reasons explain the paucity of pre-appointment wealth data. First, the federal manuscript censuses that provide information on wealth came at the end of the period under study, but about one-half (48.7%) of the judges were appointed before 1850. Secondly, not all of the judges had values recorded in the 1850 or 1860 censuses. Failure to list wealth was often as much a manifestation of the census taker's inefficiency as it was the impoverished nature of the judge. When wealth information could not be found in the census, it was considered missing data. Thirdly, state and local tax lists and censuses, while invaluable supplements to the federal census, fail to provide comprehensive coverage for the pre-1850 period. When multiple listings of wealth were obtained, the highest recorded value was assigned to the judge.

Other indicators of pre-appointment social-class position proved more accessible than wealth data. Two of particular import-

56. For contradictory assessments of the antebellum social order see R. Berthoff, An Unsettled People: Social Order and Disorder in American History 125-275 (1971); D. Donald, Lincoln Reconsidered 209-35 (1961); S. Thernstrom, Poverty and Progress: Social Mobility in a Nineteenth Century City (1969).

ance were an appointee's prominence in legal practice and his secondary non-legal occupation. Without undertaking the laborious, time consuming, and probably impossible task of preparing detailed analysis of each judge's legal practice, estimates of professional prominence must be tentative and subject to error. Nevertheless, assessment of the relative position of a nominee among his peers seems essential in order to deal with the relative quality of the federal lower judiciary. A variety of available sources offers some insight into an appointee's legal prominence. These include histories of the bench and bar, county histories, genealogies, obituaries, and perhaps most importantly, letters of application and recommendation in the National Archives.[57] These letters, whether favorable or antagonistic to a candidate, usually addressed themselves to an appointee's standing within the legal profession, indicating the scope of his legal practice and whether or not he was respected by other members of the local or state bars. Although often vague, excessively adulatory, and sometimes frustratingly contradictory, the letters nevertheless provide the readiest means of assessing an appointee's professional standing. When used in conjunction with other sources, the letters provide a crude and unsophisticated measure of a complex and changing phenomenon.

The judges' pre-appointment secondary occupations also were used to determine social-class position. It was assumed that holding a secondary occupation equal to or lesser than the status of a lawyer influenced the appointee's social-class position. All secondary occupations held from adulthood (age eighteen) to appointment were considered. The highest ranking non-legal occupation was used in every case. Table A-3 presents a ranking of the occupations.

As with social origins, each of the five indicators of social-class position was weighted and totaled to provide a composite score for each judge. Judges with elite positions scored between thirty and forty-two, prominent between eighteen and twenty-nine, and modest between four and seventeen. At least three of the five indicators had to be present to establish social-class position and at least one of these had to be either wealth or prominence in legal profession. Missing data was treated in the same fashion as in determining social origins.

57. There are two sets of appointment letters. The first is contained in the General Records of the Dep't of State, R.G. 59, and are grouped with applications for all other federal offices. The second set of letters is for the period from 1853 and later. These are in Letters of Application & Recommendation for Federal Judges, Attorneys & Marshals, Records of the Dep't of Justice, R.G. 60. In 1853 the Attorney General assumed supervision of the judicial selection process.

The social-class positions of the judges should not be viewed as mirroring basic divisions within the social order from low to high. Modest origins clearly did not equate with the lowest elements of the antebellum social order. The occupation of lawyer gave to the nominees a unique position in society. Modest class position indicated that a jurist probably occupied a position, despite his occupation, in the middle of the social order. Of course, the nominees' ties to the legal profession clearly differentiated them from the vast majority of an essentially non-professional and agricultural work force. Men of modest position had no special claim to either wealth or professional prominence. Men of prominent status were a distinct minority of antebellum society. The elite were truly unique.