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## Diversifying State Supreme Courts

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Why do some states diversify their supreme courts sooner than others? Using original data on the first black and female state supreme court justices, I contend that political and institutional pressures influence when states diversify their high courts. The results suggest that selection systems, institutions affecting turnover, and the appointment of political minorities to the United States Supreme Court are associated with states seating their first black and female justices. The findings have implications for our understanding of the political and institutional circumstances that promote judicial diversity.

The lack of diversity on state courts is well established. In 2005, blacks and women made up about 8 percent and 27 percent of the nation's state supreme court justices, respectively (Hurwitz & Lanier 2008). Not as well recognized is the long process of diversification that took place in the states or the fact that this process is ongoing. According to data provided by the American Judicature Society, 31 states did not have a black justice on their supreme courts in 2009 and two did not have a female justice. More surprising, perhaps, is that as of 2009, 19 states had yet to seat their first black justices.<sup>1</sup> Although every state has seated its first female justice, the process of gender diversification spanned from 1922–2002.

Why do some states diversify their high courts sooner than others? And how has the diversification process differed for blacks and women? Understanding the determinants of judicial diversity is an important task for several reasons. First, the presence of blacks and women on the bench may influence judicial outcomes (e.g., Baldez et al. 2006; Songer et al. 1994; Welch 1988). Even the

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<sup>1</sup> These states include: Alaska, Arizona, Delaware, Hawaii, Idaho, Iowa, Kansas, Maine, Montana, Nebraska, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Dakota, Utah, Vermont, and Wyoming.

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inclusion of black and women judges on panels may affect how other judges decide cases (e.g., Boyd et al. 2010; Cox & Miles 2008; Peresie 2005). More generally, representation may enhance trust in institutions among political minorities, while increasing democratic engagement (e.g., Bobo & Gilliam 1990; Hansen 1997; Verba et al. 1997).

To explore the diversification of state supreme courts, I collected information on the first black and female justices seated in each state. The theoretical contention is that political pressures and institutions affect the process of diversification. The results suggest that selection mechanisms, institutions affecting turnover, and the appointment of political minorities to the U.S. Supreme Court are associated with the length of time until states seat their first black and female justices. Although a large literature exists on the effect of selection institutions on diversity in state courts (e.g., Alozie 1990; Bratton & Spill 2002; Hurwitz & Lanier 2003), this work typically focuses on the proportion of positions occupied by blacks or women. By focusing on the diversification of these courts, the results contribute to the institutional literature on this topic while providing new information about the relative level of judicial diversity in the states.

## **The First Black and Female Justices**

Blacks and women have endured long struggles for greater representation and equality. The Reconstruction and Civil Rights eras led to black suffrage and enhanced legal rights (Klarman 2004), which resulted in more blacks being elected to Congress (Freedman & Jones 2007), state legislatures (Grofman & Handley 1991; King-Meadows & Schaller 2006), and local offices (Andrews 1997; Karnig & Welch 1980). Blacks encountered great difficulties breaking into the legal profession on account of long-standing political, social, and educational barriers (Smith 1999). And notwithstanding recent increases in the number of black lawyers, “blacks have had little success breaking into the upper echelons of the elite bar” (Wilkins & Gulati 1996: 497). As noted previously, this is particularly evident looking at the lack of racial diversity on state supreme courts.

Jonathan Jasper Wright became the first black justice to sit on a state supreme court when the South Carolina state legislature appointed him in 1870. Wright, who had been educated in Pennsylvania and New York, became a prominent member of South Carolina’s political scene during Reconstruction (see Woody 1933). He was the first African American admitted to the Pennsylvania bar and one of the first three African Americans admitted to the South

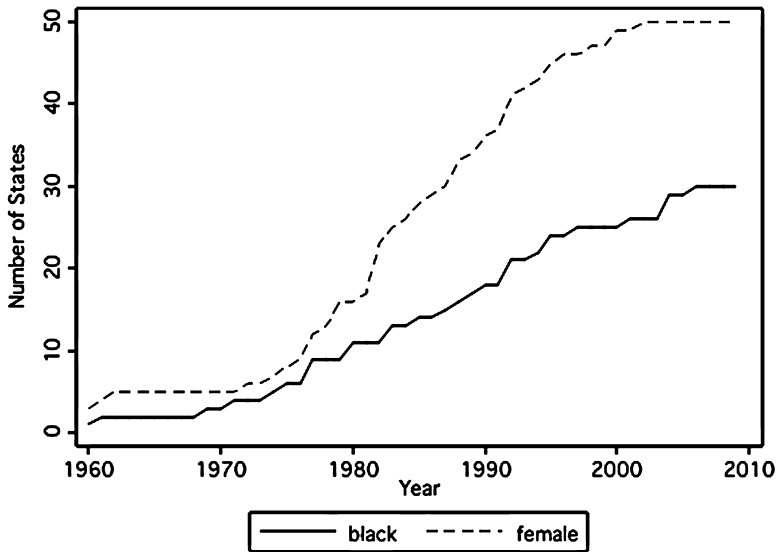


Figure 1. States seating their first black and female justices.

Carolina bar. Wright also served in the South Carolina state senate prior to being appointed to the state's supreme court.

More than 90 years passed before Michigan became the second state to seat its first black justice, when Governor John Swainson appointed Otis M. Smith to the bench in 1961. Robert M. Duncan, who was elected to the bench by Ohio voters in 1969, was the only other black state supreme court justice to take office during the 1960s. Diversification continued sporadically over the ensuing decades, as evidenced in Figure 1, which plots the growth in the number of states that seated their first black supreme court justices from 1960–2009. As of 2009, 19 states had yet to seat their first black justices.

In many ways, blacks and women faced similar struggles securing public office. Like blacks, women faced severe educational, political, and social barriers to entering the legal profession (Drachman 1998). Women were increasingly elected to public office after ratification of the 19th Amendment, which granted women suffrage (Carroll 2007; Wasniewski 2007). Florence Ellinwood Allen, for example, became the first female state supreme court justice following her election by Ohio voters in 1922—two years after ratification of the 19th Amendment. This was just one in a list of firsts for Allen, who was also the country's first female assistant prosecutor, the first woman to sit on a court of general jurisdiction in Ohio, and the first woman to serve on an Article III court following her appointment to the Sixth Circuit Court of Appeals by

President Roosevelt in 1934. Allen also nearly became the first woman appointed to the U.S. Supreme Court; President Truman considered nominating her for one of two vacancies in 1949 before “ultimately decid[ing] the time was not yet ripe” (Ginsburg 2004: 805).

After Allen’s election in 1922, another 37 years passed before Hawaii and Massachusetts seated the next first female justices with the appointments of Rhoda Valentine Lewis and Jennie Loitman Barron in 1959. Only two other states seated female justices during the 1960s. Figure 1 plots the increase in the number of states that seated their first female justices over time. Although the number of states having seated their first black and female justices remains similar throughout the 1960s and early 1970s, there is a sharp increase in the number of states seating their first female justices around 1980. South Dakota was the last state to seat its first female justice in 2002.

## **Explaining Diversification**

Why do some states diversify their supreme courts sooner than others? In this section, I contend that political pressures and institutions shape the diversification of state supreme courts. As is common in studies of policy adoption in the states (e.g., Berry & Berry 1990), I highlight both internal and external pressures on states to diversify their high courts. Existing explanations for variation in the level of diversity on state courts typically center on the influence of judicial selection mechanisms. There is little consensus, however, about how these institutions affect judicial diversity. Examining the time until states seat their first black and female justices allows for a fresh look at the question of whether selection institutions affect judicial diversity. I also consider the importance of judicial institutions that affect turnover. Although the existing literature pays comparatively little attention to these institutions, they may speed diversification by creating more opportunities to seat political minorities. Lastly, I explore the potential influence of political minorities being seated on the U.S. Supreme Court and neighboring state high courts.

### **Internal Pressures**

#### ***Selection Institutions***

A large literature is devoted to explaining the determinants of judicial diversity in the states. Much of the debate centers on unraveling the effect of judicial selection mechanisms (Alozie 1990,

1996, 1988; Bratton & Spill 2002; Dubois 1983; Flango & Ducat 1979; Glick & Emmert 1987; Graham 1990a, 1990b; Hurwitz & Lanier 2001, 2003, 2008; Martin & Pyle 2002; Williams 2007). The results are mixed, but much of this work finds little if any relationship between selection institutions and diversity. Until recently, however, the work in this area relied primarily on descriptive statistics to draw inferences about whether institutions influence the level of diversity on state courts. Nonetheless, more methodologically advanced treatments continue to yield mixed results. Bratton and Spill (2002), for example, find that women are more likely to be seated on state supreme courts under an appointment system—especially if the court is all male. In the most comprehensive multivariate analysis to date, Hurwitz and Lanier (2003) find mixed results regarding the effect of selection institutions on the number of black and female judges on state appellate courts in 1985 and 1999. States with a merit selection system, for example, had fewer black justices on average in 1985 and more in 1999. For the most part, however, institutions appeared to play little role in determining the number of political minorities on state supreme courts in those years.

Much of the existing literature examines whether selection institutions have a direct effect on judicial diversity. However, given the conventional wisdom that liberals are more likely to value representative institutions (see, e.g., Bratton & Spill 2002), it is reasonable to expect the effect of selection systems to be conditioned by ideology (see also Hurwitz & Lanier 2003). For example, we might expect states that utilize judicial elections to yield their first black and female justices sooner, as citizen liberalism increases. Even if liberal voters are not more likely to seat a black or female justice all else equal, blacks and women tend to be more liberal on average, which suggests that they will fare better generally as citizen liberalism increases. Furthermore, judicial experience helps propel political minorities to state supreme courts (Martin & Pyle 2002), and they are more likely to obtain this experience as state liberalism increases for the same reason.

*H1: Election System Hypothesis: States with an election system will seat their first black and female justices sooner as citizen liberalism increases.*

The use of nominating commissions may also influence when states seat their first black and female justices. There is substantial variation across states in the makeup of nominating commissions and the factors they consider when selecting nominees. As a general matter, however, the governor, legislature, state bar, or some combination of these actors appoints commissioners. Most commissions are made up of lawyers and non-lawyers, and many are bipartisan. Nominating commissions were created to infuse merit into the selection process. Although merit selection tends to reward judicial

experience, which has been difficult for minorities to obtain, some commissions expressly value diversity (Caufield 2007). As a result, it is reasonable to expect states that utilize nominating commissions to seat their first black and female justices sooner.

*H2: Nominating Commission Hypothesis: States with nominating commissions will seat their first black and female justices sooner.*

### ***Institutions Affecting Turnover***

In addition to selection systems, several other judicial institutions may play a role in determining when states seat their first black and female justices. The number of seats on a court is a consistent predictor of greater gender and racial diversity (Bratton & Spill 2002; Hurwitz & Lanier 2003; Solberg & Bratton 2005). One possible explanation for this result is that courts with more seats are less prestigious, which reduces the competition for office (e.g., Hurwitz & Lanier 2003). A simpler explanation is that more seats means more opportunities to seat political minorities. Similarly, other institutions that increase turnover may lead states to seat their first black and female justices sooner. Two prominent judicial institutions that affect turnover at the state level are term length and mandatory retirement rules. As term length increases, there should be less turnover, thereby reducing the number of opportunities for states to seat their first political minorities. Conversely, there should be more turnover in states that force judges off the bench at a certain age, thereby increasing the number of opportunities for states to seat their first political minorities.

*H3: Seats Hypothesis: States with more seats on their high courts will seat their first black and female justices sooner.*

*H4: Term Length Hypothesis: States where justices enjoy longer terms will be slower to seat their first black and female justices.*

*H5: Mandatory Retirement Hypothesis: States that require justices to retire at a certain age will seat their first black and female justices sooner.*

## **External Pressures**

### ***Supreme Court Appointments***

Aside from state-level institutional features, states may also be more likely to seat their first political minorities when appointments to the U.S. Supreme Court generate heightened attention to the importance of judicial diversity. Thurgood Marshall became the first black justice appointed to the U.S. Supreme Court in 1967, and Sandra Day O'Connor became the first female appointed in 1981. Subsequently, Clarence Thomas became the second black

justice in 1991, and Ruth Bader Ginsburg became the second female justice in 1993. In 2009, Sonia Sotomayor became the third female and first Hispanic nominated to the Supreme Court. Each of these appointments were salient political events that brought diversity to the forefront of debates over judicial selection (see, e.g., Abraham 2007; Overby et al. 1992; Liptak 2009). As a result, similar to the notion of vertical diffusion in the policy adoption literature (e.g., Allen et al. 2004; Daley & Garand 2005; Shipan & Volden 2006), it is reasonable to expect that these federal appointments generate increased pressure to diversify state courts, and that states will learn from and imitate the federal government's efforts to diversify its highest court.

There is anecdotal evidence that the appointment of political minorities to the U.S. Supreme Court brings attention to the issue of institutional diversity in the states. For example, shortly after President Obama nominated Sonia Sotomayor to the U.S. Supreme Court, the *Atlanta Journal-Constitution* published a piece lamenting the absence of Hispanics on Georgia's state courts, noting: "There are no Hispanics now, nor have there ever been any, on the Supreme Court of Georgia or on the Georgia Court of Appeals" (Diguette 2009). Although the nomination of minorities to the Supreme Court clearly puts pressure on political actors in appointment systems, it is reasonable to expect them to affect decisions in election states as well, where most vacancies are filled by government officials through interim appointments (Holmes & Emrey 2006). The news story from Georgia shows how this pressure manifests itself in election states, when the author adds: "Gov. Sonny Perdue must appoint someone to fill the Supreme Court seat soon to be vacated by Chief Justice Leah Ward Sears. Perhaps a Hispanic will make the governor's short list" (Diguette 2009).

*H6: Supreme Court Appointments Hypothesis: States are more likely to seat their first black and female justices sooner when appointments to the U.S. Supreme Court generate heightened attention to the issue of judicial diversity.*

### ***Neighboring State Diffusion***

The state politics literature is replete with theoretical arguments contending that policies diffuse across neighboring states (e.g., Berry & Berry 1990, 1992; Mooney & Lee 1995). Although the process of seating judges is quite different than the policy adoption process, it is reasonable to think that states could be influenced by their neighbors to seat minority judges—especially when these states have yet to seat their first black or female justices. News of a state seating its first black or female justice may spread

across state lines, generating pressure in neighboring states to examine the level of diversity on their own courts.<sup>2</sup>

*H7: Neighboring State Diffusion Hypothesis: States are more likely to seat their first black and female justices sooner as the percentage of neighboring states having seated their first black and female justices increases.*

## Data and Measurement

I collected information on the first black and female justice seated by each state from a variety of sources, including state supreme court histories, law review articles, and newspaper archives.<sup>3</sup> To model the time until these events occur, I estimate a series of duration models (Box-Steffensmeier & Jones 2004). The risk set, which identifies instances where states are at risk of experiencing the event of interest, consists of any opening on a state supreme court.<sup>4</sup> The outcome variables take values of 0 for openings prior to the first black or female justice being seated. A 1 is scored when a state seats its first black or female justice, and that state is subsequently dropped from the analysis.

## Explanatory Variables

Differences in selection mechanisms are captured using indicator variables for partisan elections (*Partisan Selection*) and nonpartisan elections (*Nonpartisan Selection*). *Citizen Liberalism* is captured using Berry et al.'s (1998) measure of citizen ideology. *Nominating Commission* is an indicator variable scored 1 when the appointing authority chooses from a list of candidates supplied by a nominating commission and 0 otherwise. *Seats* counts the number of seats on a state's supreme court. *Term Length* scores the number of years

<sup>2</sup> In 1993, for example, the *Dallas Morning News* published a story highlighting the seating of black judges in Louisiana, including the first black supreme court justice.

<sup>3</sup> It is difficult to find conclusive evidence that a state has never seated a black justice. Thus, it is possible—despite my best efforts—that I missed a first black justice for a state that I have listed as never having seated a black justice. I was, however, able to find each state's first female justice.

<sup>4</sup> Openings on state supreme courts arise in a variety of ways, including competitive electoral contests, resignations, and mandatory retirements. To code openings, I started with the comprehensive list of state supreme court justices provided by Brace et al. (2000). I then used state-specific rules on term length from the American Judicature Society to estimate when openings occurred due to reelection contests. I do not code retention contests as openings because there are no challengers. I also used a variety of state-specific histories and documents to estimate when states experienced openings. Unfortunately, I was unable to determine when openings in election states were filled through interim appointments. Thus, I was unable to examine whether these opportunities were more likely to yield a state's first black or female justice. The role these appointment opportunities play in election states is, however, an important question that deserves additional attention.



before justices face reelection or reappointment. *Mandatory Retirement* is an indicator variable scored 1 for states that require judges to retire at a certain age and 0 otherwise. To capture salient federal appointments, I include indicator variables for each of the three black or female justices nominated during the sample period—Sandra Day O'Connor (*O'Connor*), Clarence Thomas (*Thomas*), and Ruth Bader Ginsburg (*Ginsburg*). These variables are scored 1 in the two years following the nomination and 0 otherwise. To capture any diffusion effects, I score the percentage of neighboring states that have seated their first black or female justices (*Neighboring States*).

### Control Variables

I also include a set of control variables in each model. To capture the size of the eligibility pool, I include the percentage of black or female lawyers in a state (*Black Attorneys* and *Female Attorneys*). I also include the percentage of blacks or females of the total voting age population (*Black Voting Age* and *Female Voting Age*).<sup>5</sup> *Openings* scores the number of openings in a given year. It seems reasonable that political minorities may be more likely to break onto a state supreme court as the number of openings in a year increases. *South* is an indicator variable scored 1 for the eleven states of the Confederacy and 0 otherwise. I also account for whether a state already seated its first black or female justice. A state may be more likely to seat its first black justice, for example, if it already seated its first female justice. Thus, I include *Female Seated* in the first black justice models and *Black Seated* in the first female justice models, both of which are indicators scored 1 for openings following the first female and black justices being seated and 0 otherwise.

### Estimation and Results

Tables 1 and 2 present results from duration models on the time until states seat their first black and female justices. The models were fit with logit. Both models were estimated with cubic polynomials to account for temporal dependence (Carter & Signorino 2010). Standard errors are clustered by state to correct for the non-independence of observations within states. The estimation period spans from 1970–2005 for the first black justice model and 1970–2002 for the first female justice model, the year

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<sup>5</sup> As a result of Census category restrictions, I use the percentage of residents 20 and over. *Black Attorneys* and *Black Voting Age* are correlated at .02 in the full model sample; *Female Attorneys* and *Female Voting Age* are correlated at -0.21.

**Table 1.** Duration Analysis of the Time until States Seat Their First Black Justices

Variable	Model 1		Model 2	
	Estimate	s.e.	Estimate	s.e.
Partisan Selection	-10.27***	2.20	-10.17***	2.43
Nonpartisan Selection	-0.99	1.63	-0.15	1.59
Citizen Liberalism	0.04**	0.02	0.06***	0.02
Partisan * Liberalism	0.21***	0.05	0.22***	0.06
Nonpartisan * Liberalism	0.03	0.04	0.03	0.04
Nominating Commission Seats	1.48*	1.06	1.98**	0.97
Term Length	0.77***	0.19	0.68***	0.19
Mandatory Retirement	0.01	0.04	0.07	0.06
Neighboring States	1.09*	0.67	0.95*	0.69
O'Connor	-0.04	0.02		
Thomas	-0.23	1.11	-0.19	1.09
Ginsburg	1.52**	0.83	1.18*	0.89
Black Attorneys	2.41***	0.82	2.52***	0.78
Black Voters	0.03**	0.01	0.04**	0.02
Openings	0.26***	0.05	0.33***	0.07
Female Seated	-0.18	0.28	-0.23	0.25
South	1.91**	1.04	1.99**	1.00
(Intercept)	1.79	1.51	2.13	1.34
	-16.20***	2.94	-18.49***	3.76
<i>N</i>	1,158		1,130	
LogL	-90.19		-84.84	
ROC	0.91		0.92	

NOTE: Standard errors are clustered by state. \*\*\* $p < .01$ ; \*\* $p < .05$ ; \* $p < .10$ . Cubic polynomials were included in both models, but are excluded from the table.

the last state seated its first female justice.<sup>6</sup> Michigan is not included in the first black justice model because it seated its first black justice before 1970.<sup>7</sup> Similarly, Arizona, Hawaii, Massachusetts, North Carolina, and Ohio are excluded from the first female justice model because they seated their first female justices before 1970.

In both tables, Model 1 is a full-sample model that excludes the diffusion variable; Model 2 includes the diffusion variable, but excludes information from Alaska and Hawaii, which are not bordered by another state. Overall, the results are quite similar across models. As a result, I will discuss the results from Model 1 for both the first black and first female justice models unless otherwise noted. The overall model fit in both instances is quite good. Both the first black justice ( $\chi^2(20) = 126.33$ ,  $p < .001$ ) and first female justice ( $\chi^2(20) = 83.18$ ,  $p < .001$ ) models offer improvements over the null models. Moreover, the areas under the ROC curve—which convey the percentage of correct classifications from a random

<sup>6</sup> The estimation period begins in 1970 because that is the first year for which comprehensive data on state supreme court justices are available (Brace et al. 2000), and these data were important for estimating when states had openings. The first black justice model ends in 2005 because of similar data limitations.

<sup>7</sup> South Carolina is included despite seating its first black justice in 1870 because of the unusual time of the initial seating and the length of time that had passed.

**Table 2.** Duration Analysis of the Time until States Seat Their First Female Justices

Variable	Model 1		Model 2	
	Estimate	s.e.	Estimate	s.e.
Partisan Selection	1.75	1.78	1.46	1.90
Nonpartisan Selection	-1.34	1.76	-1.39	1.76
Citizen Liberalism	0.05***	0.02	0.06***	0.02
Partisan * Liberalism	-0.05	0.04	-0.04	0.04
Nonpartisan * Liberalism	0.02	0.03	0.01	0.03
Nominating Commission Seats	0.17	0.45	0.13	0.53
Term Length	0.24	0.18	0.32**	0.19
Mandatory Retirement	0.05**	0.03	0.05**	0.03
Neighboring States	-0.27	0.47	-0.38	0.47
O'Connor	0.01	0.01		
Thomas	1.05**	0.58	1.06**	0.59
Ginsburg	0.91	0.87	0.94	0.87
Women Attorneys	-0.32	0.76	-0.06	0.76
Women Voters	-0.01	0.05	-0.01	0.06
Openings	-0.01	0.12	-0.30	0.25
Black Seated	-0.11	0.18	-0.09	0.18
South	1.11**	0.59	1.13**	0.59
(Intercept)	0.74	0.68	0.77	0.74
	-5.34	6.01	5.07	12.39
N	680		671	
LogL	-121.98		-119.73	
ROC	0.85		0.85	

NOTE: Standard errors are clustered by state. \*\*\* $p < .01$ ; \*\* $p < .05$ ; \* $p < .10$ . Cubic polynomials were included in both models, but are excluded from the table.

draw of 0,1 pairs on the outcome variables—are .91 and .85 for the first black and female justice models, respectively.<sup>8</sup>

The estimated coefficients for *Partisan Selection* and *Nonpartisan Selection* are not of substantive interest since they represent effects only for the counterfactual scenario where *Citizen Liberalism* = 0 because of the interaction terms. The estimated coefficient for *Citizen Liberalism* gives its effect for states with appointment systems (i.e., when *Partisan Selection* and *Nonpartisan Selection* = 0). The estimated coefficient for *Citizen Liberalism* is positive and significant in both the first black and first female justice models. This means that states that utilize appointment systems seated their first black and female justices sooner on average as *Citizen Liberalism* increased. Substantively, a one standard deviation increase in *Citizen Liberalism* increased the odds of the first black and female justices being seated by a factor of about 2.0 and 2.2, respectively, holding the other explanatory variables constant.

The key results concerning the influence of selection systems are the estimated coefficients for the interaction terms. The interaction term between *Partisan Elections* and *Citizen Liberalism* is

<sup>8</sup> Areas under the ROC curve range from .50 to 1 (perfect prediction). A ROC curve can also be thought of as estimating how the likelihood of correctly predicting a 1 is traded off against the likelihood of correctly predicting a 0 (King & Zeng 2001).

positive and significant in the first black justice model, but is statistically indistinguishable from 0 in the first female justice model. For the first black justice model, this result suggests that the likelihood of a state seating its first black justice increases on average in states with *Partisan Selection* as *Citizen Liberalism* increases. A similar increase in *Citizen Liberalism* in states with *Nonpartisan Selection*, however, has no effect on average on the likelihood of the first black or female justice being seated. Overall, these results are intriguing. Selection systems seem to matter, but only for the seating of a state's first black justice, and only at higher levels of citizen liberalism.

States that utilize a *Nominating Commission* seat their first black justices sooner than states that do not. Substantively, the use of a nominating commission increases the odds of the first black justice being seated by a factor of about 4.5, holding the other explanatory variables constant. These commissions had no effect, however, on the likelihood of a state seating its first female justice. Although nominating commissions sometimes expressly value diversity in their consideration of candidates, there has been some question about whether they have actually increased diversity on the bench. The result from the first black justice model suggests that nominating commissions have been at least somewhat successful in increasing diversity, although commissions did not appear to have an effect on the likelihood of a state seating its first female justice.

Turning to institutions that affect turnover, the number of *Seats* on a state's supreme court is positively associated with the timing of states seating their first black justices. Substantively, an additional seat increases the odds of a state seating its first black justice by a factor of about 2.1, holding the other explanatory variables constant. The effect of the number of seats on the likelihood of a state seating its first female justice is not statistically distinguishable from 0. However, the estimated coefficient falls just short of conventional significance ( $p = .10$ , one-tailed). In Model 2, the estimated coefficient on the number of seats is statistically distinguishable from 0. Substantively, an additional seat increases the odds of a state seating its first female justice by a factor of about 1.4, holding the other explanatory variables constant.

The estimated coefficient on *Term Length* is statistically indistinguishable from 0 in the first black justice model. Counterintuitively, however, states with longer terms seem to have seated their first female justices sooner. Substantively, each additional year of term length increased the odds of a state seating its first female justice by about 1.0, holding the other explanatory variables constant. One possible explanation for this result may be that seats with

longer terms attract more attention from interest groups, thereby increasing the pressure on states to seat their first female justices.<sup>9</sup> The final institution affecting turnover—*Mandatory Retirement*—had no impact on the timing of states seating their first female justices. A retirement rule does, however, affect the timing of states seating their first black justices. Substantively, such a rule increases the odds of a state seating its first female justice by about 3.0, holding the other explanatory variables constant. Overall, the results from both models suggest that institutions affecting turnover have a substantial impact on the timing of states seating their first black and female justices.

There is no diffusion effect from *Neighboring States* in the female justice model. However, in the first black justice model, states were actually less likely to seat their first black justice given an opening as the percentage of neighboring states who had seated their first black justice increased. Substantively, a standard deviation increase in the percentage of neighboring states having seated their first black justice decreased the odds of a state seating its first black justice by about 0.4, holding the other explanatory variables constant. Because of large geographic variation in black populations (e.g., smaller populations in much of the Northeast, Northwest, and Great Plains regions), I also fit a model interacting *Neighboring States* and *Black Voting Age*. The estimated coefficient for the interaction term was positive and significant ( $p < .10$ , two-tailed), which means that the diffusion effect is strongest in states with low black populations, but grows weaker on average as those populations increase. This suggests that the counterintuitive result may reflect the fact that states that have not yet seated their first black justices tend to be grouped together geographically and have small black populations.

The appointments of certain black and female justices to the U.S. Supreme Court are associated with seating decisions at the state level as expected. The odds of a state seating its first black justice increased by a factor of about 4.6 after the appointment of Clarence Thomas (*Thomas*) to the U.S. Supreme Court, holding the other explanatory variables constant. Furthermore, the odds of a state seating its first black justice increased by a factor of about 11.2 after the appointment of Ruth Bader Ginsburg (*Ginsburg*). In the first female justice model, the appointment of Sandra Day O'Connor (*O'Connor*)—the first female to sit on the U.S. Supreme Court—is positively associated with the seating of the first female justices on state supreme courts. Substantively, the odds of a state seating its first female justice increased by a factor of about 2.9

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<sup>9</sup> Cf. arguments that longer terms attract more campaign spending (Bonneau 2007) and higher quality challengers (Bonneau & Hall 2003; Hall & Bonneau 2006).

following Justice O'Connor's appointment. Overall, these results offer support for the idea that the appointment of political minorities to the U.S. Supreme Court heightens interest in diversifying courts at the state level. Because of the necessarily blunt nature of these measures and the possibility of confounding influences, however, more work should be devoted to determining the extent to which national events affect state-level decisions to diversify courts.

Turning to the control variables, states with higher proportions of attorneys who are black (*Black Attorneys*) are more likely to seat their first black supreme court justices sooner. Substantively, a 1 standard deviation increase in the percentage of attorneys in a state who are black increases the odds of a state seating its first black justice by a factor of about 1.4, holding the other explanatory variables constant. For those who value institutional diversity, this result speaks to the importance of educating more black attorneys and doing more to place blacks in positions that can serve as stepping stones to the highest judicial offices.

A 1 standard deviation increase in the size of the *Black Voting Age* population increases the odds of a state seating its first black justice by about 7.8, holding the other explanatory variables constant. This result may also help to explain why many states have yet to seat their first black supreme court justices: many of the states that have not seated their first black justices have relatively small black populations (e.g., Idaho, New Hampshire, Wyoming, and Vermont). Neither the percentage of attorneys who are women (*Women Attorneys*) or the size of the female voting age population (*Women Voting Age*) affected the likelihood of a state seating its female justice.

The first black and female justices were no more likely to be seated in years when states had multiple *Openings*. The odds of a state seating its first black justice increased by a factor of about 6.3, holding the other explanatory variables constant, when that state had previously seated its *First Female* justice. Similarly, the odds of a state seating its first female justice increased by a factor of about 3.0, holding the other explanatory variables constant, when that state had previously seated its *First Black* justice. Southern states (*South*) were no faster or slower to seat their first black or female justices.

Lastly, it is instructive to consider the underlying hazard rates. As noted previously, each of the duration models includes a cubic polynomial to account for temporal dependence. Figures 2 and 3 plot the probabilities of seating the first black and female justices respectively as a function of time (note that the probabilities on the y-axes are different for each model). Figure 2 shows that the baseline probability of a state seating its first black justice increased or

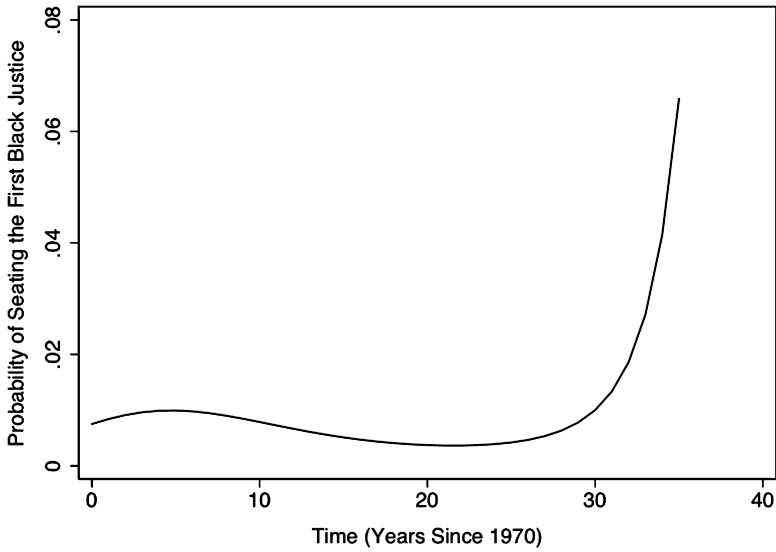


Figure 2. Hazard rate (first black justice).

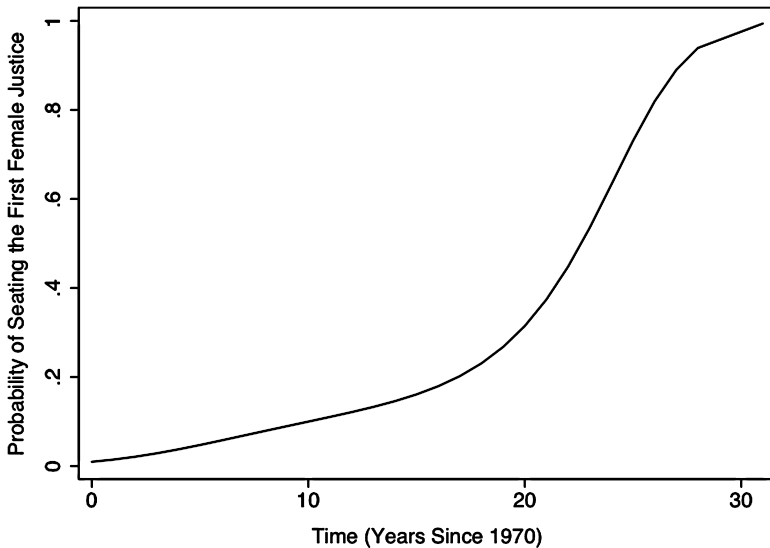


Figure 3. Hazard rate (first female justice).

held steady from 1970 until the late 1970s, then dropped steadily through about 1990, at which point it flattened out until taking a sharp upward turn around 2000. In contrast, the hazard for the first female justice model—plotted in Figure 3—looks quite

different. Following 1970, there is a slow but steady increase in the probability of a state seating its first female justice until around 1990, at which point there is a sharp upward turn until 2002 when the final state seated its first female justice.

The baseline hazard rate is instructive insofar as it provides insights regarding the impact of omitted variables (see Beck 2010). The ultimate goal is to produce a model accounting for the diversification of state supreme courts without duration dependence. Figures 2 and 3 suggest that future work would benefit from more fully considering how the process of diversifying courts has differed for blacks and women over time. Although blacks and women have both encountered formidable barriers securing public office, there is reason to expect that institutional and political pressures may have affected the underlying processes differently for these groups over time.

## **Conclusion**

When it comes to determining the time until states diversify their supreme courts, institutions matter—particularly institutions that affect turnover. States are more likely to seat their first black and female justices sooner when institutional rules result in more frequent openings. Furthermore, in the ongoing process of states seating their first black justices, the choice of selection system matters: on average, states with partisan selection systems have seated their first black justices sooner, but only in states with relatively liberal citizenries. Thus, just as the interaction of institutional design and politics matters in the context of judicial decision-making (e.g., Brace & Boyea 2008; Brace & Hall 1997; Caldarone et al. 2009), so too does it affect judicial selection. One remaining issue is to examine the impact of interim appointments on judicial diversity. Unfortunately, we lack systematic information on how particular judges obtain their seats. But given the important role that interim appointments play in diversifying courts (Holmes & Emrey 2006), further exploring this issue will be an important step forward in the study of judicial diversity in the states.

The results also suggest that states may be more likely to seat their first black and female justices during periods of heightened attention to the issue of judicial diversity generated by the appointment of political minorities to the U.S. Supreme Court. These results lend support to a growing literature on vertical diffusion, providing additional evidence that national forces can help shape state level outcomes. Because of the necessarily blunt nature of measuring vertical influence and the potential for con-



founding effects, however, more work is needed to examine the possibility that decisions at the federal level help shape judicial diversification in the states. The recent appointments of Sonia Sotomayor—the first Hispanic Supreme Court justice—and Elena Kagan offer new opportunities to examine whether appointment decisions at the federal level have spillover effects in the states.

These results are interesting from a political development perspective, but they are also relevant for enhancing our understanding of the political and institutional conditions that promote judicial diversity. This is important for several reasons. First, 19 states have yet to seat their first black justices. Moreover, groups such as Hispanics and Asian Americans are still underrepresented on state courts (Hurwitz & Lanier 2008). To the extent policy makers and voters value institutional diversity, the results suggest a normative argument for considering changes in institutional rules such as appointment systems, court size, term length, and mandatory retirement rules. The results also suggest that states with smaller numbers of black lawyers may need to focus on ways to elevate those lawyers into positions that will allow them to gain the experience necessary to obtain a seat on the state's highest court. This is a lesson that is likely to also hold true when it comes to seating members of other minority groups.

More broadly, understanding the determinants of judicial diversity is an important task because of the impact diverse courts have on political processes and public opinion. There is evidence, for example, that female (Baldez et al. 2006; Songer et al. 1994; Peresie 2005) and black (Scherer 2005; Welch 1988) judges vote differently on certain issues than their male and nonblack counterparts do.<sup>10</sup> Moreover, the mere presence of a female (Boyd et al. 2010; Farhang & Wawro 2004; Peresie 2005) or black (Cox & Miles 2008) judge on a panel may influence the way other judges decide cases.<sup>11</sup> Political minorities also bring unique perspectives to the bench that help shape the design of legal rules (Sisk et al. 1998). Thus, diversity on the bench has important implications for judicial decision-making, the interaction of judges on collegial courts, and judicial policymaking. Descriptive representation on courts also enhances perceptions of institutional legitimacy among blacks

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<sup>10</sup> The results in this literature are, however, mixed. Several studies find no systematic difference between the way females and males (Ashenfelter et al. 1995; Gryski et al. 1986; Sisk et al. 1998) or blacks and whites (Farhang & Wawro 2004; Uhlman 1978; Walker & Barrow 1985) decide certain cases.

<sup>11</sup> Farhang & Wawro (2004) find evidence of panel effects for female but not black judges. Justice Scalia offered the following anecdote concerning Thurgood Marshall's presence at conference: "He wouldn't have to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race" (Liptak 2009).

(Scherer & Curry 2010).<sup>12</sup> More generally, representation fosters trust in institutions among political minorities and increases democratic engagement (e.g., Bobo & Gilliam 1990; Verba et al. 1997; Voss & Lublin 2001).<sup>13</sup> If judicial diversity matters for these reasons, it is important to understand why some states lag behind in generating that diversity.

Several important questions remain in our effort to further unravel the determinants of judicial diversity. For example, how do we explain the 115-year gap between South Carolina seating its first and second black justice, or the fact that several states have not yet seated their second black or female justices? Do different retention systems influence how long minority justices serve? How important are interim appointments to diversification? Questions also remain as to what factors will explain the seating of justices from other minority groups. Exploring these and similar questions will be important for further developing our understanding of how political institutions and pressures influence judicial diversity in the states.

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<sup>12</sup> Overby et al. (2005) offer evidence that blacks in Mississippi do not have higher perceptions of judicial fairness in areas with more black local judges. As the authors recognize, however, the null results may be due to the low visibility of local judges, and results in Mississippi may not be typical.

<sup>13</sup> For contrary evidence, see Gay (2001, 2002) and Tate (2003).

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