

DIVERSITY IN STATE AND FEDERAL APPELLATE COURTS: CHANGE AND CONTINUITY ACROSS 20 YEARS*

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We examine the levels of racial, ethnic, and gender diversity and use of selection systems in state and federal appellate courts in the United States for the year 2005 and compare them with our earlier findings for a twenty-year period. We observe no recent increases in the number of state courts employing the merit system of selection, and other systems also remain stable, as continuity currently defines the types of selection systems used in the states. However, we find an increasing number and percentage of state and federal appellate judges who are women and members of racial and ethnic minorities, with change being the order of the day for these nontraditional judges joining the bench. Finally, we show that particular methods of selection are unrelated to rates of judicial diversity. Specifically, we find that the merit system, once derided by some as disfavoring nontraditional judges, continues to have no apparent association with diversity. While there are myriad rationales for state policy makers to choose one particular selection method over any other, our findings affirm, once again, that associated levels of diversity need not be included in that decision.

He is “good in every way, except that he’s not a woman.” Justice Sandra Day O’Connor’s reaction upon her hearing that President George W. Bush’s initial selection for her replacement was then-U.S. Court of Appeals judge John Roberts, the eventual chief justice of the U.S. Supreme Court (Bumiller, 2005).

Representation in political institutions remains a critical issue in the United States as the nation’s population continues to experience demographic change. Existing scholarship addressing the question of political representation has discussed the symbolic and substantive importance of diversity in government, the necessity for, and problems associated with, policies that enhance levels of diversity, and actual levels of diversity manifest in public institutions. In recent years, a number of studies have focused on the representative nature of the judiciary in particular compared to nonjudicial branches. Continuing in this vein, we focus on the contemporary levels of racial, ethnic, and gender diversity in the state supreme and intermediate appellate courts, as well as the federal appeals courts. In particular, we examine the type of judicial selection systems that the states have employed and ensuing levels of diversity, a critical issue in light of the long-standing controversy as to whether selection systems, particularly the merit system, influence levels of diversity on the bench. Based on our prior research (Hurwitz and Lanier 2001, 2003, 2005) and the findings we report here, we assert that the selection system, including the merit system, does not relate to judicial diversity.

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Our goal in this article is to explore present levels of judicial diversity, describe whether change or continuity in diversity has occurred over time, and illustrate how merit systems in particular, and selection systems more generally, are not associated with diversity, as well as to offer explanations as to why such transformations may, or may not, have occurred in the early stages of the twenty-first century. The present data provide a unique window on the questions presented here, as they enable us to describe and compare twenty years of selection in the state and federal appellate systems. Now is thus a propitious time to review the broad conclusions that the extant literature has reported across two decades of research on judicial diversity and how those results compare with more-contemporary findings bearing on the American judiciary in state and federal appellate courts.

We focus our study on appellate courts, not trial courts (e.g., see Graham, 2004, for levels of comparative diversity on state trial courts), and study diversity at both the state and federal levels. The appellate courts in our study both have very different functions within the judiciary and represent widely varying selection systems, thereby providing a unique window onto diversity across a wide array of contexts. By comparing the relative proportion of women and minorities who have become appellate judges in these disparate state and federal judicial systems, we are able to obtain perhaps the most comprehensive and comparative view to date of the incidence of political minorities—that is, all racial and ethnic minorities and women (of any race or ethnicity)—who have reached appellate benches in the land, their relative success in attaining those posts via differing selection methods, and the changes in both phenomena over the final stages of the twentieth century as compared to the early years in the twenty-first century.

The presence in the judiciary of political minorities, who collectively compose a majority of the larger population, provides enormous symbolic—and no doubt political—import to a vital branch of government. While questions of judicial diversity are not limited to the American bench (e.g., Thomas, 2005, who reviews the relative sparsity of judges who are political minorities in Great Britain and Canada), we concentrate on appellate courts, broadly defined, within the United States. Over the final quarter of the twentieth century, numerous efforts were made to increase the number and proportion of women and minority judges on both the state and federal courts (e.g., Goldman, 1979; Graham, 2004; Slotnick, 1981). Contemporaneously, there was a reform movement in the states toward greater use of the merit system to select judges, rather than the lifetime tenure characteristic of federal judges or judicial elections operational in many states in which the influence of money appears increasingly emphasized. The literature in this area is extensive, in terms of examining both how selection systems may affect diversity on state benches and how presidential administrations have approached the nomination process in the federal courts (e.g., Bratton and Spill, 2002, 2004; Canon, 1972; Dubois, 1983; Esterling and Andersen, 1999; Flango and Ducat, 1979; Glick and Emmert, 1987; Goldman, 1993,

1995, 1997; Graham, 1990; Hurwitz and Lanier, 2001, 2003, 2005; Martin, 1987; Slotnick, 1981, 1984; Spill Solberg, 2006; Spill Solberg and Bratton, 2005).

Research on these issues remains compelling, in part because some scholars have argued that the goals of judicial diversity and reform may conflict. As Glick and Emmert (1987), Ifill (2000), and others have declared, reform from increased use of merit selection is potentially problematic for nontraditional judges, because such potential appellate jurists are not a part of the prior status quo or do not have the same experiences or opportunities as do other judicial candidates, which militates against their chances of being selected. Consequently, these scholars argue that merit selection may augment reform in some respects but ultimately diminish diversity on the appellate bench.

This issue of representation on the bench is critical, as judicial diversity may be of import within the judicial system and the larger political structure. The present research has political and legal import because there may be systematic, empirically discernible differences in the decision making of judges of nontraditional backgrounds. There is conflicting evidence as to whether characteristics such as race and gender systematically affect a judge's decision making (Glick and Emmert, 1987; Songer and Crews-Meyer, 2000; Songer, Davis, and Haire, 1994). Notwithstanding such potential differences, some scholars assert that judicial legitimacy is increased with enhanced levels of nontraditional judges, as their decisions are more infused with "traditionally excluded perspectives" and their presence enhances the appearance of impartiality for litigants who appear before the court and for the public at large (Johnson and Fuentes-Rohwer, 2004:9; Ifill, 2000; Lazos Vargas, 2004). Others still contend that diversity increases the efficacy of the decision-making process in several contexts (Page, 2007).

The number of states employing a sundry of selection systems and their potential effect on the advancement of women and minorities to judicial positions at the appellate level justifies reanalysis of the putative relationship between selection method and diversity in state courts. This is especially true today, given the greater attention to diversity and affirmative action in general, with states such as Michigan and California, among others, adopting policies limiting the use of racial and gender preferences in government decisions. Judicial diversity has also received much publicity, in particular when President George W. Bush nominated a male to replace the retiring Justice Sandra Day O'Connor, whose historic nomination as the first woman on the Court may have led to a greater number of women subsequently being selected to state benches throughout the land (Liptak, 2005).

Because of this greater present interest in questions of diversity and our own prior research on the subject, we gathered data on the racial and gender composition of all courts of last resort and intermediate appeals courts for each of the fifty states and the District of Columbia as of June 30, 2005, and for the federal courts of appeals. Our protocol for collecting data for judicial characteristics (Hurwitz and Lanier,

2001) involved reviewing state and federal courts' Web sites and telephoning clerks of court to complete and verify information. The result is a cross-section of 2005 data covering the racial, ethnic, and gender characteristics of all 1,310 state appellate-court judges and 167 authorized, active federal appeals-court judges.

PATHS TO THE APPELLATE BENCH AND DIVERSITY

Under the U.S. Constitution, Article III judges reach the federal bench via presidential nomination and senatorial confirmation. State appellate judges may attain their positions in several ways; the formal routes include election (partisan or nonpartisan), gubernatorial appointment, legislative appointment, or nomination by commission, otherwise known as the merit system. The customary understanding of merit selection includes a nonpartisan or bipartisan commission that nominates a limited number of individuals for a judicial vacancy, for ultimate appointment (usually) by the executive from the commission's list, with continuing tenure on the bench dependent upon a subsequent retention election in which the judge appears unopposed on the ballot and voters decide whether or not to retain the judge (Champagne, 1986; Esterling and Andersen, 1999; Hurwitz and Lanier, 2003; Warrick, 1993).

Particularly when state judicial vacancies are filled on an interim basis, usually in elective systems, appointment of some kind is the usual method (Graham, 1990), but these methods of interim selection "within the elective states makes no important differences in the characteristics of judges," including their religious and legal background characteristics (Glick and Emmert, 1987:231). Because the composition of judiciaries in electoral systems may be influenced by interim appointments (Graham, 1990), readers should interpret our findings with care.

Researchers and advocates have debated whether various methods of selection, particularly the merit system, have any substantive influence on the rate at which women and minorities attain judicial commissions. More specifically, some reformers who are interested in cultivating judicial diversity (e.g., Ifill, 2000) argue that appointive systems in general, and merit systems in particular, tend to favor a prior status quo by perpetuating the dominance of traditional elites in the judiciary, thus decreasing opportunities for political minorities who may not have conventional legal backgrounds or experience. While some scholars have found that the method of selection does influence who reaches the bench, their findings are not entirely consistent across research contexts and time (Esterling and Andersen, 1999; Glick, 1978; Graham, 1990; Henry et al., 1985; Lyon, 1981; Warden, Schlesinger, and Kearney, 1979).

Other scholarship, ours included, reaches contrary conclusions. For instance, some studies determined that the merit system has no substantial influence on women and minorities becoming state judges, or that there is no difference in outcome with respect to representational diversity between those states employing elections and those employing other methods of selection (Dubois, 1983; Flango and Ducat, 1979; Glick and Emmert, 1987; Hurwitz and Lanier, 2001). Thus, even if the assertion that merit systems depress judicial diversity appears logical, the empirical evidence shows

Table 1
Type of Initial Selection System in
State Appellate Courts (1985, 1999, 2005)

Selection System	Number and Percentage of Courts		
	1985*	1999*	2005
Judicial Election	40 44.9%	39 44.1%	39 41.9%
Nomination by Commission	38 42.7%	43 44.1%	43 46.2%
Gubernatorial Appointment	5 5.6%	5 5.4%	5 5.4%
Legislative Election	5 5.6%	4 4.3%	4 4.3%
Other	1 1.1%	2 2.2%	2 2.2%
TOTAL	89 100.0%	93 100.0%	93 100.0%

* Source: Hurwitz and Lanier (2001)

that selection systems are not systematically associated in any way with minority representation, although other factors may influence judicial diversity. These include the applicable pool of potential judges (Bratton and Spill, 2002; Hurwitz and Lanier, 2003; Martin, 1987; Martin and Pyle, 2002; Spill Solberg and Bratton, 2005), prestige and size of the court (Bratton and Spill, 2002, 2004; Hurwitz and Lanier, 2001, 2003), state-level ideology at the elite and mass levels (Bratton and Spill, 2002; Hurwitz and Lanier, 2003), region (Glick and Emmert, 1987), and the extant level of diversity on the bench on which a vacancy is to be filled (Bratton and Spill, 2002; Spill Solberg and Bratton, 2005). Thus, the question of the effect of selection systems on diversity remains an open one. The consistent increases in the number of women and minority judges show that perhaps some of the customary barriers to their ascendance to the appellate bench may be beginning to erode.

SELECTION SYSTEMS OVER TIME

Before discussing the dynamics that affect the selection of nontraditional judges, we examine how states' formal selection processes—selection via nomination by commission, judicial elections, legislative selection, and gubernatorial appointment—have changed over time. We first present the types of initial selection systems that state courts employed in 2005 and compare them with our findings for two prior years, 1985 and 1999 (Hurwitz and Lanier, 2001) (see Table 1). Overall, few changes appeared in the use of selection systems, as the number of state appellate courts

employing nomination by commission and the other methods of selection remained relatively stable over the past twenty years.

The data in Table 1 differ slightly from those that we previously reported, as the selection mechanisms in New Jersey and North Dakota are more nuanced than expressed in the states' laws. In New Jersey, the chief justice of the supreme court assigns superior-court judges to serve within the appellate division (Wefing, 2002), so we code the New Jersey intermediate appellate court as "other." We also categorize as "other" the intermediate appellate court of North Dakota, created in 1987, as its judges—sitting or retired trial court judges, or retired state Supreme Court justices—are chosen to hear cases on an ad hoc basis (Bosworth, 2002). Across twenty years, there was a net increase of four appellate courts using the merit system; 43 appellate courts utilized nomination by commission in 2005, five more than in 1985. Although the virtues of merit selection continue to be exhorted by its advocates, the prior trend of prodigious growth of states' employing merit selection (Glick and Emmert, 1987) has clearly decelerated, with the numbers having achieved some equilibrium. Despite advocacy for adoption of merit selection, elections are currently used for about the same number of courts as those whose judges are selected by merit systems, yet more state appellate judges overall are chosen by formal electoral systems than any other selection method.

DIVERSITY ON STATE APPELLATE BENCHES

Continuing trends that began approximately thirty years ago, the relative levels of political minorities on state appellate benches continue to increase. The data indicate a broadening of access of some magnitude for nontraditional judges (see Table 2), although their presence is not in parity with their share of the overall population. In reporting racial and gender composition of state appellate tribunals, we have categorized jurists according to certain representative characteristics. These include an aggregate measure of all female judges and minorities reflecting nonwhite males (NWM); all racial or ethnic minorities, whether male or female; females of any race; minority females; and, separately, males and females for each racial and ethnic group. We disaggregate Asian-American and Pacific Island judges because of their relatively larger numbers than in the past and the availability of more specific data. Our analysis does not disaggregate the data into electoral subdivisions. While some authors claim that small electoral subdivisions may influence resultant levels of judicial diversity (Ifill, 2000), perhaps resulting in a majority of minorities, it seems such effects would be found, if at all, only for trial courts, with their smaller geographic jurisdictions. Appellate courts customarily cover much larger geographic areas. Indeed, we previously found that such distinctions have no influence on diversity in appellate courts (Hurwitz and Lanier, 2003).

We initially note that, in examining the 2005 data, there are few significant differences in rates of diversity across the various selection systems for the broad categories, whether NWM, women, or minorities, or for most of the more select minori-

Table 2
Representation of Women and Minorities in State Appellate Courts (2005)

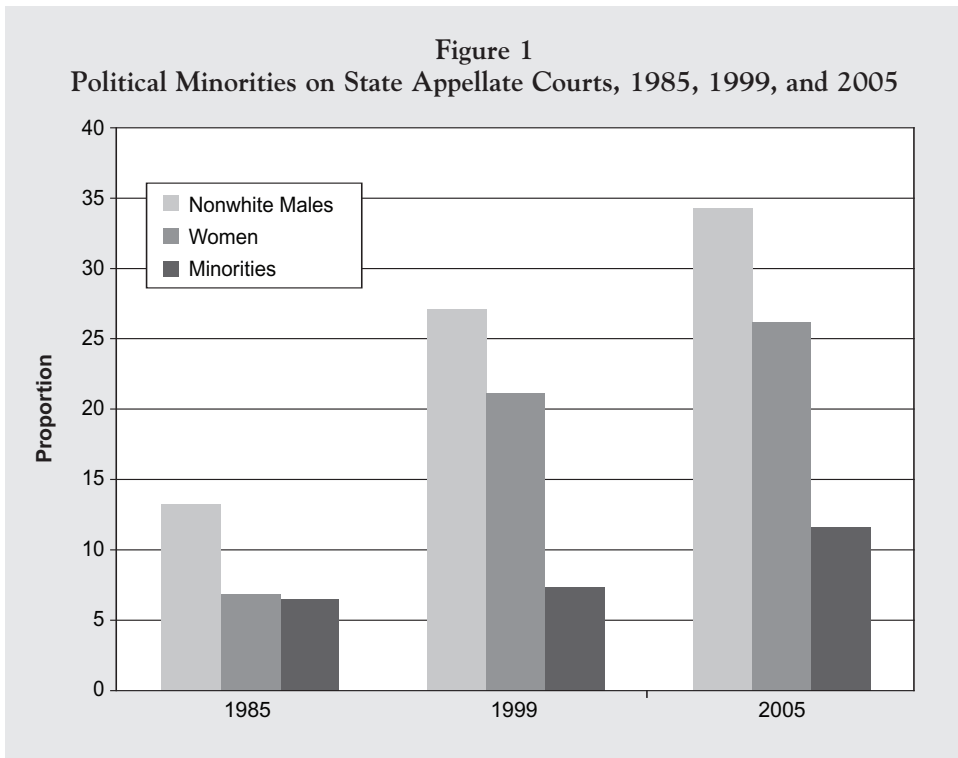
	Total	Merit System	Non-Merit System	Judicial Election	Appointment by Governor	Court of Last Resort	Intermediate Appellate Court
Females and Minorities (Nonwhite Males)	34.35% (450)	33.13% (166)	35.11% (284)	35.27% (212)	35.61% (47)	36.41% (130)	33.58% (320)
Minorities (Males and Females)	11.68% (153)	12.97% (65)	10.88% (88)	11.48% (69)	9.09% (12)	12.32% (44)	11.44% (109)
Females (any race)	26.18% (343)	23.35%*	27.94% (226)	28.12% (169)	29.55%*	26.61% (95)	26.02% (248)
Minority Females	3.51% (46)	3.19% (16)	3.71% (30)	4.33% (26)	3.03% (4)	2.52% (9)	3.88% (37)
Black Males	5.11% (67)	5.39% (27)	4.94% (40)	5.32% (32)	2.27%* (3)	6.72%* (24)	4.51% (43)
Black Females	1.98% (26)	1.40% (7)	2.35% (19)	3.00%* (18)	0.76%* (1)	1.40% (5)	2.20% (21)
Hispanic Males	2.37% (31)	3.39%* (17)	1.73% (14)	1.50%* (9)	2.27% (3)	2.24% (8)	2.41% (23)
Hispanic Females	0.99% (13)	0.80% (4)	1.11% (9)	1.33% (8)	0.76% (1)	0.84% (3)	1.05% (10)
Asian Males	0.46% (6)	0.40% (2)	0.49% (4)	0.33% (2)	1.52%* (2)	0.56% (2)	0.42% (4)
Asian Females	0.23% (3)	0.40% (2)	0.12% (1)	0 (0)	0.76%* (1)	0 (0)	0.31% (3)
Pacific Island Males	0.23% (3)	0.60%* (3)	0 (0)	0 (0)	0 (0)	0.28% (1)	0.21% (2)
Pacific Island Females	0.31% (4)	0.60% (3)	0.12% (1)	0* (0)	0.76%* (1)	0.28% (1)	0.31% (3)
TOTAL JUDGES	1,310	501	809	601	132	357	953

Explanatory Notes: An * represents a significant difference from the overall mean at the .05 level or better ($p < .05$, two-tailed test).

Reading vertically, the first number in each cell represents the percentage within that category as compared to the appropriate total, while the number in parentheses is the actual number of racial and ethnic minority and/or women judges (e.g., of the 1,310 total judges, 450, or 34.35 percent, of them are NWM).

Figures do not sum to 100 percent in each column due to double counting and overlap of the various categories. Thus, the NWMs category includes all minorities and females, less minority females (to prevent double counting), while the minorities category includes all black, Hispanic, Asian, and Pacific Island judges.

ty groups, as diversity is not associated with selection system in the vast majority of cases. There were some specific exceptions: Black males and females did not fare as well under gubernatorial appointment, and Hispanic males were more likely to reach the bench via merit selection. There were also some localized instances of statistical significance for judges of Asian or Pacific Island decent, although their numbers,



while larger than in the past, are likely too small to provide sufficient confidence in the significance of these results.

The numbers and rates of political minorities on the state appellate bench in 2005 (see Table 2) illustrate the dynamic nature of the intriguing changes in the level and proportion of political minorities on the state appellate courts (see Figure 1). Women and minorities continue to gain greater representation on appellate benches across the land. The proportion of NWM judges rose from over one-fourth (27 percent) in 1999 to about one-third (34 percent) in 2005, an absolute gain of more than 7 percent of those appellate judges in only six years. In 1985, by contrast, there were few political minority appellate judges overall (only 13 percent), so that NWM judges increased their positions more than two-and-a-half times from twenty years ago. In terms of raw numbers, in 1985 there were 140 NWM judges on state appellate benches, but in 1999 that figure had risen to 341, and then to 450 by 2005 (Hurwitz and Lanier, 2001). The proportion of white male judges has concomitantly declined as the bench has become more diverse over time.

We also disaggregate the data by specific political minority groups (see Table 2). The changes over time have not been uniform across groups. In real numbers, there were 92 minority judges in 1999 and 153 in 2005. Female judges increased their numbers from 266 to 343 during this same time period. While the increase in minority

judges from 1985 to 1999 was less than 1 percent, from 1999 to 2005 it was between 4 and 5 percent. However, for women judges, whose numbers increased slightly more than 5 percent from 1999 to 2005, in the earlier period from 1985 to 1999 the increase approached 15 percent. Hence, increases among women and minority judges in the most recent period appear to be more on a par with each other, whereas in the prior period gains among women chiefly drove the increase in political minorities (Hurwitz and Lanier, 2001). To state these findings another way, the disparity that once existed in the changing rate for women and minorities has narrowed, but not disappeared, in recent years.

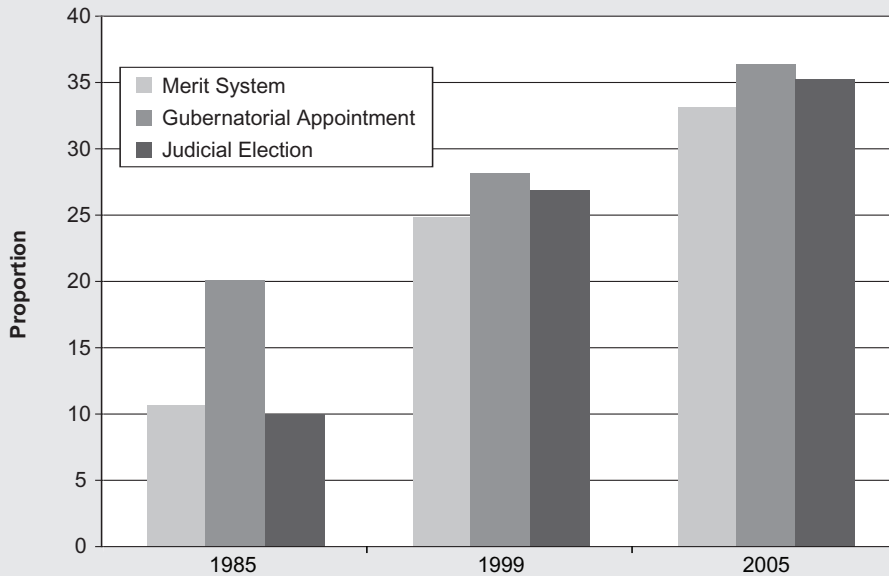
Increases are also observed for all specific racial minority groups since 1999. The proportion of black male judges decreased from 1985 to 1999, but these judges increased their proportion to slightly over 5 percent in total by 2005, reflecting an increase of twenty-one judges and a gain of between 1 and 2 percent in six years. Black female judges, whose numbers more than doubled across these years, from ten in 1999 to twenty-six in 2005, experienced a gain of more than 1 percent. Hispanic judges also experienced modest increases. The relative proportions of Hispanic male and female judges have each increased by less than 1 percent since 1999. These changes were mirrored among Asian and Pacific Island judges; slightly more than 1 percent of the states' total number of appellate judges is drawn from these groups. Disaggregating them, we find that Asian and Pacific Island female judges gained five judicial positions since 1999 (Hurwitz and Lanier, 2001). Overall, even though there are vastly different selection systems implemented across the states' tribunals, women and political minorities continue to make strides in both their real numbers and relative proportion on the states' appellate benches.

DOES SELECTION SYSTEM AFFECT DIVERSITY?

While selection systems perhaps influenced levels of diversity on appellate benches in prior eras, by the end of the twentieth century those differences had largely abated; further, while NWMs once fared better in non-merit systems, such advantages eventually dissipated entirely, as there were no evident influences of selection system on levels of diversity in the state courts (Hurwitz and Lanier, 2001, 2003, 2005). Our present results reaffirm these findings and trends. NWM judges attained their seats in 2005 at roughly the same rate in merit systems (about 33 percent) as in other systems (35 percent), a relatively minor difference that was not statistically significant (see Table 2). Moreover, any previously observed differences in the rates at which nontraditional judges reach the bench have greatly lessened over time, as selection systems themselves neither systematically favor nor prejudice judges of any gender or race.

These points are illustrated in Figure 2, which shows how the rate of judges who are political minorities has changed over time across selection systems. In 1985 NWM judges were about twice as likely to attain a seat on the bench when selected by the governor, rather than by being chosen through election or a merit system.

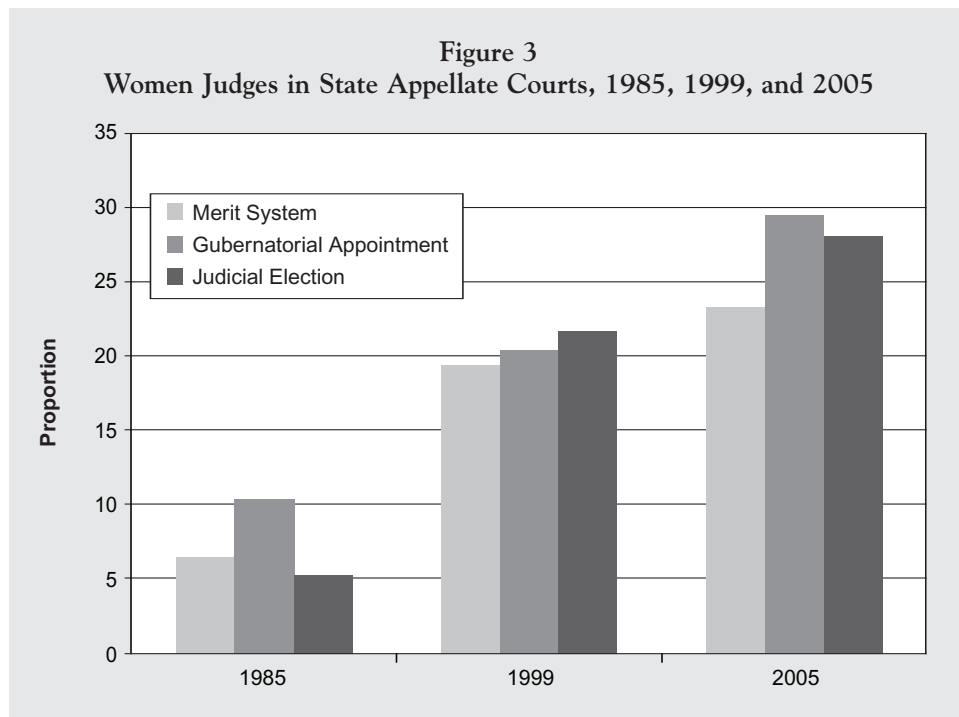
Figure 2
Women and Minority Judges in State Appellate Courts, 1985, 1999, and 2005



Twenty years later, however, the differences were much less stark, with NWM judges about as likely to reach the bench whether appointed by the governor, selected under a merit plan, or elected. As we previously found for 1999 (Hurwitz and Lanier, 2001), there currently appears to be no tangible difference by specific selection method, including the merit system, in the rate by which NWM judges are selected for state appellate benches.

During the 1999 to 2005 period, partisan distinctions may be apparent for those few states that employed gubernatorial appointments to their courts of last resort. Governor Gray Davis, a Democrat, made one appointment, that of a Hispanic male, to the California Supreme Court. Governor Angus King, an independent, appointed a white male to the Maine Supreme Judicial Court. Democratic governor Jeanne Shaheen's two appointments to the New Hampshire Supreme Court were a male and a female, both white. Of four appointments made to the New Jersey Supreme Court, Republican governor Christine Todd Whitman appointed a white female, while Governor James McGreevey, a Democrat, appointed three males—one white, one black, and one Hispanic. The small number of appointments these governors made limits the systematic differences or generalizations that can be ascertained.

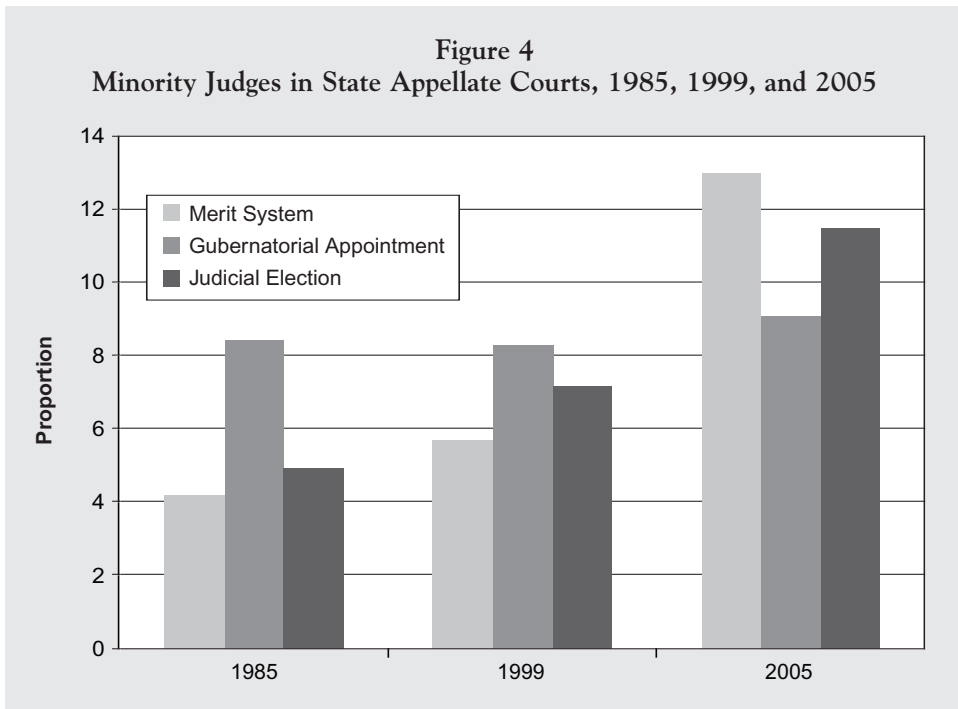
Women and racial minorities differ in their comparative success in attaining seats on the bench over time, perhaps a result of differing political dynamics as each may travel unique paths to the bench (Hartley, 2001; Williams, 2006). Disaggregating the broader NWM category thus provides a somewhat more nuanced



view into how the various selection systems may influence differing group-specific diversity over time. Currently over one-fourth of state appellate judges are female, but while gains for women judges continue, the overall rate of increase slowed for women joining the bench in all selection systems (see Figure 3). The advantage that women once held within gubernatorial appointment systems has abated. There are no significant differences for any of the selection methods for women, save for merit selection (see Table 2), which showed a statistically significant influence; however, with only a slight increase in the number of judges, from 117 to 120, this result would not have achieved statistical significance.

The rate at which racial minorities rose to appellate tribunals also changed over time (see Figure 4). While there was no noticeable change in representation of minorities on these courts from 1985 to 1999, they made gains during the early years of the twenty-first century. As with women judges, the benefit that they may once have received from gubernatorial appointment no longer appears operational. In fact, by 2005, executive appointment produced the lowest proportion of minority judges, although by only about two percentage points (not statistically significant).

When we examine the current levels of diversity for state courts of last resort and intermediate appellate courts, we find little difference in overall diversity between these two court levels, but disaggregating the data by selection system may provide a more nuanced picture of judges serving on courts of last resort and intermediate appellate courts (see Table 3). Of particular interest is that, while overall lev-



els of diversity do not differ greatly when level of court is isolated, political minorities are much more likely to be appointed to courts of last resort than to lower appellate courts by elites (gubernatorial appointment or legislative selection). This finding suggests that elected officials may sense the political benefits attendant with appointments of nontraditional judges that receive greater media attention. Minority representation in merit-selection systems similarly tends to be comparably higher in courts of last resort but lower in intermediate appellate courts. Thus, selection effects may vary for different levels of court (Hurwitz and Lanier, 2003).

These changes across twenty years are illustrated in Table 4, which provides the absolute percentage differences observed in diversity across the three time periods analyzed. These findings supply further evidence of significant change in the demographic representation of the appellate bench in the past two decades, during a time when there has been little change in the use of selection systems themselves (see Table 1). Indeed, when controlling for selection system (see Table 4), all major groups of nontraditional judges significantly increased the rate at which they attained state appellate seats.

We disaggregate levels of judicial diversity based on regional distinctions (see Table 5). We do so although region and selection system tend to correlate and there is no deductive theoretical reason to suppose that we will find systematic differences in diversity based on region. In multivariate analyses we have reported elsewhere (Hurwitz and Lanier, 2003), region itself does not attain statistical significance.

Table 3
Representation of Women and Minorities on State Appellate Courts,
by Level of Court and Selection System (2005)

	Courts of Last Resort				Intermediate Appellate Courts			
	Total	Merit Selection	Judicial Election	Elite Nomination	Total	Merit Selection	Judicial Election	Elite Nomination
Females and Minorities (Nonwhite Males)	36.41% (130)	37.97%* (60)	32.30% (52)	47.37%* (18)	33.58% (320)	30.90%* (106)	36.36% (160)	31.30%* (41)
Minorities (Males and Females)	12.32% (44)	15.19%* (24)	9.32%* (15)	13.16% (5)	11.44% (109)	11.95% (41)	12.27% (54)	7.63%* (10)
Females (Any Race)	26.61% (95)	27.22% (43)	24.22% (39)	34.21%* (13)	26.02% (248)	21.57%* (74)	29.55%* (130)	26.72% (35)
Minority Females	2.52% (9)	4.43% (7)	1.24%* (2)	0* (0)	3.88% (37)	2.62% (9)	5.45%* (24)	3.05% (4)
Black Males	6.72%* (24)	6.96%* (11)	6.83%* (11)	5.26% (2)	4.51% (43)	4.66% (16)	4.77% (21)	3.05%* (4)
Black Females	1.40% (5)	1.90% (3)	1.24% (2)	0* (0)	2.20% (21)	1.17%* (4)	3.64%* (16)	0.76%* (1)
Hispanic Males	2.24% (8)	2.53% (4)	1.24%* (2)	5.26%* (2)	2.41% (23)	3.79%* (13)	1.59% (7)	0.76%* (1)
Hispanic Females	0.84% (3)	1.90%* (3)	0* (0)	0* (0)	1.05% (10)	0.29%* (1)	1.82%* (8)	0.76% (1)
Asian Males	0.56% (2)	0.63% (1)	0* (0)	2.63%* (1)	0.42% (4)	0.29% (1)	0.45% (2)	0.76% (1)
Asian Females	0 (0)	0 (0)	0 (0)	0 (0)	0.31% (3)	0.58%* (2)	0 (0)	0.76%* (1)
Pacific Island Males	0.28% (1)	0.63%* (1)	0 (0)	0 (0)	0.21% (2)	0.58%* (2)	0 (0)	0 (0)
Pacific Island Females	0.28% (1)	0.63%* (1)	0* (0)	0* (0)	0.31% (3)	0.58% (2)	0* (0)	0.76%* (1)
TOTAL JUDGES	357	158	161	38	953	343	440	131

Explanatory Notes: An * represents a significant difference from the overall mean at the .05 level or better ($p < .05$, two-tailed test).

Reading vertically, the first number in each cell represents the percentage within that category as compared to the appropriate total, while the number in parentheses is the actual number of racial and ethnic minority and/or women judges (e.g., of the 357 judges serving on courts of last resort, reflected in the total column, 130, or 36.41 percent, of them are NWM).

Figures do not sum to 100 percent in each column due to double counting and overlap of the various categories. Thus, the NWMs category includes all minorities and females, less minority females (to prevent double counting), while the minorities category includes all black, Hispanic, Asian, and Pacific Island judges.

Elite nomination includes both gubernatorial appointment and legislative selection.

The intermediate appellate courts in New Jersey and North Dakota are not included in the table, as they do not fit within any of these defined categories and are coded "other."

Table 4
Change in Percentages of Minority and Women Judges in
State Appellate Courts and Federal Courts of Appeals, 1985 to 2005

Series	Change in % from 1985 to 1999	Change in % from 1999 to 2005	Change in % from 1985 to 2005
All States:			
Nonwhite Male Judges	13.88*	7.24*	21.12*
Women Judges	14.33*	5.04*	19.37*
Minority Judges	0.79	4.37*	5.16*
All Federal Courts of Appeals:			
Nonwhite Male Judges	10.83*	7.79*	18.62*
Women Judges	10.14*	5.39*	15.53*
Minority Judges	3.05	4.19	7.24*
All Nonwhite Male Judges:			
Merit System	14.13*	8.27*	22.40*
Gubernatorial Appointment	8.05	7.43	15.48
Judicial Election	16.79*	8.44	25.23*
Federal Courts of Appeals	10.83*	7.79*	18.62*
Women Judges:			
Merit System	12.95*	3.89*	16.84*
Gubernatorial Appointment	10.05	9.11	19.16*
Judicial Election	16.37	6.46	22.83*
Federal Courts of Appeals	10.14*	5.39*	15.53*
Minority Judges:			
Merit System	1.47	7.29*	8.76*
Gubernatorial Appointment	(-0.15)	0.80	0.65
Judicial Election	2.24	4.31*	6.55*
Federal Courts of Appeals	3.05	4.19*	7.24*

Explanatory Notes: An * represents a significant difference from the overall mean at the .05 level or better ($p < .05$, two-tailed test).

The number in each cell represents the change in the mean percentage for each series across the relevant time period (e.g., the percentage of NWM judges in all states increased from 13.23 in 1985 to 34.35 in 2005, which represents a mean absolute percentage change of 21.12 across that time period, as reflected in the top-right cell in the table).

Nonetheless, when we examine whether judicial diversity in the states diverges in the various regions of the country, we find that the Midwest has the lowest proportion of NWM judges, while the South has the highest, with judges of Hispanic and Asian descent being most frequent in the West, and the North and South having the most

black judges. These results are likely influenced by regional demographics for which we do not control here.

Our findings suggest that many factors may be related to judicial diversity in state appellate courts. More particularly, in some cases selection systems appeared to matter, yet in most instances they did not. Hence, *if* the type of selection system were to influence representation on the courts, which we contend does not occur, such effects appear to be very specific to certain racial groups, or perhaps the level of court. The data unquestionably provide evidence that representation of NWM judges has increased over time, both in absolute and relative perspectives, notwithstanding any remaining subtle differences among formal selection methods in the states.

DIVERSITY ON THE FEDERAL COURTS OF APPEALS

As with state appellate benches, changes have taken place in the levels of diversity in the federal appellate courts, but change exists alongside continuity in that context as well. The number of federal appeals-court judges who are minorities continued to rise in both real numbers and as a percentage of all judges on the bench (see Table 6). In 2005 there were sixty NWM federal appellate judges, compared with twenty-seven in 1985 and forty-seven in 1999 (Hurwitz and Lanier, 2001). The change across this twenty-year period represents an increase of nearly 19 percent. The rise stemmed from additional NWM judges appointed to seven of the federal circuits (Second, Fourth, Fifth, Sixth, Seventh, Ninth, and D.C.), whereas the number of NWM judges remained constant on each of the remaining five nonspecialized courts of appeals.

There is no theoretical reason to believe that the several federal circuits should differ in their diversity, as all their judges are chosen pursuant to the Constitution, but we nevertheless assess whether such differences exist. In 2005 the circuit with the smallest percentage of NWM judges was the Eighth, where only two of its judges were political minorities. The First also had two NWM judges, but as it is the smallest circuit with only six authorized judgeships, its relative percentage was far higher. While the Ninth Circuit has the greater number of NWM judges at ten, this result is largely attributable to its being the circuit with the most authorized judges. Its proportion of NWM judges is nearly 36 percent, placing it in the middle of the circuits. While the Third Circuit attained the highest percentage of NWM judges in 1999 (Hurwitz and Lanier, 2001), we observe no increase there since 1999. The Fifth and Sixth Circuits now contain the highest comparable rates of NWM judges among the federal appeals courts, at 47 and 44 percent, respectively.

The percentage of NWM judges on the federal appeals courts increased to nearly 36 percent by 2005; this rate was more than double that observed two decades prior. Past increases in NWM federal judges were due primarily to the larger number of females being appointed to the appeals courts (Hurwitz and Lanier, 2001). This pattern was repeated in the most recent increases. Seven more judges serving in 2005 were minorities than in 1999, producing an increase from approximately 11 percent of the judgeships to 16 percent, while the number of women judges rose from 33 to

Table 5
Representation of Women and Minorities in
State Appellate Courts, by Region (2005)

	Total	North	Midwest	South	West
Females and Minorities (Nonwhite Males)	34.35% (450)	34.40% (86)	33.63% (114)	35.27% (147)	37.05%* (103)
Minorities (Males and Females)	11.68% (153)	10.40% (26)	8.26%* (28)	14.45%* (64)	12.59% (35)
Females (Any Race)	26.18% (343)	25.60% (64)	28.32% (96)	23.70%* (105)	28.06% (78)
Minority Females	3.51% (46)	1.60%* (4)	2.95% (10)	4.97%* (22)	3.60% (10)
Black Males	5.11% (67)	6.40%* (16)	5.01% (17)	6.55%* (29)	1.80%* (5)
Black Females	1.98% (26)	0.80%* (2)	2.65% (9)	3.16%* (14)	0.36%* (1)
Hispanic Males	2.37% (31)	2.00% (5)	0.29%* (1)	2.71% (12)	4.68%* (13)
Hispanic Females	0.99% (13)	0.40%* (1)	0* (0)	1.81%* (8)	1.44% (4)
Asian Males	0.46% (6)	0.40% (1)	0* (0)	0.23% (1)	1.44%* (4)
Asian Females	0.23% (3)	0.40% (1)	0.29% (1)	0 (0)	0.36% (1)
Pacific Island Males	0.23% (3)	0 (0)	0 (0)	0 (0)	1.08%* (3)
Pacific Island Females	0.31% (4)	0* (0)	0* (0)	0* (0)	1.44%* (4)
TOTAL JUDGES	1,310	250	339	443	278

Explanatory Notes: An * represents a significant difference from the overall mean at the .05 level or better ($p < .05$, two-tailed test).

States included within each regional variable are as follows:

North: CT, DC, DE, MA, ME, MD, NH, NJ, NY, PA, RI, WV, VT

Midwest: IA, IL, IN, KS, MI, MN, MO, ND, NE, OH, SD, WI

South: AL, AR, FL, GA, KY, LA, MS, NC, OK, SC, TN, TX, VA

West: AK, AZ, CA, CO, HI, ID, MT, NM, NV, OR, UT, WA, WY

Reading vertically, the first number in each cell represents the percentage within that category as compared to the appropriate total, while the number in parentheses is the actual number of racial and ethnic minority and/or women judges (e.g., of the 1,310 Total Judges, 450, or 34.35 percent, of them are NWM).

Figures do not sum to 100 percent in each column due to double counting and overlap of the various categories. Thus, the NWMs category includes all minorities and females, less minority females (to prevent double counting), while the minorities category includes all black, Hispanic, Asian, and Pacific Island judges.

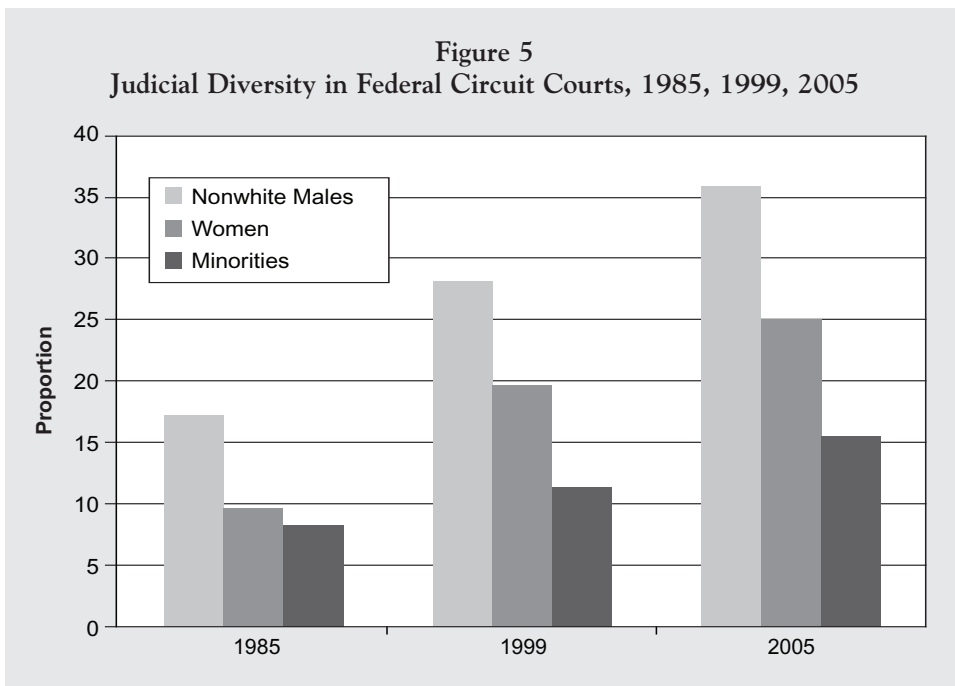
Table 6
Representation of Women and Minorities in the
Federal Courts of Appeals, by Circuit (2005)

	Total	1st Circuit	2nd Circuit	3rd Circuit	4th Circuit	5th Circuit	6th Circuit	7th Circuit	8th Circuit	9th Circuit	10th Circuit	11th Circuit	DC Circuit
Females and Minorities (Nonwhite Males)	35.93% (60)	33.33% (2)	38.46% (5)	42.86% (6)	26.67%* (4)	47.06%* (8)	43.75% (7)	36.36% (4)	18.18%* (2)	35.71% (10)	33.33% (4)	33.33% (4)	33.33% (4)
Minorities (Males and Females)	15.57% (26)	16.67% (1)	23.08%* (3)	14.29% (2)	13.33% (2)	23.53%* (4)	12.50% (2)	9.09%* (1)	9.09%* (1)	17.86% (5)	8.33%* (1)	8.33%* (1)	25.00%* (3)
Females (Any Race)	25.15% (42)	16.67% (1)	23.08% (3)	28.57% (4)	20.00% (3)	23.53% (4)	31.25% (5)	36.36%* (4)	9.09%* (1)	28.57% (8)	25.00% (3)	25.00% (3)	25.00% (3)
Minority Females	4.79% (8)	0* (0)	7.69% (1)	0* (0)	6.67% (1)	0* (0)	0* (0)	9.09%* (1)	0* (0)	10.71%* (3)	0* (0)	0* (0)	16.67%* (2)
Black Males	5.39% (9)	0* (0)	7.69% (1)	7.14% (1)	6.67% (1)	5.88% (1)	12.50%* (2)	0* (0)	9.09% (1)	0* (0)	0* (0)	8.33% (1)	8.33% (1)
Black Females	2.99% (5)	0 (0)	0* (0)	0* (0)	6.67%* (1)	0* (0)	0* (0)	9.09%* (1)	0* (0)	3.57% (1)	0 (0)	0* (0)	16.67%* (2)
Hispanic Males	5.39% (9)	16.67%* (1)	7.69% (1)	7.14% (1)	0* (0)	17.65%* (3)	0* (0)	0* (0)	0* (0)	7.14% (2)	8.33% (1)	0* (0)	0* (0)
Hispanic Females	1.80% (3)	0 (0)	7.69%* (1)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	7.14%* (2)	0 (0)	0 (0)	0 (0)
Asian/Pacific Island Males	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)
Asian/Pacific Island Females	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)	0 (0)
TOTAL JUDGES	167	6	13	14	15	17	16	11	11	28	12	12	12

Explanatory Notes: An * represents a significant difference from the overall mean at the .05 level or better ($p < .05$, two-tailed test).

Reading vertically, the first number in each cell represents the percentage within that category as compared to the appropriate total, while the number in parentheses is the actual number of racial and ethnic minority and/or women judges (e.g., of the 167 authorized judges reported in the total column, 60, or 35.93 percent, of them are NWM).

Figures do not sum to 100 percent in each column due to double counting and overlap of the various categories. Thus, the NWMs category includes all minorities and females, less minority females (to prevent double counting), while the minorities category includes all black, Hispanic, Asian, and Pacific Island judges.



42, a change from about 20 to 25 percent. Three of the women who joined the federal appellate bench in this later period were minorities. While recent additions to the courts of appeals include judges of African and Hispanic descent, there were none of Asian descent. The sole Asian-American on the federal appeals courts, Judge A. Wallace Tashima of the Ninth Circuit, assumed senior status in 2004 and, thus, is not included in our 2005 cross-section of active judges.

Group-specific information for the federal appeals courts can be seen in Figure 5, which is analogous to Figure 1 for the state courts. Political minorities continued to gain access to the courts of appeals, and they currently constitute about one-third of all federal appellate judges. Their rate of increase to these courts decelerated in the recent past, just as occurred in the states. While NWMs are becoming federal judges at a slower rate than they once did, as their numbers continue to grow the federal appellate bench turns increasingly more representative.

Most of the appointees who reached the federal bench since 1999 were selected by President Bush, although President Bill Clinton tapped a few in his final year in office. Four of President Clinton's seven appointees (about 57 percent) to reach the bench in 2000 were NWMs, while 14 of 39 Bush appointees (36 percent) were NWMs. These appointments by the two most recent presidents pushed the proportion of NWMs on the federal bench from 28 percent in 1999 to 36 percent in 2005, at the same time the number of vacancies was dropping from 24 in 1999 to 10 in 2005.

CONCLUSION: CHANGE AND CONTINUITY OVER TWENTY YEARS

This study builds upon existing scholarship and represents a continuation of our research agenda that, in part, is dedicated to understanding issues of diversity within the American judiciary. We endeavored to discover the relative rates of membership of political minorities—women along with racial and ethnic minorities—on the nation's appellate benches, and differences in the relative proportions such groups have obtained on those tribunals. The data presented here, along with our prior findings, allow us to draw some preliminary inferences regarding ever-changing judicial diversity and evolving relationships between diversity and particular selection methods in the states.

Our first key finding is that political minorities serving on both state and federal appellate benches continue to achieve gains not only in absolute numbers but also in their relative proportions on the judiciary. For all groups examined, there was a significant increase in both their numbers and proportions on appellate benches in the United States through the twenty years studied. As a consequence, more than one-third of all current state and federal appellate judges are NWMs. With many courts having more than one NWM judge, Bratton and Spill's (2002) assertion of a perceived maximum level of diversity on the bench may no longer apply. At least in some jurisdictions, there may no longer be an effect in which a selector, once having chosen a judge of nontraditional background, subsequently opts for judges of a more traditional background. There, thus, has been substantial change in political minorities on appellate benches.

The relative growth in the number of judges who are women is more similar to that for racial minorities during these past few years than was previously the case. While the prior increase of female judges far outstripped that for racial minorities, this study finds that more recent rates of change are less dissimilar than they were. In addition, whereas black judges had lagged behind Hispanics and women in obtaining appellate-court seats, both male and female black judges increased their relative proportions at slightly higher rates than did Hispanic judges.

Our data also demonstrate some potentially nontrivial differences in the rates at which women and racial minorities attain judicial posts. While our findings imply that these minority groups are now more equally represented in the general available pool of judicial candidates, a key factor in judicial selection (Hurwitz and Lanier, 2003), there may be a distinct and unique structural mechanism underlying the selection of women judges as compared with that operative for judges of color, independent of formal selection method. In addition, women represent a larger swath along the political/ideological spectrum, while racial minorities tend to be somewhat more homogeneous in their policy preferences (Bratton and Spill, 2002; Hurwitz and Lanier, 2003); this ideological diversity may facilitate the choice of women by selectors of both major parties. In any event, there remain subtle differences in the paths that women and minorities take to the federal and state appellate benches. Further

research into these areas is necessary to tease out and explain any remaining systematic divergences.

In short, across our period of analysis, we find that there has been a substantial transformation in the representation of political minorities serving on appellate benches in the United States. They have increased their real and relative numbers. Also important is that, despite these changes in diversity, nontraditional judges appear not to be systematically disadvantaged or benefited by any specific selection method, as they once may have been; this finding underscores that the influence selection methods once may have exerted is no longer felt. In particular, NWM jurists joined tribunals in states with merit systems at about the same rate as in non-merit-plan states. In 1985 there were slight differences in the success rate of NWMs overall, but by 1999 these deviations had disappeared (Hurwitz and Lanier, 2001). Confirming these results here, we find that in 2005 there remain no significant differences across the various selection systems. However, we show that black women fared somewhat better in electoral systems than otherwise, which is, perhaps, evidence supporting the argument that minority groups prefer local elections. On the other hand, Hispanic men seemed disadvantaged in electoral systems. And diversity rates differ based on level of court. The more complex and multifaceted relationships within these areas are ripe for additional research.

Our second key finding is there has been little recent change in the methods that states use to select their appellate judges. Over the past twenty years, the merit system has gained a total of only five courts, but none in the most recent years, while the number of non-merit-plan courts remained substantially stable. While the merit system is currently the most frequently used method of selection for state appellate courts, election of judges remains quite popular in the states. For selection systems in the states, continuity is the rule for the time period examined.

Our present findings, which comport with our prior results, show that merit-selection systems have no continuing relationship with the rate at which political minorities attain the bench. Indeed, the similarity of overall diversity of both the federal and state appellate courts despite their greatly divergent selection systems is further evidence that selection systems are not related to minority representation on the bench. The influence selection method once may have exerted is no longer observed for the nation's appellate courts. Furthermore, our findings support those of most empirical studies on the influences of electoral systems that show no such benefit of one selection system over another for minorities.

Hence, the arguments of those who contend that merit systems discriminate against, or at least dampen the successes of, political minorities by embedding a prior status quo of white males are not empirically supported by these data. While the merit plan in particular may once have limited minority representation in the American courts, our findings show that merit selection no longer confines minority

opportunity, nor has it for some time. Perhaps this is because the proportion of women and minorities in the legal community has increased, so that there is a larger and more diverse pool from which judges can be selected. Perhaps increasing numbers of nontraditional law-school graduates in past generations, who now have climbed to the top levels of the profession, are now available to selectors. Thus, the old order may have changed. Perhaps those who select judges realize the political benefits in choosing nontraditional judges.

While explanations for the current lack of influence of selection system on minority representation on the bench need to be explored further, particularly in a multivariate context in which systematic, causal inferences are analyzed, our findings for 2005 confirm our previous findings for 1999 as valid and accurate and not aberrantly based on sample bias. We can, therefore, definitively conclude that when policy choices are made concerning which judicial selection system is most suitable for a particular state or locale, ensuing levels of diversity need not be expressly part of the decisional calculus, as selection systems are not associated with demographic representation on appellate benches. To be clear, we do not assert that race and gender are no longer barriers to achieving judicial posts, or that discrimination no longer exists. We simply maintain that selection systems are no longer linked with judicial diversity.



Some interesting questions remain for both scholars and policy makers. One concerns what might be termed a rebound effect: if the representation of political minorities on the bench at some point in the future is perceived to be greater than their proportion in the applicable pool of qualified judicial candidates, would policy makers or the public then be quite so accepting of relatively high levels of minority representation? In addition, while here we report changes in judicial diversity over time, have analogous, concomitant changes occurred in the states' political branches, that is, the governorships and the legislatures?

Notwithstanding their relative and absolute growth on the nation's appellate courts, political minorities remain at a numerical disadvantage compared with white-male judges, a point that we do not seek to explain in this study but one that clearly calls out for further, more rigorous research. Overall, our findings show enormous change in judicial diversity across time, alongside persistent continuity with respect to the types of selection systems employed in the states. The keys to explaining diversity within appellate courts remain complex, with our study representing a cumulative step in process of understanding and explaining the compelling issues associated with judicial representation in the United States. jsj

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