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State Methods of Judicial Selection: An Evaluation of Career Ambition

by

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ABSTRACT

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Brent D. Boyea

Perspectives of judicial behavior regularly fail to recognize the impact of judge attributes on decision making. This thesis seeks to integrate two theories of judicial behavior, the strategic perspective and the institutional perspective, by introducing the distribution of judge characteristics as an explanation of judicial behavior. While the strategic perspective reasons judges behave differently if threatened by retaliation from other political actors and the institutional perspective reasons judges decide differently based on whether they face an electorate, this thesis further considers whether heightened diversity creates collective action problems. This thesis suggests many factors affect the diversity of the courts. These factors include the risks and incentives of office that affect the motivation of office seekers. Risks and incentives include formal methods of selection, court structural characteristics, and the political environment. The forces that affect the distribution of preferences on courts may differently affect collective action problems where courts are more or less cohesive. Where forces vary, different forms of composition are expected. Where the distribution of preferences is highly dissimilar conflict is anticipated. Similarly, where the attractiveness of office contributes to more cohesive courts, consensus should materialize.
This dissertation includes an investigation of several forms of diversity, including gender, racial, ideological, and tenure diversity. The results show that risks and incentives of office structure the composition of the courts. In relation to consensus, several areas of policy are examined, including capital cases, non-violent crimes, taxation policy, and tort law policy. These analyses reveal that diversity has a significant effect; however, diversity’s influence varies by methods of selection, with elected courts restricting the impact of diversity and appointed courts creating environments for sincere behavior. While conflict is influenced by the distribution of preferences and characteristics, consensus is highly dependent on the institutional determinants of diversity that structure collective action problems. This dissertation successfully reveals that the distribution of preferences and characteristics influences collective outcomes. Furthermore, this dissertation reveals that the composition of the courts shares a strong relationship with the risks and incentives of office, thus suggesting the attractiveness of office influences collective outcomes.
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Introduction

From Composition of the Courts to Cohesion

From the beginning of the American Republic, the process by which judges are recruited and retained has been the subject of much debate. A central element of this debate has focused on the appropriate linkage between the public and judicial elites. While some theorists have argued that the judiciary should remain independent from public preferences, there have been those that argue for accountability by the judiciary. Applicable to modern impressions of judicial selection and the nature of judicial action, Alexander Hamilton in the Federalist Papers, Numbers 76 and 78, advocated appointment of federal judges by the executive as a means to insulate judges from the “encroachments and oppressions of the representative body” and from the “effects of occasional ill humors in the society.”1 Hamilton further stated that “there would be too great a disposition to consult popularity to justify a reliance that nothing was consulted but the constitution and the laws” if judges were selected through popular method or by the people. More recently, Justice Sandra Day O’Connor, in a separate concurrence, Republican Party of Minnesota v. White, Chair, Minn. Bd. of Judicial Standards, made clear her distaste for popular judicial elections. She reasoned, “elected judges cannot help being aware that if the public is not satisfied … it could hurt their reelection prospects. Furthermore, the mere possibility that judges’ decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public’s confidence in the judiciary.”2 These statements by Hamilton and O’Connor illustrate the hesitation

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2 536 U.S. 765 (2002)
over popular feedback, including its influence over judicial decision-making and the impact of public opinion. The former demonstrates concerns have existed since the beginning of the American Republic, forming an initially limited public role in judicial selection. The later reveals these concerns have not disappeared and are highly salient in today's judicial environment.  

**Research Objective**

In this dissertation, I consider how the incentives and risks associated with methods of selection and the recruitment of state supreme court judges influence office-holding patterns and decisional behavior. More specifically, the risks and rewards of holding a state supreme court judgeship are posited to shape who runs and, more to the point of this project, who obtains the position of state supreme court judge affecting the diversity of the bench. Moreover, risks and rewards also influence the contingencies that will influence the aggregate behavior of the court. The project will capitalize on the vast differences in state supreme court selection methods and rewards for service to illustrate how these variations shape career decisions of state supreme court judges. Moreover, it will integrate this new perspective with actual decisional behavior in cases to assay the impact of career motivations on court outcomes.

In sum, I propose a systematic two-part investigation of judicial career ambition across the fifty state supreme courts. In the first stage, I explore how the variety of judicial selection methods, powers and rewards for service influence the characteristics of those serving on state high courts. These characteristics will include race, gender,

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3 In fact, Hall (2001a) notes elected judges should be concerned with electoral defeat and negative public feedback. From 1990 to 1995, the defeat rate of non-partisan elections was 8.3 percent and the defeat rate of partisan elections was 13.6 percent. Over the same period of time, elections for U.S. House of Representative had a defeat rate of 6.5 percent. The smaller defeat rate for congressional candidates suggests races for state supreme court positions involve public attention.
ideology, and seniority. In the second stage, I examine how the diversity of these courts relates to their decisional behavior, specifically the level of consensus. The later stage will focus on several areas of law, both criminal and civil, to examine the impact of saliency and formal methods of selection on aggregate court behavior. Combined, this study will provide a comprehensive account of how the variegated structure for judicial recruitment shapes in decisive ways the personal characteristics of the judges serving on these courts, which in turn conditions the coalitional behavior of their courts. While research (Sheldon and Maule, 1997; Brace and Hall, 1995, 1997) has clarified the impact of specific state selection processes, this project seeks to understand how state institutions, specifically selections methods, affect court composition and decisional behavior related to career maintenance.

Political ambition, the motivation of office seekers to receive benefits related to office, is clearly embedded in our democracy and has been widely studied in the political recruitment of national and subnational offices in the United States (Schlesinger, 1966, 1991; Prewitt and Nolan, 1969; Fishel, 1971; Black, 1972; Hain, 1974; Rohde, 1979; Brace, 1984; Hibbing, 1986; Fowler and McClure, 1989). Remarkably, despite pronounced concern with judicial independence and selection methods, the importance of ambition in the recruitment of state-level judges is scarcely recognized and seldom appreciated. While recent research on judicial recruitment have made remarkable advancements (on the recruitment of state supreme court chief justices see Langer, McMullen, Ray, and Stratton, 2003) the literature remains less developed concerning the impact of state institutions on career decisions related to state supreme court judgeships.
For students of political ambition as well as students of the judiciary, this paucity of attention is only more stunning than it is unfortunate.

In terms of ambition theory, one cannot find an office in the United States that varies more in terms of the rewards and powers offered by service. State supreme courts vary dramatically in salary, terms of office, size of court, and institutional professionalization. If the drive for office is at least partly shaped by the rewards or powers derived from service, it is hard to imagine a better office for assaying the effects of these inducements on career choices of elites. Beyond this, state supreme courts offer significant variation in the manner in which jurists are selected, ranging from legislative or gubernatorial appointment, to merit retention, to non-partisan elections to partisan elections. Like no other office in the United States, or perhaps the world, state supreme court selection methods offer a compelling opportunity to examine some of the most fundamental questions about how the method of selection influences the character of office holders.

Diversity and Strategic Behavior: An Overview

Collective outcomes within state supreme courts are the result of strategic interactions between judicial colleagues much like the federal courts (Epstein and Knight, 2000; Maltzman, Spriggs, and Wahlbeck, 2000). A commonly overlooked factor regarding collective outcomes are the forces shaping the characteristics of the judges on the courts. While the ideological preferences or social backgrounds of judges are sometimes given paramount importance in accounting for outcomes, seldom have we sought to consider the forces that encourage certain types of judges over others. Ultimately, however, the forces affecting composition emerge as a potentially important
influence on aggregate court behavior. This dissertation proposes collective outcomes cannot be fully understood without calculating for the impact of judge characteristics and diversity.

Past research suggests judicial behavior is the product of three sources: the preferences of judges (Segal and Spaeth, 1993, 2002), the strategic interaction of political actors that conditions how preferences are realized, and the institutional factors that condition how preferences are realized. Ultimately we imagine there is an outcome judges want, and there is the outcome judges can get based on strategic considerations mandated by the strategies of other judges and the contingencies of the office they hold. Judges interact strategically when forming majority coalitions (Brace and Hall, 1997; Maltzman, Spriggs, and Wahlbeck, 2000), joining coalitions nearest their ideological preferences and bargaining with political actors to shape opinions. Institutional arrangements, moreover, shape collective outcomes with opinion assignment rules and discussion order rules, for example, affecting the interaction of judges (Brace and Hall 1997, 1999). Further related to institutional structures, state supreme court research (Brace and Hall, 1993, 1997; Langer 2002) finds judicial behavior is constrained by formal methods of selection. Where appointed, judges vote more sincerely, benefiting from decreased accountability to the public. In elected courts, however, judges remain accountable to public preferences. Elected courts respond to public preferences and political pressures where most vulnerable.

This thesis proposes an integration of the institutional and strategic perspectives of judicial behavior. There are systematic forces that affect the distribution of preferences within the courts. These forces include recruitment and candidate
perceptions of office, including the value, risks, and costs associated with office. Once on the courts, judge preferences affect aggregate court outcomes by shaping the strategies of judges. Quite simply, being on a court of like-minded jurists will shape strategies differently than being on a court comprised of contrarians. While we cannot predict these two scenarios precisely, a fundamental point of this inquiry is that we can identify the more prominent forces that encourage one over the other. Moreover, heightened diversity may create collective action problems for reaching agreement that are not present on more cohesive courts. Just as the institutional perspective reasons judges make decisions differently based on whether they face public feedback, and the strategic perspective reasons judges behave differently if threatened by later retaliation from other political actors, variations in collective action problems caused by diversity may operate to condition both strategic and institutional considerations. Throughout this dissertation, both factors contributing toward diversity and decisional outcomes will be explored in detail. Where attractiveness of office affects the distributions of preferences within judicial office, consensus should vary accordingly with collective action problems in states with greater diversity and fewer collective action problems where cohesion is least.

Outline of the Dissertation

The subject of judicial politics is shaped by several areas of political science, including research devoted to other political institutions and general perspectives of elite political behavior. In Chapter One, the theory is outlined, providing a comprehensive review of the literature that contributes toward an explanation of aggregate court outcomes and recruitment. In Chapter Two, a descriptive analysis of diversity is presented. In Chapter Three, detailed case study analyses of several states and their
political terrain are provided ranging across forms of diversity. While empirical testing in Chapter Four provides a more robust interpretation of the distribution of characteristics, a more subtle evaluation of the state supreme courts is first appropriate. In Chapter Four, the expected relationships between the appeal of office and the diversity of state supreme courts are provided, a research design is articulated, and four diversity models are operationalized and tested empirically. In Chapter Five, attention is directed toward decisional outcomes and consensus, here a descriptive analysis of decision outcomes and consensus is presented. In Chapter Six, expected relationships between the distribution of court characteristics and consensus are provided, as well as a research design and several empirical models that test these relationships. Lastly, Chapter Seven presents the summary and implications from this research.
Chapter One

Understanding Composition and Cohesion of State Supreme Courts

In terms of our understanding of judicial behavior, it is remarkable that greater attention has not been devoted to how selection methods and rewards for service have influenced the character and operations of state courts. This is especially notable given the heated historical and continuing debates over judicial selection and judicial outcomes. While it is commonly accepted that the manner we select judges plays a large role in their ultimate behavior on the bench, the empirical scholarly literature is far from clear on this point. Multiple perspectives emerge concerning judicial selection. These perspectives differ by level of judiciary and environment. At the federal level, Goldman (1997) argues three forms of presidential agenda condition judicial selection. Agenda types include policy, partisan, and personal forms of agenda, each distinguished by presidential motivation. Where presidential motivation varies, different types of candidates are selected. Judicial selection among the states is even more diverse and multifaceted. State selection methods fall into five categories: 1) merit selection systems, which use nominating conventions; 2) gubernatorial appointments; 3) partisan elections; 4) non-partisan elections; and 5) legislative selection. This variance ensures that explanations of the federal judiciary insufficiently explain judicial selection where different methods of selection exist.

Sheldon and Maule (1997) argue multiple actors are involved in the selection of judges at the state level, with specific selection processes affecting the eventual candidate. Moreover, central to Hamilton’s criticisms of “public ill humor,” both independence and accountability are affected by the quantity of actors present in the
selection process and the form of selection. Sheldon and Maule assert two major forces affect judicial objectivity. First, judges bring with them training, experience, and a set of personal attributes. These characteristics give judges their outlook on law, politics, and society. Second, judges balance the demands placed on them both by the public and political elites weighing both accountability and independence. A common assumption within the state courts literature is that states using similar formal recruitment procedures select judges with similar perspectives (Sheldon and Lovrich, 1983; Pinello, 1995). While the range and number of participants is perceived to affect judicial behavior, the combination of formal and informal practices of selection condition judges to favor accountability to either the public or political elites or favor a more independent role.

Neo-institutional scholars assert institutional rules affect individual behavior and collective outcomes (Miller, 1992; Ostrom, 1990). Institutional rules and designs play an influential role in motivating individual behavior, conditioning preferences with constraints that alter political outcomes (Brace and Hall, 1990, 1993, 1995, 1997; Brace, Hall and Langer, 1999, 2001; Hall, 1995; Hall and Brace, 1989; Krehbiel, 1991; Shepsle and Weingast, 1981). This dissertation proposes that differences exist among state judicial institutions according to their institutional designs. In addition to method of selection, institutional features of the state supreme courts include various sizes of office, varying term lengths, tenure restrictions, and differing levels of court professionalization. Ambition is constrained by institutional mechanisms that provide electoral feedback or feedback from other governmental actors (Langer, 2002; Pinello, 1995). Judicial behavior has been interpreted to behave in two distinct manners. Emerging from interpretations of United States Supreme Court judicial behavior, the sincere voting
hypothesis (Segal and Spaeth, 1993, 2002) suggests judges vote sincerely, making judicial decisions based on sincere ideological preferences. An alternative interpretation of judicial behavior, emerging from the neo-institutional perspective, reasons that at least some judges are strategic rather than sincere. The strategic voting hypothesis asserts that both internal (Langer et al., 2003; Maltzman, Spriggs and Wahlbeck, 2000) and external actors (Brace and Hall, 2001; Hall, 2001a) affect judicial behavior. Externally, the legislative branch, political parties, interest groups, and voters each influence judicial decisions based on the perceived reactions by judges to voting behavior (Epstein and Knight, 1998; Gely and Spiller, 1990; Murphy, 1964). As both statically and progressively ambitious actors, state supreme court judges strategically respond to policy issues to avoid potential electoral failure. Evidence strongly suggests that state supreme court judges moderate their preferences. This dissertation approaches ambition as it is constrained by specific institutions with aggregate court behavior emerging as the strategic response to the structure of political opportunity and the value and risks found within state supreme court environments.

Explanations of Courts Diversity

Institutional Goals and Recruitment

Fenno’s (1973) goal assessment helps us understand how political actors make career decisions in political institutions that offer multiple goals. Legislators, like all political actors, make considerations based on the value of office and goal attainment. Within the United States Congress, congressional committees offer a variety of goals. Congressmen are thought to pursue committees that satisfy goal attainment, whether goals include institutional authority, the desire for sound public policy, or reelection.
Like Congress, state supreme courts offer differing goals. Elected courts, like the Post Office and Interior committees, stress reelection. Appointed courts, with greater independence, stress public policy and policy preferences similar to Education and Labor and Foreign Affairs committees.

Building upon these similarities and the multiple goals assessment, this paper suggests and tests for goal differences and attainment by different state supreme courts. Like committees, state supreme courts differ in their influence over policy, providing significant domain while others are singularly concerned with reelection. Depending on institutional and environment constraints, courts differ in their ability to further judge goals determining the form of ambition that is attracted to each state supreme court office.

**Definition of Ambition**

Ambition refers to the motivation of office seekers vying for political office. Ambition theory (Schlesinger, 1966, 1991) explains individual motivation for office seeking describing the structure of political opportunity with both the size (i.e. the number of office and the frequency with which they become available) and shape (i.e. patterns of movement from office to office) of political opportunity affecting evaluations of ambition. Ambition theory further posits that only politically ambitious individuals that achieve political office receive office-related benefits. Traditionally, career ambition has been linked to party organizations. Political parties provide institutional outlets for ambition both structuring the size and shape of political opportunity in exchange for use of party labels and the production of collective goods. Fundamentally, however, the concept is attributed to individual motivation shaped by the office opportunity structure.
Ambition theory can be divided into three separate forms of ambition. Discrete ambition refers to motivation by candidates to serve for a finite period. This ambition results in small tenure lengths and nearly immediate exit after one or few terms. Static ambition refers to motivation to remain within the same office, choosing neither to leave nor advance to higher office. Lastly, progressive ambition refers to motivation for career advancement, elevating to a higher office when opportunity exists.

Ambition and the Office Opportunity Structure

David Rohde (1979) has offered a succinct but enlightening formulation of the forces operating on career decisions. Specifically, Rohde posits ambition is a behavioral pattern manifested by politicians because of the risks and rewards of offices within the political opportunity structure. From this perspective, the salient features of the political opportunity structure are shaped by the values attached to the office and to the risks associated with achieving the office. Other things being equal, ambition should vary positively with the level of resources offered by an office (be it power, prestige, pay or the like) but diminished by higher costs or risks associated with attaining the office.

In the real world, the rewards for office and the likelihood of attainment are commonly related. More candidates of arguably higher quality emerge for prestigious, influential positions than for obscure, political positions. We never suffer a scarcity of candidates for the presidency of the United States but many state legislative seats go uncontested. In state supreme court elections, the level of contestation varies significantly across states (Hall, 2001a) and, in the absence of strong political parties, it is reasonable to assume the character of these campaigns increasingly depend on the personal characteristics of the individuals running (Fowler and McClure, 1989).
Judicial Office Opportunity Structure

Methods of judicial selection are highly variable across the states. Selection methods vary by elected, appointed, and retention formats with recruitment actors varying by each form of selection. Judicial recruitment refers to efforts by government and non-government actors to find and select appropriate candidates for the state judiciary. In many state environments, similar to the United States Supreme Court, selection is initiated by the executive branch for the appointment and selection to the judiciary both with and without the advice and consent of the state legislature. In other state environments, political parties play the primary role of recruiter, seeking candidates that can win under the banner of their respective party label. Additionally, in other states, while elections exist, parties are not allowed to play a role in recruitment thus impetus emerges from non-party organizations and self-starter motivation. Varying methods of selection provide an institutional background for differing forms of candidate mobilization. While several studies have evaluated the role of selection processes by state (Glick and Emmert, 1987; Sheldon and Maule, 1997), less attention has been directed toward individual motivation for candidacy and selection.

Ambition, Judicial Office Opportunity Structure and the Diversity of State Supreme Courts

Rohde's (1979) ambition equation helps us understand the largely-candidate centered decisions of elected politicians for federal and state elected office (Brace, 1984). However, this framework provides less guidance in understanding the recruitment of jurists in non-elected systems. While we can compare the value of holding judicial offices across states with different selection systems, the perceived costs or risks associated with
recruitment in non-elected systems is very difficult to conceptualize. By design, appointive systems are not candidate-centered but rely on multiple actors in other elected offices and within the legal profession (Watson, Downing and Spiegel, 1967). However, it is this very fundamental difference that would lead us to expect differences in the types of judges to emerge from the two systems.

The office opportunity structure has been shown to systematically influence the behavior of various non-judicial offices (see Berkman, 1994; Soule, 1969; Herrick and Moore, 1993; Clarke and Price, 1981; Hibbing, 1986). In the case of the judicial office, it is reasonable to expect ambition to interact with the judicial opportunity structure to produce identifiable differences in the judicial behavior of judge. The value of any political office, including judgeships within the state supreme courts, is influenced by the risks, costs, and utility associated with it. Where progressively ambitious judges act in terms of the electorate or actor he hopes to attract tomorrow, ambition theory suggests judges alter behavior through their interpretation of other's desires. Application of Hibbing's (1986) perspective suggests judges indeed behave similarly to other politicians. The structure of political opportunity however varies from other forms of political structure. While judges may pursue different forms of office, including executive and legislative positions, they also seek appointed federal judgeships. The opportunity structure for state supreme court judges suggests judges may capitalize on openings within the federal circuit and federal appeals courts. Political opportunities and opportunity structures for state supreme courts judges potentially induce strategic behavior through the desire to attract attention for federal selection. Appointive systems are difficult to conceptualize, yet previous arguments suggest that ambition occurs both
within elected and appointed forms of progressive ambition again noting the important comparative feature of state supreme courts.

**Forms of Judicial Diversity**

One would expect that skills suitable for one selection system could be largely irrelevant for another selection system. Judges with elected backgrounds should have developed the kinds of electoral skills that would serve them well in a campaign for a state supreme court judgeship. These same skills, and a public record as a campaigner, could be irrelevant or even a liability in a system that appoints their jurists. Moreover, given the common obstacles to elected office (fund raising and organizing), it may be harder for political minority candidates to compete and obtain office in elected systems (on the under-representation of women on the bench, see Cook, 1993; on ambition-gender gap, see Sapiro, 1982; Burt-Way and Kelly, 1992; Bledsoe and Herring, 1990; Carroll, 1985; Schramm, 1981; Matland and Studlar 1998; Welch and Studlar, 1996; on ambition-race, see Stone, 1980; on ambition-race in trial court judges, see Uhlmann, 1977; for race-judicial behavior linkages, see Welch, Coombs and Gruhl, 1988; Uhlmann, 1978; on diversification through appointive processes, see Gryski, Zuk and Barrow, 1994). Alternatively, an appointive system might work to diversify courts and overcome obstacles that hamper diversification in candidate-centered elected systems.

**Gender Diversity**

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4 Preliminary evidence indicates courts are a relatively homogenous community. Divided by gender, men represent nearly 79.7 percent of state supreme court population from 1995 to 1998, while women represent only 20.3 percent of the population. Similarly, divided along lines of race, whites represent 90 percent of the court population, blacks compose 6.8 percent, Hispanics compose 1.5 percent, and, lastly, Asians make up 1.8 percent of state supreme court population.
Representation by political minority jurists has increased remarkably both within the federal (Goldman, 1997) and state (Glick and Emmert, 1987) judiciaries over the last thirty years.\(^5\) Noting the increased representation of judges from traditionally underrepresented groups, both the 1991 Minnesota Supreme Court and the 1996 Michigan Supreme Court reached an important precedent with the selection of a majority female judiciary. What factors contributed to such gender diversity? Prior research (Alozie, 1996; Bratton and Spill, 2002; Hurwitz and Lanier, 2003) suggests gender composition responds to court size, the pool of qualified candidates, the existing presence of female judges, and appointed methods of selection. Bratton and Spill (2002) note more specifically that appointed methods of selection create diversity with executive preferences contributing to increased gender representation. The impact of executive appointments is strongest in previously all-male courts and least for courts with active female jurists. Research (Alozie, 1996; Hurwitz and Lanier, 2003) additionally suggests court structures are important instruments for gender diversity with women benefiting from larger court size. The effects of both the professional and legal development for underrepresented attorneys and judges are important factors contributing to greater court diversity (Martin and Pyle, 2002). As more qualified minority candidates emerge, courts diversify. With more qualified political minority candidates, access to the courts for female judges increases. Explanations of increased political minority representation include changing forms of partisan affiliation, prior career patterns, and religious affiliation.

\(^5\) Certain groups within society have had greater difficulty entering professional disciplines such as the legal field, including African-Americans and women (Hurwitz and Lanier, 2003; Gilligan, 1982). To acknowledge the difficulty of entering into professional disciplines, they are described within this dissertation as “underrepresented” groups.
Racial Diversity

Like gender diversity, the systematic discrimination of minorities has receded (Baum, 2001). While past racial discrimination was formal, dictated by laws and professional association rules, the once historical domination of white, male judges has diminished. While white judges remain the norm, minority judges now compose higher quantities of court seats (Bonneau, 2001).6 Scholars have tried to explain the increased representation of political minorities with a variety of factors found to contribute to racial diversity. Within the state supreme courts, first among these factors are formal methods of judicial selection. Sheldon and Maule (1997) find varying selection methods affect diversity in important ways. Where political elites control selection, the agenda of the selector is often an important explanatory variable for understanding the selection of minority candidates (Bratton and Spill, 2002; Hurwitz and Lanier 2001, 2003; Graham, 1990a, 1990b). Where elections exist, however, varying public goals contribute to minority selection. Systematic differences are assumed to contribute to varying racial diversity. Research consistently notes that political minorities benefit from appointed methods of selections and elite preferences that encourage the selection of political minority judges (Alozie, 1990; Graham, 1990a, 1990b). Elected methods of selection, however, discourage the selection of minorities (Hurwitz and Lanier, 2003). Other studies find methods of selection have no impact at all (Alozie, 1996; Glick and Emmert, 1987; Hurwitz and Lanier, 2001).

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6 Chapter 3 notes racial minority candidates now approach a third of the bench in several states, including many Southern states that once barred minority judges. Both Cannon (1972) and Glick and Emmert (1987) note the once low representation of minority judges.
Other factors contributing to minority representation include the prestige of the court, political environments, and the pool of eligible candidates (Hurwitz and Lanier, 2003). First, prestige theory (Alozie, 1996; Gryski, Zuk, and Barrow, 1994) suggests higher levels of court prestige discourage the selection of political minorities to the bench. Related to larger court size, which decreases the prestige of a judgeship, political minorities benefit where competition is less intense. Second, judges are viewed as a product of the political environment (Brace, Langer, and Hall, 2000); suggesting political factors contribute to political minority selection. Like Goldman notes for the president’s agenda, state executives also use personal preferences when selecting judges. Liberal executives are more likely to select underrepresented judges than conservative executives (Bratton and Spill, 2002; Hall, 2001a; Hurwitz and Lanier, 2003). Within elected methods of selection, political minorities are favored where constituents are most liberal (Hurwitz and Lanier, 2003; Sigelman and Welch, 1984). The final contribution to minority representation is the pool of eligible political minority candidates. Unlike selection to either a state or federal legislature, judicial candidates pass several professional hurdles prior to selection. Beyond earning a law degree, judicial candidates often must practice law in a state for a specific period of time. With an increasing quantity of minority attorneys, the eligible pool of candidates has increased, yet differences exist by state according to the population of minorities.

Differences that exist among political minorities, specifically female and African-American political minorities, include differences in professional integration and ideology. While both groups of minorities have faced discrimination, gender acceptance arguably preceded racial acceptance. Acceptance of women in the judiciary, while slow,
has out-paced the acceptance of minorities (Glick and Emmert, 1987; Goldman, 1997). Evidence of this phenomenon emerges within earlier studies of court composition. At the federal level, Goldman notes gender diversification preceded racial diversification. At the state level, both Cannon (1972) and Glick and Emmert find gender diversity far exceeded racial diversity as well. The second difference among political minority groups is personal preference differences. While women occupy a broad ideological spectrum (Bratton and Spill, 2002), blacks are considerable more liberal than whites (Kinder and Winter, 2001).

**Ideological Diversity**

Research has explored the relationship between judicial recruitment processes and the ideologies of judges (for a review of the literature concerning the federal judiciary, see Goldman, 1997; for a review of literature on state judicial selection, see Sheldon and Maule, 1997). In terms of judge ideology, we might expect elected systems to promote ideologies that are consistent with public ideologies. Appointive systems are explicitly designed to promote independent judiciaries and we would expect the ideologies of judges in these systems to be uncorrelated with public ideology.

The ideological characteristics of many courts, both state and federal, are found to vary substantially. Goldman (1997) notes the preferences of the executive branch are important for understanding the ideological diversity of the federal courts. State court selection, however, is non-static unlike the federal courts. States use a variety of

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⁷ Recently the opposition party to the president has fought federal court nominations on the grounds of extreme ideology. Examples include Judges Pickering and Owens during the President George W. Bush administration.
selection systems. The variety of selection systems lead to differing compositions and diversity (Sheldon and Maule, 1997; Brace and Hall, 1995).

Pinello (1995) notes different selection systems have consequences for the types of judges selected. Where selected by the governor, the impact of the executive’s preferences is analogous to the executive’s role in national judicial selection (Goldman, 1997). Judges reflect the personal policy goals of the governor and their administration. Where elected, however, judge preferences resemble voter preferences. Judges closest to the median voter preference are selected. Where legislatively appointed, selection mirrors legislative preferences. Lastly, within merit retention systems the joint preferences of the nominating commission and executive provide a moderating influence on the selection of judges. Each form of selection is noted to affect the policy output of each state supreme court, suggesting formal methods of selection condition the range of output according to the composition of judicial preferences.

**Tenure Diversity**

Relatively little is known about tenure diversity within the state courts. Several assumptions concerning ambition and opportunity structure may clarify tenure diversity. If ambition and the opportunity structure function in a manner comparable to the way they operate in other political offices (Schlesinger, 1966; Hain, 1974; Brace, 1984; Tobin and Keynes, 1975); selection methods should affect the seniority of state supreme courts. Seniority may shape both the expectations about continuing in an office or advancing to another office and the rates of retirement and turnover on courts. One can imagine one court that is viewed as a stepping stone to future advancement and another that is viewed as the capstone to a long career. For these reasons it is important to examine how
features of the judicial opportunity structure shape the length of time judges spend in judicial office.

**Decisional Behavior**

Consensus is expected to be highly contingent on the diversity and composition of the state supreme courts. Why is this relationship important? The field of judicial politics has largely overlooked the impact of diversity and consensus, almost taking characteristics of the court as a given. First, while the literature notes a strong relationship between judge ideological preferences and outcome, much less is known about the forces affecting court level ideological heterogeneity. Second, while research has evaluated racial and gender diversity, there are few definitive studies examining how these attributes relate to court consensus and conflict. Lastly, tenure diversity, the mean level of seniority within the state supreme courts, has also received sparse attention. The impact of each type of diversity potentially has a direct impact on decision outcomes. The purpose of this investigation is to better understand this impact.

**Perspectives of Cohesion**

While a perspective of legislative behavior, the conditional party government thesis (Rohde, 1991) may provide insight into state judicial behavior as well. With the conditional party government, election outcomes are the primary determinant of policy alignment. According to the conditional party government, a strong negative relationship exists between the size of majority party in the United States Congress and the polarization of the congressional parties. Essentially, electoral competitiveness determines cohesion within the majority party.
The conditional party government theory is enlightening at the state level (Aldrich and Battista, 2002), with highly polarized legislative parties resulting from competitive party systems. While parties are restricted in many state judiciaries, judges nevertheless react to contextual state features such as state ideology and electoral competition under electoral conditions. Using the conditional party government as a guide for judicial behavior, judges may act similarly to legislators according to the political context.

Related to the characteristics of the courts, the political context may provide a restrictive role on diversity’s influence. While ideological diversity varies across the states, ideological polarity may have the greatest consequence where states are least competitive. In competitive states, judges may seek less ideological conflict, while less competitive states encourage ideological sincerity. Similarly, while racial and gender diversity increase dissent (Gryska, Main, and Dixon, 1986; Songer and Crews-Meyer, 2000; Walker and Barrow, 1985), independence may be more pronounced in less competitive states. Lastly, tenure diversity’s effects may be most exaggerated in less competitive states or within appointed courts owing to fewer constraints in more independent judiciaries. Generally, court diversity may affect collective outcomes when contextual constraints least restrict sincere behavior. Like the conditional party government perspective of legislative behavior, the political environment may restrict the impact of diversity most where competition is greatest.

Consensus

Consensus, agreement within judicial decisions, is noted to have declined over the last half century. Both within the state and federal courts, fewer decisions reach high levels of consensus and even fewer are unanimous. While once a dominant feature of
most federal and state court decisions, consensus has declined. Remarkably, despite attention directed toward this phenomenon, few studies have evaluated the impact of diversity on decreasing consensus. Sheldon (1999) suggests appellate courts have three goals: (1) to be effective, (2) to encourage consensus, and (3) to provide an authoritative voice for state legal policy. The impact of dissent, however, decreases the achievement of these goals. While the expression of dissent is important for both courts and democracy, the destructive nature of dissent allows weaker precedent and less legal clarity. As in many political institutions, the judiciary must confront both collective and individual forms of behavior. While dissent is expressed at several points throughout a decision, including objections raised in conference and submission of a separate concurrence, the impact of a formal dissent “subtract(s) from the courts consensus” (Sheldon, 1999, pg. 116). All courts have collective needs for consensus, requiring consensus to gain public and legal authority as well as resoluteness. At the most extreme, unanimity strengthens the clarity of law and precedent. Where consensus is least, minimum winning coalitions emerge, contributing toward weaker precedent. Chief Justice Hughes (1928) noted, “when unanimity can be obtained ... it strongly commends the decision to public confidence.”

At the federal courts level, decreased consensus is attributed to changing norms. Walker, Epstein, and Dixon (1988) conclude factors such as greater discretionary jurisdiction, less seniority, and changing judicial leadership have affected consensus both in the United States Supreme Court since the mid-twentieth century. At the state courts level, Brace and Hall (1990, 1993) find dissent and non-unanimous decisions are influenced by several factors including the structural features of the state supreme courts
and their formal methods of selection. Consensus is especially limited within appointed courts. Dissensus is further constrained at the state court level by opinion assignment rules and fears of retribution in elected state supreme courts.

**Dissent Rates**

Most fundamentally, we could expect the candidate-centered nature of elected selection systems to promote individuality in office. Alternatively, an appointive system may nurture the careers of insider-type candidates more willing to compromise with other judges once on the court. Past research illustrates appointed supreme courts are significantly less likely to exhibit dissent (Brace and Hall, 1990, 1993, 1995, 1997, 2001; Hall and Brace, 1989). Method of selection conditions the willingness of judges to dissent from majority opinions, providing or eliminating an institutional channel for public feedback. Where judges are more attentive to public opinion, they become wary of dissent. Institutions that promote dissent also include random opinion assignments, while discretionary opinion assignment discourages non-cohesive behavior. Consistent with neo-institutional evaluations of judicial behavior, decisions to dissent from majority voting coalitions are promoted by institutional arrangements that increase candidate-centered or more individualized behavior.

**Court Diversity and Consequences for Consensus**

Within the federal courts, methods of judicial selection are restricted to appointed forms of selection with nominations by the executive branch and appointments by the United States Senate. While a static selection environment, Epstein, Knight, and Martin (2003) argue selection and diversity are linked creating a uniformity of results. Background diversity, or prior judicial experience, has grown increasingly homogenous
with few judicial selections failing to have experience prior to nomination. Epstein et al. argue such homogeneity is problematic due the reduced ability of the federal courts to perform its responsibilities. With strikingly similar career paths, two problems emerge. First, judicial choice is restricted, as judges lack the background to make informed representative decisions. Second, with limited background diversity and fewer accepted backgrounds, fewer judges from underrepresented groups are selected since access to lower courts still favors white, male candidates. Consistent with the personal perspective of judge impact, prior career experiences bring to the court distinct preferences, affecting decision-making.

Related to the state courts, these findings at the federal courts level are highly relevant. The multiple state methods of judicial selection conceivably produce a variety of judicial preferences different from the federal courts. Moving beyond background diversity, methods of selection may differently favor gender, racial, ideological, and tenure diversity. To uncover such relationships, a neo-institutional study of diversity and consensus allows for a broader explanation of selection and its impact on decision outcomes. Areas of diversity, as noted above, include gender, racial, ideological, and tenure diversity. Diversity or the range of preferences and attributes, in addition to institutional characteristics, is expected to shape the collective outcomes of the state supreme courts.

**Diversity Impact**

*Political Minority Jurists*

Associated with gender and racial diversity, two perspectives of representation emerge (Perry, 1991; Pitkin, 1967): symbolic representation and substantive
representation of political minority judges. First, related to the descriptive representation of political minorities, symbolic representation emerges from the similarity of physical characteristics between a judge and the citizens they resemble. While race or gender may impact behavior, studies of symbolic representation focus on the diversity of political institutions. Second, the substantive form of representation involves distinct forms of policy output where descriptive representation is greatest compared to traditionally homogenous courts. Symbolic representation, some argue (Goldman, 1997; Gryski, Zuk, and Barrow 1994; Marshall, 1993), is the first step toward the substantive representation of minorities.

Explanations of substantive impact include the personal perspective of judicial behavior (Cook, 1973; Crockett, 1984; Goldman, 1979; Uhlmann, 1978). The personal perspective proposes that backgrounds of political minorities are similar creating shared attitudes that differ from traditional jurists. Judges therefore bring unique experiences to the court based on their shared personal experiences. The counter view, the organizational perspective (Steffensmeier and Britt 2001; Walker and Barrow, 1985; Welch, 1985), suggests shared backgrounds and community experiences are irrelevant; judges are broadly integrated into the organizational aspects of their profession. Within the organizational perspective, both traditional white, male and political minority judges, attend law school, serve as private attorneys or prosecutors, and serve as lower level judges. These professional similarities create behavioral similarities.

**Gender Impact**

Female judges are thought to alter court policy, voting more liberally than their traditional, male colleagues. Research suggests the validity for this assumption is mixed.
Opponents of substantive representation argue that political minority judges vote similarly, arguing differences emerge only where salient issues related to gender arise (i.e. employment discrimination, see Songer, Davis, and Haire, 1994). According to opponents of substantive representation, female jurists are rarely distinctive once on the bench (i.e. criminal issues and search and seizure, see Walker and Barrow, 1985; Segal, 2000). The most inflexible arguments against substantive representation suggest gender diversity has no impact (see Davis, 1992; Segal, 2000; Walker and Barrow, 1985). Closely following the attitudinal perspective (Segal and Spaeth, 1993, 2002), opponents of substantive representation suggest political and legal preferences dominate any gender characteristics.

Proponents of substantive representation, however, advocate that women vote more liberally than their male counterparts both within civil and criminal areas of law (Allen and Wall, 1993; Songer and Crews-Meyer, 2000). Women are also found to affect the courts institutionally, contributing to more liberal decision outcomes where female justices are present (i.e. for the impact of gender diversity on state legislative institutions, see Thomas, 1991; for the impact of gender diversity on judicial institutions, see Gryski, Main, and Dixon, 1986).

**Race Impact**

Like gender, the impact of black judges also affects case outcomes, creating distinct forms of behavior among white and black judges (Crockett, 1984; Scherer, 2004; Welch, Combs, and Gruhl, 1988). The literature focuses on sentencing decisions and penalty harshness in addition to incarceration patterns. Related to criminal sentencing, findings vary. Race of the presiding judge is an important explanatory variable with race
contributing to more equitable treatments of both black and white defendants. These findings show substantive representation occurs where African-American judges consider sentencing and the equitable treatment of defendants regardless of race. Research also demonstrates that black judges are more severe, affecting both white and black defendants equally (Uhlmann, 1977). Further noting the substantive impact of racial diversity, Steffensmeier and Britt (2001) find black judges are actually more severe than white judges, incarcerating blacks at higher rates. At the legislative level, research additionally finds different voting characteristics for black and white legislators.

In contrast to substantive perspective of representation, research suggests race is less useful in explaining decisional behavior with no relationship between decisional behavior and judge race found in several studies (Segal, 2000; Spohn, 1990a, 1990b; Walker and Barrow, 1985). Where race lacks explanatory value, no substantive effects emerge to explain judicial decision-making or judicial policy.

Like gender, studies of racial composition separate into personal and organizational perspectives, as well as symbolic and substantive perspectives of impact (Kanter, 1977). The personal perspective of representation suggests black judges vote distinctly from white judges. Separate forms of socialization condition voting patterns that diverge from traditional judges. The organizational perspective, on the other hand, asserts organizational rules limit any differences caused by race (Spohn, 1990b). Judges, regardless of race, face similar legal socialization patterns, reducing any differences.

*Ideology Impact*

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8 Judge ideology (see Brace, Langer, and Hall 2000) is very heterogeneous across the states. The average judge ideology ranging from conservative to liberal is relatively conservative, while the range indicates judges exist from all positions of the ideological spectrum. Interestingly, California’s state supreme court is very conservative, while Maryland is most liberal.
Ideology is found to be a statistically discernable indicator of both individual (Brace and Hall 1993, 1997) and aggregate level (Brace and Hall, 1993; Hall and Brace, 1989) behavior in state supreme courts. The effects of ideology are most striking within insulated appointed courts, which resemble the appointed federal courts. While appointed courts encourage sincere forms of behavior, ideology is less relevant in elected courts with outlets for public feedback through the electoral mechanism. Suggesting that strategic behavior dictates judicial outcomes, Brace and Hall (1997) suggest institutional variation accounts for the balance between sincere and strategic forms of behavior. While appointed courts face few contextual political pressures, elected courts face popular feedback every six to twelve years based on the length of term. Therefore, formal methods of selection are strong explanatory factors for determining the impact of ideology and personal preferences.

Recruitment processes bring to different courts individuals with different goal orientations, including ideological preferences (Baum, 1997). Judgeships become increasingly attractive to successful candidates, as the content of policy becomes increasingly narrow and the impact of judicial decision-making becomes important.

Tenure Impact

Both Snyder (1958) and Howard (1965) are credited with developing the theory of freshman acclimation effects in the judiciary. Arguing that newcomers face a process of acclimation, both suggest norms exist within the courts constraining junior judges. These institutional norms create periods of acclimation for new justices, affecting the ideological approach of new judges (Hagle, 1993; Hurwitz and Stefko, 2004), general voting patterns (Bowen, 1995; Heck and Hall, 1981), and opinion writing (Bowen and
Scheb, 1993; Hettinger, Lindquist, and Martinek, 2003; Maltzman, Spriggs, and Wahlbeck, 2000). With acclimation effects, less senior judges are obliged to accept conformance, allowing more senior judges to act sincerely (Segal and Spaeth, 1993, 2002). Conformance emerges with newly experienced demands of the court, including increased workload and inexperience with legal issues.

Further conditioning the role of seniority are structural characteristics that provide authority for more senior judges. Throughout the courts, three structural areas of organization benefit more senior judges. The first court structure is opinion assignment rules. Like the United States Supreme Court, the chief justice of several state supreme courts is delegated the authority to assign opinions.\(^9\) When the chief justice votes with the conference minority, like the U.S. Supreme Court, the ranking most senior judge is instead assigned opinion assignment authority. Discretionary opinion assignments are expected to promote consensus by increasing potential retribution for dissenters (Brace and Hall, 1990). Therefore, where senior judges delegate opinion assignments, they largely control the both the strength and direction of outcome. Other rules favoring seniority include conference discussion order\(^10\) and final voting order\(^11\). Both structural arrangements, like opinion assignment rules, encourage less senior judges to concur with the majority based on perceived future sanctions.

While differences between federal and state judicial institutions are left largely unexamined, more independent, appointed institutions may allow greater freedom to vote

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\(^9\) Fourteen states have institutional rules giving the chief justice or the most ranking majority member authority to delegate opinion assignments. In addition, one court assigns opinions by the consensus of the court and another thirty-five courts assign opinions either through random or rotating forms of assignment.

\(^10\) Twenty-six states order discussion according to the level of seniority. Another twenty states use open discussion rules and four states have rotating discussion order rules.

\(^11\) Twenty-eight states order voting according to the level of seniority. Another nineteen states use open voting rules and three states have rotating voting order rules.
sincerely for senior judges beyond the acclimation period. Brace and Hall (1995, 1997) note that appointed state courts provide greater independence.

**Explanations of Diversity and Consensus**

As noted from the literature, institutional conditions throughout the states encourage differing forms of diversity and consensus. Goals likely diverge among different court institutions, including the formal method of selection and court structures that elevate the prestige of the courts. Related to both diversity and consensus, judge goals emerge as a strong explanation for both recruitment and decisional behavior. As Rohde (1979) notes, conditions for recruitment are strongly affected by the risk-taking propensities of each institution. In addition to risks, both the value and costs of office affect the behavior of courts and judges. While elections promote more risk-acceptant actors, the consequences for decision-making provide an avenue to better understand decision-making. Central to this dissertation then is the concept of goals and purposive behavior derived from Fenno (1973). Where judges are rational actors, judicial candidates will seek courts that satisfy their goals and self-interest. Their goals, however, are institutionally dependent and pursued strategically. The desire to reach and maintain office then is provided as a primary goal for structuring behavior.
Part I

Perceptions of Office Appeal: An Exploration of Diversity
Chapter Two

Mapping Diversity: Attributes of State Supreme Court Judges

Over thirty years ago, Cannon (1972) reported state supreme courts were institutions in flux. Indeed their characteristics have changed greatly since that important study. Following Cannon, Glick and Emmert (1987) confirmed many of his assessments, further noting changes and advancements among female jurists, regional patterns, and background characteristics. Both studies reported a small sample of female judges and Glick and Emmert noted an even smaller sample of racial minority judges, while white males were a predominant entity among the state supreme courts. They also suggested formal methods of selection had no explanatory value when describing the types of judges holding state supreme court seats. Both studies concluded that region strongly conditioned the composition of judges present in each state high court. Both studies also evaluated several additional judge characteristics, including religion, elite or non-elite law school education, state of origin, and political party affiliation. No attention was directed toward ideology or tenure length, however, as few actual or proxy measures of ideology existed at that time.\(^\text{12}\)

This dissertation departs from both studies in several meaningful ways. Proposing a systematic, multivariate analysis of court diversity, the data bring forth more recent court characteristics. The data within this analysis include four years during the late 1990’s from 1995 to 1998. Bonneau (2001) notes much has changed since Glick and Emmert’s important study, suggesting background characteristics and minority representation have changed substantially. To meet these changes the data provide a

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\(^{12}\) Brace, Langer, and Hall (2000) have since developed a party-adjusted, contextually based measure of judge ideology. The strength for this measurement has been confirmed in several studies (Hall, 2001a; Hall and Bonneau, 2001; Hurwitz and Lanier, 2003).
unique opportunity to assess judicial composition. Similar to both Cannon and Glick and Emmert's studies, this chapter provides a descriptive analysis of the characteristics of the state high courts. Consistent with both past studies, descriptive analyses provide suggestive patterns to build upon and explore. Of primary importance is the existing diversity related to gender, race, ideology, and tenure. Focusing on access to the judiciary, both studies described how successful particular groups within the electorate were regarding descriptive representation. This investigation continues in that vein.

Bonneau (2001) notes descriptive studies, such as those conducted by Cannon and Glick and Emmert, serve two important goals. First, characteristics of state supreme court judges may affect judicial behavior. The selection process for a female or African-American judge may differ from the selection of a traditional Caucasian, male judge. Second, the broader recruitment debate relates to democratic theory and the representation of groups within society. Theorists speculate descriptive representation has a symbolic and substantive impact on society (Goldman, 1997; Marshall, 1993; Rowland, Carp; and Stidham, 1984). Research suggests that symbolic forms of representation lead to positive efficacy for democratic institutions by underrepresented groups (Darcy, Welch, and Clark, 1994; Goldman, 1997; Martin and Pyle, 2000; Marshall, 1993; Pitkin, 1967). Substantive representation exceeds the impact of symbolic representation, suggesting political minority judges behave differently from traditional judges based upon the distinct personal experiences they bring to the court. To date, disagreement exists over forms of representation and their impact.

Bonneau notes the greatest limitation of prior descriptive studies is their data, which are now quite dated. Updating the descriptive characteristics, looking at all state
supreme court judges in 1994 and 2000, he finds underrepresented candidates are more common than in Glick and Emmert's later study with both women and non-white judges accounting for higher proportions of the state bench. Bonneau also finds traditional religious denominations and professional backgrounds have declined.

The current study provides an even more specific study of the state supreme court judges. Focusing on gender, racial, ideological, and tenure diversity, this investigation explores all state supreme courts, including the 506 judges that served from 1995 through 1998. These data compared to earlier studies confirm many of Bonneau's findings.

**Court Diversity**

*Gender and Racial Diversity*

[INSERT TABLE 2.1 HERE]

Table 2.1 provides the percentage of female and African-American judges from 1995 to 1998. The total proportion of women throughout this four year period is 20.6 percent. Women are under-represented as a population\(^{13}\), but gains have been made since Glick and Emmert's study. According to Glick and Emmert, throughout the period from 1980 to 1981, women accounted for only 3.1 percent of the state supreme court population. The difference between 1980 and the present is striking. Women account for almost seven times the proportion of state supreme court judges today than before. Showing even more growth within the time period of this study, female jurists accounted for 18.2 percent of the state supreme court population in 1995. By contrast in 1998, female justices were 22 percent of the state supreme court population. Even within the period of this analysis, women made gains.

\(^{13}\) The 2000 census reports women account for 50.9 percent of the total United States population.
A similar phenomenon exists for the descriptive representation of racial-minority candidates, or non-white jurists. The proportion of non-white justices from 1995 to 1998 was 10.1 percent. Contrasted to Glick and Emmert’s finding in 1980-81 of 0.6 percent there has been significant growth. While the proportion of non-white citizens is much larger than the proportion of non-white jurists\textsuperscript{14}, the growth over the period from Glick and Emmert’s study to this present investigation indicates the descriptive representation of non-white justices is growing. Non-white justices were seventeen times more likely to have a bench position than in 1981. Like gender, the proportion of non-white candidates rose within the duration of this investigation. While non-white justices were 9.6 percent of the state court population in 1995, they accounted for 10.4 percent of the state supreme court population in 1998. More specifically for this investigation, African-American state supreme court justices were 6.8 percent of the state supreme court population from 1995 to 1998. The proportion of African-American justices did not noticeably increase over the period examined, yet the bench is much more diverse than twenty years before. In 1981, male justices were 96.9 percent and white justices were 99.4 percent of the state supreme court population. In 1998, male justices accounted for only 78 percent of the state high courts, while white justices were 89.6 percent of the state supreme court population. Growth is suggested from these findings with a more diverse bench today.

Clear patterns of gender and racial diversification emerge within the states, yet do these patterns vary by state? Throughout the period of this study several states reached, or nearly reached, female majorities. Michigan in 1996 had a majority female court joining Minnesota in 1991 as the only states with female majorities in American state

\textsuperscript{14} The 2000 census reports racial minorities account for 24.9 percent of the total United States population. In addition, African-Americans account for 12.3 percent.
supreme court history. Figure 2.1 provides a detailed illustration of state level variation of gender diversity. Over the period of this study, female gender representation in five states averaged over 40 percent or greater with Michigan averaging 46 percent and Minnesota averaging 43 percent. At the lower end of the spectrum, three states failed to select a female judge: New Hampshire, South Dakota, and Wyoming. Clearly, variation between high and low gender diversity states suggests many courts promote gender diversity, while there remain obstacles to such representation in other states.

Related to gender, what are the implications of more diverse courts? Where female jurists encourage dissent (Allen and Wall, 1993; Songer and Crews-Meyers, 2000), dissensus may be the norm where gender diversity is greatest. For example, within the Rhode Island, Minnesota, and Michigan supreme courts, characterized by greater gender diversity, less consensus may be the norm. In male dominated, homogenous courts like the New Hampshire and South Dakota supreme courts, few non-unanimous decisions may characterize the behavior of these courts. Similar patterns may exist where courts share comparable characteristics, with highly diverse courts promoting policy outcomes and patterns of behavior quite different from less diverse courts. Likewise, less diverse courts may display patterns of behavior dissimilar from courts with greater gender diversity. The findings suggest patterns of gender diversity are distinct throughout the states. Furthermore, the impact of representational differences is a potentially strong explanation of differences in state supreme court behavior.

[INSERT FIGURES 2.1, 2.2, AND 2.3 HERE]

Patterns of racial diversity were quite different from patterns of gender diversity over the period of this investigation. Figure 2.2 provides the state variation for minority
representation. Racial minorities and African-American judges, more specifically, were less diverse than females. No state, except Hawaii, approached a “majority minority” population. Hawaii was the exception with four out of five non-white justices of Asian ethnicity; however, Hawaii’s position as a “majority-minority” state makes it unique.\footnote{80 percent of Hawaii’s supreme court justices from 1995 to 1998 were of Asian dissent. As of the 2000 census, Hawaii had a political minority population of 75.7 percent, much larger than any other state.} Elsewhere, California had the highest degree of racial diversity with 33 percent of the bench composed of racial minorities. At the opposite end of racial diversity spectrum, twenty-two states failed to select a minority justice. Figure 2.3 illustrates African-American diversity throughout the state high courts. Focusing more extensively on African-American judges, the states with the highest proportion of African-American justices were Georgia (25 percent) and Tennessee (22 percent). Similar to overall trends for racial minorities, twenty-five states failed to diversify selecting no African-American jurists. While African-Americans and other racial minorities fared worse than women, there is variation across the states. Some states offer clear access to underrepresented group candidates while others do not. An emerging pattern related to racial diversity and region is the performance of African-Americans in the South. As noted, Georgia had the highest proportion of African-Americans on the bench, followed closely by Tennessee, South Carolina, North Carolina, and Virginia. While Glick and Emmert commented on regional patterns, the South’s representation of minorities suggests traditional elite patterns have dissipated since the mid-nineteenth century.\footnote{Key (1949) reasons southern institutions were designed to limit political access to political minorities in most southern states.} With growth of descriptive representation, state supreme courts are moving beyond “tokenism” (Gilligan, 1982) to apparently more representative forms of democratic institutions (Phillips, 1998).
Like gender diversity, the racial diversity findings are informative. Racial diversity, even more than gender diversity, varies widely at the extremes with many courts failing to diversify. While the proportion of African-American and minority judges does not approach levels of gender diversity, many states encourage racial diversity nonetheless. Importantly, while the impact of racial historically lacks the effect of gender (Segal, 2000; Welch, Combs, and Gruhl, 1988), race may affect decision making where court structures differ. Where black judges bring personal experiences to the courts, highly diverse court outcomes may vary from less heterogeneous courts. Differently, within courts with few or no minority jurists, behavior may differ substantially from more diverse courts. The occurrence of many all white state supreme courts, suggests policies and outcomes within these courts will differ from courts like the California and Georgia supreme courts that are more racially diverse.

**Ideological Diversity**

Like racial and gender diversity, ideological diversity varies substantially across the state supreme courts. Table 2.1 presents the year and average levels of diversity for the state supreme courts, providing both the mean year score and range of ideology. During the period of this study, state supreme courts averaged an ideological score of 38.7 on a 100 point scale with scores under 50 signifying more conservative personal preferences. This value suggests most state supreme court justices fell in the more conservative direction. The range of justice ideology, or ideological diversity, of the state supreme courts provides still more information regarding ideological diversity. Ideological diversity is on average almost 43 points. Stated differently, the average distance between the most conservative and liberal justices covered over 40 percent of
the ideological spectrum, suggesting courts are often polarized. Why is this important? Clearly, dissensus may be a product of ideological disagreement if advocates of the attitudinal and neo-institutional approaches are correct.\footnote{Both proponents of the attitudinal and neo-institutional perspectives suggest ideology is important. Segal and Spaeth (1992) argue judge ideology is the strongest determinant of all legal outcomes. Proponents of the neo-institutional approach similarly suggest personal preferences are relevant, yet institutional environments may restrain behavior under certain situations (Epstein and Knight, 1998; Maltzman, Spriggs, and Wahlbeck, 2000).} Where judges are ideologically dissimilar, we may expect more conflict.

**[INSERT FIGURE 2.4 HERE]**

Figure 2.4 presents state-level variation for ideological diversity with each value representing the range between the most conservative and liberal judges. The most ideologically polarized state supreme courts within the period of this study is New Jersey (77.8) followed closely by California (76.6). Incidentally, both states use appointed forms of selection with appointments made by the executive in New Jersey and by merit selection in California. Furthermore, the next three most polarized courts are additionally merit retention states, signifying appointed courts may contribute to increased polarization. Executives with and without the input of judicial nominating commissions may select judges most similar to their personal preferences creating polarization as party control changes and judges with varying preferences are selected. Overall, the impact of merit selection is informative. At the other end of the spectrum, several states have ideologically homogenous state supreme courts. From least polarized to more polarized these states include: Missouri, Arkansas, Tennessee, Georgia, and South Dakota. Two of the five least polarized states, Arkansas and Georgia, have elected forms of selection, while the remainder utilize merit selection forms of appointment. Research suggests elected state courts should be highly ideological and accountable (Sheldon and Maule,
1997), yet the descriptive results indicate elected formats have lower ranges of judge ideology. Perhaps, elected courts attract more ideologically similar candidates.

Importantly, there is clear variation throughout the states regarding ideological diversity and court polarization. States range from least polarized in Missouri (3.1) to highly polarized in New Jersey (77.8), a range of almost 75 points. As Figure 2.3 illustrates, variation is noticeable among the state supreme courts.

Ideology largely explains judicial behavior within many judicial contexts, including the federal and appointed state courts (Brace and Hall, 1997; Segal and Spaeth, 1993, 2002). The findings above suggest that the composition of ideology varies throughout the state supreme courts. The influence of such variation may explain how court outcomes differ. The comparison of a highly diverse court and a less diverse court provides an opportunity to understand the forces operating within diverse courts. Courts that are highly polarized should offer different patterns of conflict than less diverse courts. Less ideological diversity then should encourage agreement. Where courts are less polarized, disagreement should be common, limiting the size of the majority and the resoluteness of the decision. The opposite may true in less polarized state courts, with larger majority coalitions resulting from greater ideological agreement. Tests for state variance and policy impact will follow later, yet the findings above suggest that conflict, resulting from ideological diversity, should vary throughout the states.

**Tenure Diversity**

Like other forms of diversity, the length of judicial service fluctuates widely from state to state, as Figure 2.5 depicts. Tenure length is highly important for studies of judicial politics, as research suggests more senior judges exhibit stronger patterns of
independence, while junior judges are constrained by periods of acclimation (Hettinger, Lindquist, and Martinek, 2003; Howard, 1965).

[INSERT FIGURE 2.5 HERE]

The average length of tenure by state varies from four years to fourteen years. Table 2.1 notes average seniority length was over eight years. Considering the mean age of fifty-one for state supreme court justices, the findings are informative. Clearly, structural characteristics of state supreme courts like term limits and term length may affect tenure diversity. During the period of this study, the Maryland Supreme Court represents the upper extreme with judges serving over fourteen years on average. Of further note, the Oklahoma Supreme Court had the highest average length of service for any specific year, averaging over nineteen years in 1998. In contrast, justices of the Minnesota Supreme Court served just four years on average. The dissimilarity is striking, further indicating tenure diversity differs by court. Term length, term limits, or formal methods of judicial selection may each affect jurist decisions to remain on the court. Longer term lengths may indeed increase the tenure of state supreme court justices, yet these relationships deserve further exploration.

Related to seniority, attention should also be directed to patterns of judicial age at selection and the average age of the courts. As noted above, state supreme court judges were selected at fifty-one years of age on average. While many courts restrict judicial tenures at the age of seventy, there is considerable opportunity for seniority in many states. Throughout the state high courts, age at selection ranges from under forty-one years to almost fifty-nine years. Furthermore, wide variation among the states suggests

18 The state high courts in both Oklahoma and Texas are divided. Both the Texas Supreme Court and Oklahoma Supreme Court hear only civil appeals, while the Texas Court of Criminal Appeals and the Oklahoma Court of Criminal Appeals hear criminal appeals.
some courts encourage older judges, while many courts support younger, career minded judges. For example, jurists of the Missouri Supreme Court from 1995 to 1998 were under forty-two years of age at the point of selection. At the other extreme, jurists within the Rhode Island Supreme Court were almost fifty-nine at selection. Clearly, variation exists among the state high courts related to when judges enter the courts.

The average age of the courts is also informative. The average judge age during the period of this investigation was under fifty-nine years of age. The range of judge ages, like age at selection, varies widely from under forty-seven to almost seventy-one years of age, a twenty-four year difference. Interestingly, the range of judicial age suggests courts encourage service both from younger and older judges. Patterns of age across the state supreme courts suggest states encourage a wide variance related to age. Like age at selection, the Missouri Supreme Court has a more youthful court averaging just forty-eight years of age. In comparison, the Nevada Supreme Court was much older with a mean age of sixty-six. Patterns for selection age and average court age suggest states encourage distinct judge characteristics related to age.

What do these patterns tell us about seniority or career goals? First, seniority benefits from the selection of younger judges as younger judges have the opportunity to build longer tenures. Missouri, for example, should encourage greater seniority as early selection allows time to build seniority. At the other extreme, Rhode Island should have judges with shorter tenures. Related to career goals, jurists may be responsive to institutions that allow access at a younger age. Like legislative institutions (Fiorina, 1994; Squire, 1988a), entry at an earlier age encourages career motivations and greater tenure lengths.
What explanations of judicial behavior do patterns of tenure diversity and age provide? Regarding tenure diversity, courts with more senior judges may behave quite differently than courts with junior judges. Where seniority encourages independence, less consensual outcomes are possible. Where courts are composed of many junior judges and few senior judges, we may expect fewer unanimous decisions, as the legal perspective of senior judges may differ from junior judges where a cohort effect exists (for cohort effects see Nye, 1993). Similarly, within a court with many senior judges and few junior judges, cohesion may be common especially where rules exist that encourage sanctions for independence and dissent among junior judges.

**Summary**

As the findings show, states vary considerably in terms of diversity. The diversity of gender, race, ideology, and tenure signify that state supreme courts exhibit different patterns of diversity relevant to descriptive representation. Almost half of the states had no racial minorities serving on their court, while at the other extreme racial minorities accounted for nearly a third of the bench in some states and were an actual majority in Hawaii. The impact of diversity is worth studying further, as courts with fewer racial minorities may be less sensitive to those issues that affect minorities. Similarly, courts with greater racial diversity may decide cases differently based on the personal backgrounds of judges, bringing increased familiarity to racially sensitive policies.

Like racial diversity, gender diversity varies substantially. Lagging behind male judges throughout the state supreme courts, women have been a majority on only two occasions historically, yet have held near majorities in several state supreme courts. Yet during the period of this investigation and before, there were few female justices in many
states. Female and racial minority justices are clearly gaining in descriptive representation in several states, however. In terms of ideological diversity, again variation exists. The polarization of the state supreme courts varies from courts with homogenous personal preferences to polarized courts with heterogeneous preferences. These differences may emerge from the costs and risks associated with office. Regardless, ideological diversity varies widely by state, potentially affecting court outcomes where sincere preferences matter most.

The diversity of tenure may also affect consensus. As seen within Figure 2.5, average seniority varies widely from four to fourteen years. Scholars commenting on the freshman effect (Hettinger, Lindquist, and Martinek, 2003; Hurwitz and Stefko, 2004) note more senior judges are willing to dissent and exert independence, while less senior justices are less willing to dissent as they become accustomed to life within office. Variation within the states allows one to test the consequences of seniority, as less seniority may or may not contribute to greater consensus.

Compared to prior findings, the state supreme courts have changed greatly. They are more heterogeneous, with more women and racial minorities. Success by women and racial minorities is possibly the product of more women and minorities entering the legal profession as hurdles disappear from past eras. Variation for each form of diversity quite clearly exists and deserves further attention. Assuming these trends remain or even grow they provide a source for an explanation of changing norms of decision-making.
Table 2.1
Diversity Characteristics of State Supreme Courts

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<tr>
<td>% Female</td>
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<td>18.2%</td>
<td>20.7%</td>
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<td>22.0%</td>
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<tr>
<td>% Non-White</td>
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<td>9.6%</td>
<td>9.9%</td>
<td>10.5%</td>
<td>10.4%</td>
<td>10.1%</td>
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<tr>
<td>% African-American</td>
<td>NA&lt;sup&gt;3&lt;/sup&gt;</td>
<td>6.8%</td>
<td>7.1%</td>
<td>6.8%</td>
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<td>6.8%</td>
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<td><strong>Ideological Diversity</strong></td>
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<tr>
<td>Average Judge Ideology&lt;sup&gt;2&lt;/sup&gt;</td>
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<td>39.3</td>
<td>38.9</td>
<td>38.3</td>
<td>38.0</td>
<td>38.7</td>
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<tr>
<td>Range of Ideology&lt;sup&gt;2&lt;/sup&gt;</td>
<td></td>
<td>NA&lt;sup&gt;3&lt;/sup&gt;</td>
<td>45.1</td>
<td>43.6</td>
<td>41.7</td>
<td>40.4</td>
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<tr>
<td><strong>Tenure Diversity</strong></td>
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<tr>
<td>Average Tenure Length</td>
<td>NA&lt;sup&gt;3&lt;/sup&gt;</td>
<td>8.5</td>
<td>8.3</td>
<td>8.4</td>
<td>8.9</td>
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3. No data available.
Figure 2.1

Gender Diversity in State Supreme Courts
Figure 2.2

Racial Diversity in State Supreme Courts
Figure 2.3

African-American Racial Diversity in State Supreme Courts
Figure 2.4

Ideological Diversity in State Supreme Courts
Range from Most Conservative to Most Liberal Judge
Chapter Three

Judicial Elections and Reforms: How Diversity Varies Across Selection Methods

The progressive reforms of the early twentieth century established a period of governance where democratic changes took place both nationally and subnationally. It is no coincidence that judicial selection systems among the states changed dramatically after 1900. During two primary phases these reforms took hold altering the prior norm of partisan elections to non-partisan elections or forms of appointment. The first phase was established during the progressive time period of the 1910’s through the 1930’s. The second phase correlated with later democratic reforms of the 1960’s and 1970’s as American government adjusted to changing social and political notions related to political (and judicial) accountability and independence.

During the first phase of judicial reforms, states such as California\textsuperscript{19} adopted reforms quite quickly removing the partisan element from judicial elections and establishing judicial systems that mirror many “merit selection” formats now common throughout the states. On the heels of California, emerged judicial reforms within the state of Missouri.\textsuperscript{20} Within Missouri’s judicial selection arrangement, their plan called for judges at the trial, appellate, and state supreme court levels to be nominated by the governor from a list of three judges submitted by a judicial nominating commission. The goal of this enterprise was to eliminate accountability to partisan political elements, to

\textsuperscript{19}The California state legislature adopted a non-partisan selection format in 1911, amended the constitution to provide for non-partisan judicial elections in 1926, and finally established merit selection appointments in 1936. (American Judicature Society)

\textsuperscript{20}In 1940, the Non-partisan Selection of Judges Court Plan was adopted by Missouri voters. Now removing much of the direct influence of voters and political parties, judges were selected by the governor from a group of three judicial candidates. Importantly, after serving in office for twelve months, judges then seek retention from the voters, while running unopposed. This method effectively places responsibility in the governor and selection committee’s hands, while retaining some direct, if rarely negative, feedback from voters after judges have established a limited track record as a judge and established incumbency.
select judges of a highly professional nature, and to eliminate political patronage. Closely resembling selection in states like California, the "Missouri Plan" or the merit selection format symbolized the movement away from partisan selection. Other reforms reducing the influence of parties throughout the states included the adoption of non-partisan elections and forms of executive appointment. Oregon\textsuperscript{21} in 1931 adopted a non-partisan selection system to remove the influence of political parties. Retaining the linkage between voters and judicial nominees, this method reduced the partisan impact on elections while retaining a direct relationship between voters and judges. Of those states altering partisan election frameworks to appointive formats, Delaware\textsuperscript{22} emerges as an example of reforms intended to place selection in the state executive's authority. Delaware's 1897 adoption of an executive appointment system resembled similar arrangements in New Jersey and New Hampshire, and shifted selection from the voters to the state executive. Similar to the federal arrangement of nomination by the United States President and the consent of the United States Senate, these changes gave significant authority to the state governor to make nominations, often with even greater independence from the legislature compared to the federal arrangement.

Reforms during the early twentieth century were synonymous with many of the progressive reforms that were common during this time period. Erie (1988) notes that political pressure to reduce the influence of political machines, party bosses, and cronyism led to changes in much of the state government fabric, especially in the West Coast states and the areas affected so strongly by political machines and patronage. The

\textsuperscript{21} Oregon adopted a non-partisan selection format in 1931, prohibiting judicial nominees from listing their name on a ballot with a partisan affiliation.

\textsuperscript{22} Delaware adopted of an executive appointment format in 1897 established that judges would be nominated by the governor with the consent of the state senate.
state courts were not spared such reforms, as noted above. These reforms changed how parties and voters affected the selection of judicial candidates, altering accountability and often enhancing independence within judicial office\textsuperscript{23}.

The second phase of judicial reforms is well correlated with the tumultuous time period of the 1960's and 1970's. Responding to widespread changes in American government institutions, including the United States Congress, and the continuing effort to reduce partisan affiliation in the courts, the changes of the second phase strongly reduced the partisan impact on judicial selection. States such as Arizona\textsuperscript{24}, Florida\textsuperscript{25}, and Vermont\textsuperscript{26} all changed their method of judicial selection, emphasizing the need for institutional change and altering judicial accountability. Additionally, each state maintained the trend of amending selection rules to incorporate some modified version of the Missouri Plan.

[INSERT TABLE 3.1 HERE]

Changes throughout the states have certainly favored the less direct influence of political parties. Reforms have also limited the number of states that use judicial elections. Currently, however, twenty-one states continue to use judicial elections. Eight of these states continue to use partisan election formats. While merit retention formats are the plurality of state selection methods, they account for only 44\% of state selection

\textsuperscript{23} Larry Berkson (2005) and the American Judicature Society note the pronounced effects of judicial independence within most appointive forms of selection and the rationale among reformers to reduce judicial accountability.

\textsuperscript{24} Merit selection was established in 1974 in Arizona after Proposition 108 directed all judges be selected by judicial nominating commission and with the approval of the state executive.

\textsuperscript{25} Florida altered its selection rules related to judicial selection twice during the 1970's. First, in 1971, Florida altered its partisan election format to a non-partisan election format as a first step toward a merit retention format. Second, in 1976, Florida voter completed state judicial reforms allowing merit selection and retention of state judges.

\textsuperscript{26} In 1974, Vermont changed its constitution to allow the merit selection and retention of state judges. Initial selection requires the additionally approval of the state senate after the state executive has appointed from a list one of three nominating commission candidates. Additionally, after serving six years, judges seek reelection within a retention election. Init
methods. Appointive systems, furthermore, account for 58% of state selection methods, a considerable proportion. As focused on throughout this dissertation, the political consequence of such variation is important and even staggering. It will be suggested later that there are important effects related to judicial selection, judicial behavior, and the composition of the state supreme courts. First, however, it is important to map out the political terrain of state judicial selection. This political question is an important aspect of judicial selection politics, as it implies that different selection methods create quite different forms of behavior. Related to this dissertation, the composition of a state supreme court may channel how behavior emerges. Therefore, in mapping the terrain of judicial selection throughout the states, this dissertation focuses on methods of judicial selection, the factors affecting selection, and the overall level of judicial diversity. As in the rest of this dissertation, four forms of diversity are evaluated. These areas of diversity include gender, racial, ideological, and tenure diversity. Table 3.1 provides a general breakdown of diversity in the four areas focused upon in this dissertation and their relation to state methods of selection. This table suggests that strong qualitative differences exist across methods of selection, including strong tendencies for elected states to have less ideological polarization and for appointed states to favor greater seniority. The following shall talk more specifically about state specific examples and the political consequences of state political factors as well as the impact of judicial institutions on composition and the diversity of the courts. State differences provide an interesting story related to judicial selection. Generally, just how important are methods of judicial selection? The following is an important step in answering this fundamental question.
Gender Diversity

The range of gender diversity throughout the states, as noted in chapter two, is quite significant. While many states approach significant representation of the state population of women, many others are completely underrepresented. Table 3.2 provides a summary of state to state differences. Produced in a different form, this table provides the same output noted in chapter two. The remainder of this section will focus on two states that represent the extremes of gender representation for females. Table 3.2 clearly notes that states differently benefit the selection of women to the state high courts.

High Diversity - Michigan Supreme Court

Among the examples of judicial diversity, few courts stand out as much as the Michigan Supreme Court. By its very nature, it is a highly volatile court with high membership turnover, a strongly ideological membership, and high levels of diversity that surpass most other state courts.\footnote{Martin and Pyle (2000) note each of the characteristics in “Gender, Race, and Partisanship on the Michigan Supreme Court”.
} Therefore, this is a useful state example. From 1995 to 1998, the average level of gender diversity for the Michigan state supreme court was 46%. Almost half of the Michigan high court was therefore female, creating a sharp contrast with many state supreme courts that have failed to select a female jurist over the same time period, or ever for that matter.\footnote{From 1995 to 1998, New Hampshire, South Dakota, and Wyoming each failed to select female jurists for their respective high court.
} Overall, the Michigan Supreme Court ranked second only to the Rhode Island Supreme Court and just above the Minnesota and Vermont state supreme courts in female representation. With approximately a half female court, the Michigan supreme court offers several opportunities. First, several
questions must be asked. What is the political environment? Is state public opinion very liberal or conservative? How are judges selected to the court? If elected, how competitive are Michigan elections? Related to the court’s institutions and the desirability of office, several other questions emerge. How professionalized is the court? How large is the court? How long do judges serve? Lastly, how many female-eligible jurists exist within the state? Second, after answering these questions, what consequences can we derive from this state picture.

Members of the Michigan judiciary are selected using a non-partisan form of selection with no partisan affiliation permitted on ballots for judicial office. When an individual seeks selection or even reelection, they are not permitted to identify themselves as either a Republican, Democrat, or a third party. This creates several factors that must be considered. Are judicial candidates that lack formal partisan affiliation void of the benefit of partisan linkage? What is the general consequence on voter linkage? We may create general impressions related to diversity and the occurrence of high or low diversity where parties are absent. Furthermore, are voters more interested in diversifying the courts than elites or merit commissions? There is a possibility that voters are indeed concerned with selecting female or black judicial candidates.

As a state with a non-partisan election format, there appears to be very little negative impact on gender diversity. Furthermore, it is generally assumed that executive appointments to fill vacancies benefit underrepresented groups.29 This pattern emerges in Michigan, supporting expectations. Exactly 50% of the judges present in the Michigan state supreme court were initially appointed by the executive with the joint support of judicial nominating commissions, similar to the merit selection format.

29 Bratton and Spill (2002) and Githens (1995) both suggest that women benefit from elite selection.
Importantly, Michigan’s political environment is relatively liberal.\textsuperscript{30} Therefore, the liberal political context of Michigan may enhance the nuances of judicial selection especially within a non-partisan election format that encourages voter linkage. Other political context features include the level of electoral competition.\textsuperscript{31} Like public liberalism, the features of electoral competition in Michigan are near the extreme. As one of the most electorally competitive states, gender diversity continues to thrive. Both factors create an image of Michigan where competition for office brings more numerous and varied judicial candidates. Furthermore, with a liberal-leaning electorate, voters may take either a neutral approach to gender diversity or actually prefer greater gender diversity.

The features of the court are also worth noting, as the benefits of office may encourage greater or lesser diversity. First, the Michigan state supreme court is highly professionalized.\textsuperscript{32} Because greater professionalization may attract more conventional (white, male) candidates, greater professionalization should create less opportunities for less conventional candidates (women, minorities). In addition, greater professionalization is related to less membership turnover and fewer opportunities for members of underrepresented groups.\textsuperscript{33} Both the size of office and term length may also affect gender diversity. Greater size encourages greater access for female candidates, especially in less

\textsuperscript{30} According to the Erikson, Wright, and McIver (1993) measure of public liberalism, Michigan emerges as relatively liberal state with a public liberalism score of -11.5, where scores approaching zero are more liberal.

\textsuperscript{31} Electoral competition is captured using Holbrook and Van Dunk’s measure of district level electoral competition. The variable ranges from 9.26 to 56.58 with large scores representing more competitive states. Michigan’s score is 49.58, suggesting that competition is extensive for most political offices including state wide judicial offices.

\textsuperscript{32} The measure of state supreme court professionalization ranges from -5 to 5 and Michigan’s score on this scale is a robust .83.

\textsuperscript{33} Fiorina (1994) finds that under-professionalized state legislatures have less stability and high membership turnover.
professionalized settings. Michigan's supreme court, however, does not fit this
description well. The average state supreme court size has seven positions, the same as
Michigan's. Likewise, Michigan's judicial term length does not fit the expectations of
greater gender diversity created by substantially small term lengths. While shorter term
lengths should encourage underrepresented groups, Michigan's judicial term length is the
national median of eight years. Michigan female lawyers per capita represent 19.5% of
the population of lawyers\textsuperscript{34}, or 4,049 female attorneys compared to 16,665 male
attorneys.\textsuperscript{35} While women represent a substantially smaller portion of the state attorney
population, there are evidently enough female attorneys to seek office and win office
even considering the average size of the court.

As a highly professionalized court, fewer underrepresented groups should be
present, but this is not the case. Therefore, the effect of professionalization must be
tempered by selection. Where competitive obstacles exist through judicial elections,
judicial appointments following state judicial vacancies remove the effect of these
obstacles. While greater professionalization should discourage political minority
candidates, vacancy appointments allow more female jurists than expected. With
approximately half of the state's high court jurists appointed to fill vacancies, political
minority jurists may have circumvented the traditional route allowing greater diversity
regardless. Otherwise, the standard method of selection to the court, non-partisan
elections, may actually interact with a relatively liberal public to contribute toward
greater diversity. The general impression is a court that is highly diverse that has reacted
positively to selection methods that encourage a liberal electorate to select

\textsuperscript{34} The national quantity of female lawyers per capita is 22.1%.
\textsuperscript{35} The state attorney population is from the 1990 decennial census that preceded data from this dissertation.
underrepresented individuals to serve on the court, as well as a route to selection that is somewhat dependent on the state executive. Nevertheless, Michigan is a moderate to liberal state with a moderate to liberal court\textsuperscript{36} that is also highly diverse. From here we explore other forms of diversity in addition to Wyoming, which represents the opposite extreme related to gender diversity.

**Low Diversity - Wyoming Supreme Court**

Unlike Michigan, the Wyoming judiciary is anything but diverse. Wyoming through the period of this study had yet to select a woman to the state supreme court. From a historical perspective, Wyoming is an interesting state example because of the state’s historical pattern of women successfully seeking political office and the treatment of women overall. Wyoming is considered by many the forbearer to women’s rights and equality throughout the nation. Upon entering the union in 1890, Wyoming granted the right to vote for women, as well as selected women for political office in such varied roles like justice of the peace and court bailiff, both a national first. In 1925, Wyoming was the first state to elect a female governor. Importantly, this was just five years after the ratification of the 19\textsuperscript{th} amendment of the United States Constitution, which extended suffrage to women. In many ways, Wyoming has been at the front lines of gender diversity in public office. For the Wyoming Supreme Court, however, women have had less success gaining public office. Since 1970, there have not been any female justices and only recently, in 2000, was a woman selected to the Wyoming Supreme Court.\textsuperscript{37}

Therefore, there appears to be a paradox in Wyoming. On one hand, Wyoming is very

\textsuperscript{36} The average judge ideology for the Michigan supreme court is 43.8 (Brace, Langer, and Hall, 2000). This score is near the mean score for the states supreme courts nationally.

\textsuperscript{37} Justice Marilyn Kite was selected in 2000, two years after the period of this study. She was appointed by Governor Jim Gerring to fill the vacancy created by the retirement of Justice Richard Macy. This action points out how effective vacancy appointments are for changing the composition of the state courts.
open to the enfranchisement of women in public office. On the second hand, Wyoming’s
failure to select a female justice to the Supreme Court notes the difficulty that many
states may face when confronted with relatively few female attorneys and a small state
population.

An obvious query relates to the political and institutional factors that differentiate
low gender diversity states from high gender diversity states such as Michigan. Do such
factors like the contextual political environment or access affect large differences related
to diversity from state to state? The first feature that should be noted is the formal
method of selection, which is a merit selection format. While such a format is considered
helpful to the greater representation of underrepresented groups and greater selection of
professional talent, merit selection processes have had little impact in Wyoming related
to gender diversity. Like Michigan, Wyoming also has access to vacancy appointments
when judicial vacancies arise. Again, with a homogenous male court this has had no
impact on diversity.

A factor that probably affects gender diversity in Wyoming is an extremely low
proportion of female attorneys related to the overall population of attorneys. With only
17.7% of the state legal force composed on females, or 178 female attorneys out of 1,005
total attorneys, there are fewer candidates at the most basic level, those individuals with
an active legal practice or those currently licensed by the Wyoming Bar Association. At
a glance, the difference between Michigan and Wyoming’s female lawyers per capita
seems marginal, yet it represents a full standard deviation difference. The actual
difference in quantity is even more striking when comparing the 178 female attorneys in
Wyoming to the 4,049 female attorneys in Michigan. Michigan certainly has more
potential female candidates than male candidates. Gender representation within the Wyoming judiciary appears to suffer from fewer female attorneys. In relation to the total office size, while Wyoming has five positions and Michigan has seven, the quantity of potential female candidates suggests that Michigan has less difficulty finding qualified female candidates.

Other political factors that may affect gender representation include public liberalism and electoral competition. First, the effects of public liberalism are both direct and indirect with an emphasis on the later. The direct effect emerges during retention elections and the electoral decision to keep a judge in office after they have been selected by a governor and nominating commission. The indirect effect emerges from the selection of individuals to the state’s executive office and their ideological persuasion. Like most merit retention states, the state governor selects a judge from a list provided by a nominating convention. This increases the governor’s effect on judicial nominations. State liberalism in Wyoming is conservative according to Erikson, Wright, and McIver.\textsuperscript{38} Research suggests that conservative states discourage greater diversity; this assertion is substantiated in Wyoming.

Beyond the size of office, the institutional features of the Wyoming Supreme Court are noteworthy. Small office size is enhanced by the length of term which is eight years. Like Michigan, a relatively long term length exists. There is a logical connection between a small court and long term lengths which discourage greater diversity. This may explain diversity in Wyoming even more than Michigan.

Lastly, Wyoming is the smallest state in the United States according to the 2000 decennial census, suggesting that in addition to a small per capita female attorney

\textsuperscript{38} Wyoming’s public liberalism score is -17.8, very much in the conservative direction.
population there is additionally a small base of citizens. The lack of diversity in Wyoming is possibly not so much a product of ideology or political constraints, rather the candidate pool that offers few qualified individuals for state judicial office.

[INSERT TABLE 3.3 HERE]

Racial Diversity

Like gender diversity, the racial diversity of state supreme court jurists varies substantially throughout the states, as noted in Table 3.3. While several states have made strong inroads considering past obstacles related to racial minority status, several states have failed to select a racial minority justice. As throughout this dissertation, African-Americans receive the lion’s share of attention, because of the historically enduring racial tension that has existed since prior to the establishment of the American republic. Differences in racial representation across the states center on several factors. Obstacles of black jurists may emerge from historically strong barriers in many states, especially southern states. Other reasons may center on an electorate that is non-responsive to the representation of minorities, especially in at-large districts, as all but one state utilizes at-large state supreme court positions rather than district based positions.\(^{39}\) A last reason centers on the population of political minorities and blacks more specifically. Where fewer black attorneys are present, fewer opportunities for advancement exist. Evidence in the prior chapter, suggests the later two explanations are most probable. While racial prejudices surely exist throughout the country, there is evidence that the quantity of black attorney’s vary and a very strong possibility that elective and appointive courts favor political minorities differently. Furthermore, state public opinion and the general level of

\(^{39}\) Louisiana remains the only state supreme court with district-based representation.
racial tolerance should have an impact on racial representation in the state supreme courts.

High Diversity – Tennessee Supreme Court

What becomes obvious in the previous chapter is the success of African-Americans in the Southern states, or the eleven states that composed the Confederate States of America during the American Civil War. This obviously casts doubt that roadblocks restrict access based on race alone, as the South would presumably be most restrictive. As an example of a state with greater racial representation and a Southern state, Tennessee exists as a primary example of racial heterogeneity among state supreme courts. What is most striking about the Tennessee Supreme Court is the 23% of the court that was composed of black jurists from 1995 to 1998. This proportion ranks second only to the Supreme Court of Georgia, another southern state supreme court with black jurists accounting for 25% of the court. Just below Tennessee and Georgia is South Carolina with 20% of the state high court held by African-American jurists. Therefore, throughout the South, blacks have made large advancements since the period of integration and even from the 1980’s.⁴⁰

Tennessee is in many ways a model southern state. Public opinion within the state is relatively conservative, as may be expected within the South.⁴¹ However, Tennessee is the most moderate state ideologically within South⁴² and has been so throughout much of history, according to Key (1949). Tennessee, however, has a fairly

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⁴⁰ Glick and Emmert (1987) found that few minority justices were present throughout the state supreme courts.
⁴¹ Elazar (1972) that the southern states are more conservative in nature than other states throughout the country, typifying a conservative culture.
⁴² The mean state liberalism score within the South is -20.4. Tennessee’s score of -16.6 represents the most liberal state liberalism score.
minimal level of electoral competition. This is important because of the method of judicial selection, which is non-partisan elections that are considered traditionally less salient in nature. Combined, low competition and less salient elections may create an environment that is suitable for access to the courts for political minorities, regardless of general conservative public opinion that may not benefit blacks vying for public election. Further enhancing the cause for greater black representation within the Tennessee Supreme Court is a comparatively high level of black attorneys within the state of Tennessee. Overall, 3.7% of all Tennessee attorneys are black, or 338 black attorneys out of 9,257 total Tennessee attorneys, representing a fairly high total compared to the mean for the United States. With less salience, less competition, and more black attorneys, African-Americans receive greater access to the courts as fewer contextual and selection obstacles exist to restrict access for black candidates. Furthermore, Tennessee has the sixteenth largest population among the fifty states, suggesting that more potential candidates may emerge when considering the large nature of the candidate pool among African-Americans.

The structure of the Tennessee Supreme Court seems to reduce access. First, while appointments by the governor may allow greater access to political minorities, there is no evidence of such an effect. Not one member of Tennessee Supreme Court was nominated to the court to fill a vacancy; black, white, male, or female. The court is also relatively small with only five permanent positions. Lastly, term length is eight years,

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43 Sheldon and Maule (1997) present case level examples of each state method of judicial selection. Non-partisan elections are even less salient than partisan elections according to their evidence.
44 Black attorneys throughout the United States account for 2.4% of the total attorney population.
near the mean for the country. These factors taken together suggest that the institutional characteristics of the court do not encourage access to the court, yet they are not overly restrictive. While more positions favor greater access, this factor within Tennessee alone may not restrict access. Likewise, though none of the judges within the Tennessee Supreme Court were nominated to fill a vacancy, blacks continue to be selected at or near the national average of black Americans, suggesting that vacancy appointments, or the lack there of, have had no effect on judicial selection for African-Americans.

The last structural feature of the Tennessee Supreme Court, one that may encourage selection, is the level of professionalization. The state high court of Tennessee is one of the less professionalized state supreme courts. Unlike other institutional features, this feature may create greater access to traditionally underrepresented groups because of less competition from overrepresented groups. While smaller court size and moderate term length exists, lesser professionalization should decrease interest among traditional groups and offer access to groups and individuals that would not benefit from high degrees of competition related to influential courts that offer greater benefits for service. We may expect that courts that are under-staffed, under-paid, and have few resources create less incentive for selection or candidacy.

The overall impression of Tennessee is that of a southern state that has changed like much of the South. Like other southern state supreme courts, Tennessee actually encourages black candidates to seek office and has rewarded their efforts with selection. Currently, Justice E. Riley Anderson serves on the Tennessee Supreme Court. He has

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45 The mean for term length throughout the states is nine years, though a plurality of the states use a short six year term.

46 The 2000 decennial nation census states that 12.3% of Americans are African-American.
served on this court since 1990 when he was elected to the court. Since being elected and re-elected in 1998, Justice Anderson has served as chief justice on three occasions. Unlike a majority of state high courts, Tennessee clearly provides access for non-traditionally represented groups. The evidence is the experience of individuals like Justice Anderson which have benefited from lesser professionalization, less salient forms of selection, and generally low levels of electoral competition.

**Low Diversity – Supreme Court of Ohio**

Ohio emerges throughout history as a very important state. It has been the home of eight United States presidents\(^{47}\), within its borders lie three important urban centers (Cincinnati, Cleveland, and Columbus), and the state is a center of trade with access to both the Mississippi River and the Great Lakes. With all these considerations, the Supreme Court of Ohio remains one of the least representative judicial institutions among the states. Like twenty-four other states, Ohio had no African-American jurists from 1995-1998. Considering the size of the state’s population\(^{48}\) it is rather shocking that no judges on the state supreme court are racial minorities. We are left only to evaluate what factors exist within the court and the state that may contribute to such a phenomenon.

Ohio is unique throughout the state supreme court for the state’s official method of selection. Like many states, Ohio uses elections to select members of the state judiciary, yet in 1912 Ohio elected to choose judges by non-partisan elections marking a change from appointments by the legislature. Though nominally non-partisan, Ohio’s

\(^{47}\) Presidents William H. Harrison (1841), Rutherford B. Hayes (1877-1881), James A. Garfield (1881), Ulysses S. Grant (1869-1877), Benjamin Harrison (1889-1893), William McKinley (1897-1901), William Howard Taft (1909-1913), Warren G. Harding (1921-1923) all were born and lived sizeable portions of their lives in Ohio. Ohio has had more presidential sons than any other state.

\(^{48}\) According to the 2000 United States Census, Ohio’s population was almost 11.5 million inhabitants, ranking seventh overall.
judicial selection process remains partisan because of the procedures of nomination. Prior to general election, candidates are placed on the ballot by success in a party primary. After winning a party primary, judges are then placed on the general election ballot without their party affiliation. Prior to the non-partisan general election, judicial candidates may receive endorsements from a political party and may identify themselves with one party in political advertisements, thus parties are very much important. While judges are forbidden from declaring their partisanship following the primary election within advertisements, they are permitted to identify themselves as members of political party in person during speaking engagements or campaign events. The distinction that may be drawn is this hybrid form of selection. All other states, if using elections as a form of selection, either permit or prohibit party involvement from the outset through the end of the selection process.

Acknowledging Ohio’s unique method of selection, we then must ask if this affects racial diversity in the Supreme Court of Ohio. Unfortunately, it is difficult to make such assertions from limited descriptive analysis, yet observations of the court seem to indulge the notion that such a diverse and populace state may be affected by this hybrid form of judicial election. Obstacles to nomination may block minority candidates from election to the highest court.

Like most elected state supreme courts there remains the possibility of judicial appointments when vacancies emerge. Overall, 10% of the court was selected by gubernatorial appointment from 1995 to 1998, so clearly use of this form of selection was used but infrequently and not for the benefit of racial minority candidates. Ohio is even more distinct from other states because of the form of judicial vacancy appointments
permitted. Unlike most states Ohio’s vacancy appointment process is driven almost completely by the governor. Most states require a form of joint appointment where a nominating commission and the governor choose from a list of candidates. Ohio permits the governor to determine the rules. For example, current Ohio governor Bob Taft requests nominations from party leadership which usually return three names. A standard practice within Ohio is to require at least one of the nominees be either a female or a minority candidate. In relation to African-Americans, this has had no beneficial effect.

Now turning to the contextual environment, Ohio is ideologically moderate according to Erikson, Wright, and McIver. Traditionally, the political framework is divided between the northern and southern halves of the state.49 The southern half is historically conservative and favors similarly Republican candidates, while the northern half has traditionally favored more liberal Democratic candidates. In many ways the state also represents a balance of rural and urban centers, as well as blue-collar pro-labor centers and white-collar business areas. Over the recent decade from 1995 to 2005, the state-wide political environment has favored moderate Republican candidates for governor and senator from George Voinovich to Mike DeWine to Bob Taft. Political competition is also very high. Nationally, Ohio has become a swing state, helping to determine the victor of several presidential elections. Within the state, competition clearly affects local offices possibly contributing to few judicial positions for minority candidates as the stakes and appeal of office remain high.

The inner complexities of the court may also affect perceptions and attractiveness by potential minority candidates. The Supreme Court of Ohio is highly professionalized,

49 Shriver and Green (2005) suggest the modern political divisions within Ohio developed after 1945, these factors have led to greater competition at both the state and national levels.
indicating that individuals seeking office are pursuing an office with resources comparable to those they might find in the private sector. While few state supreme courts offer the financial incentives offered by private practice, staff assistance and adequate funding in addition to prestige may encourage quality candidates to seek office. It is surmised here that such competition will decrease interest among underrepresented political groups such as African-Americans. This effect seems completely possible given the evidence of representation. Other institutional characteristics provide a somewhat different picture. First, the size of political opportunity within the Supreme Court of Ohio is near the national mean, seven judicial positions. This quantity of positions neither appears to enhance or decrease attractiveness of office, as candidates are confronted with neither five judgeships nor nine. While nine positions would offer the greatest opportunity, opportunity still clearly exists. Second, term length for the Supreme Court of Ohio is relatively small, measuring only six years. The effect on turnover should be considerable and evidence later suggests shorter term length has an impact on composition. Ohio supreme court justices serve just over six years on average, less than the national mean of over eight years. Such turnover should create greater opportunity for underrepresented groups, but as noted this is not a reality in Ohio.

The population of black lawyers per capita in Ohio is considerably higher than the national average of 2.4% and more than Tennessee for that matter. Overall, 3.5% of lawyers of within the state of Ohio are black. As a numerical value, 888 attorneys out of 25,306 are black within the state of Ohio according to the 1990 decennial census. Considering the failure of minority representation within Ohio, the number is striking, especially considering that Tennessee has far fewer black attorneys, yet has far greater
representation. While blacks continue to be underrepresented nationally within professions such as the legal field, to have a high proportion of black attorneys and no judgeships creates many scholarly questions about the role of state context and institutions on judicial selection. Fortunately, the remainder of this dissertation tackles such taxing questions like this.

The picture that may be drawn of judicial selection in Ohio is one of competing characteristics. While judicial selection is officially non-partisan there is a strong partisan element. Furthermore, the preferences of the governor in filling vacancies are stronger than elsewhere. Ohio governors largely structure the agenda of judicial appointments. Over recent years, Ohio’s governors have been Republican; the effects appear to not have benefited minority candidates. African-Americans must also confront a highly competitive state that has leaned Republican over recent years, like vacancy appointments this has not benefited black representation within the state high court. Lastly, while Ohio judicial institutions appear to create few road blocks or disincentives with the exception of office appeal created by greater resources, blacks have had little success even for a relatively large black attorney population. The impression that emerges is one of the negative consequences of electoral competition, Republican domination of state politics, and the negative consequences of attractive judicial offices for access to black minority candidates. Considering that Ohio is the seventh largest state these factors very well may condition a state environment that is hostile to minority advancement to the state high court.

[INSERT TABLE 3.4 HERE]

Ideological Diversity
One of the truly interesting features of a judiciary is the structure of ideological preferences that exist within each court. At the federal courts level we have seen in theory with the Attitudinal Model how ideology affects outcomes. The nominations by President George W. Bush of John Roberts, Harriet Miers, and Samuel Alito to the United States Supreme Court illustrate the very important consequences of judge ideology. Each nomination to the judiciary creates the possibility that fundamental legal doctrine will shift as new preferences are added to the court. In today’s national politics, such issues like the right to privacy and nation-state relations under the tenth amendment are highly related to the composition of the courts. Together the composition of judge preferences within any court creates lasting legal outcomes. At the state level, there are few differences from the impact of ideology at the national level. One goal of this dissertation is to pursue the question of impact and how the structure of the courts related to ideology affects judicial behavior. Table 3.4 provides the ideological diversity for each state. Like gender and racial diversity, there are clear and important differences among the states. A case study is useful to evaluate the examples of high and low ideological diversity, where diversity is measured as the distance between the most conservative and most liberal members of a state high court. Obviously, this measure can say very little about the overall opinion of the court, but it indicates the level of constant disagreement that any court may face.

**High Diversity – Supreme Court of New Jersey**

The New Jersey Supreme Court is an example of a court with comparatively high ideological diversity. The distance between the most conservative and liberal members on a one hundred point scale is just below seventy-eight points, a considerable distance.
As the most polarized state supreme court in the nation, the New Jersey Supreme Court stands out as a center of conflict among state supreme courts. The next closest ideologically polarized state supreme court is California with a range of almost seventy-six points. Importantly, the initial method of selection for the New Jersey judiciary is appointive, as it is for most other polarized state supreme courts including California. Specifically, New Jersey uses executive appointments to select members of the state judiciary. Very similar to appointments to the United States Supreme Court, the governor nominates a candidate and the state senate confirms the candidate. Unlike other areas of diversity, methods of selection appear to have a very clear impact on ideological diversity as evidenced by other polarized courts. Conceivably, the power to appoint by means of executive appointment provides governors with substantial authority to shape the complexion of the courts. In no other area of diversity should this be noted less than with ideological diversity. Like presidents, governors may seek to shape the state supreme court in their ideological image. Of course scholars, such as Goldman, suggest that other factors go into nominations, but ideology is never far removed.

Once again turning to New Jersey, the executive form of appointment seems to contribute to greater ideological polarity. Looking at the party affiliation of New Jersey governors over the last twenty years provides a picture of differing preferences. New Jersey has effectively had a rotating governor’s mansion with Republican following Democrat and Democrat following Republican. The governor from 1994 to 2001, and thus from 1995 to 1998, was Christie Todd Whitman, a Republican. Her predecessor was James Florio, a Democrat, who Whitman defeated in 1993. With differing preferences rotating throughout the executive branch it is quite possible that such ideological polarity
is the product of these diverse preferences. Of course, the state senate may provide a moderating effect of judicial appointments.

Turning toward the political environment, public opinion within New Jersey is moderate ideologically. Such moderation may explain why the party of the governors varies consistently. If the moderate electorate has caused greater office turnover within the state executive branch, the effect for the state judiciary is one of ideological polarity. Likewise, New Jersey is also very competitive electorally. New Jersey ranks as one of the most competitive states nationally, the effect both for the governor and judiciary has been one of turnover. Combined, both public liberalism and electoral competition seem to create an environment where different occupants of the state executive office emerge affecting the ideological composition of the state courts. With different views and orientations, executive appointment has created a very ideologically diverse state supreme court.

Other factors possibly contributing toward ideological diversity include resources related to office, the size of opportunity, and the length of tenure. The level of professionalization seems less related to greater ideological diversity at first glance. As a highly professionalized supreme court, New Jersey offers greater salary compensation, greater resources, and substantial incentives for candidates to be interested in selection. While this should decrease the range of candidates, narrowing those interested in office to the clearly qualified, there are no apparent negative incentives for those seeking office in New Jersey. Both court size and term length, however, may enable greater polarity. Neither is extreme in either direction and may create access to the courts with seven positions and a relatively short seven year term.
As the ninth largest state, New Jersey’s high court should create greater incentives to candidates interested in affecting judicial policy in a very important state. Furthermore, the reputation of the state supreme court is exceedingly high across the states.\(^5\) Neither factor seems to deter ideological polarity, or the selection of candidates that are quite different from one another. Again, the effect of selection stands out as most informative. Combined with a moderate level of public liberalism and high electoral competition, the contextual nature of the states seems to encourage the selection of judges with consistent ideological differences.

**Low Diversity – Arkansas Supreme Court**

The Arkansas Supreme Court differs from the New Jersey Supreme Court in several meaningful ways. Foremost, the high court of Arkansas is one of the least polarized state supreme courts in the nation. Polarization within the Arkansas Supreme Court registers only a 7.2 point separation between the most liberal and conservative judges on a 100 point scale.\(^5\) This leads to the obvious question, why? At first glance, the formal method of selection seems to explain some of the difference. Unlike New Jersey, Arkansas utilizes an elected method of selection, specifically using partisan elections. This seems to suggest that selection methods may have a very consequential effect on the make-up of a judiciary. Overall, the Arkansas Supreme Court is the forty-ninth least polarized state supreme court, greater only than Missouri (3.1 points) and only slightly less polarized than Tennessee (7.3). Of the ten least polarized courts, seven are selected using an elected form of selection. The remaining three states, including

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\(^5\) Caldeira (1983) provides the reputation scores for each state supreme court. New Jersey’s score, 104.2, is in the 95th percentile of reputation scores nationally.  
\(^5\) Again, I use Brace, Langer, and Hall’s (2000) measure of judge ideology and judicial preferences which operates on a 100 point scale.
Missouri, use some form of an appointed technique. Clearly, elected courts seem to create a moderating effect on those selected to operate in the state judiciary. Focusing on Arkansas, each judge is of a similar ideological stance, moderate in nature and falling just right of center ideologically.\textsuperscript{52} Further noting the effect of selection methods, Arkansas permits the governor to appoint judges when vacancies on the state high court occur. Overall, 13\% of the justices within the Arkansas Supreme Court from 1995 to 1998 were placed on this court using this form of selection. This total is relatively small given the 87\% of the court that was selected using the conventional method of selection method.

The partisan nature of judicial selection within Arkansas is a dying method nationally. As noted above, states are consistently moving away from partisan elections usually favoring merit selection formats or non-partisan elections if they prefer some public accountability. Arkansas’ use of partisan elections suggests that low polarity and moderate aggregate ideology within the court may be a product of partisan elections, or at least elections more generally. The context of electoral competition within the state is further informative. Electoral competition is generally low, strongly favoring Democratic candidates both within the Solid South period up to the modern era of national two-party competition.\textsuperscript{53} Considering the dominant tone of electoral politics favoring the Democratic Party, the state high court of Arkansas may consist largely of partisans of a single ideological nature.

\textsuperscript{52} The aggregate ideological score for the Arkansas Supreme Court is 43.3, registering a moderate/conservative score nationally.
\textsuperscript{53} Black and Black (2003) note changing levels of electoral competition in the South. While the South once selected candidates exclusively from the Democratic Party, there has been shift both for national and state-wide offices in most Southern states.
Like the Arkansas Supreme Court, public opinion within Arkansas is relatively moderate or slightly conservative. Together with the level of competition and the aggregate personal preferences for the court, there seem to be several reinforcing mechanisms than encourage less polarization.

The institutional characteristics for the Arkansas Supreme Court also may affect perceptions of office and either encourage or discourage efforts to run for office. The level of professionalization is strikingly average; neither under-professionalized, like the North Dakota Supreme Court, nor highly professionalized, as is the Supreme Court of California. There are apparently enough resources to encourage attempts at selection, yet not enough to encourage departure from financially rewarding careers in private practice. The effect on polarization may be very clear, extremely ideological individuals may find little safe haven in such a professionalized legislature. Beyond the difficulty of securing selection within an elected method of selection when candidates are distant from the median voter, candidates must also be content with the resources related to office.

Term length is another institutional variable that may be counter-productive to greater polarization. Judicial terms within the Arkansas Supreme Court last for eight years, as other levels of the Arkansas judiciary. Again, eight years is near the mean of state supreme court term length. Like term length, the size of political opportunity is moderately large with seven permanent positions. Together, term length, court size and court professionalization provide none of the extreme examples that may be seen subnationally. The Arkansas Supreme Court neither offers very short six-year terms, nor an exceedingly large court size. Arkansas seems to encourage candidates that are content

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54 Erikson, Wright, and McIver (1993) report that Arkansas’ public liberalism score is -16.2, making Arkansas a moderate/conservative state.
with seeking office within a middle-range state judiciary with many benefits, but few of
the circumstances that might encourage fringe candidates like constant turnover or short
term lengths that may encourage a very amateur judiciary.

In addition to these institutional characteristics, the method of selection provides a
very moderating effect on those seeking office and actually securing office. As Downs
notes, candidates that are highly conservative or very liberal within this very moderate
Southern state may have difficulty winning office. While the benefits of office are not so
extreme to encourage high levels of competition, there are enough benefits of office to
secure a professionalized judiciary that is free of large ideological division.

[INSERT TABLE 3.5 HERE]

Tenure Diversity

While the nature of judicial selection and the appeal of office seem to share a very
strong relationship with ideological diversity, tenure diversity may be even more
complex. Obviously, term length should share a strong relationship with seniority, yet
what further relationships enhance a jurist’s desire to stay within a court for greater
periods of time? A more thorough look at tenure diversity indicates that courts with long
term length are not always the courts with greatest seniority, so why would justices
prematurely or after just one term? Two examples below begin to answer these questions
by providing a detailed explanation of two states, one with high aggregate seniority and
another with very minimal seniority. Capitalizing on the state differences seen in Table
3.5, these differences may explain to some degree the general difference found
throughout the states, noting both the institutional characteristics of the state supreme
courts and the political context of the states.
High Diversity – Maryland Court of Appeals

The high court of Maryland is one of two courts nationally that does not characterize itself as the "supreme court" of the state. The other state high court is the New York Court of Appeals with New York actually giving the lower state trial courts the "supreme court" title. Founded in 1776, the Maryland Court of Appeals came into being during the American Revolutionary War, the same year as the American Declaration of Independence. Therefore, the Maryland Court of Appeals is one of the oldest state high courts in the nation and among the original thirteen states. Among the fifty-two state supreme courts, Maryland also derives some notoriety as a court that encourages extremely long tenures. On average, members of the Maryland Court of Appeals served over fourteen years during the period of this study. The closest other tenure duration existed in Virginia and Iowa, with just less than thirteen years in both states. The effect of seniority is open to some debate and will be discussed further within this dissertation, yet the most pressing effect may be the defense of the institution for those judges with longer tenure and the development of judicial policy that confirms the clarity of law.

Two factors materialize as a fairly obvious cause of increased seniority. First, term length seems positively related to longer aggregate term length and greater tenure diversity. Term length for the Maryland Court of Appeals is ten years per term.\textsuperscript{55} Other than three states with life time terms\textsuperscript{56} and the New York Court of Appeals, which has fourteen year terms, Maryland is at the extreme of longer term lengths throughout the

\textsuperscript{55} Interestingly, Maryland reduced the length of each term from fifteen years to twelve decreasing the potential effect of term length on seniority.

\textsuperscript{56} Massachusetts, New Hampshire, and Rhode Island are the three states that allocate lifetime tenure for selection to their respective state supreme court. Noting their historical origins and geographical region, each is among the original thirteen colonies and resides on the Northeast.
states. The correlation for longer term length and greater aggregate seniority seem obvious but the relationship will be investigated later in this dissertation. Maryland, however, seems to signify a definite relationship. The second consideration, like the other areas of diversity, is the method of selection. Creating security for longer tenures, Maryland utilizes a merit selection form of judicial selection which allows retention elections within the first year. This method of selection may enhance a judge’s\textsuperscript{57} ability within the Maryland Court of Appeals to serve longer. Combined with long term lengths, Maryland high court judges may be very protected from turnover problems.

The next obvious question concerns whether the court is worth serving a long period of time. From a glance, the Maryland Court of Appeals seems like a reasonable destination for judicial candidates. From a professionalization stand point, the court scores a very average score near and actually above the median of all state supreme courts.\textsuperscript{58} The court provides an average level of assistance and the salary is also near the national mean, so there is no strong disincentive to leave the court. The size of the court is also very average, so there are fewer positions than many other states. The court appears to provide few incentives for judges to leave office early.

Lastly, electoral competition within the state of Maryland is below the national average. So in addition to a method of selection that reduces electoral competition by running one-year incumbents unopposed in a retention election, they run for election in a state with less competition on average. This seems to signify that the electoral context of judicial elections within Maryland further contributes toward longer tenure as judges may

\textsuperscript{57} Unlike most state supreme courts, the Maryland Court of Appeals refers to members of its judiciary as “judges” rather than “justices”, the norm throughout the states.

\textsuperscript{58} The Maryland Court of Appeals professionalization score is -0.17, above the national median score of -0.2.
fear retention with less intensity than other states that use purely elective forms of selection and identify partisan affiliation.

Maryland, overall, is useful example of court longevity. In addition to long term lengths, judges run for election unopposed in a state with less electoral competition than most of other states. The impact of such arrangements may vary, yet it seems obvious that judges within the Maryland Court of Appeals are fairly secure within their office and need not fear electoral reprisal during retention elections.

Low Diversity – Supreme Court of Texas

Texas is unique in that it uses two courts to divide the jurisdiction of final appeals. The first court is the Texas Court of Criminal Appeals, which hears only crime-related matters. These appeals usually flow from either the lower appellate court or directly from the trial court. The second court, the court evaluated here, is the Supreme Court of Texas. This court hears civil matters and like the Court of Criminal Appeals, appeals originate from both the state appeals court and the trial court. Both courts represent the final say on most legal questions with the exception of those cases heard before the United States Supreme Court. Subnationally, only Oklahoma, Texas’ adjacent state, uses an arrangement that is similar.

The Supreme Court of Texas represents one of the least tenured state high courts with judges averaging only 5.2 years on the court. Other low seniority state courts include Minnesota (4.4 years), Georgia (4.5 years), Hawaii (4.5 years), and New Mexico (4.8 years). The Texas Supreme Court provides an interesting example because of the state’s relative importance, as the second largest state.\(^{59}\) Over recent years, like much of the South, Texas has gone through an electoral transformation. Once a solidly one-party

\(^{59}\) The 2000 decennial census ranks Texas as the second largest state, behind only California.
state, which favored the Democratic Party, Texas now has strong two-party competition at all levels of government. Moreover, Texas now favors the Republican Party. Since 1987, all but four years have found the occupant of governor's mansion to be a Republican. Similarly, since 1994 every senator from the state of Texas has been a Republican.\(^6\) Both noting this transformation and divided nature of the Texas judiciary, it is then interesting to evaluate the potential impact on tenure diversity.

Like Arkansas, an adjacent Southern state, Texas utilizes partisan elections to select justices to the Texas Supreme Court. As noted, use of partisan elections has declined substantially over the prior century and now only a hand full of states use this process. Texas, however, is one of these states. Texas also uses vacancy appointments by the governor with the consent of the state senate to fill vacancies as they arise. Overall, 42% of Texas Supreme Court justices were initially selected by the governor to fill a judicial vacancy. This phenomenon possibly notes just how common turnover is, as access to the court routinely goes through the office of the governor because justices are leaving creating a presumably lower average tenure.

Both Texas courts have relatively large court sizes, which also decreases the level of seniority. With more political opportunity through more available positions, there is greater possibility for judges to leave the court or to be defeated when they run for reelection. The length of office term is also important, as Texas’ six year terms represent one of seventeen states that use the statistical minimum six year term. Together greater

\(^6\) The last Democratic senator, Lloyd Bentsen, retired in 1993 to serve as President Bill Clinton's Secretary of the Treasury. He was replaced in a 1993 by Bob Krueger, who was appointed to fill Senator Bentsen's vacancy. Senator Krueger subsequently lost his bid to retain Senator's Bentsen's seat in 1993 to Kay Bailey Hutchison.
court size and minimal term length create an environment in Texas that is not conducive to longer tenure.

Returning to the changing nature of electoral competition, it is quite possible that incumbent judges faced the negative consequences of two-party emergence. During the 1980’s and 1990’s, much of the South experienced this transformation of two-party competition. Perhaps in Texas, such changes affected any Democratic state high court judges that maintained party allegiance even though the Republican Party became the dominant party in state-wide politics. If so, the transition within the Texas Supreme Court may have resulted from Democratic judges leaving the court and Republican judges entering the court. Either way, there is evidence within Texas that membership is fluid, changing relatively quickly and establishing relatively short tenures for most supreme court justices. Combined with a court that offers greater access and very short term lengths, the Texas Supreme Court discourages greater seniority. The effects are potentially numerous, yet they may range from collegiality, the establishment of non-permanent court norms, or less policy stability as judges may not fear reprisals if their tenure is limited from almost the very beginning.

Conclusion

These case studies provide a relatively short summary of differences in state court diversity. For each form of diversity, two states were chosen that reflect the cross-state differences related to diversity. Diversity certainly varies from state to state, yet by looking at the contextual and political environment more closely it is sometimes easier to understand why phenomena occur. For the states described above, the expectation is well-founded. While looking at greater tenure diversity in the Maryland Court of Appeal,
for example, we find a well thought out connection between term length and greater seniority. Neither a stretch nor an over-simplification, this is a very plausible relationship that is only enhanced by a form of selection, merit selection, that reduces competition for office. Similarly, low ideological polarity in the Arkansas Supreme Court may relate to very low electoral competition, a dominant political party, a moderate constituency, and a partisan election method of selection. Each factor feasibly affects the ideological dissimilarity among the Arkansas jurists. Once again referring to Downs, elections may decrease the range of successful candidates and in low competition states this may only be intensified.

The case study analyses above have quite intentionally focused on a variety of selection methods and each of the four geographic regions of the United States. The only omission related to selection method was the legislative form of judicial appointment, which is now used in only two states, South Carolina and Virginia. Of the geographic regions, every region is evaluated at least twice with the exception of the West, which was evaluated only with Wyoming. All together, there is a general sample of states and the methods they use to select judges. While very few conclusive statements can, or should, be made about the absolute connection between some factors and specific level of diversity across the four fields, several general relationships are noted. The following chapter will evaluate these relationships further and will find that many expectations are well founded.
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<tbody>
<tr>
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¹Totals do not include the Oklahoma Court of Criminal Appeals or the Texas Court of Criminal Appeals.

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'Totals do not include the Oklahoma Court of Criminal Appeals or the Texas Court of Criminal Appeals.

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'Totals do not include the Oklahoma Court of Criminal Appeals or the Texas Court of Criminal Appeals.

Table 3.5
Tenure Diversity by State

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</table>

Notes: Totals do not include the Oklahoma Court of Criminal Appeals or the Texas Court of Criminal Appeals.

Chapter Four

Explanations of Judicial Diversity: The Impact of Office Appeal

Previous research indicates judicial behavior is shaped by judicial institutions (Brace and Hall, 1997; Hall and Brace, 1989) and the behavior of other judges (Maltzman, Spriggs, and Wahlbeck, 2000; Epstein and Knight, 1997). The current inquiry considers forces that influence the composition of courts. Institutions may attract persons of similar or divergent attributes, and the make-up of courts may systematically influence the strategic behavior of judges. This thesis thus looks at the intersection of institutions and strategy, considering how institutions shape the distribution of preferences on courts and how these preferences then influence strategy.

While past research focuses on judicial behavior both at the court and individual levels, few studies explore the impact of court composition on judicial behavior. While decisions and compromise are the nature of many court settings (Maltzman, Spriggs, and Wahlbeck, 2000), left unanswered is the influence of composition on behavior. This dissertation seeks to answer this question by moving back in the antecedent conditions that may influence behavior. Some courts attract jurists with a narrow range of attributes, with little range in age, gender, race or ideology. Other courts display much greater variety in the attributes of the judges, with more diversity in the age, gender, race and ideology of their members. My premise is that these two scenarios raise differing collective action problems and strategies and behavior for one situation that may not fit the other. For a cohesive court, agreement should be quite simple, coalitions will be large, and the range of issues raised in their decisions can be quite narrow. Alternatively, on a diverse court, coalition formation will be more challenging. The size of coalitions
should be smaller on average and, to facilitate agreement, the range of issues addressed in court opinions should be larger.

To see how this would operate, imagine we were performing a jury experiment. Rather than randomizing our subjects, assume we picked one group of white males of similar ages screened to have similar ideologies. In another groups we selected a diverse group, with differing genders, age, race and political predispositions. Now suppose we asked each group to view a simulated criminal trial and required that they render a verdict by majority vote, explaining their choice. We would expect that the former group would likely produce a unanimous decision with a succinct justification while the latter group would likely have to bargain to produce a majority. Furthermore, the bargained outcome would likely need to address a broader array of issues to secure a majority. Literature related to jury selection confirms the characteristics of a jury influence case outcomes quite dramatically (Fahringer, 1980; MacCoun, 1989). If this process operates in state supreme courts, it indicates that the process of selection shapes both the certainty of the rule of law manifested in the coalition sizes supporting outcomes, but also in the scope of issues covered in those outcomes.

The neo-institutional perspective of judicial behavior describes collective outcomes as the product of strategic interaction among political actors (Murphy, 1962; Pritchett, 1961). Judges make choices to achieve policy or office goals. Epstein and Knight (1998, 2000) likewise suggest judges act strategically, with decisions based on the expected reactions of colleagues. Furthermore, these choices are influenced by institutional structures in which they reside. This thesis suggests methods of selections and attractiveness of office condition recruitment for office, which in turn affecting
strategic decisional behavior. The organization of this chapter proceeds first with the influences that contribute toward judicial diversity, including methods of judicial selection and factors that affect the value and costs associated with office. Later, decisional behavior receives attention with composition provided as an additional explanation of strategically and institutionally influenced behavior within the state supreme courts.

**Expectations about Diversity: The Role of Ambition and Recruitment**

Diversity has emerged as a defining characteristic of both the federal and state judiciaries. Goldman (1997) notes starting with the Carter administration and continued with the Clinton administration, racial and gender diversity expanded widely within the judiciary. Noting preferences for greater diversity, Goldman demonstrates the composition of the federal courts changed greatly. While diversity at the federal level has been explored (Goldman, 1997; Marshall, 1993; Walker and Barrow, 1985; Welch, Combs and Gruhl, 1988), less is known concerning state level judiciaries. Yet, research at the state level supports the growth of descriptive representation and diversity (Canon 1972; Glick and Emmert, 1987; Bonneau, 2001). While black and female judges were less common prior to the 1970's, recent growth of political minority judges and their impact on judicial decision-making is found (Allen and Wall, 1993; Martin and Pyle, 2000; Songer and Crews-Meyer, 2000; Steffensmeier and Britt, 2001).

As noted in Chapter One, the value of office, risks associated with office, and the costs of office (Rohde, 1979) are tied to the desirability of a political office. While the courts are the most insulated branch within the political system of most states (Hall and Brace, 1989), structural characteristics and political environments contribute to differing
assessments of office appeal. For instance, where state courts provide fewer positions, prestige is greatest and the impact of each vote is heightened. Greater interest exists in capturing office, as they provide the greatest impact and reward for policy goals. While state courts lack the stature of the federal bench, their impact on legal policy should not be understated. State courts of last resort are the final arbiter for most legal disputes (Langer, 2000; Sheldon and Maule, 1997) hearing cases involving abortion, death penalty decisions, and election laws that the federal courts rarely decide.

To understand diversity, several features of the state courts are evaluated to better understand the impact of the value, risks, and costs of office. First, structural characteristics are important determinants of office value. Structural characteristics include court size, term length, court professionalization, and retirement rules. Second, related to risks associated with selection and office, methods of selection are examined with the assumption that selection methods increase or decrease demand for office. Influenced by the actors involved in selection, difficulty of judicial recruitment varies. Third, the state political context dictates the costs of judicial selection with electoral competition and state liberalism affecting the range of candidates. Together these factors provide an explanation of judicial diversity.

**Office Value - Structural Characteristics**

As noted above, structural characteristics of the state supreme courts determine the value of judicial office. Professionalization, according to Brace and Hall (2001), are the characteristics of office that include salary, staff size, and work load. State courts provide either sufficient resources to make tenure appealing or fail to provide enough support to aid judges in reaching decisions easily. Related to status, Caldeira (1983)
finds prestige varies, where prestige is the impact of court decisions on state policy. For instance, the California Supreme Court is highly influential with decisions affecting millions of state residents. Conversely, the Vermont Supreme Court is much less professionalized and affects far fewer citizens. To better understand the relationship between court structure and diversity, the following hypotheses concerning office value and diversity are provided.

Size of Office

While state supreme courts are smaller than many political institutions, fewer seats nonetheless enhance the status of office (Schlesinger, 1992). With increased scarcity, smaller office size restricts access to groups within society traditionally unable to obtain office. Underrepresented, female and African American, candidates should have greater opportunity for office within larger state courts compared to smaller state courts with fewer positions and minimal turnover. Martin and Pyle (2002) assert women and minority judicial candidates indeed benefit from larger courts. This dissertation includes the following hypotheses about the relationship between judge diversity and the size of office:

H1a_{diversity}: Larger court size will result in greater gender representation.

H1b_{diversity}: Larger court size will result in greater representation of African-Americans.

Like the effect of court size on gender and racial diversity, ideological diversity positively relates to greater size. State legislative research (Fiorina, 1994) suggests legislatures of lower value exhibit ideological variation related to the composition of the legislatures. Similarly, among state supreme courts, a positive relationship is expected between larger courts and ideological diversity.
H1c_{diversity}: Larger court size will result in greater ideological polarity.

Regarding tenure diversity, seniority is greatest in courts with fewer seats and higher office value (Rohde, 1979). Where status is greatest among political institutions with fewer offices, office value increases. Where judges desire greater seniority in courts with greater legal impact, we may assume tenure diversity is inversely related to more office seats.

H1d_{diversity}: Larger court size will result in lower mean court seniority.

Term Length

Like office size, judicial term length affects the attractiveness of office (Carroll, 1985; Diamond, 1977). Related to the status of an institution, longer term lengths with less vulnerability for office are likely related to more competitive and prestigious positions. With high-status positions, competition for office should emerge. Term lengths vary from six years terms within fifteen states to a fourteen year term in the New York Court of Appeals. Three states additionally have lifetime terms similar to the federal judiciary.

Since gender and racial diversity are hypothesized to benefit from less competitive, low-status positions (Alozie, 1992; Alozie and Manganaro, 1993a), shorter term lengths should encourage greater access for underrepresented candidates. Service in higher value offices should be limited for underrepresented, female and minority candidates.

H2a_{diversity}: Longer term lengths will result in greater gender representation.

H2b_{diversity}: Longer term lengths will result in greater representation of African-Americans.
Similar to term length effects on gender and racial diversity, ideological diversity shares a negative relationship with increased office value and, therefore, longer term length. Like state legislatures (Fiorina, 1994), assuming low-status courts encourage a wider range of candidates, shorter term length courts should encourage greater ideological polarity.

\( H2_{\text{diversity}}: \) Longer term lengths will result in greater ideological polarity.

Related to seniority, longer terms should contribute to longer tenures. Longer terms increase the prestige and protection associated with office (Caldeira, 1983). Seniority should relate positively to greater protection and higher office value found in courts with longer term lengths (Rohde, 1979). Longer term lengths logically encourage longer tenures within political institutions (Carey, Neimi, and Powell, 2000).

\( H2d_{\text{diversity}}: \) Longer term lengths will result in higher mean court tenures.

**Court Professionalization**

The level of professionalization is found to affect the attractiveness of most political institutions (Squire 1988a, 1988b). This is no less relevant to judicial institutions and the state supreme courts. State supreme courts provide an array of highly professionalized and less professionalized judicial institutions. Contributions to professionalization at the state supreme court level include increased staff support, higher salary, and minimum docket size. While high levels of professionalism attract stronger candidates, low levels attract lower caliber candidates as well as underrepresented group candidates. Hogan (2001) finds weaker professionalism affects gender representation in state legislatures. At the state supreme court level, lower professionalism should also contribute to greater gender and racial representation.
H3a\textsubscript{diversity}: Higher professionalism will result in lower gender representation.

H3b\textsubscript{diversity}: Higher professionalism will result in lower representation of African-Americans.

For both ideological diversity and tenure diversity, professionalization may have a strong effect. Like the less professionalized, ideologically heterogeneous New Hampshire state assembly (Fiorina, 1994), low professionalism may contribute to greater ideological diversity within the state supreme courts. Less professionalized courts with lower status have fewer resources and attract fewer elite candidates, allowing greater access for ideologically extreme candidates.

H3b\textsubscript{diversity}: Higher professionalism will result in less ideological polarity.

Like other forms of diversity, tenure diversity reacts to lesser professionalism. While higher-status, more professionalized courts face greater competition; candidates seeking office have static or progressive ambition (Rohde, 1979; Schlesinger, 1966, 1992) and remain in office for longer periods of tenure. Judges remain within courts with higher value longer than courts with lesser value.

H3c\textsubscript{diversity}: Higher professionalism will result in higher mean court tenures.

\textit{Mandatory Retirement}

Related to seniority, mandatory retirement should have a negative impact on court tenure. This effect will be greatest for highly tenured judges, as most restrictions begin at the age of seventy.

H4\textsubscript{diversity}: Mandatory retirement laws will result in higher mean court tenures.

\textbf{Office Risk - Methods of Judicial Selection and Retention}
Associated with the risk of office, state methods of judicial selection vary dramatically. Unlike state legislatures, which are partisan structures\textsuperscript{61}, state supreme courts are both partisan and non-partisan institutions. Additionally, selection varies by elected and appointed formats. The impact of these structures affects judicial behavior and the decisions of the courts (Brace and Hall, 1990, 1993, 1997). To understand the impact of state selection methods, it is useful to evaluate the relationship between selection and diversity.

\textit{Elected Method of Selection}

Research demonstrates that political minority candidates benefit differently from elected and non-elected forms of selection (Bratton and Spill, 2002; Hurwitz and Lanier, 2003; Sheldon and Maule, 1997). Women benefit disproportionately from appointed methods of selection (Bonneau, 2001; Hurwitz and Lanier 2001; Martin and Pyle 2002). Moreover, the Fund for Modern Courts (1985) concluded “women (and minorities) were more likely to obtain judicial office when appointed by a governor or within a merit selection system” (Bratton and Spill 2002, 508). The following hypotheses note the expected relationships between diversity and methods of selection:

\begin{align*}
\text{H5a}_{\text{diversity}} &: \text{Elected methods of selection will result in lower gender representation.} \\
\text{H5b}_{\text{diversity}} &: \text{Elected methods of selection will result in lower representation of African Americans.}
\end{align*}

The expected impact of selection on ideological diversity is simpler. Both judicial and legislative (for studies of partisan and non-partisan legislative institutions see Wright and Schaffner, 2002) research notes the impact on selection systems. Sheldon

\textsuperscript{61} Nebraska is an exception to state legislative structure. While other state legislatures utilize a partisan and bicameral structure, Nebraska’s legislature is both non-partisan and unicameral.
and Maule (1997) find selection systems encourage much different candidates to pursue office. While appointed formats encourage candidates with preferences similar to the governor or legislature’s preferences, elected states cannot restrict the selection of candidates according to ideology. Within elected formats, however, judicial diversity is subject to the median voter hypotheses, where candidates closest to median voter are selected (Downs, 1957). Where judicial candidates are restricted by elected formats, more moderate candidates should be selected and court polarity and decreased.

$H5_{\text{diversity}}$: Elected methods of selection will result in less ideological polarity.

Tenure diversity, like ideological diversity, is more stable in appointed courts (Glick and Emmert, 1987). Judges build more seniority where less competition exists for judicial office and where executives and legislatures act as gatekeepers. Contrary to appointed methods, Hall (2001a) notes elected judges face significant competition and challenges for judicial office.

$H5_{\text{d}_{\text{iversity}}}$: Elected methods of selection will result in lower mean court tenures.

*Vacancy Appointments*

Since minority and female judges benefit from appointed selection systems, appointments following judicial vacancy also benefit underrepresented candidates (Bratton and Spill 2002; Martin and Pyle 2000, 2002). Vacancy appointments are another outlet for elite preferences and an opportunity for governors to select underrepresented groups within society. Bratton and Spill (2002) suggest diversity, specifically gender, will be most substantial where judges are appointed rather than elected.

$H6_{\text{a}_{\text{diversity}}}$: Vacancy appointment laws will result in greater gender representation.
H6b_{diversity}: Vacancy appointment laws will benefit in greater representation of African-Americans.

States that permit vacancies by the executive following a judicial vacancy allow more extreme personal preferences (Bratton and Spill, 2002; Hurwitz and Lanier, 2000, 2003). With few constraints, executives select judges with shared preferences. Therefore, the ideological polarity of the courts is greatest in states that allow executives to select judges.

H6c_{diversity}: Vacancy appointment laws will result in greater ideological polarity.

Vacancy appointments permit executives to place judges on state supreme courts prior to normal periods of selection in both elected and appointed states. With incumbency status prior to re-selection, judges gain several ballot advantages including name recognition and incumbent notation (Klein and Baum, 2001; Volcansek, 1981).

H6d_{diversity}: Vacancy appointment laws will result in higher mean court tenures.

Office Costs - Political Context

Public Ideology

Sigelman and Welch (1984) assert political minorities are more likely to win elections where constituents have more liberal preferences. Research also suggests political minorities benefit from appointed systems where liberal executives and legislative elites control the apparatus of government (Bratton and Spill, 2002; Martin, 1987; Martin and Pyle, 2002). Liberal elites and voters are more accepting of underrepresented candidates because of dispositions toward fairness, equality, and descriptive representation. While underrepresented candidates are restrained in elected
systems like traditional candidates, candidates with extreme preferences fare more positively in appointed formats (Hurwitz and Lanier 2003).

\[ H7a_{\text{diversity}}: \text{Greater public liberalism will result in greater gender representation.} \]

\[ H7b_{\text{diversity}}: \text{Greater public liberalism will result in greater representation of African-Americans.} \]

Ideological polarization is also influenced by state liberalism. State supreme court polarity is potentially influenced by the level of state ideology. States with more extreme ideology compared to the national mean should have more homogenous courts, as the median voter hypothesis suggests voters will prefer election candidates with similar predispositions, extreme or otherwise (Downs, 1957).

\[ H7c_{\text{diversity}}: \text{More extreme public ideology will result in less ideological polarity.} \]

**Electoral Competition**

Like state liberalism, electoral competition affects the selection of political minority judges, with greater electoral competition promoting more diversity. Bonneau and Hall (2003) note diversity relates positively to the level of competition. Noting a positive relationship between state electoral competition and the proportion of female and minority judges, more judges from underrepresented groups attain office where competition is highest.

\[ H8a_{\text{diversity}}: \text{Greater electoral competition will result in greater gender representation.} \]

\[ H8b_{\text{diversity}}: \text{Greater electoral competition will result in greater representation of African-Americans.} \]
Like political minority judges, competition also affects ideological diversity. Where competition is greatest, less extreme judicial candidates capture office, lowering the ideological polarity of the state supreme courts.

\[ H_{8c_{\text{diversity}}} : \text{Greater electoral competition will result in less ideological polarity.} \]

Tenure diversity should react negatively to greater electoral competition, as challenges to office are more common with higher electoral competition (Bonneau and Hall, 2003; Hall, 2001). Where state judges face greater competition, decisions to retire and electoral defeat will be greatest.

\[ H_{8d_{\text{diversity}}} : \text{Greater electoral competition will result in lower mean court tenures.} \]

The expected relationships between diversity and judicial office suggest recruitment and the attainment of office respond to state environments and office characteristics. The combination of the value, risks, and costs of office are hypothesized to affect perceptions of office attractiveness and perceptions of status. Generally, the hypotheses assert political minority judges react positively to lower prestige. Additionally, the ideologically range of judges and seniority should respond accordingly to the appeal of office. While the following section of hypotheses entails how composition influences judicial behavior, diversity itself should be highly related to the attributes of state courts that provide access and appeal.

**Research Design and Methodology**

To understand the strategic nature of courts and forms of composition among the state supreme courts, data are used to test hypotheses for both court diversity and court consensus. Using data collected from the Brace-Hall State Supreme Court Data Project,
decisional data from 1995 to 1997 are gathered to allow an investigation of strategic judicial behavior. In addition, both the Brace-Hall State Supreme Court Data Project and Langer’s natural court data project (Langer 2001; Langer and Wilhelm, forthcoming) provide access to biographical information for most state supreme court justices. These data jointly contain information related to state supreme court justices from 1995 to 1998 for every state supreme court, including the Texas Court of Criminal Appeals and the Oklahoma Court of Criminal Appeals. The year of origin for both data sets is 1995, to maintain temporal similarity.

While most studies of state court composition and behavior employ cross-sectional approaches, this study uses a pooled cross-sectional time-series design. In a pooled analysis, cross-sectional data are combined with longitudinal data, forming a pool of states over a period of time. Cross-sectional designs are generally limited because they make few inferences regarding change over time. While a four year investigation is also limited, several natural courts emerge in each state over the period examined allowing change over time relative to diversity. Brace and Jewett (1995) note that recent studies have devoted more effort in conducting comparative research across the states. Continuing in that direction, this investigation seeks to systematically investigate the similarities and differences across the states related to both diversity and structure. While examining just three years within the decisional models, all fifty-two state supreme courts are included within these analyses. Departing from limitations related to time-series analysis used within studies of the federal courts, pooled cross-sectional time-series analysis at the state level allows inferences regarding the impact of differing state
institutions, including the impact of methods of selection and other court structural characteristics, over time and space.

*Diversity Models*\(^{62}\)

The diversity section of this project focuses on the compositional aspects of the state supreme courts. As forms of diversity, gender diversity, racial diversity, ideological diversity, and tenure diversity within each state bench are evaluated from 1995 to 1998. Each form of diversity is a dependent variable for one of four diversity models.

To operationalize diversity, several approaches have been used. Literature focusing on local city councils has explored diversity and descriptive representation with great success. The first measurement approach, a “ratio” computation, involves using an institution’s percentage of minority members divided by the population’s percentage. Engstrom and McDonald (1981) note few studies using this approach find a relationship between electoral systems and the ratio of minority city council members. The second approach, a subtractive measure, involves the difference between the institution’s percentage of minority city council members and the population’s percentage of minorities. Both measures are met with criticism because of city characteristics with small minority populations and the qualitative nature of the subtractive measure. A third approach, a measure of proportion, succeeds as an adequate measure of descriptive representation. This “proportion” measure is the percentage of the institution’s population held by minority members. Studies of local city councils have used this measure of descriptive representation effectively (Engstrom and McDonald, 1981; Sass and Pittman, 2000; Zax, 1990).

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\(^{62}\) For a detailed list of variables used within this dissertation, see Appendix A and Appendix B, which list both the dependent and independent variables.
At the state supreme court level, several alternative measurement approaches have been used. First, count models using the quantity of political minority judges present within the courts have been used successfully (Hurwitz and Lanier, 2003). Second, a binary variable approach with a dependent variable equal to one if diversity is greater to zero has been also used effectively (Bratton and Spill, 2002). The last approach is similar to Engstrom and McDonald's (1981) measure of city council proportion (Alozie, 1996). To date, few studies have found a relationship between the proportion of underrepresented group candidates and electoral systems. The present study uses the later proportion approach owing to varying office size and the principle that greater representation affects decisional behavior differently. Noting specific diversity variables, the gender diversity dependent variable is the proportion of female judges within each state supreme court. A continuous dependent variable, gender diversity ranges from 0 percent to almost 50 percent of the state supreme courts. Similarly, the racial diversity dependent variable is the proportion of African-American judges, ranging from 0 percent to 33 percent. Departing from the proportion form of measurement, the ideological diversity dependent variable is the range of judge ideology using the absolute value of the distance between the most conservative and liberal judges. Range is used as a measurement of court polarity to understand qualitative court difference related to judge ideology. Ideological distance ranges from 3 points to 80 points. Lastly, the tenure diversity dependent variable is computed using the average length of judge tenure. Average tenure among the state supreme courts ranges from almost 3 years to almost 19 years.
With the continuous nature of each diversity dependent variable, ordinary least squares (OLS) analysis is used to estimate the impact of each independent variable. Additionally, each model reports a goodness of fit statistic, the F-test, and the sample size. The $p$ value for each statistically significant independent variable is reported using conventional methods of notation.

The literature focuses on several explanatory variables and how each affects court composition and diversity. These measures include variables related to the risks related to office, the value of the office, and costs related to office. First, risks related to office include factors that create uncertainty within selection. Second, office value is the structural influences of the courts that increase prestige. Value relates to increased levels of professionalization, lesser court size, and longer term lengths. Third, costs linked to office include political influences and the contextual environment.

[INSERT TABLE 4.1 HERE]

The risks associated with office include two independent variables used within prior diversity models: formal method of selection and vacancy appointments (Bratton and Spill, 2002; Hurwitz and Lanier, 2003). Both variables focus on formal state methods of judicial selection. As Table 4.1 demonstrates, state supreme courts utilize five methods of judicial selection: partisan elections, non-partisan elections, legislative appointments, executive appointments, and merit selection appointments. Brace and Hall (1990, 1993, 1997) note formal selection methods can be categorized into appointed and elected forms of selection for statistical purposes. Therefore, the method of selection is a dichotomous variable coded “1” if a state uses an elected format and “0” if a state has an
appointed format. The second office risk variable is the early appointment of judges by the executive where vacancies emerge. Based on prior research (Bratton and Spill, 2002), governors are highly influential actors when filling court vacancies. Vacancy appointments symbolize governor policy preferences and provide interim judges with incumbency status that may benefit later elections. Vacancy authority is coded "1" in states where the governor has the authority to fill a vacancy and "0" in states where the governor lacks such authority. The estimate for this variable signifies whether appointment authority allows executives to influence the bench.

Associated with the structural components of office, four variables estimate the impact of office value: court size, term length, court professionalization, and mandatory retirement. Each variable contributes to the attractiveness of the position. Court size is a continuous measure of court size, ranging from five to nine judges. While the value of a court increases with fewer positions, more positions provide greater opportunities for underrepresented or fringe candidates to be selected (Alozie, 1996). Term length is a continuous measure of term duration as mandated by each state’s constitution. Term lengths vary from six to fourteen years in addition to three states with lifetime terms analogous to the federal judicial system. Lastly, court professionalization is a composite score of staff support, salary, and the docket size (Brace and Hall, 2001). The estimate for court professionalism indicates whether higher professionalization increases or decreases diversity. The final measure is mandatory retirement. States with mandatory

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63 States with merit selection formats are included within the appointed selection category, as judges are initially appointed and face few challenges in later retention elections (Hall, 2001a).
64 Mandatory retirement is only included within the tenure diversity model, as the relationship between seniority and mandatory retirement is expected to be greatest.
retirement are coded “1”, while states without forced retirement are coded “0”. Mandatory retirement is assumed to decrease the size tenure diversity.

Lastly, costs related to office are tied to state political influences. To capture costs affected by the state context, two variables are included within the model, electoral competition and state ideology. First, Holbrook and Van Dunk's (1993) continuous measure of electoral competition provides an estimate for competition on levels of diversity. Higher competition is suggested above to be a moderating influence on court diversity. Second, for the gender and racial diversity models, Erikson, Wright, and McIver's (1993) measure of public liberalism is used to assess the impact of greater liberalism on the selection of political minorities. For the ideological and tenure diversity models, extreme state ideology is tested as an influence on greater polarity or seniority. The difference between the national mean of public liberalism and each state’s individual score is operationalized to test this effect. More extreme state ideology is hypothesized to limit the acceptable range of candidates.

Results

The following analyses note the direct impact of recruitment on diversity. The results demonstrate that the appeal of office, including the value, risks, and costs of office, has a strong impact on the characteristics of the state supreme courts. One goal of this dissertation is to provide a better understanding of how the assessment of judicial office contributes to the diversity of the state high courts.

Courts attract jurists that range in attributes. Based upon this variation, we may expect differences in behavior. To understand the impact of judge attributes, we must first explore those factors that influence the range of attributes found in each state
supreme court. While one court may attract a relatively homogenous group of jurists that share similar ideological preferences and physical characteristics, another court may be very heterogeneous with diverse preferences and characteristics. Following the logic provided by Rohde (1979) the range of attributes will be influenced by recruitment and the attractiveness of office. Where appeal of judicial office is influenced by features affecting the value, risks, and costs associated with office, different characteristics of the courts should emerge where these features vary. One court that is elected, for example, may differ from another that is appointed. Jurists may prefer the safer, institutionally bounded environments of appointed courts, while less risk-averse jurists may seek office within elected courts. The possible differences in composition are many. For example, ideologically extreme candidates may pursue policy goals in appointed courts, while moderate jurists in elected courts pursue office goals and greater cohesion. The analyses below will explore the affects of office appeal on composition in more detail.

[INSERT TABLE 4.2 HERE]

The results for each diversity model are provided below. For each type of court diversity, findings are provided that present variables related to the impact of the value, risks, and costs associated with office. As noted from the goodness of fit, reported by the r-square statistic, the models perform well and the hypotheses largely receive directional support. Table 4.2 also provides an illustration of the expected direction for the hypothesis described above. Figures noted in bold are those expectations that are confirmed by the empirical findings.

Gender Diversity

[INSERT TABLE 4.3 HERE]
Table 4.3 presents the results from the multivariate analysis estimating the influences of gender diversity. The dependent variable is the proportion of female jurists within each state supreme court from 1995 to 1997. The performance of this model is strong with predictors from each category (office value, risks, and costs) emerging as strong indicators of gender diversity. The F-test is statistically significant at the .01 level, indicating the fitted model performs better than the null. The r-square goodness of fit statistic explains almost 36 percent of the variation.

Elected methods of judicial selection have a positive influence on the gender diversity of the bench. This finding is unpredicted, previous literature consistently notes a negative relationship between elected methods of selection and the selection of female justices. Bratton and Spill (2002) assert, however, appointed courts refrain from the selection of women once a single female justice has been selected. While the selection of individual female judges benefits from appointed methods of selection (Goldman, 1997; Hurwitz and Lanier, 2003), greater gender diversity is more difficult in these same courts. If elected systems increase gender diversity, they appear less reactive to existing female justices. Associated with vacancy appointments, there is no support that vacancy appointments increase the diversity of the court related to women. The most consistent influence on gender diversity among court structural characteristics is the level of professionalization, which is negative and statistically significant. As expected, women face fewer obstacles to gaining office in less desirable courts. Where courts are less professionalized with lower salaries, less staff assistance, and larger workloads, female judges benefit, yet this is probably because they face less competition. The findings suggest traditional male candidates contest lower status court positions less often than
high status positions, creating access to underrepresented female candidates. This result is consistent with expectations of prestige and access for political minority judicial candidates. The two additional structural variables (court size and term length) fail to reach conventional levels of statistical significance.

Statistically significant contextual political variables include electoral competition, state liberalism, and the state’s proportion of female attorneys. Female justices are more common in state high courts where electoral competition is highest. Bonneau and Hall (2003) suggest diversity and interest in office should benefit from more competitive states. Furthermore, greater ideological liberalism among the state’s population has the positive and statistically discernable effect of increasing gender diversity. Lastly, the proportion of female attorneys, or the candidate pool, while significant has a negative effect on gender diversity. Unanticipated, greater quantities of female attorneys have a negative and statistically discernable relationship with gender judicial diversity.

*Summary of Results for Gender Diversity*

The gender diversity model in Table 4.3 demonstrates courts are highly responsive to elected methods of selection, more professionalized courts, electoral competition, and increased state liberalism.\(^{65}\) The impact of method of selection suggests elected courts actually increase gender diversity, increasing the proportion of female justices. Similarly, greater electoral competition benefits the selection of women to the bench. As expected, lower status courts provide greater access to women. While the

\(^{65}\) Regions were again controlled within the gender diversity model, having strong statistically significant effect in both the Northeast and the South. No effect was reported within the West, again suggesting regions differ.
model fails to confirm several hypotheses, the findings suggest gender diversity is responsive to institutions that rely upon public feedback and courts with lower prestige.

[INSERT TABLE 4.4 HERE]

**Racial Diversity**

Table 4.4 presents the estimates of those explanatory variables that affect the proportion of African-American minority justices among the state supreme courts. The dependent variable is the proportion of African-American justices in each state throughout the period of this analysis. The F-test is statistically significant at the .01 level, indicating that the model explains racial diversity better than the null. The goodness of fit is very strong with an r-square of .573. While some explanatory variables perform poorly, several parameters emerge as strong or moderately strong predictors of racial diversity. The results provide strong support for the impact of office costs and moderate support for office risks.

Several variables contribute to the proportion of African-American justices across the state supreme courts. More specifically, elected methods of selection have a statistically moderate and negative influence on the presence of African-American justices. While significant, African-American justices benefit from appointed methods of selection. In several states, the additional authority to fill judicial vacancies upon the event of death or resignation is expected to aid racial diversity. Unforeseen, the negative, statistically significant coefficient demonstrates vacancy appointments reduce the

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66 African-American justices, unlike other racial minorities, have received a considerable amount of attention in past research concerning both diversity (Hurwitz and Lanier, 2003; Martin and Pyle 2002) and the impact (Welch, Combs, and Gruhl, 1988; Walker and Barrow 1985) of African-American justices. Consistent with these past studies and seeking to overcome data limitations, this study also evaluates traditionally underrepresented African-American justices as a subset of racial minority justices.
proportion of black justices suggesting minorities do not benefit from vacancy appointments.

Structural characteristics outside of formal methods of selection minimally shape racial diversity. While court size is hypothesized to increase racial diversity, the findings demonstrate this expectation is incorrect. There are fewer African-American justices within larger courts, decreasing racial diversity. Another structural characteristic expected to shape racial diversity is the level of court professionalization. The results for court professionalism, however, fail to reach a conventional level of significance. The final expectation related to office value, term length, fails to reach a conventional level of significance. The measures of court structure fail to confirm that underrepresented racial minority candidates react to the structural characteristics of the state supreme courts with the exception of the influence of court size, which does not receive directional support.

The costs associated with office, noted by state contextual environments, strongly affect racial diversity, however. Each contextual variable reaches a conventional level of significance and provides directional support for their respective hypothesis. The findings confirm greater electoral competition has a strong and positive impact of racial diversity. As argued by Bonneau and Hall (2003), diversity benefits from greater competition. More liberal state public opinion also leads to racial diversity. As states become more liberal, there is a positive influence on racial diversity. Finally, the proportion of African-American attorneys within the attorney population has a strong, positive impact on racial diversity. In states with proportionately more black attorneys, more black justices are on the state high courts. This finding is statistically significant and provides directional support for the hypothesis tested.
Summary of Results for Racial Diversity

The diversity of African-American justices within the state supreme courts is related to several forms of influence.\footnote{Region is included as an impact on racial diversity. Past studies note the impact of region on court composition. By controlling for this impact the variables of theoretical importance are given more creditability. The findings for region note the impact of racial diversification in particular within the South. Noted within Chapter three, black judges are generally more common within the South. This finding may emerge due to the South’s comparatively large proportion of African-American citizens. The Northeast region also reaches a conventional level of significance, providing a weaker though negative effect on racial diversity. Though the variables for region are significant in both the South and Northeast, though not the West, several primary variables of concern still emerge as significant even where region is controlled.} The findings indicate higher proportions of black attorneys within a state have a strong effect on racial diversification. Court structures have almost no impact and methods of selection receive only moderate support. Lastly, state context and the political environment are highly important areas of influence for racial diversity. African-American judicial candidates benefit from more liberal public opinion suggesting African-Americans overcome hurdles for office as the public becomes more ideologically liberal. African-Americans additionally benefit from heightened levels of electoral competition, signaling a desire for office within states with greater competition. The effects of court structure, methods of selection, and the political environment suggest racial diversity within the courts is a product of limited factors, with only the political context playing an important role for the descriptive representation of the African-American population.

[INSERT TABLE 4.5 HERE]

Ideological Diversity

The ideological diversity model reported in Table 4.5 again uses a multivariate model to uncover the impact of variables that contribute to the value, risks, and costs associated with state judicial office. The dependent variable, ideological diversity, is the range of justice preferences in each state supreme court from 1995 to 1997. The
estimators of ideological diversity perform strongly across the model. Strong statistical support emerges for two categories: formal methods of judicial selection and court structure. Weak support emerges only within the category of costs related to office. The F-test is significant at the .01 level, showing the fitted model performs better than the null. The r-square goodness of fit exceeds .59, suggesting the model explains almost 60 percent of the variance related to ideological diversity.

The impact of the explanatory variables on ideological diversity is informative. In the area of risks related to office, or formal methods of judicial selection, elected forms of selection have a negative and statistically significant impact on ideological diversity. Where justices are selected by the public, rather than appointed, there is a decreased range of justice ideology. This finding disputes appointment and merit retention system advocates who claim appointed courts are more homogenous and prone to less conflict than elected courts (Dunn 1976; Dubois 1980). The results suggest appointed courts are more polarized, potentially causing non-cohesive forms of behavior. While there is no evidence that vacancy appointments affect ideological diversity, the strong impact of elected selection methods substantially explains how selection affects ideological composition and polarization.

Connected to structural characteristics, institutional arrangements strongly affect ideological diversity. First, the size of the court has a significant and positive impact on court ideological polarization. As the size of the court increases from five members to nine, ideological diversity becomes more heterogeneous suggesting larger courts allow varying personal preferences. Second, state supreme court professionalization decreases

---

68 State supreme courts have five, seven, or nine permanent justices. While justices may rotate with occasional non-permanent replacements, the size of the court is designated in each state’s constitution.
ideological diversity. With greater judicial resources, state supreme courts encourage less ideologically diverse groups of judges. This finding suggests more ideologically extreme candidates have less access to offices with higher status. Alternatively, in less professionalized courts ideologically extreme candidates may face less competition for office. Term length also has a positive, statistically significant coefficient. The direction of impact, however, is in the unanticipated direction.

The last category, the contextual environment or the costs related to office, performs poorly. Electoral competition has a positive, statistically significant effect on ideological diversity. Unexpectedly, higher levels of state level competition increase the range of personal preferences selected to state judicial office. The second contextual measure, extreme state ideology, is insignificant and has no apparent effect on ideological diversity.

*Summary of Results for Ideological Diversity*

The estimates for this model largely explain ideological diversity. Several variables emerge as extremely strong indicators, including elected methods of selection, the size of office, and court professionalization. Method of selection stands out as an important predictor of ideological diversity, as elected selection systems strongly discourage ideologically heterogeneous courts. These same elected courts encourage courts with more narrow sets of justice preferences. While courts with elected methods of selection are criticized for pandering to the public and to political parties where partisan, the findings suggest elected selection methods may also encourage more

---

69 Every region within the analysis has a strong, positive effect on ideological diversity. While the impact of the South is greatest, both the West and the Northeast contribute to greater ideological diversity compared to the base category, the Midwest. Clearly, region affects ideological polarity among the state high courts, yet where controlled other variables still have strong and statistically discernable effects.
homogenous courts and possibly less conflict. Elections appear to narrow the range of acceptable ideologies. Methods of judicial selection again are important devices for understanding state court attributes with elected courts contributing toward a narrower range of judicial preferences. Elections evidently work to eliminate or reduce ideological outliers.

[INSERT TABLE 4.6 HERE]

**Tenure Diversity**

The data presented in Table 4.6 reveal several factors affect tenure diversity. Tenure diversity, the average length of seniority within the state supreme courts, varies greatly by state as Chapter Two notes. The F-test is again statistically significant at the .01 level, suggesting the fitted model explains tenure diversity better than the null. The model’s level of explanation reported with the r-square statistic, explains almost 30 percent of the model’s variance, with many variables receiving directional support.

A variety of structural and political features affect seniority. First evaluating factors related to political risk, elected methods of selection have a strong, negative impact on tenure diversity. Elected courts have noticeably lower average tenures than appointed state supreme courts. While appointed courts face fewer obstacles for staying in office, elected courts provide sanction from the public regularly. This electoral feedback has the effect of either removing justices from office or decreasing desires for longer tenure. The effect is one of shorter average judicial tenures. The tenure diversity model also indicates vacancy appointments have a positive and statistically discernable effect of increasing seniority. States with gubernatorial appointments following judicial

---

70 Political parties are involved with judicial elections in several states with elected methods of selection. While the non-partisan election format has decreased party influence over candidate selection, partisan selection systems allow parties to both endorse and nominate judicial candidates.
vacancies increase the average tenure of judges, suggesting even limited incumbency status enables longer judicial careers.

Table 4.6 also indicates state court structures and the value of judicial office have a strong impact on tenure diversity. The findings reveal court size increases the average length of seniority. As court size increases, the assumed value of office decreases causing longer judicial careers. Like court size, the term length coefficient is positive and statistically significant. Longer term lengths increase the average tenure of state supreme court justices. While intuitively straightforward, the finding illustrates a strong and clear relationship between term length and tenure length. Related to court professionalization, the coefficient is insignificant failing to reject the null hypothesis. Resources and workload have no perceived effect on tenure diversity. Lastly, states with mandatory retirement rules have longer tenure lengths, which is unanticipated. The length of tenure shares a positive relationship with mandatory retirement rules, suggesting judges enter these courts well before retirement rules have an impact.

Hypotheses related to the costs of office fare poorly. While statistically significant, electoral competition does not receive directional support. The impact of context and office costs appears minimally related to tenure diversity. Judge tenure lengths appear non-responsive to competition, suggesting incumbency overcomes the effects of competition.

*Summary of Results for Tenure Diversity*

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71 Twenty-two states have no mandatory retirement rule and twenty-eight have a forced retirement rule. Of those states with mandatory retirement, the age of retirement differs with twenty states limiting judicial tenure length after the age of seventy, four states after the age of seventy-two, and another four states after seventy-five years of age.
The results for tenure diversity reflect the consistently important impact of selection method. Elected selection methods are a strong negative predictor of tenure diversity, noting the risk associated with public feedback. Similarly, longer tenures are positively related to court size and term length, suggesting judicial institutions affect the tenure diversity of the courts. Overall, the relationship between tenure diversity and state supreme court institutions is very strong with methods of selection and court structures emerging as strong predictors of tenure length.

Summary

Does court diversity relate to methods of selection, the structure of the state high court, or the political environment? The data suggest there are strong relationships between each of these characteristics and diversity. Quite clearly, the composition of the courts is shaped by methods of selection and the character of office. The findings reveal methods of selection are a strong predictor across the categories of diversity, particularly with ideological diversity and tenure diversity. The risks associated with public feedback structure court diversity in such a manner that courts differ where selection methods vary. The authority to appoint justices to fill vacancies is also important with average lengths of seniority increasing where justices are appointed to fill a vacancy.

While the impact of structure varies, there is evidence that the value related to office, including term length and court professionalization, affects the recruitment of candidates and the appeal of judicial office. For gender diversity, the impact of structure is perceptible with the negative impact of court professionalization. Underrepresented female candidates are more common among less professionalized courts, while males

---

72 Region again has a sizable impact on diversity, in this case tenure diversity. Only the South has a statistically significant impact on tenure diversity, exerting a strong, positive impact on the average court tenure length within courts in that region.
disproportionately benefit from more professionalized courts. For both ideological
diversity and tenure diversity, structural characteristics are strong predictors of diversity.

State contextual characteristics also affect diversity. Racial diversity is strongly
and positively related to the proportion of minority attorneys within a state. State
liberalism is positively related to both racial and gender diversity, suggesting more liberal
states encourage diversity of political minority justices. Lastly, electoral competition
greatly affects diversity with competition sharing a positive relationship with racial
minority and female candidates.

The effects of each category suggest a multivariate integrated approach to the
attractiveness of office is appropriate. The relationship between categories of recruitment
and diversity suggest forms of diversity vary in expected ways. The most salient aspect of
each model remains the relationship between method of selection and diversity. Elected
methods of selection, the factor contributing toward risk, strongly affects diversity. As
noted in the following chapter, with selection directly affecting diversity, selection
methods may also indirectly influence decisional behavior. Courts with differing
compositions are likely inclined toward differing collective action problems; therefore,
the impact of selection and office appeal indirectly may affect collective outcomes of the
courts. While forms of diversity affect may consensus, the results of this chapter suggest
methods of selection are important factors in predicting diversity.
<table>
<thead>
<tr>
<th>Gubernatorial Appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Connecticut, Maine, New Hampshire, New Jersey, New York</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Legislative Appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>South Carolina, Virginia</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Judicial Nominating Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Wyoming</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Partisan Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, Wisconsin</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-Partisan Election</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama, Arkansas, Illinois, Louisiana, North Carolina, Pennsylvania, Texas, West Virginia</td>
</tr>
</tbody>
</table>

**Table 4.2**  
Expected vs. Confirmed Findings  
Diversity in State Supreme Courts

<table>
<thead>
<tr>
<th>Variable</th>
<th>Gender Diversity</th>
<th>Racial Diversity</th>
<th>Ideological Diversity</th>
<th>Tenure Diversity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elected Method of Selection</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
<td>Vacancy Appointments</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Court Size</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Court Professionalization</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Term Length</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
<td>State Liberalism</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
<td>Candidate Pool</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>N.A.</td>
<td>N.A.</td>
</tr>
</tbody>
</table>

1Expectations in bold are confirmed within the empirical findings.  
2Expectation is rejected if either the finding is statistically insignificant or has an unexpected direction of impact.
Table 4.3
State Supreme Court Diversity
OLS Analysis of Gender Diversity†

Dependent Variable – Proportion of Female Justices

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>t</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elected Method of Selection</td>
<td>.065</td>
<td>.020</td>
<td>3.22***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Vacancy Appointments</td>
<td>.028</td>
<td>.020</td>
<td>1.42*</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>-.011</td>
<td>.007</td>
<td>-1.64**</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Court Professionalization</td>
<td>-.023</td>
<td>.009</td>
<td>-2.54***</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Term Length</td>
<td>.003</td>
<td>.003</td>
<td>.92</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>.006</td>
<td>.001</td>
<td>7.06***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>State Liberalism</td>
<td>.005</td>
<td>.002</td>
<td>2.71***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Candidate Pool</td>
<td>-.572</td>
<td>.330</td>
<td>-1.73**</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>.109</td>
<td>.106</td>
<td>1.03</td>
<td></td>
</tr>
</tbody>
</table>

R²                          | 0.359       |
F-test                      | 9.70***     |
N                           | 176         |

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
†Regional controls for Northeast, Midwest, South, and West regions are included in analyses.
**BOLD expectations are statistically significant, yet do not provide directional support for hypothesis.
Table 4.4
State Supreme Court Diversity
OLS Analysis of Racial Diversity†

Dependent Variable – Proportion of African-American Justices

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>t</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elected Method of Selection</td>
<td>-.014</td>
<td>.009</td>
<td>-1.58*</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Vacancy Appointments</td>
<td>-.054</td>
<td>.007</td>
<td>-7.35***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>-.008</td>
<td>.004</td>
<td>-1.73**</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Court Professionalization</td>
<td>.008</td>
<td>.005</td>
<td>1.51*</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Term Length</td>
<td>-.001</td>
<td>.001</td>
<td>-.98</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>.001</td>
<td>.0005</td>
<td>2.59***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>State Liberalism</td>
<td>.002</td>
<td>.001</td>
<td>3.01***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Candidate Pool</td>
<td>2.277</td>
<td>.240</td>
<td>9.50***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>.112</td>
<td>.046</td>
<td>2.46***</td>
<td></td>
</tr>
</tbody>
</table>

R² 0.573
F-test 92.47***
N 176

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
†Regional controls for Northeast, Midwest, South, and West regions are included in analyses.
**BOLD** expectations are statistically significant, yet do not provide directional support for hypothesis.
### Table 4.5
State Supreme Court Diversity
OLS Analysis of Ideological Diversity†

Dependent Variable – Range of Justice Ideology

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>t</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elected Method of Selection</td>
<td>-12.459</td>
<td>2.478</td>
<td>-5.06***</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Vacancy Appointments</td>
<td>-3.654</td>
<td>2.501</td>
<td>-1.46*</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>2.998</td>
<td>1.024</td>
<td>2.93***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Court Professionalization</td>
<td>-2.459</td>
<td>1.048</td>
<td>-2.35***</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Term Length</td>
<td>.860</td>
<td>.462</td>
<td>1.86**</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>1.329</td>
<td>.128</td>
<td>10.36***</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
<td>-.036</td>
<td>.322</td>
<td>-.11</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>-43.258</td>
<td>10.418</td>
<td>-4.15***</td>
<td>-</td>
</tr>
</tbody>
</table>

R²: 0.589
F-test: 36.89***
N: 176

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
†Regional controls for Northeast, Midwest, South, and West regions are included in analyses.
**BOLD** expectations are statistically significant, yet do not provide directional support for hypothesis.
Table 4.6
State Supreme Court Diversity
OLS Analysis of Tenure Diversity†

Dependent Variable – Mean Length of Justice Tenure

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>t</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elected Method of Selection</td>
<td>-1.600</td>
<td>.388</td>
<td>-4.13***</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Vacancy Appointments</td>
<td>2.525</td>
<td>.505</td>
<td>5.00***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>.644</td>
<td>.145</td>
<td>4.44***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Court Professionalization</td>
<td>.009</td>
<td>.175</td>
<td>.05</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Term Length</td>
<td>.192</td>
<td>.051</td>
<td>3.77***</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>.077</td>
<td>.021</td>
<td>3.61***</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Mandatory Retirement</td>
<td>.720</td>
<td>.380</td>
<td>1.90**</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>-3.565</td>
<td>1.453</td>
<td>-2.45***</td>
<td></td>
</tr>
</tbody>
</table>

R² 0.300
F-test 10.60***
N 184

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), ***(p ≤ .01).
†Regional controls for Northeast, Midwest, South, and West regions are included in analyses.
BOLD expectations are statistically significant, yet do not provide directional support for hypothesis.
Part II

The Impact of Judicial Diversity: An Analysis of Consensus
Chapter Five

Conflict and Consensus: Examining Variations in Outcomes on
State Supreme Courts

Consensus within judicial institutions is a crucial variable for the impact of court
decisions. Accordingly, the size of the majority is instrumental for a decision's impact.
Scholars suggest consensus is important for both judicial institutions and society. For
instance, the strongest form of consensus, unanimity, has significant political and societal
importance. Legal institutions and the public respond to strong, forceful opinions that
explain with clarity the position of the court. While the importance of consensus has
changed over time both within the federal (Epstein, Walker, and Dixon, 1988) and state
courts (Sheldon, 1999), consensus remains important. While early American courts
favored separate majority opinions in rendering majority decisions, the judiciary later
favored unanimity as a mechanism for expressing strength of precedent and legal
certainty (see Kaminski and Schaffer, 2005). By the early 1800's, influenced by Chief
Justice Marshall, a tradition began of encouraging unanimous decisions to remove
uncertainty and strengthen legitimacy for decisions of the United States Supreme Court.
This resoluteness by the courts contributed to judicial outcomes that directed society
toward legal and political change from civil rights to interstate commerce.

This dissertation argues that the characteristics of the state supreme courts affect
the consensual nature of state supreme courts. Focusing broadly on the relationship
between diversity and consensus the following analyses offer descriptive results related
to consensus within four areas of policy: capital cases, non-violent crimes, taxation
policy, and tort law. These areas of policy are included because of their diverse nature;
however, they separate by their criminal or civil nature. Capital and non-violent crime
cases are distinct, offering two different forms of judicial policy. Similarly, taxation policy and tort law cases are quite different and may bring forward different types of behavior. By the inclusion of these four areas of judicial policy, we may generalize more completely about the impact of court diversity on judicial outcomes. Lastly, because of the qualitative importance of decision strength, consensus is measured by the formation of unanimous majority coalitions within state supreme court decisions.

[INSERT TABLE 5.1 HERE]

Criminal Cases

Consensus – Decisions Involving Capital Crimes

Throughout the states few areas of judicial policy create such reaction as capital cases, in particular decisions involving the death penalty. The common presence of race in sentencing, the constitutional right to a fair trial, and appropriate punishments for violent crimes has led to strong public reactions related to capital cases. As Baum (2003) notes, capital cases embody a “hot-button” response by judges to the public, particularly for judges serving in elected courts. In relation to capital cases, the public remains more attentive to security and crime concerns than many other areas of law (Norrander, 2000). As Langer (2002) notes, where large groups of people are attracted to a single issue there is more pressure placed on the judiciary and less independence to act sincerely. Accordingly, attention to public concerns toward crime and violence may lead to varying degrees of case salience and differing forms of behavior.

[ENTER FIGURE 5.1 HERE]

Striking evidence emerges related to state-level variation of consensus within capital cases. Table 5.1 provides the proportion of cases decided unanimously within
each area of policy. Where courts fail to reach unanimity, dissensus is thought to reduce decision impact (Sheldon, 1999). Figure 5.1 provides an illustration of state level consensus patterns. Overall, almost 65 percent of state capital cases were decided unanimously. At the upper extreme, three states, Alaska, Delaware and Maine, display the strongest patterns of consensus where the proportion of unanimous capital cases is 100 percent. This finding suggests that capital cases in many states are met with cohesive court behavior that deters questions regarding court legitimacy. At the lower bound, the Texas Court of Criminal Appeals emerges as the least consensual state supreme court with only 4 percent of the capital cases heard on appeal reaching unanimity. If unanimity is a reflection of certainty of law, the pattern of consensus in Texas suggests law speaks less resolutely than in Alaska, Delaware and Maine. To further demonstrate the variance of consensus patterns, unanimous decisions within the Texas Court of Criminal Appeals, which hears all capital case appeals, represented only 3 percent of those appeals heard in 1995, the minimum for any year within this study.

Associated with the range of decision outcomes, Figure 5.1 illustrates that the range of consensual behavior varies widely. Cross-state variation is quite remarkable with unanimity ranging from 100 percent to 4 percent. Noted by cross-state variation, no single pattern of consensus emerges throughout the states. Evidently, consensus is not the norm of behavior for every state.

**Consensus – Decisions Involving Non-violent Crimes**

[ENTER FIGURE 5.2 HERE]

Like capital cases, consensus within non-violent crimes varies as Figure 5.2 illustrates. Unlike murder decisions, non-violent crimes represent a less salient form of
judicial policy with public attention less intense than crimes involving murder. Non-violent crimes include disorderly public behavior, driving under the influence of alcohol or narcotics, public drunkenness, fraud, prostitution, possession of stolen property, traffic law violations, vagrancy, vandalism, and more. Table 5.1 again presents the proportion of unanimous decisions related to non-violent crimes, with unanimous behavior in less than 62 percent of state non-violent crime decisions. States with the highest levels of consensus approach unanimity in every non-violent decision heard on appeals. Consensus in Rhode Island and Virginia was extremely strong, with unanimous decisions in every non-violent crime appeal. At the minimum, Michigan had no unanimous decisions during the period of this analysis.\textsuperscript{73} Like capital cases, courts differ by their willingness to act cohesively. The contrast is evident when comparing the extremes, with states either acting cohesively or non-cohesively. Like capital cases, significant variation exists throughout the states. The range of consensus is quite similar to capital cases with remarkable variation related to non-violent crime decision.

Civil Cases

The following forms of judicial policy are civil in nature. While distinct from criminal judicial policy, civil policies provide an additional area of analysis to determine if consensus is driven by state or case characteristics.

\textit{Consensus – Decisions Involving Taxation Policy}

Taxation cases generally involve disputes between an individual or business and a government entity. Furthermore, this area of policy involves greater public attention owed to public reactions to higher levels of taxation (Bowler and Donovan, 1995; Welch,\textsuperscript{73} Interestingly, Martin and Pyle (2000) note the Michigan Supreme Court is highly diverse and partisan.)
1985) and personal responses to tax burden (Kinsey, Grasmick, and Smith, 1991). Table 5.1 reports that almost 68 percent of taxation cases reached unanimity.

**[ENTER FIGURE 5.3 HERE]**

Figure 5.3 demonstrates that patterns of consensus vary dramatically. Taxation cases were unanimous in just over 68 percent of the cases sampled. Nine states, including Maryland, Tennessee, and Virginia, voted unanimously in every taxation decision. Interestingly, West Virginia alone heard eighteen taxation cases, voting unanimously in each. Compared to states with higher levels of consensus, Oklahoma voted non-unanimously in every taxation case heard from 1995 to 1997, hearing eleven taxation cases in total. Importantly for civil areas of law, every state heard at least one taxation appeal with Ohio's docket including eighty taxation appeals from 1995 to 1997. Like criminal cases, state level variation among taxation cases provides an opportunity to understand conditions that create consensus. While fewer taxation cases were docketed than capital cases, 766 compared to 2393, respectively, variation is evident. Cross-state patterns of variation illustrated in Figure 5.3 suggest consensus differs throughout the state high courts.

**Consensus – Decisions Involving Tort Law Policy**

**[ENTER FIGURE 5.4 HERE]**

Tort law cases include premises liability, medical and professional malpractice, labor disputes, automobile related litigation, and several other areas of law. Table 5.1 reveals like each other area of law, the event of unanimity within tort appeals is common with over 66 percent of the cases sampled reaching unanimity.
Figure 5.4 illustrates that consensus varies strongly throughout the states. While many states reach consensus quite often, others display intense conflict. At the upper extreme, the New Mexico Supreme Court reached unanimity in every tort appeal heard. At the lower extreme, only 6 percent of the tort appeals docketed reached a unanimous decision in the Ohio Supreme Court. The dissimilarity between the most consensual and least consensual states as well as the gradual state-level variation noted in Figure 5.4 suggests states react to tort appeals quite differently. The variation apparent within Figure 5.4 appears remarkably similar to patterns of consensus in capital cases and non-violent crime cases. Like those areas of policy, the range of consensus within tort appeals is dramatic.

*Why Variation?*

Each area of policy illustrates wide variation throughout the states with some state courts encouraging consensus and others encouraging conflict. In several states, we see either entirely consensual outcomes or conflict within every decision. However, we still are unclear what factors contribute toward such variation. Why should one state prefer consensus while another prefers conflict? The explanations are numerous, yet they might include preferences for legal clarity, institutional differences that encourage consensus, differences in the compositional attributes of the state supreme courts, or a combination of these explanations.

Past research suggests preferences for legal clarity and institutional differences are highly important explanations of consensus. Sheldon (1999) asserts state supreme courts prefer unanimity and extreme consensus to strengthen precedent and the certainty of law. Clearly, many states support such an argument, yet many states seem
unconcerned with conflict or the size the majority coalition. The institutional explanation of consensus is also noteworthy. Maltzman, Spriggs, and Wahlbeck (2000) argue that institutional characteristics encourage consensus including discretionary opinion assignments, the order of conference voting, and threats of dissent prior to the formal decision in conference. At the state level, structural characteristics influence judicial consensus with opinion assignments and seniority rules, in addition to methods of selection and other structural characteristics, influencing judicial outcomes and consensus (Brace and Hall, 1990, 1993). The final explanation of judicial consensus, the range of court preferences and attributes, merits further attention. As Chapter Two notes, the composition of the state supreme courts is very diverse. The impact of such diversity provides, in addition to institutional and legal perspectives of consensus, an opportunity to further understand differences in decision outcomes.

[ENTER TABLE 5.2 HERE]

Table 5.2 shows the level of consensus correlation for each area of law throughout the states. Correlations are conducted using a pair-wise correlation of each policy area and the proportion of unanimous decisions found in each state supreme court related to that policy areas. The results are notable. Each area of policy is statistically correlated with each other area of law suggesting states have clarity of law preferences across policy areas. One state that prefers consensus in one area of law might also prefer legal clarity for another area of law. The results suggest consensus is positively correlated to other forms of consensus, signifying courts prefer consensus across policy types. To further understand conditions that encourage legal clarity and certainty of law, the remainder of this thesis will evaluate those conditions within the state supreme courts that contribute to
consensus. Primarily, where the range of preferences and characteristics are alike within similar institutional arrangements, similar policy outcomes are expected to emerge. Where these attributes differ, however, differing forms of consensus should emerge.

**Summary**

States vary considerably in terms of consensus. While later analyses explore the impact of diversity on consensus, the descriptive findings within this chapter confirm consensus varies throughout the state supreme courts irrespective of judicial policy. While consensus within capital cases demonstrates wide variance, other policies also vary substantially. Overall, variation is sufficiently strong across the states to merit a more detailed analysis of those conditions contributing toward conflict and consensus.

As noted above, consensus implies that courts are resolute, instructing the legal community and society to respect the findings of the court. Where greater consensus establishes greater precedent, many states encourage support for their decisions. In several states like California and Ohio, however, consensus is anything but common. In these states, support for judicial outcomes should be least. This dissertation seeks to better understand the forces that affect consensus. For the purpose of this dissertation, these forces include the range of judge attributes found in each state supreme court as well as the institutional characteristics that influence collective action outcomes. While later chapters provide a more detailed explanation of forces expected to influence consensus, the findings within this chapter illustrate that variation is substantial and deserving of investigation.
Table 5.1
Unanimous Majority Coalitions in State Supreme Courts

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Criminal Cases</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Capital Case Consensus</td>
<td>57.6%</td>
<td>60.8%</td>
<td>63.4%</td>
<td>60.7%</td>
</tr>
<tr>
<td>Non-Violent Crimes Consensus</td>
<td>53.2%</td>
<td>63.6%</td>
<td>69.6%</td>
<td>61.9%</td>
</tr>
<tr>
<td><strong>Civil Cases</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Taxation Law Consensus</td>
<td>62.6%</td>
<td>73.0%</td>
<td>68.3%</td>
<td>67.9%</td>
</tr>
<tr>
<td>Tort Law Consensus</td>
<td>65.7%</td>
<td>67.2%</td>
<td>65.7%</td>
<td>66.2%</td>
</tr>
</tbody>
</table>

Table 5.2
Pair Wise Correlations of Unanimous Decisions

<table>
<thead>
<tr>
<th></th>
<th>Capital Cases</th>
<th>Non-violent Cases</th>
<th>Taxation Cases</th>
<th>Tort Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital Cases</td>
<td>1.0000</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Non-violent Cases</td>
<td>0.6362*</td>
<td>1.0000</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Taxation Cases</td>
<td>0.5136*</td>
<td>0.6411*</td>
<td>1.0000</td>
<td>-</td>
</tr>
<tr>
<td>Tort Cases</td>
<td>0.6908*</td>
<td>0.7213*</td>
<td>0.7581*</td>
<td>1.0000</td>
</tr>
</tbody>
</table>

Note: Statistically significant parameter estimates are denoted by * (p ≤ .01).
Figure 5.2
Consensus in State Supreme Courts
Non-Violent Crime Cases
Figure 5.3
Consensus in State Supreme Courts
Taxation Cases

[Bar chart showing the percentage of unanimous cases across various states.]
Figure 5.4
Consensus in State Supreme Courts
Tort Cases
Chapter Six

Evidence of State Supreme Court Consensus: The Impact of Court Attributes

Research concerning judicial politics reveals judges behave strategically based on perceptions of colleagues and the structural organization of the judiciary. In addition, judicial voting and consensus vary according to additional factors, including the level of salience and formal methods of selection. Salience, noted by Pinello (1995) and Langer (2002), conditions judicial behavior at the state supreme court level, increasing or decreasing the range of voting alternatives. Where more salient policy areas exist, judges are more sensitive to the preferences of other political elites. Where cases are less salient, judges are more inclined to vote their sincere preferences. Elected judges, furthermore, appear more responsive to public preferences than non-elected judges, depending on the salience of an issue to the public. This investigation extends the strategic behavior perspective with the inclusion of court diversity as a dimension of the influences affecting decisional outcomes. Just as we expect judges to vote differently when other political elites or the public may become aroused by their decisions, judges may behave differently where courts are composed differently. State supreme courts vary widely in terms of their diversity. The degree of gender, racial, ideological, and tenure diversity may each affect the decisions of courts. In this chapter, forces that account for differing levels of diversity are considered.

Both with limited studies and more systematic analyses of state supreme courts, prior research suggests an interplay of factors condition the behavior of judges (Brace and Hall, 1995, 1997) and courts (Brace and Hall, 1990; Langer, 2002). Among factors that influence judicial behavior are formal methods of selection, the contextual
environment, judge ideology, and case attributes. Like legislators (Mayhew, 1974; Fenno, 1973), judges react to their environments, assuming personal vulnerability within high-profile policy debates such as capital punishment and abortion (Baum, 2003; Hall, 1987, 2001a). The impact of electoral consequences varies with the level of public attention and the actors affected with state public opinion and electoral competition affecting judicial decision-making where stronger linkages between judges and the public exist. In addition to external constraints, judge preferences, as argued by Segal and Spaeth (1993, 2002), affect decisions to sustain or overturn appeals cases. The impact of preferences, however, is conditioned by selection systems and the political environment. While the federal courts have largely autonomous judges, elected state judges may be sanctioned by the electorate promoting strategic behavior. Lastly, judges consider the merits of a case, including all mitigating and aggravating factors. Votes of reversible error require substantial legal stimuli, as judges are unwilling to overturn lower court decisions without clear legal justification (Brace and Boyea, 2004; Brace and Hall, 1997).

Importantly, patterns of strategic behavior differ by formal methods of selection with behavior differing by court structure and general case characteristics. According to Baum (2003) divisive “hot button” issues exist, while less sensitive cases also exist. Langer (2002) suggests areas of policy differ by the breadth of impact. Cases affecting few individuals and with few social and legal consequences receive the least attention. Policy areas that affect the public at-large, however, are highly salient. While no clear agreement exists over the definition of saliency by policy area, capital cases are fairly divisive, involving public perceptions of criminal punishment and heinous crimes. For this reason, this examination looks at all capital cases as a salient form of policy. At the
other end of the criminal spectrum are non-violent crimes. In contrast to salient crimes, non-salient crimes issues include issues related to fraud, forgery, vagrancy, and other crimes where violence is not involved. Criminal cases, however, may differ from civil cases, so civil cases are included within this analysis. The salient civil category is taxation cases. Like policy, taxation affects a large breadth of the public unlike less salient policy areas. For this reason, tort law cases are included as the final non-salient policy area. Interpretation of diversity, including gender, racial, tenure and ideological diversity, provides informative cues concerning judicial behavior within each policy area.

Expectations about Consensus: The Role of Diversity in Decision-Making

Gender Diversity

The impact of gender on judicial decision-making causes considerable debate. Like legislative research at the national, state, and local levels, there is disagreement over the impact of female representation. Non-substantive arguments (Gruhl, Spohn, and Welch, 1981; Segal, 2000; Walker and Barrow) suggest gender has no impact on judicial behavior. With substantive representation arguments, however, different explanations of behavior emerge. State supreme court research suggests that substantive representation by gender indeed emerges within state court decisions causing more liberal outcomes and greater dissensus (Allen and Wall, 1993; Songer and Crews-Meyer, 2000). This dissertation focuses on this debate, arguing that substantive representation should be greatest in elected courts, while least within appointed courts decisions.

Divergent from past state court studies of gender representation, the following analysis suggests that women and men overcome many of the same hurdles yet these hurdles differ by method of selection. The prior section notes that women rise to the state
high courts more frequently within elected courts, rather than appointed courts, again suggesting that access to appointed courts is limited. This access may contribute to more consensual and coalition-building approaches by female jurists within appointed courts. Therefore, women should display more independent and less consensual forms of behavior in elected courts. In elected courts, women may respond to specific constituencies that support distinct positions that women identify more closely with. This effect should be strongest within discrimination or tort cases, however, representation of specific social groups should create differences generally where individual seek reelection as in all elected courts. Within appointed courts, however, where women are selected by a state executive with or without the assistance of a nominating commission, more consensual forms of behavior may exist. Thomas (1991) suggests that the presence of more women within state legislatures contributes toward larger coalitions and positions favorable toward women. Within state supreme courts, a greater proportion of female jurists may contribute toward consensus and the event of unanimous majority coalitions.

The following hypotheses note the disagreement within the area of gender impact. Accordingly, three hypotheses are formed related to substantive and non-substantive representation debate. First, where judges bring to the court similar views and predispositions, then no effect on consensus should be noted in any court. This is a non-substantive argument. Second, where judges affect consensus either contributing to greater or lesser consensus, then female jurists should contribute to the consensual nature of each court’s policy. For women, this effect should be negative within elected courts where female judges cater more actively to specific constituencies. Appointed courts,
alternatively, may encourage more consensual policy as the selection of women within these courts is less common and dependent on the state executive.

$H_{1_{\text{consensus}}}$: Increased gender diversity will have no effect on the likelihood of unanimity within any state supreme court.

$H_{2_{\text{consensus}}}$: Increased gender diversity will decrease the likelihood of unanimity within elected courts.

$H_{3_{\text{consensus}}}$: Increased gender diversity will increase the likelihood of unanimity within appointed courts.

**Racial Diversity**

Similar to gender diversity, substantive representation proponents suggest that African American judges affect case outcomes; however, blacks and whites behave less distinctly than male and female judges according to much of the literature (Steffensmeier and Britt 2001; Walker and Barrow, 1985; Segal, 2000). Where differences are present, they often emerge within racially charged issues, such as capital and employment discrimination cases (Steffensmeier and Britt 2001). Differences are less likely within cases where race is not a factor. The clearest behavioral differences emerge within incarceration decisions (Steffensmeier and Britt 2001; Welch, Combs, and Gruhl 1988) as well as sentence appeals at the appellate level (Uhlmann 1978). As an explanation, Kanter (1977) suggests underrepresented, black judges bring characteristics to the bench that causes distinct patterns of behavior. An alternative explanation suggests few substantive differences exist (Segal 2000; Spohn 1990a, 1990b; Walker and Barrow 1985).

As with gender diversity, racial differences manifest differently within appointed and elected state courts. The following hypotheses structure the expected relationship between racial diversity and consensus, as well as their effects by method of selection.
Unlike gender diversity, based on the previous findings African Americans actually have greater access to appointed courts. For this reason, blacks should be more independent within appointed courts. Exercising their sincere ideological preferences, African-Americans may respond to greater access by displaying greater dissensus. Unlike women, access for blacks within appointed courts is greatest, yet election formats provide less access. Therefore, blacks should display less independence within elected courts. The following hypotheses, like the gender impact hypotheses, are divided into non-substantive and substantive forms.

\( H_4^{consensus} \): Increased racial diversity will have no effect on the likelihood of unanimity within any state supreme court.

\( H_5^{consensus} \): Increased racial diversity will increase the likelihood of unanimity within elected courts.

\( H_6^{consensus} \): Increased racial diversity will decrease the likelihood of unanimity within appointed courts.

**Ideological Diversity**

While the attitudinal model suggests judges vote according to their personal preferences (Segal and Spaeth, 2002), the strategic neo-institutional perspective suggests several factors condition the impact of ideology (Brace and Hall, 1990, 1997; Maltzman, Spriggs, and Wahlbeck, 2000) with preferences being only a single predictor of judicial behavior. The impact of ideological diversity should be most pronounced in appointed courts that more closely approximate the federal appointed courts. Ideological diversity, however, should be less central in elected courts, as judges avoid sanctions and strategically moderate their behavior. Therefore, ideological diversity should decrease
consensus in appointed courts as ideological conflict increases. Ideological diversity should have a less pronounced effect in elected courts.

\[ H7_{consensus} \]: Increased ideological diversity will decrease the likelihood of unanimity within appointed courts.

**Tenure Diversity**

The seniority of judges has long been an explanation of dissent (Snyder, 1958) with junior judges conforming to legal precedent seen as a common characteristic of judicial behavior. Junior judges join majorities non-separated regardless of ideological similarity. Snyder suggests junior judges are less comfortable pursuing ideologically extreme positions. Furthermore, both case complexity and increased work load favor uniformity among junior judges. Acclimation to court norms is a dynamic process with judges growing more independent as they become more senior. Hettinger, Lindquist, and Martinek (2003) suggest acclimation to court norms and work load responsibilities occur within the first two years of service.

\[ H8_{consensus} \]: Longer mean court tenure will decrease the likelihood of unanimity across all policy types.

**Control Variables**

The neo-institutional perspective of state judicial behavior predicts features of the courts and the contextual environment influence behavior. Such features as intermediate appeals courts, opinion assignment rules, size of office, state ideology, electoral competition, and case stimuli, influence the adoption of norms of universalism (Weingast, 1984). State supreme courts provide an avenue for testing these assumptions by looking at consensus. For an adequate explanation of institutional influences, one must consider institutional structures that encourage universalism.
Structure - Intermediate Appellate Courts

State intermediate appellate courts exist in thirty-eight states. The presence of lower appellate courts consistently decreases the likelihood of consensus and decreases the level of conflict in state supreme courts (Brace and Hall, 1990). Here the influence of lower appellate courts is considered. Consistent with past evaluations of judicial dissent (Brace and Hall, 1990; Canon and Jaros 1970; Glick and Pruett, 1986), consensus is expected to be lowest in states with intermediate appellate courts. Lower appellate courts screen out cases that are more easily solved leaving more difficult cases for the higher appellate court.

$H_{9_{\text{consensus}}}$: The presence of state intermediate appellate court will decrease the likelihood of unanimity.

Structure - Opinion Assignment Rules

Opinion assignments, like many other court features, vary from state to state. While many courts use rotating assignment rules, other courts like the United States Supreme Court utilize discretionary forms of assignment with the chief justice or ranking justice choosing the opinion author. More simply, opinion assignment rules divide into random and non-random assignments. Prior research (Brace and Hall, 1990, 1999) suggests random opinion assignment rules create conflict, as sanctions are removed from the voting process. Random opinion assignments should, therefore, promote conflict and increased dissensus.

$H_{10_{\text{consensus}}}$: Random opinion assignment rules will decrease the likelihood of unanimity.

Structure - Office Size
Like random opinion assignments, state supreme court office size varies substantially, ranging from five to nine judges. Scholars emphasize more prestigious institutional positions are those institutions with the fewest available positions (Fiorina, 1994; Rohde, 1972; Shapley and Schubert, 1954). Accordingly, sincere behavior increases with the size of office, as noted by Hall’s (1987) study of the Louisiana Supreme Court. With increased size, judges face fewer pressures to join the majority, as the value of an individual vote decreases.

\[ H1_{\text{consensus}}: \quad \text{Larger office size will decrease the likelihood of unanimity.} \]

**Political Context - Public Opinion**

The contextual environment of each state is moreover an important explanation of judicial decision-making. More complex political environments produce greater conflict and disagreement, especially within institutions that channel the political environment into the courts by electoral feedback. Two standard state contextual characteristics are public liberalism and electoral competition. State liberalism (Erikson, Wright, and McIver, 1993) reflects public opinion. For purposes of this investigation, extreme public opinion is investigated to determine the impact of ideologically extreme public sentiments on consensus. Where judges do not face public feedback through elections, reaction to more extreme public opinion is minimal (Brace and Hall, 1997, 1999; Hall, 2001a). Where judges face public feedback, however, courts and judges should prefer consensus. To better isolate themselves from political reprisals, judges should support oversized majorities in a manner similar to how members of Congressional committees log roll to produce universalistic outcomes to enhance their chances of reelection (Weingast, 1980; Niou and Ordeshook, 1984). Hence,
H12\textsubscript{consensus}: More extreme public ideology will increase the likelihood of unanimity within elected courts.

Political Context - Electoral Competition

Electoral competition is related to greater consensus and strategic behavior that reduces conflict (Brace and Hall, 1993, 1997). Courts avoid negative public reaction within elected states by voting as a cohesive unit where competition is greatest.

H13\textsubscript{consensus}: Higher electoral competition will increase the likelihood of unanimity within elected courts.

Case Characteristics

Lastly, general case characteristics and case stimuli also affect case outcomes and consensus. Maltzman, Spriggs, and Wahlbeck (2000) find the United States Supreme Court reacts negatively to greater case salience and appeal complexity contributing to dissensus. At the state level, a similar finding is noted by Brace and Hall (1997) and Brace, Langer, and Hall (2001) suggesting greater legal stimuli encourages dissensus and more independent behavior. Case saliency is noted by the participation of third parties, while appeal complexity is noted by the quantity of legal challenges within an appeal.

H14\textsubscript{consensus}: Third party briefs decrease the likelihood of a unanimous majority coalition.

H15\textsubscript{consensus}: Greater appeal complexity decreases the likelihood of unanimity.

Together the primary hypotheses and control variable hypotheses provide a theoretical approach to understanding consensus at the state supreme court level. Consistent with past neo-institutional approaches to judicial decision-making, these hypotheses suggest courts and judges are strategically responsive to many factors, including the diversity of the courts, institutional characteristics, state context, and case related characteristics.
Summary

The examination of hypotheses expected to affect both diversity and consensus are provided above. Together, these hypotheses describe the relationship between diversity and consensus, with the former expected to influence strategic behavior within the state courts. Through a better understanding of the value, risks, and costs of office, we are better able to explain judicial behavior and judicial decision-making within the state judiciaries. The following chapter describes how each hypothesis is operationalized.

Research Design and Methodology

The consensus section of this study focuses on state supreme court decisions and the degree of consensus. Focusing on consensus, the unit of analysis is the individual case. The dependent variable, consensus, is a binary variable coded "1" for decisions that are unanimous. Non-unanimous decisions are coded "0" where one or more judges dissent. Unanimity is a strong and qualitatively important form of consensus (Sheldon 1999). Importantly, separate concurrences are not included as votes within the majority. The consensus models use state supreme court cases from 1995 and 1997 to examine four types of cases, both criminal and civil in nature. Salient policy areas include state capital cases and taxation appeals. Non-salient policy areas include all non-violent crimes and tort law appeals. While capital cases and taxation appeals involve a limited range of appeals, non-violent crimes and tort law cases are a composite of several case types.

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74 Again, for a detailed description of the dependent and independent variables used within the analysis see Appendix A and Appendix B, respectively.

75 Non-violent crimes include disorderly public behavior, driving under the influence of alcohol, drug abuse and trafficking violations not involving violence, public drunkenness, embezzlement, forgery, fraud, gambling offenses, non-violent theft, illegal possession of alcohol, vehicle theft, possession of stolen property, traffic violations, vagrancy, vandalism, and illegal possession of weapons.
Data used within these models is from the Brace-Hall State Supreme Court Data Project (NSF – SBR 9616891). These data provide all case and judge level decision outcomes for the fifty-two state supreme courts from 1995 to 1998, providing the richest source of state supreme court behavior available. Each model reports a goodness of fit statistic, the chi-square statistic, the sample size, as well as notations for levels of significance ($p$ value) for each measure tested.

Building upon the integrated model of judicial behavior and previous neo-institutional models (Brace and Hall, 1995, 1997; Traut and Emmert 1998; Songer and Crews-Meyer 2000), the model includes accepted explanatory variables as measures of judicial decision-making. These indicators include measures of state court structural characteristics, state contextual characteristics, case-related factors, and court diversity characteristics. The later are the independent variables of primary interest.

Concerning the effects of diversity, forms of diversity from the previous section are used as measure of consensus. A number of studies suggest that gender either affects consensus (Allen and Wall 1987, 1993; Gilligan 1982; Songer and Crews-Meyer 2000; Gryski, Main, and Dixon 1986; Walker and Barrow 1985; Songer, Davis, and Haire 1994; Davis, Haire, and Songer 1993) or has no effect at all (Welch 1985; Thomas and Welch 1991; Gruhl, Spohn, and Welch 1981; Segal 2000; Davis 1992) at both the state and federal level. Using the proportion of female judges within each court, the assumption that gender diversity affects decision outcomes and consensus is tested. Similar to gender diversity, the impact of racial diversity is tested on the likelihood of unanimity. Disagreements over the impact of minority judges exist, however, with some

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76 Tort law cases include issues involving medical and professional malpractice, automobile related tort, products liability, toxic substances, premises liability, libel, slander, defamation, employee injury and workers compensation, employment discrimination, and other labor issues.
arguments in favor of gender influence (Cook 1973; Welch, Combs, and Gruhl 1988; Uhlmann 1978) and others opposed to gender impact (Steffensmeier and Britt 2001; Spohn 1990a, 1990b; Walker and Barrow 1985; Segal 2000). Like gender diversity, I use the proportion of African-American judges present within each court to test the assumption that racial diversity affects decision outcomes. The last two forms of diversity, ideological diversity and tenure diversity, build upon a more under-developed literature. First, while past studies (Brace and Hall 1992; Songer and Hair 1992; Songer and Crews-Meyers 2000) have used party affiliation to determine judge sincere preferences, the literature benefits from the introduction of the PAJID measure of judicial preferences (Brace, Langer, and Hall 2000). PAJID provides a contextually adjusted measure of judicial attitudes taking into account the preferences of elite and public selectors. Unlike prior proxy measures of judge attitudes, PAJID avoids the problems associated with using under-informed editorial responses, partisan affiliation, or biographical characteristics. The range of judicial preferences provides the ideological diversity of each state supreme court. As a measure of polarity, this estimate tests whether increased ideological diversity decreases consensus. Lastly, the estimate of tenure diversity is the average level of seniority in each state supreme court. This is a continuous measure of average tenure length by court. Suggested earlier, increased seniority should decrease consensus within the courts with longer average tenure length expected to decrease the likelihood of unanimity.

Judges are also influenced by the structure of the courts, providing security in some courts and less security elsewhere. Structural factors include court size, intermediate appeals courts, and opinion assignment rules. Following the logic of
Shapley and Shubik (1954) and later Rohde (1972), larger courts are expected to increase judicial independence, as the value of each vote decreases with more judges present. Smaller courts, however, have greater pressures to conform as the impact of each vote increases as courts grow smaller. To estimate the impact of court size, a continuous measure of court size is included within the model. As the size of the bench increases, the likelihood of consensus is expected to increase. Intermediate appellate courts also affect state high court outcomes. Brace and Hall (1990, 1997) note state supreme courts frequently overturn lower court decisions. To estimate the impact of lower appellate courts, a dichotomous variable is included within the model with "1" representing states with intermediate appellate courts and "0" representing states without lower appellate courts. Lastly, discretionary opinion assignments provide incentives for judges to vote with the majority. State supreme courts, however, use a variety of opinion assignment rules including discretionary and non-discretionary assignments. To estimate this impact, a binary variable is included with "1" representing states with non-discretionary opinion assignment rules and "0" for states with discretionary assignments.

Noting the confirmed relationship between the political environment and strategic judicial behavior, two contextual control variables are included. First, a measure of extreme public opinion is included. This estimate tests whether more extreme states lead to greater consensus. Again using Erikson, Wright, and McIver's (1993) measure of state liberalism, the estimate is derived using the deviation of each state liberalism score from the national mean. Analysis of Erikson, Wright and McIver's public liberalism score has found it to be extremely stable over time and highly reliable. Second, electoral competition provides a contextual measure of state electoral influence. As expected from
prior findings (Brace and Hall, 1990, 1992; Sheldon and Maule, 1997; Sheldon, 1999), judges avoid dissent within more competitive states. The estimate of electoral competition is Holbrook and Van Dunk's (1993) continuous measure of state-level competition in congressional districts.

Models of strategic behavior (Brace and Hall, 1993, 1997; Traut and Emmert 1998; Songer and Crews-Meyer, 2000; Maltzman, Spriggs, and Wahlbeck, 2000) also note the role of case facts and legal stimuli. Commonly, the complexity of the appeal and case salience are included to control for specific case attributes. The impact of case complexity cannot be understated (Segal, 1984, 1986; George and Epstein, 1992). While judges have individual ideological predispositions, judges are not oblivious to case characteristics. To control for mitigating factors a measure of appeal complexity is included within each statistical model. The measure of appeal complexity is the total quantity of issue questions raised within the appeal. The other case attribute, salience, represents the formal submission of an amicus brief by a third party on behalf of either the respondent or the petitioner. Representatives from the American Civil Liberties Union (ACLU), Common Cause, and the National Rifle Association (NRA) are active within many areas of litigation. Salience is coded "1" for cases in which a third party is involved and "0" otherwise.

Acknowledging the complexity associated with dichotomous relationships, the statistical models estimating the likelihood of unanimity use maximum likelihood estimation (MLE) designs. Because of the dichotomous dependent variable, unanimity, a LOGIT design is used to estimate the impact of each explanatory variable. Because ordinary least squares (OLS) regressions place no limits on the values of the dependent
variables, use of a MLE design is more appropriate (Gujarati, 1995; Long, 1997). Unlike an OLS design, the parameters for a LOGIT regression are estimated according to the contribution that each explanatory variable makes to the probability that the dependent variables falls into one of the two categories, unanimous or non-unanimous case decisions. Each explanatory variable has a maximum-likelihood estimate and a reported standard error. These maximum likelihood estimates represent the change within the LOGIT model that results from a one-unit marginal change in the explanatory variables.

**Error Correction**

Careful attention has been directed toward the problem of heteroskedasticity. Like many pooled cross-sectional time-series design, assumptions of equal variance are often problematic because of state-unit differences. Special precautions, however, eliminate this problem from affecting the statistical output. Heteroskedasticity occurs when the assumption of equal variance among the disturbance terms \( (u_i) \) is violated, or where the conditional variances of \( u_i \) are not identical (Gujarati 1995, 61). This violation reduces the reliability of estimates and distorts the importance of some predictors while reducing the importance of other estimates. Heteroskedasticity is more problematic in cross-sectional data rather than time-series data since cross-sectional data usually involve observations from fewer points in times. Pooled cross-sectional data reflect systematic variations, creating real differences across sections.

To control for heteroskedasticity, several techniques are employed to detect and correct for unequal variance among the error terms. First, the Glejser test uses a two-stage procedure to detect heteroskedasticity using several functional forms. The first stage involves obtaining the residuals from the initial regression. The second stage
involves regressing the absolute value of the residuals against the problematic explanatory variables. If the suspected explanatory variable exceeds the critical level of significance (p = 0.05), then we may reject the assumption of homoskedastic variances. A second detection technique is White’s general heteroskedasticity test. This detection technique relaxes the normality assumption and requires the computation of the disturbance term \( u_i \). The existence of heteroskedasticity is determined using a chi-square \( \chi^2 \) distribution derived from an auxiliary regression. If the \( \chi^2 \) value exceeds the critical value at the critical level of significance (p = 0.05), then heteroskedasticity exists.

Where heteroskedasticity is detected, then correction techniques must be employed. Where error variance is known, a common correction technique is the weighted least squares method. Error variance, however, is rarely known, so a correct alternative includes White’s heteroskedasticity-corrected standard errors. White’s standard errors produce \( t \) values much larger than the OLS standard errors, reducing the exaggerated effects produced in the non-heteroskedasticity-corrected estimates. Using such a technique provides increased scrutiny and more valid results where heteroskedasticity exists.

**Summary**

The variation in state characteristics, including institutional rules and political context contribute to variation related to diversity and consensus. Through studying the likelihood of consensus and observed patterns of diversity, this examination should provide a useful guide to understanding the relationship between consensus and diversity. The statistical models discussed above note the usage of conventionally accepted measures of court diversity and consensus. Through clarification of the relationship
between theses phenomena, this association should contribute an even clearer understanding of state court behavior and composition.

Results

Consensus within the state supreme courts, like the federal judiciary, is a declining phenomenon. Sheldon (1999) depicts the transition from high consensus to low consensus as an event of major importance for legal precedent and the clarity of law. At both the federal and state levels, explanations of increasing dissensus include declining seniority, electoral competition, changing styles of judicial leadership, and the reduction of norms that once compelled judges to concur for the purpose of legal clarity. In addition, state supreme courts may also react to court diversity. With changing diversity, connected to the inclusion of underrepresented female and racial minority judges, consensus may respond to the diversity of the courts. In addition to racial and gender diversity, both ideological and tenure diversity are asserted to affect consensus.

The conditional party government thesis (Aldrich and Batista, 2002; Rohde, 1991) provides an explanation of when diversity should matter in the state supreme courts. While two state supreme courts may have similar compositions they may behave in entirely dissimilar ways, suggesting additional features are involved within judicial decision-making. While developed as a perspective of legislative behavior, the conditional party government thesis provides insight into other political institutions. With elections and competition the primary determinants of legislative behavior, state supreme courts reasonably may respond to similar stimuli including varying methods of selection and the political environment. The following analyses explore how methods of selection, the political environment, and saliency affect when composition matters.
The following analyses evaluate several areas of law and their patterns of consensus. Two models (capital cases and non-violent crime cases) evaluate criminal forms of judicial policy, while the remaining two models assess civil forms of judicial policy, taxation policy, and tort policy. Again, four areas of policy were chosen, both civil and criminal, to reflect the general nature of state supreme court cases and to generalize the occurrence of unanimity across case types. Each area of policy is evaluated separately by method of selection, with findings reported for both elected and appointed methods of selection. Consequently, judicial behavior is potentially conditioned by the political environment, which is directed to the courts by formal methods of selection. As noted above, the impact of such factors may determine when diversity affects judicial decision-making. With each area of policy, findings of judicial consensus are presented as well as brief summaries of the results. Like the diversity findings, illustrations noting the specific performance of the described hypotheses are providing in Table 6.1 and 6.6. Both tables offer the success in predicting consensus based on the expected relationship between the dependent variable, unanimity, and the independent variables. The models perform well and many hypotheses are confirmed. Marginal effects on the probability of a unanimous majority coalition were estimated for every statistically significant variable within the model that received directional support. The discrete effect or the change in probability across the full range of an independent variable’s value is used as the technique for estimating the change in probability holding all other variables constant.

[INSERT TABLE 6.1 HERE]

[INSERT TABLE 6.2 HERE]
Consensus within Criminal Cases

Decisions involving Capital Crimes

Results for Appointed Courts

[INSERT TABLE 6.3 HERE]

Table 6.3 presents estimates of the likelihood capital cases will reach unanimity for state courts with appointed methods of selection. The unit of analysis is an individual case. Throughout the states from 1995 to 1997, there were 1,144 capital cases. For appointed states, the chi-square indicates the fitted model performs significantly better than the null. The results provide strong support for the hypotheses tested; suggesting consensus within appointed courts is shaped by court diversity in addition to court institutional characteristics, the political environment, and legal stimuli. The goodness of fit for the model is .109, reported by the pseudo r-square statistic, suggesting the fitted model explains almost 11 percent of the dependent variable’s variation. The predicted probability of a unanimous voting coalition within capital cases with all independent variables held at their mean value is just under 61 percent.

Again, the diversity of the courts is expected to shape aggregate forms of behavior. More specifically, greater diversity, including ideological, gender, racial, and tenure diversity, should decrease the likelihood of unanimity in appointed states supreme courts. Of the court diversity variables, gender, racial, and ideological diversity are statistically significant at the .01 level and provide directional support for the hypotheses tested. In addition to court diversity, structural characteristics of state courts and cases related factors are also found to influence consensus in appointed court capital cases.
The results indicate that greater ideological diversity of appointed courts contributes to less consensus. As appointed courts become more polarized, there is a decreased likelihood that unanimity will be reached. A discrete change in ideological diversity reduces the probability of unanimity by almost 33 percent. Similarly, greater racial diversity is associated with a decrease in the probability of a unanimous majority coalition as expected. Confirming the hypothesis, a discrete change in racial diversity, ranging from the least racially diverse court to the most racially diverse court, decreases the probability of unanimity by 27 percent. Gender diversity also affects consensus in appointed courts, contributing to increased consensus. Where more women are present, unanimity is substantially more likely. Where gender diversity moves from least diverse to most diverse within appointed state courts, the probability of unanimity increases by almost 26 percent. The last form of diversity, tenure diversity, expected to encourage less consensus, fails to reach a conventional level of statistical significance.

The substantive findings support several of the expectations formulated above. The impact of diversity on capital decisions is important. Courts with different characteristics make profoundly distinct choices within capital cases. By focusing on diversity in appointed courts, consensus is less common where courts are more racially or sexually diverse. Looking at gender diversity alone, the composition of courts related to women is very significant. The greatest proportion of women on any court from 1995 to 1996 was exactly 50 percent. Where courts are equally composed of women, the substantive findings report that the probability of a unanimous majority coalition exceeds 77 percent. Taking a look at the other extreme, where women are not represented as in Florida in 1997 and Pennsylvania in 1995, a suppressing effect emerges. Where a court
is composed entirely of men, only 51 percent of the cases actually reach unanimity. Consensus in these low diversity states is certainly less likely. Clearly, the prevalence of greater gender diversity does not hinder consensus within capital crime decisions.

Like gender diversity, racial diversity has a substantial impact on consensus. As characterized within earlier hypotheses, greater racial diversity should suppress consensus and this is evidently the case in most appointed courts. As noted above, the probability of a unanimous decision decreases by over 33 percent where racial diversity moves across the full range of the value. Evaluating very racially diverse courts, a very racially diverse court reaches unanimity in fewer than 42 percent of the capital cases heard. Comparing these totals to the minimum where blacks are not represented within a state’s supreme court, a very racially white homogenous court reaches unanimity in almost 70 percent of all capital cases. Racial diversity, as expected, considerably decreases consensus in appointed courts where jurists have the luxury of less public feedback. This result suggests that racially diverse courts are prone to greater dissensus, suggesting that black and white jurists approach the question of crime and punishment somewhat differently allowing greater dissensus.

The findings related to ideological diversity represent another confirmation of the effects of diversity on consensus. Ideological diversity provides a very strong negative effect on consensus in appointed courts, suggesting that more polarized courts find more difficulty reaching unanimous agreement. This result is anything but surprising. Yet to what degree does this impact exit? It is highly illustrative to evaluate polarized and non-polarized supreme courts. While unanimity in moderately polarized court is quite common, occurring in almost 61 percent of the decisions rendered, consensus within
highly polarized courts is quite different. Where a court is polarized near the national maximum\textsuperscript{77} consensus is substantially reduced. The probability of unanimity is only 47 percent in cases decided within a highly polarized court. In states with the least polarized courts, on the other hand, unanimity is a more common occurrence with 80 percent of capital cases reaching unanimity. Clearly, legal precedence and large coalitions take a back seat in state courts that are highly polarized, allowing state supreme court jurists to be less concerned with consensus and more concerned with their personal preferences.

The structural characteristics of the courts are also expected to affect the likelihood of unanimity. The estimated coefficients for both intermediate appeals courts and random opinion assignments confirm this expectation. With respect to intermediate appellate courts, states with lower appellate courts decrease the probability of unanimity in state supreme courts by 28 percent. Concerning the impact of opinion assignment, courts with non-discretionary opinion assignments have a 26 percent lower probability of having a unanimous majority coalition. The results for court size indicate larger courts have no impact on consensus within appointed court capital decisions.

The result for amici briefs indicates that consensus is reduced where third parties are active and cases are salient. Where third parties are involved, appointed courts are 16 percent less likely to have a unanimous majority. Appointed courts react to increased attention from outside the court by increasing dissenus and conflict. Lastly, the appeal complexity variable is insignificant, so the finding is unable to reject the null hypotheses.

Examination of each variable reveals that several factors influence consensus in appointed courts. Among these influences are the impact of ideological diversity, racial and gender diversity. Providing directional support for the hypotheses tested, both

\textsuperscript{77} The greatest range of judicial preferences is 80.05, found in New Jersey from 1995 to 1996.
ideological and racial diversity negatively affect the event of unanimity confirming court
diversity conditions the behavior of the courts. Gender diversity, alternatively, has the
expected effect of increasing consensus with more female jurists contributing to
consensual forms of judicial policy. Of those variables reported as statistically
insignificant, both electoral competition and state ideology emerge as non-influential
factors in understanding aggregate court behavior. Within states with appointed courts,
courts appear insulated from contextual political pressures as expected. The results
provide compelling evidence; however, that appointed court consensus is a factor of
several influences, not insignificant among these factors is diversity. Courts react to
diversity in their ability to reach consensus.

Results for Elected Courts

[INSERT TABLE 6.4 HERE]

Table 6.4 presents findings for elected courts in capital crime decisions. In the
elected state supreme courts, 1,174 murder cases were heard from 1995 to 1997. The chi-
square again indicates the model performs better than null model. Like the appointed
court model in Table 6.3, nearly every variable is statistically significant at the .01 level
and in the expected direction. The pseudo r-square statistic for the model reports 16
percent of model’s variation is explained by the fitted model. The predicted probability
of unanimity for the model is 63 percent with each explanatory variable held at the mean.
The results provide strong support for the hypotheses tested, court diversity shapes
consensus within elected state supreme court murder decisions. The results also confirm
expectations for court structure, case factors, and political context.
Again, ideological, racial, and gender diversity emerge as significant predictors of consensus. The results indicate that more polarized elected state supreme courts increase the likelihood of unanimity. Where intra-court personal policy preferences diverge, court consensus is more difficult to reach. A discrete change in ideological diversity decreases the probability of a unanimous majority coalition by 36 percent. The estimated coefficient for racial diversity again reveals a statistically significant impact. As anticipated, racial diversity in elected courts contributes to increased consensus differing from appointed courts. A discrete change in racial diversity contributes to a 36 percent increase in the probability of unanimity. The final significant form of diversity, gender diversity, has a negative effect on consensus. Where more women are at hand, the event of unanimity decreases. Substantively, a discrete change in gender diversity contributes to a 25 percent decrease in the probability of unanimity. Courts with a greater quantity of women have more difficulty reaching highly consensual outcomes. Lastly, tenure diversity has no discernable impact on consensus in elected courts.

While appointed courts may allow judges to vote according to their sincere preferences allowing greater disagreement, elected institutions essentially moderate acts of independence. Just as past studies have noted that preferences are important\(^7\), this study goes one step further and suggests that diversity in part determines voting outcomes and the strength of the majority. The findings above confirm these expectations. The first and most remarkable finding relates to ideological diversity. Like appointed courts, greater polarity encourages greater dissensus. This immediately brings forth the suggestion that elected courts suppress tendencies for independence even where judges

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\(^7\) Brace and Hall (1995, 1997) find consistently that personal preferences structure decision outcomes in appointed state supreme courts.
are quite different ideologically. In the case of highly polarized elected courts this is not the case. Differences of opinion related to capital crimes appear difficult to repress, perhaps responding to the life and death nature of this group of cases. More specifically, the most polarized elected courts reach unanimity in only 45 percent of those cases heard. This compares to almost 82 percent of the cases that reach unanimity where the courts are least polarized. Elected courts clearly allow disagreement in this important area of policy.

Unlike appointed capital cases, gender diversity has a negatively discernable effect on consensus. Gender diversity suppresses consensus to a great degree in elected courts. The probability of a unanimous majority decision is only 47 percent in those cases involving murder where female judges represent half the court. Dissimilarly, where elected courts are entirely male, the proportion of unanimous cases is 72 percent. This difference represents almost a 25 percent difference with high diversity strongly limiting unanimous forms of behavior.

Racial diversity has a much different effect on consensus in elected courts compared to appointed courts. Greater racial diversity motivates greater consensus in elected courts, suggesting that blacks vote much like their white colleagues when electoral pressures exist. Within capital cases, blacks contribute toward much greater consensus where representation for black jurists is greatest. Where blacks represent 25 percent of a court, the probability of a unanimous decision is 83 percent. Where blacks do not serve on a state court, fewer than 47 percent of the cases are unanimous. Consensus reacts strongly to racial diversity in elected courts. Where white justices
represent the entire court, the homogenous nature of the court strongly reduces cooperation.

Having established the diversity of the courts is statistically significant, the structure of the courts also emerges as a direct influence on consensus. The results reported in Table 6.4 suggest the direct effects of court structure, including court size, opinion assignment rules, and the presence of intermediate appellate courts, are important. First, where office size is largest, there is a strong, negative effect on the level of consensus within murder cases. The effect of this coefficient suggests larger courts decrease pressure for uniformity, decreasing consensus as court size increases. Court size has the predicted effect of decreasing the probability of unanimity by almost 16 percent. Second, random opinion assignment rules have a strong discernable effect on consensus. The impact of non-discretionary opinion assignment rules has a positive effect on consensus within murder cases. Random opinion assignment rules increase the probability of unanimity by almost 26 percent. Third, intermediate appeals courts have a statistically strong impact on consensus, increasing the probability of unanimity by 26 percent. Consistent with past findings, state supreme courts use cues from lower court opinions when making decisions involving salient criminal appeals in elected courts.

Further exploring effects on consensus, contextual factors also shape conflict in elected courts. First, electoral competition has a strong, statistically significant effect. Increased electoral competition contributes to a 39 percent increase in the probability of unanimity with a discrete change in electoral competition. Second, regarding extreme state ideology, the variable fails to reach a conventional level of significance. While receiving directional support, the finding cannot reject the null hypothesis.
Case related factors have a strong, negative effect on consensus. Appeal complexity emerges as a strong, statistically discernable indicator of consensus. With greater appeal complexity, court majorities are 28 percent less likely to be unanimous. Lastly, the presence of third parties has a negative impact on consensus. The probability of unanimity decreases by 42 percent where amici briefs are submitted to the court.

Within the elected courts model, there is strong support that diversity contributes to consensus. Ideological, racial, and gender diversity emerge as strong, statistically significant determinants of unanimity. In addition, with strong support for expectations related to court structural, electoral competition, and case attributes, the model meets expectations of impact, providing an informative view of how elected state supreme courts decision-making.

**Summary of Capital Cases**

The results provide compelling evidence court diversity, court structure, and case characteristics affect decisional behavior within both elected and appointed courts. Noticeable within the analysis is the impact of diversity. Ideological diversity emerges as a negative deterrent to consensus. In addition, both racial and gender diversity have varying effects. While racial diversity encourages dissent within more insulated appointed courts, the electoral pressures facing elected courts contribute to greater consensus. Like racial diversity the impact of selection processes is important for gender diversity. Greater racial diversity strongly encourages dissent within elected courts, suggesting that female jurists are concerned with specific electoral pressures that encourage independence. There may also be indirect pressures that contribute toward dissensus within elected courts, as selection may favor more independent minded jurists.
The findings suggest diversity affects consensus as expected within both elected and appointed court murder cases.

**Decisions Involving Non-Violent Crimes**

**Results from Appointed Courts**

[INSERT TABLE 6.5 HERE]

Table 6.5 presents the estimates of the likelihood a case will be unanimous within appointed court decisions involving non-violent crimes. Overall, there were 627 cases involving matters ranging from vagrancy to driving under the influence of alcohol. As stated earlier, these cases are less salient in nature as they involve fewer parties and issues assumed to be of lesser consequence to the population at large. The chi-square is statistically significant at the .01 level, again indicating the fitted model performs better than the null. The goodness of fit for the model approaches 16 percent of explained variance according to the r-square statistic. The predicted probability that unanimity will occur within appointed court decisions involving non-violent crimes is almost 74 percent. Overall, the model performs poorly, as the results demonstrate.

The results moderately confirm that diversity affects state supreme court decision-making. While this model is weaker than the more salient capital case findings, less salient non-violent crimes display many expected relationships. While ideological diversity is not statistically significant, gender diversity, racial diversity, and tenure diversity are each statistically discernable. As for racial diversity, the anticipated impact emerges. More racially heterogeneous courts contribute to non-unanimity within non-violent crime cases within appointed courts. With more blacks on the court, appointed courts have greater dissensus. Across the full range of the racial diversity variable, the
probability of unanimity is decreased by 18 percent. Like racial diversity, both gender
diversity and tenure diversity are strong, statistically significant predictors of court
consensus. Gender diversity has a strong, positive effect on consensus. With a higher
proportion of female jurists, as in Michigan and Minnesota, there is greater consensus in
decisions involving non-violent crimes. The probability of a unanimous majority
decision is increased by 28 percent for a discrete change in gender diversity. Like gender
diversity, tenure diversity contributes to greater consensus; however, this is unexpected.
Appointed courts with longer serving judges encourage consensus. Unfortunately, the
effect for tenure diversity lacks theoretical explanation.

The impact of sexually heterogeneous courts provides an excellent context within
appointed courts and non-violent crime decisions to evaluate the effects of diversity at the extremest. Empirical findings suggest that women contribute toward greater consensus.79
More clearly, where women are equally represented, consensus, through the guise of unanimous decisions, increases the probability of unanimity to almost 88 percent.
Women, more than men in entirely male courts, encourage strong consensus suggesting that women increase conformity and consensus tendencies. Where courts are entirely male, the proportion of unanimous decisions is 66 percent. Like women, racial diversity also has a discernable effect. As stated above, this effect is negative, however. Where blacks account for one-quarter of a court, the maximum for appointed courts, the probability of unanimity is just 62 percent within those cases rendered. Where courts are entirely white, consensus increases. Overall, nearly 79 percent of cases reach unanimity where courts are entirely male as in half the state supreme courts.

79 Songer and Crews-Meyer (2000) find that the proportion of women within state courts affects aggregate decision making.
The remainder of the model, like the diversity category, performs poorly. Of the remaining variables, several emerge as significant predictors of unanimity. Beginning with institutional characteristics, the model reports that court size, random opinion assignment rules, and lower appellate courts each have strong relationships with consensus, yet only the intermediate appellate courts coefficient receives directional support. First, court size exerts a positive effect on consensus. The direction of this impact is unpredicted, suggesting consensus benefits from larger courts. Second, like court size, random opinion assignments emerge as a statistically significant, positive predictor of consensus. Less salient appointed court criminal cases receive greater consensuses where non-discretionary opinion assignments exist. This finding lacks directional support for the hypothesis tested. Lastly, lower appeals courts have a negative effect on consensus. State supreme courts are most willing to disagree where lower appellate courts exist. The probability of a case being decided unanimously is decreased by almost 17 percent in states with lower appellate courts compared to states without intermediate appeals courts. State supreme courts may use lower court decisions and discretionary dockets to settle issues involving greater dispute, deterring high levels of consensus.

The final two categories of predictors include the state political context and legal stimuli. For both contextual measures, electoral competition and state ideological extremism, the findings report strong, statistically significant effects on consensus with both measures sharing a negative relationship with consensus. Neither variable is expected to affect institutionally secure appointed courts, so the results lack explanation. As for case related factors, only appeal complexity emerges as a significant predictor of
consensus. Though in the unanticipated direction, greater appeal complexity contributes to greater consensus.

While structural and contextual considerations have some role in non-violent crime decisions within the state courts, the impact of diversity is mixed. Only the racial and gender diversity coefficients confirm the hypothesis related to the effects of race, while the effect of tenure diversity emerges in the unexpected direction. Ideological diversity has no effect on consensus within non-violent crime decisions. The greater model only reasonably supports the hypotheses structured above.

Results from Elected Courts

[INSERT TABLE 6.6 HERE]

In Table 6.6, the estimates of consensus for non-violent crime appeals within elected courts are reported. Overall, there were 553 non-violent crime appeals from 1995 to 1997. As within appointed courts, the chi-square indicates the fitted model performs better than the null model. The goodness of fit, according to the pseudo r-square statistic, exceeds 15 percent of the model's variation. The predicted probability a decision involves a unanimous majority coalition with all independent variables held at their mean is 50 percent in elected state supreme courts. Clearly, the elected courts model is more robust than the appointed courts model. Overall, most variables are significant and provide directional support for the hypotheses.

While ideological diversity does not achieve statistical support, the direction of the coefficient is in the expected direction. Furthermore, gender, racial, and tenure diversity each affect decisions involving non-violent crimes. Gender diversity significantly influences the likelihood of unanimity with respect to non-violent crime
appeals within elected courts. The probability of a case involving a unanimous majority decision is decreased by 32 percent with a discrete change in gender diversity. Where female judges share a higher proportion of the court, dissensus is more common. The results also indicate that racially heterogeneous courts favor dissensus; however, the direction of impact is unexpected. Lastly, where courts have longer lengths of tenure, conflict is more common. The change in probability of a unanimous decision is 32 percent lower with a discrete change in tenure diversity. The effects of gender, racial, and tenure diversity each share a negative relationship with consensus in decisions involving non-violent crimes, suggesting greater dissensus exists in these criminal matters within elected courts.

The impact of gender diversity within elected state supreme courts is quite different than appointed state courts. Most noticeably, women create a substantial deterrent to unanimous decision outcomes. Overall, unanimous voting coalitions occur in only 27 percent of cases rendered where gender representation is comparatively equal. High gender diversity states decrease by almost half the number of unanimous decisions in non-violent criminal matters. Greater gender heterogeneity contributes both negatively and strongly against greater consensus.

Also focusing on the negative effect of tenure diversity, unanimous decisions account for just 33 percent of the cases heard before the state supreme courts when judges serve over 14 years as in Maryland. On the other side, where seniority is least, as in Georgia or Hawaii where judges serve about three years on average, unanimity occurs in only 63 percent of the cases heard. This suggests that more senior judges are less concerned with consensus and are increasingly independent as they become more senior.
Junior judges on the other hand support greater consensus. This distinction is noted by the 30 percent difference in unanimity among highly senior and highly junior courts.

The variables associated with court structure, also report strong statistical relationships with consensus patterns. As expected, greater court size provides flexibility for greater dissensus. The probability of unanimity is decreased by 42 percent with a discrete change in court size. Like murder appeals, both random opinion assignment rules and lower appeals courts contribute to consensus. The likelihood of unanimity increases where opinions are delegated randomly. The probability of unanimity is increased by almost 37 percent in states with random opinion assignments. Similar, lower appellate courts increase the likelihood a case will be unanimous, suggesting state high courts use lower court opinions as guides and frequently uphold their decisions. The probability of unanimity is increased by almost 12 percent in states with intermediate appellate courts.

As with the estimated effects of diversity and court structure, the contextual environment emerges as a significant predictor of unanimity. Higher levels of electoral competition contribute to greater consensus, increasing the likelihood of unanimity by 32 percent with a discrete change in electoral competition. State ideological extremism, however, fails to have any discernable effect. Where third parties are active, noted by the submission of an amicus brief, the likelihood of consensus decreases. The probability of a unanimous majority coalition is reduced by almost 25 percent where third parties are involved. The impact of appeal complexity, does not reach a conventional level of significance, failing to reject the null.
The model's ability to explain the likelihood of unanimity is robust. The impact of diversity, with the exception of ideological and racial diversity, explains the state supreme courts' ability to reach high levels of consensus. While several control variables are statistical discernable and achieve directional support, diversity remains a strong predictor of consensus. Each statistically significant predictor, including gender and tenure diversity, provides a negative influence, suggesting more diverse courts have more difficulty reaching consensus.

**Summary of Non-Violent Crimes**

While the appointed court model of non-violent crime appeals performs weakly, the stronger elected court model suggests less salient crimes contribute to a more independent environment even where electoral sanctions exist. Diversity emerges as a strong predictor of consensus within elected court non-salient cases.

**Consensus with Civil Cases**

**Decisions Involving Taxation Policy**

**Results from Appointed Courts**

[INSERT TABLE 6.7 HERE]

Table 6.7 presents the findings for civil taxation policy cases. Overall, there were 434 taxation cases from 1995 to 1997 in the twenty-seven appointed state supreme courts. The chi-square is statistically significant again at the .01 level, indicating the fitted model performs better than the null expectation. The r-square for this model exceeds .102, suggesting over 10 percent of the variation within appointed court taxation cases is explained. The predicted probability of a unanimous outcome is almost 78 percent within appointed court taxation cases.
Court diversity emerges as a strong predictor of consensus. Ideological diversity reduces the likelihood of unanimity as courts become more polarized. Appointed courts are highly responsive to ideological diversity with increased conflict as judge preferences diverge. The probability of a unanimous decision is reduced by almost 30 percent with a discrete change in ideological diversity. Gender diversity also contributes to an increased likelihood of unanimity. Where women represent a larger proportion of the court, consensus is more common. Unlike gender diversification, racial diversity reduces the likelihood of unanimity as expected. The probability of a unanimous majority coalition increases by 37 percent with a discrete change in gender diversity. As in the other models, racial diversity adds to conflict in appointed court decisions. The probability of a unanimous outcome decreases by almost 18 percent with a discrete change in racial diversity. Lastly, tenure diversity encourages dissensus. The probability of unanimity is reduced by 20 percent with a discrete change in tenure diversity. Courts again are more willing to have conflict where aggregate court tenures are highest.

The substantive impact of gender diversity is even more important when considering the greater representation of women in state supreme courts. Where women represent half the court, the probability of unanimity reaches almost 95 percent suggesting again that women encourage consensus. Where women are not present, however, the probability of unanimity decreases to only 59 percent. Unlike gender diversity, greater racial diversity provides a very negative effect on consensus. While courts with an entirely white judge population reach unanimity in almost 82 percent of cases heard, more heterogeneous courts like Tennessee have a 56 percent probability of
unanimity. Like gender diversity, highly diverse courts in relation to race substantially affect the phenomenon of unanimity.

Ideological diversity and greater polarization also have a very strong effect on consensus. Where state high courts are highly polarized similar to New Jersey, where the most liberal and conservative judges are separated by over eighty-five points, the probability of unanimity is 62 percent within taxation cases heard. Comparatively, where polarization is least as in many elected states, state supreme courts reach unanimity in over 90 percent of the cases heard. Like polarization, greater tenure diversity also has a negative effect on unanimous majority coalitions. As expected, greater aggregate seniority encourages consensus with unanimity reached in less than 63 percent of cases heard on appeal. Where aggregate seniority is least, however, the probability of unanimity is 85 percent.

While not directionally supported, increased court size increases the likelihood a taxation case with have a unanimous majority. Both remaining structural variables, random opinion assignment and intermediate appellate court presence, are not statistically significant, so the null hypotheses cannot be rejected. In addition, the contextual environment has no discernable impact on unanimity. Both predictors neither encourage nor discourage consensus, as anticipated within appointed courts.

As for case related factors, both case salience and appeal complexity are statistically significant. When third parties are involved with the submission of an amicus brief, state supreme courts are decreasingly likely to form a unanimous voting coalition. The probability of unanimity is decreased by 10 percent for those cases with third party involvement. Like third party involvement, greater appeal complexity reduces
the likelihood of unanimity, reducing consensus. As cases become more complex with greater legal stimuli, dissensus emerges as courts react to multiple factors that make consensus more difficult. The probability of a unanimous majority coalition is reduced by 42 percent as appeal complexity moves across the full range of the variable.

The findings for taxation cases within appointed courts again suggest diversity contributes to varying levels of consensus. Diversity provides a strong independent explanation of judicial behavior within appointed court tax cases. In addition to these influences, court size and internal case characteristics strongly affect consensus.

Results from Elected Courts

[INSERT TABLE 6.8 HERE]

Table 6.8 presents findings for elected courts and taxation related cases. In total, there were 308 tax cases in twenty elected courts from 1995 to 1997. The chi-square (α=.01) indicates the fitted model performs better than the null. The r-square for this model is .154, suggesting over 15 percent of the model’s variation is explained. The predicted probability of a unanimous majority outcome is nearly 61 percent for elected court tax decisions.

Elected state supreme court tax decisions, like appointed courts, are affected by diversity. Unlike appointed courts, however, both ideological diversity and gender diversity fail to reach conventional levels of significance. Both racial diversity and tenure diversity, however, strongly affect consensus. First, racial diversity has a very strong predicted effect on consensus; however, the direction of impact is unexpected. With more racially diverse courts, the likelihood of unanimity is reported to increase rather than decrease. Second, as anticipated, longer aggregate tenure lengths discourage
consensus. Greater seniority reduces the probability that a majority coalition will be unanimous by 39 percent.

Both racial and tenure diversity emerge as strong significant effects on consensus in taxation cases within elected state supreme courts. First, racial diversity has a very sizable effect on unanimity. Within the most diverse courts, those courts approaching one-third of the court composed of African-American justices as in Georgia and Tennessee, the probability of unanimity is over 93 percent of those taxation cases heard. In states without black justices, however, consensus is less resolute. Overall, the probability of unanimity is less than 50 percent. Like racial diversity, tenure diversity has a measured and important effect. While courts with few senior judges and low average seniority encourage consensus, unanimous majority coalitions account for greater than 72 percent of cases decided. From 1995 to 1997, the greatest level of seniority for any state and within any year was just under thirteen years in Wisconsin during 1995. The effect of high seniority in elected court decreases the probability of a unanimous outcome to 33 percent. Compared to low seniority states, this statistic is striking and comments on the impact of seniority.

The results indicate that court structures matter as well. Court size, lower appellate courts, and random opinion assignment each affect consensus. With larger courts, the expected likelihood of unanimity decreases. Providing directional support for the hypothesis, larger courts encourage dissensus. A discrete change in court size decreases the probability of unanimity by almost 25 percent. Like court size, the presence of lower appellate courts has a strong, statistically significant impact on consensus. The probability of a unanimous decision is reduced by 36 percent in states with lower
appellate courts. Random opinion assignment rules similarly discourage consensus through the removal of sanctions. Where courts lack the discretionary allocation of opinion assignments, the likelihood of unanimity is reduced by 29 percent.

Table 5.6 also reports the results for the contextual environment. Neither variable succeeds in rejecting the null hypothesis, so neither has an independent effect on the likelihood of unanimity. Unlike the contextual estimators, case related factors have a substantial effect on consensus. While third party participation has no discernable effect on consensus, appeal complexity has a strong, statistically significant impact on consensus. The likelihood of consensus decreases as cases become more complex, suggesting courts react to complexity with an increasing willingness to dissent. A discrete change in appeal complexity reduces the probability of unanimity by 49 percent.

Summary of Taxation Cases

As found within the appointed courts model, diversity affects unanimity. Unlike the appointed courts model, the impact is concentrated on tenure and racial diversity. Both ideological diversity and gender diversity fail to have a statistically significant impact. Consensus is most common where courts are largely inexperienced and racially traditional. Consensus also emerges within smaller courts with discretionary opinion assignments and within cases with greater complexity.

Decisions Involving Tort Law Policy

Results from Appointed Courts

[INSERT TABLE 6.9 HERE]

The logit results reported in Table 6.9 confirm the likelihood of unanimity within appointed courts is tied to a variety of factors, in particular diversity. There were 1,809
cases involving tort litigation throughout the years from 1995 to 1997. The chi-square ($\alpha=.001$) indicates the fitted model is significantly better than the null. The pseudo $r$-square for the model reports almost 9 percent of the dependent variable's variance is explained. The predicted probability a case will have a unanimous majority opinion for the fitted model is almost 76 percent. Overall, the model performs very well with high levels of statistical significance and directional support for the hypotheses tested.

The ideological diversity coefficient is statistically significant at the .05 level. Therefore, as appointed courts become more polarized, the likelihood of unanimity is reduced. The probability of a unanimous decision is decreased by almost 12 percent with a discrete change in ideological diversity. Table 6.9 also indicates gender diversity has a strong, positive effect on consensus. Also expected, the direction of impact for gender diversity suggests that more female judges increase the likelihood of unanimous majority coalitions. The change in probability of a unanimous majority coalition is 34 percent where a discrete change in gender diversity occurs. The impact of racial diversity similarly provides directional support for the hypothesis tested. Greater quantities of black judges reduce the probability of unanimity by 21 percent. The positive relationship between racial diversity and dissensus, suggests consensus is dependent on racially homogenous courts. Lastly, tenure diversity as expected has a negative impact on consensus. With more senior courts, unanimity is more difficult to achieve. The probability of a unanimous decision is almost 33 percent greater as courts move across the full range of tenure diversity.

Substantively, both gender diversity and tenure diversity are strong predictors of unanimity. Both have extremely strong substantive effects on consensus. Gender
diversity has the positive effect of encouraging consensus as the population and proportion of women increases. Specifically, while courts without female representation have almost a 60 percent probability of reaching unanimity, courts with near equal gender representation reach unanimity in nearly 93 percent of tort related cases. Unlike gender diversity, racial diversity has a negative and much less substantial effect. The effect, however, is still important with homogenous white courts permitting unanimity in 80 percent of the cases rendered. More heterogeneous courts with one-quarter of the court represented by African-American judges, however, have a probability of unanimity in 60 percent of cases decided. The impact of greater racial diversity is negative suggesting that relations among racially-divided courts can be contentious.

Moving to extremely high forms of tenure diversity, highly senior elected courts have a 52 percent probability of reaching a unanimous outcome. Alternatively, the least senior elected courts reach unanimity in 88 percent of state supreme court cases. Like tenure diversity, ideological diversity and greater polarization has a strong negative effect. The most polarized courts have a 71 percent probability of reaching unanimity. Compared to highly polarized courts, less polarized courts have much less difficulty building unanimous majority coalitions with almost 82 percent of these courts reaching unanimity and greater consensus. The impact of diversity within tort cases symbolizes just how important diversity can be toward consensus.

Moderate support for the structural characteristic hypotheses also emerges. The intermediate appeals court coefficient is statistically significant; indicating consensus in appointed court tort law cases is least with the presence of lower appellate courts. The probability of a unanimous majority opinion is reduced by almost 7 percent where
intermediate courts exist. The court size coefficient is also significant, yet the direction of the impact is unexpected. Court size is reported to have a strong, positive impact on consensus. Lastly, the coefficient for random opinion assignments is statistically insignificant.

Results for state contextual characteristics indicate both electoral competition and extreme public ideology are significant. Both findings are unexpected, as each coefficient is a negative predictor of consensus. Connected to case stimuli, first, amicus briefs have a strong, negative impact on the likelihood of consensus. The probability of unanimity is almost 79 percent greater when a third party is involved. Second, appeal complexity, while moderately significant at the .1 level, also has a negative impact on consensus.

**Results from Elected Courts**

[INSERT TABLE 6.10 HERE]

Table 6.10 presents the results from the logit analysis on the likelihood of unanimity within tort law cases held in elected courts. While the performance of this model is weaker than the appointed model, the fitted model provides a strong level of explanation for consensus. Five variables are statistically significant and provide directional support for their respective hypothesis test. The chi-square indicates the fitted model again performs better than the null. Like the appointed court model, the goodness of fit for the model is a relatively low 7 percent. The model has a total of 1,651 tort case observations over the period of this study with a 59 percent predicted probability of unanimity.
The ideological diversity coefficient is insignificant with no impact reported in either the positive or negative direction. Gender diversity, however, is statistically significant providing a negatively discernable effect on the likelihood of unanimity. The occurrence of unanimity is highest where courts are sexually less diverse. Again, the outcome of a unanimous majority decision is much less likely in elected courts. The probability that a taxation cases will involve such a majority is 21 percent less in states with extremely high quantities of female jurists compared to state courts without female jurists. While racial diversity is moderately significant at the .1 level, race has an impact on consensus, reducing the likelihood of unanimity. Lastly, the tenure diversity coefficient is also statistically discernable. More senior courts have fewer unanimous majority coalitions than less senior courts. The probability a case will involve a unanimous majority opinion is almost 24 percent less in states where tenure diversity moves across the full range of the variable. The data indicate diversity has a strong impact on consensus, reducing the likelihood of unanimity as courts experience higher levels of tenure diversity.

In elected state supreme courts, only gender diversity and tenure diversity have markedly important effects on consensus. The effect of greater gender diversity is negative with greater gender diversity decreasing consensus. Specifically, courts with equal gender representation have fewer unanimous majority coalitions with the probability of unanimity only 49 percent. Where courts have no female jurists, the probability of unanimity increases to 65 percent. Related to tenure diversity, the effect is negative where court seniority is greatest. The probability of unanimity is only 44
percent where tenure is longest. Inversely, where tenure diversity is least, the probability of unanimity is over 69 percent.

The logit results for court structure confirm judicial institutions affect consensus. As expected, the court size coefficient is statistically significant. The probability of unanimity is 42 percent lower where court size is largest. The random opinion assignment coefficient is also statistically significant. Random opinion assignments within elected courts increase consensus within tort law cases. The probability of a unanimous outcome is almost 11 percent greater where state supreme courts assign opinions randomly. The intermediate appeals court coefficient is moderately significant, weakly validating the hypothesis that lower appellate courts increase the likelihood of unanimity.

The state contextual environment has no impact on court behavior within tort law cases. Neither electoral competition nor more ideologically extreme states have statistically significant coefficients, suggesting consensus is not affected by competition or extreme state ideology. The final category, case related characteristics, gain moderate statistical support. Where third parties enter amici briefs to the court on behalf of either the respondent or the petitioner, consensus is less likely. Courts react to greater attention from outside groups with more dissensus. The probability of unanimity is reduced by 9 percent where amici briefs are submitted. As for appeal complexity, the coefficient is not statistically significant and fails to reject the null.

**Summary of Tort Cases**

As a less salient form of judicial policy, courts display varying degrees of consensus. As found within both appointed and elected courts, diversity, court structure,
political context, and case attributes differently affect the aggregate behavior of courts within some civil policy areas. In particular, while ideological diversity has a strong, negative impact on consensus within appointed courts, judicial preferences are less important within elected courts. For other forms of diversity, only tenure diversity consistently and negatively impacts consensus within tort law decisions.

**General Comments across Areas of Policy**

The findings suggest that judicial diversity conditions behavior. While Epstein et al. (2003) argue effectively that diversity and career backgrounds affect judicial decision-making; their argument is only partially valid when applied to the state courts. Each form of diversity, including ideological, racial, gender, and tenure, has pronounced effects within appointed courts that resemble the federal judiciary. Within elected state courts, however, the impact of diversity is slightly less substantial specifically within civil cases. While the composition of one court may resemble another, there may be distinct differences in behavior according to judicial selection and case saliency. Overall, appointed courts have clear differences from elected courts in relation to ideological, racial, and gender diversity. The results presented above suggest appointed courts encourage independence. Ideological diversity has substantially stronger effects within both appointed court decisions and less salient policy areas. Similarly, racial diversity causes greater dissensus in appointed courts, while contributing to consensus in elected courts. The one area of diversity that does not encourage more independence within appointed methods of selection is gender diversity. As speculated above, female jurists may react to different constituencies and electoral pressures that contribute toward dissensus in elected courts. Also as expected, appointed courts with higher quantities of
women have more consensual outcomes, suggesting that the processes involved with female jurist selection differ from racial diversity. Clearly, methods of selection and general case characteristics serve as modifying influences in the full effect of diversity.

Lastly, tenure diversity has a consistently negative impact on consensus. This impact is heightened with appointed methods of selection and within certain policy matters. While controls for court structure, political context, and case characteristics emerge as statistically significant explanations of consensus, the model's findings related to diversity are informative. The combined influence of general case characteristics and judicial selection appear to influence the role of diversity. While courts may appear very similar, differing forms of behavior are explained by the environment in which each court resides and the attention directed toward each policy area.
Table 6.1
Expected vs. Confirmed Findings
Consensus in State Supreme Courts

Criminal Policy: Capital and Non-Violent Crimes

<table>
<thead>
<tr>
<th>Variable</th>
<th>Expected Findings</th>
<th>Capital Crimes</th>
<th>Non-Violent Crimes</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Appointed Courts</td>
<td>Elected Courts</td>
</tr>
<tr>
<td>Gender Diversity</td>
<td>β&gt;0</td>
<td>β&lt;0</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>β&lt;0</td>
<td>β&gt;0</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>β&lt;0</td>
<td>β&gt;0</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>β&lt;0</td>
<td>β&gt;0</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>N.E.</td>
<td>β&gt;0</td>
<td>N.E.</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
<td>N.E.</td>
<td>β&gt;0</td>
<td>N.E.</td>
</tr>
<tr>
<td>Amici Briefs</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Appeal Complexity</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
<td>β&lt;0</td>
</tr>
</tbody>
</table>

1Expectations in bold are confirmed within the empirical findings.
2Expectation is rejected if either the finding is statistically insignificant or has an unexpected direction of impact.
Table 6.2
Expected vs. Confirmed Findings
Consensus in State Supreme Courts

Civil Policy: Taxation and Tort Cases

<table>
<thead>
<tr>
<th>Variable</th>
<th>Taxation Cases</th>
<th>Expected Findings</th>
<th>Tort Cases</th>
<th>Expected Findings</th>
</tr>
</thead>
<tbody>
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<td></td>
<td>Appointed Courts</td>
<td>Elected Courts</td>
<td>Appointed Courts</td>
<td>Elected Courts</td>
</tr>
<tr>
<td>Gender Diversity</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
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<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
<td>Court Size</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &gt; 0$</td>
</tr>
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<td>Electoral Competition</td>
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<td>N.E.</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
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<td>N.E.</td>
<td>$\beta &gt; 0$</td>
</tr>
<tr>
<td>Amici Briefs</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
<tr>
<td>Appeal Complexity</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
<td>$\beta &lt; 0$</td>
</tr>
</tbody>
</table>

1 Expectations in bold are confirmed within the empirical findings.
2 Expectation is rejected if either the finding is statistically insignificant or has an unexpected direction of impact.
Table 6.3
Appointed State Supreme Court Consensus
Logit Analysis of Consensus within Capital Cases

Dependent Variable – Occurrence of Case Unanimity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>z</th>
<th>PrA</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Diversity</td>
<td>2.361</td>
<td>.833</td>
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<td>β&gt;0</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>-4.652</td>
<td>1.075</td>
<td>-4.33</td>
<td>-27%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>-.020</td>
<td>.005</td>
<td>-3.60</td>
<td>-33%</td>
<td>β&lt;0</td>
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<tr>
<td>Tenure Diversity</td>
<td>-.032</td>
<td>.039</td>
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<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Court Size</td>
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<td>.085</td>
<td>1.05</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
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<td>-3.82</td>
<td>-28%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
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<td>.172</td>
<td>-6.50</td>
<td>-26%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>-.003</td>
<td>.010</td>
<td>-0.35</td>
<td>-</td>
<td>N.E.</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
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<td>.020</td>
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<td>-</td>
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<tr>
<td>Amici Briefs</td>
<td>-.663</td>
<td>.328</td>
<td>-2.02</td>
<td>-16%</td>
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<tr>
<td>Appeal Complexity</td>
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<td>.021</td>
<td>-0.48</td>
<td>-</td>
<td>β&lt;0</td>
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<tr>
<td>Constant</td>
<td>3.034</td>
<td>.665</td>
<td>4.56</td>
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Pseudo R-square 0.1058
% Correctly Predicted 66.52
% Modal Category 59.88
% Reduction of Error 16.55
Chi-square 144.75***
N 1144

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
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<th>z</th>
<th>PrA</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
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<td>4.85***</td>
<td>+36%</td>
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<tr>
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<td>.012</td>
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<td>-36%</td>
<td>β&lt;0</td>
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<tr>
<td>Tenure Diversity</td>
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<td>-</td>
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<tr>
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<td>4.13***</td>
<td>+26%</td>
<td>β&gt;0</td>
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<td>.257</td>
<td>4.26***</td>
<td>+26%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
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<td>.013</td>
<td>2.82***</td>
<td>+39%</td>
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<td>Extreme State Ideology</td>
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<td>.043</td>
<td>1.47*</td>
<td>-</td>
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<tr>
<td>Amicus Brief</td>
<td>-1.876</td>
<td>.547</td>
<td>-3.43***</td>
<td>-42%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Appeal Complexity</td>
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<td>-28%</td>
<td>β&lt;0</td>
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<tr>
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<td>2.88***</td>
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<tr>
<td>Pseudo R-square</td>
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<td></td>
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</tr>
<tr>
<td>% Correctly Predicted</td>
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<td></td>
<td></td>
<td>74.61</td>
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</tr>
<tr>
<td>% Modal Category</td>
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<td></td>
<td></td>
<td>61.48</td>
<td></td>
</tr>
<tr>
<td>% Reduction of Error</td>
<td></td>
<td></td>
<td></td>
<td>34.10</td>
<td></td>
</tr>
<tr>
<td>Chi-square</td>
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<td></td>
<td></td>
<td>182.53***</td>
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</tr>
<tr>
<td>N</td>
<td></td>
<td></td>
<td></td>
<td>1174</td>
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</tr>
</tbody>
</table>

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
Table 6.5
Appointed State Supreme Court Consensus
Logit Analysis of Consensus within Non-violent Crime Cases

Dependent Variable – Occurrence of Case Unanimity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>z</th>
<th>PrA</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Diversity</td>
<td>2.604</td>
<td>1.175</td>
<td>2.22**</td>
<td>+28%</td>
<td>β &gt; 0</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>-3.209</td>
<td>1.704</td>
<td>-1.88**</td>
<td>-18%</td>
<td>β &lt; 0</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>.007</td>
<td>.006</td>
<td>1.17</td>
<td>-</td>
<td>β &lt; 0</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>.120</td>
<td>.050</td>
<td>2.40***</td>
<td>+15%</td>
<td>β &lt; 0</td>
</tr>
<tr>
<td>Court Size</td>
<td>.222</td>
<td>.131</td>
<td>1.70**</td>
<td>+15%</td>
<td>β &lt; 0</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>-1.146</td>
<td>.370</td>
<td>-3.09***</td>
<td>-17%</td>
<td>β &lt; 0</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>.402</td>
<td>.230</td>
<td>1.75**</td>
<td>+6%</td>
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</tr>
<tr>
<td>Electoral Competition</td>
<td>-.041</td>
<td>.014</td>
<td>-2.87**</td>
<td>-21%</td>
<td>N.E.</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
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<td>-2.67**</td>
<td>-21%</td>
<td>N.E.</td>
</tr>
<tr>
<td>Amicus Brief</td>
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<td>-0.87</td>
<td>-</td>
<td>β &lt; 0</td>
</tr>
<tr>
<td>Appeal Complexity</td>
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<td>Constant</td>
<td>-.523</td>
<td>.792</td>
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</table>

Pseudo R-square                  | 0.1578      |
% Correctly Predicted            | 77.03       |
% Modal Category                 | 71.42       |
% Reduction of Error             | 19.61       |
Chi-square                       | 91.42***    |
N                               | 627         |

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
Table 6.6
Elected State Supreme Court Consensus
Logit Analysis of Consensus within Non-violent Crime Cases

Dependent Variable – Occurrence of Case Unanimity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>z</th>
<th>PrΔ</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Diversity</td>
<td>-3.277</td>
<td>1.424</td>
<td>-2.30**</td>
<td>-32%</td>
<td>β&lt;0</td>
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<td>Racial Diversity</td>
<td>-3.221</td>
<td>1.751</td>
<td>-1.84**</td>
<td>-26%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>-.020</td>
<td>.016</td>
<td>-1.25</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>-.123</td>
<td>.061</td>
<td>-2.01**</td>
<td>-32%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>-.490</td>
<td>.107</td>
<td>-4.56***</td>
<td>-42%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>.535</td>
<td>.291</td>
<td>1.84**</td>
<td>+11%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>1.769</td>
<td>.427</td>
<td>4.14***</td>
<td>+36%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>.026</td>
<td>.014</td>
<td>1.76**</td>
<td>+32%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
<td>-.036</td>
<td>.038</td>
<td>-0.94</td>
<td>-</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Amicus Brief</td>
<td>-1.052</td>
<td>.470</td>
<td>-2.24**</td>
<td>-24%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Appeal Complexity</td>
<td>-.051</td>
<td>.095</td>
<td>-0.54</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>3.222</td>
<td>.988</td>
<td>3.26***</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Pseudo R-square 0.1545
% Correctly Predicted 72.33
% Modal Category 51.04
% Reduction of Error 43.48
Chi-square 98.25***
N 553

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
### Table 6.7
Appointed State Supreme Court Consensus
Logit Analysis of Consensus within Taxation Cases

Dependent Variable – Occurrence of Case Unanimity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>z</th>
<th>PrΔ</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Diversity</td>
<td>5.108</td>
<td>1.272</td>
<td>4.01***</td>
<td>+37%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>-3.865</td>
<td>2.172</td>
<td>-1.78**</td>
<td>-17%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>-.022</td>
<td>.008</td>
<td>-2.67***</td>
<td>-29%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>-0.082</td>
<td>.041</td>
<td>-1.98**</td>
<td>-20%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>.459</td>
<td>.138</td>
<td>3.32***</td>
<td>+26%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>-.466</td>
<td>.380</td>
<td>-1.23</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>-.245</td>
<td>.254</td>
<td>-0.96</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>-.010</td>
<td>.016</td>
<td>-0.63</td>
<td>-</td>
<td>N.E.</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
<td>.00003</td>
<td>.030</td>
<td>0.00</td>
<td>-</td>
<td>N.E.</td>
</tr>
<tr>
<td>Amicus Brief</td>
<td>-.577</td>
<td>.309</td>
<td>-1.87**</td>
<td>-10%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Appeal Complexity</td>
<td>-.202</td>
<td>.106</td>
<td>-1.89**</td>
<td>-42%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>.477</td>
<td>1.063</td>
<td>0.45</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

| Pseudo R-square              | 0.1020      |            |        |         |             |
| % Correctly Predicted        | 76.26       |            |        |         |             |
| %Modal Category              | 75.33       |            |        |         |             |
| % Reduction of Error         | 3.77        |            |        |         |             |
| Chi-square                   | 43.55***    |            |        |         |             |
| N                             | 434         |            |        |         |             |

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
Table 6.8  
Elected State Supreme Court Consensus  
Logit Analysis of Consensus within Taxation Cases  

Dependent Variable – Occurrence of Case Unanimity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>z</th>
<th>PrΔ</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Diversity</td>
<td>2.188</td>
<td>1.964</td>
<td>1.11</td>
<td>-</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>7.929</td>
<td>2.223</td>
<td>3.57***</td>
<td>+42%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>.014</td>
<td>.029</td>
<td>0.49</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>-.182</td>
<td>.111</td>
<td>-1.65**</td>
<td>-39%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>-.286</td>
<td>.159</td>
<td>-1.79**</td>
<td>-24%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>-.1998</td>
<td>.541</td>
<td>-3.69***</td>
<td>-36%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>-1.625</td>
<td>.550</td>
<td>-2.95***</td>
<td>-29%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>-.003</td>
<td>.023</td>
<td>-0.13</td>
<td>-</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
<td>.060</td>
<td>.065</td>
<td>0.92</td>
<td>-</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Amicus Brief</td>
<td>-.361</td>
<td>.412</td>
<td>-0.88</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Appeal Complexity</td>
<td>-.491</td>
<td>.173</td>
<td>-2.84***</td>
<td>-36%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>5.320</td>
<td>1.590</td>
<td>3.34***</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Pseudo R-square: 0.1542  
% Correctly Predicted: 70.77  
% Modal Category: 57.49  
% Reduction of Error: 31.24  
Chi-square: 47.08***  
N: 308

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
Table 6.9  
Appointed State Supreme Court Consensus  
Logit Analysis of Consensus within Tort Cases  

Dependent Variable – Occurrence of Case Unanimity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>z</th>
<th>PrA</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Diversity</td>
<td>4.260</td>
<td>.635</td>
<td>6.70***</td>
<td>+34%</td>
<td>β&gt;0</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>-3.976</td>
<td>1.001</td>
<td>-3.97***</td>
<td>-21%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>-.007</td>
<td>.004</td>
<td>-1.71**</td>
<td>-12%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>-.127</td>
<td>.021</td>
<td>-6.01***</td>
<td>-32%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Court Size</td>
<td>.291</td>
<td>.072</td>
<td>4.04***</td>
<td>+17%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>-.444</td>
<td>.169</td>
<td>-2.62***</td>
<td>-6%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>-.058</td>
<td>.128</td>
<td>-0.45</td>
<td>-</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>-.029</td>
<td>.009</td>
<td>-3.12***</td>
<td>-13%</td>
<td>N.E.</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
<td>-.076</td>
<td>.014</td>
<td>-5.35***</td>
<td>-20%</td>
<td>N.E.</td>
</tr>
<tr>
<td>Amicus Brief</td>
<td>-.888</td>
<td>.169</td>
<td>-5.24***</td>
<td>-78%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Appeal Complexity</td>
<td>-.060</td>
<td>.044</td>
<td>-1.36</td>
<td>-26%</td>
<td>β&lt;0</td>
</tr>
<tr>
<td>Constant</td>
<td>2.301</td>
<td>.451</td>
<td>5.10***</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Pseudo R-square                   0.0877
% Correctly Predicted             75.29
% Modal Category                  75.03
% Reduction of Error              1.01
Chi-square                        139.56***
N                                 1809

Note: Statistically significant parameter estimates are denoted by * (p ≤ .10), ** (p ≤ .05), *** (p ≤ .01).
### Table 6.10
Elected State Supreme Court Consensus
Logit Analysis of Consensus within Tort Cases

Dependent Variable – Occurrence of Case Unanimity

<table>
<thead>
<tr>
<th>Variables</th>
<th>Coefficient</th>
<th>robust s.e.</th>
<th>(z)</th>
<th>PrA</th>
<th>Expectation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gender Diversity</td>
<td>-1.309</td>
<td>.663</td>
<td>-1.97**</td>
<td>-21%</td>
<td>(\beta &gt; 0)</td>
</tr>
<tr>
<td>Racial Diversity</td>
<td>-1.240</td>
<td>.807</td>
<td>-1.54*</td>
<td>-</td>
<td>(\beta &lt; 0)</td>
</tr>
<tr>
<td>Ideological Diversity</td>
<td>-.004</td>
<td>.007</td>
<td>-0.54</td>
<td>-</td>
<td>(\beta &lt; 0)</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>-1.104</td>
<td>.029</td>
<td>-3.55***</td>
<td>-23%</td>
<td>(\beta &lt; 0)</td>
</tr>
<tr>
<td>Court Size</td>
<td>-.437</td>
<td>.056</td>
<td>-7.69***</td>
<td>-42%</td>
<td>(\beta &lt; 0)</td>
</tr>
<tr>
<td>Intermediate Appeals Court</td>
<td>.199</td>
<td>.155</td>
<td>1.28*</td>
<td>-</td>
<td>(\beta &gt; 0)</td>
</tr>
<tr>
<td>Random Opinion Assignment</td>
<td>.385</td>
<td>.205</td>
<td>1.87**</td>
<td>+11%</td>
<td>(\beta &gt; 0)</td>
</tr>
<tr>
<td>Electoral Competition</td>
<td>-.004</td>
<td>.007</td>
<td>-0.58</td>
<td>-</td>
<td>(\beta &gt; 0)</td>
</tr>
<tr>
<td>Extreme State Ideology</td>
<td>-.003</td>
<td>.022</td>
<td>-0.15</td>
<td>-</td>
<td>(\beta &gt; 0)</td>
</tr>
<tr>
<td>Amicus Brief</td>
<td>-.396</td>
<td>.183</td>
<td>-2.16**</td>
<td>-9%</td>
<td>(\beta &lt; 0)</td>
</tr>
<tr>
<td>Appeal Complexity</td>
<td>-.059</td>
<td>.058</td>
<td>-1.02</td>
<td>-</td>
<td>(\beta &lt; 0)</td>
</tr>
<tr>
<td>Constant</td>
<td>4.845</td>
<td>.512</td>
<td>9.45***</td>
<td>-</td>
<td></td>
</tr>
</tbody>
</table>

Pseudo R-square: 0.0730
\% Correctly Predicted: 64.14
\% Modal Category: 56.40
\% Reduction of Error: 17.75
Chi-square: 153.74***
N: 1651

Note: Statistically significant parameter estimates are denoted by * (\(p \leq .10\)), ** (\(p \leq .05\)), ***(\(p \leq .01\)).
Chapter Seven

Conclusion: Career Goals and Policy Outcomes in State Supreme Courts

Chapter Six reveals that state supreme court diversity has a noteworthy effect on consensus. Whether courts are inclined toward conflict or consensus is largely determined by the range of judge attributes present. As Epstein, Knight, and Martin (2003) reason, diversity influences decisional behavior, yet their impression of diversity is only partially correct. Chapter Six illustrates that diversity's influence varies by selection method with elected courts restricting the impact of diversity and appointed courts creating environments for sincere forms of behavior and greater dissensus. The contribution of this dissertation is the inference that characteristics of state supreme courts affect the range of attributes on courts which in turn influence decision outcomes. Another contribution is the integration of two perspectives of judicial behavior: (1) the strategic and (2) the institutional perspectives of judicial behavior. With the inclusion of the institutional determinants of diversity into the calculus of decision making, we now understand that selection of distinct courts with varying judge attributes influences the interaction of judges and formation of majority coalitions.

Since attractiveness of office varies by the structural characteristics of each state court, state supreme courts provide a unique set of institutions to test for decisional differences related to diversity. Using data on court composition from 1995-1998 and data on consensus from 1995-1997, this research demonstrates that the appeal of office contributes toward patterns of diversity and patterns of diversity in turn affect the behavior of the state high courts. The appeal of office is the product of structural characteristics, the difficulty of selection, and the political characteristics of each state.
Dependent on these systematic factors, composition varies in many expected ways, with the value, risks, and costs associated with office each contributing to unique patterns of recruitment. Of even greater importance, the range of attributes influenced by attractiveness of office affects cohesion within the courts. Consensus emerges as the product of recruitment with varying patterns of behavior determined by selection methods and those present within the courts.

Related to ideological diversity, does a highly diverse court similar to the California Supreme Court have less consensual policy outcomes than a homogenous body like the Missouri Supreme Court? The results suggest consensus is less likely within the California Supreme Court, yet both are appointed state supreme courts. A more interesting pairing may include the California Supreme Court and the Arkansas Supreme Court, which is elected. If the assertions made throughout this dissertation are correct, then the magnitude of consensus should be quite different. Arkansas should display stronger patterns of consensus and a narrower range of preferences.

Consensus is less likely within polarized appointed courts. The results for three of four areas of policy confirm this expectation. Within elected courts, however, ideological diversity is a weaker influence. The systematic forces that shape the distribution of preferences also affect the collective outcomes of courts. Chapter Six demonstrates that appointed courts are often more polarized. This finding reinforces that appointed courts have greater difficulty reaching consensus, as collective action problems emerge within appointed courts that permit greater independence. While both elected and appointed courts face collective action problems, dissensus should be greatest where institutions favor sincerity and ideological polarization.
The range of characteristics related to gender and race are also informative. Research suggests that political minority judges often vote very differently from their traditional colleagues. Evidence from the state supreme courts suggests again that conflict is greatest within appointed courts. Partially for that reason, African-American jurists display greater independence in appointed courts. African-Americans also benefit from greater access to appointed courts with traditionally greater freedom. These results support prior arguments that personal experiences lead to dissimilar forms of behavior for minority judges (Songer and Crews-Meyer, 2000; Walker and Barrow, 1985). Favoring the substantive representation perspective of behavior, racial diversity contributes to quite different patterns of consensus in elected versus appointed courts, suggesting that electoral feedback within elected courts creates environments that encourage consensus regardless of personal characteristics. This finding strengthens the institutional interpretation of judicial behavior. Where electoral competition encourages inclusive majority opinions within elected states, the results demonstrate that racial diversity positively contributes toward consensus in elected states and where electoral competition is greatest (Brace and Hall, 1990, 1997). Regardless of race, judges avoid electoral sanctions, especially when access is traditionally limited within appointed courts.

Like race, gender diversity expectations receive considerable support. Largely different from racial diversity, however, gender diversity contributes to greater consensus within elected courts. It is speculated above that greater access to elected courts as historical hurdles subside have created more dissensus within courts with more female jurists. Reacting possibly to electoral considerations, women act much more independently than other groups contributing to less consensual outcomes within elected
courts. In appointed courts, where access for women is limited, greater gender diversity contributes to unanimous decisions. Therefore, unlike racial diversity, consensual outcomes benefit from greater judicial independence and less from electoral politics. An explanation of greater consensus within appointed courts may reflect the similar professional development that male and female attorneys receive. While elected female jurists react to electoral considerations, perhaps male and female judges emerge from similar backgrounds contributing to an environment where gender does not create conflict.

The results related to tenure diversity are also informative. While tenure diversity is greatest in appointed courts with longer term lengths, seniority decreases consensus in all courts. The negative impact of seniority on consensus signifies dissensus is more common in appointed courts that promote greater seniority. Chapter Four notes that seniority is restricted in elected courts by shorter term lengths and less certainty of office.

The findings support the suggestion that the strategic and institutional accounts of judicial behavior are incomplete. The research above demonstrates that the distribution of judge characteristics further explains judicial behavior. More specifically, office appeal has a significant impact on consensus. The attractiveness of office contributes to dissimilar judge attributes, where the risks and incentives associated with office vary. Clearly, where judges respond to distinct risks and incentives, office seeking motivations respond to the attractiveness of office differently according to judicial career goals. Diversity responds to elected forms of selection, with smaller distributions of judge characteristics and preferences found within elected courts.
The relationship has the additional and highly important effect of shaping consensus, as institutional determinants of office affect collective action problems, which shape office cohesion. Where courts are less diverse in high-status and elected offices, consensus is greatest. Consensus is therefore greatest where office appeal is greatest. Interestingly, consensus, like diversity, differs by selection method with elected courts restricting diversity and increasing consensus, while appointed courts act more sincerely and display greater conflict.

While the strategic perspective of judicial behavior reasons judges behave differently if threatened by retaliation from other political actors and the institutional perspective reasons judges decide differently based on whether they face an electorate, this thesis confirms that diversity creates collective action problems that differ across the state supreme courts. While incomplete, the strategic and institutional perspectives of judicial politics benefit from these findings. The strategic and institutional perspectives of judicial behavior improve our understanding of collective action problems within the courts where the structure of composition is considered. Accordingly, strategic interaction differs where the distribution of preferences vary. Similarly, the distribution of judge characteristics vary by method of selection, suggesting institutions structure preferences within the courts contributing to diverse forms of behavior. Related to goal attainment, the findings above demonstrate that courts attract different types of candidates. Where elected courts limit the impact of diversity and encourage consensus, office oriented candidates emerge. Elected state supreme courts favor consensual outcomes limiting sanctions where courts act cohesively. While elected courts attract office-seekers, appointed courts attract policy seekers based on patterns of consensus.
With few constraints, appointed courts promote more sincere forms of behavior as evident from patterns of dissensus.

**Implication of Judicial Diversity and Consensus**

Fundamentally, this thesis has tried to explain the relationship between the motivation for office and decision outcomes. To understand office motivation, we must understand the impact of diversity on decision outcomes. Evidently, the attractiveness of office is important for understanding both descriptive representation and decision outcomes. Candidates evaluate the value of office, the risks of selection, and the political costs of recruitment. Building upon Rohde’s (1979) assessment of ambition and recruitment, the results demonstrate state supreme court recruitment is subject to many office characteristics. Where judicial candidates are ambitious and desire higher status offices, there are limited outlets for ambition, as elected and high-status courts limit the range of judge characteristics. For instance, higher status judicial offices encourage candidates with less extreme personal preferences, while recruitment for low-status offices restricts fewer candidates. As a method of explanation, the assessment of the value, risks, of costs of selection proves invaluable as ambitious jurists react to the status and attractiveness of office.

The results indicate that elected methods of selection contribute toward more inclusive majorities with greater consensus. While observers from Alexander Hamilton to Justice Sandra Day O’Connor feared judiciaries affected by the “ill humors” of the public, the results suggest elections contribute to greater legal consensus. Where consensus contributes to legal clarity, elected courts more than appointed courts favor legal certainty. Other methods of selection and institutional arrangements also have
consequences with appointed courts preferring smaller majority opinions driven by perceived policy motivations. Greater independence within appointed courts is derived from judicial systems designed to enhance independence.

With dissimilar patterns of consensus among appointed and elected courts, distinct career goals emerge. Where elected courts prefer inclusive majorities and legal certainty, the findings reveal elected courts contribute toward office seeking goals. With less divisive, universalistic majorities, elected courts promote outcomes that aid the retention of office. In appointed courts, however, majority coalitions are often less than universal, suggesting policy goals are primary. Appointed courts require less inclusive majorities, as external sanctions are few. Judges with policy motivations should prefer appointed courts that permit sincere behavior. Elected courts, on the other hand, should attract judges with fewer policy goals and a desire to stay in office. The occurrence of high levels of unity in elected courts suggests elected judges sacrifice attitudinal preferences for office preferences. Therefore, courts based on the range of attributes and selection methods promote different career goals.

Similarly, appointed courts favor dissensus and sincere policy interests. With diversity greater among appointed state supreme courts, there is a significant relationship between policy motivations and institutional structures that grant independence. Diversity consequently contributes toward conflict and less durable policies within appointed courts, while the motivation of office within elected courts limits the expression of dissent and creates stronger precedent.

Considering career goals and conditions that encourage diverse preferences, the findings suggest state judicial institutions create a relationship between career goals and
decision-making. While many judicial institutions promote outlets for sincere forms of behavior, others promote more restrained office seeking goals. The product of this difference is policy outcomes that vary by state and institution. Explanations of judicial behavior emerging from this thesis suggest that policy outcomes are the product of judge characteristics, including career goals, and the institutional arrangements that encourage the presence of these goals. While legal theorists argue case outcomes are a product of legal stimuli and attitudinal theorists argue outcomes are the result of sincere preferences, institutional attributes beyond case stimuli and preferences affect case outcomes.

**Implications for the Future**

This study has explored important topics related to judicial politics and the perspective of strategic behavior. More specifically, this dissertation has sought to integrate two perspectives of judicial behavior by investigating those factors that affect decision making. While the impact of diversity has received prior attention, there remain many unanswered questions. The analyses above find diversity and consensus vary strongly by state court. For future research related to diversity's impact on outcomes, additional forms of diversity also require investigation, including educational background, religious identification, ethnic backgrounds, and state of origin. Each characteristic may further clarify the role of diversity and how the attractiveness of office affects judicial decision-making.

In addition, more attention should be directed toward additional types of policy. For instance, it would be interesting to evaluate other areas of policy that affect political minorities. Dissimilar patterns of behavior may emerge within elected and appointed courts where the personal characteristics of political minority judges are involved.
Previous research suggests that racial minority and female judges are sensitive to policies related to their underrepresented group status. Where no relationship is found in multiple policy settings, these findings may suggest that judges from traditionally underrepresented groups repress their personal preferences and vote inclusively with the majority regardless of their personal characteristics within elected courts. In appointed courts, however, judges may be more sensitive to personally salient policy areas voting in a more sincere manner. An alternative expectation of gender and race related behavior suggests, blacks and females may vote in a supportive manner of the political minority party contributing to substantive representation. This, of course, requires further attention.

While this study focuses on four areas of policy, criminal and civil, as well as salient and non-salient, an investigation of additional policies may be constructive. This study finds that diversity is significantly related to collective action outcomes with the range of court attributes affecting consensus differently by method of selection. Studies of a broader magnitude may confirm that diversity affects decisional behavior beyond the policies within this study. In addition to capital cases and non-violent crime appeals, exploration of all criminal matters may fully explain the influence of diversity on decision outcomes. In addition, a more extensive range of civil policies may contribute to a more comprehensive understanding of judicial decision making. For instance, while the distribution of court attributes affects taxation and tort law outcomes, it may have no impact on decisions to revoke an attorney’s practice license. Data concerning attorney disciplinary proceedings, which often originate and conclude in state supreme courts,
show courts are often unanimous in nature. Accordingly, certain policy areas may restrict the effects of diversity beyond methods of selection.

Avenues of investigation also include additional forms of decisional behavior. This investigation focuses exclusively on consensus and the event of unanimity. Other behaviors may include ideological case outcomes, docket characteristics, issue fluidity, and coalition behavior. Similar to patterns of consensus, composition may structure other forms of decision outcomes. Associated with ideological case outcomes, the appeal of office and the political factors involved with recruitment may influence the direction of case outcomes. Behavior may also vary according to the institutional characteristics of the court similar to consensus. Research notes ideological outcomes are institutionally determined with more liberal outcomes influenced by liberal political environments in elected courts (Brace and Hall, 1997). Related to docket characteristics, the structure of the state supreme court dockets may depend largely on judges selected to the bench. While institutional considerations may affect decisions to grant certiorari, including limited docket control and intermediate appellate courts, the range of judge attributes may affect decisions to place controversial or less controversial issues on a court’s agenda where docket control is greatest (see Brace and Hall, 1999, 2001). Like docket characteristics, issue fluidity, or the number of issues heard on appeal, may share a relationship with court composition. The quantity of issues may increase or decrease according to a court’s ability to reach consensus. Where conflict is avoided, judicial institutions may restrict the quantity of appeals focusing on fewer issues with greater potential for inclusive majorities. Finally, coalition behavior, an individual level behavior, depends largely on the general characteristics of the courts. While tendencies
for consensus are greatest in elected courts, recruitment of jurists with office-seeking goals may cause larger coalitions.

This study has considered the relationship between composition and decision outcomes, anticipating that judicial institutions structure the attributes present within the courts. Because of this narrow focus, the findings can only describe the relationship between diversity and consensus examined. The findings, however, provide a directional focus that can be expanded in future endeavors. While limitations surely exist, the theory attached to these phenomena provides a robust form of explanation, allowing more developed perspectives of strategically and institutionally influenced behavior.
Bibliography


**Appendix A**

Dependent Variable Descriptions

<table>
<thead>
<tr>
<th>Variable</th>
<th>Variable Description</th>
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</thead>
<tbody>
<tr>
<td><strong>Diversity Models</strong></td>
<td></td>
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<tr>
<td>Ideological Diversity</td>
<td>Range of court ideology (PAJID), the distance from the most conservative judge to the most liberal judge in each state supreme court.</td>
</tr>
<tr>
<td>African-American Diversity</td>
<td>Proportion of black judges in each state supreme court and year.</td>
</tr>
<tr>
<td>Female Diversity</td>
<td>Proportion of female judges in each state supreme court and year</td>
</tr>
<tr>
<td>Tenure Diversity</td>
<td>Average length of tenure for all justices by state supreme court and year.</td>
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<tr>
<td><strong>Consensus Models</strong></td>
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<tr>
<td>Consensus</td>
<td>Variable equal to 1 in unanimous cases with no votes of dissent, 0 in cases with one or more votes of dissent.</td>
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### Appendix B

**Independent Variable Descriptions**

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<td><strong>Diversity Variables</strong></td>
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<td>Female Diversity</td>
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<tr>
<td>Ideological Diversity</td>
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<td>Tenure Diversity</td>
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<tr>
<td><strong>Court Structural Variables</strong></td>
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<td>Random Opinion Assignment</td>
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<tr>
<td>State Ideological Extremism</td>
</tr>
<tr>
<td>State Liberalism</td>
</tr>
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</table>
**Decision Variable**

Case Saliency

1 for cases with an amicus curiae brief submitted by a third party, 0 otherwise.