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Impropriety’s Invisible Hand: Judicial Race and Gender Biases Within State Supreme Courts

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It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence.

-Thomas Jefferson2

A judge should refrain from acting upon or manifesting racial, gender or other bias or prejudice toward any participant in the legal process.

-204 Pa. Code § 99.2

A hallmark of justice in the American legal system is judicial impartiality. This fundamental value takes primacy in the American Bar Association’s Model Code of Judicial

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Ethics. The first canon of the Model Code reads, “A judge shall uphold and promote the, independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” While scholars, litigants and professional organizations are overwhelmingly focused on judicial prejudice or the appearance thereof with respect to the relationship between judges and litigants, it is important to consider what role, if any, personal biases may play in internal court dynamics.

Consider courts as public workplaces. Since the mid-twentieth century, the federal government and nearly every state has enacted statutory schemes to combat workplace discrimination. Employers promulgate policies to hedge against hostile work environments and

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3 Model Code of Judicial Conduct Canon 1.

engender a workplace of diversity and inclusion.\textsuperscript{5} Framing courts of last resort as public workplaces that should exhibit impartiality internally as well as externally raises two questions. First, are there race and gender prejudices present within the judicial process? Second, can certain judicial administrative processes better serve to suppress race and gender bias, unconscious or otherwise, than others?

The answers to these questions have serious implications for the integrity of judicial institutions and the quality of jurisprudence. If, for example, it is widely believed that judicial

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\textsuperscript{5} See, e.g., Coca-Cola Corporation, \textit{Workplace Culture}, http://www.coca-colacompany.com/our-company/diversity/workplace-culture (describing the Coca-Cola Corporation’s workplace diversity strategy programs).
diversity matters\textsuperscript{6} — that the identity-related composition of courts can positively influence the contours and development of jurisprudence— the benefits of diversity may be neutered by

\begin{itemize}
  \item The American Bar Association has a standing committee on judicial diversity. See American Bar Association, Standing Committee on Diversity in the Judiciary, http://www.americanbar.org/groups/judicial/committees/scdj.html. The American Bar Association’s statement on judicial diversity illustrates a strong view that judicial diversity matters:
    \begin{quote}
      The public's trust and confidence in the justice system is enhanced when they see that the judges deciding their cases resembles the vast racial, ethnic, and cultural groups that make up American society. Likewise, a diverse judicial branch expands an individual judge's perspective in making decisions that impact a diverse population. Id.
    \end{quote}

  \item Professor Jeffrey Jackson echoed this idea:
    \begin{quote}
      Judges are not the exclusive province of any one section of society. Rather, they must provide justice for all. In order for a judicial selection to be considered fair and impartial, it must be seen as representative of the community. It is important for a selection system, insofar as it is possible, to advance methods that provide for a judicial bench that reflects the diversity of its qualified applicants. Jeffrey D. Jackson, Beyond Quality: First Principles in Judicial Selection and Their Application to A Commission-Based Selection System, 34 FORDHAM URB. L.J. 125, 145 (2007).
    \end{quote}
\end{itemize}
judicial processes more prone to biases. An empirical examination of the relationship between judicial administration and prejudice is imperative not only for institutional integrity and legitimacy, but also in the interest of substantive law.

This Article seeks to study the effects of three distinct judicial administrative settings on race, gender and other biases in state supreme courts. We look at justices’ workload assignments to detect bias—even unconscious bias. Specifically, the Article models to what extent a majority opinion writing assignment is affected by prejudice in states that use randomized assignments, rotated assignments, or fully discretionary assignments, respectively. Part I will discuss relevant portions of the legal and social science literatures that cover bias in the workplace. Part II will address the theoretical underpinnings of the study and proffer predictions. Part III describes the methods and data used and is followed by a discussion of the findings that are from data collected from all 50 states’ courts of last resort in Part IV. In this Part, evidence that judicial prejudice exists and certain processes of judicial administration are better mechanisms than others to curb the effects of race and gender bias is produced and explained. Part V concludes with a discussion of the normative implications of the findings for legal institutions and legal doctrine.

Part I. Public Workplace Bias Based on Race and Gender

See e.g., Katherine W. Phillips, et al., Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers, 35 PERSONALITY & SOC. PSYCH. BULL. 336 (2009) (finding that heterogeneous groups performed better than homogenous groups).
Judges, like any similarly situated public administrator, routinely face competing value priorities and these can include personal biases and self-interests. Scholars of law, political science, public administration and practitioners in these fields consequently have a vested interest in how those entrusted with power exercise their discretion. Thinking about judges as public actors/officials while drawing on broader literatures we make the following observations.

8 Herbert Kaufman, Emerging Conflicts in the Doctrines of Public-Administration, 50 AM. POL. SCI. REV. 1057 (1956) (noting the competing values of representativeness, neutral competence, and executive leadership in public administration); GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE (1991) (arguing that courts are constrained by non-legal factors in shaping jurisprudence).


10 See, e.g., H. L. A. Hart, Discretion, 127 HARV. L. REV. 652 (2013) (addressing philosophical questions with respect to discretion and law); Samuel J. Levine, Taking Ethical Discretion
Public actors with discretionary functions use that discretion in various ways. Public officials act as citizen advocates, at times pushing the boundaries of preexisting rules. Public officials act as citizen advocates, at times pushing the boundaries of preexisting rules.

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actors have been found to utilize their discretion to improve services for citizens of their own sex, race or ethnicity.\textsuperscript{14} Other times, those public officials entrusted with discretionary power can sidestep neutral efficiency and advance partisan politics.\textsuperscript{15} While these public actors operate street-level bureaucrats' beliefs prioritizing pragmatic judgments over impractiable formal mandates is responsible).

\textsuperscript{13} Lael Keiser, \textit{State Bureaucratic Discretion and the Administration of Social Welfare Programs: The Case of Social Security Disability}, 9 J. of Public Admin. Research & Theory 87. (1999) (finding the implementation of the Social Security Disability program is influenced by the need for benefits, the health of the economy, and state partisan politics).


\textsuperscript{15} See Keiser, \textit{supra} note 12.
under the color of law to advance a cause beyond their purview, others use their discretion to exact punishment and retribution. At times, discretion has been found to result in biased outcomes.

Importantly, no one single factor is dispositive of how a public actor ultimately exercises his or her discretion. Individual, organizational, institutional, and other contextual factors all contribute to the manner in which discretion is employed and outcomes, as a result, are affected. For example, one study found that automating the processing of unemployment insurance claims curbed the systematic discrimination against female applicants in an administrative process that granted discretion to bureaucrats. This begs a number of questions. Are judges different than other public agents? Can we take look to the research of internal administrative processes reforms implemented by public agencies and apply a parallel analysis to judicial institutions? What can we learn from the random-, rotation-, and discretion-based administrative processes utilized in judicial institutions?

This Article explores these questions within the context of state courts of last resort. Those specifically examining judicial behavior have linked race and gender to judicial decision-making. In other words, even if unconsciously, judges’ personal attributes can impact the world in a bias manner. One study found that “race and gender . . . shape a judge’s policy goals and

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16 See Lipsky, supra note XX; Wenger & Wilkins, supra note XX, at 315 (arguing public actors use their power to “give in to favoritism, stereotyping, and routinizing and use the rules to discourage and harass citizens”).

17 Id.

18 Wenger and Wilkins, supra note XX.
Other scholars have found that judges’ racial and gender identities may play a role in their decision-making, noting that women and judges of color may be more sympathetic towards parties alleging civil rights violations than non-minority judges.\textsuperscript{20}

This Article explores whether judges’ personal biases surface in internal ways as well. How do elements of discretion and judicial identity diversity impact the judicial process itself?

**Part II. The Elements of Prejudice and Process**

Though discrimination was once enshrined in law and encouraged by political and social elites, there has been a decline in prejudice in the United States in wake of the Civil Rights Movement.\textsuperscript{21} This shift notwithstanding, implicit bias has continued to persist.\textsuperscript{22} Indeed,


\textsuperscript{22} Id at 313 (“…even among persons who hold a sincere belief in race blindness, images and depictions of members of racial groups learned beginning in childhood are influential on their thinking. Similar forms of implicit attitudes are also at play in nonracial situations, including
scholars have logged a body of evidence showing the extent of express and implicit bias in both the public and private sector. Specifically, judges have not been immune from findings of bias.


Ian Ayres and Joel Waldfogel found in a study of Connecticut judges that bail amounts for black defendants were twenty-five percent higher than for similarly situated white defendants.\(^{24}\) A study of federal judges found that imposed sentences were twelve percent longer for convicted black defendants than similarly situated white defendants.\(^{25}\) Evidence from capital punishment statistics suggest that those who murder white victims are more likely to receive a death sentence than convicted murderers of black victims.\(^{26}\) That same study also showed black defendants convicted of capital crimes were more likely than white defendants convicted of capital crimes to receive the death penalty.\(^ {27}\) A study of judges’ implicit racial attitudes found white judges exhibited significantly higher implicit racial biases than black judges.\(^ {28}\) Legal scholars have also

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\(^{27}\) *Id.*

\(^{28}\) Jeffrey J. Rachlinski et. al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1211 (2009).
raised concerns of judicial bias through anecdotal evidence of judges’ behavior exhibiting racial bias.29

One body of literature on status characteristics explains how race and gender stereotypes might implicitly shape decision-making.30 Status characteristics theory argues that status cues and stereotypes can generate subconscious thinking that members of non-majority classes are of different status than majority-class members.31 These stereotypes often perpetuate notions that


31 Professor Amy Wax provides an excellent example of how an employee’s class membership can give rise to unconscious disparate treatment in the workplace:

“Although the decisionmaker might think he is being “fair,” the inadvertent bias might alter the outcome of a decision about the employee. For example, a supervisor might unconsciously place more weight on errors in grammar or spelling in a memo prepared by a Hispanic clerk than in a document submitted by an Anglo counterpart. Or he might view a female employee's restraint in a client meeting as manifesting a lack of aggressiveness rather than prudence or good judgment. In both cases, the “difference” in
members of minority groups have diminished expectations of competence. This phenomenon has been found to plague the political branches. For example, one study found state legislators viewed African-American colleagues as less effective lawmakers. Another study found female politicians seeking elected office or holding elected office are held in lesser esteem on certain salient issues because they are perceived as less qualified or competent. Like the legislative branch, executive branch agencies are impacted by bias. Researchers have documented that bureaucratic agencies have a disproportionate number of white men in leadership and decision-making positions than women and persons of color. While there is strong evidence highlighting

the employer's reaction ultimately depends upon the employer's identification of the employee as belonging to a particular group. This conduct fits the framework of disparate treatment because observations regarding the worker's protected trait are causally linked to less favorable judgments, which may result in adverse treatment in the workplace.”

Amy L. Wax, Discrimination As Accident, 74 Ind. L.J. 1129, 1131 (1999).

32 See, e.g., Kim Fridkin & Patrick Kenney, The Role of Gender Stereotypes in US Senate Campaigns, 5 Politics and Gender 301 (2009).

33 See Haynie, supra note XX.


the impact of prejudice in the political branches, there remains open questions about to what extent, if any, similar ills harm judicial institutions.

Though prejudice exists, scholarly research shows that the expression of bias can be cabined by process. For example, assessment of women and blacks can be more conductive to curbing biases if they are done so in a public setting over a private setting.\textsuperscript{36} Monitoring and oversight, too, play an important role. Indeed, it has long been understood that oversight is a key condition to guarantee that the adherence to rules is not sacrificed to administrative discretion.\textsuperscript{37} Thus, in the typical administrative setting, process matters.

Courts are not typical administrative settings in the sense that they are imbued with values and norms that are not typical of agencies across the broad. This is especially true with respect to issues of discrimination that implicate bedrock principles of equal protection. Judges are students and enforcers of the Constitution and have the duty to regularly adjudicate equal protection-based claims. Therefore, it should be expected that judicial actors are particularly sensitive to matters of bias and prejudice—even in the internal workings of the justice process.

\textit{A Road Less Traveled?}, 69 Public Admin. Rev. 373 (2009).


However, this is a heretofore-unexplored question and there is no examination of the enforcement mechanisms or oversight with respect to internal judicial processes to hedge against bias or prejudice, especially given judges’ non-public method of deliberation. This fuels a need to consider how discretion, rules, norms, monitoring, and prejudice are impacted/controlled by various judicial administrative practices. Our particular interest is how prejudice might impact the internal processes of assigning the writing of the majority opinion.

The Power of the Pen: Majority Opinion Assignments

In 2007, state supreme courts collectively disposed of nearly 65,000 appellate cases and nearly 10,000 original cases. Because state courts of last resort are the final arbiters of state law, their significance cannot be overstated. This concept is well established in scholarly literature. The assignment to write the majority’s opinion specifically is understood to be a


39 See Brace & Hall, supra note XX; Robert Kagan, et al., The Business of State Supreme Courts, 1870-1970, 30 Stan. L. Rev. 121 (1977) ("Although often overshadowed in the public eye by the federal courts, SSCs decide many fundamental issues of individual rights and governmental powers. They are the courts of last resort on most issues of commercial and property law, family and inheritance law, tort and criminal law, and powers and procedures of local government."); G. Alan Tarr & Mary Cornelia Aldis Porter, State Supreme Courts in State and Nation (1988).
major tool for shaping jurisprudence and, particularly in the case of common law-based
decisions, public policy.\textsuperscript{40} Elliott Slotnick succinctly summarized the nature of this influence:
“It is the majority decision where controlling constitutional principles are established and
broader policy directives beyond the immediate case are often fashioned. Thus, the designation
of the majority opinion writer has critical significance for the kinds of public policy that
ultimately emerge.”\textsuperscript{41} Indeed, this importance seems to be understood by the chief justices on the
United States Supreme Court. As study by Linda Greenhouse noted in a study, Chief Justice
John Roberts wrote three times more among salient cases than he would have written if those
opinions were evenly assigned among Supreme Court.\textsuperscript{42} Greenhouse argues that this
phenomenon might occur because the Chief “retain[s] the maximum possible control over how an
issue is framed.”\textsuperscript{43} Because majority opinion writers wield considerable influence over the

\textsuperscript{40} See Brenner, supra note XX; \textsc{Walter Murphy}, \textsc{Elements of Judicial Strategy} (1964);
Ulmer, supra note XX.

\textsuperscript{41} Elliott E. Slotnick, \textit{Who Apeaks for the Court? Majority Opinion Assignment from Taft to

\textsuperscript{42} Linda Greenhouse, \textit{Chief Justice Roberts in His Own Voice: The Chief Justice's Self
Assignment of Majority Opinions}, 97 \textsc{Judicature} 90 (2013).

\textsuperscript{43} \textit{Id. at} 96. \textit{See also} Amanda Frost, \textit{Academic highlight: Assessing the Chief Justice’s self-
assignment of majority opinions}, SCOTUSBLOG (Feb. 7, 2014, 11:21 AM),
http://www.scotusblog.com/2014/02/academic-highlight-assessing-the-chief-justices-self-
assignment-of-majority-opinions/ (“Nonetheless, the author sets the tone in an initial draft to
judicial process and the shaping of law and policy, it is important to consider whether and to extent to which biases may impact how majority opinion writing assignments are doled out among justices in a majority coalition.

In state supreme courts, there are three different types of administrative processes used to assign majority opinions. Twenty-two states use a procedural arrangement based on rotating the writing assignment, 13 states randomly assign the writing task, and 15 states use a procedural arrangement based on discretion. Together, these processes may control for race and gender bias in the assignment of writing the majority opinion differently. Thus, a study of intra-court judicial processes can tease out whether members of the majority coalition who are female and/or black receive disproportionately fewer writing assignments due, in part, to the particular judicial processes in place in a given state court of last resort.

By examining the impact of varying types of judicial administration processes, this Article extends the work on status characteristics and bias in public administration to judicial institutions.\(^4\) Even among policy elites trained and charged to guard against inequity, as we would expect of state supreme court justices, it is likely that race and gender attitudes may penetrate the judicial process. As a result, a study may well find a disproportionate distribution of writing assignments among justices in a majority coalition that negatively impacts the ability for justices of color and female justices to not only speak for the court but shape doctrine through which the others respond, and thus the Chief Justice can use self-assignment to augment his influence on decisions, thereby changing the course of the law.”).

\(^4\) See, e.g., Wenger and Wilkins, supra note XX; Maynard-Moody & Mushenom, supra note XX
the majority opinion. As previously discussed, status characteristics theory suggests that this may be the result of diminished expectations of competence for black and female justices. As a result, we our default assumption is that black and female justices in majority coalitions will receive fewer majority opinion writing assignments. However, the magnitude of prejudicial attitudes may be muted or amplified by the opinion writing assignment process adopted by a court. Thus, it is expected that race and gender bias are stronger in processes that are less “open” to scrutiny.

Assignment by Rotation

In states using rotation to assign majority opinion writing duties, a judge within a majority coalition is assigned the duty of opinion writing without regard to the nature of the case or any characteristics of the justice. This process is simple and straightforward. As a result a departure from that rule would not only be easily detected, but would be a socially undesirable departure from the rotation norm. As such, it would be a difficult task for any justice or number of justices to suspend this type of rule in furtherance of a race- or gender-bias. It is therefore expected that in state courts of last resort that use rotation-based assignment procedures, race- and gender-bias will be minimal to nonexistent (and statistically insignificant). In other words, any given female and/or black justice in a majority coalition will receive as many opinion writing assignments as male and white justices in the majority coalition.

Assignment by Randomization

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See Haynie, supra note XX (demonstrating that white state legislators ascribe lower competence and diminished effectiveness to their black peers).
Assigning majority opinion writing randomly should also discourage race- and gender-biases in similar fashion to rotation-based assignment processes. Randomization can “eliminate behavioral incentives and, as such, is a tool for fighting corruption.” However, unlike assignment by rotation, random assignment is difficult to monitor. Irregular, chance-based processes can potentially mask departures from equitable distribution in short-term random patterns. Because chance can, in the short-term, benefit certain justices over others, minority justices may be unable to easily discern if they were being bypassed in a particular case due to chance or an unseen manipulation of the system motivated by bias. Because of the possibility of the latter, it is expected that in state courts of last resort using randomization to assign opinion-writing duties, there may be a statistically significant relationship indicating an influence of gender or race bias. Due to the fact that a random judicial process is difficult to monitor, female and black justices voting in the majority may be less likely to receive an opinion-writing assignment than their eligible male and white colleagues.

**Discretion or Seniority Assignments**

Approximately one-third of state courts of last resort use discretion-based assignment procedures. In these states, like the United States Supreme Court, the most senior justice in the

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*See also* BARBARA GOODWIN, *JUSTICE BY LOTTERY* (1992) (exploring how lottery systems can achieve social justice and redress inequalities).
majority coalition assigns the opinion. The opinion assigner must balance a number of interests. Some scholars have suggested that opinion assigner is concerned with advancing their own preferences. Others note that opinion assignors must balance self-interest with efficiency, workload balance, collegial harmony, the political branches and social norms. In theory, a discretionary assignment process allows for the greatest degree of expression of an assigning justice’s race- and gender-bias. On the one hand the calculus behind the assignor’s choices may be concealed and difficult to systematically assess in terms of racial or gender prejudices. On the other hand, the assignor’s choices are expected to exhibit some conformance with social desirability and institutional norms. While the monitoring constraint is not insignificant, the discretionary assignment process may on the whole facilitate race and gender bias. It is therefore expected that in courts with discretion-based assignment procedures, race- and gender-bias will


50 See, Rosenberg, supra note XX.
be detectable. In short, female and black justices will receive fewer writing assignments when part of a majority coalition than their male and white justices who are also in the majority coalition.

In sum we hypothesize that the internal process of majority opinion assignments will exhibit justices’ gender and racial bias to the extent that they are not otherwise discouraged by open and easily detected departures from impartiality. To this end rotation-based opinion assignments may be the least susceptible to justices’ unconscious imposition of race and gender-based status prejudices.

**Part III. Data, Methods and Measures**

*Data*

The data used in this study come from Brace and Hall’s *State Supreme Court Data Project*,[^51] which contains data from decisions from every state’s court of last resort between 1995 and 1998.[^52] As noted in Table 1, 13 states use random assignment, 22 states use rotated assignments, and 15 states use discretionary assignments. The Brace and Hall database, although now somewhat dated, is unique in that it also contains biographical information for all justices.

[^51]: Paul Brace & Melinda Gann Hall, State Supreme Court Data Project, http://www.rafirice.edu/~pbrace/statecourt.

[^52]: While we would like to examine race and gender effects more recently, these data linking judge and case characteristics are unique and are only recently becoming widely used.
The data were arranged so that a justice's participation in the case is the unit of analysis. Only those justices that voted with the majority in the cases are studied, since they are the only eligible authors of the opinion of the court by virtue of their voting with the majority coalition. The dependent variable, case assignment, is coded 1 if a judge is assigned to write the majority opinion. The case assignment is coded 0 if the judge is not assigned. Because the dependent variable is dichotomous, we estimate our models with logistic regression techniques. We model the three procedural processes separately to assess the impact on race or gender bias in assignments within each of these settings. Additionally, within each of the three models, we

53 Given the structure of our data, autocorrelation is a particular concern. For example, with multiple observations (one for each judge in the majority) per case, if our model incorrectly predicts the assignment outcome for one judge, the error could correlate with errors in predicting other observations within the same case. Similarly, unobserved court level factors could result in correlated error structures for observations within courts. To account for intra-class error correlation within cases, we estimated White-Huber robust standard errors clustered by case

54 As an alternative to clustered standard errors, we also estimated a random effects model with case cluster. The results of all hypotheses tests for the main and control independent variables were identical to those in the models we chose to present. Alternatively, instead of using separate models for each of the assignment regimes, one could pool the data, analyzing all fifty states together. In brief, we did this as an additional robustness check and found that none of our conclusions with respect to our hypotheses changed. We also note the following for readers who might be particularly interested in the pooled analysis. First, we included dummy variables for
included state-level fixed-effects dummy variables\textsuperscript{55} to account for the intraclass error correlation within courts.\textsuperscript{56} The study additionally verified that the models were robust to the potential for correlated errors across study years.

two of the three regimes (e.g., rotation and discretion) and multiplied each dummy variable separately with each of the covariates. For example, the model with rotation and discretion dummy variables included Tenure, Tenure X Random and Tenure X Discretion. The coefficient for the Tenure variable then reflected the effects of tenure on opinion in the reference category regime—in the rotation states. The multiplicative term Tenure X Random, conversely, estimated the effects of tenure in random assignment states, compared to the effects of tenure in rotation states. Of course, interpretation of the pooled model becomes relatively more complex. First, to estimate the overall effects of the independent variables in each regime (as opposed to effects of the variable in the regime compared to the reference category), we had to include a model for each regime. Additionally, each pooled model included more than three times as many non-fixed effects covariates. In return for this dramatic loss of parsimony, we gained little. Again, when we estimated the pooled models, the results conform with the findings of the non-pooled models presented herein.

\textsuperscript{55} The dummies are used in each model.

\textsuperscript{56} There is, of course, a third possible cause of autocorrelation in our data: the judges. Most of the judges sit in the majority in multiple cases, and it is possible that errors explaining the assignment to a judge in one case could be correlated with errors in other observations for that judge. Given the total number of judges in the data (several hundred in each subset we analyzed), combined with the nature of the data, we could not account for all types of autocorrelation
simultaneously. Indeed, mixed models of random and fixed effects did not converge. Similarly, fixed effects models (for both states and judges) with clustered standard errors for the case did not converge. We did, however, estimate the models with state level fixed effects while clustering by judge. In the random and rotation models, the changes in the results were minor: the results of the hypotheses tests for the main independent variables did not change and the changes in the hypotheses tests for the controls were minor (most were still significant at the 0.05 level; at worst, the significant controls in the presented models were significant in the judge-clustered models at the 0.063 level or less). The changes in the discretion models were more severe. While the results of the hypotheses tests regarding the black male judge variables were consistent with those that we presented, the White female judge results did change. Specifically, the findings that contradicted our theory—that women judges are more likely to receive the opinion (in the model with all cases and in the non-salient cases)—disappears. The coefficients are no longer significant, even at the 0.10 level. The gender finding that was consistent with our theory—that women are less likely to receive the assignment in salient cases (based on the statistical significance of the interaction of White, female judge and salience)—is also less robust, but still statistically significant at the 0.10 level. Additionally, while all of the controls were significant in the discretion models we presented, three of the five are not close to statistically significant in the models that cluster the standard errors by judge. Of course, we are not concerned with the statistical significance of the controls. Overall, while this robust check slightly diminishes our findings regarding one of our main hypotheses in one model (inferences regarding the interaction of salience and White, female judge is now less certain), it also
Independent Variables

**Judge characteristics.** To determine whether a judge’s race or gender influences opinion assignment, this study used dichotomous variables to indicate whether a justice is (1=*Black, male judge*) or (1=*White, female judge*).\(^57\)

Beyond race and gender, there are naturally other ‘status’ heuristics that court members may use to evaluate a decision whether to assign a particular judge the duty of writing a majority opinion, including education, age, experience, and ideology.

We measure education dichotomously whether a justice attended a prestigious law school (*Elite law school*= 1).\(^58\) Based on previous research, it is expected as a counter-hypothesis to the race and gender bias hypothesis that prestigiously trained justices are more likely to receive

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\(^{57}\) There were an insufficient number of black, female judges to explore assignment and the intersectionality of race and gender. Similarly, due to the small number of Latinos and Asian-Americans overall (one percent each) as well as the small number of states with Latinos (six) and Asian Americans (two) we were also unable to explore these groups. Indeed, in some assignment sub-samples, we had no Latinos and/or no Asian Americans. To enhance parsimony and facilitate interpretation, we excluded all observations unless the judge was white or an African American male.

writing assignments. Experience is measured \((\text{Tenure at decision}=\) years) as the number of years between a justice’s appointment and the year of the decision. A dichotomous measure is included to indicate whether the justice in question is chief \((\text{Chief judge}=1)\). It is expected that chief justices and more experienced judges will be more likely to receive the writing assignment. Although \textit{age} and \textit{tenure} are not highly correlated,\(^6^0\) it is expected that that older judges \((\text{Age at decision}=\) years old at decision) will be more likely to receive the assignment.\(^6^1\) Finally, we expect that judges of moderate ideology will be more likely to receive the writing assignment than very conservative or very liberal judges.\(^6^2\) Our measure, \textit{Ideological Extremism}, is continuous. Higher values reflect ideological extremism (regardless of direction); lower values

\(^{59}\text{Id.}\)

\(^{60}\)Given both the inclusion of state-level fixed effects, multiplicative terms variables measuring related concepts (e.g., age and tenure), high multicollinearity is always a concern. However, the variance inflation factors (VIFs) for all of the variables are relatively low. The highest VIF in any model, for one of the state dummy variables, is 3.18, well below troublesome levels. Moreover, in half the models, the highest VIF was under 1.5.

\(^{61}\text{See Elliott E. Slotnick, Who Apeaks for the Court? Majority Opinion assignment from Taft to Burger, 23 Am. J. of Poli. Sci. 60 (1979).}\)

\(^{62}\text{See Bonneau, supra note XX; Danelski, D. J. (1968). The Influence of the Chief Justice in the Decisional Process of the Supreme Court in The Federal Judicial System 147 (T. P. Jahnige & S. Goldman, eds.) (1968).}\)
indicate moderation. The variable reflects both the ideology of the state and the partisanship of the individual justice.

**Case characteristics.** The study also considers whether certain types of cases may impact opinion assignments. For example, a particular status characteristic (whether race, gender, experience, or ideology may matter more when assigning a case of particular importance or salience. The primary indicator we use to measure case importance is case salience. A common measure for salience in lower courts is whether an amicus brief has been filed.\(^63\) \((\text{Salient case } = 1)\).\(^64\)


\(^{64}\) To test for possible conditional relationships, we included the *Salient case* variable, as well as two multiplicative terms: *Black, male judge X Salient case* and *White, female judge X Salient case*. Of course, it is possible that case salience conditions the effects of our other independent variables. If that is true, one might consider splitting the samples into salient and non-salient cases. As a robust check, we split the samples and then estimated the models in all three assignment regimes. Using this method, we found no evidence of an interaction—at least not the one posited.
Part IV. Analysis

Two analyses were conducted to test the likelihood of unbiased majority opinion assignment in each of the three identified procedural contexts. The first analysis focuses on whether judge status characteristics have any detectable influence on the assignment process. The second analysis focuses on whether case characteristics condition assignment—specifically whether assignment bias manifests itself differently in salient cases.

Study One: Direct Effects on Prejudiced Assignments

Our results suggest that judicial administrative process impacts the extent to which status characteristics.

Rotated Assignment. In courts that utilized a rotation-based assignment process, minority judges were equally likely to receive the writing assignment as were their colleagues in the majority, supporting the hypothesis about rotation-based assignment. Ease of detection and simplicity of the assignment rule appears to eliminate the possibility of race or gender prejudice in the assignment process. Age also appears to have served as a negative status cue, although its impact is relatively minimal. For every additional 4.5 years of age, a judge is 0.4 percent less

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65 With the exception of salience, all of our independent variables have a predicted unidirectional impact on likelihood of assignment (e.g., tenure should increase likelihood of assignment). We therefore use one-tailed significant tests at the p<0.05 level of impact, unless otherwise noted in the individual tables.
likely to receive the assignment. Chief judges were 1.4 percent less likely to receive an assignment in rotation-based states.

**Random Assignment.** Courts that employ randomized opinion writing assignments show a different pattern than that in rotation-based processes. Indeed, here, status characteristics appear to influence assignments. Black male judges were over two percent less likely, and white female judges were almost 1.5 percent less likely, to receive writing assignments than their white male counterparts.

Age also appears to have a negative status cue attached to it in randomized processes. For every additional 4.5 years of age, a judge is one percent less likely to receive a writing assignment. In these same courts, judges at the ideological fringes were less likely to receive a rotation assignment. For every 6.5 points towards the spectrum’s extremes, a judge’s likelihood to be assigned a majority opinion, while in the majority coalition, dropped 0.7 percent. Law school quality did not serve as a cue in rotation states; it did, however, in random-based states. Judges trained at elite law schools were 2.4 percent more likely to receive the assignment than non-elite alumni, as predicted.

**Discretion Assignment.** Whereas the results in the randomized and rotation-based processes were a mixed bag with respect to the impact of status characteristics, every status characteristic influences the assignment decision in discretion-based processes. Black male judges in the majority coalition were almost 4 percent less likely to be assigned a case than a white male judge in the coalition. White female judges received a disproportionate number of assignments. However, female judges were 2.4 percent *more* likely to be assigned a case. It is difficult to discern why this finding, contrary to the hypothesis, holds true. Some literature has
suggested that racial stereotypes are activated before gender stereotypes.\textsuperscript{66} Other literature has proffered some actors may be more responsive to gender-based discrimination.\textsuperscript{67}

In addition to race and gender, chief justices and elite law school alumni were more likely to be assigned an opinion by 2.8 percent and 3.7 percent, respectively. Older judges were 1.3 percent more likely to receive an opinion for every additional 4.5 years in age. Ideologically extreme judges were less likely to receive an assignment.

\textit{Study Two: Effects on Prejudiced Assignments, Moderated by Case Salience}

The study also tested the impact a case’s salience has on the assignment process in each of the three procedural settings. In distinguishing between particularly important and routine decisions, greater insight can be had as to the effect prejudice has in cases bound to have the most impact. In this portion of the analysis we are specifically examining how case importance/salience may condition the race- and gender-biased assignments.

\textsuperscript{66} See Tiffany A. Ito & Geoffrey R. Urland, \textit{Race and Gender on the Brain: Electrocortical Measures of Attention to the Race and Gender of Multiply Categorizable Individuals}, 85 J. OF PERSONALITY & SOC. PSYCH. 616 (2003) (reporting that cognitive functions responding to race were trigged more quickly than those responding to gender).

\textsuperscript{67} See Catherine J. Turco, \textit{Cultural Foundations of Tokenism}, 75 AM. SOCIOLOGICAL REV. 894 (2010) (finding in the leveraged buyout industry “gender is a more relevant status characteristic for exclusion than is race, and female tokens are differentially disadvantaged”).
Rotated assignment. We found that for rotation-based states case salience has no interactive effects — black males and white women were no more or less likely to receive an assignment in either salient or non-salient cases.

Random and discretion assignments. The same is not true, however, for assignments in randomized assignment processes or discretion-based processes where there was a significant relationship between case salience, race, and gender in the former, and case salience and gender in the latter. In random states, black male judges and white female judges were less likely than white male judges to receive a salient opinion assignment.\textsuperscript{68} In discretion states, while white women were slightly more likely to receive the average writing assignment (where the assignment is not conditioned by case importance), white women were actually less likely to receive the assignment when the case was important/salient.

To better understand the substantive importance of these findings, we calculated the conditional effects of assignment—the differences in the probability the judge would be assigned the opinion—in salient versus nonsalient cases.\textsuperscript{69} We focus on calculated percentage changes in predicted probabilities to help us understand the importance of these results “in practice.”

\textsuperscript{68} White women were no more or less likely than white men to receive an assignment in a salient case.

\textsuperscript{69} To calculate the conditional probabilities, we used Stata’s prvalue command, developed by as part of the spost postestimation suite of commands. So doing, we were able to focus on salience’s conditioning effects on race and gender while controlling for all of the variables in our model.
2A and 2B report these results and we discuss case salience’s effects in states using random assignment and then in discretion-based states.

** Tables 2A and 2B **

First, we note that percentage changes in predicted probabilities are only reported when statistically significant. As is evident in Table 2A and Table 2B, in rotation based states—no matter how salient the opinion—black and female justices in the majority coalition are no less likely to receive the assignment to write the majority opinion than white and male justices.

On the other hand, in courts that use random assignments, the bias that may be linked to the use of status cues is especially prolific in important cases. In salient cases black male judges are 43 percent less likely, than white male judges, to receive the majority opinion writing assignment. We view this as fairly strong and substantively meaningful evidence that case characteristics can condition the assignment process, even in ‘random’ administrative contexts. The direction of this moderation suggests that white male judges, in accordance with the theory of status characteristics, are favored to write the majority opinion in higher profile cases.

Salience also conditions the use of gender cues in random states, where white women are eight percent less likely to receive a non-salient assignment. Thus, racial and gender bias can occur even in a process grounded in randomization, and perpetuated by policy elites (i.e., justices) trained in constitutional rights and equity. While this prejudice seems suppressed in the average, non-salient case— it is undeniably manifest in those cases considered to be socially or legally salient.
Assignments in discretion-based settings also confirm that case salience matters to the process by which judges use status cues. Black male judges were 15 percent less likely than white male judges to receive the writing assignment in non-salient cases in courts employing discretion-based assignment processes. With respect to gender cues, in non-salient decisions, women were 15 percent more likely to receive the assignment than white males, but this encouraging pattern disappears when we examine salient cases. Female justices received fewer assignments to write the opinions in salient cases – but the finding does not rise to a level of statistical significance. Even so, we have undeniable evidence that assignors’ discretion to task opinion writing is shaped (even if unconsciously) by gender and race biases, which may be shaped, in turn, by social desirability.

Together, these findings support the study’s hypotheses but the patterns are meaningfully nuanced. Unlike the random- and discretion-based process, judges in states using rotation-based assignment were neither influenced by race nor by gender cues— even when accounting for case salience. Race and gender impacted assignments in states where monitoring/checking was difficult (random and discretion states) and where social desirability potentially shaped assignment (discretion states). Additionally, the influence of race and gender in these states was both tempered and concentrated by case salience.70

Part V Discussion

70 It is worth reemphasizing that while it could be argued these relationships are a byproduct of minority judges’ tendency to disproportionately dissent. Limiting the sample to only judges who were in the majority, however, controlled for this.
These findings have significance for four major reasons. First, they highlight what has been an understudied area of judicial institutions: state courts of last resort. These institutions, whose members are charged with guarding life, limb, and liberty should be zealous champions of principles of equality. Yet, this study finds that even learned jurists perpetuate biased decision-making in the daily internal processes necessary to execute justice—majority opinion writing. Indeed, not only do justices exhibit patterns of bias along race and gender status characteristics, but also discriminate on the basis of other status cues including age, ideology, position, tenure and education.

Second, the findings highlight that case salience influences or conditions the impact of prejudicial decision-making. In randomized assignment courts, black male judges received disproportionately fewer important writing assignments. In courts with discretion-based processes, white female judges received disproportionately more non-salient writing assignments, but did not receive disproportionately more salient writing assignments.

Third, this study is positioned to significantly inform the many conversations among scholars, practitioners, political actors, and opinion leaders about judicial diversity. While judicial diversity is often cited as important to ensure fair courts for litigants and improve the quality of jurisprudence, these normative ideals are seriously undermined if minority judges are underutilized or unfairly dismissed by their colleagues.

Professor Sherrilyn Ifill posited that minority judges might strategically mute their perspectives for fear of negative repercussions. Ifill wrote, “Often minority judges and judicial candidates are cautious of, and quite rightly, conscious of revealing an explicit racial voice. Revealing such a voice may mean sure defeat at the polls, scuttled nominations, charges of bias,
or recusal motions in racially sensitive cases.”71 However, as a society we cannot even begin to address these fears if minority justices are systematically bypassed.

On its own, it is a serious thing that minority justices may fear retribution for expressing views in the opinion writing process. A chilling effect may certainly result wherein justices self-regulate their views. However, a process wherein judges are not even allowed to grapple with finding their voice also cannot serve the judicial process well. This raises a significant question about importance attached not only to diversity considerations in judicial nominations, but also to processes by which internal judicial decisions like opinions assignments are made. It may well be that continued emphasis on diversity should be placed in the judicial nomination process to build a critical mass of minority judges in order to hedge against chilling effects of minority underrepresentation in the judiciary and the effects of discriminatory decision-making.72


72 See Deirdre M. Bowen, Brilliant Disguise: An Empirical Analysis of A Social Experiment Banning Affirmative Action, 85 IND. L.J. 1197, 1206-07 (2010) (“…critical mass not only promotes the positive goals others have articulated, such as sociological legitimacy, role modeling, enriching and transforming the educational experience, and remedying past discrimination, it puts others on notice that race is contextualized, that all of us have fundamentally different racialized experiences, and affirmative action can start to remediate current racial discrimination.”).

Similar arguments have been made in favor of critical masses in the educational context:
However, we find equally compelling the argument that simple steps like encouraging states to adopt rotated opinion assignment processes can give better voice to minority judicial voices. To repeat: courts of all varieties should carefully consider the benefits of more open judicial processes that can neutralize implicit biases.

There is no compelling reason to leave the U.S. Supreme Court out of this discussion. As the U.S. Supreme Court’s membership becomes increasingly diverse, this research begs the question: does the U.S. Supreme Court’s decision assignment process yield to similar gender and race biases? While this Article does not have an evidentiary basis to answer that question, there nevertheless is no reason to believe unconscious biases can influence Article III federal court judges any more or less than a state supreme court justice. We believe the justices of the U.S. Supreme Court should seriously contemplate this Article’s findings and implement a new opinion assignment process that departs from the current discretionary system and minimizes the potential for status-based bias. We believe this can improve the institutional integrity of the Court and the quality of opinions. By improving this one component of the Court’s

First, it encourages minority students to participate in the educational process. That participation, the argument goes, will enrich and transform the educational experience of all students to the extent that the backgrounds of these minority students inform the nature of the issues that become part of the conversation, as well as the perspectives through which the issues are viewed and analyzed. Second, the participation of a critical mass of minority students will transform not only the subject of deliberation but the identity of the deliberators as well. Adeno Addis, *The Concept of Critical Mass in Legal Discourse*, 29 Cardozo L. Rev. 97, 123 (2007)
administrative processes, latent impediments to the unencumbered diffusion of minority voices may well be lifted.

Finally, and related to the previous point, this study extends earlier evidence revealing that status cues vary across different administrative contexts. Just as an automated-based administrative context curbed gender bias in unemployment insurance claim processing, here, rotation-based processes were most effective in promoting race and gender equality within the judicial process—in both salient and non-salient cases.

Why are these patterns of discrimination present? Perhaps, simply, judges act like any other public administrator. When they are monitored effectively, their discretion is limited by the administrative context. As Professor Charles Lawrence noted, “Judges are not immune from our culture’s racism, nor can they escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs.”

For rotation states, we surmise that the simplicity of the rotation-based rule, combined with the ability to easily detect deviations, creates an administrative context that minimizes the likelihood of shirking and/or prejudice. Should the assigner not follow the rotation pattern, the prejudice is obvious, and sanctions could then be applied. This is consistent with the research’s findings. In rotation states, black men and white women are just as likely to receive the majority

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73 Wenger & Wilkins, *supra* note XX.

opinion assignment as white males. Indeed none of the measures of competency in rotation states have the posited effects in rotation states. Additionally, the only discretionary hypothesis that received any support—the tendency not to assign the opinion to ideological extremists—had a small substantive effect. Rotation-based administrative practices appear to effectively combine strong constraint and checking rules. Thus, rotation can preclude race and gender straightforward rule where the monitoring processes are strong enough to discourage deviations from the practice that might inject status-based bias.

Random-based and rotation-based assignment states share a common strong constraint rule: gender- and race-neutral assignment, whether through rotated or randomized selection. For this reason we might intuitively expect the same race- and gender-neutral assignment patterns over time that we saw in the rotation-based states. However, in our theory development we have raised the possibility that, unlike contexts using rotation methods, shirking and/or prejudicial behavior is less apparent in a random system. The absence of effective monitoring or a checking rule, combined with the policy importance of the assignment decision, particularly in salient cases, creates a context in which judges as street level bureaucrats theoretically have more discretion adhering to randomized processes. Empirically, we found evidence that this occurs. Judges in random-assignment contexts appear to utilize three competency heuristics in the manner we posited: the prestige of the judge’s law school alma mater, as well as race and gender characteristics.

In state courts using discretion-based assignment processes, the assigning justice holds significant latitude. It was only in discretion-based processes in which every status cue tested was significant. Lacking any strong constraints, the assigning justice can rely upon status cues to make opinion assignment decisions.
To some extent, this process may be practical as it would allow an assignor to give an opinion to a colleague with a particular expertise or voice that would improve the quality of an opinion. However, whatever practical benefits there may be to this system, empirical evidence suggests that judges assigning opinions are influenced by race and gender bias.

While a systematic pattern of racial bias was detectable in discretionary assignment processes, there was also a systematic favoring of female judges. However, favorable treatment was not consistent in all cases. Indeed, gender biases were perceived more negatively in important, salient cases than it was a positive cue in non-salient cases. This is an interesting conundrum, which is perhaps explainable by assignors’ desire to behave according to societal norms on gender equality—particularly when a case is not salient. Again, a rotation based process may help transcend this conundrum.

Part VI. Conclusion

_Due process is a growth too sturdy to succumb to the infection of the least ingredient of error._

_-Justice Benjamin Cardozo_  

Judges are susceptible to the influences of their own racial and gender biases affecting the responsibilities and influence of their colleagues on the court. These are important findings with significant import in conversations about judicial diversity and the integrity of the judicial process. The empirical evidence generally follows the direction status characteristics theory suggests. However, the evidence is not generalizable to other court, agency, or cultural contexts. While status characteristic theory continues to be relevant, these findings are limited to the extent

that they do not capture race and gender attitudes changes. Nor, do the available data allow for the exploration of other status characteristics, like sexual orientation, which may also play a role in intra-court decision-making processes.

The research’s empirics raise a number of important considerations for law, policy, and the management of judicial institutions. First, biased behavior manifests itself in actors who are not only trained in the law, but who are charged with faithfully enforcing constitutional mandates of equal protection. Second, administrative context and process shapes behavior in courts.

Third, the constraints of a particular administrative process alone may not be sufficient to mute bias. Effectively constraining prejudicial behavior appears to also require effective monitoring. Prejudice based on status characteristics can be pervasive enough to manifest itself despite constraint rules working to the contrary. In this vein, it is important for judicial institutions to engender an organizational culture of inclusiveness and equality. This embrace of diversity need not—and should not—begin in judicial institutions. Indeed, this process can and should begin in legal education.

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76 Taylor H. Cox & Stacy Blake, Managing Cultural Diversity: Implications for Organizational Competitiveness, 5 THE EXECUTIVE 45 (1991) (arguing that diversity can improve competitive advantages); NORMA M. RICCUCCI, MANAGING DIVERSITY IN PUBLIC SECTOR WORKFORCES (2002) (exploring the impact of an increasingly diverse population on government employment practices and how to best manage diversity in the public sector workforce).

77 Others have written extensively about the importance of diversity in legal education for the integrity of the legal profession. See, e.g., Lani Guinier, Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 HARV. L. REV. 113, 199 (2003) (noting
The overarching takeaway is the importance of administrative process. While education, introspection, and exposure to diversity would do well to help erode bias among judges, the right process has been quantifiably verified as a failsafe to push back against it. Evidence shows that even judges—the guardians of rights and liberties who should be least susceptible to engage in discriminatory behaviors—are not immune from exhibiting gender and racial bias. Yet, the right administrative process can curb those biases and, in turn, lead to better outcomes. This may be as true for courts as it might be for administrative agencies or, perhaps, even legislative bodies. To be clear, administrative processes alone do not address the root of discriminatory attitudes, nor are they a substitute for judicial diversity. The limitations of process notwithstanding, process cannot and must not be overlooked as a vehicle for improving the quality of justice meted out and maintaining society’s trust in judges. Class-based discrimination is one the most repugnant of ills that plague society. Proper administrative safeguards are necessary and effective to prevent discrimination from infecting the very governmental institutions charged to combat it.

that diversity policies in law schools are intended to improve the educational institutions themselves and the legal profession). Others have noted that improving diversity’s role in legal education requires a commitment in admissions and administration. Cruz Reynoso & Cory Amron, *Diversity in Legal Education: A Broader View, A Deeper Commitment*, 52 J. LEGAL EDUC. 491, 492 (2002) (“While the law school admissions committee scrutinizes the enrollments, the administration's attention should be on creating conditions in which the diversity of students and faculty is not just welcomed and solicited, but actively fostered.”).
Table 1  State supreme courts by assignment types, 1995-1998

<table>
<thead>
<tr>
<th>State</th>
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Table 2A Evidence of Race Bias in State Supreme Courts, By Salience & Assignment

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<th>NON-SALIENT CASES</th>
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<td>DISCRETION</td>
<td>A black male justice is <strong>no less</strong> likely* to get the assignment than a white male justice</td>
<td>A black male justice is <strong>15% less</strong> likely* to get the assignment than a white male justice</td>
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<td>RANDOM</td>
<td>A black male justice is <strong>43% less</strong> likely* to get the assignment than a white male justice</td>
<td>A black male justice is <strong>no less</strong> likely* to get the assignment than a white male justice</td>
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<tr>
<td>ROTATION</td>
<td>A black male justice is <strong>no less</strong> likely* to get the assignment than a white male justice</td>
<td>A black male justice is <strong>no less</strong> likely* to get the assignment than a white male justice</td>
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</table>

* No statistically significant difference at the 0.05 confidence level; % change: The percent difference between the probability of the assignment of minority (black male; white female) judge and a white male judge. This is derived as follows: 100 X (Probability of assignment to the minority judge - Probability of assignment to the white judge)/(Probability of assignment to the white male judge).

Table 2B Evidence of Gender Bias in State Supreme Courts, By Salience & Assignment

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<td>A white female justice is <strong>15% more</strong> likely* to get the assignment than a white male justice</td>
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<td>RANDOM</td>
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<td>ROTATION</td>
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<td>A white female justice is <strong>no less</strong> likely* to get the assignment than a white male justice</td>
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* No statistically significant difference at the 0.05 confidence level; % change: The percent difference between the probability of the assignment of minority (black male; white female) judge and a white male judge. This is derived as follows: 100 X (Probability of assignment to the minority judge - Probability of assignment to the white judge)/(Probability of assignment to the white male judge).