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# Alternative Paths to the Bench: Recruitment of Women to Become Judges in Georgia

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*At the end of 2008, women constituted 39 of Georgia's 202 superior court judges. The path taken by women to the bench differs little from the path taken by men. Most of the female and male judges originally came to the bench via gubernatorial appointment rather than election with the percentages of men and women initially appointed being almost equal. While most women initially received appointments, there is no evidence that women face greater challenges than men in the electoral sphere. In contested elections, women have enjoyed success similar to that of men. Sitting women judges who attract opposition win reelection at higher rates than male judges. The number of women serving as judges in a circuit increases with the number of judicial seats in a circuit.*

**T**he phenomena of women achieving political positions have generated an extensive literature. Most of this work has focused on women who serve in legislatures such as Congress, state legislatures or local collegial bodies. Far less attention has gone to female jurists. Nonetheless some of the same advantages articulated for increasing the numbers of female legislators apply to the judiciary. One factor has been a desire to have a more representative judiciary, a judiciary whose make up provides better descriptive representation for those who come to court seeking justice.

A second factor is the claim that women bring to the bench a unique perspective toward the law and its application. Female jurists have acknowledged differences related to gender. Prior to being nominated to the United States Supreme Court, Sonia Sotomayor stressed the importance of her gender and ethnicity in giving her a perspective different from that of a white male. As reported in the *New York Times*, Judge Sotomayor said in a lecture at the University of California Law School, "I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life" (Baker and

Zeleny 2009). Both of the first two women to serve on the nation's highest court believe that the presence of women on the bench impacts the decision making of that collegial body. Justice Ruth Bader Ginsburg has observed that, "But there are perceptions that we have because we are women. It's a subtle influence. We can be sensitive to things that are said in draft opinions that [male justices] are not aware can be offensive" (Mears 2009).

The perceptions of high ranking female jurists that women judges may reach different conclusions than their male counterparts have received support in scholarly research that has often found that women bring a different perspective to the bench. Typically on those issues on which female and male judges decide differently, women are more liberal (Gryski, Main, and Dixon 1986; Songer and Crews-Meyer 2000; Songer, Davis, and Haire 1994). While women are not more liberal than their male colleagues on all issues, research has not found issues on which women are consistently more conservative than male judges.

Largely unexplored has been the question of whether women arrive on the bench following the same routes as their male colleagues. Are women's judicial prospects indistinguishable from men? While relatively little attention has been paid to this topic in the context of appellate courts, as will be reviewed later, even less is known about state trial judges.

We address these questions by reviewing the selection process of Georgia trial court judges. Georgia judges can come to the bench either by winning an election or through appointment by the governor. Governors make appointments to fill vacancies following the death or resignation of a sitting judge or when the legislature creates a new position. In most sessions the legislature creates new judgeships in response to increased case loads. Appointed judges must compete in the next regularly scheduled election cycle. We examine women's success in obtaining trial court judgeships in Georgia through these alternative methods.

Georgia's court of general trial jurisdiction is the superior court that is arranged in 49 circuits. Each judicial circuit has at least two judges with the upper limit being 19 in the Atlanta Circuit. In 2008 the state had 202 superior court judges of whom 39 (19 percent) were women.

### **Judicial Selection**

Prior to 1984 Georgia conducted partisan judicial elections as part of the regular election cycle with primaries held in the summer, runoffs when

no candidate achieved a majority followed the primary, and the general election took place in November. When the legislature made judicial positions nonpartisan, it scheduled elections to coincide with primaries with a runoff necessary when no candidate achieved a majority. While the names of nominees appeared on the general election ballot, they had no opponent. Prior to the 2006 election cycle the legislature moved the date for choosing judges back to the general election. Candidates achieving a majority vote at that time are elected with a runoff occurring four weeks later when no candidate gets a majority. Although the date for judicial elections changed, they remain nonpartisan.

The governor has the authority to name new judges to fill vacancies that occur between elections. To help the chief executive make selections, Governor Jimmy Carter created the Judicial Nominating Commission in 1972 and charged it with screening potential judges and forwarding a short list to him. The JNC is not a government entity and the governor is not required to take its advice, although he almost invariably picks the new judge from the short list that contains three to five names. Although Georgia judgeships are elective positions, most new judges initially arrive via a gubernatorial appointment. The appointment data analyzed in this study begin with the creation of the JNC and continue through 2008. The electoral data also begin with 1972 and end with the 2008 election.

### **Literature and Hypotheses**

Much of what we know about increases in the number of women decision makers comes from studies of collegial bodies, especially studies of Congress and state legislatures. These studies conclude that women are much more successful when running for open seats as opposed to challenging incumbents (Burrell 1992; Darcy, Welch, and Clark 1994; Dolan 2006; Fox 2006; Palmer and Simon 2001). We expect similar findings to apply to Georgia judgeships. That is, we hypothesize that women will be more successful when seeking open seats than when challenging incumbents. Incumbency, we expect, is not gender specific and, therefore, we hypothesize that women incumbents will be quite successful in retaining their positions.

Since Georgia has two ways to become a judge, we can examine whether women are more likely to reach the bench by the ballot or through appointment. The literature disagrees on whether the method of selection affects the prospects of women wishing to become judges. Some scholars have

found no relationship between the method of selection and the likelihood of women getting on the bench (Alozie 1990; Alozie 1996; Hurwitz and Lanier 2003). Anthony Champagne (1986) concludes, “Although there may be localities where one system has been successful in producing a representative judiciary, no system is clearly more successful overall in recruiting blacks and women” (105). Some contend that nonpartisan elections help women become trial court judges (M. Williams 2007, 1200). A study of women competing for seats on intermediate state appellate courts finds no bias against them (Frederick and Streb 2008). However a study of how women became members of state supreme courts finds that women do better in appointed than electoral systems, especially when the court had previously been all male (Bratton and Spill 2002; Githens 1995).

While Georgia’s judicial positions are elective, approximately 60 percent of new judges initially obtain their positions through appointment. This may occur because of a death or retirement, or because the legislature has created a new judgeship. We expect that women will more often come to the bench via appointment than the elective route.

A study of the representation of women on state appellate courts concludes that women more frequently serve on courts with larger panels (Hurwitz and Lanier 2003, 344). Translating this finding to trial courts suggests that the greater the number of judges in a circuit, the more likely that the circuit will have women judges.

Over time the number of women judges has increased. We expect that this will be partially due to greater numbers of non-incumbent women competing in judicial elections. When more women offer for these positions, the number actually serving increases (Dubois 1983, 75). During the 36 years of this study, the potential pool of female jurists has increased as the enrollment of women in law schools has grown dramatically. Women now comprise about one-half of law schools’ graduating classes (National Association of Women Lawyers 2006). Recent surveys report that 70 percent of women work in private practice, although many are working only part-time due to the pressures of a work-life balance (Patton 2005; J. Williams 2007). With growing numbers of women practicing law, a greater number of women have the seven years experience that is required of judges in Georgia. In addition, many women lawyers may consider a judgeship appealing for career advancement due to its more flexible and predictable work schedule, which can help accommodate a work-family balance. Therefore, we expect that the numbers of women becoming judges, whether through appointment

or election, will increase over time.

### **Contestation**

The literature concludes that a major obstacle to increasing the number of women in electoral offices has been the dearth of female candidates (Dubois 1983). We present data on contestation in two ways. First we look at the incidence of women competing for judicial posts. Later we consider the number of judgeships for which women have competed, since there are instances in which more than one woman has contested a single judgeship.

Superior court contests still attract relatively few women. Of 584 candidates in superior court contests since 1972, only 89, or 15 percent, were women who competed in 31 percent of the 240 elections.<sup>1</sup> As reported in Table 1, of the women seeking judgeships, 51 or (57 percent) had a degree of success in the initial round. Here success is either an outright victory in the initial round or advancing to a runoff. The success rate for women exceeds the 47 percent success rate for men. The number of men competing and consequently the success rate for males in Table 1 is influenced by many all-male contests. Focusing just on men who ran against women reduces the number of male judicial candidates to 115 of whom 33 (29 percent) succeeded. Higher success rates for women, especially when focusing on female-male contests, indicates that gender discrimination does not constitute an insurmountable obstacle in judicial elections.

One-fifth of the contests required a runoff to determine the winner. Women competed in 21 of these and won ten (48 percent) including two runoffs in which both candidates were women. Eight women, including four in 2008, defeated men while nine men defeated women. Just over half of all men competing in runoffs against women won. Prior to 2008, men had an edge in male-female runoffs but that year's elections erased the difference when women prevailed in four of five female-male runoffs.

The general literature concludes that open seats offer the best prospects for increasing the number of female officeholders. Incumbents enjoy advantages of broader name recognition, greater experience in running campaigns and generally find it easier to raise campaign funds. Given that women have a better prospect of winning an open seat, it is surprising that a larger share of the 93 open seat contests did not involve a woman. Forty women competed for open seats and had a 55 percent success rate, meaning that they either won the position or advanced to a runoff. The overall success rate for men

**Table 1. Success of Judicial Candidates Controlling for Gender and Electoral Status, 1972-2008**

	All Contests		Open Seats		Women Incumbent		Men Incumbent	
	1 <sup>st</sup> Round Election	Runoff	1 <sup>st</sup> Round Election	Runoff	1 <sup>st</sup> Round Election	Runoff	1 <sup>st</sup> Round Election	Runoff
Contests	240	48	93	40	24	2	123	6
# Women	89	21	40	17	30	2	19	2
Female Success*	51	10	22	10	24	0	5	0
# Men	495	73	238	61	22	2	235	10
Male Success*	232	38	108	30	2	2	122	6
# Men in Male-Female Contests	115	17	74	13	22	2	19	2
Male Success	33	9	15	5	2	2	16	2

Note: \*The numerator is the number of contests with one or more women. Since some contests attracted multiple women, the number of female candidates in a category can exceed the number of contests involving women.

seeking open seats, 45 percent, falls below that for women. Excluding all-male contests, 47 percent of the men who competed against women for open seats succeeded.

Seventeen women made it into runoffs for open seats and ten won these second contests, including two all-women runoffs. Men fared less well with fewer than half the males (five of thirteen) competing against women winning open-seat runoffs.

Thirty women competed in 24 contests in which a sitting female judge faced a challenge. Not surprisingly, men who challenged women already on the bench fared poorly. None of the men defeated the incumbent in the initial round, but two pushed the incumbent into a runoff. While 22 women incumbents polled majorities in the first round, the two forced into a runoff fell to their male challengers. The 92 percent success rate for sitting women judges is in line with the reelection rates for incumbents in Congress and state legislatures. To put the loss of two female incumbent judges in runoffs in context, an extensive study of runoffs found that incumbents forced into a runoff win 65 percent of the time (Bullock and Johnson 1992, 47).

The final information in Table 1 focuses on challenges to sitting male judges. Of the 123 challenges to male judges, only 19 involve women, three of whom knocked off the incumbent and two others advanced to a runoff. Neither female challenger succeeded in unseating the judge in the runoff. However the 82 percent success rate of male incumbents (and 84 percent for those who face a female challenger) falls below the rates for legislators and sitting women judges.

Table 2 shifts the focus from candidacies to contests, and since some contests have multiple women, the values in Table 1 frequently exceed those in Table 2 and can never be less than in Table 2. Moreover in Table 2, unlike in Table 1, only the ultimate election is considered. That is only actual wins and not advances to runoffs are counted as successes. Women won outright majorities in 41.9 percent of the contests in which a woman competed and won just over half the runoffs to which a woman advanced. All of the runoff victories came in open seat contests as did six of the first-round wins. While women won two-thirds of the runoffs for open seats, they had little success in the initial rounds for open seats in which they competed winning less than 20 percent of the time. Female incumbents won 22 of the 24 times they faced challengers. In two instances the woman incumbent failed to poll a majority and both times she lost the runoff. Three of 19 women who challenged a sitting judge won in the first round.

**Table 2. Victories in Superior Court Judgeships Controlling for Gender and Electoral Status, 1972-2008**

	All Contests		Open Seats		Women Incumbent		Men Incumbent	
	1 <sup>st</sup> Round Election	Runoff	1 <sup>st</sup> Round Election	Runoff	1 <sup>st</sup> Round Election	Runoff	1 <sup>st</sup> Round Election	Runoff
Contests	240	48	93	40	24	2	123	6
Contests (with women)	74	19	31	15	24	2	19	2
# Judgeships (won by women)	31	10	6	10	22	0	3	0
% success	41.9	52.6	19.4	66.7	91.7	0	15.8	0
Contests (men vs. women)	69	17	30	13	20	2	19	2
% success (won by men vs. women)	42.0	52.9	50.0	38.5	0	100	73.6	100
# Judgeships (won by men)	161	38	47	30	0	2	114	6

Note: This table counts as successes only instances in which a candidate wins office and does not include instances in which the candidate advances to a runoff.

Men ran against women in 69 judicial elections and won 42 percent of these so that the success rates for men facing women and women confronting men in contests not going to a runoff are identical. The two types of pairings show that women are as likely to win runoffs as are men who run against women in runoffs. Women fare as well as do the men who run against them. The overall figures mask some gender differences. In the initial round for open seats, men win half the time when facing a woman while women win just 19 percent of the time. Women however do much better in the runoffs than do men who square off against women in an open seat runoff. Women incumbents do better against male challengers, winning 91.7 percent of the time in the first round, than do male incumbents facing a woman since the men won just 73.6 of those in the initial round.

The number of women winning superior court elections has increased over time from 1972 through 1982 when three of seven women succeeded. In the next decade ten women won elections, and from 1996 through 2008 the number goes to 28. As shown in Table 3, the number of women running for the superior court increased across the three time periods, as did the number of women winners; however, the percentage of successes did not increase in the third period. The proportion of female winners in the most recent period equals that for the earliest period and falls below the 63 percent success rate in the intermediate period.

One final aspect of potential gender difference would occur if sitting women judges attracted more opposition than incumbent males. Results from 2008 reveal no meaningful difference suggesting that potential challengers do not see women as especially vulnerable. Two of 23 (8.7 percent) incumbent women drew male challengers. Of 91 incumbent males, seven (7.7 percent) faced an opponent, five of whom were women. While all female incumbents

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**Table 3. Female Superior Court Candidates Success over Time**

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	Women Candidates	Winners No.	%	Open Seat Winners	Reelected Incumbents	Defeated Incumbents
1972-1982	7	3	43	1	0	2
1984-1994	16	10	63	6	4	0
1996-2008	66	28	42	9	18	1

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secured additional terms, two sitting males lost and one of these fell to his female challenger.

### Appointments

The first step in the appointment process is consideration by the Judicial Nominating Commission. Those who aspire to become judge may be nominated by others, although self-nominations are common. Of the 39 women currently serving as superior court judges, 22 (56 percent) initially achieved their positions through gubernatorial appointments. The share of the 163 male judges who came to the bench via an appointment is only slightly higher (58 percent).

As shown in Table 4, the proportion female among candidates considered by the JNC has increased over time. Under Carter women constituted only 2.7 percent of the candidates. During the next two governorships, women constituted just over seven percent of judicial candidates.

Zell Miller faced a unique challenge when it came to naming new judges. Black plaintiffs, led by several members of the General Assembly, charged that the selection system violated the Voting Rights Act (*Brooks v. State Board of Elections*, 775 F. Supp. 1470, S.D. Ga., 1989; *Brooks v. State Board of Elections*, 848 F. Supp. 1548, S.D. Ga., 1994). Georgia judicial circuits are made up of one or more whole counties and judges compete in circuit-wide elections. *Thornburg v. Gingles* (478 U.S. 30, 1986) had established that under Section 2 of the Voting Rights Act when multi-member legislative districts dilute minority political influence, they could

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**Table 4. Female Applicants for Superior Court Judgeships by Governor**

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Governor	Total Nominees	Women	Percent Women
Carter (1972-1974)	113	3	2.7
Busbee (1975-1982)	331	24	7.3
Harris (1983-1990)	184	13	7.1
Miller (1991-1998)	1,365	471	34.5
Barnes (1999-2002)	315	76	24.1
Perdue (2002-2008)	296	79	26.7

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be struck down. The Georgia plaintiffs sought to extend *Gingles* to require the subdividing of judicial circuits so that some judges would be selected from predominately black constituencies. While the plaintiffs' lawsuit ultimately failed, Miller sought to increase the diversity of the judiciary. He appointed a record number of black judges and, as Table 4 shows, an extraordinary number of women appeared before the JNC (Bullock and Gillespie 2004). During Miller's tenure, 471 women sought appointments and they constituted more than one-third of all candidates considered by the JNC.

Under Miller's successor, the number of female judicial candidates dropped to just under one-quarter. During Sonny Perdue's first six years in office, women continued to make up a fourth of the pool of candidates reviewed by the JNC.

For the Perdue era, we have obtained the short list of candidates forwarded from the JNC to the governor. In no case does the JNC send the governor more than five nominees, and in some instances it sends fewer. As one JNC member explained, when a vacancy attracts a small pool of candidates, the JNC may refer only two or three names to the governor since if it recommended the entire pool or virtually the entire pool, it would not have helped the governor winnow the field. During the first six years of the Perdue administration, women made up 22.5 percent of the short-listed applicants for superior court vacancies, which approximates the share of all applicants reviewed by the JNC who were women.

The pattern over time for women actually being appointed to the bench shows some parallels with their incidence among the individuals considered by the JNC. As Table 5 shows neither governors Carter nor Busbee named any women to the bench. The first appointments of women come during the Harris administration (1983-90) when he picked women for approximately 10 percent of the superior court vacancies. Miller followed through on his pledge to diversify the bench and tapped women for 27.8 percent of the vacancies he filled. With Governor Barnes the incidence of women slipped to just below 20 percent. Through 2008, Governor Perdue named only two women to the 31 court vacancies filled on his watch. For one vacancy, four of the five recommendations were women but the appointment went to the only man. We do not control for experience, years of practice, type of practice, or reputation of the individuals on the short list and, therefore, cannot explain why only two of the 27 women on short lists made it on to the bench.

Partisanship may hold the key. Women disproportionately participate in Democratic as opposed to Republican primaries. In 2008, 58 percent of the

**Table 5. Female Superior Court Judges and the Governors Who Appointed Them**

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Governor	Total Appointees	Women	Percent Women
Carter	16	0	0
Busbee	62	0	0
Harris	31	3	9.7
Miller	72	20	27.8
Barnes	31	6	19.4
Perdue	31	2	6.5

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women who turned out voted in the Democratic primary. The women serving in the General Assembly are also disproportionately Democrats. It may be that the pool of eligible female attorneys are disproportionately Democrats and that would reduce their probability of being tapped for the bench by a Republican governor.

Only Governor Harris named women to the bench at a higher rate than their presence in the pools considered by the JNC. For the next two governors, the disparity ranged from five to about ten percentage points. While Governor Miller got to fill more superior court positions than any other governor, and that partially helps explain the large number of women he tapped, it is still notable that he appointed almost twice as many women as the other five governors combined. The rate for Governor Perdue is the lowest for a governor who named any women to the bench.

### **Number of Judges in the Circuit**

As expected, the number of judges serving in a judicial circuit is positively related to the incidence of women on the bench. Four circuits, Atlanta, Cobb, Gwinnett, and Stone Mountain (DeKalb County) have at least ten superior court judges. Of the 49 judges in these four circuits, 18 (37 percent) are female. Seven circuits have between five and nine judges. Of the 41 judges serving in these circuits, five (12 percent) are women. In the smallest circuits, those with fewer than five judges each, sixteen women are found among the 112 jurists (14 percent). While all but three of the eleven circuits with five or

more judges have at least one woman on the bench, 63 percent of the circuits with four or fewer judges do not have a female jurist.

When the number of women judges in a circuit is regressed on the total number of judgeships in the circuit, the relationship is strong and positive. Each additional judgeship is associated with .39 more women judges.<sup>2</sup>

In the absence of information by judicial circuit on the numbers of women who meet the minimum seven-years of practice needed to become a judge, it is impossible to know whether the circuits with larger panels which serve more urban areas have higher proportions of eligible women than do smaller circuits or whether governors and perhaps JNC panels are more willing to nominate women in circuits where there are more positions.

### **Conclusion**

As hypothesized, women more frequently come to the bench via appointment than the election route. Across the 36 years of the study, more women got appointed to the bench than won election to an open seat or by challenging an incumbent. Of the 39 women serving as superior court judges at the end of 2008, 15 initially won open seats and two defeated a male incumbent as compared with 22 tapped by a governor. The proportions for women closely approximate those for men.

As anticipated, women competing in judicial elections fared far better when seeking open seats than when challenging incumbents. The rate at which members of one sex successfully challenged judges of the other sex is similar with three of 19 women who took on a male judge defeating him as did two of 22 men who ran against female judges.

Also as expected, women who made it to the bench rarely lost, having a 90 percent success rate when challenged. This exceeds the 82 percent reelection rate for male judges who faced a challenge. Sitting women judges are not disproportionately the targets of challenges. While women judges remain relatively rare, holding fewer than 20 percent of the posts, those who do compete in elections have success rates similar to those for males. Overall the election rates for women in initial elections and in runoffs are almost identical to those for men competing against women.

Although the applicant pools considered by governors for superior court vacancies have had higher percentages of women beginning with Governor Miller, the rate at which women get selected falls below their share of the names considered by the JNC. Only under Governor Harris did the percentage

of appointments going to women exceed the percentage of women in the candidate pools.

While most women, and most men, initially got on the bench following an appointment, a different pattern characterizes the first six years of the Perdue administration. Governor Perdue rarely selected women to fill vacancies so that more women have become judges as a result of elections than appointments during his tenure. Perdue has appointed two women, but in the last two elections eight women have come to the bench by winning elections.

The rates at which women have come to the bench in Georgia demonstrate that improvement comes slowly. Over a period of 36 years, governors have selected only 31 women to become superior court judges, an average of less than one per year. Across the 18 election cycles covered in this study, a total of 17 women have won initial seats to the bench, an average of not quite one per election cycle. The rate at which women become trial judges in Georgia may accelerate now that more women attend law school. A delay is likely, however, since judgeships go disproportionately to individuals who have proven themselves as litigators, and disproportionate numbers of women attorneys remain relatively junior. However, as noted above, eight of the 39 female jurists have won seats in just the last two rounds of elections.

Women judges provide a representative balance to the judicial system, demonstrating equality and fairness of the law. Because of the different perspective that women often bring to the bench, it would benefit the judicial system if greater numbers of women pursue judgeships either electorally or through the appointment process and if chief executives tap more women when filling vacancies.

## Appendix

### Cases

*Brooks v. State Board of Elections*, 775 F. Supp. 1470 (S.D. Ga. 1989)

*Brooks v. State Board of Elections*, 848 F. Supp. 1548 (S.D. Ga., 1994)

*Thornburg v. Gingles*, 478 U.S. 30 (1986)

### Notes

<sup>1</sup> These analyses do not include uncontested elections. Most of Georgia's judicial elections involve unopposed incumbents and these are excluded from the analysis.

<sup>2</sup> The model is: No. women judges =  $-.798 + .387 (.033)$  total judges. Adjusted  $R^2 = .74$ .

Eliminating the Atlanta circuit has little effect on the model.

Adding a quadratic term results in: No. women judges =  $-.35 + .216 (.100)$  total judges +  $.010 (.006)$  total judges<sup>2</sup>. Adjusted  $R^2 = .75$ .

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