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Original Publication Information


This is the peer reviewed version of the following article:

Moyer, Laura P. and Holley Tankersley. "Judicial Innovation and Sexual Harassment Doctrine in the U.S. Courts of Appeals." 2012. *Political Research Quarterly* 65(4): 784-798.

which has been published in final form at <http://dx.doi.org/10.1177/1065912911411097>.

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Judicial Innovation and Sexual Harassment Doctrine in the U.S. Courts of Appeals

Political Research Quarterly
XX(X) 1–15
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sagepub.com/journalsPermissions.nav
DOI: 10.1177/1065912911411097
http://prq.sagepub.com


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Abstract

The determination that sexual harassment constituted “discrimination based on sex” under Title VII was first made by the lower federal courts, not Congress. Drawing from the literature on policy diffusion, this article examines the adoption of hostile work environment standards across the U.S. Courts of Appeals in the absence of controlling Supreme Court precedent. The results bolster recent findings about the influence of female judges on their male colleagues and suggest that in addition to siding with female plaintiffs, female judges also helped to shape legal rules that promoted gender equality in the workplace.

Keywords

sexual harassment, precedent, U.S. Courts of Appeals, policy diffusion, policy innovation, gender and judging, sex discrimination, courts, judicial policy

From the passage of the Civil Rights Act of 1964 prohibiting “discrimination on the basis of sex” to the U.S. Supreme Court’s decision in *Meritor Savings Bank v. Vinson* (477 U.S. 57(1986)), lower courts were left to create and develop both the legal meaning of sex discrimination and the standards by which sex discrimination cases would be adjudicated. Scholars such as Catharine MacKinnon have observed that because of the lack of legislative guidance on Title VII, it was the courts that truly shaped the legal standards governing sex discrimination in the workplace by responding to the reality of women’s experiences in discrimination lawsuits. This is not particularly surprising: in the absence of clear guidance from the U.S. Supreme Court, the circuits that make up the U.S. Courts of Appeals are regularly left to the task of statutory interpretation and setting legal policy for their respective jurisdictions. But why did some circuits lead the way while others were slower to develop doctrine? Was innovation driven by internal factors or external ones?

Drawing from these questions, this article looks at the evolving body of common law on sex discrimination that developed in the U.S. Courts of Appeals prior to the U.S. Supreme Court’s adoption of a controlling legal framework for evaluation of such claims under Title VII. While the disputes that the circuits hear on appeal are decidedly not representative of all claims, these cases are important because they establish precedent for the whole circuit and set forth a standard for lower courts to use in future claims.

Specifically, we investigate the development of workplace sex discrimination doctrine during two periods of uncertainty in the law. The first period of doctrinal evolution occurred in the federal appellate courts between 1964 and the Supreme Court’s 1986 decision in *Meritor Savings Bank v. Vinson*, which formally expanded the definition of sexual harassment to include “hostile work environment” but left other legal questions unanswered. The second period of interest includes cases decided after *Meritor* but before the Supreme Court’s 1993 ruling in *Harris v. Forklift Systems* (510 U.S. 17(1993)); this decision held that an abusive work environment does not have to cause tangible injury in order for a victim to bring a claim.

We proceed in the following fashion. First, we discuss the concept of policy diffusion and how it operates in the judicial context, and specifically in the U.S. Courts of Appeals. We then explain how the role of the judiciary differed in the area of sexual harassment compared to other gender equality issues advocated by women’s rights groups during the same time period. With this discussion as a backdrop, we then set forth to test several hypotheses

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about the relevant institutional, legal, and environmental factors that should influence a court's adoption of the legal rule that sexual harassment is discrimination based on sex. We conclude by discussing what our findings tell us about the circumstances that most favored the advancement of gender equality in the workplace. Central among these is the presence of female judges on the appellate bench.

Policy Diffusion in the Judicial Context

Policy diffusion, or the process by which a policy innovation is disseminated to potential adopters, is well-traveled territory in studies of policymaking. Policy innovations are simply new policy adoptions; the innovation represents the first time a particular agency, legislature, or government has adopted or implemented a particular policy. That scholars have chosen to describe the spread of policy innovations as "diffusion" implies that governments or governmental units influence one another to adopt the new policy (Shipan and Volden 2008). While most studies of policy diffusion are conducted at the state level and focus on a legislature's decision to adopt a particular policy innovation, there exists a substantial body of literature on the ways in which policy innovations—defined more specifically as new rules or doctrines—spread across court systems. Like studies of legislative policy adoption, most studies of judicial diffusion investigate the transmission of precedent across state court systems (Caldeira 1985; Canon and Baum 1981; Lutz 1997; Savage 1985), although scholars are increasingly interested in explaining the same process at the federal appellate level (Klein 2002; Songer, Segal, and Cameron 1994; Spill Solberg, Emrey, and Haire 2006).

In general, theories of policy diffusion center around three sets of determinants: internal, external, and policy-specific characteristics. Internal determinants include such factors as institutional structures and characteristics, public opinion, demographic factors, ideology (of both government and the populace), and economic variables (Dye 1966; Erikson, Wright, and McIver 1993; Gray 1973; Jacoby and Schneider 2001; Squire 1993; Walker 1969). External factors typically taken into consideration include the influence of regional neighbors, federal institutions, or historical events (Berry and Berry 1992; Karch 2004; Menzel and Feller 1997; Mooney 2001; Welch and Thompson 1980). Finally, most diffusion models include determinants specific to the policy innovation itself; for instance, studies of innovation in criminal justice policy might include measures of crime statistics specific to each unit under observation.

Despite some findings that suggest judicial diffusion differs significantly from the process for legislative

policy adoption and diffusion (e.g., Canon and Baum 1981; Lutz 1997; Savage 1985), there is evidence that the general determinants and mechanisms of diffusion do apply to the adoption of innovative doctrines across both state and federal appellate courts. The institutional structures and characteristics of specific courts, along with a well-developed system of judicial communication (via the publication of written opinions), have been particularly cited as having a significant impact on the likelihood that a court will adopt a legal innovation.

Determinants of Judicial Diffusion

Using the standard model of diffusion, judicial scholars have investigated the adoption of precedent across state supreme courts, finding that the diffusion of precedent is inconsistent and does not conform to any standard pattern. Instead, judicial diffusion appears to depend largely on internal determinants such as communication networks (e.g., legal reporting districts, citing doctrine in written opinions), cultural similarities (i.e., shared demographic profiles), and institutional structures and characteristics (e.g., level of court professionalism, caseload, and court prestige) of the courts in question (Caldeira 1985; Canon and Baum 1981; Kilwein and Brisbin 1997; Lutz 1997; Savage 1985).

The idea that the adoption of a new doctrine or precedent is dependent upon internal determinants (and thus appears to be idiosyncratic) is not wholly inconsistent with the general findings in much of the diffusion literature. Recent findings by Volden (2006) suggest that geographic proximity, the typical measure of regional or neighborhood effects on policy diffusion, does not necessarily lead to policy emulation. Instead, policy diffusion is common across states that have similar demographic, political, and fiscal profiles. Accordingly, if judicial diffusion is indeed fairly idiosyncratic in nature, then it is likely that the judicial diffusion process is significantly impacted not only by the institutional characteristics of courts but also by socioeconomic variables and demands, which vary widely across states, regions, and time periods. Thus, the particular events of the time period under question, the needs of the population at various moments in time, and the characteristics of the very issue at question all should have increased significance in the judicial diffusion process.

Indeed, Canon and Baum (1981) suggest as much when they note that pre- to postwar changes in population size and urbanization had at least a minimal impact on the diffusion of judicial innovations. In the same vein, Kilwein and Brisbin (1997) also find that the characteristics of the question at hand, in addition to court characteristics, have an impact on the likelihood of adoption, noting that courts are most likely to adopt rules that favor

“have-nots,” or those who are disadvantaged, when they are dominated by Democratic, relatively liberal judges.

Mechanisms of Diffusion

In addition to studying the determinants of policy adoption and diffusion, scholars have expanded their scope of research to examine the mechanisms of diffusion. Studies of state legislatures show that states are more likely to adopt policies that have been successful in other states; thus, it appears that states actively learn from the experiences of their peers, waiting to adopt a policy until they are sure that policy will actually work (Shipan and Volden 2008; Volden 2006). Extending this logic to judicial diffusion, researchers have documented a similar mechanism at work. Emulation appears to take place over the long term, as policy innovations and judicial meaning evolve to become commonly accepted (Glick 1992, 1994; Glick and Hays 1991; Phillips and Grattet 2000; Volden 2006). The process by which appellate courts develop the legal meaning of a concept in response to increasingly accepted judicial rhetoric can then be equated to policy learning (Phillips and Grattet 2000; Shipan and Volden 2008).

Just as Volden (2006) suggests that simply having a high proportion of adopting neighbors does not guarantee that a state will adopt a policy innovation, regional influence does not appear to have a significant impact on the likelihood that an innovation will be adopted by a given court (Canon and Baum 1981). This is likely due to two factors. First, the courts' ability to adopt a precedent is dependent upon opportunity, or the actual supply of cases (Caldeira 1985; Canon and Baum 1981). No applicable case on the docket? No adoption. Second, the idea of regional neighborhood influence is too narrow for judicial diffusion; the legal system has well-established channels of communication that do not rely on geographical proximity (Canon and Baum 1981; Lutz 1997). In fact, it is this system of written opinions and legal reporting that may be most responsible for the transmission of legal doctrine.¹ For example, all federal appellate opinions designated for publication are included in the *Federal Reporters* (rather than being separated out into regional publications), so a panel of judges from the First Circuit arguably has easy access to the legal rules established by the Fifth Circuit. Additionally, the hierarchical arrangement of courts within the federal system works to structure the patterns of diffusion. Courts that are lower in the hierarchy (e.g., trial courts, intermediate appellate courts) are bound by precedents established by their courts of last resort, and on matters of federal law, state courts are bound by federal court pronouncements. In the federal judiciary, the intermediate appellate courts are organized into regionally based “circuits”; each circuit cultivates its

own body of precedent and, in the absence of Supreme Court guidance, can emulate or ignore other circuits' legal innovations as it sees fit.

One might also expect that judicial diffusion may be slower than diffusion across legislatures or administrative institutions. There may be several reasons for this. First, judicial diffusion may be hampered by relative autonomy of courts (Kilwein and Brisbin 1997). This makes diffusion most likely when a court has the institutional capacity to “receive, adapt, and implement the message about the establishment of a doctrine” (Kilwein and Brisbin 1997, 132). Indeed, even those scholars who argue that there are no defined patterns of judicial diffusion emphasize the importance of communication between courts in the transmission of legal precedent (Caldeira 1985; Comparato 2002; Savage 1985). For example, Caldeira (1985) finds that courts are more likely to adopt a precedent from their peers when the two courts exist within the same regional communication channel (i.e., distance and legal reporting district). Consequently, it is likely that judicial diffusion is facilitated by policy learning, especially given the propensity of courts to cite the decisions of other courts and judges as a way to justify their own decisions (Shapiro 1970, 51; Spill Solberg, Emrey, and Haire 2006; Shipan and Volden 2008).

Diffusion across the U.S. Courts of Appeals

While most judicial diffusion studies involve the spread of doctrine and precedent across state court systems, Klein (2002) and Spill Solberg, Emrey, and Haire (2006) investigate the Courts of Appeals' reactions to areas of law in which they do not have clear Supreme Court direction. In general, Klein (2002) argues that judges at the appellate level do not make decisions about adoption of a particular doctrine based on concerns about or anticipation of possible Supreme Court reaction; instead, judges are influenced by a number of other considerations, including their own ideological proximity to the rule under consideration as well as the legal prestige and expertise of the judge who originally authored the doctrine under consideration. Like Klein (2002), Spill Solberg, Emrey, and Haire (2006) find that circuits are more likely to adopt those new doctrines that were developed by circuits perceived to have policy expertise; this indicates that circuits cite those courts that frequently publish opinions in particular policy areas, or at least those who are willing to be first adopters (see also Walsh 1997). However, they also note that circuits are likely to rely on their own legal capital when possible (Spill Solberg, Emrey, and Haire 2006, 286). These findings are consistent with those studies that note the importance of institutional characteristics in judicial diffusion (Caldeira

1985; Canon and Baum 1981). They also echo Shipan and Volden's (2008) finding that smaller, less experienced governmental institutions are more likely to adopt policy innovations in imitation of larger, more experienced institutions.

Klein (2002) also discusses the importance of widespread circuit acceptance of a rule; he finds that increased circuit support for a given rule heightens the probability that subsequent judges will adopt. This finding is underscored by another conclusion: that judges are less likely to adopt the doctrine in question when a previous ruling includes a dissent (Klein 2002). Taken together, the impact of widespread circuit acceptance and presence of a dissenting opinion indicate the judges want to be sure of the "success" (in this case, defined as legal viability or "settled" meaning) of a new rule (see also Phillips and Grattet 2000). Again, this mirrors the legislative diffusion process, as governments are more likely to adopt an innovation that has already proven to be successful at some level (Volden 2006).

Similarly, Spill Solberg, Emrey, and Haire (2006) find that judges on the Courts of Appeals do seem to be influenced by the decisions and opinions of other circuits. However, this effect happens over time; early in the process of developing a new area of law, judges are more reliant on the characteristics of their own circuits. This finding provides support for the idea that judicial diffusion is a slow process that is driven by policy learning: judges wait to adopt an innovative rule or doctrine until they are assured of its success and support across other circuits (Klein 2002; Phillips and Grattet 2000; Volden 2006). The authors also note that circuits are more likely to cite outside opinions when making decisions in cases involving particularly difficult issues (Spill Solberg, Emrey, and Haire 2006). The logic is simple: in such cases the circuit majority is seeking additional justification to enhance the legitimacy of its opinion (see also Walsh 1997).

Finally, because previous research has found that the adoption of legal rules is subject to the nature of the policy area, we turn our attention to the larger context of the women's movement and the degree to which fighting sexual harassment was connected to this movement's policy goals.

Gender Equality, Sexual Harassment, and the Courts

Unlike other types of sex discrimination claims (e.g., equal pay, support for working mothers, fairness in hiring and promotion), sexual harassment did not start out as an issue championed by the women's rights movement. In her essay "The Logic of Experience" (reprinted in her 2007 edited volume), Catharine MacKinnon observes, "Social movements did not first define the issue of sexual

harassment in the public mind to the degree that the courts did" (p. 165). Instead, sexual harassment became a cognizable legal claim through the uncoordinated decisions of individual women who believed that their employment should not be conditioned on their performance of sexual favors (quid pro quo harassment) or their acquiescence to pervasive verbal, physical, and psychological abuse (hostile environment harassment). These decisions exemplify the way in which legal mobilization can infuse private litigation with political significance (Jacob 1969).

Visible and audible, as an injured party, someone with relevant information, a woman could, at the least, make a man look bad, perhaps cost him a great deal. . . . With women no longer absorbing the entire cost of this conduct in private, sexual politics went public, shifting the ground of political convention and becoming a visible part of politics as usual. . . . Fundamentally, sexual harassment law transformed what was a moral foible (if that) into a legal injury to equality rights. (MacKinnon 2007, 185)

This perspective on the courts' contribution to gender equality in the workplace views judicial creativity in a positive light, heralding the advantages of "bottom-up" policy development by courts as opposed to "top-down" policymaking by legislative bodies. In particular, MacKinnon argues that features of the common law decision-making process—extrapolating broader principles from a set of facts and applying them to similar facts—was helpful to women in this case. Rather than being defined in the abstract by a legislative body or an advocacy group, legal recognition of sexual harassment as discrimination came about in an incremental process shaped by women's lived experiences with discrimination.

While MacKinnon (2007) heralds the role of the courts in addressing the social and legal implications of sexual harassment, other scholars argue that the courts were only allowed to act because of social and political developments occurring outside the judiciary. In these accounts, the process by which the courts addressed sexual harassment was a culmination of multiple events that were brewing in the political and institutional environments well before the first official judicial recognition of the problem. For example, Zippel (2006) provides a narrative of the evolution of sexual harassment policy in the United States, noting that the courts were spurred to action by the convergence of two key events: the social mobilization of the second-wave women's movement, including the conscious decision to address the growing problem of "sexual harassment" and the Equal Employment Opportunity Commission's (EEOC's) decision to file an amicus brief in support of a plaintiff claiming sex-based discrimination

(*Corne v. Bausch & Lomb* 390 F. Supp. 161 (D. Arizona, 1975)). Others have argued that because the courts developed sexual harassment precedent in response to social and political activity, this created a restrictive definition of sexual harassment, a narrow definition that focuses too much on sexual abuse as popularly understood and not enough on harassment based on gender discrimination and mistreatment (Schultz 1998).

The Equal Employment Opportunity Commission also played a role in the conceptualization of sexual harassment as a violation of workplace anti-discrimination policies. In particular, the EEOC's contribution to legal innovation primarily occurred through its activities as a rule-making body and through its decisions to file amicus curiae briefs in federal court.² With respect to rulemaking, in 1980, the EEOC (under the direction of Eleanor Holmes Norton) issued its first set of guidelines describing sexual harassment as a type of discrimination based on sex prohibited by Title VII. In these guidelines, the EEOC noted that "[u]nwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature" all constituted sexual harassment, whether they were directly connected to quid pro quo harassment or with harassment that had "the purpose or effect of unreasonably interfering with an individual's work performance," thereby "creating an intimidating, hostile, or offensive working environment" (29 CFR 1604.11(a)). The Supreme Court explicitly drew upon this language in *Meritor v. Vinson*, though it rejected the EEOC's proposed scheme of employer liability as raised in their amicus brief (Anderson 1987). The EEOC also filed amicus briefs in early cases such as *Bundy v. Jackson* (641 F.2d 934 (D.C. Cir. 1981)) and *Henson v. City of Dundee* (682 F.2d 897 (11th Cir. 1982)) and intervened on behalf of the plaintiffs in a Ninth Circuit hostile environment case, *EEOC v. Hacienda Hotel* (881 F.2d 1504 (9th Cir. 1989)).

Of course, legal developments in sexual harassment doctrine would likely not have happened without judges who were willing to innovate in the absence of legal guidance from the Supreme Court or Congress, attorneys who were willing to push the envelope with novel legal arguments, and plaintiffs who understood their treatment at work as an injury deserving of legal redress and were willing to take on the various costs of litigation.³ Discusses the obstacles that early plaintiffs had to surmount even after they decided they wanted to litigate. Central among these was finding attorneys willing to argue for an expanded definition of sex discrimination law, since the plaintiffs were not "repeat players" in the litigation process (Galanter 1974).⁴

In sum, by naming and recognizing the problems faced by women in the workplace (problems that were not being adequately addressed by existing employment discrimination laws), these plaintiffs, attorneys, and judges

served as "critical actors" for the larger cause of gender equality, even if their efforts were not coordinated. Childs and Krook (2006, 528) define critical actors as "those who initiate policy proposals on their own . . . and embolden others to take steps to promote policies for women." Because of the important role that precedent plays in a common law system, the significance of the first few appellate cases to recognize sexual harassment went beyond victory for the plaintiffs involved. As favorable precedent began to emerge in a few circuits, judges in other circuits had more "legal capital"⁵ available to them when facing these novel claims themselves. While appellate judges are not bound by precedent from circuits other than their own, they often look to other courts' examples when their circuit has not established a clear rule (Klein 2002).

Theoretical Framework

Given the reactive, not proactive, nature of the judicial institution, we argue that both internal and external factors affected the timing of each circuit's first decision interpreting Title VII to prohibit hostile work environment sexual harassment. These initial decisions are important, not because they represent all of the sexual harassment claims filed in court (they do not), but because they established circuit-wide precedent in the absence of any Supreme Court precedent on sexual harassment.⁶ The literature suggests three sets of explanations for policy adoption that can be broadly classified as legal, institutional, and environmental in nature.

Legal Factors

Miller and Sarat (1980-1981, 544) describe the dispute resolution pyramid as having several stages, with smaller numbers at each subsequent level: injury, grievance, claim, dispute, resort to lawyers, and filing. For a case to appear before a circuit court, we add another step to the process: an appeal. Prior to the passage of Title VII, there were almost certainly many "injuries" in the form of sexual harassment in the workplace, but as the concept of "sexual harassment" per se was not understood as such (MacKinnon 2007). However, once legislation that banned "discrimination based on sex" was in place, this provided legal grounds for women to articulate a grievance: they were being treated unfairly by their employers because of their sex.

Thus, the opportunity for federal appeals courts to rule on sexual harassment is, first, dependent upon the presence of relevant disputes. We conceptualize this "opportunity" as including the time elapsed after the passage of Title VII.⁷ This allows time both for cases to make their way through the court system and for circuits to seek out

signals from other courts prior to adopting a new rule (Klein 2002; Phillips and Grattet 2000; Volden 2006). In addition, the presence of available “legal capital” (Spill Solberg, Emrey, and Haire 2006), such as existing circuit precedent or other circuits’ precedent, may explain the timing of a court’s decision. One potential source of precedent available to courts is the existing precedent interpreting Title VII as prohibiting “racial harassment” as part of “discrimination based on race.” These cases first explicated the concept of an “abusive” or “hostile” environment, language later picked up in the sexual harassment cases, detailing how constant slurs, taunting, and the like constituted “discrimination based on race.” Because judges engage in analogical reasoning as they search for relevant legal authorities to guide their decisions (Sunstein 1993), similarities between a racially and sexually hostile environment might inform a court’s decision to recognize a hostile work environment in the sexual harassment context.⁸

Likewise, if a court had previously ruled on a *quid pro quo* sexual harassment case, this would be a source of “in-house” legal capital available to help formulate a new rule on hostile environment discrimination (and would allow for a relatively smaller, more incremental shift in policy). In addition to looking to other circuits, the participation of organized interests via *amicus curiae* briefs can provide legal arguments as well as ideological cues that hasten adoption (Martinek 2006). Finally, because of the structure of the federal judicial hierarchy, it should be expected that relevant *stare decisis* from the Supreme Court should hasten a circuit’s adoption of a legal rule. Two Supreme Court decisions on sexual harassment were handed down between 1965 and 1994: *Meritor Savings v. Vinson* (1986) and *Harris v. Forklift Systems* (1993). It should be noted that *Meritor* was not dispositive on the issue of sexual harassment, as it left open several important issues that were later clarified by *Harris*. For this reason, we include cases decided both before and after *Meritor*, though we expect that circuits will be more likely to adopt the hostile environment standard after *Meritor* was handed down in 1986.

Institutional Factors

In addition to legal factors, a substantial body of research has acknowledged the importance of the institutional context in shaping circuit court outcomes, particularly panel- and circuit-level influences (e.g., Cohen 2002; Hettinger, Lindquist, and Martinek 2006). Of these, the ideological preferences of the court have been identified as having a substantial effect (Kastellec 2007; Tiller and Cross 1999). We expect that the preferences of the circuit, as measured by its median ideology, will affect when a court will adopt a hostile environment rule.

Likewise, we expect that the preferences of the panel hearing the case will be related to adoption, with more liberal panels being more likely to adopt than more conservative panels (Kilwein and Brisbin 1997).⁹

The timing of adoption may also be driven by the Courts of Appeals’ status as an intermediate appellate court under the Supreme Court’s direction. It is possible that a circuit may be responding to recent oversight and correction by the Supreme Court, in the form of reversals. While the degree to which the Supreme Court acts as an effective principal is quite limited due to the small fraction of cases it accepts each year (Lindquist, Haire, and Songer 2007), a circuit might be less likely to innovate if it had recently sustained a number of reversals. Additionally, innovation might be affected by the degree to which the circuit and the Supreme Court are ideologically congruent, with circuits more willing to take “risks” when conditions at the Supreme Court appear favorable (but see Klein 2002).

Finally, the likelihood of circuit adoption of a hostile environment rule may be influenced by the presence of a female judge. A growing body of empirical research on the U.S. Courts of Appeals supports this expectation in employment discrimination cases. Peresie (2005) finds that in cases involving claims of sexual harassment or sex discrimination, plaintiffs double their chances of a favorable decision when the panel includes a female judge. Songer, Davis, and Haire (1994) note that women judges make relatively more liberal decisions when it comes to claims of employment discrimination. Finally, Boyd, Epstein, and Martin (2010) find that women judges have both an individual and panel impact when it comes to judging sex discrimination cases; specifically, male judges who serve with a woman on a panel in such cases are more likely to rule in favor of the plaintiff.¹⁰ Following this literature, we expect that the presence of a female judge should increase the likelihood that a court will adopt a hostile environment standard.

Environmental Factors

The remaining set of factors that are likely to affect the timing of innovation can be found not in the law or in the federal judiciary, but in the environments in which the circuits are situated. Regional characteristics of the circuit, such as the proportion of women in the workforce, citizen liberalism, and litigiousness, may affect both the “supply” of lawsuits and the willingness of judges to respond with a new legal standard. The public awareness of sexual harassment arguably increased greatly after 1991, due to the volume of news coverage of the Clarence Thomas confirmation hearings and the Tailhook scandal. However, these events do not affect our analysis

because the last circuit to adopt a hostile environment interpretation did so in 1989.

Research Design

In this article, we are seeking to explain innovations by the U.S. Courts of Appeals in the absence of controlling Supreme Court precedent on sexual harassment law. Specifically, we look at each time a circuit explicitly noted that “discrimination based on sex” included the creation of a sexually hostile or abusive work environment (“first adoptions”).¹¹ We also examine subsequent clarifications of the standard in cases that followed first adoption cases. We allow for multiple “adoptions” by a circuit because fact patterns vary across cases and courts are constrained by the cases brought to them. For example, after the first time a circuit recognized hostile environment harassment, subsequent decisions might clarify questions about liability, the severity of harassment needed for an actionable claim, and the vantage point from which objectionable behavior is assessed.

In terms of the opportunity to make policy, we identify two “windows” in which these decisions occurred. The first window exists after the passage of Title VII in 1965 and before the Supreme Court’s 1986 decision in *Meritor Savings v. Vinson*. In *Meritor*, the Court ruled that Title VII was not limited to sex discrimination of an “economic character,” that the correct standard for review was whether the behavior was “unwelcome,” and that trial courts should consider the “totality of the circumstances” rather than evaluating each incident in isolation. Prior to 1986, five circuits had adopted a hostile environment rule.

The second window spans the time between *Meritor* and the Supreme Court’s second sexual harassment case, *Harris v. Forklift Systems* (1993). *Harris* clarified the reference point for determining whether behavior was offensive (the “reasonable person” standard)¹² and emphasized that to have an actionable claim, plaintiffs must show that the conduct was “more than a mere utterance” while not requiring the conduct to cause a “nervous breakdown.” Between *Meritor* and *Harris*, the remainder of the circuits adopted the policy, with the last court (the Ninth Circuit) adopting in 1989.

To explain the timing of each circuit’s adoption of the hostile environment interpretation of Title VII, we utilize a Cox proportional hazards model. Duration analysis is particularly useful for the study of policy innovation and diffusion, as the main line of inquiry involves speculation on both the circumstances that contribute to policy adoption and the timing of individual adoptions. Duration models account for the possibility that individual subjects observed in multiple time periods might “fail” by succumbing to some event (in this case, adopting a standard for the adjudication of sexual harassment claims).¹³

Among the survival time methods, the Cox proportional hazards model is used here because it requires no assumption regarding the model distribution, which comports well with diffusion theory (Box-Steffensmeier and Jones 1997; Gray 1973; Rogers 1962).¹⁴ Because our data include multiple adoptions by individual circuits, we estimate a multiple events Cox model; this allows for the fact that a given circuit experienced the same event (i.e., adoption of a standard) more than once during the time period under question. The variance corrected model utilizes robust standard errors with observations clustered by circuit; the data are stratified by event, or the order in which adoptions occurred.¹⁵

Dependent Variable

We conceptualize our dependent variable as each time a circuit adopted, clarified, or expanded a hostile environment standard in a case. To identify the instances in which a circuit adopted or expanded the hostile environment standard, we generated a list of cases via the Westlaw database, using the search terms *sexual harassment*, *Title VII*, and *hostile environment*.¹⁶ This produced the universe of published opinions for the eleven numbered circuits and the District of Columbia; from these, trained coders content analyzed all sexual harassment cases decided by each circuit between 1965 and 1993. A case was designated as an “adoption” (coded as a 1) based on explicit language in the majority opinion stating that the court was expanding the definition of sex discrimination to include a hostile or abusive work environment or that it was clarifying its hostile environment rule.

Independent Variables

To account for the role of institutional factors in explaining policy adoption, we included several variables related to the court’s policy preferences and decision-making tendencies. As a measure of circuit ideological preferences, we used the circuit median ideology variable from the Judicial Common Space scores (Epstein et al. 2007). These scores are calculated based on the NOMINATE Common Space scores (Poole 1998; Poole and Rosenthal 1997) and range from -1 (most liberal) to +1 (most conservative). In this issue area, more liberal circuits should have a greater likelihood of adoption compared to conservative courts because of their policy preferences related to women’s rights. Another variable captures aspects of policy preferences at the panel level. The panel ideology variable is the median of the Judicial Common Space scores for the three members of the panel hearing the case. As with circuit preferences variable, if a majority of the panel holds relatively liberal policy preferences, we should expect them to be more likely than a conservative

panel to expand the definition of sex discrimination to include hostile environment harassment. Third, because previous work has found that the degree of ideological cohesion within a court influences the extent to which a panel will cite caselaw from another circuit (Spill Solberg, Emrey, and Haire 2006), we also included a lagged estimate of circuit dissensus that is a moving three-year average of the dissent rate in each circuit.¹⁷

Additionally, the presence of female judges as “critical actors” who help promote an understanding of sex discrimination (Boyd, Epstein, and Martin 2010) might hasten the adoption of a hostile environment rule. We test this expectation with a dummy variable that indicates whether there was a woman judge serving on the panel hearing the case (coded 1 if there was at least one woman and 0 if there were no women).¹⁸

Within the judicial hierarchy, the relationship between a given circuit and the Supreme Court might also influence a panel’s decision about whether and when to innovate. To account for this relationship, we include variables that tap into the degree of oversight a circuit has received and also the degree to which a circuit shares the policy preferences of the Supreme Court. For the former variable, we calculated a lagged reversal rate using the Spaeth Supreme Court data set, using the raw number of reversals in the previous year divided by the total number of terminations on the merits.¹⁹ To account for ideological congruence (or lack thereof) between a circuit and the Supreme Court, we calculated the distance between the Supreme Court and the circuit median using the Judicial Common Space scores, then took the absolute value.

Several variables related to environmental explanations for diffusion were obtained from the U.S. census. As a rough indicator of the “opportunity” for sexual harassment lawsuits, we calculated the proportion of women in the civilian workforce for each circuit. While a yearly figure would be more sensitive to changes in workforce demographics, these data are only available in the census reports, so we used the 1970 data for 1965-1970, the 1980 data for 1971-1980, the 1990 data for 1981-1990, and the 2000 data for 1991-1993. Additionally, to account for the relative levels of litigiousness within each circuit, we utilize the population density averaged across all states in the circuit.²⁰ Previous scholarship has found that greater levels of social complexity are related to more litigation (Yates, Davis, and Glick 2001; Harrington and Ward 1995). We also control for the possibility that citizen ideology influences the relative litigiousness of a circuit by including the Berry et al. (1998) measure of citizen liberalism, which ranges from 0 (conservative) to 100 (liberal).

The legal capital variables were coded directly from the cases and Westlaw search results. The number of previous appellate sexual harassment cases was summed to

provide a “count” of available legal capital across all circuits. To account for intracircuit legal capital, we also included a dummy variable equal to 1 if the circuit had previously acknowledged quid pro quo harassment as a violation of Title VII. The use of racial harassment precedents was coded as a 1 if the court cited such a case in any way and a 0 if not. Finally, drawing from the literature on “policy entrepreneurs” as well as recent findings on the influence of amicus curiae briefs (Collins 2007), we control for the presence of an amicus brief as a proxy for the participation of a policy entrepreneur (Martinek 2006).²¹ For example, discussions of sexual harassment law often mention interventions by attorneys representing women’s rights groups, such as Nadine Taub of Rutgers’ Women’s Rights Litigation or the EEOC.

Analysis

The Equal Employment Opportunity Commission began collecting data on Title VII sexual harassment charges in 1990.²² Unfortunately, these data were not collected by the EEOC throughout the entire period of our study and as such, cannot be included in our multivariate analysis, but they do provide us some insight on variation in the number of reported incidences of sexual harassment in the workplace. “Charges” refers to reports filed with the EEOC and does not reflect whether the EEOC determined that there was reasonable cause or whether the claim was ultimately successful. Rather, we consider “charges” as an indicator of awareness of sexual harassment and as a necessary but not sufficient condition for a grievance to become a lawsuit (Miller and Sarat 1980-1981).

In the period between 1990 and 1994, there is a sizeable jump across all states after the year of the Thomas confirmation hearings and the Tailhook scandal in 1991; the average number of charges increases from 65 in 1990 to 110 in 1992. The rising trend then continues in subsequent years. Across circuits, after adjusting for population size, the District of Columbia circuit has the highest average number of charges during this time period, followed by two of the southern circuits (the Fifth and the Eleventh). At the lower end of the range, the Ninth and the First circuits, respectively, have .06 and .02 charges per 1,000 residents. The number of charges is moderately and positively correlated with the population of a state ($r = .72$) and the number of women in the civilian workforce ($r = .54$), so we can be reasonably confident that even without a direct measure of the number of charges, including these two variables allows us to tap into the “supply” side of litigation. (See the appendix for tables detailing this information at <http://prq.sagepub.com/supplemental/>.)

Turning next to the adoptions data, across circuits, no regional trends appear to explain the order in which

adoption occurred.²³ There were a total of fifty-six published cases where adoptions occurred during this time period. The Seventh Circuit (comprising Illinois, Wisconsin, and Indiana) led the way with twelve cases, about two standard deviations above the mean (6.8), while the First Circuit (Maine, New Hampshire, Massachusetts, and Rhode Island) and the Third Circuit (Pennsylvania, New Jersey, and Delaware) tied for the fewest number of cases (two). Women were the plaintiffs alleging sexual harassment in all of the cases included in our study. A little over half of the cases (54 percent, or thirty cases) yielded outcomes that were clearly favorable to the female plaintiff. In addition, 8.9 percent of cases (five) yielded mixed outcomes, meaning that the female plaintiff won on at least some of her claims. The remaining 38 percent of cases were resolved in favor of the employer. This tells us that while a court's adoption was not uniformly beneficial for the women bringing their claims to court, in about two-thirds of the cases, most female plaintiffs were at least somewhat successful.

The results of the Cox proportional hazards model are displayed in Table 1. Because there was not enough variance to analyze the first time window of 1965-1986 separately, the results shown in the first column include the years of 1965 to 1993, along with a dummy variable to flag cases decided after *Meritor v. Vinson*. The results shown in the second column reflect only post-*Meritor* cases through 1993.²⁴ Throughout the entire period (and in both models), institutional and legal factors had the greatest and most significant impact on a circuit's decision to adopt the hostile or abusive work environment standard. Only one of the variables representing environmental factors achieved statistical significance: citizen ideology. Contrary to expectations, circuits located in more conservative regions were approximately 4 percent to 6 percent more likely to adopt the hostile environment standard than other circuits. Neither of the other variables that captured the "supply" side of litigation (women in the labor force and population density) was statistically significant, though this is likely due to the lack of variance in the census measures.

With regard to institutional factors during the 1964-1993 period, characteristics of the panel hearing the case emerged as more influential than characteristics related to the court as a whole. While circuit ideology had no effect, panels comprised of more liberal judges were more likely to adopt the hostile environment standard. This is consistent with earlier work that finds that liberal judges are more likely to adopt legal standards that favor disadvantaged parties (Kilwein and Brisbin 1997). Interestingly, the gender composition of the panel yielded a much larger substantive impact on adoption, even after controlling for ideology; panels were three times more likely to adopt a hostile environment rule when a female judge was present

compared to cases heard by only male judges. This measure has the second largest effect of any independent variable in the model, including Supreme Court precedent.

Looking at the variables that tap into the dynamics of innovation within a judicial hierarchy, it appears that circuits were making legal policy without being constrained by concerns about sanctioning from the Supreme Court. When cases from both the pre- and post-*Meritor* periods are included, we see that reversals were not significant predictors of adoption; moreover, in the post-*Meritor* model, a circuit's reversal rate was negatively related to adoption of the hostile environment standard. In both models, greater ideological distance from the Supreme Court actually increased the likelihood of adoption—a finding inconsistent with the argument that ideologically "extreme" circuits curbed their innovations out of concerns that the Supreme Court would alter their preferred rule. Taken together, it appears that the intermediate appellate courts were only minimally responsive to the threat of reversal, and then only after the Supreme Court had provided some indication of its preferences on the issue of sexual harassment. The final circuit-level control variable, workload, was significantly related to adoption in both models (hazard ratio = .99). Circuits that led the way in adoption tended to be those with a slightly smaller caseload, perhaps because they had more available time to spend on innovations.

The availability of legal capital from other circuits emerged as the most important legal factor to influence adoption in both models. As expected, the citation of sexual harassment precedent from other circuits increased the likelihood of adoption of the hostile or abusive work environment standard; circuits that cited existing sexual harassment precedent from other courts were nearly three times more likely to adopt their own rule. While panels are not bound by the decisions of other circuits, the citation of these other rulings provides support for a policy learning account of diffusion, namely, that panels legitimized their decisions by pointing to "successful" doctrinal innovations in other jurisdictions. In contrast, there was not evidence of widespread reliance on racial harassment doctrine; citations to these analogous cases were limited to just a few opinions. Contrary to our expectations, the existence of intracircuit precedent on quid pro quo harassment had a small, negative effect on adoption and clarification of the hostile environment standard, but only in the post-*Meritor* period. While we can only speculate as to why this happened, courts were consistently willing to rely on out-of-circuit precedent when they adopted or clarified the hostile environment rule throughout the entirety of the period studied; perhaps after *Meritor*, there were simply fewer appeals in circuits that had already recognized one type of sexual harassment (i.e., quid pro quo). The amicus variable also failed to

Table 1. Factors Influencing Adoption of Standards for Sexual Harassment Cases: Cox Proportional Hazards Models

Variable	Model 1 (1965-1993)			Model 2 (1987-1993)		
	Coefficient	RSE	Hazard ratio	Coefficient	RSE	Hazard ratio
Circuit ideology	-1.47	1.31	0.23	-2.16	1.49	0.115
Ideological distance from Supreme Court	2.23***	0.70	9.33	2.23**	1.13	9.28
Lagged reversal rate	-5.41	6.93	0.00	-15.60*	9.02	0
Population density in circuit	0.00	0.00	1.00	-0.00	0.00	0.10
Percentage Women in workforce (circuit)	-3.55	5.37	0.03	-7.57*	5.29	0.00
Citizen ideology of circuit	-0.03**	0.01	0.97	-0.06***	0.02	0.94
Sexual harassment precedent from other circuits	0.86**	0.37	2.37	0.91***	0.39	2.48
Circuit previously adopted quid pro quo standard	-0.68	0.52	0.51	-1.93***	0.63	0.14
Cites racial harassment precedent	-0.12	0.44	0.89	0.29	0.71	1.33
Amicus brief	0.38	0.37	1.46	0.52	0.53	1.68
Female judge on panel	1.23***	0.46	3.41	1.39**	0.57	4.02
Panel ideology	-3.61***	1.14	0.027	-5.47***	1.20	0.00
Circuit workload	-0.02**	0.006	0.985	-0.02*	0.01	0.98
Lagged dissent rate	7.66	4.69	3153	9.81	8.17	18,27
<i>Meritor v. Vinson</i>	35.34**	16.30	0.00	—	—	—
Log pseudo-likelihood	-88.47			-67.87		
		Circuits = 12			Circuits = 12	
		Total observations = 348			Total observations = 84	
		Failures = 56			Failures = 42	

Results of a Cox proportional hazard model with time-varying covariates, using the Breslow method for ties. Hazard ratios greater than one indicate a positive relationship; hazard ratios less than one indicate a negative relationship.

* $p < .10$. ** $p < .05$. *** $p < .01$.

achieve statistical significance, underscoring the significance of legal arguments raised by plaintiffs' attorneys rather than a well-organized and -financed concerted effort by women's rights groups as third parties.²⁵

After the Supreme Court's first sexual harassment ruling in *Meritor v. Vinson*, we see a statistically significant but substantively negligible effect on the likelihood of adoption. The coefficient tells us that this is a negative effect, but the size of the effect is quite small. This is also fairly common in studies of policy diffusion, as a period of early innovation is followed by a surge in adoption that marginally recedes as individual adopters pause to evaluate and review the changing policy landscape (Glick and Hays 1991; Walker 1969).

Discussion

In this analysis, we hypothesized that the timing of circuit adoption of a hostile environment standard would be contingent on institutional, legal, and environmental factors. Of these, internal determinants related to institutional and legal variables were the strongest explanatory factors, underscoring the utility of an integrated model of appellate court decision making (Songer and Haire 1992). Panel ideology was a driving force for adoption, and throughout the entire time period, ideologically dis-

tant courts were more likely to adopt or clarify their standards. These findings suggest that courts were not anticipating or responding to the Supreme Court's preferences in the timing of their decisions, but rather were following their own preferences. This is not altogether surprising, given the limited ability (and willingness) of the Supreme Court to monitor the lower courts on all developing legal issues. Klein (2002, 126) observed, from his interviews with circuit court judges, "the Supreme Court's potential actions may sometimes enter into circuit judges' thinking but are not a major influence on their decisions." His interpretation is consistent with our findings here. The significance of ideological impact in our model is also consistent with previous literature (Kilwein and Brisbin 1997) suggesting that judges with more liberal policy preferences are more likely to issue rulings that favor groups that traditionally have been victims of discrimination.

In addition to the ideological composition of the panel, the gender composition of the panel was strongly associated with the adoption of the hostile environment standard. Adoption was three times more likely when a panel contained a woman—a striking result given the paucity of the women on the bench during this time period (1965-1993). Two perspectives from the literature provide insight on this result. First, scholars in the substantive representation

literature have argued that rather than focusing on the raw numbers or proportion of women in political institutions, we should instead focus on “critical actors” who were instrumental in promoting policies that are beneficial for women (Childs and Krook 2006). Here, we see evidence that female judges in the 1970s and 1980s were behaving as “critical actors,” at least in terms of sexual harassment law. This should not be surprising, given that the few women who were federal judges during this era likely faced hostility or isolation as trailblazers in their profession. For example, both Sandra Day O’Connor and Ruth Bader Ginsburg have described numerous personal experiences with gender discrimination in their legal careers during this same time period (Bazelon 2007). Of course, we should be cautious in generalizing about the effect of female judges to other time periods, as the female composition of the federal bench likely reflects the appointment goals of particular presidents and may not necessarily translate to pro-woman outcomes in other areas of the law.

Second, recent research on the U.S. Courts of Appeals has documented significant differences in outcomes between mixed-gender panels and all-male panels in cases involving sex discrimination (for a review of the literature see Boyd, Epstein, and Martin 2010). Even after controlling for ideology, we find that the presence of female judges exerts a liberalizing tendency on male judges in terms of support for plaintiffs. However, our findings go beyond previous work; here, female judges are associated with the creation of a legal rule favorable to women, not just casting a pro-plaintiff vote. Although we do not fully understand the causal mechanism behind this effect, it provides support for Catharine MacKinnon’s assertion that sexual harassment law is indeed women’s common law; the judges on the bench at this time shaped the contours of precedent that acknowledged the realities of workplace discrimination.

Legal capital played an important role in the adoption of the hostile environment standard. To bolster their decisions, adopting courts were more likely to cite precedent on sexual harassment from other circuits. This result echoes those of previous studies that have found diffusion to be a process largely driven by policy learning (Shipan and Volden 2008; Volden 2006). Research on state courts suggests that they prefer to delay adoption of a specific policy until their peers signal a willingness to develop or change that legal standard (Glick 1992, 1994; Glick and Hays 1991; Phillips and Grattet 2000). It also comports well with findings that circuits are more likely to adopt new doctrines that have already been tacitly endorsed by at least one of their peers (Klein 2002; Spill Solberg, Emrey, and Haire 2006). As in most cases of policy innovation, each institution is hesitant to be the first adopter, but once an innovation is introduced, circuits are more

likely to become interested in shaping and molding the new policy.

In conclusion, our findings highlight the degree to which the “policy laboratory” concept, usually used in the context of state policymaking, applies to the development of the law occurs in the lower federal courts. The Supreme Court’s first intervention in sexual harassment law came a full nine years after the U.S. Court of Appeals for the District of Columbia recognized the claims of Paulette Barnes in her suit against her employer, the Environmental Protection Agency. The innovation of the lower federal courts in interpreting “discrimination based on sex” to include a hostile work environment paved the way for a national standard that now protects men and women in the workplace.

Declaration of Conflicting Interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Notes

1. It is worth noting that the widespread use of electronic databases (such as Westlaw) for legal research by clerks and judges may have changed this particular mechanism for judicial diffusion.
2. The Equal Employment Opportunity Commission (EEOC) guidelines were merely interpretations of Title VII and not legally binding, though appellate courts in some cases chose to adopt their approach as controlling (e.g., *Bundy v. Jackson* 641 F.2d 934 (D.C. Cir. 1981)).
3. Interviews with judges have revealed that they hold different conceptions of their role (Gibson 1978; Howard 1981; Klein 2002), which also explains the willingness of certain judges to act as “innovators.” However, when faced with an issue of first impression, arguably judges are more or less forced to be innovators.
4. Early plaintiffs found attorneys from two kinds of social networks. Family and friends were more likely to recommend a generalist attorney (without political ties to the women’s movement), while plaintiffs who connected with politically active attorneys or bystanders were more often referred to attorneys who specialized in civil rights law or that had the backing of organizations like the Women’s Legal Defense Fund that could provide resources. Both types of attorneys had success, however.
5. Legal capital is best defined as information gleaned from existing legal precedent; judges may rely on this information when crafting new decisions. For a more detailed discussion, see Landes and Posner (1976) and Caldeira (1985).

6. Our focus is exclusively on published opinions because of their precedential weight, particularly during this time period.
7. Duration analysis, the statistical approach applied here, accounts for elapsed time, thereby making it unnecessary to add additional control variables for time.
8. For example, in the sexual harassment case *Bundy v. Jackson* (641 F.2d 934 (D.C. Cir. 1981)), the panel cited a Fifth Circuit case, *Rogers v. EEOC*, that recognized racial harassment as a violation of Title VII (454 F.2d 234 (5th Cir. 1971)).
9. Liberalism has been shown to be associated with greater support with women's rights and feminism (Bolzendahl and Myers 2004; Mason and Lu 1988).
10. The causal mechanism underlying these effects is still not well understood, particularly given that gender composition of a court does not appear to affect outcomes consistently in other potentially gender-salient areas of the law and may vary across court settings. See Kenney (2008) for a discussion of the limitations of this research.
11. While it would be ideal to examine only first adoptions, there are not enough observations ($n = 11$) to analyze these in a systematic way. All circuits adopted the hostile environment standard by 1989, with the first adoption occurring in 1981.
12. Some circuits had adopted the "reasonable woman" or "reasonable victim" standard, in response to criticism that the "reasonable person" standard was too lenient and accommodating toward harassers. (For an excellent discussion of this alternative standard, see Bartlett and Harris 1998, 509-13.)
13. Subjects that do not fail during the time period under observation are considered right censored; ordinary least squares (OLS) cannot provide accurate estimates in this situation because it does not distinguish between cases that are uncensored and those that are right-censored (Box-Steffensmeier and Jones 1997). Scott and Bell (1999) also note the advantages of survival analysis for the study of policy diffusion, pointing out methodological difficulties with logit models (e.g., not accounting for duration dependence) and time series models (e.g., loss of degrees of freedom and possibility of perfect prediction).
14. All models in the analysis were estimated using robust standard errors and the Breslow method for ties. Additionally, we calculated the Schoenfeld test statistic to determine whether the proportional hazard assumption held for the models included here. In all models estimated, the Schoenfeld test did confirm that the hazard rate was proportional across the circuit-year observations ($\text{prob} > \chi^2 = .900$).
15. For a thorough discussion of multiple (or repeated) events models, see Box-Steffensmeier and Jones (2004), especially 158-62.
16. The authors would like to acknowledge the assistance of Kevin Baggett at the Louisiana State University Hebert Law Center in accessing the Westlaw database. The case list was compared against a legal casebook on gender and the law as a validity check (Bartlett and Harris 1998).
17. This measure is drawn from the Multi-User Database on the U.S. Courts of Appeals (Songer 1997).
18. Because panel deliberations are closed to the public, we are unable to observe the role that female judges had in crafting opinions, so this measure serves as a proxy. In addition, we do not include dummy variables for the Clarence Thomas hearings or the issuance of EEOC guidelines because there are not enough cases after the Thomas hearings or before the issuance of the guidelines to provide adequate variance for model estimation.
19. The case dispositions included in this variable were reverse, reverse and remand, vacate and remand, and vacate. If a decision was affirmed in part but reversed in part, it was not included.
20. We considered using the number of attorneys as a proxy for litigiousness, but data were not consistently available in all states for the time period of this study.
21. We also included a dummy variable for the participation of the EEOC as an amicus curiae. However, this variable failed to achieve statistical significance and did not change the results for the other independent variables, so we opted to omit it in order to preserve degrees of freedom.
22. The authors gratefully acknowledge the assistance of James Goldweber at the EEOC.
23. The order in which circuits first addressed the hostile environment standard was as follows: DC, Eleventh, Third, Fourth, Eighth, Seventh, Sixth, Fifth, Tenth, First, Ninth, and Second. The sequence of adoption is unrelated to the raw number and the proportion of women judges in each circuit.
24. We report coefficients and hazard ratios for all variables. The coefficient does not have a conventional interpretation but is used to evaluate magnitude of statistical impact as well as to calculate the hazard ratio. Hazard ratios above 1.0 indicate that cases meeting a particular criterion are more likely to adopt the innovation in question. For instance, a hazard ratio of 1.6 indicates that a circuit possessing the variable characteristic is 60 percent more likely to adopt the policy than other circuits, while a hazard ratio of .75 indicates that a circuit is 25 percent less likely to adopt the policy than other circuits.
25. The EEOC participated as an amicus in only seven cases, followed with two cases each by the Women's Legal Defense Fund and Equal Rights Advocates. By and large, the counsel listed as representing female plaintiffs appeared to be local counsel, given the location of their offices and the fact that they did not appear in multiple cases.

References

- Anderson, Katherine S. "Employer Liability under Title VII for Sexual Harassment after *Meritor Savings Bank v. Vinson*." *Columbia Law Review* 87(1987):1258-276.
- Bartlett, Katharine T., and Angela P. Harris. *Gender and Law: Theory, Doctrine, Commentary*. 2nd ed. New York: Aspen Law & Business, 1998.

- Bazon, Emily. "The Place of Women on the Court." *The New York Times Magazine* (July 12 2007).
- Berry, Frances, and William Berry. "Tax Innovation by American States: Capitalizing on Political Opportunity." *American Journal of Political Science* 36(1992):715-42.
- Berry, William D., Even J. Ringquist, Richard C. Fording, and Russell L. Hanson. "Measuring Citizen and Government Ideology in the American States, 1960-1993." *American Journal of Political Science* 41(1998): 327-48.
- Bolzendahl, Catherine I., and Daniel J. Myers. "Feminist Attitudes and Support for Gender Equality: Opinion Change in Women and Men, 1974-1998." *Social Forces* 83(2004): 759-90.
- Box-Steffensmeier, Janet M., and Bradford S. Jones. 1997. "Time Is of the Essence: Event History Models in Political Science." *American Journal of Political Science* 41(1997): 1414-461.
- Box-Steffensmeier, Janet M., and Bradford S. Jones. *Event History Modeling: A Guide for Social Scientists*. New York: Cambridge University Press, 2004.
- Boyd, Christina, Lee Epstein, and Andrew Martin. "Untangling the Causal Effects of Sex on Judging." *American Journal of Political Science* 54(2010): 389-411.
- Caldeira, Gregory A. "The Transmission of Legal Precedent: A Study of State Supreme Courts." *The American Political Science Review* 79(1985): 178-94.
- Canon, Bradley C., and Lawrence Baum. "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines." *The American Political Science Review* 75(1981): 975-87.
- Childs, Sarah and Mona Lena Krook. "Should Feminists Give Up on Critical Mass? A Contingent Yes." *Politics & Gender* 2(2006): 522-530.
- Cohen, Jonathan Matthew. *Inside Appellate Courts: The Impact of Court Organization on Judicial Decision Making in the United States Courts of Appeals*. Ann Arbor: University of Michigan Press, 2002.
- Collins, Paul M., Jr. "Lobbyists before the U.S. Supreme Court: Investigating the Influence of Amicus Briefs." *Political Research Quarterly* 60(2007): 55-70.
- Comparato, Scott A. "On the Reputation of State Supreme Courts Revisited." Paper presented at the Annual Meeting of the Midwest Political Science Association, Chicago, IL, 2002.
- Dye, Thomas R. *Politics, Economics, and the Public: Political Outcomes in the American States*. Chicago: Rand McNally, 1966.
- Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland. "The Judicial Common Space." *Journal of Law, Economics, and Organization* 23(2007): 303-25.
- Erikson, Robert, Gerald C. Wright, and John P. McIver. *Statehouse Democracy: Public Opinion and Policy in the American States*. Cambridge, UK: Cambridge University Press, 1993.
- Galanter, Marc. "Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change." *Law and Society Review* 9(1974):95-160.
- Gibson, James L. "Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model." *The American Political Science Review* 72(1978): 911-924.
- Glick, Henry. "Judicial Innovation and Policy Re-invention: State Supreme Courts and the Right to Die." *The Western Political Quarterly* 45(1992): 71-92.
- Glick, Henry. "The Impact of Permissive Judicial Policies: The U.S. Supreme Court and the Right to Die." *Political Research Quarterly* 47(1994): 207-22.
- Glick, Henry R., and Scott P. Hays. "Innovation and Reinvention in State Policymaking: Theory and the Evolution of Living Will Laws." *Journal of Politics* 53(1991): 835-50.
- Gray, Virginia. "Innovation in the States: A Diffusion Study." *American Political Science Review* 67(1973): 1174-185.
- Harrington, Christine and Daniel Ward "Patterns of Appellate Litigation, 1945-1990." In *Contemplating Courts*, edited by Lee Epstein. Washington, DC: CQ Press, 1995.
- Hettinger, Virginia A., Stefanie A. Lindquist, and Wendy L. Martinek. *Judging on a Collegial Court: Influences on Federal Appellate Decision Making*. Charlottesville: University of Virginia Press, 2006.
- Howard, J. Woodford. *Courts of Appeals in the Federal System*. Princeton, NJ: Princeton University Press, 1981.
- Jacob, Herbert. *Debtors in Court*. Chicago: Rand McNally, 1969.
- Jacoby, William, and Sandra Schneider. "Variability in State Policy Priorities: An Empirical Analysis." *Journal of Politics* 63(2001): 544-68.
- Karch, Andrew. "Federal Controversy and State Political Agendas." Paper presented at the Annual Meeting of the Midwest Political Science Association, April 15-18. Chicago, IL, 2004.
- Kastellec, Jonathan P. "Panel Composition and Judicial Compliance on the US Courts of Appeals." *Journal of Law, Economics, and Organization* 23(2007): 421-441.
- Kenney, Sally. "Thinking about Gender and Judging." *International Journal of the Legal Profession* 15(2008): 87-110.
- Kilwein, John C., and Richard A. Brisbin, Jr. "Policy Convergence in a Federal Judicial System: The Application of Intensified Scrutiny Doctrines by State Supreme Courts." *American Journal of Political Science* 41(1997): 122-48.
- Klein, David E. *Making Law in the United States Courts of Appeals*. New York: Cambridge University Press, 2002.
- Landes, William, and Richard A. Posner. "Legal Precedent: A Theoretical and Empirical Analysis." *Journal of Law and Economics* 19(1967): 249-307.
- Lindquist, Stefanie A., Susan B. Haire, and Donald R. Songer. "Supreme Court Auditing of the U.S. Courts of Appeals: An Organizational Perspective." *Journal of Public Administration Research and Theory* 17(2007): 607-24.

- Lutz, James M. "Regional Leaders in the Diffusion of Tort Innovations among the American States." *Publius* 27(1997): 39-58.
- MacKinnon, Catharine A. *Women's Lives, Men's Laws*. Cambridge, MA: Harvard University Press, 2007.
- Martinek, Wendy L. "Amici Curiae in the U.S. Courts of Appeals." *American Politics Research* 34(2006): 803-824.
- Mason, Karen Oppenheim, and Yu-Hsia Lu. "Attitudes toward Women's Familial Roles: Changes in the United States, 1977-1985." *Gender & Society* 2(1988): 39-57.
- Menzel, Donald C., and Irwin Feller. "Leadership and Interaction Patterns in the Diffusion of Innovations among the American States." *Western Political Quarterly* 30(1997): 528-36.
- Miller, Richard E., and Austin Sarat. "Grievances, Claims, and Disputes: Assessing the Adversary Culture." *Law and Society Review* 15(1980-1981): 525-66.
- Mooney, Christopher Z. "Modeling Regional Effects on State Policy Diffusion." *Political Research Quarterly* 54(2001): 103-124.
- Peresie, Jennifer L. 2005. "Female Judges Matter: Gender and Collegial Decision making in the Federal Appellate Courts." *Yale Law Journal* 114(2005): 1759-790.
- Phillips, Scott, and Ryken Grattet. "Judicial Rhetoric, Meaning-Making, and the Institutionalization of Hate Crime Law." *Law & Society Review* 34(2000): 567-606.
- Poole, Keith T. "Recovering a Basic Space from a Set of Issue Scales." *American Journal of Political Science* 42(1998): 954-93.
- Poole, Keith T., and Howard Rosenthal. *Congress: A Political-Economic History of Roll Call Voting*. New York: Oxford University, 1997.
- Rogers, Everett M. *Diffusion of Innovations* (4th edition). New York: The Free Press, 1962 (1995).
- Savage, Robert L. 1985. "Diffusion Research Traditions and the Spread of Policy Innovations in a Federal System." *Publius* 15, no. 4 (1985): 1-27.
- Schultz, Vicki. "Reconceptualizing Sexual Harassment." *Yale Law Journal* 107(1998): 1706-738.
- Scott, Kevin, and Laura Cohen Bell. "Modeling Mistrust: An Event History Analysis of Term Limits for State Legislators." Paper presented at the Annual Meeting of the Southern Political Science Association, November 4-6. Savannah, GA, 1999.
- Shapiro, M. "Decentralized Decision-Making in the Law of Torts." In *Political Decisionmaking*, (pp. 44-79) edited by S. Ulmer. New York: Van Nostrand, 1970.
- Shipan, Charles R., and Craig Volden. "The Mechanisms of Policy Diffusion." *American Journal of Political Science* 52(2008): 840-57.
- Solberg Spill, Rorie, Jolly A. Emrey, and Susan B. Haire. "Inter-Court Dynamics and the Development of Legal Policy: Citation Patterns in the Decisions of the U.S. Courts of Appeals." *Policy Studies Journal* 34(2006): 277-93.
- Songer, Donald R. *Multi-User Database on the U.S. Courts of Appeals, 1925-1996*. Ann Arbor, Michigan: Inter-university Consortium for Political and Social Research, 1997.
- Songer, Donald R., Sue Davis, and Susan Haire. "A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals." *The Journal of Politics* 46(1994): 425-39.
- Songer, Donald R., and Susan B. Haire. "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the U.S. Courts of Appeals." *American Journal of Political Science* 36(1992): 963-82.
- Songer, Donald R., Jeffrey A. Segal, and Charles M. Cameron. "The Hierarchy of Justice: Testing a Principle-Agent Model of Supreme Court-Circuit Court Interactions." *American Journal of Political Science* 38(1994): 673-96.
- Spaeth, Harold J. "United States Supreme Court Judicial Database, 1953-1997." (ICPSR 9422, 9th version). Ann Arbor: Inter-university Consortium for Political and Social Research, 1999.
- Squire, Peverill. "Professionalization and Public Opinion of State Legislatures." *Journal of Politics* 55(1993): 479-91.
- Sunstein, Cass R. "On Analogy in Legal Reasoning." *Harvard Law Review* 106(1993): 741-89.
- Tiller, Emerson H., and Frank Cross. "A Modest Proposal for Improving American Justice." *Columbia Law Review* 99(1999): 215-34.
- Volden, Craig. "States as Policy Laboratories: Emulating Success in the Children's Health Insurance Program." *American Journal of Political Science* 50(2006): 294-312.
- Walker, Jack L. "The Diffusion of Innovations among the American States." *American Political Science Review* 63(1969): 880-99.
- Walsh, David J. 1997. "On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases." *Law and Society Review* 31(1997): 337-62.
- Welch, Susan, and Kay Thompson. 1980. "The Impact of Federal Incentives on State Policy Innovation." *American Journal of Political Science* 24(1980): 715-26.
- Yates, Jeffrey, Belinda Creel Davis, and Henry R. Glick. "The Politics of Torts: Explaining Litigation Rates in the American States." *State Politics & Policy Quarterly* 1(2001): 127-143.
- Zippel, Kathrin. *The Politics of Sexual Harassment: A Comparative Study of the United States, the European Union, and Germany*. New York: Cambridge University Press, 2006.

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