

WOMEN JUDGES AND MERIT SELECTION UNDER THE MISSOURI PLAN

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I. INTRODUCTION

How judges should be selected is a longstanding debate emanating from the time of the American Revolution, when most judges were selected by the king or his authorities and the people had no voice in selection. Advocates for the appointment of judges emphasize the unwillingness of many lawyers to engage in electioneering, the ignorance of the general electorate, and the need for judicial independence. Those who favor election of judges stress the merits of the democratic process and the need for public accountability.

In 1940, Missouri adopted the "Missouri Nonpartisan Selection of Judges Court Plan," frequently referred to as the "Missouri Plan," for selection of its appellate judges and its urban trial judges.¹ This judicial selection system combines elements of both appointive and elective methods: it provides for participation by the governor, the bar, the bench, and the public through nonpartisan nominating commissions, executive appointment, and retention elections. Since 1940, thirty-six states, the District of Columbia, and Puerto Rico have adopted nonpartisan, merit

1. MO. CONST. art., V §§ 25-29 (1940, amended 1970, amended 1976); MO. SUP. CT. R. 10. See *infra* notes 29-42 and accompanying text. Missouri continues to choose its outstate trial judges through partisan elections. The adoption of nonpartisan, merit selection of judges has been described as "the single greatest event in the history of judicial reform in this century." Hall, *The National Trend for Merit Selection*, 6 TRIAL JUDGES' J. 11, 12 (1967).

selection methods patterned after the Missouri Plan.²

The use of nonpartisan, merit judicial selection raises many public policy concerns: the effect of the procedure on the quality of judges ultimately chosen, the appropriate balance of public, professional, and government involvement in the process, the proper role of politics in judicial selection, and the influence of the selection and retention method on judicial decision-making. This article addresses one additional facet of that debate: the impact of the Missouri Plan on women's opportunities to become judges.³

In the summer and fall of 1986, this author researched the largely unrecorded history of women judges in Missouri and examined judicial appointments since 1940 to determine the effect of the Missouri Plan on the appointment of women judges and to compare these results with the selection of women through partisan election.⁴ The author examined the

2. D. VANDENBERG, JUDICIAL MERIT SELECTION: CURRENT STATUS 4 (1984). In addition to the thirty-five states reviewed in Vandenberg's study, Washington now uses a form of merit selection for the selection of Seattle's Municipal Court judges. FUND FOR MODERN COURTS, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 62 (1985) [hereinafter cited as THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE].

3. This article does not address the benefits of adding women to the judiciary beyond the general benefit of providing equal opportunity. The author's underlying premise is that the Missouri Plan should provide equal opportunity for both sexes as measured against the national average and the percentage of eligible lawyers in the State. Critics of the Missouri Plan suggest that it produces an elitist judiciary, unrepresentative of the interests of society at large. See, e.g., Davidow, *Judicial Selection: The Search for Quality and Representativeness*, 31 CASE W. RES. L. REV. 409, 419-24, 429-49 (1981) ("The main problem with present merit selection plans is their failure to assure sufficient representativeness"); Note, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, HOFSTRA L. REV. 267, 298, 300-03 (1976) ("[T]he most prevalent criticism of the Missouri Plan has been that it provides for elitist control of the judiciary. . . .").

Some political commentators assert that the presence of women judges on the bench will "[make] the judicial system more representative . . . , further legitimate women's political participation, and make the legal system more just." Martin, *Women on the Federal Bench: A Comparative Profile*, 65 JUDICATURE 307, 313 (1982). Others speculate that adding women jurists will have specific policy implications. One constitutional scholar, for example, suggests that feminine jurisprudence (which she generally attributes to women) is more likely to embrace Jeffersonian republicanism than masculine jurisprudence (which she generally attributes to men). Sherry, *Civil Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 544 (1986). A study of President Jimmy Carter's federal appellate appointees showed no significant deviations in voting patterns between women and men judges. Divergencies were perceived between appointees of Democratic administrations and Republican administrations, regardless of sex. Gottschall, *Carter's Judicial Appointments: the Influence of Affirmative Action and Merit Selection on the U.S. Court of Appeals*, 67 JUDICATURE 165, 171-77 (1983).

4. See *infra* notes 64-119 and accompanying text. The Missouri research included telephone and personal interviews with over thirty former and current women and men judges and judicial

stages and parties in the Missouri Plan process to determine possible breakdowns in the operation as to women candidates.⁵ In order to assess the lack of women judges on the appellate bench in Missouri, the author also analyzed the gender composition of all of the appellate courts of the fifty states and the District of Columbia.⁶

The research conducted by this author demonstrates that in Missouri, the mother state of merit selection, women paradoxically are elected to the judiciary far more often than they are chosen under the Missouri Plan.⁷ Missouri trails the rest of the country in merit selection of women to its judiciary, especially at the appellate level.⁸ Missouri also lags behind other states in the overall percentage of women judges on the bench.⁹ Missouri differs from the national norm which is that women lawyers are more likely to become judges where judges are appointed by chief executives or chosen through merit selection procedures, than where judges are elected.¹⁰

This article discusses the development of various methods of judicial selection in the United States, including the Missouri Plan. It analyzes the progress of women lawyers gaining access to the bench, both nationwide and in Missouri. The article points out suggestions to improve the operation of the Missouri Plan¹¹ and calls on Missouri to assume a lead-

candidates in Missouri, a review of the 23 Official Manuals of the State of Missouri between 1941 and 1986, and an examination of records provided by the Missouri State Courts Administrator's Office, the Missouri Secretary of State's Office, the Clerk's Office of the Missouri Court of Appeals, Eastern District, and the Clerk's Office of the Supreme Court.

5. See *infra* notes 120-82 and accompanying text.

6. See *infra* Table 1. The study of gender composition of state appellate courts included a survey of the judges lists in West's regional reporters through Sept. 1, 1986 and WANT'S FEDERAL-STATE COURT DIRECTORY (1986), and telephone contacts with state courts administrators' offices.

7. See *infra* notes 64-119 and accompanying text; see also *infra* Tables 2 & 3.

8. See *infra* notes 58-61, 116-19 and accompanying text; see also *infra* Tables 1 & 3.

9. See *infra* notes 111-13 and accompanying text; see also *infra* Tables 1 & 3.

10. See *infra* Table 3; see also THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 65. This study surveyed the success of women and minorities in achieving judicial positions requiring a law degree in the fifty states, the District of Columbia, and the federal courts as of Sept. 1, 1985. It correlated the results with the methods used to select judges. The study also concluded that women and minorities are more successful in achieving judicial office under appointive methods than by election. *Id.* at 66. An earlier study, published in 1982 by the American Judicature Society, surveyed law-trained women judges serving in state courts on several issues, including how they reached the bench. The researchers concluded that "it is less likely that women will succeed where [partisan election] is used. On the other hand, women may have greater success under the nominating commissions system." Carbon, Houlden & Berkson, *Women on the State Bench: Their Characteristics and Attitudes About Judicial Selection*, 65 JUDICATURE 295, 299 (1982).

11. Prompted by public allegations of impropriety by the judicial member of the Appellate

ership role in reforming the Plan.

The findings raise major public policy questions about the Missouri Plan; the findings suggest that without leadership, commitment, and vigilance by elected officials, the legal community, and the public, even a nonpartisan, merit plan inhibits access of women to the bench. They indicate a need for Missouri and other states to scrutinize the impact of nonpartisan, merit selection methods on women candidates. They should be useful in improving the operation of existing methods in Missouri and other states, assisting other states as they decide which method to adopt, and generally promoting fairer access to the judiciary.

II. HOW JUDGES ARE SELECTED IN THE UNITED STATES

A. Modern Methods of Selecting State Judges

The fifty states and the District of Columbia employ a “curious patchwork” of elective and appointive judicial selection methods.¹² Eight states choose their judges primarily through partisan elections, twelve through nonpartisan elections, one through legislative elections, and four through executive appointments.¹³ Some states use a combination of

Nominating Commission in 1985, the Missouri Bar Association and the Missouri Senate investigated the general effectiveness of the Missouri Plan. See MISSOURI BAR SPECIAL COMMITTEE TO REVIEW AND EVALUATE THE MISSOURI NONPARTISAN COURT PLAN, REPORT TO THE BOARD OF GOVERNORS OF THE MISSOURI BAR (1986) [hereinafter cited as MISSOURI BAR REPORT] and MISSOURI SENATE INTERIM COMMITTEE REPORT ON THE NONPARTISAN COURT PLAN (Jan. 24, 1986) [hereinafter cited as MISSOURI SENATE REPORT]. The reports offer suggestions to improve the operation of the Plan. Only the Missouri Bar report refers to the paucity of women judges; it urges the governor to give greater consideration to women candidates. MISSOURI BAR REPORT, *supra*, at 9, 14. The Commission on Retirement, Removal and Discipline of Judges investigated the allegations against the judicial member and found no probable cause. Letter from Godfrey Padberg, Chairman of the Commission (dated Nov. 1, 1985) (on file with the author).

12. P. DUBOIS, FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 4 (1980); THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 34-64; L. BERKSON, S. BELLER & M. GRIMALDI, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (1981). Although the methods of initial selection vary, federal judges are nominated by the President and confirmed by the Senate. U.S. CONST. art. II, § 2.

13. See the following illustrative table developed from data in THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 34-62; D. VANDENBERG, *supra* note 2, at 5-8:

STATE JUDICIAL SELECTION METHODS

Partisan Election (8)	Nonpartisan Election (12)	Legislative Election (1)	Gubernatorial Appointment (4)	Combinations of Procedures (14)
Alabama	Idaho	Virginia	Connecticut	Arizona
Arkansas	Georgia		Maine	California

procedures.¹⁴ Eleven, plus the District, use nonpartisan, merit selection procedures exclusively; eleven others, including Missouri, use this form of selection to choose some of their judges, while fourteen others use it to fill interim vacancies.¹⁵

The elective methods of judicial selection vary in several respects.¹⁶ In a "partisan election," the judicial candidate obtains a party endorsement through primary election or party nomination and campaigns in the general election on the party ticket. In a "nonpartisan election," a candidate is selected through a partisan or nonpartisan primary election or through nomination, but the candidate's name appears on the general election ballot without a party designation. In a "legislative election" the judge is chosen by vote of a legislature, and in a "judicial election" the judge is chosen by vote of a court.

Under appointive methods, the State's elected chief executive usually

Mississippi	Kentucky	New Hampshire	Florida
New Mexico	Louisiana	New Jersey	Illinois
North Carolina	Michigan		Indiana
Pennsylvania	Minnesota		Kansas
Texas	Montana		Missouri
West Virginia	Nevada		New York
	North Dakota		Oklahoma
	Ohio		Rhode Island
	Oregon		South Carolina
	Wisconsin		South Dakota
			Tennessee
			Washington

14. See *supra* note 13.

15. See the following illustrative table developed from data *supra* note 13.:

STATES USING MERIT SELECTION METHOD

FOR CHOOSING ALL JUDGES (11)	FOR CHOOSING SOME JUDGES (11)	FOR INTERIM APPOINTMENTS (14)
Alaska	Arizona	Alabama
Colorado	Florida	Georgia
Delaware	Indiana	Idaho
Hawaii	Kansas	Kentucky
Iowa	Missouri	Minnesota
Maryland	New York	Mississippi
Massachusetts	Oklahoma	Montana
Nebraska	Rhode Island	Nevada
Utah	South Dakota	New Mexico
Vermont	Tennessee	North Carolina
Wyoming	Washington	North Dakota
		Pennsylvania
		West Virginia
		Wyoming

16. THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 3-4.

selects the judges.¹⁷ In an “executive appointment” system, the chief executive is sometimes aided by a commission or bar association screening process and the appointment usually requires confirmation by the legislature. In a “nonpartisan, merit selection” system, the chief executive chooses judges from a limited list of nominations put forth by a nonpartisan nominating commission of lawyers and lay persons. Merit-selected judges usually run unopposed for retention on separate nonpartisan ballots.

B. The History of State Judicial Selection Methods

The various judicial selection methods used by Missouri and the other states are products of historical trends.¹⁸ In the early days of colonial independence, most states rejected the appointment of judges in search of methods providing greater public participation and judicial independence. Legislative election or executive appointment with confirmation by the legislature were the most commonly used judicial selection methods during this period.¹⁹

The egalitarianism of Jacksonian democracy led states to shift from legislative or executive selection, usually from the wealthy or privileged classes, to popular election of judges. By the mid-1800’s, the majority of

17. *Id.* at 4-5.

18. The discussion of the historical roots of various judicial selection procedures, including the Missouri Plan, is derived from J. CORSI, AN INTRODUCTION TO JUDICIAL POLITICS 104-07 (1984); A. ASHMAN & J. ALFINI, THE KEY TO JUDICIAL SELECTION: THE NOMINATING PROCESS (1974); and R. WATSON & R. DOWNING, THE POLITICS OF THE BENCH AND THE BAR: JUDICIAL SELECTION UNDER THE MISSOURI NONPARTISAN COURT PLAN 2-14 (1969). The Watson and Downing text, considered the definitive study of the Missouri Plan, pre-dates the appointment of any women under the Plan. See Blackmar, *Book Review*, 35 U. MO. L. REV. 139 (1970), for an excellent critique of this text, pointing out its successes and its shortcomings. The classic historical study of judicial selection procedures is E. HAYNES, THE SELECTION AND TENURE OF JUDGES (1944). See the following illustrative table from H. GLICK & K. VINES, STATE COURT SYSTEMS 41 (1973), showing, for those states adopting or changing methods, the percentages of states adopting or changing to different judicial selection methods:

INITIAL ADOPTION AND CHANGE OF JUDICIAL SELECTION SYSTEMS IN THE
AMERICAN STATES BY HISTORICAL PERIODS

Method	1776-1831	1832-1885	1886-1933	1934-1968
By legislature	48.5%	6.7%	0.0%	0.0%
Gubernatorial appointment	42.4%	20.0%	10.7%	5.6%
Partisan election	9.1%	73.3%	25.0%	11.1%
Nonpartisan election	—	—	64.3%	11.1%
Merit selection plan	—	—	—	72.2%

19. R. WATSON & R. DOWNING, *supra* note 18, at 7.

the states selected their judges by popular elections.²⁰ In the post-Civil War period, some of the Confederate states temporarily shifted to gubernatorial appointments but later returned to partisan elections.²¹

Partisan election of judges prompted criticism from the legal community. Lawyers vied with political machines for control of judicial elections. The Tweed machine's intrusion into New York judicial elections led to the organization of the first modern bar association, the Bar of the City of New York, in 1870.²² Soon thereafter a number of other bar associations, including the American Bar Association, were established. For years these groups tried unsuccessfully to improve judicial selection within the context of partisan elections. In a famous address to the American Bar Association in 1906, Roscoe Pound, then a young professor at the University of Nebraska Law School, decried partisan election of judges, saying it destroyed respect for the judiciary.²³

As concern about the quality of judges and the politics of judicial selection heightened in the Progressive period, support for nonpartisan election of judges increased. Several states experimented with nonpartisan election, but found the method largely unsatisfactory because candidates were still selected by political party leaders. In another famous American Bar Association speech given in 1913, ex-President William Howard Taft denounced nonpartisan elections.²⁴ In his opinion, this method limited the pool of judicial candidates to those who were willing, and could afford, to campaign for office: "For Taft, elections in general implied that right, and justice had no standard other than popular opinion."²⁵

The country began to turn full circle, rejecting election of judges and embracing appointment methods, formerly viewed as elitist and nonrepresentative. The American Judicature Society, founded in 1913, coordinated efforts to develop an improved method of judicial selection, free from partisan influence.²⁶ Northwestern University law professor Albert M. Kales, a founder of the Society, designed a compromise that included

20. *Id.*

21. E. HAYNES, *supra* note 18, at 100.

22. R. WATSON & R. DOWNING, *supra* note 18, at 7.

23. *Id.* at 8.

24. J. CORSI, *supra* note 18, at 105 (citing Taft, *The Selection and Tenure of Judges*, 38 A.B.A. REP. 418 (1918)).

25. *Id.*

26. *Id.* at 106.

components of prior appointive and elective methods.²⁷ He proposed appointments by an elected chief justice from a list of lawyers compiled by judges and lay members, with voter input through periodic retention elections.

Harold Laski, a political scientist, modified the Kales model in 1926.²⁸ Laski proposed appointment by a chief executive, rather than by a chief justice, and the addition of lawyers to the nominating commissions. Unsuccessful efforts to adopt methods similar to the Kales-Laski plan were made in some states in the 1930's. In 1937, the American Bar Association officially endorsed a plan for nonpartisan, merit selection of state judges similar to the Kales-Laski model.

C. *The Missouri Nonpartisan Court Plan*

1. *The Birth of the Missouri Plan*

Missouri's early history of judicial selection progressed in line with the rest of the country. During Missouri's first thirty years of statehood, the governor, with the advice and consent of the Senate, appointed the judges of the Supreme Court, circuit courts, and chancery courts (later abolished by the General Assembly).²⁹ The Missouri Constitution was amended in 1849 to provide for popular election of judges; the amendment remains in effect for the majority of Missouri's trial judges.³⁰

Commentators suggest that Missouri was "fertile ground"³¹ for the nonpartisan merit proposal, favored by the American Judicature Society and the American Bar Association, because of blatant political abuses by

27. *Id.* The original articulation of the plan can be found in A. KALES, UNPOPULAR GOVERNMENT IN THE UNITED STATES 239, 245-47, 249-50 (1914).

28. Laski, *The Technique of Judicial Appointment*, 24 MICH. L. REV. 529, 533 (1926).

29. E. HAYNES, *supra* note 18, at 118; OFFICIAL MANUAL, STATE OF MISSOURI 184 (1985-1986). The Missouri judiciary is a three-tier court system: the Supreme Court, composed of seven members; the Court of Appeals, with 32 members who sit in three districts located in St. Louis, Kansas City, and Springfield; and the circuit courts, a system of 303 trial judges who sit in 44 state judicial circuits. Each circuit consists of one to five counties. Each circuit must have at least one circuit judge, and each county is required to have at least one associate circuit judge. *Id.* at 184, 214. According to constitutional amendments effective in 1979, circuit courts are courts of original civil and criminal jurisdiction. Circuit judges include certain former circuit judges, magistrate judges, probate judges, and judges of the former Hannibal and Cape Girardeau Courts of Common Pleas and the St. Louis Court of Criminal Corrections. Associate circuit judges include former magistrate and probate judges in counties with less than 65,000 population. Associate circuit judges may hear classes of cases formerly heard by magistrates or any case assigned to them by their presiding circuit judge or by the Supreme Court. MO. CONST. art. V, § 27 (1976).

30. OFFICIAL MANUAL, STATE OF MISSOURI 184 (1985-1986).

31. MISSOURI BAR REPORT, *supra* note 11, at 4.

the Pendergast and Shannon Democratic factions in Kansas City and the Dickmann machine in St. Louis in the 1930's.³² Led by the Bar Association of St. Louis, a coalition of St. Louis, Kansas City, and State bar associations and citizen groups gathered the required 50,000 signatures to place the Missouri Plan on the ballot and organized a successful ratification campaign.³³

In November of 1940, Missouri took the lead in judicial reform, becoming the first state to adopt nonpartisan, merit judicial selection.³⁴ The voters amended the Missouri Constitution and adopted the "Nonpartisan Selection of Judges Court Plan" for selection of the State's appellate judges and the circuit judges in St. Louis City and Jackson County (Kansas City). In the early 1970's, voters in St. Louis, Platte, and Clay Counties (the metropolitan St. Louis and Kansas City counties) adopted the Missouri Plan for selection of their circuit judges, and in 1979 extended the Plan to associate circuit judges in the five judicial circuits utilizing the Plan.³⁵

There has been little effort to adopt the Plan in outstate Missouri. In the thirty-nine outstate judicial circuits, which encompass about 60% of the 342 State judgeships, the circuit and associate circuit judges are still selected through partisan elections.³⁶

2. *The Major Components of the Missouri Plan*

Thirty-six states, the District of Columbia, and Puerto Rico have adopted nonpartisan, merit selection methods modeled after the Missouri Plan.³⁷ Although the specifics vary from state to state, the Missouri Plan embodies the three basic features found in most plans.

The nominating commission is the first component of the Missouri Plan. Like other states, Missouri has several such commissions—a local commission for each of the five circuits that have adopted the Plan and a

32. *Id.* In 1938, the Kansas City Democratic Party tried unsuccessfully to unseat a respected Supreme Court justice who reputedly voted against Pendergast in a matter before the court. In 1934, ward bosses in St. Louis elected to the circuit court a pharmacist whose service on the bench was severely criticized by the St. Louis press and bar. R. WATSON & R. DOWNING, *supra* note 18, at 10.

33. R. WATSON & R. DOWNING at 10-11.

34. *Id.* at 9. See MO. CONST. art. V, §§ 25-29 (1940, amended 1970, amended 1976).

35. OFFICIAL MANUAL, STATE OF MISSOURI 184, 214 (1985-1986). See MO. CONST. art V, §§ 25-29.

36. Judges in the outstate judicial circuits may be brought under the provisions of the Plan by a majority vote of the electors voting on the question. MO. CONST. art. V, § 25(b).

37. See *supra* note 2.

statewide commission for the appellate courts. The circuit judicial commissions, which recommend nominees for the trial courts (circuit and associate circuit courts), consist of the chief judge of the district of the court of appeals within which the judicial circuit (or the major portion of its population) lies, two non-lawyer residents of the circuit appointed by the governor, and two lawyers elected by members of the Missouri bar residing in the circuit.³⁸ The appellate judicial commission, which nominates candidates for the supreme court and the court of appeals, includes seven members: a judge of the supreme court, one non-lawyer resident from each of the three court of appeals districts, and one lawyer from each of the three districts.³⁹ The number and make-up of commissions vary from state to state. When a vacancy occurs or a new judgeship is created, the appropriate nominating commission nominates three candidates.

The second major feature of the Plan is appointment by the governor. The chief executive must appoint one of the three nominees to fill the vacancy. In Missouri, if the governor does not act within sixty days after the list is certified to him, the commission may choose the judge.⁴⁰

The last element of the Plan is the retention election. At the first general election occurring twelve months after appointment, judges run unopposed for retention, without party affiliations. The judge must win a majority of votes in order to be retained in office.⁴¹ Should the voters reject an individual, the process of nomination and appointment would reoccur to fill the vacancy.

According to one commentator, the Missouri Plan was designed to maximize the strengths of appointive and elective methods:

[T]he nomination—appointment addition to election was assumed to result in judges of a higher caliber while retaining the democratic nature of the selection process. The undisguised purpose, then, of this hybrid innovation was to obtain “better” judges, reduce the influence of party politics, yet leave the electorate with at least a form of veto power.⁴²

38. MO. CONST. art. V, § 25(d). Both the lawyer and lay members of the commissions serve six-year terms. MO. SUP. CT. R. 10.03.

39. MO. CONST. art. V, § 25(d).

40. MO. CONST. art. V, § 25(a).

41. The electorate simply votes “yes” and “no” on the question, “Shall Judge _____ be retained in office?” MO. CONST. art. V, § 25(c)(1).

42. J. CORSI, *supra* note 18, at 106.

III. WOMEN JUDGES IN THE UNITED STATES

A. *The Number of Women Judges*

In 1873, the United States Supreme Court reviewed an Illinois decision denying women the right to practice law and found no constitutional violation.⁴³ The law and public policy prohibiting women from entering the legal profession eroded very slowly.⁴⁴ In the late 1960's, women began attending law schools in substantial numbers; by the late 1970's, women lawyers were making visible inroads into the state and federal judiciaries.⁴⁵ The appointment of the first woman to the United States Supreme Court in 1981 symbolized the legitimacy of women's place in the legal profession and in the judiciary.⁴⁶

State courts, with over 12,000 judgeships, provide many more opportunities for women to become judges than does the federal court system, with less than 1,000 judgeships.⁴⁷ With combined annual caseloads in the millions, the state courts also provide more opportunities for women to affect the development of the law.

The 1985 Fund for Modern Courts survey of state and federal, trial

43. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873). *Accord In re Lockwood*, 154 U.S. 116 (1894); *Ex parte Robinson*, 131 Mass. 376 (1881); *In re Goodell*, 39 Wis. 232 (1875).

44. Case law now holds that arbitrary denial of admission to the bar of a state violates the due process and equal protection guarantees of the fourteenth amendment. *In re Griffiths*, 413 U.S. 717 (1973); *Konigsberg v. State Bar*, 353 U.S. 252 (1957); *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957). *See infra* note 64.

45. The percentage of women law students was 4% in the 1960's, 8.5% in 1970, 15.8% in 1973, 22.9% in 1975, 30.3% in 1978, and 33% in 1980. The percentage of women lawyers grew from 4% in 1960, to about 5% in 1970, to 12.4% in 1980, to 13.1% in 1985. C. EPSTEIN, *WOMEN IN LAW* 4, 5, 50, 53 (1983); B. CURRAN, K. ROSICH, C. CARSON & M. PUCCHETTI, *SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985* at 3. According to American Bar Foundation figures, women make up 39% of the nation's law students and 40% of the class of 1985. Kaplan, *Enrollment Continues to Plunge*, Nat'l. L.J., Apr. 8, 1985, at 4, col. 3. It is estimated that women lawyers will constitute one-third of all lawyers by the year 2000. D. Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A.J. 578, 579-82 (1981). *See generally* Cook, *Women Judges: A Preface to Their History*, 14 GOLDEN GATE L. REV. 573 (1984) (discussion of women lawyers accessing state and federal judiciaries) [hereinafter cited as Cook, *Women Judges*]; *see also infra* note 65.

46. In 1981, Sandra Day O'Connor became the first woman associate justice appointed to the United States Supreme Court. Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra Day O'Connor*, 65 JUDICATURE 314 (1982).

47. The 1980 Census Bureau reported 27,845 judges presiding in the United States, ranging from traffic-court referees to Supreme Court justices. Dullea, *Women Judges: The Ranks Grow*, N.Y. Times, Apr. 26, 1984, at C1, col. 3. According to the Fund study, approximately 12,000 state court judgeships and 750 federal court judgeships are required to be filled by lawyers. *See infra* text accompanying note 49.

and appellate judges in full-time positions required to be filled by a lawyer identified 23 women judges on state courts of last resort (6.8%), 46 on state intermediate appellate courts (6.5%), and 804 on state trial courts (7.3%).⁴⁸ Women accounted for 873, or 7.2%, of the 12,093 state court judges and 56, or 7.4%, of the 753 federal court judges included in the survey.⁴⁹

This author's 1986 survey of state appellate courts revealed higher numbers for both state appellate categories:⁵⁰ twenty-five women on the states' highest courts (7.4%) and fifty-eight on state intermediate appellate courts (7.9%).⁵¹ These increases at the appellate level raise the overall percentage of women state court judges to 7.3%, presuming that the number of women and positions at the trial level has not decreased since 1985. It is quite likely that the actual number of women judges on state trial courts exceeds that reported in the 1985 survey.⁵²

It must be noted the success of women reaching state benches varies widely from state to state. In Alaska, which chooses all of its judges through merit selection, women account for 21.9% of the total judiciary.⁵³ In Tennessee, which chooses the majority of its judges in partisan elections, women make up only 1.3% of the state judges.⁵⁴ All states now have at least one law-trained woman judge, although Idaho, New

48. THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 65.

49. *Id.* at 64-65. Although the Fund reports 873 women state court judges in its discussion section, the numbers reported in the tables total 874. *Id.* at 18-21, 28. According to the Fund study, 465, or 3.8%, of the 12,093 state judges are Blacks and 53, or 7%, of the 753 federal judges are Blacks. *Id.* at 65.

50. This author's appellate court survey covers the period through Sept. 1, 1986. The numbers are higher than those in the 1985 study because of additions to the appellate courts and miscalculations in the Fund's statistics. The Fund study mistakenly calculated intermediate appellate positions for Montana and Utah, neither of which has an intermediate appellate court, and failed to include Minnesota, which does. THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 17. This author did not survey trial court judges because of the size of the population, the difficulty in attaining information as to the gender and number of trial court judges, and the recent date of the Fund survey.

51. See *infra* Table 1.

52. The number of women state court judges doubled between 1980 and 1985. *Election v. Appointment: Who Wins?*, Nat'l L.J., Dec. 30, 1985, at 8, col. 4; Dullea, *supra* note 47, at C1, col. 3. The percentage of women state court judges nearly tripled between 1970 and 1980. *Id.*

53. Percentages calculated from figures contained in Table 1, *infra*. See THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 34.

54. Percentages calculated from figures contained in Table 1, *infra*. See THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 59.

Hampshire, South Dakota, and Vermont have only one.⁵⁵ Sixteen states have five or fewer.⁵⁶ California ranks the highest with 112.⁵⁷

Thirty-six states and the District of Columbia have had women judges at the appellate level.⁵⁸ Thirty plus the District of Columbia have had women on their highest court.⁵⁹ Michigan, Minnesota, and Oklahoma, and the District of Columbia currently have two women on their supreme courts, and at least two states, California and Connecticut, have selected female chief justices.⁶⁰ Of the thirty-six states that have an intermediate appellate court, only five have not had a woman judge at the appellate level.⁶¹

55. See *infra* Table 1.

56. *Id.*

57. *Id.*

58. The 14 states that have not had a woman judge at the appellate level are: Alaska, Delaware, Idaho, Kentucky, Missouri, Montana, Nebraska, Nevada, New Hampshire, South Carolina, South Dakota, Vermont, West Virginia, and Wyoming. See Cook, *Women on the State Bench: Correlates of Access*, in *POLITICAL WOMEN: CURRENT ROLES IN STATE AND LOCAL GOVERNMENT* (J. Flammang, ed. 1984) 191, 195-97 [hereinafter cited as Cook, *Women on the State Bench*], and *infra* Table 1. Since Cook's 1984 study, women appellate judges have been selected in Georgia, Illinois, Indiana, Louisiana, Tennessee, and Virginia.

59. The following 30 states have had women on their highest court; the states in capital letters currently have women on their highest court: ALABAMA, Arizona, Arkansas, California, COLORADO, CONNECTICUT, FLORIDA, Hawaii, IOWA, KANSAS, MAINE, Maryland, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, Ohio, OKLAHOMA, Oregon, Pennsylvania, RHODE ISLAND, Texas, UTAH, WASHINGTON, and WISCONSIN. See Cook, *Women on the State Bench*, *supra* note 58, at 191, 195-97, and *infra* Table 1. Since Cook's 1984 study, women supreme court justices have been selected in Florida (Judge Rosemary Barkett—1985), Iowa (Judge Linda Neuman—1986), New Mexico (Judge Mary C. Walters—1985), North Carolina (Judge Rhoda Billings—1986), and North Dakota (Judge Beryl J. Levine—1985). California Chief Justice Rose Bird was defeated in her bid for retention in November 1986. See *infra* note 174.

60. See *infra* Table 1; see also *THE AMERICAN BENCH: JUDGES OF THE NATION* 221, 471 (3d ed. 1985-86).

61. The following 36 states have intermediate-level appellate courts; the states in capital letters have had a woman on a state appellate court, while the five states in lower case letters have not: ALABAMA, Alaska, ARKANSAS, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, Idaho, ILLINOIS, INDIANA, IOWA, KANSAS, Kentucky, LOUISIANA, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, Missouri, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, South Carolina, TENNESSEE, TEXAS, VIRGINIA, WASHINGTON, and WISCONSIN. See Cook, *Women on the State Bench*, *supra* note 58, at 195-97, and *infra* Table 1. Since Cook's 1984 study, Elisi Jane Roy of the Supreme Court of Arkansas, Rhoda Lewis of the Supreme Court of Hawaii, and Betty Roberts of the Supreme Court of Oregon have retired.

TABLE 1: SURVEY OF INDIVIDUAL STATE COURT JUDGES

	COURTS OF LAST RESORT*		INTERMEDIATE APPELLATE COURTS*		TRIAL COURTS**	
	Number	Women	Number	Women	Number	Women
Alabama	9	1	8	0	215	13
Alaska	5	0	3	0	65	16
Arizona	5	0	18	1	95	8
Arkansas	7	0	6	0	70	3
California	7	1	77	9	1006	102
Colorado	7	1	10	2	195	22
Connecticut	6	1	6	1	125	9
Delaware	5	0	-	-	89	18
Florida	7	1	46	4	575	45
Georgia	7	0	9	1	203	9
Hawaii	5	0	3	0	53	7
Idaho	5	0	3	0	33	1
Illinois	7	0	43	2	744	32
Indiana	5	0	12	1	265	16
Iowa	9	1	6	1	138	5
Kansas	7	1	7	1	211	24
Kentucky	7	0	14	0	214	9
Louisiana	7	0	48	2	262	13
Maine	7	1	-	-	40	4
Maryland	7	0	13	1	194	16
Massachusetts	7	1	10	3	279	20
Michigan	7	2	18	1	550	45
Minnesota	7	2	12	3	210	15
Mississippi	9	1	-	-	101	2
Missouri	7	0	32	0	303	18
Montana	7	0	-	-	84	13
Nebraska	7	0	-	-	109	4
Nevada	5	0	-	-	60	5
New Hampshire	5	0	-	-	32	1
New Jersey	7	1	28	3	287	17
New Mexico	5	1	7	1	84	10
New York	7	1	48	4	1046	99
North Carolina	7	1	12	1	217	12
North Dakota	5	1	-	-	52	2
Ohio	7	0	53	4	588	24
Oklahoma	12	2	12	2	202	17
Oregon	7	0	10	1	143	8
Pennsylvania	7	0	15	1	323	13
Rhode Island	6	1	-	-	42	4
South Carolina	5	0	6	0	123	17
South Dakota	5	0	-	-	35	1
Tennessee	5	0	21	1	130	1
Texas	18	0	79	5	372	27
Utah	5	1	-	-	77	4
Vermont	5	0	-	-	24	1
Virginia	7	0	10	1	293	6

Washington	9	1	16	1	214	30
West Virginia	5	0	-	-	60	2
Wisconsin	7	1	13	0	187	12
Wyoming	5	0	-	-	36	3
TOTAL	338	25	734	58	11,055	805
		(7.4%)		(7.9%)		(7.3%)

Sources: *The state appellate court figures are extracted from this author's survey of the judges lists in West's regional reporters through Sept. 1, 1986 and WANT'S FEDERAL-STATE COURT DIRECTORY (1986), and telephone interviews with state courts administrators' offices.

**The trial court figures are extracted from the Fund for Modern Courts study, which covers the period up to Sept. 1, 1985. FUND FOR MODERN COURTS, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 34-64 (1985).

B. How Women Lawyers Fare Under Different Judicial Selection Methods

As of September 1985, a higher percentage of women had achieved state judicial office through an appointment process, either executive appointment (9.3%) or merit selection (9.5%), than through an elective process, whether judicial election (6%), partisan election (6.2%), non-partisan election (6.7%), or legislative election (2.5%).⁶² The percentage of women who achieved federal judgeships through Presidential appointment was 7.4%.⁶³

IV. WOMEN JUDGES IN MISSOURI: A CASE STUDY

A. The Number of Women Judges in Missouri

Women were first admitted to the Missouri Bar in 1870.⁶⁴ Nearly a

62. THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 65.

63. *Id.* at 64.

64. Missouri was the second state to admit women to the bar. The first was Iowa, which granted a woman a license to practice law in 1869. Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 286, 290 (1981-1982). Lemma Barkeloo, who attended Washington University Law School for a brief period, was admitted to the Missouri Bar in 1870. In that same year, she became the first woman to try a case in a federal court. She died a premature death in 1870. Kesling, *Trailblazing the Legal Frontier: A History of Women in Law*, WASH. U.L. SCH. MAG. Fall 1983, at 5.

Missouri was also a trailblazer in the admission of women to law school. In 1871, Phoebe Olson Couzins became the first woman to graduate from law school in Missouri. Couzins was the first woman to graduate from Washington University and from its School of Law. Her admission to the Law School, although met with some initial resistance, resulted in a resolution by the school never to discriminate against an applicant on the basis of sex. *Id.* Union College Law School graduated a woman in 1870 and the University of Michigan did so in 1871. Columbia University did not admit women law students until 1929, Harvard University not until 1950, and Washington and Lee Uni-

half century passed before women lawyers achieved temporary positions on the Missouri bench; another quarter century elapsed before they were elected to full-time positions.⁶⁵

The first woman to hold a judicial position in Missouri was Frances Hopkins, who was appointed as temporary probate judge in 1915.⁶⁶ Little else is known about her, and it is not clear whether she was a lawyer.

Tiera Farrow, a 1903 graduate of the University of Kansas City School of Law, was appointed temporary municipal judge in Kansas City in 1927, the first woman judge in the city and county.⁶⁷ Farrow's accomplishments as a scholar and pioneering woman lawyer leading to her provisional appointment to the bench are chronicled in her autobiography, *Lawyer in Petticoats*.⁶⁸

Mabel Wood Hinkley, a graduate of City College of Law in St. Louis, was St. Louis' first woman judge.⁶⁹ In 1929, she was appointed provisional police court judge for the City of St. Louis. Hinkley, who sought the Republican nomination for the St. Louis City Circuit bench in 1930, may have been the first woman to seek election to the judiciary in Missouri.

Since the Farrow-Hinkley era, at least thirty women lawyers have achieved full-time positions on Missouri state courts: two in the mid-1950's, four in the 1960's, fifteen in the 1970's, and, so far, nine in the 1980's.⁷⁰ Of the thirty women judges, eighteen remain in office today.

versity not until 1972. Weisberg, *Barred from the Bar: Women and Legal Education in the United States, 1870-1890*, in 2 *WOMEN AND THE LAW* 231, 232, 240-41 (D.K. Weisberg, ed. 1982).

65. See *infra* notes 66-70 and accompanying text. The first woman attorney to serve on a state court anywhere in the United States was Carrie Kilgore, who was appointed master-in-chancery for Pennsylvania in 1886. *NOTABLE AMERICAN WOMEN* 330 (T. James, ed. 1971). The first woman attorney elected to a state judicial post in the country, other than justice of the peace, was Florence Ellinwood Allen, elected judge of the Court of Common Pleas in Cuyahoga County, Ohio in 1921. Berkson, *supra* note 64, at 291. She became the first elected woman justice of a state supreme court the following year. *Id.* In 1934, President Franklin Roosevelt appointed Allen to the U.S. Court of Appeals for the Sixth Circuit, making her the first woman federal circuit judge. *Id.* The first woman to serve on a federal district court was Burnita Shelton Matthews, appointed to the District Court for the District of Columbia by president Harry S Truman in 1949. *Id.* at 292. Women judges did not serve in every state until 1980. *Id.* at 293. As of 1984, seven states had yet to have at least one woman judge serving on a court of general jurisdiction. Cook, *Women on the State Bench*, *supra* note 58, at 195-97.

66. Berkson, *supra* note 64, at 290.

67. T. FARROW, *LAWYER IN PETTICOATS* 167-72 (1953).

68. *Id.*

69. St. Louis Post Dispatch, Jan. 11, 1932, at 3A, col. 4; St. Louis Post Dispatch, May 4, 1966.

70. Interviews with, and written communication from, Judy Tripp, Missouri State Courts Administrator's Office (July-Oct. 1986) (notes on file with the author); OFFICIAL MANUALS, STATE OF

1. *Former Full-time, Law-trained Women Judges*

At least eleven women lawyers formerly held full-time positions on the Missouri judiciary. For many of these women, the ascent to the bench came in the twilight of their legal careers. Several followed in the footsteps of their husbands or fathers. Most had been deeply involved in Missouri politics. All sat on elected probate or magistrate courts and all but one presided in rural judicial circuits.

The first woman lawyer elected to the Missouri judiciary was Margaret Young, who served as Buchanan County Magistrate Judge from 1954 to 1974.⁷¹ Young was, in her own words, "a youngster" when elected to the bench in 1954, after twenty-four years in practice.⁷² Young, the only woman in her 1931 law school graduating class at St. Joseph Law School and Missouri's first woman Assistant Attorney General, ran "because the fellas in the local bar association pushed me to run."⁷³ Young's initial success was all the more remarkable because she was elected to the judiciary without the benefit of a preceding interim appointment.⁷⁴ According to Young, who still practices law in St. Joseph, Missouri, she was defeated in 1974 at the age of sixty-seven because "my opponent kept bringing up the question of my age."⁷⁵

Gladys Berger Stewart, on the other hand, was sixty-seven years old when appointed Douglas County Probate and *ex officio* Magistrate Judge by Governor Warren Hearnes in 1966.⁷⁶ Stewart was reelected thereaf-

MISSOURI (1973-1974)-(1985-1986); Missouri Retired Judges (June 1, 1986) (unpublished report supplied by the Missouri State Courts Administrator's Office) (on file with the author).

71. OFFICIAL MANUAL, STATE OF MISSOURI 276 (1973-1974); Missouri Retired Judges, *supra* note 70, at 19.

72. Interviews with Margaret Young (Sept. 1986) (notes on file with the author).

73. *Id.*; St. Joseph News-Press, Nov. 3, 1954, at 6.

74. See *infra* Table 3. Several of the former and current elected women judges in Missouri were initially appointed to the court by the governor on an interim basis. These types of appointments do not go through the Missouri Plan selection process. Nearly all of the states that elect judges permit the state's chief executive to appoint a successor to fill a mid-term vacancy caused by the death, retirement, or resignation of a sitting judge. THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 6. According to several studies, more than 50% of elected state court judges (male or female) initially reach the bench through interim appointment. See, e.g., Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731, 738; Atkins, *Judicial Elections: What the Evidence Shows*, 50 FLA. BAR J. 152, 153-54 (1976); Atkins & Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 2 AMER. POL. O. 427, 446 (1974); Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N.D. L. REV. 60, 64 (1962).

75. Interviews with Margaret Young, *supra* note 72.

76. Interviews with, and written communication from, Judy Tripp, Missouri State Courts Ad-

ter until 1979. She died in 1984. A graduate of Cumberland University Law School, Stewart served in the legislature from 1934 to 1942. According to her 1935 official state biography, Stewart was once appointed Special Judge for the 31st Judicial Circuit, making her the first woman ever to occupy a circuit bench in Missouri.⁷⁷

Gertrude Sadler was sixty-three years old when appointed Probate and *ex officio* Magistrate Judge for St. Clair County by Governor Hearnnes in 1969.⁷⁸ Sadler, a *cum laude* graduate of Kansas City School of Law, which she attended on a competitive, full-tuition scholarship, replaced her husband on the bench.⁷⁹ Elected in 1970, Sadler retired in 1974 as she neared her seventieth birthday.⁸⁰

Hazel Palmer was seventy years old when she was first elected to the bench in Missouri.⁸¹ Palmer, a well-known figure in Missouri Republican history, attended law school at National University in Washington, D.C. while her father served in the U.S. House of Representatives.⁸² Palmer later practiced law with her father in Sedalia for twenty-six years, served as Pettis County Collector of Revenue from 1943 to 1955, and was President of the National Federation of Business & Professional Women from 1956 to 1958. Palmer, the Republican nominee for the U.S. Senate from Missouri in 1958, was defeated by the incumbent, Stuart Symington.⁸³ In 1973, Governor Christopher Bond appointed Palmer, who then had practiced law for over forty years, to fill a vacancy as the Pettis County Magistrate Judge.⁸⁴ She successfully held the seat through

ministrator's Office (July-Oct. 1986); telephone interview with Bill Singleton, former law clerk to Gladys Stewart (Oct. 7, 1986) (notes on file with the author); OFFICIAL MANUAL, STATE OF MISSOURI 276 (1973-1974); OFFICIAL MANUAL, STATE OF MISSOURI 282 (1975-1976); OFFICIAL MANUAL, STATE OF MISSOURI 268 (1977-1978).

77. OFFICIAL MANUAL, STATE OF MISSOURI 97 (1935-36).

78. Interviews with, and written communication from, Judy Tripp, Missouri State Courts Administrator's Office (July-Oct. 1986) (notes on file with the author); OFFICIAL MANUAL, STATE OF MISSOURI 278 (1973-1974).

79. Interviews with Gertrude Sadler (Sept. 1986) (notes on file with the author).

80. Missouri Retired Judges, *supra* note 70, at 18.

81. Interviews with, and written communication from, Judy Tripp, Missouri State Courts Administrator's Office (July-Oct. 1986) (notes on file with the author).

82. Interviews with Hazel Palmer (Sept. 1986) (notes on file with the author).

83. *Id.*: Leonor Kretzer Sullivan, a Democrat who served in the U.S. House of Representatives from 1952 to 1976, was the first and only woman to be elected to Congress from Missouri. OFFICIAL MANUAL, STATE OF MISSOURI 88 (1953-1954).

84. Interviews with Hazel Palmer, *supra* note 82; OFFICIAL MANUAL, STATE OF MISSOURI 284 (1975-1976); OFFICIAL MANUAL, STATE OF MISSOURI 270 (1977-1978); OFFICIAL MANUAL, STATE OF MISSOURI 222 (1979-1980); OFFICIAL MANUAL, STATE OF MISSOURI 183 (1981-1982).

elections in 1974 and 1978 and was elevated to associate circuit status in 1979. Although still "energetic and thoroughly enjoying her job," she retired at the end of her term in 1982 at the age of seventy-nine.⁸⁵ She continues to practice estate and probate law in Sedalia.

Macye Jones Maness was also seventy years old when first elected to the bench in Missouri in 1974.⁸⁶ A popular figure in Missouri Democratic politics who served in the Missouri House of Representatives from 1940 to 1942, Maness succeeded her husband in the legislature. She also succeeded him as prosecuting attorney in Ripley County in 1942, becoming Missouri's first woman elected prosecuting attorney.⁸⁷ Maness, a practitioner with forty-five years of experience, won the Democratic primary election for Ripley County Probate Judge in August 1974. Because no Republican candidate registered for the seat in the general election, Governor Bond named Maness as an interim appointee, after leaving the office vacant for over six months.⁸⁸ Maness successfully ran for the position in 1974 and 1978 and was elevated to associate circuit status in 1979. She retired at the end of 1982 at the age of seventy-eight, and practiced law with her son in the reconstituted firm of Maness and Maness until appointed a special judicial commissioner.⁸⁹

Ann Quill Niederlander, who practiced law for forty years prior to her judicial appointment, was sixty-three years old at the time she achieved judicial office. Niederlander, an active Democrat, was named by Governor Joseph Teasdale to a newly created post as magistrate judge for the 21st Judicial Circuit in St. Louis County at the end of 1978.⁹⁰ She was the first woman judge to serve full-time in one of Missouri's two major metropolitan areas. In 1979, she was elevated to associate circuit judge status. Because of the incorporation of the urban associate circuit judges under the Missouri Plan in 1979, Judge Niederlander never had to run for election. She successfully stood for retention in 1980 and 1984, and retired from the bench in 1985.⁹¹

85. Interviews with Hazel Palmer, *supra* note 82; Missouri Retired Judges, *supra* note 70, at 11.

86. OFFICIAL MANUAL, STATE OF MISSOURI 105-06 (1941-1942); interviews with, and written communication from, Judy Tripp, Missouri State Courts Administrator's Office (July-Oct. 1986) (notes on file with the author).

87. Interviews with Macye Maness (Sept. 1986) (notes on file with the author).

88. *Id.*

89. Missouri Retired Judges, *supra* note 70, at 11.

90. Interview with, and written communication from, Ann Niederlander (Sept. 1986) (notes on file with the author); OFFICIAL MANUAL, STATE OF MISSOURI 230 (1979-1980).

91. Interview with, and written communication from, Ann Niederlander, *supra* note 90; Mis-

Other former women judges in Missouri include Betty Pine Lockard, Johnson County Probate and *ex officio* Magistrate Judge from 1962 to 1966;⁹² Janice Pueser Noland, Camden County Probate and *ex officio* Magistrate Judge from 1970 to 1974;⁹³ Vera Funk, Howard County Probate and *ex officio* Magistrate Judge from 1961 to 1975;⁹⁴ Deann D. Smith, Texas County Probate and *ex officio* Magistrate from 1971 through 1978;⁹⁵ and Phyllis Schnebelen, St. Francois County Magistrate Judge from April 1975 through 1978.⁹⁶

2. *Current Full-time, Law-trained Women Judges*

The eighteen current women judges constitute 5.3% of the 342 full-time, law-trained state court judges in Missouri.⁹⁷ The election and retention records of the current women judges are set out in Table 2. The twelve women associate circuit judges constitute 7.1% of the 170 associate circuit judges in Missouri; they preside in eleven of the forty-four state judicial circuits. The six women circuit judges, who preside in four of the forty-four judicial circuits, constitute 4.5% of the state's 133 circuit judges. No woman has ever been elected or appointed to a full-time position on a Missouri appellate court.⁹⁸

Missouri Retired Judges, *supra* note 70, at 11; OFFICIAL MANUAL, STATE OF MISSOURI 1281 (1981-1982); OFFICIAL MANUAL, STATE OF MISSOURI 1297 (1985-1986). *See infra* note 149.

92. Interview with Betty Pine Lockard (Dec. 1986) (notes on file with the author); OFFICIAL MANUAL, STATE OF MISSOURI 1022 (1963-1964); OFFICIAL MANUAL, STATE OF MISSOURI 1064 (1965-1966).

93. OFFICIAL MANUAL, STATE OF MISSOURI 1141 (1971-1972); OFFICIAL MANUAL, STATE OF MISSOURI 276 (1973-1974); interview with Janice Pueser Noland (Oct. 6, 1986) (notes on file with the author).

94. OFFICIAL MANUAL, STATE OF MISSOURI 935 (1961-1962); OFFICIAL MANUAL, STATE OF MISSOURI 1019 (1963-1964); OFFICIAL MANUAL, STATE OF MISSOURI 1061 (1965-1966); OFFICIAL MANUAL, STATE OF MISSOURI 1011 (1967-1968); OFFICIAL MANUAL, STATE OF MISSOURI 1119 (1969-1970); OFFICIAL MANUAL, STATE OF MISSOURI 1147 (1971-1972).

95. OFFICIAL MANUAL, STATE OF MISSOURI 1161 (1971-1972); OFFICIAL MANUAL, STATE OF MISSOURI 279 (1973-1974); OFFICIAL MANUAL, STATE OF MISSOURI 285 (1975-1976); OFFICIAL MANUAL, STATE OF MISSOURI, 271 (1977-1978).

96. OFFICIAL MANUAL, STATE OF MISSOURI 284 (1975-1976); OFFICIAL MANUAL, STATE OF MISSOURI 270 (1977-1978); Missouri Retired Judges, *supra* note 70, at 18. Judge Schnebelen's daughter, Cara Detring, is now a municipal judge in the City of Farmington. Interview with Cara Detring (Oct. 8, 1986) (notes on file with the author).

97. *See infra* Table 2.

98. Circuit Judge Ellen Roper served as a Special Judge on the Missouri Supreme Court in September 1981 and on the Missouri Court of Appeals, Western District, in April 1986. Circuit Judge Edith Messina served as a Special Judge on the Missouri Court of Appeals, Western District, in November 1984. Circuit Judge Jean Hamilton served as a Special Judge on the Missouri Court of Appeals, Eastern District, on two occasions in 1984. Circuit Judge Anna Forde served as a special

a. *Elected Women Judges*

Thirteen of Missouri's eighteen current women judges were elected to the judiciary through partisan elections: all twelve of the associate circuit judges and one of the six circuit judges. All but one of the elected women judges preside in outstate Missouri circuits.⁹⁹

Associate Circuit Judge Marybelle Mueller, who still serves, followed Buchanan County Judge Margaret Young as the second woman elected to the bench in Missouri. Appointed to an interim position as Cape Girardeau County Magistrate Judge by Governor Phil Donnelly in 1955, Mueller won a partisan election as Probate Judge for that county in 1956.¹⁰⁰

The first and only woman judge ever elected from either of Missouri's two major metropolitan areas is Associate Circuit Judge Susan Block, elected as a magistrate judge in St. Louis County in 1978.¹⁰¹ The first woman President of the Missouri Association of Probate and Associate Circuit Judges is Associate Circuit Judge Kathie Guyton, elected to that post in April 1986.¹⁰²

Circuit Judge Ellen Roper of the 13th Judicial Circuit is the only woman ever to be elected to the circuit bench in Missouri.¹⁰³ Initially elected as Boone County Probate Judge on the Republican ticket in 1976, Judge Roper was elevated to the circuit bench under the Court Reorgani-

judge on the Missouri Court of Appeals, Southern District, in 1986. Interviews with Judges Roper, Messina, Hamilton, and Forder (Aug.-Oct. 1986) (notes on file with the author).

99. See *infra* Table 2. The number of elected women judges in Missouri will remain the same in 1987. Associate Circuit Judge Joan Pinnell of Boone County will retire at the end of 1986 after 15 years on the bench. Her successor is Larry Bryson, who defeated two women candidates in the primary and ran unopposed in the general election. Judge Pinnell, a graduate of Marquette Law School in Milwaukee, was appointed to the bench by Governor Warren Hearnes in 1971 at the age of 51. She successfully ran for election in 1972, 1974, 1978, and 1982. Patricia Scott was elected Morgan County Associate Circuit Judge for the term beginning in January 1987.

100. Judge Mueller retired temporarily in 1962, but was re-elected in 1974 and 1978. In 1982, she was elected associate circuit judge. She was unopposed in her bid for re-election in 1986. Interviews with, and written communications from, Judge Marybelle Mueller and Judy Tripp, Missouri State Courts Administrator's Office (July-Oct. 1986) (notes on file with the author); OFFICIAL MANUAL, STATE OF MISSOURI 281 (1975-1976); OFFICIAL MANUAL, STATE OF MISSOURI 247 (1979-1980); OFFICIAL MANUAL, STATE OF MISSOURI 237 (1983-1984); OFFICIAL MANUAL, STATE OF MISSOURI 266 (1985-1986).

101. OFFICIAL MANUAL, STATE OF MISSOURI 230 (1979-1980); interviews with Judge Susan Block (Aug. 1986) (notes on file with the author).

102. Interview with Judge Kathie Guyton (Oct. 3, 1986) (notes on file with the author).

103. Roper was appointed by Governor Bond to fill a vacancy as Probate Judge in Boone County in 1976, prior to her first election. Interview with Judge Ellen Roper (Sept. 4, 1986) (notes on file with the author). OFFICIAL MANUAL, STATE OF MISSOURI 222 (1985-1986).

zation Act in 1979, making her the first woman to sit full-time on a court of general jurisdiction in Missouri.¹⁰⁴ She was elected circuit judge in 1982.

b. Women Judges Selected Under the Missouri Plan

The remaining five of Missouri's eighteen current women judges were appointed under the Missouri Plan. They serve in the St. Louis and Kansas City metropolitan judicial circuits.¹⁰⁵ They are the only women selected under the Plan in its forty-six year history.

Circuit Judge Anna Forder, a former deputy juvenile officer and practitioner from St. Louis City, became the first woman appointed under the Missouri Plan when Governor Joseph Teasdale named her to the 22nd Judicial Circuit in 1979, the thirty-ninth year of the Plan.¹⁰⁶ Circuit Judge Margaret Nolan, a practicing lawyer for twenty-four years, was appointed by Governor Christopher Bond to the 21st Circuit in St. Louis County in 1982.¹⁰⁷ Circuit Judge Jean Hamilton practiced as an attorney for eleven years, serving terms with the U.S. Department of Justice and the U.S. Attorney's Office, before her selection by Governor Bond to the 22nd Circuit in 1982.¹⁰⁸

Circuit Judge Evelyn Baker, formerly with the National Labor Relations Board, the St. Louis City Circuit Attorney's Office, and the U.S. Attorney's Office, became the first Black woman circuit judge in Missouri when Governor Bond added her to the 22nd Circuit in 1983.¹⁰⁹ Circuit Judge Edith Messina served in the Kansas City Public Defender's Office and in private practice for ten years before Governor Bond selected her to the 16th Circuit in Jackson County in 1984.¹¹⁰

104. *Id.* See MO. CONST. art. V, § 27 (1976).

105. See *infra* Table 2. Three of the five women circuit judges appointed under the Plan are from the 22nd Judicial Circuit (St. Louis City); one is from the 21st Circuit (St. Louis County); and one is from the 16th Circuit (Jackson County).

106. OFFICIAL MANUAL, STATE OF MISSOURI 245 (1985-1986); interviews with Judge Anna Forder (Aug. 1986) (notes on file with the author).

107. OFFICIAL MANUAL, STATE OF MISSOURI 232 (1985-1986).

108. OFFICIAL MANUAL, STATE OF MISSOURI 245 (1985-1986); interview with Judge Jean Hamilton (Sept. 10, 1986) (notes on file with the author).

109. OFFICIAL MANUAL, STATE OF MISSOURI 245 (1985-1986).

110. OFFICIAL MANUAL, STATE OF MISSOURI 227 (1985-1986); interviews with Judge Edith Messina (Oct. 1986) (notes on file with the author).

TABLE 2: WOMEN JUDGES IN MISSOURI—1986

JUDGE	CIRCUIT	YEAR APP'TED	YEAR ELECTED/RETAINED*
Marybelle Mueller	32nd	(1955)	1956, 1958, 1974, 1978, 1982, 1986
Joyce M. Otten	2nd	(1969)	1970, 1974, 1978, 1982, 1986
Joan M. Pinnell	13th	(1971)	1972, 1974, 1978, 1982
ELLEN ROPER	13th	(1976)	1976, 1978, 1982
Barbara Gale Lame	43rd	(1976)	1976, 1978, 1982, 1986
M. Keithley Williams	29th	(1976)	1978, 1982, 1986
Susan E. Block	21st	—	1978, 1982*, 1986*
Kathie B. Guyton	11th	—	1978, 1982, 1986
Pam Kline	17th	—	1978, 1982, 1986
ANNA C. FORDER	22nd	1979	1982*
Mary A. Dickerson	26th	(1981)	1982, 1986
Patricia Breckenridge	28th	(1982)	1982, 1986
Lucy D. Rauch	11th	—	1982, 1986
Mary W. Sheffield	25th	—	1982, 1986
MARGARET M. NOLAN	21st	1982	1984*
JEAN C. HAMILTON	22nd	1982	1984*
EVELYN BAKER	22nd	1983	1984*
EDITH MESSINA	16th	1984	1986*

CAPITALS = CIRCUIT JUDGES

Lower case = Associate circuit judges

() = Interim appointment

Sources: As of Nov. 1, 1986. OFFICIAL MANUAL, STATE OF MISSOURI 261-67 (1985-1986); interviews with, and written communications from, Judy Tripp, Missouri State Courts Administrator's Office; interviews with Judges Block, Breckenridge, Dickerson, Forder, Guyton, Hamilton, Kline, Lame, Messina, Mueller, Pinnell, Rauch, Roper, and Sheffield (July-Dec. 1986) (notes on file with the author).

B. *How Women Lawyers Fare Under Different Judicial Selection Methods in Missouri*

The percentage of women judges in Missouri,¹¹¹ 5.3%, is below the national average of 7.2-7.3%.¹¹² Missouri ranks thirty-third among the fifty states and the District of Columbia in percentage of women

111. All of the current federal judges in Missouri on the U.S. District Courts and on the U.S. Court of Appeals for the Eighth Circuit are men. Carol Jackson was selected a U.S. Magistrate for the Eastern District of Missouri in January 1986. Karen M. See was appointed U.S. Bankruptcy Judge for the Western District of Missouri in 1986. Interview with Judge Carol Jackson (Oct. 1986) (notes on file with the author). Three of the current federal judges in Missouri are Blacks: one each on the U.S. Court of Appeals, the U.S. District Court for the Eastern District, and the U.S. Magistrate Court for the Eastern District. Interviews with Judge Theodore McMillian (Oct. 1986) (notes on file with the author).

112. See *supra* text accompanying notes 48-52.

judges.¹¹³

Missouri's thirteen elected women judges constitute 6.5% of the 201 partisan-elected judges in the state,¹¹⁴ consistent with the national average of elected women judges, 6.2%.¹¹⁵ Only one of Missouri's elected

TABLE 3: HOW WOMEN REACH THE STATE BENCH

METHOD	NATION*		MISSOURI**	
	NUMBER OF JUDGES	SEATS HELD BY WOMEN	NUMBER OF JUDGES	SEATS HELD BY WOMEN
Partisan Election	3,611	223 (6.2%)	201	13 (6.5%)
Nonpartisan Election	3,933	263 (6.7%)		
Legislative Election	403	10 (2.5%)		
Judicial Election	351	21 (6.0%)		
Gubernatorial Appointment	1,685	157 (9.3%)		
Merit Selection Appointment	2,110	200 (9.5%)	141	5 (3.5%)
TOTAL	12,093	874 (7.2%)	342	18 (5.3%)

Sources: *The national figures are extracted from the Fund for Modern Courts study, which covers the period up to Sept. 1, 1985. FUND FOR MODERN COURTS, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 18-21, 28 (1985).

**The Missouri statistics are extracted from the OFFICIAL MANUAL, STATE OF MISSOURI 189-95, 201-59, 261-67 (1985-1986). They were accurate as of Sept. 1, 1985 and Sept. 1, 1986.

113. Ranking based on percentages calculated from figures provided *supra* in Table 1.
 114. *See infra* Table 3.
 115. *Id.* The percentage of elected women judges in Missouri is below the percentage of age-eligible women lawyers in the State, 11.4%. *See infra* Table 4. The percentage of elected women judges is also less than that of elected women in the legislative and executive branches of Missouri government. Twenty-eight, or 14.2%, of the 197 members of the Missouri legislature are women. Twenty-six, or 16%, of the 163 members of the Missouri House of Representatives are women, as are two, or 6%, of the 34 state senators. Missouri is in line with the rest of the nation as to percentage of elected legislators. Women in the 50 state legislatures now comprise 1,103, or 14.8%, of the total of 7,461 legislators, according to a study by the Eagleton Institute of Politics at Rutgers University. At the federal level, 22, or 5.1%, of the 435 Representatives in the House are women, and two, or 2%, of the Senators are women. Brozen, *State Legislature: Center Stage for Women*, N.Y. Times, Nov. 18, 1985, at B8, col. 2; Tomasson, *State Legislatures Have More Women*, N.Y. Times, March 27, 1985, at C14, col. 3. Harriett Woods holds one of the state's six executive offices. She became the first woman elected to statewide office in Missouri with her November 1984 victory in the lieutenant governor's race. State Auditor Margaret Kelly became the first woman to hold a statewide executive office when Governor Bond appointed her in July 1984; she successfully ran for election in November 1986.

women judges, however, serves on a court above the associate circuit level, the lowest trial level.

Missouri's five appointed women judges constitute 3.5% of the 141 merit-selected judges in the state, substantially below the national average of merit-selected women judges, 9.5%.¹¹⁶ Of the thirty women judges who have taken office since the adoption of the Missouri Plan in 1940, only five reached the judiciary under the Plan. No women lawyers have achieved appellate judgeships under the Plan. Missouri is one of fourteen states that has never had a woman judge at the appellate level.¹¹⁷ Missouri is one of only five states with an intermediate level court of appeals that never has had a woman judge at the appellate level.¹¹⁸ Of these five states, Missouri by far has the largest number of appellate judges.¹¹⁹

V. GENDER AND JUDICIAL SELECTION UNDER THE MISSOURI PLAN

One hundred and nine years, over twice the national average,¹²⁰ passed from the date women were first admitted to the Missouri Bar until a woman lawyer first held a full-time position on a Missouri trial court of general jurisdiction.¹²¹ Thirty-nine years elapsed from the date Missouri adopted merit selection until a woman was appointed to the circuit bench under the Missouri Plan. Missouri ranks below the national average for women judges chosen under merit selection plans, and has a lower percentage of appointed women judges than its percentage of women lawyers.

116. See *supra* Table 3. The percentage of merit-selected judges in Missouri is below the percentage of women lawyers in the State in the typical age categories. See *infra* section VI.

117. See *supra* note 58 and accompanying text.

118. See *supra* note 61 and accompanying text.

119. The five states with intermediate level appellate courts that have not had a woman on any appellate court, and the number of judges at the intermediate appellate level are: Alaska (3), Idaho (3), Kentucky (14), Missouri (32), and South Carolina (6). The five states and the total number of appellate judges are: Alaska (8), Idaho (8), Kentucky (21), Missouri (39), and South Carolina (11). Alaska and Missouri appellate judges are appointed under merit selection, while Idaho, Kentucky and South Carolina appellate judges are elected. THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 34, 41, 44, 49, 58.

120. The average time interval from state bar admittance of women lawyers to presence of a woman judge on a state trial bench of general jurisdiction for the 50 states and the District of Columbia was 52 years. Cook, *Women Judges*, *supra* note 45, at 598. Women were first admitted to the Missouri Bar in 1870. Ellen Roper took office as circuit judge on Jan. 2, 1979. See *supra* notes 64 & 104 and accompanying text.

121. The Missouri Plan was adopted in 1940. Anna Forder was appointed circuit judge under the Plan in 1979. See *supra* note 106 and accompanying text.

Why does the Missouri Plan, despite its high ideals, currently fail to provide Missouri women attorneys with equal access to the judiciary? The precise reasons are difficult to determine, but an assessment of the stages in the process, the qualifications for the judiciary, and the parties involved indicates possible sources of the problem.

A. *The Selection Process*

1. *Application, Nomination, and Appointment Stages*

There are three stages in the Missouri Plan Selection process: application, nomination, and appointment. There are no available statistics on the gender of judicial applicants for Missouri Plan judgeships. Applicants' names remain confidential. Only the names of the three lawyers whom the commissions eventually nominate to the governor become public. Informal sources indicate that women lawyers have applied for almost every state judicial opening in the past ten years, but that before then women only infrequently applied.¹²² Based on this data, it appears that there is a problem in the Missouri Plan at the application level.

Since the adoption of the Plan in 1940, the judicial commissions have nominated almost 650 lawyers.¹²³ During this period, the commissions have recommended approximately twelve women nominees: only two women nominees for the appellate court and ten women nominees for the trial court.¹²⁴ The small number of women nominated since 1940 suggests a possible flaw in the nomination stage. However, it is impossible to assess conclusively women's success, or lack thereof, at the nomination stage without access to information about the number of women and men applicants and their relative qualifications.

122 Conversations with judges, judicial applicants, and chairs of the Judiciary Committee of the Women Lawyers Association of Greater St. Louis from 1976 to 1986.

123 This author's survey identified 167 appointments under the Missouri Plan between 1965 and 1986. See *infra* Table 10. Watson and Downing identified approximately 48 Missouri Plan appointments between 1940 and 1964. R. WATSON & R. DOWNING, *supra* note 18, at 151, 193.

124. In addition to the five women appointed to the trial bench under the Plan, *supra* notes 105-110, three other women have been nominated for the trial bench: Martha Sperry-Hickman (once), Judith Rea (twice), and Corinne Richardson (once). Telephone interview with Martha Sperry-Hickman and Judith Rea (Nov. 1986) (notes on file with the author). Judge Messina was nominated for an associate circuit position before she was nominated and appointed circuit judge. Interviews with Judge Edith Messina (Oct. 1986) (notes on file with the author).

Lucile Wiley Ring was nominated for the Missouri Court of Appeals, Eastern District, in 1972 and Gerre S. Langton was nominated for the Missouri Court of Appeals, Eastern District, in 1978. St. Louis Post Dispatch, Apr. 2, 1972, at 3A, col. 5-8; written communication from Bill Thompson (Oct. 7, 1986) (letter on file with the author).

Approximately 215 judges have been appointed under the Missouri Plan.¹²⁵ Neither of the two women nominees for the appellate bench were selected; five of the ten women nominees for the circuit court were selected. Again, it is impossible to assess conclusively women's success, or lack thereof, at the appointment stage due to the paucity of the information available.

2. *Qualifications for the Judiciary*

The limited success of women nominated or appointed to the bench under the Missouri Plan may be attributed to a low number of women applicants or to disparate treatment in the nomination and appointment stages. Another way to assess the impact of the process on women is to analyze women's success relative to the available applicant pool of women lawyers qualified for the judiciary.

The express criteria for selection to the judiciary in Missouri are minimal: the Missouri Constitution requires only that judges be over a certain age, be qualified voters for a certain number of years, and be licensed to practice law.¹²⁶ Associate circuit judges must be at least twenty-five years old; circuit and appellate judges must be at least thirty years old.¹²⁷

Tables 4 and 5 indicate that approximately 11.4% of Missouri's lawyers, most of whom are presumably age twenty-five or older, are women; approximately 9.2% of the State's lawyers over age thirty are women. These percentages far exceed the 3.5% overall selection rate of women lawyers for judgeships under the Missouri Plan (5.0% of the Missouri Plan circuit and associate circuit judges are women; 0.0% of the Missouri Plan appellate judges are women).

The qualifications of judges selected under the Plan typically, although not always, exceed the minimums. The author surveyed age and other qualifications at the time of appointment for incumbent Missouri Plan judges.¹²⁸ Age is perhaps the most objective and quantifiable criterion; it

125. *See supra* note 123.

126. MO. CONST. art. V, § 21. Appellate judges must have been U.S. citizens for fifteen years and qualified voters of Missouri for nine. They must be residents of the district of their court and at least 30 years of age. *Id.* Circuit judges must have been U.S. citizens for 10 years and qualified voters of Missouri for three. They must be residents of the circuit and at least 30 years of age. *Id.* Associate circuit judges must be qualified voters, residents of the county, and at least 25 years of age. *Id.*

127. *Id.*

128. This author calculated the age and years in practice at the time of appointment for incumbent Missouri Plan judges using data collected from the Official Manuals for the State of Missouri,

is also the one criterion for which there is comparative statistical data broken down by sex. Age is also one of the reasons most often cited for the low number of women advancing through the Missouri Plan stages.

TABLE 4: MISSOURI LAWYERS BY SEX AND AGE

AGE GROUP	MALE		FEMALE		TOTAL	
	NUMBER	%	NUMBER	%	NUMBER	%
29 years or younger	1179	73.6	423	26.4	1602	100.0
30-34 years	1862	81.1	435	18.9	2297	100.0
35-39 years	2028	87.3	294	12.7	2322	100.0
40-44 years	1289	92.9	99	7.1	1388	100.0
45-54 years	1620	95.1	84	4.9	1704	100.0
55-64 years	1455	97.5	38	2.5	1493	100.0
65 years or older	1588	97.2	45	2.8	1633	100.0
TOTAL	11021	88.6	1418	11.4	12439	100.0

Source: B. CURREN, K. ROSICH, C. CARSON & M. PUCCETTI, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 at 84.

TABLE 5: MISSOURI WOMEN LAWYERS BY AGE

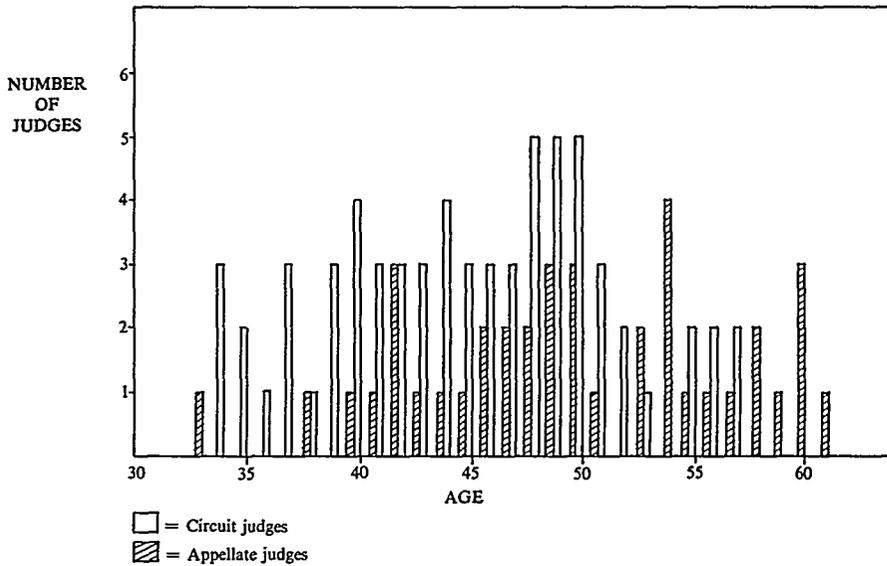
	NUMBER OF WOMEN LAWYERS	% OF LAWYERS WHO ARE WOMEN
30 years and older	995	9.2
35 years and older	560	6.6
40 years and older	266	4.3
35-54 years	477	8.8
35-64 years	515	7.5
40-64 years	221	4.8

Source: B. CURRAN, K. ROSICH, C. CARSON & M. PUCCETTI, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 at 84.

Table 6 shows that age at the time of appointment for incumbent appellate judges ranges from thirty-three to sixty-one; age at the time of appointment for incumbent circuit judges ranges from thirty-four to fifty-

law directories, and telephone interviews. The author also examined the law school attended and prior legal experience, including law enforcement, public defender, elected office, or judicial office. Other criteria for selection to the judiciary, not evaluated here, might include nature of practice, bar association involvement, and political party involvement. Comparative data for factors other than age are not readily available by sex cohorts.

TABLE 6: AGE AT TIME OF APPOINTMENT FOR CURRENT CIRCUIT AND APPELLATE MISSOURI PLAN JUDGES



Sources: As of Nov. 1, 1986. OFFICIAL MANUAL, STATE OF MISSOURI 189-95, 201-12, 215-99 (1985-1986); MARTINDALE HUBBELL LAW DIRECTORY (1985); THE AMERICAN BENCH: JUDGES OF THE NATION (3d ed. 1985-96); telephone interviews with incumbants.

TABLE 7: AGE AND YEARS IN PRACTICE AT TIME OF APPOINTMENT FOR CURRENT CIRCUIT AND APPELLATE MISSOURI PLAN JUDGES

	YOUNGEST AGE OF JUDGE TO CURRENT COURT	MEDIAN AGE OF JUDGE TO CURRENT COURT	SHORTEST TIME OF JUDGE TO CURRENT COURT	MEDIAN TIME OF JUDGE TO CURRENT COURT
Sup Ct (7)	33	58	8	30
Mo App Ct. E.D. (14)	40	48	13	23
Mo App Ct. W.D. (11)	38	50	12	23
Mo App Ct. S.D. (7)	42	48	12	24
TOTAL APPELLATE (39)	33	50	8	24
Cir Ct Platte Co. (1)	44	44	18	18
Cir Ct Clay Co. (4)	37	47	9	18
*Cir Ct Jackson Co. (18)	37	44	10	16
Cir Ct St. L. (24)	34	45	5	16
*Cir Ct L. Co (19)	34	48	8	23
TOTAL CIRCUIT (66)	34	45	5	18

* = One position unfilled.

() = Number of judges

Sources As of Nov. 1, 1986. OFFICIAL MANUAL, STATE OF MISSOURI 189-95, 201-12, 215-59 (1985-1986); MARTINDALE HUBBELL LAW DIRECTORY (1985); THE AMERICAN BENCH: JUDGES OF THE NATION (3d ed. 1985-86); telephone interviews with incumbents

seven. Table 7 indicates that the median appointment age for appellate judges is fifty and the median appointment age for circuit judges is forty-five. Associate circuit judges were not included in the survey, but their median appointment age presumably is younger than that of the circuit judges.¹²⁹

The percentage of appellate judges selected under the Missouri Plan who are women, 0.0%, is obviously below the 4.8% of women lawyers in the typical age range for appellate appointments, forty to sixty-four years.¹³⁰ Similarly, the percentage of circuit and associate circuit judges who are women, 5.0%, is also lower than the 8.8%-9.2% of women lawyers in the typical age range of thirty-five to fifty-four years for circuit judges and the presumed lower range for associate circuit judges. Based on age analysis, it appears that the percentage of qualified women lawyers exceeds the percentage successfully advancing through the three stages in the Missouri Plan.

This author also surveyed other data regarding incumbent Missouri Plan judges, for which there are no comparative data broken down by sex. The information may be useful in evaluating the failure of individual

129. Associate circuit judges were not included because the Official Manuals do not disclose biographical data for them. More important, an unknown number of the current Missouri Plan associates were initially elected, rather than appointed to the bench under the Plan.

130. See *supra* Table 4. The typical age range is defined 1) by age categories for which data are available and 2) by the distribution of ages of incumbents at the time of appointment, adjusted to eliminate extremes.

women candidates. As shown in Table 7, the median time from admission to the bar to the appellate court is roughly twenty-four years, while the median time to reach the circuit court is roughly eighteen years. The median time in practice to reach the associate circuit bench presumably is less for associates than that for circuit judges. As with age, the data reveal that some judges are appointed with near minimum qualifications. Table 7 indicates that some incumbents reached the appellate and circuit benches in less than ten years. The shortest time for an incumbent to reach the appellate bench was eight years; to reach the circuit bench was five years.

Table 8 indicates that the appellate and circuit benches draw primarily from the nearest located, in-state law school. Slightly over three-fourths of the incumbent appellate judges attended in-state law schools, while 88% of the incumbent circuit judges attended in-state law schools. The highest percentage of appellate judges attended the University of Missouri, Columbia, Law School, 33.3%. The highest percentage of circuit judges attended St. Louis University, 36.4%.

Table 9 reflects that almost 70% of the incumbent appellate judges once held law enforcement positions (*e.g.*, city attorney, city counselor, circuit attorney, prosecuting attorney, attorney general, U.S. Attorney, or Judge Advocate General), 18% held elected municipal or state, executive or legislative offices (*e.g.*, city council, alderman, mayor, State representative, or State senator), and 56% held prior judicial positions. Two were public defenders and only one was a full-time law professor. Approximately 47% of the incumbent circuit judges were prosecutors, 15% held elected office, and 26% held lower judicial offices. Three were public defenders and none were full-time law professors.

3. *Watson and Downing Revisited*

Richard Watson and Ronald Downing analyzed the characteristics of Missouri Plan judges appointed between 1941 and 1964.¹³¹ This author's survey of incumbent Missouri Plan judges, illustrated in Tables 6-9, shows similarities between the earlier Plan judges and the current Plan judges as to legal education, prior law enforcement experience, and prior political experience.¹³² The incidence of prior judicial experience has in-

131. R. WATSON & R. DOWNING, *supra* note 18, at 203-19.

132. *Compare id.* at 208, 214, 218, with Tables 6-9. The categories used by Watson and Downing are comparable to those used in this author's study. Watson and Downing define "law enforcement" as "primarily local office, such as circuit attorney, prosecutor, city or county counselor, or

TABLE 8: LEGAL EDUCATION FOR CURRENT CIRCUIT AND APPELLATE MISSOURI PLAN JUDGES

	St. Louis University	Washington University	University of Missouri, Kansas City	University of Missouri, Columbia	Out-of-State
Sup.Ct.(7)	0	1	1	3	2
Mo.App.E.D.(14)	6	3	0	2	3
Mo.App.W.D.(11)	0	1	4	3	3
Mo.App.S.D.(7)	0	1	0	5	1
TOTAL APPELLATE (39)	6=15.4%	6=15.4%	5=12.8%	13=33.3%	9=23.1%
Cir.Ct. Platte Co.(1)	0	0	1	0	0
Cir.Ct. Clay Co.(4)	0	0	3	1	0
*Cir.Ct. Jackson Co.(18)	0	0	13	3	2
Cir.Ct. St.L.(24)	15	2	1	2	4
*Cir.Ct. St.L.Co.(19)	9	6	0	2	2
TOTAL CIRCUIT (66)	24=36.4%	8=12.1%	18=27.3%	8=12.1%	8=12.1%

* = One position unfilled

() = Number of judges

SOURCES: As of Nov. 1, 1986. OFFICIAL MANUAL, STATE OF MISSOURI 189-95, 201-12, 215-59 (1985-1986); MARTINDALE-HUBBELL LAW DIRECTORY (1985); THE AMERICAN BENCH: JUDGES OF THE NATION (3d ed. 1985-86); telephone interviews with incumbents.

creased, while the age at the time of appointment has dropped for both circuit and appellate judges.

In the Watson and Downing study, 85% of circuit judges and 67% of appellate judges attended law school in Missouri. The current study shows that the percentage of Missouri judges educated in-state has remained fairly constant. Of current judges, 88% of circuit judges and 77% of appellate judges received their legal education in Missouri.

According to the Watson and Downing study, 47% of circuit judges and 54% of appellate judges had law enforcement backgrounds. This author's study shows a slight increase in law enforcement experience at the appellate level; 47% of current circuit judges and 69% of current appellate judges worked in law enforcement positions.

assistant State Attorney General." *Id.* at 215. This author also included U.S. Attorney and Judge Advocate General. Watson and Downing do not explicitly define "legislative and other political experience." This author included city council, alderman, mayor, state representative, and state senator positions in this category.

TABLE 9: SELECTED PRIOR LEGAL EXPERIENCE FOR
CURRENT CIRCUIT AND APPELLATE MISSOURI
PLAN JUDGES

	Law Enforcement	Public Defender	Exec./Leg. Office	Law Professor	Judicial Office
Sup. Ct. (7)	6	0	2	1	3
Mo. App. E.D. (14)	10	1	2	0	9
Mo. App. W.D. (11)	7	1	3	0	7
Mo. App. S.D. (7)	4	0	0	0	3
Total Appellate (39)	27=69.2%	2=5.1%	7=17.9%	1=2.6%	22=56.4%
Cir. Ct. Platte Co. (1)	0	0	1	0	1
Cir. Ct. Clay Co. (4)	3	0	1	0	1
*Cir. Ct. Jackson Co. (18)	5	1	2	0	1
Cir. Ct. St. L. (24)	15	2	4	0	6
*Cir. Ct. St. L. Co. (19)	8	0	2	0	8
Total Circuit (66)	31=47.0%	3=4.5%	10=15.2%	0=0.0%	17=25.8%

* = One position unfilled

() = Number of judges

Sources: As of Nov. 1, 1986. OFFICIAL MANUAL STATE OF MISSOURI 189-95, 201-12, 215-59 (1985-1986); MARTINDALE-HUBBELL LAW DIRECTORY (1985); THE AMERICAN BENCH: JUDGES OF THE NATION (3d ed. 1985-86); telephone interviews with incumbents.

In the Watson and Downing study, the percentage of judges holding prior legislative or other political office was 18% for circuit and 16% for appellate judges. Of today's judges, 15% of the circuit and 18% of the appellate judges held prior political posts.

The degree of prior judicial experience for circuit judges has increased.¹³³ In Watson and Downing's study, only 9% of circuit judges had prior minor court judicial experience. Among today's incumbents on the circuit court, 26% had prior judicial experience. Previous judicial experience for appellate judges was 58% for the earlier group and 56% for current judges.

Age at the time of appointment has dropped for circuit and appellate judges.¹³⁴ In Watson and Downing's report, 32% of circuit judges came from the forty to forty-nine age category and 47% from the fifty to fifty-nine category. The recent report shows a substantial increase in circuit judges appointed in the forty to forty-nine category; 54% of current circuit judges were between ages forty and forty-nine when appointed, while

133. Compare R. WATSON & R. DOWNING, *supra* note 18, at 214, with *supra* Table 9.

134. Compare R. WATSON & R. DOWNING, *supra* note 18, at 208, with *supra* Table 6.

only 26% were between ages fifty and fifty-nine. In both studies, the percentage of circuit judges appointed under age forty was almost 20%.

Of the appellate judges surveyed in Watson and Downing's study, 21% were appointed between ages forty and forty-nine and 63% between ages fifty and fifty-nine. The percentage of appellate judges appointed in the lower age category has doubled; of current appellate judges, 44% were appointed from the forty to forty-nine age category and 41% from the fifty to fifty-nine category. In both studies, the percentage of appellate judges appointed under age forty was 5% or less and age sixty or over was 12% or less.

B. The Parties in the Missouri Plan

Four parties participate in the Missouri Plan process: appellate judges who, frequently but not always, serve as chairs of the commissions; lawyers, who are elected to the nominating commissions by lawyers in the district in which they reside; the public, who are represented by lay persons on the commissions and who vote on the retention of judges; and the governor, who selects the lay members of the commissions and makes the judicial appointments.¹³⁵

The fact that women have been somewhat excluded from the nomination and appointment process might explain the low number of women nominations and appointments under the Plan.¹³⁶ Because Missouri has never had a woman governor, no woman has ever participated in the appointment of judges or in the selection of lay members to the nominating commissions. Because Missouri has had no women judges on the appellate bench, no women judges have served on the judicial nominating commissions. And, perhaps most important, no woman has been elected as a lawyer member of any nominating commission in the Plan's forty-six year history.¹³⁷ The only women who have participated in the operation of the Missouri Plan, and only as of 1976, have been lay members of the

135. Watson, *Observations on the Missouri Nonpartisan Court Plan*, 40 Sw. L.J. 2-4 (1986).

136. See Cook, *Women on the State Bench*, *supra* note 58, at 209 for a discussion of the impact of women participants in the appointment process.

137. A survey of the 23 Official Manuals of the State of Missouri published between 1940 and 1986 revealed this fact. How often women lawyers have run is unknown. In 1985, Shulamith Simon, a senior partner in Husch, Eppenberger, Donohue, Elson & Cornfeld and a member of the American College of Trial Lawyers, ran unsuccessfully for the St. Louis County Nominating Commission. Mary Anne Sedey, who has practiced law in St. Louis City for twelve years, lost in her bid for a place on the St. Louis City Nominating Commission in a run-off election in 1985.

commissions.¹³⁸ Five of the ten current lay members on the various circuit commissions are women, as is one of the three lay members of the appellate court commission.¹³⁹

1. *Judicial Members of the Nominating Commissions*

The judges on the nominating commissions carry a certain prestige and authority by virtue of their office. Richard Watson, a recognized commentator on the Missouri Plan, suggests that judges are the most powerful members of the commissions because they have the biggest investment in who reaches the bench, substantial influence over the lawyer members, and political ties to the governor.¹⁴⁰

Watson's contention that the judges wield the *most* influence on nominating commissions is disputable. Because chief judges rotate every one to three years, individual judges sit on the commissions for much shorter periods than lawyer and lay members who have six-year terms. Contrary to Watson's assertions, the judges do not always serve as the chairmen of the commissions and are not always of the same political party as the governor in office at the time.

2. *Lawyer Members of the Nominating Commissions*

The lawyer members of the nominating commissions, who have a stake in promoting "their" kind of lawyer to the bench, have perhaps the most influence in the nomination process.¹⁴¹ They are frequently the conduits for judicial applicants coming before the commissions.

Rival plaintiff and defendant-oriented bar associations have played major roles in the elections of the lawyer members of the nomination commissions since the adoption of the Missouri Plan.¹⁴² These groups jockey to place "their" representatives on the nominating commissions to

138. The first woman to serve on a judicial commission in Missouri was Rose Marie Neher, appointed to the Appellate Judicial Commission from the Eastern District (St. Louis) by Governor Christopher Bond in 1976. OFFICIAL MANUAL, STATE OF MISSOURI 264 (1977-1978).

139. OFFICIAL MANUAL, STATE OF MISSOURI 281-82 (1985-1986).

140. R. WATSON & R. DOWNING, *supra* note 18, at 138-39; Watson, *supra* note 135 at 4-5.

141. P. DUBOIS, *supra* note 12, at 10.

142. Watson and Downing suggest that in the first two decades of the Plan, the opposing lawyer candidates for the nominating commissions came from two groups: the Bar Associations and the Lawyers' Associations in Kansas City and St. Louis. R. WATSON & R. DOWNING, *supra* note 18, at 20-43. Other sources suggest that the Missouri Association of Trial Attorneys has become the most influential organization during the last two decades. Interviews with judges and judicial candidates. (Aug.-Nov. 1986) (notes on file with the author).

ensure selection of "their" candidates on the bench.¹⁴³

Women are just beginning to achieve positions of power in the Missouri Bar and in the major metropolitan bar associations.¹⁴⁴ These groups, some of which initially excluded women from membership, as yet have not promoted the candidacy of any women lawyers for the nominating commissions or for the state judiciary.

Women's bar associations in Missouri, first formed in the 1910's, reorganized in both Kansas City and St. Louis in the mid-1970's, with the advancement of women in the judiciary as one of their principal objectives.¹⁴⁵ In 1985, the Women Lawyer's Association of Greater St. Louis actively promoted two women lawyers for the 21st and 22nd Judicial Circuit Nominating Commissions. Although both candidates were unsuccessful, one forced a run-off with her opponent.¹⁴⁶

143. R. WATSON & R. DOWNING, *supra* note 18, at 39.

144. No woman has ever been elected president or vice-president of the Missouri Bar. Irene Dulin, a St. Louis attorney, was appointed treasurer of the Missouri Bar in 1936. She became the first woman elected to the Missouri Bar Board of Governors in 1944. Over thirty years passed before the next woman, Margaret Nolan, was elected to the Board of Governors in 1976. Four women will serve on the Board during the upcoming term: Doreen Dodson, Mary-Louise Moran, Anne-Marie Clarke, and A. Mary Sterling. The current chair of the Young Lawyers Section of the Missouri Bar is Jennifer Gillie-Bacon, from Kansas City. Interviews with Lucile Wiley Ring (Oct. 1986) and Keith Birkes, Executive Director, Missouri Bar (Oct. 10, 1986) (notes on file with the author).

No woman has ever been elected president of the Bar Association of Metropolitan St. Louis. Irene Dulin was the first woman elected an officer; she served as vice-president from 1956 to 1957 and was a member of the Executive Committee from 1960 to 1962. WHO'S WHO IN AMERICAN WOMEN (3d ed. 1964-65). Lucile Wiley Ring and Helen Bauer subsequently served as vice-presidents. In 1985, Annette Heller was elected vice-president, receiving the highest number of votes of any candidate running for bar association office. In 1981, Mary E. Fiser became the first woman elected President of the St. Louis County Bar Association. Interviews with Lucile Wiley Ring and Annette Heller (Aug.-Oct. 1986) (notes on file with the author). In 1984, Sandra Schermerhorn became the first woman elected president of the Kansas City Bar Association. In 1986, E. Beth Cox became the first woman president of the Jackson County Bar Association. Interviews with E. Beth Cox and Charlotte Thayer (Nov. 1986) (notes on file with the author).

145. In 1913, the Women's Bar Association of St. Louis was formed because the Bar Association of Metropolitan St. Louis did not admit women. That policy was officially changed in 1928; the first woman admitted was Bonita E. Schramm (Mrs. Kenneth R. Runde). Kansas City also formed a Women's Bar Association in 1913; the Kansas City Bar Association did not admit women until 1957. The Missouri Women Lawyers' Association was organized in 1914. The state-wide organization and the two city organizations were disbanded in the late 1960's. Interviews with Lucile Wiley Ring and Charlotte Thayer (Oct.-Nov. 1986) (notes on file with the author). The Women Lawyers' Association of Greater St. Louis and the Women Lawyers' Association of Kansas City were formed in 1976, with the express purpose of advancing women in the judiciary. All five of the current St. Louis women judges are members of the St. Louis organization; Judge Anna Forder was its charter president.

146. See *supra* note 137 and accompanying text.

3. *The Public*

a. *Lay Members of the Nominating Commissions*

The influence of the women lay members on the nominating commissions is tempered by the fact that lay persons, as a group, may be the least influential members of the nominating commissions. As Richard Watson recently opined, "[T]he lay members] know less about the capabilities of the judicial candidates and tend to defer to the lawyers and even more to the judicial members of the commission on that issue."¹⁴⁷ However, certain individual lay members have wielded influence through the strength of their personalities, their political connections, or both.

b. *Voters*

The public also participates in the Missouri Plan through judicial retention elections. Although the public's voice in retention is sometimes described as "meaningless," the election process arguably evokes a certain "answerability" by judges and decreases the likelihood of "federalitis" (a condition attributed to judges appointed for life tenures).¹⁴⁸

Public voter response to the five women circuit judges appointed under the Missouri Plan has been very positive. The women judges generally have received a higher percentage of "yes" votes than their male counterparts.¹⁴⁹ In the 1982 retention elections in the 22nd Circuit, Circuit Judge Anna Forder received a 73.4% affirmative vote.¹⁵⁰ The fourteen men judges who ran for retention in the 22nd Circuit that year averaged

147. Watson, *supra* note 135, at 4. Watson suggests that lay members also may be handicapped because they know little about the role of judges, represent amorphous public interests, and may be politically beholden to the governor who appointed them. *Id.*

148. MISSOURI SENATE REPORT, *supra* note 11, at ii, 12. In the 46 year history of the Plan in Missouri, only one judge (who did not come in under the Plan) has been voted out of office, and even he nearly won, receiving a 46.5% affirmative vote. J. CORSI, *supra* note 18, at 111. Judge Marion D. Waltner, aligned with the Pendergast political machine and opposed by a number of prominent attorneys, received considerable negative press coverage before his retention vote in the early 1940's. Braithwaite, *Removal and Retirement of Judges in Missouri: A Field Study*, 1968 WASH. U.L.Q. 378, 413-14. See *infra* note 174 for a discussion of recent, more aggressive voter participation in retention elections in other states.

149. Associate Circuit Judge Niederlander, although not selected under the Plan, was the first woman judge to run for retention under the Missouri Plan. In the 1980 election, she received 70.0% "yes" votes, the highest percentage of "yes" votes for judges running in the 21st Circuit. Percentages calculated from figures published in the OFFICIAL MANUAL, STATE OF MISSOURI 1281 (1981-1982).

150. Percentages calculated from figures published in the OFFICIAL MANUAL, STATE OF MISSOURI 1336 (1983-1984).

72.4%. In 1984, ten circuit and associate judges ran for retention in the 21st Judicial Circuit election. Circuit Judge Margaret Nolan, in her first bid for retention, received the highest percentage of "yes" votes of all judges, at 73.6%.¹⁵¹ The percentages for the men judges ranged from 68.5% to 70.8%. In the 1984 retention elections for the 22nd Judicial Circuit, voters gave Circuit Judges Evelyn Baker and Jean Hamilton 77.5% and 76.2% "yes" votes, respectively.¹⁵² The two women received the highest pro-retention percentages of the nine judges in the 22nd Circuit who ran for retention that year. The seven men judges received percentages ranging from 71.0% to 75.8%. Circuit Judge Edith Messina stood for retention for the first time in November 1986; she garnered the highest percentage of "yes" votes of all judges at 71.8%.¹⁵³

4. *The Chief Executive*

The chief executive can influence judicial nominations directly through his lay appointees or indirectly through his connections with the judges and lawyer members. The degree of gubernatorial involvement in the application and nomination stages, sometimes referred to as "pre-selection,"¹⁵⁴ usually correlates with the executive's political or philosophical views about the judiciary, or both.

Watson and Downing suggest that most governors use judicial appointments as rewards and have no inhibitions about attempting to get their political supporters nominated.¹⁵⁵ Watson cites, as a recent example, the current governor's first appointment to the Missouri Supreme Court.¹⁵⁶ He submits no direct evidence of gubernatorial intervention, but notes that the Appellate Nominating Commission included the governor's thirty-three year-old chief of staff and former deputy Attorney General in the panel of three names. The governor selected this nominee over two experienced appellate judges. Watson and Downing cite two

151. Percentages calculated from figures published in the OFFICIAL MANUAL, STATE OF MISSOURI 1297 (1985-86).

152. *Id.*

153. Percentages calculated from 1986 General Election figures provided by the Missouri Secretary of State's Office (on file with the author).

154. McMillian, *Selection of State Court Judges*, 40 SW. L.J. 9, 13 (1986).

155. R. WATSON & R. DOWNING, *supra* note 18, at 187-88. See, Dubois, *State Trial Court Appointments: Does the Governor Make a Difference?*, 69 JUDICATURE 20 (1985) (author's study of interim appointments of recent California governors shows a preference for individuals who share the governor's partisan and ideological disposition).

156. See Watson, *supra* note 135, at 4; see also McMillian, *supra* note 154, at 13.

governors, Forrest Donnell and Phil Donnelly, who thought it was unethical to pressure the nominating commissions.¹⁵⁷

The variation in the numbers and percentages of women selected under the past six Missouri governors and the past five presidents, reflected in Tables 10 and 11, suggests that the attitude of the chief executive may affect women's access to the judiciary. While the pool of women lawyers has increased steadily since 1960,¹⁵⁸ the number and percentage of women lawyers selected for the Missouri and federal judiciaries has fluctuated.¹⁵⁹ Although the impact of the chief executive's attitude cannot be proved definitively by the data, the explicit affirmative efforts by Governor Christopher Bond and President Jimmy Carter to recruit women applicants correlate with increased numbers of women judicial appointees during their tenures.

Missouri Governor Warren Hearnes appointed one woman to the state judiciary during his first term from 1965 to 1968, or 1.4% of his appointments.¹⁶⁰ During his second term, from 1969 to 1972, he appointed three women for 3.7% of his appointments.¹⁶¹ Governor Bond appointed six women in each of his two terms from 1973 to 1976 and from 1981 to 1984, or 7.6% and 10.7% of his judicial selections, respectively.¹⁶² The intervening governor, Joseph Teasdale, selected only two women between 1977 and 1980, or 3.3%.¹⁶³ Bond's successor, Governor John Ashcroft, has selected no women for the nineteen judicial appointments made during his first two years in office, 1985 and 1986.¹⁶⁴ No women have been nominated for the ten Missouri Plan positions to date during Ashcroft's tenure, nor has Ashcroft appointed any women for the nine interim appointments.

President Lyndon Johnson appointed three women to the federal judiciary, or 1.8% of his appointments; President Richard Nixon appointed one, or 0.4%; and President Gerald Ford appointed one, or 1.5%.¹⁶⁵ In

157. R. WATSON & R. DOWNING, *supra* note 18, at 187.

158. *See supra* note 45.

159. *See infra* Tables 10 and 11.

160. *See infra* Table 10.

161. *Id.*

162. *Id.* In his 1973 State of the State Address to the General Assembly, Governor Bond urged passage of the Equal Rights Amendment and advocated the advancement of women in political, economic, and governmental institutions. Address by Governor Christopher S. Bond, Message to the 77th General Assembly, Mo. S. J. 79, 83 (Jan. 10, 1973).

163. *Id.*

164. *Id.*

165. *See infra* Table 11.

contrast, between 1977 and 1981, President Jimmy Carter named forty women to the bench, 15.5% of his appointments.¹⁶⁶ President Jimmy Carter created merit selection nominating commissions for the federal circuit courts and issued guidelines for district court appointments.¹⁶⁷ In his executive orders, Carter underlined the need for the advisory panels to affirmatively recruit well-qualified women as potential nominees. President Reagan rescinded the executive orders, disbanded the nominating commissions, and reverted to earlier appointment methods.¹⁶⁸ In his first term of office, from 1981 to 1985, Reagan appointed only fourteen women judges, or 8.4% of his appointments.¹⁶⁹

TABLE 10: JUDICIAL APPOINTMENTS OF RECENT MISSOURI GOVERNORS

Governor Warren Hearnes (Jan. 1, 1965 - Dec. 31, 1968)			
Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	2	0	0
Appeals	4	0	0
Circuit	19	0	0
Interim*	<u>45</u>	<u>1</u> (Stewart)	<u>0</u>
	70	1 = 1.4%	0 = 0.0%

*Interim appointments made by governor to fill newly created judgeships or mid-term vacancies caused by death, retirement, or resignation of a sitting judge.

Governor Warren Hearnes (Jan. 1, 1969 - Dec. 31, 1972)			
Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	2	0	0
Appeals	14	0	1 (McMillian)
Circuit	23	0	1 (Tillman)
Interim*	<u>43</u>	<u>3</u> (Sadler, Otten, Pinell)	<u>0</u>
	82	3 = 3.7%	2 = 2.4%

166. *Id.*; *Election v. Appointment: Who Wins?*, *supra* note 52, at 8, col. 4.

167. Exec. Order No. 12,059, 3 C.F.R. § 180 (1978) (*reprinted in* 28 U.S.C. § 44 at 6 (Supp. 1981)); Exec. Order No. 12,097, 3 C.F.R. § 254 (1978) (*reprinted in* 28 U.S.C. § 133 at 71-72 (1982)).

168. Pike, *The Court-Packing Plans*, Nat'l. L.J. (Aug. 29, 1983) at 1, col. 1.

169. See *infra* Table 11; *Election v. Appointment: Who Wins?*, *supra* note 52, at 8, col. 4. Carter named 37 Black federal judges to the bench, or 14.3% of his appointments, while Reagan appointed two in his first term, or 1.2%. *Id.*

Governor Christopher Bond (Jan. 1, 1973 - Dec. 31, 1976)

Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	1	0	0
Appeals	5	0	0
Circuit	21	0	1 (Cahill)
Interim*	<u>52</u>	6 (Palmer, Maness, Lame, Schnebelen, Roper, Williams)	<u>0</u>
	79	6 = 7.6%	1 = 1.3%

Governor Joseph Teasdale (Jan. 1, 1977 - Dec. 31, 1980)

Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	3	0	0
Appeals	14	0	0
Circuit and Assoc. Circuit	18	1 (Forder)	1 (Gaitan)
Interim*	<u>26</u>	1 (Niederlander)	<u>0</u>
	61	2 = 3.3%	1 = 1.6%

Governor Christopher Bond (Jan. 1, 1981 - Dec. 31, 1984)

Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	3	0	0
Appeals	7	0	0
Circuit and Assoc. Circuit	21	4** (Noland, Hamilton Baker, Messina)	2 (Baker, Shaw)
Interim*	<u>25</u>	2 (Breckenridge, Dikerson)	<u>0</u>
	56	6 = 10.7%	2 = 3.6%

**Includes one Black woman

Governor John Ashcroft (Jan. 1, 1985 - Nov. 1, 1986)

Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	1	0	0
Appeals	2	0	1 (Gaitan)
Circuit and Assoc. Circuit	7	0	1 (Autrey)
Interim*	<u>9</u>	0	<u>0</u>
	19	0 = 0.0%	2 = 10.5%

SOURCE: These figures were compiled by reviewing all judicial appointment letters since January 1, 1965, supplied by Paul D. Block, Director, Campaign Reporting Division, Office of Secretary of State; Missouri Retired Judges (June 1, 1986) and Seniority List - Missouri State Judges (Sept. 8, 1986) (unpublished reports, supplied by Judy Tripp, Missouri State Courts Administrator's Office); and Appellate Judicial Commission Panels Submitted to Governors, 1975 — Present (Oct. 7, 1985) (unpublished report, supplied by Bill L. Thompson, Staff Counsel, Clerk of the Supreme Court). The number of Black judges is included in the hope the information will be useful to future researchers; it is not readily available from other sources.

TABLE 11: JUDICIAL APPOINTMENTS OF RECENT U.S. PRESIDENTS

President Lyndon B. Johnson, (1963-1968)			
Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	3	0	1
Appeals	40	1	2
District	<u>122</u>	<u>2*</u>	<u>5</u>
	165	3 = 1.8%	8 = 4.8%
*Includes one Black woman			
President Richard M. Nixon, (1969-1972)			
Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	4	0	0
Appeals	45	0	0
District	<u>179</u>	<u>1</u>	<u>6</u>
	228	1 = 0.4%	6 = 2.6%
President Gerald R. Ford, (1973-1976)			
Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	1	0	0
Appeals	12	0	0
District	<u>52</u>	<u>1</u>	<u>3</u>
	65	1 = 1.5%	3 = 4.6%
President Jimmy Carter, (1977-1980)			
Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	0	0	0
Appeals	56	11*	9
District	<u>202</u>	<u>29**</u>	<u>28</u>
	258	40 = 15.5%	37 = 14.3%
*Includes one Black woman			
**Includes six Black women			
President Ronald Reagan, (1981-1984)			
Court	Number of Judges	Number of Women Judges	Number of Black Judges
Supreme	1	1	0
Appeals	36	1	1
District	<u>130</u>	<u>12</u>	<u>1</u>
	167	14 = 8.4%	2 = 1.2%

SOURCE: FUND FOR MODERN COURTS, THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 22-24 (1985). The number of Black judges appointed is included in the hope the information will be useful to future researchers; it is not readily available from other sources.

This evaluation of the parties in the Missouri Plan shows that women

have participated only minimally in the operation of the Plan and, as yet, have never held the more powerful roles of chief executive, lawyer, or judicial members. Women's chances of garnering positions on the nominating commissions and on the bench should improve if women lawyers advance in the traditional bar associations, if women's bar associations grow in influence, if women lay members and voters are assertive, and if women increase their presence in elected political office. Given the current scenario, the male orientation of the nomination and appointment process may perpetuate that of the judiciary. According to one commentator,

The more women on the nominating commissions reporting names to the governor, the more likely are women to appear on the lists. Where judges choose other judges, the presence of other women on the higher courts helps to put women on the lower courts. . . . When a woman has the power of appointment, the chances of female candidates improve, simply because they are more likely to be found within the appointer's network.¹⁷⁰

C. *The Politics of the Missouri Plan*

Politics pervades the selection of judges under the Missouri Plan and the partisan election plan it was designed to replace. Rather than removing politics from the judicial selection process, the Missouri Plan simply rebalances the political interests of the bar, the bench, the governor, political parties, and the voters.¹⁷¹ Watson and Downing suggest that lawyer members are elected essentially within a "competitive 'two party system,' " in which the "parties" are rival bar associations, representing distinct professional status groups and broader socioeconomic and political interests.¹⁷² Their data showed that lay members are frequently drawn from the business community and tend to reflect the attitudes of lawyers with whom they are associated, those representing business interests.¹⁷³ The gubernatorial selection of lay members and judges more often than not reflects the partisan politics of the governing party. Judicial members of the commissions, who have worked their way through the system, may foster their political biases through their influence on the nominating commissions.

The principal merit of the Missouri Plan is that it promotes judicial

170. Cook, *Women on the State Bench*, *supra* note 58, at 209.

171. R. WATSON & R. DOWNING, *supra* note 18, at 42.

172. *Id.*

173. *Id.* at 338.

integrity and independence by removing politics from the "post-selection" stage. In contrast to elected judges, judges selected under the Plan are less beholden to the interests of the electorate or political parties to remain in office.¹⁷⁴ The controversy that concerns the public, the legal community, and potential candidates is whether the Plan sufficiently removes politics from the "pre-selection" stage and adequately focuses on nonpartisan, merit qualifications.

Although control of judges by machine politics, such as occurred in the 1930's, is highly unlikely today, the threat of excessive political intervention still hovers over the Missouri Plan. Last year, allegations of impropriety against the judicial member of the appellate nominating commission regarding three Supreme Court nominations prompted investigations by the Missouri Bar and the Missouri Senate.¹⁷⁵ Witnesses testified to widespread "closed door" politicking by candidates, commissioners, the governor's office, and political party officials. For example, the former Chairman of the Missouri Republican Party, John Powell, testified before the Senate Committee that he had extensive contact with commissioners during the "pre-selection" phase; he unequivocally stated: "I feel that my involvement in gubernatorial selections was a duty of my position as State Chairman."¹⁷⁶

The Missouri Bar and the Missouri Senate endorsed continuation of the Missouri Plan, but both suggested changes to minimize political intervention at the "pre-selection" phase. The Senate Committee criticized the bench and bar for failing to meet their responsibilities under the Plan by accepting as a matter of course excessive "pre-selection" politicking of and by the commissioners and the governor.¹⁷⁷ The Committee also suggested that the influence of the lay members in the nomination process "was undercut by erratic selection procedures and inadequate education."¹⁷⁸

174. In recent years, conservative law-and-order coalitions have committed huge amounts of money to, and generated considerable voter turnout for, retention elections. In the 1986 general election, California Chief Justice Rose Bird and two other liberal supreme court jurists were defeated in their bids for retention, allegedly due to voter dissatisfaction with the judges' anti-death penalty decisions. A similar campaign was waged against Bird in 1978 and Oregon Supreme Court Justice Hans Linde in 1984. The anti-Bird campaign is becoming a model for campaigns against liberal judges in other states. *St. Petersburg Times*, Nov. 2, 1986, at 17A, col. 2-4; *St. Petersburg Times*, Nov. 5, 1986, at 3-5.

175. See MISSOURI SENATE REPORT AND MISSOURI BAR REPORT, *supra* note 11.

176. Statement by John Powell to the Missouri Senate (Sept. 17, 1985) (on file with the author).

177. MISSOURI SENATE REPORT, *supra* note 11, at i-ii.

178. *Id.* at ii.

The Missouri Bar Committee, composed of six lawyers and three lay persons, including two women members, undertook an intensive study of the Plan: they also addressed the need to improve the performance of the participants and proposed several changes in Missouri Supreme Court Rule 10 to improve the effectiveness of the Plan.¹⁷⁹ The Committee specifically cited the small number of women elected or appointed to the judicial nominating commissions, nominated on panels, or appointed to the bench. The Committee suggested that women "are available for judicial appointment and are an important resource that should be utilized," and concluded that "the governor should give more consideration to the appointment of women and minorities as lay members of the commissions and as judges."¹⁸⁰ To date, the Missouri Supreme Court has not adopted any of the Commission's proposed rule changes, but has distributed copies of the report to judicial commission members.¹⁸¹

Judicial selection under the Missouri Plan will always involve a degree of politics. However, when widespread "closed door" politicking for the judiciary is the norm, particularly in the early stages of the process, "nonpartisan, merit selection" is reduced to a test of political influence and lobbying skills.¹⁸² Many qualified lawyers do not apply or advance because they are unwilling or unable to engage in extensive electioneering for judgeships. Women and other political minorities are particularly disadvantaged in this climate.¹⁸³

179. MISSOURI BAR REPORT, *supra* note 11, at 15-23. The Committee conducted public hearings and research during a five-month period in 1985 and submitted an extensive report to the Missouri Bar and the Missouri Supreme Court in January 1986. The Committee framed its suggestions as proposed revisions to Missouri Supreme Court Rule 10, rather than to the Missouri Constitution. The Committee subsequently drafted a manual for judicial commissioners.

180. *Id.* at 9, 14. The Missouri Bar Report does not address the failure of the bar to elect women as lawyer-members of the nominating commissions.

181. St. Louis Post Dispatch, Oct. 22, 1986, at 5A, col. 6.

182. MISSOURI SENATE REPORT, *supra* note 11, at ii.

183. Although women constitute the majority of the population, they hold a minority of the elective political offices. *See supra* note 115. It is possible that the past appointments of women to the judiciary were "politically" motivated. But the degree to which women "politically" influence their selection to the bench does not appear comparable to that of their male counterparts. As indicated earlier, the percentage of women lawyers selected under the Missouri Plan, 3.5%, is substantially below the national average of merit-selected women judges, 9.5%. *See supra* Table 3. The percentage of Black judges selected under the Missouri Plan, 1.8%, is also well below the national average of merit-selected Black judges, 4.5%. THE SUCCESS OF WOMEN AND MINORITIES ACHIEVING JUDICIAL OFFICE, *supra* note 2, at 28, 49.

VI. IMPROVING THE OPERATION OF THE MISSOURI PLAN

The limited success of women in becoming judges under the Missouri Plan to date may, in and of itself, have a chilling effect on the number of women lawyers applying for judgeships, and therefore the number eligible to receive nominations and appointments. Reforms in the operation of the Plan that enhance its nonpartisan, objective operation and image would heighten women's confidence in the system. Increasing women's confidence in the system might result in increased applications and re-applications after initial rejections. The following actions would diminish the possibility of wrongful discrimination in the selection process and concomitantly enhance public trust in the Missouri Plan and the judiciary:¹⁸⁴

- a. Broader advertisement of lawyer openings on the judicial commissions and on the judiciary to increase awareness among lawyers about the nomination and selection process, and to increase applications;¹⁸⁵
- b. Articulated standards for evaluating judicial candidates to increase the emphasis on merit and ability;¹⁸⁶
- c. Education and training for commission members, such as that provided by the American Judicature Society, to enhance their expertise in interview-

184. Since its inception in 1913, the American Judicature Society has focused considerable attention on developing and improving the judicial merit selection process, through their educational Institutes for Judicial Nominating Commissioners and many educational publications. See, e.g., M. GREENSTEIN, *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS* (1984); L. BERKSON & S. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980). Both of these texts provide detailed suggestions, procedures, rules, and forms. The Missouri Bar Special Committee relied heavily on the Society's *HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS* in drafting its proposed Missouri handbook.

185. See generally M. GREENSTEIN, *supra* note 184, at 37-53; MISSOURI BAR REPORT, *supra* note 11, at 9-17.

186. The American Judicature Society has identified criteria for judicial candidates, including measures for specifically evaluating each criterion: 1) qualities for all judges: suitable age, good health, impartiality, industry, integrity, professional skills, community contacts, and social awareness; 2) additional qualities for appellate judges: collegiality and writing ability; 3) additional qualities for trial judges: decisiveness, judicial temperament, and speaking ability; and 4) additional qualities for supervisory judges: administrative ability and interpersonal skills. M. GREENSTEIN, *supra* note 184, at 58, 67-82.

President Jimmy Carter articulated criteria for district court judges by executive order. See *Standards for Evaluating Proposed [U.S. District Judge] Nominees*, set out in Exec. Order No. 12,097, 3 C.F.R. § 254 (1978) (reprinted in 28 U.S.C. § 133 at 71-72 (1982)):

- 1-201. The standards to be used in determining whether a person is qualified to serve as a district judge are whether that person:
- (a)
 - (b) Possesses, and has a reputation for, integrity, good character, and common sense;
 - (c) Is, and has a reputation for being, fair, experienced, even-tempered and free of biases against any class of citizens or any religious or racial group;

ing and assessing candidates;¹⁸⁷

d. Uniform interviewing, screening, and voting procedures for the commissions to make the selection process more efficient and just;¹⁸⁸

e. Administrative rules barring commissioners from receiving communications directly, or indirectly, from the governor, and requiring commissioners to record and circulate all written and oral communications about candidates to reduce "closed door" politicking;¹⁸⁹ and

f. Rules of ethics for commissioners to establish standards for conduct and to increase public respect for the Missouri Plan and the judiciary.¹⁹⁰

In addition to the above suggestions, three changes in the working philosophy are necessary to address the gender imbalance. First, the nominating commissions must openly reaffirm that judicial ability, not political loyalty, is the dominant qualification for the judiciary. Second, the governor, on behalf of the State, must articulate an affirmative policy to recruit qualified women for the nominating commissions and for the judiciary.¹⁹¹ And third, the Missouri Bar and other bar associations must acknowledge the deficiencies in the current operation of the plan and initiate an investigation into specific reforms to ensure fairer access to the judiciary.¹⁹²

(d) Is of sound physical and mental health;

(e) Possesses and has demonstrated commitment to equal justice under law;

(f) Possesses and has demonstrated outstanding legal ability and competence, as evidenced by substantial legal experience, ability to deal with complex legal problems, aptitude for legal scholarship and writing, and familiarity with courts and their processes;

(g) Has the ability and the willingness to manage complicated pretrial and trial proceedings, including the ability to weigh conflicting testimony and make factual determinations, and to communicate skillfully with jurors and witnesses.

187. See generally M. GREENSTEIN, *supra* note 184; MISSOURI BAR at 15-17, 21; MISSOURI SENATE REPORT, *supra* note 11, at 16-17; Watson, *supra* note 132, at 6.

188. See generally M. GREENSTEIN, *supra* note 184, at 57-126; MISSOURI BAR REPORT, *supra* note 11, at 17-18, 20; MISSOURI SENATE REPORT, *supra* note 11, at 16-17.

189. See generally MISSOURI BAR REPORT, *supra* note 11, at 1920; McMillian, *supra* note 154, at 12.

190. See MO. SUP. CT. R. 2, Canon 4D (ethics rule for judges, including judicial members of the commissions). See generally M. GREENSTEIN, *supra* note 184, at 127-36; MISSOURI BAR REPORT, *supra* note 11, at 18-19.

191. See Slotnick, *Gender, Affirmative Action, and Recruitment to the Federal Bench*, 14 GOLDEN GATE U. L. REV. 519 (1984) (author analyzes the positive impact of President Carter's executive order mandating recruitment of applicants from all qualified segments of the bar); Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 JUDICATURE 488 (1979).

192. Although the Missouri Bar Special Committee acknowledged the paucity of women commissioners and judges and urged the governor to appoint more women, it proposed no structural reform to address the issue. Some commentators suggest that structural reform is necessary. See, e.g., Davidow, *supra* note 3, at 434-49 (suggests the use of proportional representation in the selection of some members of the nominating commissions and selection by lot); Note, *supra* note 3, at 304-13.

VII. CONCLUSION

“Merit selection” of judges as a goal is hardly debatable, but how best to accomplish it is a far more complicated issue. The method utilized must balance the interests of judicial independence and public accountability; it must attract and advance the most qualified members of the bar—including women. Efforts to reform the Missouri Plan should address its effect on women’s ability to achieve judicial office, particularly on the appellate bench.¹⁹³ The employer’s objective in any hiring process should be to recruit and select the most qualified applicants. In the case of the State’s hiring of the judiciary, this objective is also a moral obligation.¹⁹⁴

Missouri’s pioneering effort in the development of the nonpartisan, merit selection method fostered a new perspective on the selection of judges in this country. Inherent in this nonpartisan, merit philosophy are expectations that judicial candidates will be chosen on the basis of integrity, intellect, wisdom, and commitment—and that the selection process will provide equal opportunity. To ensure the highest quality judiciary possible, Missouri must renew its historical commitment to “merit selection” and assume a leadership role in reforming operation of the Missouri Plan.

193. It is estimated that women lawyers, the pool of available judges, will constitute one-third of all lawyers by the year 2000. Fossum, *supra* note 45, at 582. In the next 15 years, 70 or more Missouri Plan judicial vacancies are likely to result from retirement, including six of the seven positions on the Supreme Court and 23 of the 32 positions on the Court of Appeals. This estimate is based on a retirement age of 70 for incumbent Missouri Plan judges. See MO. CONST. art. V, § 26. A survey of judicial biographies reveals that in the remainder of the present governor’s term, there will be at least one scheduled opening in each of the three districts of the Missouri Court of Appeals if each incumbent retires at age 70. During the next gubernatorial term, five of the seven Missouri Supreme Court positions will be vacated if each incumbent retires at age 70. OFFICIAL MANUAL, STATE OF MISSOURI 189-212, 215-46 (1985-1986). Whether the Age Discrimination in Employment Act of 1967, amended in 1986 to eliminate mandatory age requirements, covers or exempts Missouri Plan judges has not been litigated. 29 U.S.C. §§ 621-34 (1982, amended by Publ L. No. 99.592, — Stat. — (Oct. 31, 1986).

194. In a recent communication to the U.S. Senate Judiciary Committee, Professors Philip Kurland and Lawrence Tribe urged Senators to set a “higher standard” for judges than for other appointees. Kurland & Tribe, *The Burden of Advice and Consent: Review of Federal Judicial Nominees Demands Great Care*, L.A. Daily J., June 13, 1986, at 4, col. 3-6 (reproduces a letter sent to the Senate Judiciary Committee by Philip B. Kurland, the William R. Kenan Distinguished Service Professor at the University of Chicago and Lawrence H. Tribe, the Ralph S. Tyler, Jr. Professor of Constitutional Law at Harvard University); Wermiel, *Senate Judiciary Panel Democrats Begin a Push to Toughen Standards for Selecting U.S. Judges*, Wall St. J., June 9, 1986, at 40, col. 1.

WASHINGTON UNIVERSITY LAW QUARTERLY

VOLUME 64

NUMBER 3

1986

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