JUDICIAL SELECTION AS IT RELATES TO GENDER EQUALITY ON THE BENCH

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I. INTRODUCTION

Within the next twenty-five years, women will achieve equality. Today, and for the first time in America's history, there is a woman as the Speaker of the House of Representatives.[1] Today's news is filled with stories and polls regarding the possibility of a woman running for President in 2008.[2] In addition, the number of women executives is increasing, as is the number of female doctors, lawyers, physicists, architects, and engineers.[3] Right now, women represent fifty percent of most medical school and law school classes and more than one third of all MBA graduates are women.[4]

However, equality is not here yet. The judiciary in America has not come close to anything resembling gender equality. For example, the United States Supreme Court is currently comprised of eight men and just one woman. This is an insignificant percentage in comparison to the overall demographics of America and this number is even more appalling given the number of female lawyers, which comprises the pool of potential justices. The Supreme Court and the rest of the federal judiciary are appointed by the President and must be confirmed by the Senate.[5] However, each state is free to choose its own method for selecting its judiciary. The question for the states is: how can gender equality within the judiciary best be attained?

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[1] *See* Kate Zernike, *Nancy Pelosi Is Ready to Be the Voice of the Majority*, N.Y. TIMES, Nov. 11, 2006, at A1.

[2] *See also* Anne E. Kornblut, *Clinton's 2006 Victory Lap Has Futuristic Feel, Like 2008*, N.Y. TIMES, Nov. 11, 2006, at P14.

[3] *See generally* Judith H. Dobrzynski, *Cherchez la Femme*, WALL ST. J., Aug. 4, 2006 at A16.; Arlene S. Ash et al., *Compensation and Advancement of Women in Academic Medicine: Is There Equity?*, 141 ANNALS INTERNAL MED. 205 (2004); Elianne Riska, *Towards Gender Balance: But Will Women Physicians Have an Impact on Medicine?*, 52 SOC. SCI. & MED. 179 (2001).

[4] *See* News-Medical.Net, *Survey finds half of all new medical students are women, available at* http://www.news-medical.net/?id=4455; *see also* Lawschool.com, *Women are Close to Being Majority of Law Students, available at* http://www.lawschool.com/femalemajority.htm; *see also* Washington University in St. Louis, *Female M.B.A. students aim to increase their numbers in b-school and the workplace, available at* http://news-info.wustl.edu/news/page/normal/8083.html.

[5] *See* U.S. Const. art. II, §2.

Many interest groups,[6] legal scholars,[7] and even women's organizations[8] support a merit based or appointment system to ensure gender equality in state courts. The proponents of merit based and appointment methods often claim that more women are selected for the bench via this type of appointment than through judicial elections.[9]

However, the notion that more women are appointed than elected is false. The evidence suggests that the percentage of women being appointed and elected is actually about equal. This Note argues that a merit plan does not ensure greater gender equality and proposes some hypotheses to explain why merit selection has failed to prove a superior selection method with respect to gender equality.

II. BACKGROUND

A. Independence vs. Accountability

The underlying conflict behind the different methods of judicial selection dates back to America's Founding Fathers. On July 4, 1776, the Declaration of Independence was finalized, which listed the many grievances the Americans lodged against the King of England.[10] Specifically, the Americans charged that the King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[11] In England, as well as in the Colonies, the King had absolute control over the appointment and removal of judges, resulting in the King having complete authority over the judiciary.[12]

Having rejected England's method for selecting the judiciary, the Founding Fathers realized creating a new selection process would be no simple task. Two competing ideologies emerged as a response: either the judiciary should be

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[6] *See generally* ABA Standing Comm. on Jud. Independence, *Standards on State Judicial Selection,. available at* http://www.abanet.org/judind/downloads/reformat.pdf ("The ABA has supported and continues to support a merit based appointive system for judicial selection sometimes referred to as 'merit selection.'"). *See also* Common Cause of Pa., Issue Priorities (2006), http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=998811 (last visited Mar. 8, 2006) ("Amending the state constitution to provide for merit selection . . . would improve the caliber of Judges, and produce a better balanced judiciary with regard to minorities, gender and, social background."); Common Cause of R.I., Common Cause of Rhode Island Committees (2006),, http://www.commoncause.org/site/pp.asp?c=dkLNK1MQIwG&b=1287389#Judicial (last visited Mar. 8, 2006).

[7] *See generally* Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 17 (1995) ("[The merit proposal] will actively encourage consideration of the need for diversity on the bench, and thereby lead to significant increases in the number of women and minority judges.").

[8] *See* The League of Women Voters of Pennsylvania, Judiciary (2004), http://pa.lwv.org/issues/judiciary.html (last visited Mar. 8, 2006) ("LWVPA support for a merit appointment system for judges dates back to 1949.").

[9] *See* Webster, *supra* note 7, at 6.

[10] Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 4 (1994).

[11] THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

[12] Goldschmidt, *supra* note 11.

independent from the other branches of government and the public; or the judiciary should be held directly or indirectly accountable to the American people.[13]

Alexander Hamilton believed the judiciary should be independent; independent not only from the encroachment of the legislature or the President, but also from majoritarian influence.[14] Generally, those who support Hamilton's position claim that the judiciary needs to be independent in order for judges to make difficult decisions, decisions that might not be popular, such as desegregation in some states.[15] The rationale underlying this belief is that if judges were accountable to an executive, the legislature, or the voting public, then judges may decide cases merely to appease these groups.[16] Proponents of an independent judiciary also argue that it is equally important that the judiciary be "perceived as independent by society," because, "in our society, the power and authority of the judiciary depend upon the public's continued respect and support for that institution."[17]

Thomas Jefferson believed that the courts must be held accountable to the voting public. Jefferson felt that there must be some check on the power a court could wield.[18] This notion is grounded in the idea that judges do not merely apply the law, but that they must also interpret the laws passed by the legislature. Therefore, the judiciary often functions like the legislative and executive branches. Some advocates that favor judicial accountability even suggest that the judiciary "has more political power than legislators, because they have the ability to thwart the will of the majority."[19] The logical extension of this idea is that if the judiciary makes policy and we live in a representative democracy, then the "lack of

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[13] Keri E. Hieneman, *Women in the Judiciary: Kentucky's Need for Change*, 42 BRANDEIS L.J. 447, 551 (2004).

[14] *See* The Federalist, No. 78 (Alexander Hamilton).

> If then the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit of judges, which must be essential to the faithful performance of so arduous a duty.

Id.

[15] *See* Webster, *supra* note 7, at 4.

[16] *Id.*

[17] *Id.*

[18] *See* Thomas Jefferson on Politics and Government, *available at* http://etext.virginia.edu/jefferson/quotations/jeff1270.htm/

> It is not enough that honest men are appointed judges. All know the influence of interest on the mind of man, and how unconsciously his judgment is warped by that influence. To this bias add that of the esprit de corps, of their peculiar maxim and creed that 'it is the office of a good judge to enlarge his jurisdiction,' and the absence of responsibility, and how can we expect impartial decision between the General government, of which they are themselves so eminent a part, and an individual state from which they have nothing to hope or fear?

[19] Webster, *supra* note 7, at 4.

electoral accountability runs counter to those democratic principles which we hold most dear."[20]

B. History of Selection Methods

With the passage of the Constitution, the debate was settled at the federal level. The Constitution created a system in which judges are appointed by the President, but must be approved by the Senate.[21] Upon confirmation by the Senate, federal judges have life tenure, as long as they act in good behavior.[22]

Amongst the states, each may employ its own method for selecting its judiciary.[23] Initially, each of the thirteen colonies preserved some form of appointment method for selecting the judiciary.[24] However, this was not an absolute power placed in the hands of one political actor, like in England.[25] Seven of the thirteen colonies established a system in which the legislature —either one or both houses—chose the judiciary.[26] Alternatively, in five colonies the governor along with a council selected the judiciary.[27] In Delaware, the governor along with the legislature selected the judiciary.[28] Each new state joining the Union continued using an appointive method to select their judiciary, until Texas in 1849.[29]

In the early 19th Century, states began to rethink judicial selection in response to the rise of Jacksonian Democracy or populism. The roots of Jacksonian Democracy are commonly believed to have begun following the election of 1824, in which Andrew Jackson won the popular vote, but ended up losing the election.[30] As a result, there was a general movement, which "encouraged greater popular

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[20] *Id.*

[21] *See* U.S. Const. art. II, § 2, cl. 2 ("with the Advice and Consent of the Senate . . . ").

[22] *See* U.S. Const. art. III, §1, cl. 1.

[23] *See* U.S. Const. art. III, § 2 cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made . . . . "). *See also* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

[24] *See* Goldschmidt, *supra* note 11, at 5.

[25] *See id.*

[26] *See* Glenn R. Winters, *Selection of Judges – An Historical Introduction*, 44 TEX. L. REV. 1081, 1082 (1966). (The seven states were: Connecticut, Rhode Island, New York, Virginia, North Carolina, South Carolina and Georgia.)

[27] *Id.* (The five states were: New Hampshire, Massachusetts, New Jersey, Pennsylvania and Maryland.)

[28] *Id.*

[29] *Id.* ("The 1845 Texas Constitution provided for appointment of all judges by the Governor and confirmation by the State Senate.")

[30] Hieneman, *supra* note 14, at 452 (The 1824 election featured four candidates John Quincy Adams, Henry Clay, William H. Crawford and Andrew Jackson. Jackson swept the popular vote, but did not have enough electoral votes to win the election. Therefore the election was to be decided by the House of Representatives. Adams and Clay felt that Jackson was a country bumpkin and wanted to prevent him from becoming President. Clay at the time was Speaker of the House and threw his political support behind Adams, guaranteeing a victory for Adams. When Adams became President, he appointed Clay as Secretary of State, in what appeared to be a payoff for helping him secure the election.)

control of the government."[31] In addition to the controversy surrounding the Presidential election there was a growing sentiment that judges were merely the pawns of the wealthy and could easily be bribed.[32] One of the consequences of the Jacksonian Democracy movement and the negative view of the judiciary was the shift from an appointment scheme for selecting judges to popular elections. The first state to implement statewide judicial elections was Mississippi in 1832.[33] Within the next twenty-eight years, twenty-four of the thirty-four states in the Union held partisan elections to select their judiciary.[34]

However, it did not take long before there was widespread frustration with the political abuses that were permeating judicial elections.[35] The rise in abuses correlated to the increased power of political parties in the late 19th and early 20th centuries. During this time period arose the political machines, such as Tammany Hall in New York City, which dominated local politics.[36] Tammany Hall had such a strangle-hold on New York City politics that it was said that they were able to hand-pick judges that were "politically-responsive."[37] The initial backlash prompted the return of the appointment method in some states.[38] Whereas other states placed the blame for the failure of elections on the increased power of political parties and, therefore, decided to hold nonpartisan elections to select their judiciary.[39]

While many states were reverting back to the appointment method and others were trying to mend the election process, the foundation for a new selection method was being established.[40] In 1906, University of Nebraska professor Roscoe Pound delivered a speech, entitled "The Causes of Popular Dissatisfaction with the Administration of Justice," to the American Bar Association.[41] In his speech Professor Pound stated that "[p]utting courts into politics and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench."[42] Shortly thereafter, Professor Pound, along with John H. Wigmore, Herbert Harley and others, founded the American Judicature Society

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31 *See id.*

32 *See id.*

33 *See* Winters, *supra* note 27, at 1082 (Actually, the first state to have judicial elections was Georgia in 1812, however, only lower court judges were elected.).

34 *See* Hieneman, *supra* note 14, at 452.

35 *See* Goldschmidt, *supra* note 11, at 6.

36 Winters, supra note 27, at 1083 ("In the 1860's, the Tammany Hall organization in New York City seized control of the elected judiciary and aroused public indignation by ousting able judges and putting in incompetent ones.").

37 John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 841 (1990).

38 *See id.* (Virginia, Vermont and Mississippi to returned to selection methods previously used.)

39 *See id.* ("The nonpartisan-ballot system gained its greatest acceptance around the turn of the century in the states of the Northwest, from Ohio and Michigan to the Pacific coast, but it was also adopted in others such as Arizona and Tennessee.").

40 *See id.*

41 *Id.*

42 Goldschmidt, *supra* note 11 at 6, *quoting* Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 748 (1906).

[hereafter AJS].[43]

Albert M. Kales, a colleague of John H. Wigmore at Northwestern University was, in addition to being a founder of AJS, also its director of research.[44] Kales wanted to create a new method of judicial selection that combined the advantages of both election and appointment, while simultaneously limiting their weaknesses.[45] Kales' system or merit plan[46] was immediately adopted by the AJS and consisted of three elements: appointment, election, and a non-political nominating commission.[47] The plan called for judicial vacancies to be filled:

> [T]hrough appointment by a high elected official from a list of names submitted by the commission, which would have an affirmative responsibility to seek out the best available judicial talent. The judges nominated and appointed would thereafter go before the voters, without competing candidates, on the sole question of their retention in office.[48]

If a judge were to not be retained, the formal process would start again, with the commission nominating candidates followed by an appointment by the designated elected official.[49] In 1926, a British political scientist, Harold Laski, proposed minor changes to Kales' plan—one such change was that the governor, rather than the chief justice of the state supreme court, should appoint judges from the commission's list.[50]

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[43] *See* Winters, *supra* note 27, at 1083. *See also* Am. Judicature Soc'y, About Us, http://www.ajs.org/ajs/ajs_about.asp (last visited Feb. 6, 2007).

> The American Judicature Society (AJS), founded in 1913, is an independent, national, nonpartisan organization of judges, lawyers, and other members of the public who seek to improve the justice system. AJS, which brings a public perspective to justice system issues, has the mission to secure and promote an independent and qualified judiciary and fair system of justice.

Id.

[44] Winters, *supra* note 27, at 1084.

[45] *Id.*

> [Kales] saw the strength of the appointive system in its pinpointing of responsibility for the selections and in the opportunity it offered for intelligent appraisal of the candidate's qualifications, in contrast to the usual unfamiliarity of the voter with the requirements of the office and the extent to which the candidates met them. Kales viewed the latter as the chief weakness of the elective system, along with the preeminence election naturally gave to political rather than judicial qualifications, a fault to be found also, however, under a political appointive system. He felt that there was some merit in the desire of the people to keep in their own hands as much control over their government as possible, and he saw a positive benefit in the reminder to the elected judge that he is the people's servant and not their master.

Id.

[46] *Id.* at 1085 ("Nebraska coined the term 'merit plan.'").

[47] *Id.* (The Kales plan was first published in 1914.).

[48] *Id.*

[49] *Id.*

[50] *See* Roll, *supra* note 38, at 843. (The other change Laski suggested dealt with the make up of the advisory committee—Laski suggested that the advisory committee, "consist of a judge or judges from the state supreme court, the attorney general, and the president of the state bar association.")

In 1937, the American Bar Association endorsed the merit plan,[51] thus giving it greater legitimacy.[52] Shortly thereafter in 1940, Missouri voters adopted the merit plan for, "its appellate courts, the circuit and probate courts of St. Louis City, and Jackson County, and the St. Louis courts of criminal correction."[53] Since Missouri's adoption of the plan, the merit plan has been commonly referred to as the "Missouri Plan."[54] Several years later, Alaska became the first state to adopt a statewide merit plan when it joined the Union in 1959,[55] and Florida and Colorado became the first states to apply the merit plan.[56]

C. Selection Methods in the States Today

Even today, there is no apparent consensus on the best method for selecting a state's judiciary. There are four methods for judicial selection still being used: appointment, merit plan, partisan elections, and nonpartisan elections.[57] In addition, some states are experimenting by mixing and matching the various selection methods amongst different levels of the state's judiciary.

Merit Selection Through Nominating Committee	**Appointment (Legislative and Gubernatorial)**	**Partisan Election**	**Nonpartisan Election**	**Combined Merit Selection and Other Methods**
Alaska	California (G)	Alabama	Arkansas	Arizona
Colorado	Maine (G)	Illinois	Georgia	Florida
Connecticut	New Hampshire (G)	Louisiana	Idaho	Indiana
Delaware	New Jersey (L)	Michigan	Kentucky	Kansas
District of	South Carolina	Ohio	Minnesota	Missouri

[51] *See* Goldschmidt, *supra* note 11, at 9-10. The ABA proposed:

(a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office. (b) If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested. (c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?

Id.

[52] *See id.*

[53] *Id.* at 10.

[54] Winters, supra note 27, at 1084.

[55] *See* Goldschmidt, *supra* note 11, at 10.

[56] *See* Winters, *supra* note 27, at 1086. (The first minor courts were, "the Metropolitan Court, a court of limited jurisdiction in Dade County (Miami), Florida, and the Denver County Court.").

[57] *See* ALLEN D. SOBEL, JUDICIAL SELECTION IN THE STATES - APPELLATE AND GENERAL JURISDICTION COURTS (2004), http://www.ajs.org/js/JudicialSelectionCharts.pdf/ (last visited Mar. 6, 2006).

Columbia	(L)			
Hawaii	Virginia (L)	Pennsylvania	Mississippi	New York
Iowa		Texas	Montana	Oklahoma
Maryland		West Virginia	Nevada	South Dakota
Massachusetts			North Carolina	Tennessee
Nebraska			North Dakota	
New Hampshire			Oregon	
New Mexico			Washington	
Rhode Island			Wisconsin	
South Carolina				
Utah				
Vermont				
Wyoming				

*The following nine states use merit plans only to fill midterm vacancies on some or all levels of court: Alabama, Georgia, Idaho, Kentucky, Minnesota, Montana, Nevada, North Dakota and Wisconsin.[58]

III. THE SELECTION METHODS

A. Appointment

Proponents of the appointment method of selection argue that it is the most effective way to "ensure the independence of judges."[59] This is "because it insulates judges from periodically having to submit themselves—and their sometimes controversial decisions—to the electorate for approval."[60] The fear is that judges will be voted out of office for upholding the law, because in making the correct legal decision they may alienate the public.

Supporters of the appointive selection method believe that better judges will reach the bench through the appointment process rather than through elections, because voters usually have no means by which to evaluate judicial candidates.[61] Voters are therefore likely to base their decisions merely upon party, ethnicity, or another irrelevant consideration.[62] Thus, advocates of an appointive method of

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[58] *Id.* (Within the appointment system there are three states in which the governor appoints the judiciary: Maine, New Jersey and New Hampshire. There are two states in which the legislature appoints the judiciary: Virginia and South Carolina.)

[59] Webster, *supra* note 7, at 13.

[60] *Id*

[61] *Id.*

[62] *Id.* at 14-15.

selection believe "it makes more sense to place responsibility for such matters in the hands of an individual or group possessing adequate knowledge and understanding."[63]

Proponents contend that there is some accountability in an appointment system, because the appointing authority, whether it be the governor or legislature, are subject to the will of the people.[64] Advocates also claim that an appointment system will ensure that more minorities and women will reach the bench.[65] This is because "candidates are chosen based on their qualifications and merit, and not simply who can raise the most campaign funds."[66] In addition, supporters argue that the appointment method of selection does not slip into the nastiness that is inherently a part of contested elections.[67]

While the appointed system is the most effective at ensuring independence, "not everyone is an ardent supporter of a system in which judges, for all practical purposes, free of all constraints upon their actions."[68] This is because, while judges in the appointment system have the independence to decide cases and not fear retribution from the public, there is no guarantee that they will make the "right" or "justified" decision.[69] Once a judge is confirmed in an appointment state, barring bad behavior and an impeachment hearing, there is no other check on the judge.[70] Therefore, "[i]n return for true independence, one must face the rather substantial risk that judges will pursue personal agendas, either political or otherwise, which are at odds with their responsibilities."[71]

There is also no way to evaluate what makes a "good" judge or whether "better" judges are appointed or elected. While, numerous studies have revealed that many voters do not possess "the knowledge required for the intelligent selection of judges."[72] There is really no way of knowing whether governors or legislators possess this knowledge either.[73] While judicial elections are for the most part inundated with political overtones, there is no way of denying the grasp partisan politics has on the appointment process.[74] Whether the appointment decision is in the hands of the governor or legislature is irrelevant, the party in power is for the most part going to choose party loyalists to fill judicial

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63 *Id.* at 14.

64 *Id.*

65 Webster, *supra* note 7, at 15.

66 Hieneman, *supra* note 14, at 453.

67 *See generally* Webster, *supra* note 7.

68 *Id.* at 14.

69 *Id.*

70 *Id.* at 14-15.

71 *Id.*

72 *Id.* at 16. *See also* Marie Hojnacki & Lawrence Baum, *Choosing Judicial Candidates: How Voters Explain Their Decisions*, 75 JUDICATURE 300 (1992); Nicholas P. Lovrich et al., *Citizen Knowledge and Voting in Judicial Elections*, 73 JUDICATURE 28, 28-29 (1989).

73 Webster, *supra* note 5, at 15-16.

74 *Id.* at 16.

vacancies.[75]

B. Partisan Elections

Whereas the appointment method of selection champions independence, partisan elections lie at the opposite end of the "independence/accountability spectrum."[76] Proponents of partisan elections often claim that elections are the only means by which to ensure accountability of the judiciary.[77] Compelling judges to go before the electorate, proponents say, is the most effective way to protect the will of the people and rid the judicial system of "bad" judges.[78] Some supporters analogize the role of the judiciary to that of the legislature, by arguing that both make law and should, therefore, be chosen in similar fashions.[79]

Whether or not judicial elections ensure accountability is at best tenuous. This is because the majority of states that employ judicial elections usually allow for gubernatorial appointment in order to fill judicial vacancies.[80] Therefore many of the judges in these states are initially appointed by the governor and then get to run as incumbents in the subsequent election.[81] Cynics claim that because of these interim appointments, many of these judges become both entrenched and often run unopposed in future elections.[82]

In addition, critics of partisan elections point to the fact that most voters are often uninformed about judicial races.[83] As a result, the public tends (1) not to vote, or (2) if they do vote; to rely on cues such as party affiliation or name recognition, or (3) vote with no rational basis at all.[84] Opponents of partisan judicial elections often conclude then that we are left with either an uncontested election or a contested race "decided by a very small minority of the electorate, most of whom have no rational basis for their vote."[85]

While the arguments advanced by critics of partisan judicial elections have long been taken as fact, they are beginning to be broken down by changes in the politics of judicial elections.[86] Over the past twenty years, the number of contested elections has increased dramatically.[87] Furthermore, these elections "are becoming more acrimonious, thereby generating greater voter interest."[88] In North Carolina,

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[75] *Id.*
[76] *Id,*
[77] *Id.* at 18.
[78] Hieneman, *supra* note 14, at 454.
[79] *See* Webster, *supra* note 7, at 17.
[80] *See id.* at 13.
[81] *See id.* at 18.
[82] *See id.*
[83] *See* Hieneman, *supra* note 14, at 454.
[84] *Id. See also* Webster, supra note 7, at 18.
[85] *Id.*
[86] *Id.* at 8
[87] *Id.*
[88] *Id.*

for example, where the Democratic Party has long been a fixture of state government, the Republican Party has begun making strides in recapturing elected offices.[89] The Republican Party in North Carolina has not only targeted executive and legislative branch offices, but judicial positions as well, making uncontested judicial elections, "a relic of the past."[90]

However, with change comes new problems and as a result of the increasing animosity within judicial elections, there has been exponential growth in the amount of money being spent.[91] In 2004, two candidates for the Illinois State Supreme Court raised $9.3 million and spent more than candidates in eighteen U.S. Senate races.[92] In West Virginia's 2004 State Supreme Court race, the public was flooded with over 4,000 attack advertisements in the state's most expensive court race ever.[93]

However, this is not a problem without a solution. North Carolina's legislature in 2002 enacted a system in which high-level judicial elections will be publicly financed.[94]

> [T]he North Carolina act gives candidates for state Supreme Court and Court of Appeals the option of running with full public financing, if they raise sufficient qualifying contributions and agree to strict fund-raising and spending limits. The law will also provide additional public funds to participating candidates if a non-participating candidate or independent group tries to outspend them, and it lowers private contribution limits as well.[95]

By eliminating the race to secure financial donations, perhaps the legislature has curtailed some of the influence of special interests.[96]

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89 *See* John J. Korzen, *Changing North Carolina's Method of Judicial Selection*, 25 WAKE FOREST L. REV. 253, 265-266 (1990).

90 *Id.* quoting Author, Title, N.C. LAW WEEKLY, Nov. 7, 1988, at 8, col. 1 (citing` Chief Justice Exum's speech to the State Bar Council on Oct. 28, 1988); *see also* L. Douglas Kiel et al., *Two-Party Competition and Trial Court Elections in Texas*, 77 JUDICATURE 290, 291 (1994) (In addition to North Carolina, Texas has seen a tremendous increase in the acrimony involved in judicial elections.).

91 *See* Kavan Peterson, *Cost of Judicial Races Stirs Reformers*, STATELINE.ORG, Aug. 5, 2005, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=47067; *see also* Webster, *supra* note 7, at 20.

92 *See* Peterson, *supra* note 92 ("Other states that saw record-breaking sums spent included: Alabama - $7.4 million; Ohio - $6.3 million; Pennsylvania - $3.3 million; and Nevada - $3 million.").

93 *Id.*

94 North Carolina Legislature Adopts Full Public Financing of Judicial Elections, PUBLICCAMPAIGN.ORG, *available at* http://www.publicampaign.org/pressroom/pressreleases/release2002/pr10-03-02.htm/; *see* Peterson, *supra* note 92. (In North Carolina, taxpayers can voluntarily check off on their income statements for $3 to go to judicial elections. The money generated from this plan was used to elect two Supreme Court Justices in 2004.).

95 North Carolina Legislature Adopts Full Public Financing of Judicial Elections, PUBLICCAMPAIGN.ORG, *available at* http://www.publicampaign.org/pressroom/pressreleases/release2002/pr10-03-02.htm/;

96 *See id.*

C. Nonpartisan Elections

While nonpartisan elections are often treated as a separate and distinct selection method, it is realistically more like a subset of partisan elections.[97] The primary argument of those who favor nonpartisan elections for judicial selection is that it, "removes partisan political considerations while ensuring the same type of judicial accountability as do partisan elections."[98] Therefore, proponents argue that instead of choosing a judge based purely on party affiliation, people will make their decision based on the candidate's credentials.[99] In addition, supporters of nonpartisan elections suggest that there is less frequent turnover on the bench than partisan elections because, "[i]n a nonpartisan election system, good judges are usually unopposed."[100]

However, some critics claim that nonpartisan elections are in fact worse than partisan elections,[101] while others suggest that it is just the worst system of them all.[102] Frequently, in judicial elections, the electorate is uninformed about the candidates and therefore voters tend to base their decision upon political party. However, when party affiliation is removed, voters often have nothing to base their vote upon, thus voters have based their decision on factors such as: ballot position and name recognition.[103] As a result, "the American Judicature Society has refused to support [nonpartisan elections] because offering the voters only a name and an appearance breeds what the Society calls the 'dictatorship of irrelevancy.'"[104]

In addition to the dilemma of voter ignorance, critics also point to the problem of voter apathy in nonpartisan elections.[105] Voter turnout is often low because the electorate is uninformed about the candidates.[106] On the other hand, because of the virtual obscurity of the candidates, candidates often have to spend more money than in partisan elections to reach the public,[107] therefore creating greater potential for special interest interference.[108] Most states that hold nonpartisan elections, like partisan election states, allow for the governor to appoint judges when a vacancy exists.[109] Therefore, a system that is supposed to be nonpartisan is infused with partisan politics because the governor, most likely, will

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97 *See* Webster, *supra* note 7, at 24.

98 *See id.* at 25.

99 *See id.*

100 *See id.* (citing Thomas E. Brennan, *Nonpartisan Election of Judges: The Michigan Case*, 40 SW. L.J. 23, 26 (1986).

101 *See* Hieneman, *supra* note 14, at 454.

102 *See* Korzen, *supra* note 90, at 270.

103 *See* Webster, *supra* note 7, at 26.

104 Martin L. Kaminsky, *Available Compromises for Continued Judicial Selection Reform*, 53 ST. JOHN'S L. REV. 466, 491 (1979) (citing *The Dictatorship of Irrelevancy*, 48 JUDICATURE 124 (1964).

105 *See* Webster, *supra* note 7, at 11.

106 *Id.*

107 *See* Korzen, *supra* note 90, at 270.

108 *See generally* Webster, *supra* note 7, at 11.

109 *See id.*

appoint party loyalists.[110]

D. Merit Plans

Commission selection is most often referred to as either the Missouri Plan or merit selection.[111] Many supporters of the merit plan see it as a compromise between the appointment methods and election methods.[112] While the merit plan may at first glance look similar to an appointment scheme, the merit plan creates a pre-appointment screening process of all potential judicial candidates, thereby preventing the governor or legislature from appointing whomever it would like.[113]

Proponents of the plan often claim that, "regardless of the particulars... it removes politics from the process of selecting judges."[114] Hence, once politics is removed from the selection process, better judges will be selected.[115] Additionally, supporters regularly claim that more women and minorities reach the bench under a merit plan than through contested elections.[116] Therefore, advocates argue that states using a merit approach have a more diverse judiciary.[117]

Proponents believe that when the merit selection is joined "with a provision for periodic retention elections, merit selection permits an accommodation between the competing concepts of independence and accountability."[118] Retention elections provide that there will be democratic participation, as well as a means to remove judges.[119] In addition, supporters argue that merit selection along with retention elections are, "preferable to contested elections because the former will generally ensure greater security of tenure, thereby encouraging 'better' candidates to apply."[120]

Opponents of the merit approach claim that it disenfranchises the electorate.[121] They believe that it is undemocratic for a non-elected commission to select a pool of candidates, from which the governor selects one. What bothers many is that the commission is not accountable to the electorate—that they are too

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110 *See, e.g.*, Judicial Selection in the States, Am. Judicature Soc'y, http://www.ajs.org/js/wi_methods.htm/ (last visited Mar. 6, 2006). For example, in Wisconsin, "Governor Doyle uses a judicial selection committee to screen applicants for interim judicial vacancies and recommend qualified candidates. The committee is comprised of nine attorneys appointed by the governor. The governor is not bound by the committee's recommendations." *Id.*

111 *See* Webster, *supra* note 7, at 11.

112 *Id.*

113 *See* Roll, *supra* note 38, at 855-856 (stating that in Arizona, Governors had created commissions even before merit selection came into being, but they would disregard the commissions' opinions because they were not bound by their decisions.).

114 *Id.*

115 *See id.* at 856.

116 *See* Webster, *supra* note 7, at 31.

117 *See id.*

118 *Id.*

119 *See* Roll, *supra* note 38, at 862.

120 Webster, *supra* note 7, at 31.

121 *See generally* Roll, *supra* note 38, at 863.

far removed.[122] Proponents would argue that the governor is still ultimately accountable for his selection and that if the public is unhappy they can remove the judge during a retention election.

Critics, however, often view the retention component of merit selection as the most problematic aspect of the system.[123] That is because retention elections "are subject to virtually all of the criticisms directed at partisan and nonpartisan judicial elections, and then some."[124] Many political and legal pundits are not even sure that retention elections offer any "meaningful degree of accountability."[125] The problem begins with the fact that in a retention election a judge runs unopposed.[126] As a result, very little money is invested in these elections, which translates into virtually zero knowledge about the credentials and/or judicial record of these judges.[127]

Therefore, as with nonpartisan elections, the electorate has virtually no guidance in deciding whether to retain a particular judge or not.[128] Consequently, voter apathy is even greater in retention elections than in both partisan and nonpartisan elections,[129] and this results in an even greater entrenchment of the judiciary.[130] A study that looked at retention rates amongst ten states over the course of twenty years revealed that in a total of 1,900 retention elections only twenty-two judges were not retained.[131]

More troubling still is the increasing confusion of the electorate regarding retention elections.[132] For example, a Missouri study showed that 35% of voters could not even recall seeing the judicial retention ballot at the previous election.[133] In Florida, at the behest of former Chief Justice Leander Shaw, a study was conducted that revealed 17.3% of those polled believed that retention elections were in fact a recall election.[134] Another Florida poll, several years later, indicated that 40% of those polled believed that the judges were only on the ballot because they had done something wrong.[135] One of the problems in objectively evaluating the

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122 *See id.*

123 *See* Webster, *supra* note 7, at 34.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *See* Webster, *supra* note 7, at 34

129 *Id.*

130 *See id.*

131 *Id.*; William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340 (1987); *See also* Gary Toohey, *Informing the Voters in Missouri's Retention Elections*, 76 JUDICATURE 264 (1993) (In the Missouri retention elections of November 1992, forty-one of the forty-two justices were retained.).

132 *See* Gary Toohey, *Informing the Voters in Missouri's Retention Elections*, 76 JUDICATURE 264 (1993).

133 *Id.*

134 *See* Webster, *supra* note 7, at 34 (citing Randolph Pendleton, *State Chief Justice Faces Misconceptions About Vote*, FLA. TIMES-UNION, Oct. 23, 1990, at B1).

135 *See id.* (citing Editorial, *Merit Retention? Confused? Just Vote "Yes" Seven Times*,

merit plan as a whole is that virtually no two plans are identical.[136]

These commissions often do not represent the state's gender and racial composition.[137] Many opponents believe that the merit selection "process is dominated by state and local bar associations whose members overwhelmingly are white, male, Protestant, conservative 'establishment' attorneys who are inclined to favor their own with judicial positions."[138] Moreover, these commissions generally, are just extensions of the governor, because the governor is often responsible for appointing a majority of the commission members. Therefore, the stated aim of merit selection, the elimination of politics from judicial selection, has failed.[139] The result is merely shifting partisan politics from a transparent election or appointment system to a closed-door commission.

IV. STUDY

A. Research Question

While each state has a choice in selecting their judiciary, this choice is not an easy one. All four of the selection methods have advantages as well as disadvantages and there is, without question, no perfect approach. What remains then, is an ongoing debate among proponents of the merit plan and those who favor

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TALLAHASSEE DEMOCRAT, Oct. 20, 1994, at A10.

[136] *Id.*

> However, those on both sides of the issue generally agree that one key to the success of any type of "merit" plan lies in the provisions regarding the composition and powers of the nominating commission. To have any hope of achieving its asserted goals, such a plan must be based upon provisions which ensure a truly independent, impartial, and diverse commission, with the power and resources to investigate thoroughly those who come before it as candidates.

Id.

[137] *See* Goldschmidt, *supra* note 11; *See also Judicial Qualifications Committee*, Nebraska Judicial Qualifications Committee, *available at* http://court.nol.org/comm/jqc.htm (The Nebraska committee is comprised of ten members: four judges, three attorneys and three lay people. Of the ten members only three are women with two being lay members and one an attorney.). *See also Commission Roster*, State of Rhode Island & Providence Plantations Judicial Nominating Commission, *available at* http://www.state.ri.us/jnc/roster.htm (Currently on the Rhode Island committee there are eight members and one pending appointment. Of the eight members there is only one woman.).

[138] Henry R. Glick and Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 230 (1987).

[139] *See id.; See also Judicial Selection in the States*, Am. Judicature Soc'y, http://www.ajs.org/js/DE_methods.htm. (last visited Mar. 6, 2006). An example of how the merit plan does not eliminate party politics is the Delaware judicial selection committee:

> The judicial nominating commission is composed of nine members. The governor appoints eight members, including four lawyers and four non-lawyers. The president of the Delaware State Bar Association appoints the ninth member, with the consent of the governor. The governor designates the commission's chairperson. Commissioners serve staggered, three-year terms and may be reappointed by the governor. No more than five commissioners may be members of the same political party at the time of their appointment.

Id.

Therefore, the governor's party will just about always have a majority on the commission.

judicial elections over which of the two methods is superior. Both sides of the debate point to evidence in support of their approach, while at the same time criticizing the opposition's point of view. Proponents of the merit plan continuously claim, however, that merit selection ensures greater gender diversity on the bench. This Note examines whether or not this claim is true.

B. Study Method

In an effort to see whether or not the proponents of merit selection claims are true, this Note looks at the gender make-up of nine state judiciaries. Of the nine states surveyed: three states appoint their judiciary, three states hold judicial elections, and the remaining three states employ a merit approach. The three states that use an appointive method are Maine, New Jersey, and Virginia.[140] The three states that utilize judicial elections are Texas, Ohio, and North Carolina. [141] Finally, the three states that subscribe to merit selection are South Carolina, Colorado, and Connecticut.[142]

This Note analyzes the gender make-up of each state's court of last resort, appellate court and general jurisdiction court. Furthermore, the gender make-up is analyzed for 2001 and 2005 in an effort to compare potential rates of change occurring over the past few years. [143] Finally, this note will compare the gender make-up of the state's judiciary to the percentage of women lawyers in the state.[144]

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[140] *See generally Judicial Selection in the States*, Am. Judicature Soc'y, http://www.ajs.org/js/select.htm (last visited Mar. 6, 2006).

[141] *See id.* (No distinction was made between partisan and nonpartisan election states, in an effort to group an elected state, an appointive state and a merit plan state in similar geographic regions. In addition, there appears to be no substantial difference of gender make-up in partisan versus nonpartisan states.)

[142] *See id.* (Attempting to compare states from similar geographic regions, however, the appointment method is used almost exclusively along the east coast and for all practical purposes has almost completely been done away with. The only states, with a pure appointment system are New Jersey, Maine and Virginia.)

[143] *See id.* The 2001 numbers from each state came from the American Judicature Society's website which displays data from the ABA study. In order to compile data for 2005, I referred to each state's judicial website. For each state's court of last resort and appellate court there is ample information on the websites including pictures of the judges in order to determine the male to female ratio. The general jurisdiction courts were more difficult to compile. I based the initial count on the proper names of the justices. As for names that posed an ambiguity, I used the internet to try and ascertain their sex.

[144] Comparisons are made to the percentage of women lawyers in the state, because the judicial pool is often limited to lawyers and not the public at large.

C. Study Findings

1. Merit Selection

i. Colorado

The Colorado court system is made up of a Supreme Court, Court of Appeals and District Court.[145] Colorado's judiciary was initially selected through general elections.[146] However, in 1966 this system was abrogated in favor of merit selection.[147] The commissions meet and evaluate judicial candidate qualifications.[148] The commission then submits a list of three candidates to the governor, who then must appoint a judge from the list of judges.[149] The judges must then stand for retention two years later.[150]

Instead of one commission, however, Colorado has two types of nominating commissions.[151] The first is a Supreme Court Nominating Commission. The other is a judicial district nominating commission, which consists of a commission for each of the twenty-two districts.[152] The Supreme Court Nominating Commission consists of fifteen members, seven of which are women.[153] The Commission also consists of seven lawyers and eight laypeople.[154] The twenty-two district court nominating commissions each consist of seven members.[155]

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145 *Judicial Selection in the States: Judicial Selection in Colorado*, Am. Judicature Soc'y, http://www.ajs.org/js/CO.htm (last visited Mar. 6, 2006).

146 *Id.*

147 *Id.*

148 *See id.*

149 *See id.*

150 *Id.*

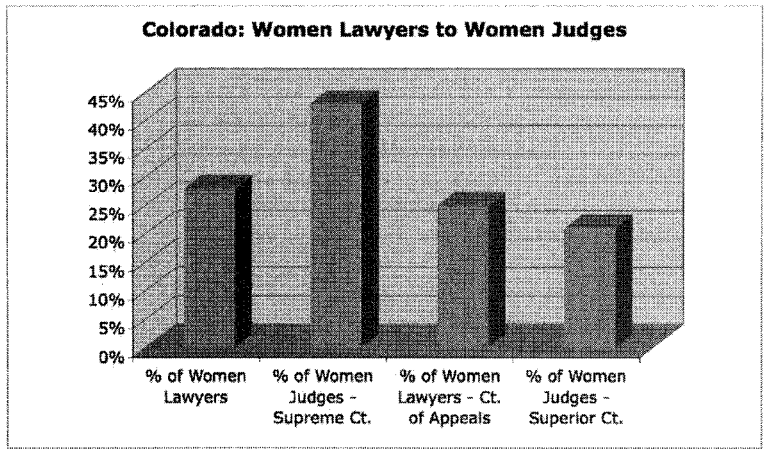
151 *See Judicial Nominating Commissions: Colorado Merit Selection System*, Colorado Judicial Branch, http://www.courts.state.co.us/supct/committees/supctnomincomm.htm (last visited Mar. 8, 2006).

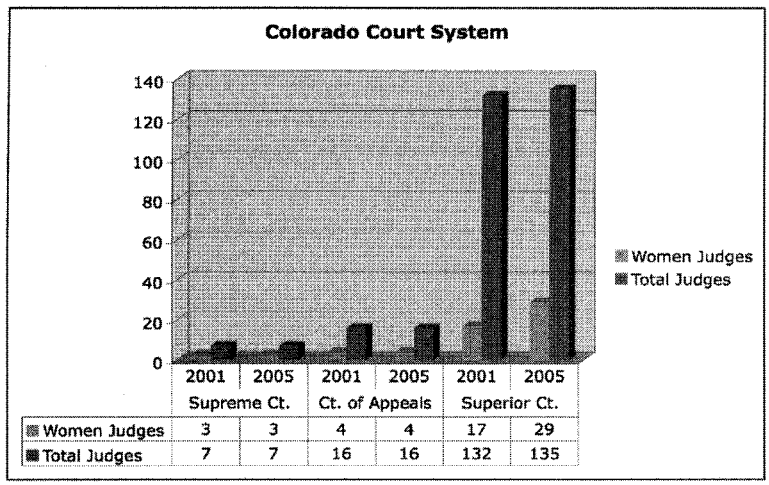
152 *Id.*

153 *Id.*

154 *Id.*

155 *Id.*





	2001 Supreme Ct.	2005 Supreme Ct.	2001 Ct. of Appeals	2005 Ct. of Appeals	2001 Superior Ct.	2005 Superior Ct.
Women Judges	3	3	4	4	17	29
Total Judges	7	7	16	16	132	135

Colorado, while improving, has not reached a level of equality when comparing percentage of female lawyers, 27.9%, to the percentage of female judges.[156] However, Colorado has succeeded in bringing a high level of gender equality to the Supreme Court. Furthermore, there has been an increase in the

[156] *See* Carla N. Carson, *The Lawyer Statistical Report*, American Bar Foundation, 2000 at 53.

number of women judges at the District Court level between 2001 and 2005.

ii. Connecticut

The Connecticut court system is made up of a Supreme Court, Appellate Court and Superior Court.[157] The Connecticut General Assembly had historically chosen the state's judiciary.[158] However, in 1986, a constitutional amendment was passed, that changed the state's selection method to a merit plan.[159] The commission researches and proposes qualified candidates to the governor.[160] The governor then nominates a candidate, who then must then be approved by the general assembly.[161]

The commission is comprised of twelve members, two from each congressional district.[162] From each congressional district, one commission member must be an attorney, the other a layperson.[163] In addition, no more than six commission members may be affiliated with the same political party.[164] The governor appoints the six attorney members of the commission, while various leaders in the state legislature appoint the six laypeople.[165] As of 2002, the Connecticut Judicial Selection Commission consisted of ten men and two women.[166]

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157 *See Judicial Selection in the States: Judicial Selection in Connecticut*, Am. Judicature Soc'y, http://www.ajs.org/js/CT.htm (last visited Mar. 8, 2006).

158 *See Judicial Selection in the States: Connecticut: History of Judicial Selection Reform*, Am. Judicature Soc'y, http://www.ajs.org/js/CT_history.htm (last visited Mar. 8, 2006).

159 *See id.; See also* C.T. Const. art. XXV.

160 *Judicial Selection in the States: Connecticut: History of Judicial Selection Reform*, Am. Judicature Soc'y, http://www.ajs.org/js/CT_history.htm (last visited Mar. 8, 2006).

161 *See id.*

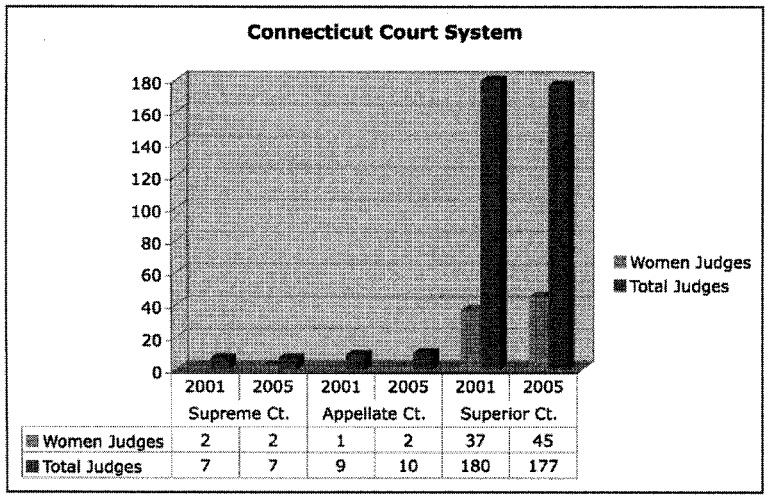
162 *See* Kevin P. Johnston & Robert G. Jaekle, *Auditor's Report Judicial Selection Committee*, State of Connecticut (2002), *available at* http://www.state.ct.us/apa//pdf2003/Judicial%20Selection%2011070-02.pdf.

163 *See id.*

164 *See id.*

165 *See id.*

166 *See id.*



	2001	2005	2001	2005	2001	2005
	Supreme Ct.		Appellate Ct.		Superior Ct.	
Women Judges	2	2	1	2	37	45
Total Judges	7	7	9	10	180	177

167

The Connecticut judiciary has realized an increase of one woman on the Appellate Court and there has been a moderate increase in the number of female Superior Court judges.[168] However, there has been no change on the State's Supreme Court.[169]

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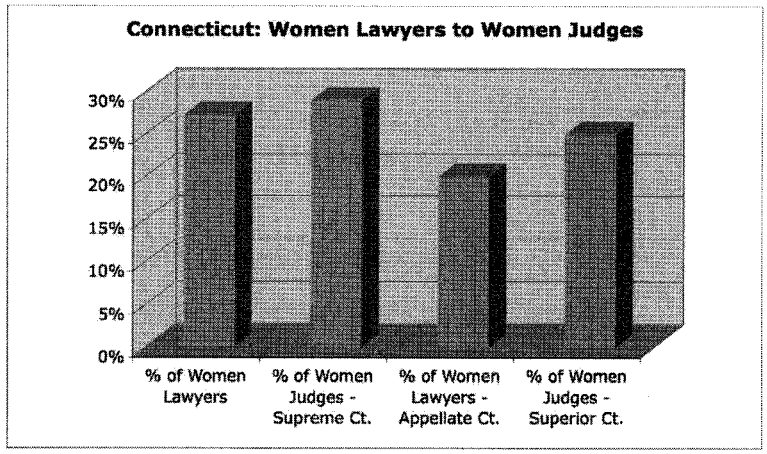
[167] *See* Connecticut Supreme Court, http://www.jud.state.ct.us/external/supapp/ (last visited Mar. 8, 2006); Connecticut Appellate Court, http://www.jud.state.ct.us/external/supapp/appjudge.html/ (last visited Mar. 8, 2006); Connecticut Superior Court, http://www.jud.state.ct.us/jud2/scripts/JudLoc.asp/ (last visited Mar. 8, 2006); *Judicial Selection in the State: Connecticut: Diversity on the Bench*, Am. Judicature Soc'y, http://www.ajs.org/js/CT_diversity.htm/ (last visited Mar. 8, 2006).

[168] Connecticut Appellate Court, http://www.jud.state.ct.us/external/supapp/appjudge.html/ (last visited Mar. 8, 2006); Connecticut Superior Court, http://www.jud.state.ct.us/jud2/scripts/JudLoc.asp/ (last visited Mar. 8, 2006); *Judicial Selection in the State: Connecticut: Diversity on the Bench*, Am. Judicature Soc'y, http://www.ajs.org/js/CT_diversity.htm/ (last visited Mar. 8, 2006).

[169] Connecticut Supreme Court, http://www.jud.state.ct.us/external/supapp/ (last visited Mar. 8, 2006); *Selection in the State: Connecticut: Diversity on the Bench*, http://www.ajs.org/js/CT_diversity.htm/ (last visited Mar. 8, 2006).



In 2005, women made up about 27.3% of the legal community.[170] While the percentage of women on the Supreme Court exceeded the state average, Connecticut's Appellate Court and Superior Court continued to fall below the percentage of women attorneys.

iii. South Carolina

The South Carolina judiciary includes a Supreme Court, Court of Appeals and Circuit Court.[171] Since becoming state in 1776, the state legislature had always appointed the judiciary.[172] However, in 1996 South Carolina voters passed a constitutional amendment, replacing the appointment scheme with a merit plan.[173] The merit plan consists of a commission, which first reviews the qualifications of potential justices.[174] The Commission then submits three names to the general assembly and the general assembly must then select from the three candidates.[175]

The South Carolina judicial nominating commission is comprised of ten members.[176] The Speaker of the House appoints five members of the commission,

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170 *See* Carson *supra* note 158, at 57.

171 *See* South Carolina Judicial Department, http://www.judicial.state.sc.us/index.cfm (last visited Mar. 8, 2006).

172 *See History of Judicial Selection Reform*, Am. Judicature Soc'y, http://www.ajs.org/js/SC_history.htm (last visited Mar. 8, 2006).

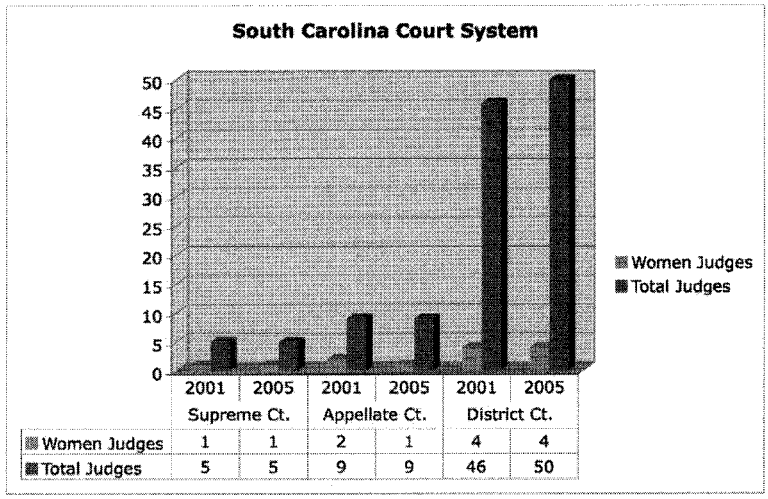
173 *See Judicial Selection in South Carolina: An Introduction*, Am. Judicature Soc'y, http://www.ajs.org/js/SC.htm (last visited Mar. 8, 2006).

174 *See id.*

175 *See id.*

176 *See* Charles F. Reid, *Joint and Special Committees of the Senate and House*, South Carolina State House, *available at* http://www.scstatehouse.net/html-pages/judmerit.html (last visited Mar. 9,

three must be serving members of the General Assembly and two must be selected from the general public.[177] The Chairman of the Senate Judiciary Committee appoints three members of the committee and the President Pro Tempore of the Senate appoints the two remaining commission members.[178] The current composition of the Judicial Merit Selection Commission includes nine men and one woman.[179] The gender make-up of the South Carolina judiciary has shown little change from 2001 to 2005.[180]



	2001	2005	2001	2005	2001	2005
	Supreme Ct.		Appellate Ct.		District Ct.	
Women Judges	1	1	2	1	4	4
Total Judges	5	5	9	9	46	50

[181]

There is currently one less woman on the Court of Appeals and while the size of the district court has been expanded, the number of women has remained stagnant.[182] When the percentage of women judges is compared to the percentage of women attorneys in the state, the numbers are even more disturbing:

2006).

[177] *See id.*

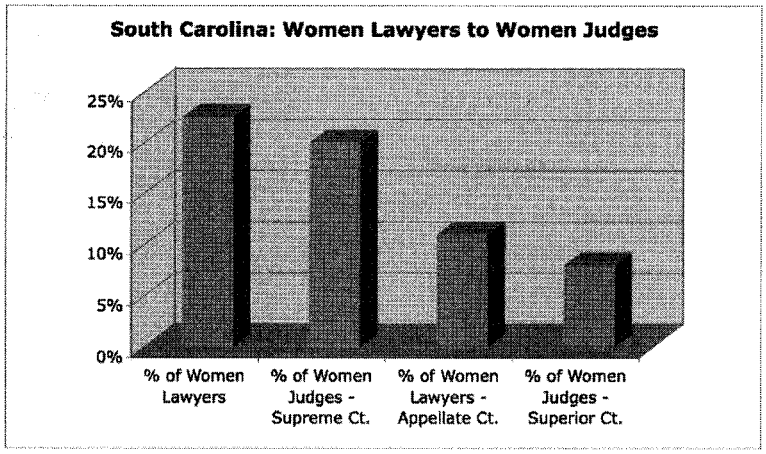
[178] *See id.* (Of the five commission members appointed by the Senate; three must be lawyers and two must be from the general public.)

[179] *See id.*

[180] *See* South Carolina Judicial Department, *supra* note 173.

[181] *Id.*

[182] *See id.*



Women make up 22.5% of the legal population and yet they are underrepresented on all three levels of the state's court system.[183]

2. Appointment

i. Maine

The Maine judicial system consists only of a Supreme Judicial Court and a Superior Court; there is no intermediate court of appeals.[184] Maine's system of judicial selection is an appointment approach and is very similar to the federal system.[185] In Maine, the governor appoints the judiciary with confirmation from the state senate.[186]

Maine's judiciary has not changed significantly from 2001 to 2005. The only difference in the gender make-up of the state's court system was the appointment of a third woman to the Superior Court.[187]

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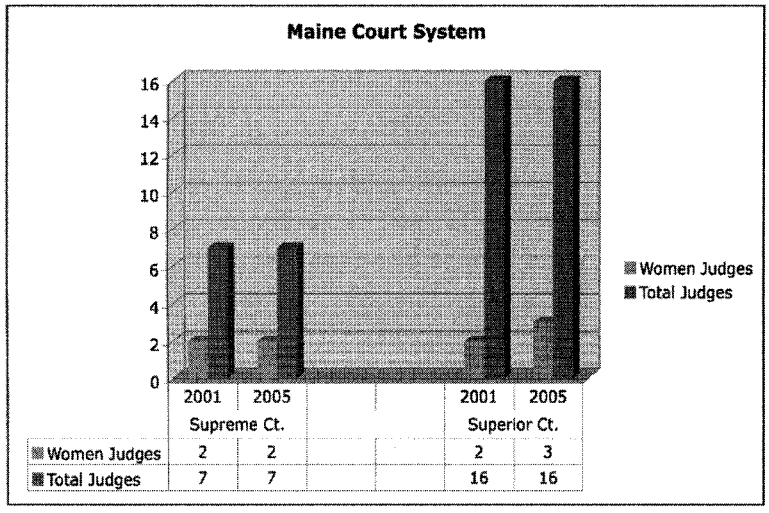
183 *See* Carson, *supra* note 158, at 193.

184 *See Judicial Selection in the States: Maine: Current Methods of Judicial Selection*, Am. Judicature Soc'y, http://www.ajs.org/js/ME_methods.htm (last visited Mar. 8, 2006).

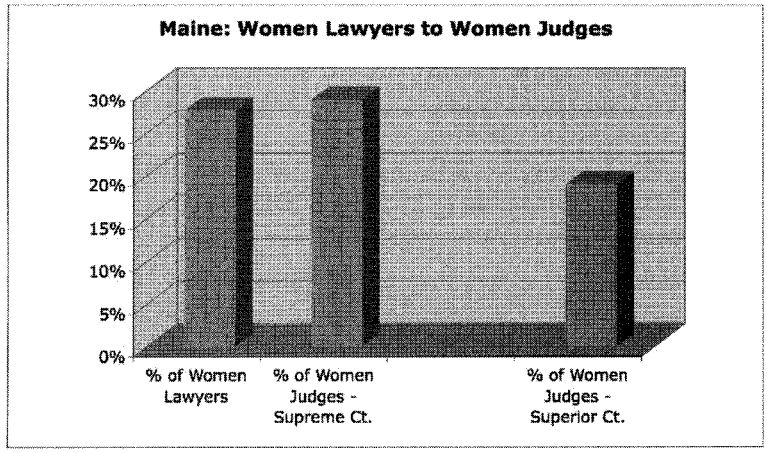
185 *See id.*

186 *See id.*

187 *See* Maine Supreme Judicial Court, http://www.ajs.org/js/TX_diversity.htm/ (last visited Mar. 8, 2006); Maine Superior Courts, http://www.courts.state.me.us/mainecourts/superior/index.html/ (last visited Mar. 8, 2006); *Judicial Selection in the States: Maine: Current Methods of Judicial Selection*, Am. Judicature Soc'y, http://www.ajs.org/js/TX_diversity.htm/ (last visited Mar. 8, 2006).



The percentage of women attorneys in the state of Maine is 27.7%,[188] which reveals that the Superior Court is currently underrepresented.



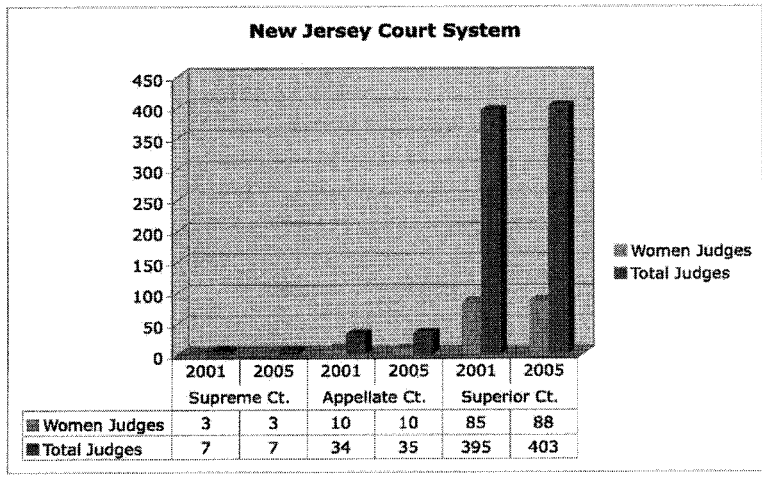
ii. New Jersey

The New Jersey court system consists of a Supreme Court, an Appellate Division, and the Superior Courts.[189] Initially, both houses of the legislature

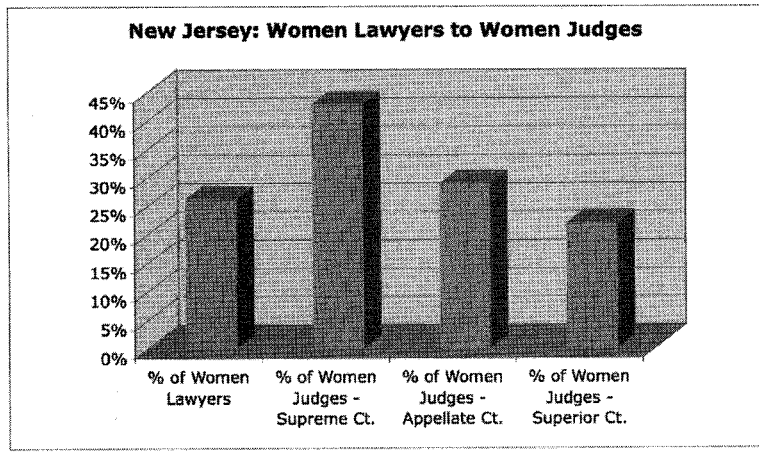
[188] *See* Carson, *supra* note 158, at 109.

[189] *Judicial Selection in the States: Judicial Selection in New Jersey*, Am. Judicature Soc'y,

jointly selected the judiciary.[190] In 1844, the selection method was changed to provide for gubernatorial appointment with senate approval.[191]



	2001 Supreme Ct.	2005 Supreme Ct.	2001 Appellate Ct.	2005 Appellate Ct.	2001 Superior Ct.	2005 Superior Ct.
Women Judges	3	3	10	10	85	88
Total Judges	7	7	34	35	395	403



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New Jersey is one of the only non-elected states, in which the percentage of women on the judiciary is actually greater than the percentage of female lawyers in

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http://www.ajs.org/js/NJ.htm (last visited Mar. 8, 2006).

190 *Id.*

191 *Id.*

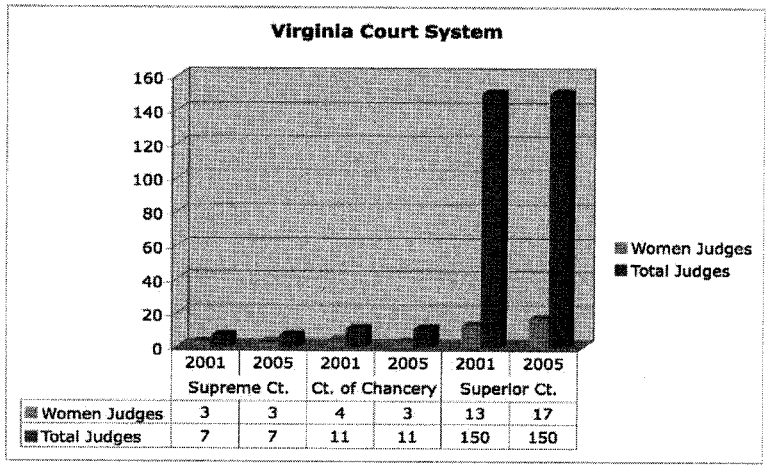
192 New Jersey Supreme Court, http://www.judiciary.state.nj.us/supreme/index/ (last visited Mar. 8, 2006); New Jersey Appellate Division, http://www.judiciary.state.nj.us/appdiv/parts.pdf / (last visited Mar. 8, 2006); New Jersey Superior Courts, http://www.judiciary.state.nj.us/trial.htm/ (last visited Mar. 8, 2006).

the state. However, somewhat disturbing is the lack of any real growth in the number of female judges from 2001-2005.

iii. Virginia

The Virginia court system is comprised of a Supreme Court, Court of Chancery, and a Superior Court.[193] Virginia's judiciary is selected through an appointment process.[194] However, the legislature elects the judiciary instead of the governor.[195]

While women are generally underrepresented in the Virginia judiciary, three of the seven justices on the Virginia Supreme Court are women.[196]



	2001	2005	2001	2005	2001	2005
	Supreme Ct.		Ct. of Chancery		Superior Ct.	
Women Judges	3	3	4	3	13	17
Total Judges	7	7	11	11	150	150

Women represent 24.4% of the lawyers in the state of Virginia;[197] therefore the appellate courts are well represented. However, the trial courts lag well behind any semblance of gender equality.

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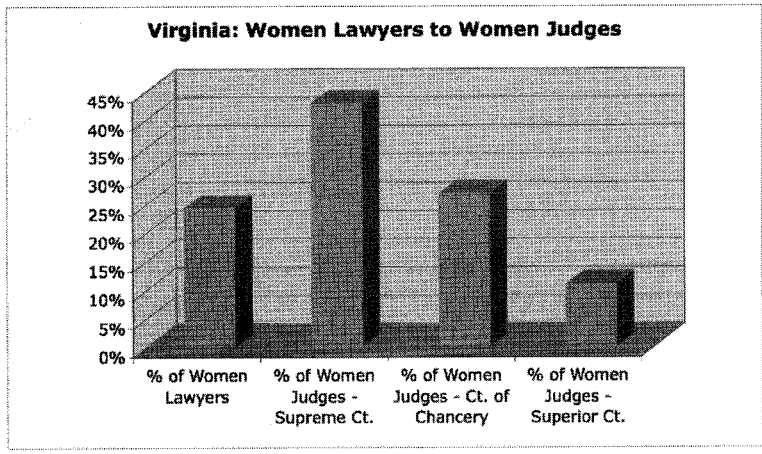
193 *Judicial Selection in the States: Virginia: Diversity on the Bench*, Am. Judicature Soc'y, http://www.ajs.org/js/VA_diversity.htm/ (last visited Mar. 8, 2006).

194 *Id.*

195 *Id.*.

196 Virginia Supreme Court, http://www.courts.state.va.us/supreme.htm/ (last visited Mar. 8, 2006).

197 *See* Carson, supra note 158, at 53.



3. Judicial Elections

i. Texas

Texas is one of the only states with two courts of last resort.[198] The Texas Supreme Court handles civil appeals, while the Texas Court of Criminal Appeals handles all criminal appeals.[199] Each of Texas' courts of last resort contains nine justices.[200] The Texas state judiciary is also comprised of a Court of Appeals and a District Court.[201] In 1845, when Texas became a state, an appointment method was utilized, which required senate confirmation.[202] However, since 1876, the Texas judiciary has been selected through partisan elections.[203] Throughout all three levels of the Texas judiciary, women make up at least 25% of the judiciary.[204]

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198 *See Judicial Selection in the States: Judicial Selection in Texas*, Am. Judicature Soc'y, http://www.ajs.org/js/TX.htm (last visited Mar. 8, 2006) (the other state to have two courts of last resort is Oklahoma); *see* The Oklahoma State Court Network, http://www.oscn.net/applications/oscn/start.asp?viewType=COURTS (last visited Mar. 8, 2006).

199 *See id.*

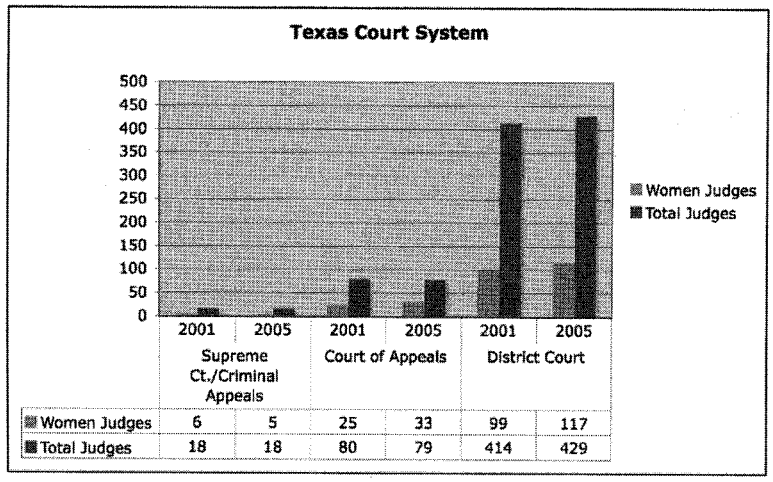
200 *See Judicial Selection in the States: Texas: Current Methods of Judicial Selection*, Am. Judicature Soc'y, http://www.ajs.org/js/TX_methods.htm (last visited Mar. 8, 2006).

201 *See id.*

202 *See Judicial Selection in the States: Judicial Selection in Texas*, Am. Judicature Soc'y, http://www.ajs.org/js/TX.htm (last visited Mar. 8, 2006).

203 *Id.*

204 *See* Carson, supra note 158, at 205.



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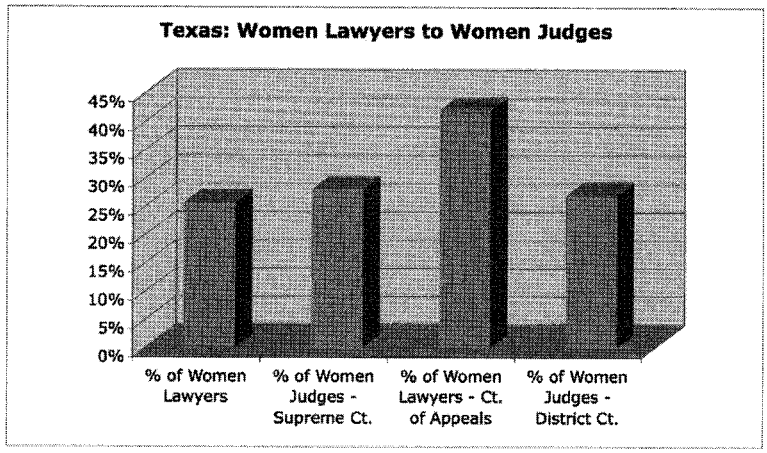
The numbers at the Court of Appeals and District Court level show a continuing rise towards greater gender equality. While the number of women serving on the courts of last resort did decrease, there is still much to be excited about in Texas. This is because the percentage of women judges at all three levels of the court system is now higher than the percentage of women lawyers in the state (25.7 percent).[206]



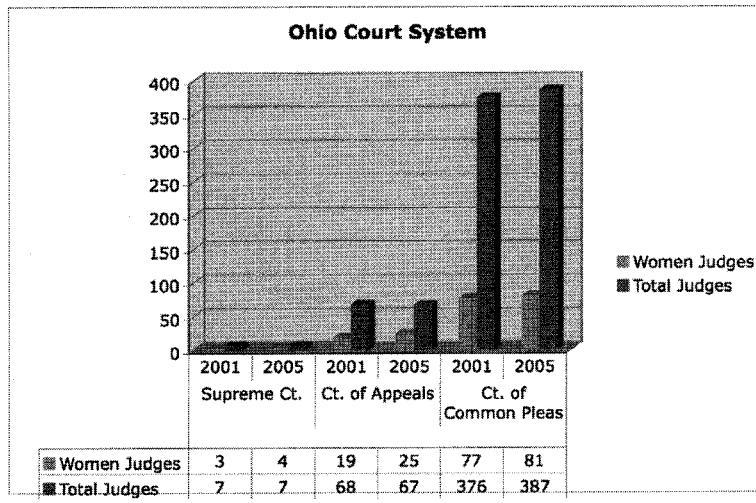
[205] The Supreme Court of Texas, http://www.supreme.courts.state.tx.us/ (last visited Mar. 8, 2006); The Texas Court of Criminal Appeals, http://www.cca.courts.state.tx.us/ (last visited Mar. 8, 2006); The Texas Court of Appeals, http://www.courts.state.tx.us/appcourt.asp/ (last visited Mar. 8, 2006); The Texas District Courts, http://courts.state.tx.us/trial/courtlin.asp/ (last visited Mar. 8, 2006).

[206] *See* Carson, *supra* note 158, at 205.

ii. Ohio

The Ohio court system is made up of a Supreme Court, a Court of Appeals, and a Court of Common Pleas.[207] The judiciary in Ohio is currently selected through nonpartisan elections, meaning that party affiliation is not listed on the ballot.[208] But the election system is not completely devoid of partisan politics, because political parties play an integral role in judicial primary elections.[209]

Ohio is one of a handful of states where women make up a majority on the state's court of last resort. There has been a considerable amount of growth at the appellate levels; however, the number of women justices at the trial level has remained stagnate.

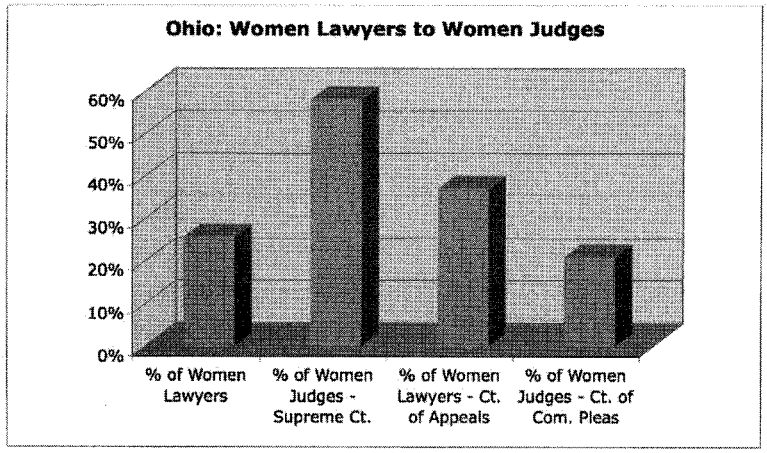


	2001 Supreme Ct.	2005 Supreme Ct.	2001 Ct. of Appeals	2005 Ct. of Appeals	2001 Ct. of Common Pleas	2005 Ct. of Common Pleas
Women Judges	3	4	19	25	77	81
Total Judges	7	7	68	67	376	387

207 *See Judicial Selection in the States: Judicial Selection in Ohio*, Am. Judicature Soc'y, http://www.ajs.org/js/OH.htm (last visited Mar. 8, 2006).

208 *See id.*

209 *See id.*



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Ohio appears to be in a very good position regarding gender equality when the percentage of women justices is compared with the percentage of women lawyers in the state, 25.6 percent.[211]

iii. North Carolina

The North Carolina court system consists of a Supreme Court, Court of Appeals, a Superior Court, and a district court.[212] Since 1868, North Carolina has elected its judiciary; however, recently the state has moved from partisan to nonpartisan elections.[213] Today, the various levels of the judiciary are selected entirely through nonpartisan elections.[214] In connection with the switch to nonpartisan elections, North Carolina passed the Judicial Campaign Reform Act [hereinafter the Act].[215] The Act provides for public funding of judicial elections and lowers the amount an individual may contribute to a particular judicial

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210 Supreme Court of Ohio, http://www.sconet.state.oh.us/justices/default.asp/ (last visited Mar. 8, 2006); Ohio Court of Appeals, http://www.sconet.state.oh.us/District_Courts/ (last visited Mar. 8, 2006); Ohio Court of Common Pleas, http://www.sconet.state.oh.us/web_sites/courts/ (last visited Mar. 8, 2006).

211 *See* Carson, *supra* note 158, at 173.

212 *See Judicial Selection in the States: Judicial Selection in North Carolina*, Am. Judicature Soc'y, http://www.ajs.org/js/NC.htm (last visited Mar. 8, 2006).

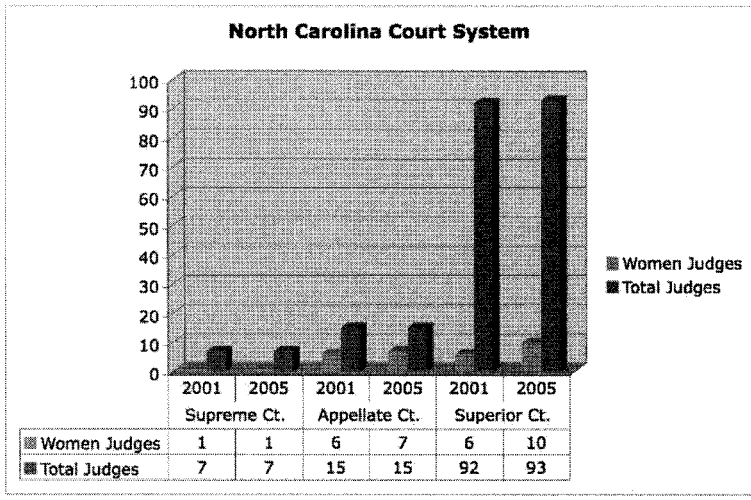
213 *See id.* Nonpartisan elections began for Superior Court judges in 1996 and for Appeals judges in 2002.

214 *See id.*

215 *See* North Carolina Legislature Adopts Full Public Financing of Judicial Elections, PUBLICCAMPAIGN.ORG, *available at* http://www.publicampaign.org/pressroom/pressreleases/release2002/pr10-03-02.htm/;

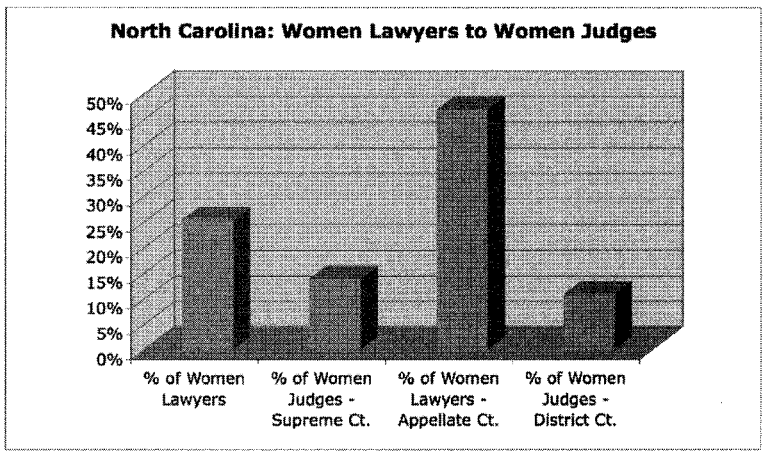
campaign.[216] Under the Act, North Carolina institutes a full public financing system for judicial elections.[217]

North Carolina, like other southern states, has a low number of female judges.



	2001 Supreme Ct.	2005 Supreme Ct.	2001 Appellate Ct.	2005 Appellate Ct.	2001 Superior Ct.	2005 Superior Ct.
Women Judges	1	1	6	7	6	10
Total Judges	7	7	15	15	92	93

Especially problematic is the low percentage of women on the Supreme Court. North Carolina also lags behind when comparing the percentage of women judges to the percentage of women lawyers in the state (25.4 percent).[218]



216 *See id.*

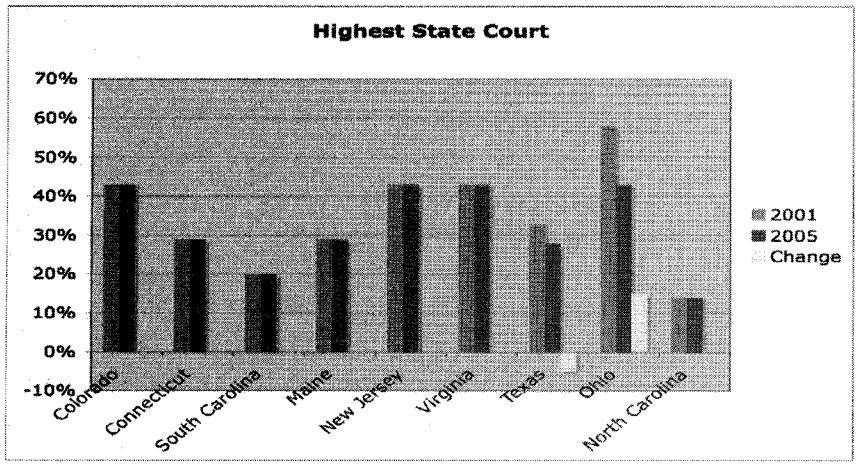
217 *See id.*

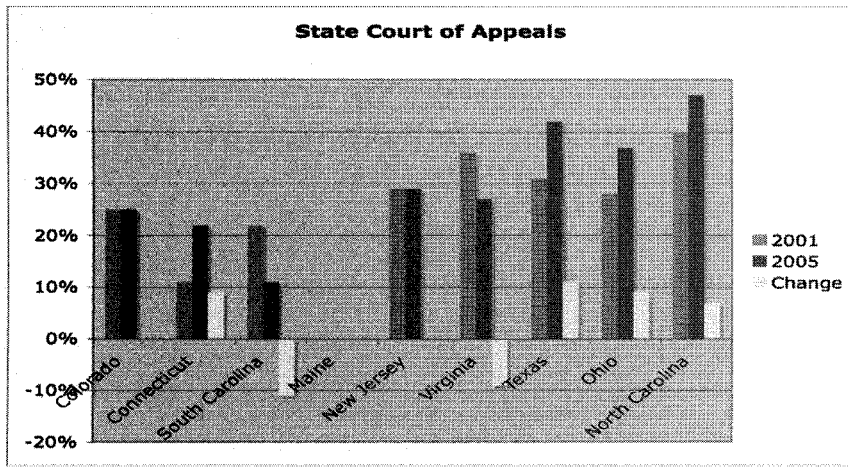
218 *See* Carson, *supra* note 158, at 165.

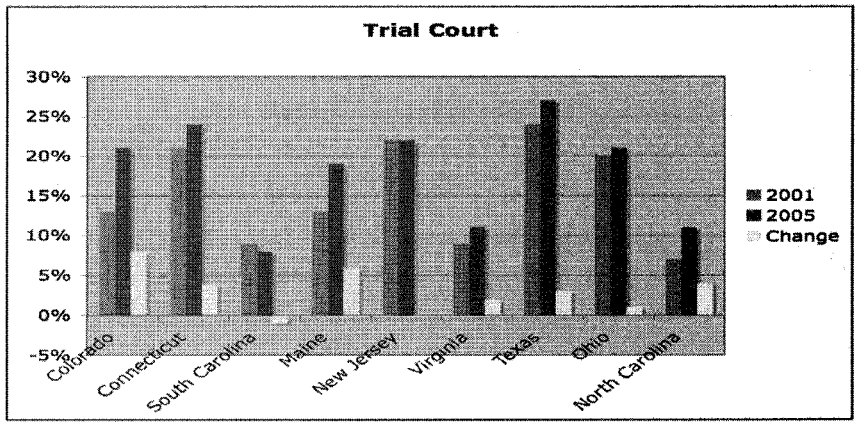
However, there were increases at both the Court of Appeals and Superior Court levels between 2001 and 2005.

4. Study Summary

An overview of the aggregate data reported below illustrates that merit-selection is not superior to other forms of judicial selection in ensuring gender equality.







In comparing merit plan states with elected states in similar geographic regions, the numbers are very similar. If anything, there appears to be more women becoming judges in elected states than in merit-plan states. However, there are more women on the courts of last resort in merit plan states than in elected states.

V. DOES MERIT SELECTION WORK?

In theory, one would assume that merit selection would ensure greater gender equality than judicial elections. Because, on the one hand, many lobbying groups,[219] legal scholars,[220] and even women's organizations claim that a merit based approach is superior in bringing about gender equality.[221] Additionally, one can look to the traditional elected branches of government, such as the legislature,[222] and executive branch to see that women continue to represent an extremely small minority. Why, then, are states that use elections to select their

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219 ABA Standing Comm. on Jud. Independence, *Standards on State Judicial Selection,. available at* http://www.abanet.org/judind/downloads/reformat.pdf.

220 *See* Webster, *supra* note 7, at 42. ("[The merit proposal] will actively encourage consideration of the need for diversity on the bench, and thereby lead to significant increases in the number of women and minority judges.")

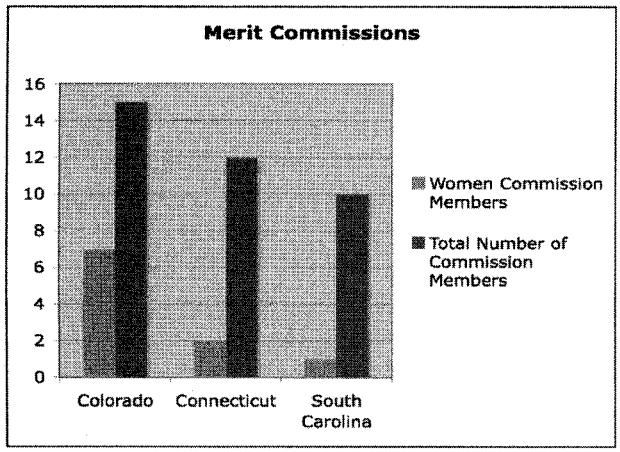
221 *See* The League of Women Voters of Pennsylvania, Judiciary (2004), http://pa.lwv.org/issues/judiciary.html (last visited Mar. 8, 2006) ("LWVPA support for a merit appointment system for judges dates back to 1949.").

222 *See* MILDRED L. AMER, WOMEN IN THE UNITED STATES CONGRESS 1917-2006, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS (2006), *available at* http://www.senate.gov/reference/resources/pdf/RL30261.pdf (There are more women in 109th Congress than any other time in history. However, there are still only 70/535 (13%) in the House of Representatives and only 14/100 (14%) in the Senate); *See* The Legislative Branch of Texas, http://texaspolitics.laits.utexas.edu/html/leg/0304.html (last visited Mar. 8, 2006) (Women only make up 21% in the House and 13% in the Senate.).

judiciary not only keeping pace, in seeking gender equality, with merit plan states, but in some instances surpassing them?

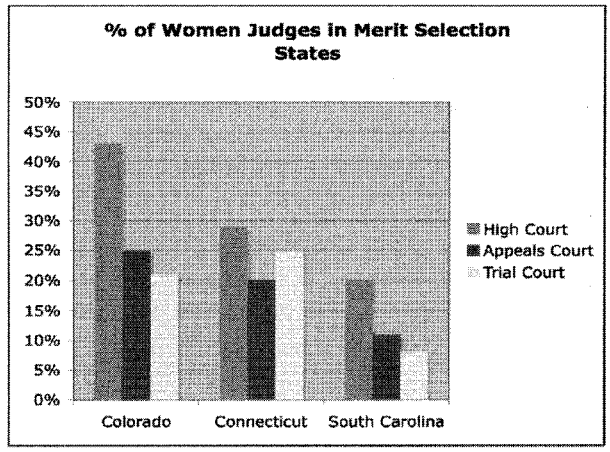
One way to examine this issue is to look at the merit plan itself to see if it is flawed. Those in favor of judicial elections often claim that merit committees continue to be made up mostly of men.[223] If this turns out to be false, and merit commissions do bear a resemblance to the demographics of the state, what else can account for the lack of progress in merit plan states? Perhaps the issue in merit plan states is just circumstance: there just may not be enough qualified female judicial candidates in a particular state or jurisdiction. In the alternative, there may be a reason why women on gender equal merit committees are disinclined to select other women.

Critics of the merit approach believe that, "the process is dominated by state and local bar associations whose members overwhelmingly are white, male, Protestant."[224]



223 *See* Henry R. Glick and Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 230 (1987).

224 *Id.*



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South Carolina's figures suggest that the lack of women on the merit commission may in fact directly impact the number of women justices. However, when one compares the data between Connecticut and Colorado, this assumption becomes less clear. In Connecticut, the percentage of women is extremely close to the percentage of women lawyers in the state, even though there are few women on the nominating commission.[226] In contrasting Connecticut with Colorado, where there is nearly a fifty-fifty split on the nominating commission, there appears to be no significant correlation between the number of women on the nominating commission and the number of female judges.

Circumstance is one explanation or crutch advocates of the merit plan can lean on in an attempt to justify why merit states have not secured greater gender equality of the judiciary. This justification perhaps is appealing because it cannot objectively be disproved. What qualifications make a good judge? Is there a formula that can be applied to potential jurists, that reveals whether they will be good or bad judges? Absolutely not—the fallacy of the circumstance rationalization is that it can neither be proved nor disproved.

In spite of this, there is a potential justification for the lack of women judges in certain jurisdictions. Today, most law schools generally have equal numbers of both men and women.[227] However, this was not always the case.[228] In order to

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[225] *See* Charles F. Reid, *Joint and Special Committees of the Senate and House*, South Carolina State House, *available at* http://www.scstatehouse.net/html-pages/jtspeccommlist.pdf (last visited Mar. 9, 2006). *See* Colorado Judicial Branch, Judicial Nominating Commissions: Colorado Merit Selection System, http://www.courts.state.co.us/supct/committees/supctnomincomm.htm (last visited Mar. 8, 2006); *See* Kevin P. Johnston & Robert G. Jaekle, *Auditor's Report Judicial Selection Committee*, State of Connecticut (2002), *available at* http://www.state.ct.us/apa//pdf2003/Judicial%20Selection%2011070-02.pdf.

[226] *See* Carson, *supra* note 158, at 57.

[227] *See* David Rosenlieb, *Fall 2005 Enrollment Statistics*, *available at*

be considered "qualified" for a judicial position, one would assume you would need *X* number of years of work experience. Therefore, if we assume that people generally become judges in their forties, circumstance might dictate that certain states and jurisdictions have more women lawyers forty years old and above, resulting in a larger pool of "qualified" female judicial candidates.

This notion appears to have some credibility when one compares Colorado, Connecticut, and South Carolina. Colorado and Connecticut have a much higher percentage of women serving in the judiciary than does South Carolina. In Colorado, 27.9% of lawyers are women,[229] and in Connecticut 27.3% of lawyers are women,[230] whereas in South Carolina women account for 22.5%.[231] If one merely focuses on the number of women attorneys in these three states it is unclear why such a discrepancy exists in the number of women judges. However, one must evaluate which age group predominates within the percentage of women attorneys. In Colorado, approximately 51% of women attorneys are ages forty and fifty-four,[232] and in Connecticut 47% of women attorneys are ages forty and fifty-four, which we might consider the prime age bracket for judicial appointment.[233] On the other hand, in South Carolina, only 39% of women attorneys are between ages forty and fifty-four.[234] The majority of women attorneys in South Carolina are below the age of forty, perhaps as these women gain more experience, the number of women judges in South Carolina will increase.

In conjunction with the lack of women attorneys in the forty and fifty-four age bracket is the lack of women partners at major law firms. Many judges came to the bench via work as an attorney in private practice, having already attained the status of partner. While law schools have been graduating equal numbers of men and women, and "firms are absorbing new associates in numbers that largely reflect that balance, something unusual happens to most women after they begin to climb into the upper tiers of law firms—they disappear."[235] According to the National Association for Law Placement, "only about 17[%] of the partners at major law

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http://www.abanet.org/legaled/statistics/fall2005enrollment.pdf ("Males comprise 52.5% of the J.D. enrollment for 2005 while females comprise 47.5%. Males comprise 53.1% of the first year enrollment for 2005 while females comprise 46.9%. In 2004, males comprised 52.5% of the first year enrollment while females comprised 47.5%.").

228 First Year Enrollment in ABA Approved Law Schools, http://www.abanet.org/legaled/statistics/femstats.html (last visited Mar. 8, 2006) (In 2005 enrollment of women was 47.5%, in 1995 it was 44%, in 1985 it was 40%, in 1975 it was 23% and in 1965 it was 4%.).

229 *See* Carson, *supra* note 158, at 53.

230 *Id.*

231 *See id.* at 193.

232 *See id.* at 53.

233 *Id.*

234 *See id.* at 193.

235 Timothy L. O'Brien, *Why Do So Few Women Reach The Top In Big Law Firms*, N.Y. TIMES, Mar. 19, 2006, *available at* http://www.nytimes.com/2006/03/19/business/yourmoney/19law.html?ex=1300424400&en=f9b2756ce77b02bc&ei=5088&partner=rssnyt&emc=rss.

firms nationwide were women in 2005."[236] Maybe, the age and/or experience of women attorneys is not the only factor in explaining why women are not reaching the bench in greater numbers. Perhaps the lack of women in visible roles as partners in the major law firms is contributing to the limited representation of women judges.

Perhaps merit selection has not outperformed elected states in reaching gender equality because women in positions of power may be disinclined to pick other women. The idea being that, as more and more women are placed into positions of power, such as appointed to a merit commission, they may refrain from selecting other women. This occurs because, possibly, women are predisposed to pick men; society has historically favored men over women. Dr. Phyllis Chesler, a Professor Emerita of Psychology and Women's Studies has lectured on this issue.[237] In response to a question dealing with why women leaders are so hard on colleagues, Dr. Chesler explains:

> Very often women leaders in a male-dominated system are only tokens in that system, and must be twice as good as her male counterpart and is under much greater pressure. She must also keep other women down, because there might be room for only one or two at the top. Finally, she's there because she has internalized the views of the men at the top.[238]

While individual women may have broken the glass ceiling, potentially women have yet to feel secure in their respective power positions to pull other women along.

Alternatively, what if the public today, more than at any other point in our nation's history, has accepted the notion that women are just as qualified, just as smart and just as hard working as men. Perhaps it is the nominating commission that lags behind; maybe they have yet to come to this realization. Numerous polls have been conducted to gauge how the voting public would feel about a woman for President, a female Speaker of the House, and women in politics.[239] While there is little research regarding the public's perception of female judges, one can infer that if the public is comfortable with women in Congress, the Senate, and as President, then the public would be as amenable to women in the judiciary. Perhaps this change in public perception is why women are ascending to the bench at a more rapid pace in states that employ judicial elections.

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[236] *Id.* The National Association for Law Placement is a trade group that provides career counseling to lawyers and law students.

[237] *See* Phyllis-Chesler.com, http://www.phyllis-chesler.com/bio.html (last visited Mar. 8, 2006).

[238] U.S.A TODAY, Talk Today, Woman's Inhumanity to Woman: Phyllis Chesler, http://www.usatoday.com/community/chat/2002-04-11-chesler.htm (last visited Mar. 8, 2006).

[239] *See* Associated Press, *Poll: U.S. May Be Ready For Female President*, FOXNEWS.COM, Feb. 23, 2005, http://www.foxnews.com/story/0,2933,148441,00.html; *Ready For A Woman President?*, CBS NEWS, Feb. 5, 2006, http://www.cbsnews.com/stories/2006/02/03/opinion/polls/main1281319.shtml.

VI. CONCLUSION

The debate over judicial selection has been occurring since this country's founding. However, this Note in no way takes a position on which selection method is better and is certainly not advocating for judicial elections. The limited scope of this paper was intended to explore the various methods of judicial selection and to ascertain whether one method ensured greater gender equality than another.

The empirical data in this Note reveals that merit selection is not more effective in bringing about greater gender equality. While studies show that merit selection has been more effective in first diversifying an all-male court, once one or two women have been appointed or selected, it is unlikely that additional women will be appointed or selected in the future.[240] Today there exists very few all-male courts; women typically have some representation. The question that needs to be addressed now is—how will gender equality in the judiciary be furthered in the future?

[240] Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83(2) SOC. SCI. Q. 504 (2002), (By gender diversity the authors are not referring to 50/50 split, but rather some nominal level of diversification of an all male court, perhaps one or two judges.).