

6-1-1978

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Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. Miami L. Rev. 509 (1978)

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university of miami law review

VOLUME 32

JUNE 1978

NUMBER 3

THE PROMISE AND THE PERFORMANCE OF THE MISSOURI PLAN: JUDICIAL SELECTION IN THE FIFTY STATES

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Attempts to improve the integrity of the judiciary have focused on the proper method of selecting judges. In this article, the author analyzes whether the Missouri Plan has achieved its expected goals: improving the selection process; emphasizing professional qualifications rather than political influence; and promoting superior decision-making by the bench.

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I. INTRODUCTION

One of the most controversial and often heated debates in American law and politics concerns the method by which judges should be chosen for office. The controversy over judicial selection is not new, but has been an important part of judicial history since the founding of the republic. Numerous social and economic groups, political parties, lawyers, state legislatures and others have battled to have judges chosen by one means or another. Gubernatorial appointment, legislative election, partisan election, nonpartisan election and now the Missouri Plan all have been defended and defamed at different times in the past two hundred years.

The nonpartisan, reformist Missouri Plan is currently the most popular, winning acceptance in more and more states. The impact of the Missouri Plan on American state judicial systems cannot be underestimated. Not only have there been hundreds of articles published in state bar and other professional journals and in university law reviews supporting the new recruitment method, but the poli-

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tics of adoption makes it clear that the Missouri Plan now has considerable momentum and growing acceptance. In the past thirty years, every state which has changed its method of judicial selection has adopted some version of the Missouri Plan.¹ No state has moved to any other judicial selection procedure. Initially, reformers compromised their demands for statewide adoption by typically agreeing to have the plan applied first to state appellate courts, where few judgeships are affected and where political parties and their allies will lose the least influence in judicial selection.² Nevertheless, once the plan gains entry into a state and is used for several years, thereby gaining legitimacy and acceptance, it becomes easier to extend it to the lower trial courts where more judicial positions are at stake. The chances for the continued adoption of the Missouri Plan are excellent and we can expect to see it used in more states. Advocates of the Missouri Plan have made many claims about the superior procedure and results which will be achieved through reformed selection. The Plan now has been in use long enough that we can begin to make comparative evaluations about the actual experience of the Plan and how it performs relative to other traditional methods of selecting judges. The purpose of this paper is not to add to the continuing debate about what the plan promises to accomplish, but rather to examine actual state experiences with the Missouri Plan, as well as other methods of recruitment, to determine how the Plan actually has changed state courts and judges and how the performance of the Plan compares with reform goals.

II. JUDICIAL RECRUITMENT AND REFORM

The politics of judicial selection is a game of high stakes which involves a great deal of conflict among many groups and organizations. Judgeships, for example, are especially important to political parties because they provide a relatively large number of prestigious, high paying government jobs which can be offered, through appointment or support in elections, to deserving party loyalists. Careful distribution of judgeships multiplies party influence by motivating future office seekers to perform party work. In an era when civil service and direct mass media candidate-to-voter communication have weakened party organization and influence, judgeships still provide an important link between parties, government and political activists.³

1. H. GLICK & K. VINES, *STATE COURT SYSTEMS* 41 (1973).

2. L. Pelekoudas, *Judicial Reform Efforts in Ten States, 1950-1961*, at 89-90 (1963) (unpublished Ph.D. dissertation, University of Illinois, Department of Political Science).

3. For an excellent illustration of the link between parties and city politics, see W. SAYRE

Numerous interest groups are also vitally concerned with how judges are chosen. Allied with political parties, they frequently seek a "fair share" of judicial positions for group members, creating local ticket balancing and tangible rewards for having provided voter support for other party candidates. Moreover, like other political positions, the judiciary has been an important avenue of social and political advancement for non-elites. Throughout recent American history, new political groups—the Irish, Italians, Jews—have sought prestigious judicial positions as an opportunity for social advancement and acceptance. In contemporary politics, blacks, women, Chicanos and Indians demand access to judgeships in order to provide similar opportunities for equality. Clearly, these positions cannot provide opportunities for many group members, yet recruitment of the few is symbolic and representative of political power and status for all who identify with the group.

Patronage probably is the most important feature of judicial recruitment for parties. Except for the highest appellate courts, the issue of how judges will decide specific cases is less important because political parties have no direct stake in the outcome of most litigation. Nevertheless, if staunch party members are selected as judges, their own accumulated experiences, attitudes and sympathies may lead them to decide cases in ways that are consistent with party policy.

As we shall see, not all judicial recruitment is permeated with party politics. In many states, political parties are poorly organized with few state or local party leaders having much influence in judicial selection. In certain of these states, however, interest groups are generally influential and may attempt to affect the selection of judges.⁴ For large groups, such as business and labor, the question of how judges will decide cases is important, since these groups often find themselves directly involved in or affected by litigation. For them, anticipated judicial policy and the slant of decisions remain important political issues.

It is these features of partisan and group influence in judicial recruitment that most concern judicial reformers. Reformers typically object to court positions being allocated on the basis of party loyalty or expected favorable decisions, and they fear that professional legal skills and judicial qualifications will be sacrificed for

& H. KAUFMAN, *GOVERNING NEW YORK CITY*, ch. 14 (1960). See generally H. GLICK, *SUPREME COURTS IN STATE POLITICS* (1971); *POLITICS IN THE AMERICAN STATES* (3d ed. H. Jacob & K. Vines 1976).

4. See generally T. DYE, *POLITICS IN STATES AND COMMUNITIES* (3d ed. 1977); H. ZEIGLER, *INTEREST GROUPS IN AMERICAN SOCIETY* 308-14 (1964).

partisan goals. Since judges are supposed to be detached and objective, reformers argue that care needs to be taken to ensure that only well educated, well trained and experienced lawyers, with certain desired personal characteristics, are seriously considered for judge-ships. Partisan experience is irrelevant and may actually be a detriment since it distorts conceptions of social issues and leads to judicial bias. Moreover, it creates conditions under which judges become politically indebted to others, losing their valued judicial independence.

To safeguard the courts from partisan influence, a nonpartisan judicial selection process, known commonly as the Missouri Plan, has been widely proposed and adopted in the United States. The Plan establishes procedures whereby professional legal evaluations are made a formal part of early screening of judicial candidates and thus limits the range of alternatives available to political appointment authorities. Briefly, the Plan creates a nominating commission composed of several members representing different political and legal interests. Typically, two local attorneys, two laymen from the immediate community (appointed by the governor), and the presiding or senior judge from the local judicial district comprise the commission. The group screens potential candidates from what may be a large list of eligibles and must narrow the selection to three. The three names are forwarded to the governor who must appoint one of them. After serving in office, typically for one year, the judge stands for a retention election, running, not against another candidate, but against his records as a judge. Voters usually are asked: "Shall Judge X be retained in office? Yes ____ No ____."

Political roles in the Missouri Plan are substantially different from those in other methods of judicial selection.⁵ In election or gubernatorial appointment, the organized bar is but one of many interest groups seeking to influence governors' or voters' choices, and political party influence is assumed to be high. Under the Missouri Plan, lawyers have guaranteed access to the selection system and are expected to apply nonpartisan professional criteria to the candidates. The laymen represent nonlegal local interests which may be partisan or reflect other social values. Nevertheless, they are expected to be influenced by the lawyers, and by the presiding judge, who represents the voice of judicial experience and understands the kinds of personal attributes judicial candidates ought to possess. After the nomination commission makes its choice of three

5. For an excellent survey of many views concerning judicial selection and political reform, see *SELECTED READINGS, JUDICIAL SELECTION AND TENURE* (rev. ed. G. Winters 1973).

candidates, the governor has a limited role in selecting one from the list. While he may operate in a partisan fashion, his real choices are narrow. At election time, the public retains its right to express the public will, but in a much more limited way, evaluating only the professional performance of the judge. Irrelevant and distracting political issues and personalities will be avoided.

Legal literature and reform proposals reveal three basic results which the Missouri Plan is expected to achieve.⁶ First, reformers argue that the *selection process* itself will be vastly changed and improved. Missouri Plan recruitment will de-emphasize partisan affiliations, making extensive prior political connections irrelevant for recruitment. The absence of party primaries and reelection contests will free judges from continuous partisan political obligations, permitting them to become genuinely independent both on and off the bench and able to devote themselves full-time to their court duties. Parties and interest groups will be effectively removed from significant participation in selection, thereby depoliticizing state judicial recruitment.⁷

Besides redirecting the selection process itself, Missouri Plan recruitment will shift emphasis away from partisan to *professional qualifications* for the judicial office. Since representative attorneys, informed laymen and a presiding judge shall operate in concert on the selection commissions, they will seek individuals with superior professional stature for the courts. Moreover, since partisanship has been substantially removed as a prime requisite for office, superior individuals who previously had refused to become involved in politics will now permit themselves to be considered for office. Consequently, the professional qualifications and personal stature of judges under the Missouri Plan clearly will be superior to those selected by other, more partisan political means.

Finally, the Missouri Plan is expected to lead to *superior decision-making* by the courts. Under the Missouri Plan, partisan motivations for any decision will be removed and superior judges will be selected and nonpartisan rationality will become the dominant force on the courts. Therefore, the decisions of courts in

6. Literally hundreds of books and articles describe the goals and expectations of the Missouri Plan. The following discussion summarizes the central theme of the reform outlook. For additional discussion, see JUDICIAL SELECTION AND TENURE, *supra* note 5; Hearn, *Twenty-five Years Under the Missouri Plan*, 49 J. AM. JUD. Soc'y 100 (1965); Peltason, *Merits and Demerits of the Missouri Court Plan*, in JUDICIAL SELECTION AND TENURE, *supra* note 5, at 95; 4 HOFSTRA L. REV. 267 (1976). A useful bibliography can be found in S. ESCOVITZ, JUDICIAL SELECTION AND TENURE (1975).

7. 4 HOFSTRA L. REV. 267, 296-97 (1976).

Missouri Plan states will be less partisan from those in other states. Since the judges run on their judicial record after one year in office, the voters are expected to be able to make a well informed decision about retaining a judge based upon his decisional record.

As mentioned earlier, there has been sufficient research on numerous features of the state judicial process and the recruitment of judges to permit fairly close examination of these alleged merits of the Missouri Plan, and to determine in what ways the judicial process may differ between Missouri Plan and non-Missouri Plan states. Each of the three sets of reform goals will be examined to determine how they relate to judicial selection.

A. *Selection Process*

One element of the selection process which concerns judicial reformers is the visibility of judicial elections and their recognition as public news events. Campaigning means oversimplification of issues and the likely distortion of candidates' abilities and qualifications. Competing for news coverage and public attention, according to critics, requires candidates to become strident, outspoken and controversial, destroying the proper image they ought to project to the public. Given the special obligations and duties of judicial office, electioneering is demeaning; in turn, a quieter, more reserved, more rational and more insulated process ought to be employed to choose judges.

The issue of public visibility and the assumed advantages of secrecy and insulation may be misleading, however. Judicial elections are visible, not only because candidates need to use the media in order to become known and attractive to the public, but also because *all* election campaigns provide easy sources of news for the local media. Mindful of the power of the media to convey information and images to the voters, most candidates usually are accessible, generally cooperative and anxious to maintain good relations with the press. Consequently, they are readily available and utilized as news by the media.

A political appointment, on the contrary, which is controlled by a governor or nominating commission, and not subject to official public review or easy scrutiny, usually receives little news coverage. The only visibility which some appointments obtain is a mere announcement of the appointment itself, the end result of the process. The politics of selection remains hidden despite the personal campaigns and group endorsements which may have been crucial in

filling the vacancy.⁸ Indeed, in order to limit competition and conflicting demands over an appointment, governors and other participants actually may seek to avoid publicity. In the Missouri Plan, there is also evidence that many attorneys object even to having their names released as possible candidates for court positions, fearing that should they not receive the nomination, their "loser" image will prevent them from being seriously considered in the future.⁹

If appointive candidates actively avoid news coverage, local news reporters may ignore judicial selection and spend their time instead on more accessible events and personalities. Thus, Missouri Plan selection and other judicial appointments will remain less visible and less open to public participation than most other political events. But an important consequence of this lack of visibility is that because the candidates do *not* generate public attention and controversy, judicial appointments appear to be nonpolitical or nonpartisan. Election campaigns generate publicity, news coverage and conflict; therefore, if a political process is not visible, not reported in the local press and not controversial, it also will be perceived as nonpartisan and routine.

This conclusion applies to most judicial appointments, but especially to the Missouri Plan, which distinctly claims to be genuinely nonpartisan. Without scrutiny of the actual Missouri Plan procedures and results it would be easy to conclude, as the reformers have, that the low-visibility, unreported event is routine, administrative, and nonpartisan and that the "best person" is chosen. But the lack of visibility is not a useful test of any important features of a recruitment process. For example, lawyers in Missouri Plan states, who fear being cast in a loser image if their unsuccessful bid for judicial office is made visible are *not* voicing nonpartisan or Missouri Plan reform reasons for avoiding public exposure. Their fear of adverse publicity and the creation of unfavorable political images is a concern which applies to any political selection process. These fears may be well-founded, of course, but they do not differ from the political concerns of other candidates.

Judicial elections have been the main quarry of reformers seeking new methods of selecting state judges. Although many states continue to use elections, they are the most visible and obvious targets, especially since certain judicial elections openly demonstrate the failure of public judicial selection. In order to evaluate the performance of the Missouri Plan, and to compare its performance

8. E.g., Crow, *Subterranean Politics: A Judge Is Chosen*, 12 J. PUB. L. 275 (1963).

9. R. WATSON & R. DOWNING, *THE POLITICS OF THE BENCH AND THE BAR* 69 (1969).

with other methods, an illustration of the main features of alternate selection systems is needed.

It is important to recognize at the outset that most judges in states where elections are used as the official method of recruitment are, in fact, not elected at all initially, but are appointed to fill mid-term vacancies created by the death or fortuitous resignation of incumbents. In an early study of all the states, James Herndon discovered that about fifty-six percent of all elective state judges were initially appointed to the bench.¹⁰ Indeed, half of the state courts of last resort were dominated by judges who had been appointed.¹¹ Perhaps more importantly, in those states where the selection process is most partisan—where the state uses both partisan primaries and partisan general elections—slightly over half of the high court judges had been appointed initially, thus insulating them from partisan election politics. Judges in those states were more likely to have been defeated for reelection at some time in their career, due to shifting patterns of party strength and voter support. But even in the most extreme partisan settings, with the greatest shifts in party fortunes and strength, about fifty percent of these judges had been appointed initially and continued to win reelection without difficulty.¹²

In certain elective states, the odds of being defeated after gaining a special interim appointment are especially low. In Wisconsin, for example, less than two-thirds of the reelection bids of judges who were initially appointed were even *contested*. Under ten percent were defeated in their efforts to stay on the bench.¹³ Judges in other states may face even less opposition. In a twenty-two year period in Texas, which has an elective recruitment process, sixty-six percent of the incumbent judges had originally been appointed. Following appointment, an overwhelming eighty-six percent ran for reelection unopposed. Of those opposed, only four percent were defeated.¹⁴ In Louisiana, over a fifteen year period, only four percent of incumbent trial and appellate judges were defeated. Most faced infrequent opposition.¹⁵

10. Herndon, *Appointment as a Means of Initial Accession to Elective State Courts of Last Resort*, 38 N.D.L. REV. 60, 64 (1962).

11. *Id.* at 65.

12. *Id.* at 71. While this is the general national trend, there are, of course, individual state exceptions where judges are defeated more frequently. See Barber, *Ohio Judicial Elections—Nonpartisan Premises with Partisan Results*, 32 OHIO ST. L.J. 762 (1971).

13. Ladinsky & Silver, *Popular Democracy and Judicial Independence: Electorate and Elite Reactions to Two Wisconsin Supreme Court Elections*, 1967 WIS. L. REV. 128, 132 n.14.

14. B. HENDERSON & T. SINCLAIR, *THE SELECTION OF JUDGES IN TEXAS* 21 (1965).

15. Vines, *The Selection of Judges in Louisiana*, 8 TUL. STUD. POL. SCI. 114-16 (1962).

Several patterns common in the fifty states help to explain judges' success in remaining in office. First, in many jurisdictions bar associations adhere to a value commonly termed the "sitting judge principle"—judges ought not be challenged for partisan or personal reasons, but should be permitted to run for reelection unopposed as long as they are performing adequately. In some states, judges apparently are informally guaranteed a certain number of terms before they will be legitimately challenged.¹⁶ But as the above figures indicate, the chances of defeating an incumbent after one or more terms in office are remote.

Defeat is rare partially because judicial elections are among the least visible elections.¹⁷ Voter turnout for judicial contests is notoriously low; sometimes only ten or fifteen percent of the voters cast ballots. Most voters simply are not sufficiently interested in what appear to be unimportant, noncontroversial, low-key elections. Typically they have received little information from the candidates themselves, and the nominees appear to be essentially identical. Often, only the incumbent is recognized by the voters and his prestigious title as judge gives him a paramount edge over the challenger.

With these kinds of results, voter turnout and performance in judicial elections is somewhat parallel to Missouri Plan states where the electorate has an opportunity to accept or reject the incumbent after a year in office. Practically no Missouri Plan judge has ever been defeated, and voter turnout has been very low. Few voters are even aware of judicial offices and most are unfamiliar with any given judge's performance during the preceding year. Like other judicial elections where visibility and information are lacking, few voters bother to cast ballots and the incumbent essentially serves a life term. Missouri Plan referenda and judicial elections are similar in another way. Incumbent judges and challengers normally adhere to widely accepted interpretations of the judicial role, and present the proper, well-mannered image of a judge, avoiding heated political battles that are common in other kinds of elections. One Pennsylvania judge, interviewed about his own experiences in campaigning for judicial office, explained the lack of controversy and the maintenance of judicial decorum this way:

It's alright for a judge to get out if he keeps the campaign on the proper level. Personally, I enjoyed my campaign. I didn't go to any saloons or joints. I didn't engage in any kind of political

16. THE SELECTION OF JUDGES IN TEXAS, *supra* note 14, at 95.

17. Most research on judicial elections confirms this general finding. For a recent study, see Adamany & DuBois, *Electing State Judges*, 1976 Wis. L. Rev. 731 (1976).

hassle. Usually, when I went to a political meeting the party men were very considerate. They usually let me speak first before things got rough and if they did get bad, I just left. During the campaign the judge gets to know the state. There are no conflicts at that level . . . there's no influence.¹⁸

It probably is accurate to conclude that only if he becomes involved in a major scandal is the incumbent judge likely to jeopardize his position at reelection. As long as he remains largely invisible to the public, his chances of remaining in office are excellent. Moreover, reformist fears that good judges frequently will be defeated due to unfortunate and uncontrollable turns of political events are not supported by the findings concerning state judicial elections. Nevertheless, suspicion of judicial elections and involvement with political parties or allied interest groups is common. Through intensive interviews with state supreme court judges, for example, it became evident that *both* elected and appointed judges opposed most forms of political party participation. These judges believed party participation was alien to judicial integrity and independence. Despite their fears and objections, however, the elected judges also volunteered that most of their colleagues actually had run unopposed. Therefore, the kind of political involvement they worried about rarely became a fact of judicial life.¹⁹

There are occasional exceptions, of course, to these general findings about judicial elections. For example, in those states with the most competitive political systems and which use partisan primary elections and partisan general elections to recruit judges, heavily contested and occasionally raucous elections are more likely to be found. In Pennsylvania, certain state supreme court candidates have faced closely contested party primaries, and have occasionally withdrawn from such a race to avoid party division, thereby earning a political debt from party leaders for a later judicial endorsement. Other judicial candidates have become involved in campaigns where partisan and ethnic charges have dominated the election, some candidates implying that favorable court decisions would be forthcoming once they were elected.²⁰ Similar kinds of campaigns have occurred in Louisiana, where Democratic party factional support has been crucial in many state elections.²¹ In Michigan, the supreme court has been greatly affected by the emergence of active two-party competition in state politics. Despite the nonpartisan

18. H. GLICK, *supra* note 3, at 132.

19. *Id.* at 127-28.

20. *Id.* at 124-25.

21. H. GLICK & K. VINES, *supra* note 1, at 43.

general election, court candidates are selected and endorsed by party conventions and the successful nominees often have campaigned openly as Democrats or Republicans, some promising and actually performing according to established party policy once elected to the court.²²

Although these kinds of judicial elections do occur, they are exceptional. We normally have to search hard to identify these kinds of clearly partisan, heavily contested judicial elections. Of the total number of judicial elections held in the fifty states, closely contested, partisan "unjudicial" judicial elections probably constitute no more than five to seven percent of the total. Figures from other research show that few judges are even challenged, and almost never face a close, hard-fought campaign. Even after the election is over, no matter how it was fought, the incumbent usually comes out the winner.

Judicial elections clearly are not as evil as many reformers believe, but we nevertheless need to assess how well the Missouri Plan has performed in accomplishing its reform goals of de-emphasizing partisan considerations in the selection process, freeing judges from partisan and interest group ties, and shifting a crucial part of recruitment decisions to nonpartisan participants.

The Missouri Plan has produced a selection system that is much less visible than judicial elections. Yet the insulation seems only to obscure, not remove, many important partisan features and influences in judicial selection. This becomes clear by examining the roles of each set of participants. Under the Missouri Plan, the bar is expected to play a crucial part, frequently holding two of the five seats on the nominating commissions, and offering professional recommendations concerning the legal and personal qualifications of potential nominees. Since the attorneys represent the practicing bar, they are to act as the specialists who are best acquainted with the necessary skills, stature and experience. In addition, the attorneys often know the candidates who seek judicial positions. However, detailed research of thirty years of operation of the Missouri Plan in Missouri, the state where it has been used the longest, shows that the nonpartisan recruitment plan does not perform this idealized role in judicial selection.

During the 1930's, the bar split into two large competing urban organizations representing fundamentally different social and economic classes of litigants.²³ One group is identified as plaintiffs'

22. Ulmer, *The Political Party Variable in the Michigan Supreme Court*, 11 J. PUB. L. 352, 354-55 (1962).

23. R. WATSON & R. DOWNING, *supra* note 9, ch. 1.

attorneys (mostly democrats who are sole practitioners, receiving lower income and representing "have-not" economic interests) and the other as defendants' attorneys (mostly republicans who are corporate practitioners, receiving higher incomes and representing large corporations, banks and other "have" interests). These two groups dominate the bar elections and the judicial nominating commissions.²⁴ Like active, competitive political parties, these groups nominate a restricted slate of candidates, run campaigns, mobilize blocs of attorneys for support, and like competitive political parties in many states, they share the victories. Both groups have won approximately the same number of commission seats and they frequently each have one representative on a particular commission at the same time.

Contrary to reformist hopes that the attorneys would provide and support professional criteria for selection, the attorneys are motivated to select judges whose social and economic views are most likely to coincide with those of the litigants they represent in court. Unlike political parties, which primarily are interested in the reward or patronage value of judicial positions and the influence which appointing power gives to a party organization, the attorneys are interested in the outcomes of specific court cases. Therefore, in making recommendations, they essentially want judges who are sympathetic to their clients' interests. However, openly evaluating a nominee's economic position would violate all of the normative and ethical expectations involved in the selection process; therefore, the attorneys can only evaluate vaguely stated judicial qualifications and judicial temperament.

The difficulty in applying professional criteria to the selection process is apparent in Ashman and Alfini's national survey of nominating commissioners. Commissioners in fifteen selection jurisdictions were asked to rank those factors which were important in judicial selection. Their responses produced a smorgasbord of fifty-two assorted items referring to personal background qualifications (fourteen items), professional skills (sixteen items) and character and personality (twenty-two items).²⁵ Neither the commissioners nor the researchers themselves suggested how these criteria can be "operationalized" or converted into practical, workable measures

24. Although the political divisions in other states are not as clear as they are in Missouri, research in Ohio suggests that the bar there is divided into two different groups: The Cleveland Bar Association, which generally reflects defendants' attitudes, and the County Bar Association which exhibits greater support for the plaintiffs' position. See Barber, *supra* note 12, at 787.

25. A. ASHMAN & J. ALFINI, *THE KEY TO JUDICIAL MERIT SELECTION: THE NOMINATING PROCESS* 61-63 (1974).

which can meaningfully differentiate among judicial nominees. At best, these criteria remain vague notions that commissioners generally try to apply to candidates. On the other hand, the criteria may be mere platitudes that describe the abstract "ideal judge" but which simply masquerade serious concern with more concrete issues.

The inability of nominating commissioners to establish professional standards for judicial office and to agree on nominees usually nullifies these lawyer-representatives' potential influence on the Missouri nominating commission.²⁶ The governor's lay appointees, however, have considerable power. These representatives are not selected at random, but are individuals who have supported the governor's own election or have been active in local party politics. The lay appointees have intrinsic sympathies for the governor's appointment preferences. Frequently they are open to information from and persuasion by, the governor himself or, more often, from others who are active in state and local politics and who are politically close to the governor.²⁷ Frequently, the governor's specific choice is conveyed to the commissioners and the list of nominees is "rigged" to include that individual among the three named by the commission. The governor then is free to select his favorite and to implement his own specific partisan goals. As Watson and Downing concluded: "[The governor] is primarily interested in using [court] positions to reward his personal friends or former political supporters. Moreover, judgeships are also available as potential bargaining weapons to obtain support for the governor's legislative program, or in lining up backing for future campaigns for public office."²⁸

Although lacking the detail of Watson and Downing's research, Ashman and Alfini generally confirm these major findings. Commissions generally are not bipartisan, but are loaded with partisan gubernatorial appointees. In Florida, for example, of the sixty-eight commissioners returning questionnaires, sixty-two were democrats, indicating heavy democratic dominance in state judicial selection, despite a growing republican party in the state. Many commissioners also reported that their meetings were informal and non-directed, permitting the officially taboo subject of partisan politics to enter the agenda.²⁹ Ashman and Alfini propose certain structural reforms which would prohibit political discussion, but these seem

26. R. WATSON & R. DOWNING, *supra* note 9, at 91-93.

27. *Id.* at 90-91.

28. *Id.* at 335-36.

29. A. ASHMAN & J. ALFINI, *supra* note 25, at 75-78.

very unlikely to have much effect other than shifting meaningful discussion and negotiation away from official meetings to more informal gatherings.

In Missouri, the presiding judge furthers partisan influence in the appointment process. The judge himself has usually obtained his position through a recruitment procedure essentially identical to the one over which he presides. Consequently, he is well aware of the political expectations and rules of the game which shape judicial selection and he continues to maintain contacts with old friends and political leaders. As the presiding judge, he encourages and guides the continuation of this political process. Since both laymen and lawyers defer to him, ultimately, the judge leads the others to narrow their list of candidates, making certain that the governor's stated choice is among the three.

It is likely that the commissioners will ignore professional standards either because the criteria are so cumbersome and ill-defined, or because they have more precise political goals at stake. But there is also a genuine concern that the nominating commissions may use the *aura* of professional criteria to hide exclusionary selection procedures. A black Michigan judge has suggested, for example, that should the Missouri Plan be adopted in his state, "qualified for office" would translate to mean that few, if any, black lawyers would be chosen. Moreover, the judge charges that the Missouri Plan has become more popular among elite members of the bar and other government reform groups only because blacks have won an increasing number of judicial elections. Replacing judicial elections with a selection procedure under the control of a few elite individuals would effectively cancel local (predominantly black) influence in judicial recruitment.³⁰

It is abundantly clear from Watson and Downing's thorough research in Missouri that the selection process in that state is dominated by the Governor and the Democratic Party. This and other research demonstrates that it probably is impossible to alter the dominant features of a state political system by creating a new method of judicial selection. Instead, well established patterns of party politics and the action of political officials will adapt to the new method of selection and in turn, find ways of making the new method operate within the context of existing political conditions. The Missouri Plan has not taken judicial selection out of partisan politics. It has created a new and distinctive way of selecting judges, but in an established partisan setting where the governor and his

30. Crockett, *Judicial Selection and the Black Experience*, 58 JUDICATURE 439 (1975).

allies in the dominant political party continue to have considerable influence in the appointments. In this way, the Missouri Plan does not operate very differently from formal gubernatorial appointment or the interim appointment of judges in elective states.

There is little other detailed research on the operation of the Missouri Plan in other states. It seems reasonable to conclude, however, that although the functioning of the system may vary among the states, the Plan will be adapted in each individual state to meet the established expectations and patterns of political influence, political power and competition.

B. *Professional Qualifications and Background*

Proponents of the Missouri Plan maintain that judges with superior personal and professional qualifications will be selected for the courts if a nonpartisan, professionally-oriented nominating commission screens all potential candidates. A problem exists, however, because the legal literature dealing with judicial qualities is extremely vague and imprecise in specifying the kinds of qualifications an individual must have in order to sit on the bench. Frequently, only idealized references to proper judicial temperament, neutrality and experience are suggested as the qualities thought desirable for a judge.³¹ It is practically impossible to apply these standards to individual candidates in actual recruitment situations. Lawyer-representatives on Missouri commissions have little success with the standards. In addition, these general standards or qualifications are practically unverifiable, since they are nearly impossible to translate into measureable or distinguishable evaluations that can accurately screen potential judicial nominees.

Acknowledging these difficulties, social science research nevertheless has attempted to examine the backgrounds of judges and candidates for judicial office with a view toward determining any important features of the people recruited to the courts. Special attention has been given to the effect which the differing methods of recruitment have on producing judges with distinctly different backgrounds. Not only do these studies provide specific information about judges' past experiences, but they also offer some information concerning the ability of selection systems to produce judges with varying personalities, abilities and other attributes which reflect the characteristics of an ideal judge.

31. In addition to the essays contained in JUDICIAL SELECTION AND TENURE, *supra* note 5, see H. GLICK, *supra* note 3; E. HAYNES, SELECTION AND TENURE OF JUDGES (1944); K. LLEWELLYN, THE COMMON LAW TRADITION (1960); S. SCHULMAN, TOWARD JUDICIAL REFORM IN PENNSYLVANIA (1962).

Very little of this research deals directly with the thorny and elusive notions of judicial temperament, intellectual capacity and demeanor. Instead, more readily available information is examined, such as place of birth, type and location of education, political career and judicial experience. These differences are then used as indirect indicators of professionalism and judicial capacity. For example, place of birth and location of education are said to indicate the extent to which ties to local political organizations and bar associations might influence judicial recruitment. On the other hand, out-of-state birth and education indicates a more cosmopolitan background and a detachment from local organizations. If the Missouri Plan produces superior judges, there should be no special emphasis on local men; the Plan should select judges regardless of their attachment to the community. Similar propositions are offered regarding education. Holding a degree from a prestigious out-of-state law school implies that the candidate will be perceived by others as having achieved a quality education. Judges who attended night law school while working during the day are seen as having attained a sub-standard or possibly inferior education. With the Missouri Plan's emphasis on the selection of quality personnel, judges from fully accredited state, private and prestigious universities will be selected more often than individuals who have obtained their law education at night.

Similarly, the Missouri Plan's emphasis on legal professionalism, superior judicial decision-making and experience places emphasis on judicial candidates who have prior judicial experience and who have shunned extensive partisan political careers. Examining judges' backgrounds makes it possible to distinguish between judges who have this valued judicial experience and those who have devoted much of their early careers to non-judicial, frequently partisan, political activity. Those who have prior judicial experience might be expected to perform better on the bench since they have had an opportunity to develop their own skills at managing trials, keeping their values and preferences under control, and protecting the decorum of the court. Those with partisan careers, on the contrary, may be expected to lack the experience and skill so necessary for a well-run courtroom. Moreover, their own partisan preferences may prevent them from being detached and objective.

In one of the earliest studies on the effect of selection systems and judges' backgrounds, Herbert Jacob cast some serious doubts on the ability of the Missouri Plan to recruit decidedly superior judges or to select judges who are even markedly different from

those in elective or appointive states.³² Examining trial judges in twelve states representing all of the various selection systems (Missouri was the only Plan state) Jacob discovered that in having a pre-law college education and attending a prestigious law school, the Missouri Plan judges ranked considerably behind judges in legislative election and nonpartisan election states and were essentially equal to judges in partisan election states. Although only twelve states were studied, and at that time the Missouri Plan was still very young (with few other states having had many years of experience with it), Jacob's findings do not support the contention that Missouri Plan judges can be expected to have superior formal training. Contrary to Missouri Plan expectations that professional screening will recruit quality judges from a large pool of eligibles, Jacob also reported that the Missouri Plan judges were more likely than any other judges to have been born in the district in which they preside, and to have attended law school in the state. This suggests that a candidate needs to develop and nurture state and local contacts in order to *actually* be eligible for a judicial post in Missouri Plan states.

More recent and comprehensive research produces findings which also question the role of the Missouri Plan in selecting superior judges. In an analysis of state supreme court judges in all fifty states, Bradley C. Canon discovered that equal percentages of Missouri Plan judges and judges from other selection systems had been educated in the state of their current court position; partisan election judges were only slightly more likely to have been educated in the same state.³³ Moreover, the educational credentials of Missouri Plan judges do not distinguish them from other judges. Almost equal percentages of partisan, nonpartisan and Missouri Plan judges have Bachelor of Arts degrees (fifty-three and fifty-four percent respectively); however, all three groups rank behind the gubernatorially-appointed and legislatively-elected judges.³⁴

It is surprising to discover that Missouri Plan judges have had political careers similar to judges in election states: fifty-three to fifty-nine percent of elected and Missouri Plan judges had been prosecutors, a visible political position often considered important for future political roles. Only thirty-nine percent of gubernatorial and twenty-three percent of legislative appointment judges had

32. Jacob, *The Effect of Institutional Differences in the Recruitment Process: The Case of State Judges*, 13 J. PUB. L. 104, 106-13 (1964).

33. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 L. & Soc'y REV. 579 (1972).

34. *Id.* at 589.

been prosecutors. In contrast, gubernatorial and legislative appointment judges had the greatest prior judicial experience (seventy-six and sixty-five percent respectively). Missouri Plan and partisan election judges had less judicial experience, but nearly identical levels of trial experience (fifty-seven and fifty-eight percent respectively).

Although there are some differences between judges selected under the various systems, the findings show that the Missouri Plan does not distinguish itself by producing clearly superior judges. Canon's findings suggest further, that at least in certain states, none of the selection systems are likely to make any difference in the characteristics of selected judges. For example, judges in the far west, where immigration has been great, are much less likely to have been born in or to have received their college education in the state where they now serve. In addition, judges in certain northeastern states such as Vermont and Rhode Island are likely to have obtained their undergraduate education within the state, but to have left the state for their legal education, reflecting fewer opportunities for legal education in those states. These findings suggest that regardless of the recruitment system which has been adopted, there are regional or local conditions that favor the selection of judges with different background characteristics.³⁵

Despite these findings, proponents of the Missouri Plan still argue that in specific states this selection process produces judges with superior credentials. Generalizations about the Plan's performance across the entire country may simply not apply to particular states. But if this is true, we might nevertheless wonder if the Plan were responsible for the beneficial results, or if the distinctive politico-legal environment of the state was the cause. Additional evidence on individual state systems supports the conclusion that the Missouri Plan has not produced substantially different kinds of judges. Watson and Downing in Missouri, and Berg in California and Iowa,³⁶ have carefully compared the differences in judges' background characteristics both before and after adoption of the Plan. In California, a group of defeated judicial candidates was also compared to a group of election winners.³⁷ While recognizing the unknown effect of time on state politics, this research nevertheless presents an excellent opportunity to examine the results of changes in judicial selection systems within the context of individual states.

35. *Id.* at 586-88, 590.

36. The three Missouri Plan states are Missouri, California, and Iowa. See generally R. WATSON & R. DOWNING, *supra* note 9; Berg, *The Consequences of Judicial Reform: A Comparative Analysis of the California and Iowa Appellate Court Systems*, 28 W. POL. Q. 263 (1975).

37. See Berg, *supra* note 36.

The most important finding of this research is that the Missouri Plan has not produced major changes in the kinds of judges selected. Moreover, some of the changes which have occurred have actually been in the opposite direction of legal reformers' expectations and hopes. In all three states, Missouri, California and Iowa, the use of the Missouri Plan resulted in narrowing the pool of eligibles. Larger percentages of judges were born in the state after the Plan was adopted. In Missouri, when the Plan replaced partisan elections, a larger percentage of the judges selected had been educated in the state, but more importantly, a larger percentage of them had attended night school. Most of the remainder were educated at other Missouri day law schools.³⁸ In California and Iowa, there were no significant educational differences between the elected and the Plan selected judges. Moreover, defeated judicial candidates differed from winners only by party label. Therefore, partisan elections did not result in the rejection of clearly superior candidates as many advocates of reform have feared.

As noted earlier, political careers in Missouri Plan states are strikingly similar to those in partisan election states. Similar percentages of judges in both systems had been prosecuting attorneys. However, the Missouri Plan does not seem to especially favor judges with prior judicial experience, an important feature of reform goals. Although the differences are not great, in Missouri elected judges had more prior experience in lower trial courts than the Plan judges have had, but in Iowa and California, more Missouri Plan judges had prior judicial experience. On the California Supreme Court, however, nearly ninety percent of elected judges, as opposed to eighty-two percent of the Plan appointed judges, had prior judicial experience.

None of these differences are very great but it is most important that the variations which are presented do not follow a recruitment system pattern. We might draw two conclusions from this research. First, the Missouri Plan does not consistently produce obviously superior judges in terms of quality education, cosmopolitan backgrounds, previous judicial experience or nonpartisan careers. Indeed, not only are the judges not decidedly superior in this regard, but they often appear indistinguishable from the others. Second, the studies suggest that regional, cultural, or individual state factors are more important in explaining who become judges.

Although Missouri Plan recruitment has not produced judges with superior or even substantially different backgrounds, reformers

38. R. WATSON & R. DOWNING, *supra* note 9, at 208-09.

may still argue that nonpartisan recruitment emphasizes important personal qualities which cannot be measured through background analysis, but which distinguish judges in important ways. This, after all, is the most important feature of nonpartisan professional selection. In terms of actual performance on the bench, it may not matter whether an individual attended a prestigious law school or is cosmopolitan. What really makes a difference are the intrinsic and individual qualities of specific judges. Here the Missouri Plan arguably makes a difference. Unfortunately, there is no proof for such contentions. Again, it is extremely difficult to apply relevant personality and intellectual characteristics to a comparative study of large numbers of judges. More importantly, it would seem impossible, without numerous personal interviews, testing, and perhaps in-court observation, to gather sufficient information to examine propositions about the superiority of the Missouri Plan. Yet, professional screening of candidates on the basis of personality, intellectual skills, integrity and other characteristics is a fundamental element of the Missouri Plan and is used to promote its acceptance.

Despite the persuasiveness of these arguments, there is good reason to believe that the Missouri Plan will not achieve these esteemed goals. First, as Watson and Downing have amply demonstrated, competing bar associations in Missouri have been unwilling or ineffective in implementing professional criteria and reform goals in judicial selection. Lawyer-representatives on nominating commissions are preoccupied with the decisional propensities of potential judges. Second, if there are no systematic differences in judges' formal backgrounds due to selection systems, there is no reason to expect more subtle, personal differences to appear based upon the selection system used. For example, attending an urban night law school may provide an adequate legal education, but is it likely to produce a number of exceptionally well-trained or intellectually superior judges? The judges may be capable, but there is no apparent reason why they should be expected to excel on the bench. Similarly, if partisan politics influences the selection process and the governor is motivated by partisan goals, should we imagine that the system will mysteriously produce especially distinguished judges?

Even if genuine nonpartisans controlled the Missouri Plan, the results of recruitment may not be any different, and exceptional people may not necessarily be selected. To insulate against partisan influence, members of the nominating commission would have to be chosen from those who were least active in politics, business, or other social organizations. This, of course, is unlikely because members of nominating commissions and other "blue ribbon" citizen

panels typically are social and economic elites—community leaders—who usually have formed attitudes and values about major aspects of political and economic life, even if they are not active members of a political party. Their views are likely to influence the nomination of candidates and hence the selection of judges. Moreover, when confronted with vague, imprecise and unfamiliar parameters, such as judicial temperament, experience or intellectual skills, these citizens are likely to seek more concrete and familiar measures to evaluate judicial nominees, such as political associations, values, organizational memberships, religion, social status and wealth. Following the presiding judge's leadership, final choices may be justified or rationalized in terms of superior judicial temperament or demonstrated ability. But this will only obscure the use of experience-relevant criteria that are applied to these choices.

Evaluations of the Missouri Plan's ability to produce superior judges often rely on highly selective perceptions and incomplete information or experiences to justify and support the original assumptions and claims. Surveys of lawyers, judges and other political groups, for example, often indicate that political influence and personal experience are crucial in understanding their opinions of the Missouri Plan. Specifically, judges and lawyers who support the locally dominant political party (e.g. republicans in rural areas; democrats in urban areas) often favor partisan elections. Their political party influences judicial recruitment in their locale and they wish to maintain this influence. In contrast, lawyers who support the local minority party have little effect on recruitment, and often favor the Missouri Plan because it provides an opportunity to reduce the dominant party's influence in selection.³⁹

Lawyers' evaluations of the performance of state judges are related to the lawyers' support for the Missouri Plan. Watson and Downing asked hundreds of attorneys to rate the performance of judges who had been elected prior to the adoption of the Missouri Plan as well as those more recently chosen under the Plan. The researchers examined lawyers' evaluations according to the type of selection plan used, and the judges' characteristics. They found, first of all, that Plan judges generally were rated higher by attorneys; however, ratings clearly were linked to lawyers' preferences for

39. For an early study of the effect of partisanship and political experience on perceptions of judicial recruitment, see Keefe, *Judges and Politics: The Pennsylvania Plan of Judge Selection*, 20 U. PITT. L. REV. 621 (1959). Other discussions of lawyers' and judges' perceptions of judicial selection may be found in H. GLICK, *supra* note 3; Watson, *Missouri Lawyers Evaluate the Merit Plan for Selection and Tenure of Judges*, in JUDICIAL SELECTION AND TENURE, *supra* note 5, at 51; Atkins, *Judges' Perspective on Judicial Selection*, 49 ST. GOV'T 180 (1976); L. Pelekoudas, *supra* note 2, at 35-40 & ch. 4.

different selection systems. Specifically, lawyers who favored the Missouri Plan were more likely to rate Plan-selected judges higher than lawyers who preferred partisan elections. In contrast, the latter tended to rate partisan elected judges at least equal and sometimes superior to Missouri Plan judges. Thus, though the attorneys did not agree, they evaluated judges, at least in part, according to their ideological attachment to a specific judicial selection system. For certain attorneys, the Missouri Plan is superior, so judges chosen according to that system must also be superior. Advocates of partisan elections, however, fail to assign this superior status to Missouri Plan appointees.⁴⁰

The importance of the attorneys' predisposition toward the Missouri Plan seems even more significant in light of the findings that there were no consistent patterns linking lawyers' ratings and judges' backgrounds (age, legal education, place of birth, party affiliation, judicial or political experience). Republican and democratic judges as well as judges who had attended state law schools full-time, were equally likely to be rated as superior or inferior. An equal percentage of judges, rated as superior or inferior, had been prosecutors before going on the bench. One interesting connection did appear, however, in lawyers' rankings and the legal background of the judges. Lawyers were more likely to rate as superior, those judges whose law practices had been the most prestigious: judges who had practiced in law partnerships (instead of sole practitioners), judges who had earned over \$20,000 per year, and judges rated highly by Martindale-Hubbel. No information is available as to why these judges had originally practiced with prestigious law firms, but their visibility and prestige traveled with them to the courts. Perhaps prestige begets prestige.

Besides judges' personal qualifications, the Missouri Plan also emphasizes judicial integrity and proper judicial conduct as important manifestations of reform. Professional screening will select individuals who best demonstrate the capacity for proper judicial behavior. There appears to be no systematic appraisal of the Missouri Plan's performance regarding judicial ethics. Therefore, in order to obtain a rough calculation of the Plan's success, news events of the past three years were examined to determine if Missouri Plan states had a better record of selecting ethical judges. All news articles in the *New York Times* from 1974 through 1976 were screened in order to find all reports of judicial misconduct. Articles about New York and New Jersey courts were excluded since they are local news and

40. R. WATSON & R. DOWNING, *supra* note 9, at 286-88.

a disproportionate number of these articles appear in the *Times*. Obviously, this survey did not include all news about judicial misconduct in the United States; however, major news items were included since most of the misconduct reported resulted in removal, resignation or censure of the judge. This gives some general idea about the relative performance of different selection systems. The survey is geographically representative, including states from Massachusetts to Alabama and from Florida to California.

The following table illustrates that the distribution of judicial misconduct news items is essentially equal among nonpartisan election, gubernatorial appointment and Missouri Plan states. Only two news items regarding judicial misconduct appeared regarding partisan election and legislative election states. Therefore, the Missouri Plan does not seem to have any greater success in screening and predicting the behavior of its judicial nominees than any other selection system.

Frequency of Judicial Misconduct in Five Judicial Selection Systems, 1974-1976

Type of Selection System*

| | Partisan Election | Nonpartisan Election | Gubernatorial Appointment | Legislative Election | Missouri Plan |
|-------------------------|----------------------|-------------------------|------------------------------|-------------------------|------------------|
| Number of News Items | 2 ^a | 5 ^a | 4 | 2 ^b | 5 ^b |

*Based upon *New York Times*. New York and New Jersey excluded.

a. One citation for criminal violation.

b. Two citations for criminal violations.

Reformers might argue that the Missouri Plan is more likely to uncover judicial misconduct due to its superior judicial ethics committees, but this is not supported by the news tally. The Missouri Plan has approximately the same success as the other selection systems. Likewise, there is no support for the view that the Missouri Plan prevents potential wrongdoers from obtaining office. The figures indicate that the type of selection system itself makes little difference in preventing or discovering judicial misconduct.

C. *Decision-making*

One of the key features of Missouri Plan recruitment is to provide an insulated and secure environment which makes it possible for judges to decide cases "neutrally." Proponents of the Plan contend that since judges no longer are directly linked to political par-

ties or interest groups, the bench will not be swayed by the social, economic or political status of the litigants, or their personal stakes in the outcome, but will be free to focus on the merits of the individual case. Only dispassionate and detached concern with law and justice will be relevant in decision-making.

While this generally is viewed as a desirable product of reform, some believe the Missouri Plan actually will select conservative judges. Recruitment in the hands of the professional bar, they fear, will favor successful lawyers; the more visibly prestigious, wealthy attorneys associated with institutions of concentrated economic power—banks, corporations, insurance companies and the professions. Consequently, since these potential nominees have devoted most of their professional careers to moneyed interests, it is feared that their decisions will favor conservative economic groups at the expense of the “have-nots.” Injured employees, tenants, consumers, the unemployed, criminal defendants and others not affiliated with large, powerful organizations will find the scales of justice imbalanced.⁴¹

Recent research on state courts is relevant to this issue. Social scientists recently have begun to examine the fifty state court systems to determine if links exist between the environments which surround state courts, the characteristics of judges, and the kinds of decisions courts produce. Decisions have not been examined in terms of judicial neutrality or bias since absolutely neutral justice is impossible to achieve. Important aspects of judges' lives have been affected by numerous personal, social, political and professional experiences and the resulting attitudes are bound to influence court decisions. Since judges have considerable discretion, personal judgment affects decisions and prevents strict neutrality. While avoiding the idea of neutrality, social scientists have examined courts and judges in order to research many of the same issues that concern judicial reformers, notably the question of partisan influence in judicial decision-making and the effect which judges' backgrounds and judicial recruitment systems have on court decisions.

A common theme in social science research is that different selection systems are likely to favor certain classes or categories of candidates for judgeships.⁴² Certain groups become more politically “eligible” for recruitment than others due to variable requirements. In turn, these special groups of individuals, varying among the states and selection systems, will favor different types of litigants

41. *Id.*

42. This theme is developed in Atkins and Glick, *Formal Judicial Recruitment and State Supreme Court Decisions*, 22 AM. POL. Q. 427-49 (1974).

and claims in court. Thus, personal background and the type of selection system are expected to have a combined influence in judicial decision-making. The selection system itself could have an independent effect on court cases. For example, political experiences and pressures exerted by different selection systems may produce judges who conflict with their fellow judges and who may favor different classes of litigants more strongly or more consistently. For example, consider judges who have been especially active in party politics and campaigns for most of their adult lives, giving contributions, managing campaigns and running for office. Experienced and weathered in competitive state and local politics, they have developed attitudes sympathetic to the groups who support party goals and candidates. Once elected or appointed, it is likely that these judges will maintain past sympathies, supporting those litigants who hold similar political and social beliefs. Moreover, experience in scrappy state politics may have sharpened and intensified judges' attitudes, and they may tend to openly disagree with, and dissent from, their colleagues' opinions.⁴³

There is little doubt that judges vote, at least in part, according to their political party identification and the sympathies they have developed over their lives. Moreover, the politics of judicial selection may amplify or depress the effect of partisanship in decision-making. Over fifteen years ago, Stuart Nagel concluded that in state supreme court cases, democratic and republican judges were likely to vote in favor of social and economic positions which paralleled the general posture of their political party in areas of public policy.⁴⁴ Democratic judges, for example, were more likely to support a criminal seeking a new trial, a tenant suing a landlord, an employee in a personal injury suit, or a labor union bringing an action against management. Most important here, Nagel discovered that selection systems made additional differences in judges' voting: party influence was magnified in states using elections to choose judges, whereas appointed judges were more likely to vote contrary to their established party pattern. Nagel suggested that special features of states which appoint judges may dilute the influence of otherwise partisan pressures in recruitment, thus selecting judges who are less closely attached to their own state political party. New Jersey, for

43. Political activism of state judges is discussed in Adamany, *The Party Variable in Judges' Voting: Conceptual Notes and a Case Study*, 63 AM. POL. SCI. REV. 57 (1969). See also H. GLICK & K. VINES, *supra* note 1, at 77-82; Canon & Jaros, *External Variables, Institutional Structure & Dissent on State Supreme Courts*, 3 POLITY 175 (1970).

44. Nagel, *Political Party Affiliation and Judges' Decisions*, 55 AM. POL. SCI. REV. 843 (1961).

example, has a longstanding custom of requiring the governor to alternate party appointments to the supreme court regardless of his own partisan preferences. This may result in a liberal democratic governor choosing a liberal republican judge because tradition requires a republican appointment, and the governor prefers to choose a liberal. This particular judge might vote contrary to typical republican policy positions. (It is important to note that this type of judge is not necessarily neutral; he simply is not typical of most republicans and finds himself, at times, voting with more liberal democratic judges.)

Several individual states clearly illustrate the influence of selection procedures and state politics on judges' voting. Studies of the Michigan Supreme Court have shown, for example, that conflict among the judges, measured in terms of rates of dissent, as well as partisanship in court voting, had increased as new members with different political experiences and affiliations were added to the court. As democratic membership increased, gradually replacing the republican monopoly, the rate of dissent rose sharply, with the democrats generally arrayed in a bloc against the republicans. In particular, workmen's compensation cases sharply distinguish the two parties. Whenever the judges cast dissents, all democrats voted in favor of the employee while all republicans voted against the employee. These kinds of cases illustrate how major divisive issues in a highly competitive two-party state are translated into judicial decision-making.⁴⁵

Moreover, judicial selection provides fuel for court conflict. Michigan's judicial selection calls for nonpartisan general elections. However, studies reveal that the candidates were nominated in party conventions, which placed the greatest value on potential candidates' party loyalty, their ideological attachment to the party, and their use of patronage to reward important party supporters. Even though the elections were nominally nonpartisan, the campaigns themselves usually were explicitly partisan. Candidates openly identified themselves as members of particular parties and implied directly that they could be expected to behave on the court in accordance with their party affiliations and sympathies.

Despite the intensity of the conflict in certain states, the evidence does not establish a close link between judicial selection and judges' voting. In neighboring Wisconsin, the nonpartisan ballot is used for primary as well as general elections. Traditions and experience in the state indicate that most elections have been bipar-

45. See generally G. SCHUBERT, *QUANTITATIVE ANALYSIS OF JUDICIAL BEHAVIOR* 129-42 (1959).

tisan, with candidates receiving endorsements and support from a wide range of political and professional groups.⁴⁶ The results of recruitment in Wisconsin closely approximate and can be considered a paradigm of the Missouri Plan. Both democrats, republicans, labor and business, as well as most lawyers and bar association leaders, endorsed the successful candidates. Indeed, Wisconsin judicial politics seems more nonpartisan than Missouri's! The level of dissent among Wisconsin Supreme Court judges is very low and the conflict which exists cannot be traced to judges' party affiliation. Voting alignments are temporary and differ from the more stable partisan blocs in Michigan.

Michigan and Wisconsin illustrate opposing tendencies in judicial selection and decision-making. An important question remains concerning how common these states' characteristics are across the country and how other Missouri Plan and election states compare to these patterns. First, the overall level of visible conflict among judges on appellate courts is low. Only a few state supreme courts, representing all types of selection systems, have dissent rates exceeding twenty percent.⁴⁷ Moreover, research in several states does not consistently identify different groups of dissenters based upon party affiliation. Instead, shifting voting alignments among judges have been found, which cut across party or factional lines, and seem likely to rest on other bases of interpersonal agreement.⁴⁸ Thus, state courts more closely approximate the Wisconsin than the Michigan experience, regardless of the selection system used.

Although the harmonious Wisconsin pattern generally applies to the Missouri Supreme Court as well, it is interesting that the rate of dissent on the Missouri Supreme Court actually *increased* after the court became staffed by a majority of judges selected under a nonpartisan plan. The dissent rate was significantly lower when the court was dominated by judges elected by partisan ballot. But while the dissent rate rose, party affiliation did not account for any of the voting alignments.⁴⁹ Despite political party influence and bar com-

46. Adamany, *supra* note 43, at 61-62, 69. In New York it appears that party politics have been more significant than in Wisconsin, but not so powerful a force as in Michigan. See Beiser & Silberman, *The Political Party Variable: Workmen's Compensation Cases in the New York Court of Appeals*, 3 *POLITY* 521 (1971).

47. H. GLICK & K. VINES, *supra* note 1, at 79.

48. Beiser & Silberman, *supra* note 46; M. Feeley, *A Comparative Analysis of State Supreme Court Behavior* (1969) (unpublished Ph.D. dissertation, University of Minnesota, Department of Political Science).

49. R. WATSON & R. DOWNING, *supra* note 9, at 318-23. For a discussion of diverse social backgrounds and dissent, see Patterson & Rathjen, *Background Diversity & State Supreme Court Dissent Behavior*, 8 *POLITY* 610 (1976).

petition in Missouri, supreme court decision-making has not been greatly affected. Similarities in decision-making cut across all selection systems, making the Missouri Plan practically indistinguishable from the others in its effects on decision-making. Certain state variations remain, of course, but the type of selection system, as a single variable, does not exert overwhelming influence on modes of decision-making.

Not only are decisional styles substantially similar among the states, but patterns of decisions themselves do not differ according to the selection system used. A recent study of all fifty state supreme courts tested the hypothesis that courts arranged according to selection method would produce different levels of support for different categories of litigants.⁵⁰ Litigants were classified into five major groups: state government; criminal defendant; corporate; litigants with superior economic power (creditors, landlords, employers); and litigants with inferior economic power (tenants, consumers, employees). The findings show that while there was great variation among the fifty state supreme courts in their support for the five categories of litigants, no clear pattern emerged based on the type of selection system used in the state. Selection systems were not an important predictor of how courts would decide cases. One interesting exception discovered was that litigants with inferior economic power (the "have-nots") fared best in states where partisan elections or the Missouri Plan was used to select judges. In this regard, Missouri Plan states had more in common with partisan election states than with those states using other selection methods.

This finding is especially interesting in that it parallels the perceptions Missouri lawyers have toward their own elected and plan-appointed judges.⁵¹ Lawyers were asked if the judges were likely to favor plaintiffs (that is, litigants with inferior economic power) or defendants (that is, litigants with superior economic power). The attorneys responded that there were no substantial differences in judges' decisions regardless of how they had been selected for office. Most judges were perceived as taking a middle position; however, both elected and Missouri Plan judges had a slight tendency to favor plaintiffs over defendants.

The Missouri study, along with other state studies, further indicate that fears that the Missouri Plan will produce an abundance of conservative judges are unfounded. While bar participation is a major element in judicial selection reform, the actual role lawyers

50. Atkins & Glick, *supra* note 42.

51. R. WATSON & R. DOWNING, *supra* note 9, at 344-45.

perform differs substantially from their ideal role. Frequently, bar associations are divided on important political issues, including judicial selection, thus preventing a single group of bar elites from dominating judicial recruitment. The Missouri bar, in particular, is sharply split and unable to exert any consistent or predictable influence over judicial selection. In addition, judges' voting patterns do not support the proposition that conservative bar elites are successful in selecting judges in their own image.

Most state research has concentrated on appellate courts, and the effect of party affiliation and recruitment on trial courts is not well known and probably subject to various special and local conditions. Generally, however, there appears to be little direct or obvious influence from political parties and types of selection systems on trial court decision-making.⁵² There are, of course, exceptions. In a very few instances, political parties are directly affected and judges who owe their appointment or election to parties and who identify with them, are sensitive to the risks at stake in such cases. This is very rare, however, since only occasionally are American political parties interested in cases not directly affecting the party. Frequently, political parties are poorly organized and not ideologically cohesive, permitting a wide range of independence by local officials who are only nominally affiliated with the party. For trial court judges, who are more insulated from partisan pressures than most office holders, the relevance of the party in decision-making is very low.

Except for these kinds of generalizations, little is known about the effects of judicial selection systems on trial court decision-making. A detailed analysis of courts in two cities, however, provides information from which to infer the relevance of different selection systems. In a study of Pittsburgh and Minneapolis, Martin Levin concludes that major differences in urban political settings produce marked variations in the way judges handle criminal cases and the kinds of sentences imposed.⁵³ Pittsburgh judges are chosen in partisan elections which are greatly influenced by well-organized, competitive political parties. Nominations are given to strong party supporters who have worked regularly in party and governmental affairs. In contrast, Minnesota's nonpartisan elections are similar to Wisconsin's. They are low-key, not competitive and uncontrolled by party organizations.

52. K. DOLBEARE, *TRIAL COURTS IN URBAN POLITICS* 75 (1967).

53. Levin, *Urban Politics and Policy Outcomes: The Criminal Courts*, in *CRIMINAL JUSTICE* 372-406 (2d ed. G. Cole ed. 1976):

Court decisions in these two cities are dramatically different. Pittsburgh judges vary their sentences to fit individual cases and generally are lenient, frequently awarding probation to both white and black defendants. Minneapolis judges, however, are much more consistent in their sentencing and normally impose jail or prison terms rather than probation. Trials in Pittsburgh are more likely to be short, informal, pragmatic and directly linked to the judges' personal sense of justice. Trials in Minneapolis are longer and require the formal presentation of witnesses and evidence.

Levin maintains that the Pittsburgh judges have brought most of their style and decisional tendencies to the bench with them, having gathered a great deal of empathy and practical wisdom in city and party politics. These lawyer-politicians have achieved an informal "people-and-justice" decisional style. Minneapolis judges, on the contrary, have had little political experience, but have extensive backgrounds in business and corporate law. Feeling little empathy with criminal defendants, these judges are likely to apply rigid legal requirements and impose harsher sentences in criminal cases.

Decisions in Pittsburgh and Minneapolis can be evaluated according to reform standards of judicial objectivity. Neither city produced obviously partisan democratic or republican decisions in the sense that party policy is translated directly into opinions. Thus, there is no overt party influence on the courts. But, in terms of general policy toward criminal defendants, Pittsburgh justice is much closer to a liberal political position while Minneapolis justice approaches a conservative position. Each set of judges applies a different standard of justice, and while direct party influence is missing, neither states' process of decision-making is neutral or strictly unbiased.

According to Missouri Plan goals, the Minneapolis decisions appear to fit the mold of judicial objectivity better than the Pittsburgh decisions. Criminal sentences in Minneapolis are more uniform and more consistent, and the judges' aloof decisional style gives the appearance of objectivity and personal detachment. The Pittsburgh judges appear to be much more subjective and more likely to apply personal standards of justice. Nevertheless, while Minneapolis decisions are more uniform, as we have seen, they are also stricter; they are not neutral, but reveal a consistent conservative slant. In the same vein, Pittsburgh decisions, while varying from case to case, are consistently more lenient. Therefore, despite differences in personal style and objectivity, both sets of judges produce distinctive criminal sentencing policies which are not random, but which reflect differences in local political systems and the kind of attitudes the judges themselves have developed. As in other

areas of judicial decision-making, these differences seem closely connected to state and city variations as well as local experiences. Despite the type of selection system used and the outward appearance of judicial objectivity, the specific content of judicial decisions will vary, reflecting the major values and orientations of judges and their community.

III. CONCLUSION

Most of the evidence about Missouri Plan recruitment of state judges leads to the conclusion that selection systems themselves have little impact in guaranteeing that selection procedures will be free from partisan or interest group politics, or that decidedly superior judges will be selected for office. Instead, existing patterns of state politics are more important in influencing the selection process. States which have strong traditions of party competition or partisan influence can be expected to encounter partisanship in judicial recruitment, despite changes in formal mechanisms. Even in Missouri, the Democratic Party's dominance has increased since the Plan was adopted, and has led to the nomination of *more* democratic judges than ever before (nearly seventy percent of the total).⁵⁴ Other highly partisan states, such as Pennsylvania and Michigan, would still be expected to have a large measure of party influence in judicial selection if the states were to adopt the Missouri Plan. In contrast, states such as Wisconsin and Minnesota, which currently appear highly nonpartisan, probably would have a bipartisan or nonpartisan Missouri Plan if the Plan were adopted there.

Despite the lack of evidence that the Missouri Plan makes any difference in judicial selection or in the kinds of judges chosen, the debate over the Plan's merits and the role of the professional bar probably will continue. Many proponents are committed to ideologies which support the Plan, and their devotion to the *idea* of nonpartisan recruitment probably will motivate them to seek adoption of the Missouri Plan despite its performance in other states. In addition, proponents might argue that other states' *general* experience with the plan is no guarantee that it will produce the same results in their particular state. This is technically correct, of course, even though the accumulated evidence better supports the opposite conclusion.

The Missouri Plan also affords the organized bar an opportunity for increased political power. Indeed, the battle over recruitment

54. R. WATSON & R. DOWNING, *supra* note 9, at 218.

seems to have as much to do with controlling the machinery of recruitment as it does with the expected results of the Plan. Should the Missouri Plan be adopted in a state, thus giving bar organizations at least a formal opportunity for influence, political parties still can be expected to search out alternative ways to influence the selection of judges. Neither bar associations, political parties nor other allied interest groups are likely to abandon the battle for judicial selection, given the important values at stake. The method of recruitment may change, requiring changes in political strategies and technique, but the goals remain the same.

Ideologies and political commitments often lead political activists to exaggerate the merits of their own position and to misperceive and disparage the opposition. Advocates of reform often see partisan selection of judges as producing inferior or incompetent judges whose only qualification is having contributed something to a political party. As some judges themselves have expressed it: a judge simply is a man who knew the governor. This is a limited view of judges chosen through election or appointment, and it oversimplifies the roles of the governor and political parties in judicial recruitment.

Even though a partisan governor and political parties are active in the selection of judges, recruitment does not automatically result in judges with poor reputations for integrity or intelligence, or in judges who can only be described as "party hacks." Little is gained by electing obviously unqualified people to the bench. A political appointment, especially a judgeship, affects the image of a political party and provides a vehicle for patronage. Politically deserving as well as qualified people from both political parties are always available for any governmental position. In order to present the best image of the party to the voters and to encourage others to become politically active, party leaders generally try to accomplish two goals when making appointments: to reward their own party activists, and to fill the vacancy with a respected, qualified candidate. Accomplishing both goals in one appointment serves the party's best interests. It rewards current party activists and supporters, demonstrating to others that party roles can lead to important political positions. It also presents a general image to the community that the party is responsible in political recruitment, thus earning continued respect and support. Consequently, the election or appointment of clearly unqualified or incompetent individuals is not common, regardless of which recruitment system is used. This says nothing, of course, about the types of decisions these judges may make, but refers only to the roles which political parties, governors and bar associations play in making initial selections for judicial vacancies.

Although political debate over the Missouri Plan will continue, reformers concerned about the performance of American courts may not see judicial selection as a fruitful issue, especially since there is little support for the claim that the Missouri Plan is a superior recruitment procedure. For example, asking whether or not judges are objective or neutral in criminal sentencing is practically meaningless because, despite their objective demeanor and courtroom conduct, judges have a great deal of sentencing discretion. This discretion is affected by their own values and the influence of others in the judicial system, making it literally impossible to achieve absolute neutrality. Indeed, any decision involves discretion and cannot be absolutely neutral.

For many groups, especially those outside the judiciary and the legal profession, the role of American courts in remedying social problems is considerably more important than judicial objectivity, nonpartisanship and recruitment. Indeed, many would shun objectivity altogether, wishing instead to involve the judiciary in creating solutions and remedies for existing problems: remedies that do not require detached judicial neutrality, but would explicitly involve the courts in conscious policy-making. Issues such as the non-political use of bail, the reduction of recidivism, the use of punishment as deterrence, better ways to protect the community from habitual criminals, access to civil courts, access to legal services, child abuse, consumer law and white collar crime are considered too important and too demanding to permit courts to remain passive, satisfied with achieving a posture of judicial objectivity and non-involvement.

Not only will conflict over the proper method of selecting judges continue, but those involved in the conflict may face competition from others who have little regard for the entire recruitment question itself, but who nevertheless hold values about judicial performance which run contrary to the ultimate goals of most judicial reformers: objectivity and neutrality. Conflict between these two sets of groups may be the greater issue in the future.