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## Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment, The

Jay A. Daugherty

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# **The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?**

*The Honorable Jay A. Daugherty\**

## I. INTRODUCTION

Surveys have shown that as America's distrust of the political system increases, so does its unfavorable perception of the judiciary.<sup>1</sup> This distrust and unfavorable perception result in declining retention percentages for judges and challenges to the merit selection system by minorities and legislatures.<sup>2</sup> Although the authority of the courts is grounded in the law, that authority ultimately depends on the public's knowledge and trust in the courts. If public knowledge and trust in the courts has eroded, the result may be new and varied challenges against non-partisan or merit selection plans, with outcries from the legislatures and minorities to repudiate such plans and return the judiciary to partisan politics. This article focuses on the challenges to the merit selection of judges. It will provide a historical overview of the Missouri Non-Partisan Court Plan ("the Plan") and its expansion across the country. The article will explore the positive and negative aspects of the Plan and examine traditional criticisms levied against it. Declining voter confidence in merit system states will be discussed, and the article will analyze and report on declining retention percentages in Missouri and their implications on the Plan. Furthermore, recent attacks in Missouri on the merit selection system by minority groups and the state legislature will be studied. After examining the challenges to the Plan and exploring their possibility of success, the article will provide suggestions and observations to both challengers and defenders of the Plan.

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\* Circuit Judge for the 16th Judicial Circuit Court of Missouri, Division 13. University of Missouri-Columbia (B.S. Public Administration); University of Missouri-Kansas City School of Law (J.D.); University of Nevada/National Judicial College (Masters in the Judiciary).

1. Larry T. Aspin & William K. Hall, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 347 (1987).

2. *Id.*

## II. EVOLUTION OF THE MISSOURI NON-PARTISAN COURT PLAN

The method by which judges are chosen for office has been an important part of judicial history since the birth of our nation. Historically, the method of selection and retention of judges has been controversial,<sup>3</sup> with all aspects of society involved in the debate over how judges should be selected. The essence of this debate is the search for a selection system that increases public participation, but reduces politics. It is characterized by the tension between judicial accountability and judicial independence.<sup>4</sup>

### A. *Judicial Selection in the United States Prior to the Missouri Plan*

At the time of its formation, our nation adopted the appointive judicial selection system from England.<sup>5</sup> The Founders were torn between the exclusive selection of judges by the executive branch versus a direct election of judges by a populace they distrusted.<sup>6</sup> Consequently, “[i]n order to protect judicial independence, a majority of the states provided for lifetime appointments, subject to good behavior. Popular elections for judges were unheard of.”<sup>7</sup> At the beginning of the nineteenth century, political populism emerged in America, led by Presidents Jefferson and Jackson.<sup>8</sup> This populism clashed directly with the judiciary when Chief Justice John Marshall announced in *Marbury v. Madison*<sup>9</sup> that judges could overturn laws passed by legislatures.<sup>10</sup> Public criticism of the judiciary grew as both Jefferson and Jackson attacked the judges’ lack of accountability.<sup>11</sup> The populist movement, seeking accountability for elected officials, was dedicated to the concept of direct elections. Thus, evolution of judicial selection in the nineteenth century was characterized by a movement from executive appointment to contested partisan elections. By the latter part of

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3. Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge’s Prospective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1970, 1972 (1988).

4. William Jenkins, Jr., *Retention Elections: Who Wins When No One Cares?*, 61 JUDICATURE 79 (1977).

5. Hon. Elmo B. Hunter, *Revisiting the History and Success of Merit Selection in Missouri and Elsewhere*, 60 UMKC L. REV. 69, 69 (1991).

6. John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837, 839 (1990).

7. Grodin, *supra* note 3, at 1970.

8. Grodin, *supra* note 3, at 1971.

9. 5 U.S. (1 Cranch) 137 (1803).

10. Grodin, *supra* note 3, at 1971 n.7.

11. Roll, *supra* note 6, at 841.

the nineteenth century, most state judges in the United States were elected in contested partisan elections.<sup>12</sup>

Unfortunately, by the late 1800s and early 1900s, the practice of electing judges, while representing a democratic ideal, often degraded into the selection of machine sponsored judicial “hacks.”<sup>13</sup> In 1906, Professor Roscoe Pound, the future dean of the Harvard Law School, criticized the direct election of judges as being inconsistent with the standards of quality and independence expected of the judicial branch. He argued that a partisan election compelled a judge “to become a politician, [and] in many jurisdictions ha[d] almost destroyed the traditional respect for the bench.”<sup>14</sup> In response to these concerns, a search for alternatives began. For a time, the election of judges in non-partisan contested elections gained support, but that was also deemed a failure, as unqualified candidates could win elections by aggressive campaigning.<sup>15</sup> The most obvious alternative was the federal appointive model, but in light of continued populist feelings, a third model was put forward containing a retention vote component.<sup>16</sup>

During this era, the judicial “independence versus accountability” debate was recast in terms of “formalist versus realist.”<sup>17</sup> Many scholars asserted that judges make decisions as “formalists,” such that law is a system of rules supplemented by principles which are capable of being discovered and applied without the discretion of the judge. If this were the situation, then most would agree that the direct election of judges makes no sense.<sup>18</sup> On the other hand, “legal realists” argued that judicial decisions were simply the product of a judge’s personality. “If this were true, then the direct election of judges makes perfect sense.”<sup>19</sup> Unfortunately, neither of these theories adequately describes the true judicial function. The modern judge is a melange of the “formalist” and “realist” prototypes. Precedent is usually followed, and decisions are commonly reached objectively and dispassionately. However, at times, judges must act subjectively and more like legislators. For these and other philosophical and political reasons, compromise plans, including merit selection, began to emerge in the 1930s and 1940s.

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12. Roll, *supra* note 6, at 841.

13. Roll, *supra* note 6, at 842-43. For example, Thomas Pendergast exercised great control over judicial elections in Kansas City, while Tammany Hall did the same in New York City. See *supra* notes 21-25 and accompanying text.

14. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 20 J. AM. JUDICATURE SOC’Y 178, 186 (1962).

15. Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1083 (1966).

16. Grodin, *supra* note 3, at 1971.

17. Grodin, *supra* note 3, at 1973-74.

18. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 38-39 (1977).

19. JEROME FRANK, LAW AND THE MODERN MIND 108-17 (1936).

Merit selection methods of choosing judges began to develop publicly around 1913, with the founding of the American Judicature Society (AJS). This organization supported the development of an independent, apolitical judiciary. Its leaders believed that merit selection and retention was a compromise between pure appointive and pure elective methods.<sup>20</sup> Their belief was that merit selection would be politically acceptable and would create an opportunity for a more independent and less political state judiciary. In developing a plan for the selection of judges, numerous proposals were put forth over several years, with three essential components emerging: (1) the recommendation of several judicial nominees based solely on merit by a commission, (2) the selection of a judge from the list of recommended judges by an *elected* official (usually chief justice or governor) and (3) noncompetitive retention elections.<sup>21</sup> Such plans were referred to as “commission plans” due to their use of a commission for initial recommendations of judicial candidates.

### B. *Judicial Selection in Missouri*

At the turn of the century in most of the heavily populated areas of the country, “political machines” and “party bosses” began to control the election of state judges; such was the case in Missouri.<sup>22</sup> Thomas Pendergast, the “party boss” in Kansas City, and later Harry Truman’s benefactor, controlled most of the significant elections throughout the state. “At times, the results flowing from this system ranged from the ludicrous to the near chaotic.”<sup>23</sup> Judges found their tenure on the bench at risk irrespective of their ability, merit, or service as a judge.<sup>24</sup> A judge’s position in Missouri under “machine politics” was so tenuous that between 1918 and 1941 only twice was a state supreme court judge re-elected.<sup>25</sup> Consequently, concerned citizens, jurists and lawyers began numerous attempts to legislatively create a “commission plan” of judicial selection. When these efforts failed, they organized petitions to place the Missouri Non-Partisan Court Plan on the ballot. In 1940, despite the efforts of the “political machines,” the Missouri Plan passed statewide by over 80,000 votes.<sup>26</sup> After its passage,

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20. Michael R. Belknap, *From Pound to Harley, the Founding of AJS*, 72 JUDICATURE 78 (1988).

21. Roll, *supra* note 6, at 842-43.

22. Hunter, *supra* note 5, at 70.

23. Hunter, *supra* note 5, at 70.

24. Hunter, *supra* note 5, at 70.

25. Hunter, *supra* note 5, at 70.

26. Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128, 131 (1990); LYLE WARICK, JUDICIAL SELECTION IN THE UNITED STATES: A COMPENDIUM OF PROVISIONS (1993). When initially passed in 1940, the Missouri Plan covered the Supreme Court of Missouri, the three Missouri Courts of

there were several unsuccessful attempts to repeal the Plan.<sup>27</sup> Since the initial passage of the Missouri Plan, over thirty-three states and the District of Columbia have adopted some form of the Missouri Plan, making it the most popular method of judicial election in America.<sup>28</sup>

Under the Missouri Plan, judges are initially appointed by the governor, who selects from a list of three nominees who are recommended by a judicial commission. At the next general election within the first year on the bench, judges must face the voters in a retention election. Judges who receive affirmative votes in this uncontested retention election of at least fifty percent earn a full six year term in office if a trial judge or a twelve year term if an appellate judge.<sup>29</sup>

Few would argue with the proposition that the Missouri Plan's expectations and goals are laudable. The Plan seeks to improve the selection process and promote superior decision making from the bench by emphasizing professional qualifications rather than political influence.<sup>30</sup> More specifically, advocates maintain that the merit selection process provides the following benefits: (1) the quality of applicants is improved; (2) a pre-appointment screening process is provided; (3) judges are removed from politics, emphasizing professional qualifications rather than political influence; (4) judges need not campaign or solicit campaign funds; (5) the large number of judicial offices make contested judicial elections impractical; (6) judicial stability is promoted; and (7) retention elections provide for democratic participation.<sup>31</sup>

However, the most popular judicial selection system may not be the best. Opponents of a merit selection system argue: (1) merit selection is undemocratic; (2) judges are selected by small elite groups; (3) merit selection allows for removal, but not selection; (4) politics is still a factor at the nomination and appointment level; (5) it is a secretive process; (6) bar polls do not accurately reflect the interest of citizens; and (7) contested elections make judges accountable and responsive.<sup>32</sup>

Whether or not the Missouri Plan has achieved its expected goals, "the impact of the Missouri Plan on American state judicial systems cannot be

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Appeals and the Circuit Court of Jackson County (Kansas City) and the City of St. Louis. Hunter, *supra* note 5, at 71. While additional metropolitan areas of the state have also enacted the Missouri Plan, other areas of the state still utilize partisan contested elections.

27. Krivosha, *supra* note 26, at 131.

28. Krivosha, *supra* note 26, at 131.

29. MO. CONST. art. V, § 25(c)(1).

30. 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).

31. *Id.* at 510, 512-13.

32. *Id.* at 513-23.

underestimated.<sup>33</sup> Every state that has changed its method of judicial selection in the past forty-five years has adopted some form of the Missouri Plan and no state that has adopted the Missouri Plan has moved to some other method of judicial selection.<sup>34</sup> There have been no substantive changes to the non-partisan court plan method of selection and retention in Missouri. The judges selected utilizing the Plan have enjoyed high retention rates and have seldom been voted out of office.<sup>35</sup>

### *C. Erosion of Retention Percentages for Missouri Plan Judges and the Ensuing Panic*

After its enactment in 1940, Missouri judges selected under the Plan routinely were retained by percentages that often approached ninety percent.<sup>36</sup> For a period of over forty years, affirmative vote retention percentages for Missouri judges seldom fell below an average of seventy-five to eighty percent.<sup>37</sup> In the early 1980s, Missouri voters' support for judges selected under the Missouri Plan began to erode.<sup>38</sup> After the 1984 retention election, affirmative vote percentages began a steady decline.<sup>39</sup> In 1986, Missouri Plan judges received an average retention percentage of seventy-two percent to seventy-five percent. This was somewhat below their historical percentages, but still not cause for concern among Plan supporters.<sup>40</sup> In 1990, however, the retention percentage fell dramatically to an average of fifty-seven percent. This sudden erosion of support created concern among the judiciary and the bar. Many supporters of the Plan worried that competent and experienced judges would not be retained in the next judicial election of 1992, even though judicial scandal and controversy were almost non-existent.<sup>41</sup>

Approaching the November 1992 retention election, it appeared that the nationally acclaimed and emulated Missouri Plan was in danger of extinction in the state of its birth. If a drop in retention percentages occurred in 1992 as had occurred between 1988 and 1990, scores of the Missouri Plan judges would be ousted. Judges, attorneys and bar leaders who had previously ignored gradual

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33. *Id.* at 509.

34. *Id.* at 510.

35. MO. CONST. art. V, § 25(c)(1).

36. Based on a review of election results from the Missouri Secretary of State for non-partisan judges from 1940-1996. *See also* Aspin & Hall, *supra* note 1, at 344-46.

37. *See supra* note 36.

38. *See supra* note 36.

39. *See supra* note 36.

40. *See supra* note 36.

41. Thomas Jackman, *Judges Fear Falling Prey to Voter Anger*, KANSAS CITY STAR, Dec. 2, 1991, at A1.

declines were suddenly awakened by the dramatic realization that the Missouri Plan was in danger of collapse. They believed that if judges could not expect competent service to ensure retention, then no competent attorney would consider becoming a judge, for fear that he or she could face a potentially unsuccessful retention election one year later.<sup>42</sup>

The irony of the erosion of affirmative votes for the Missouri Plan judges is that it had not been occurring in conjunction with any “coordinated” attack by interest groups, the legislature, or any other group. Yet with the Missouri Non-Partisan Court Plan wounded by declining retention percentages, the “buzzards” began to circle. In the state legislature, a bill was introduced that would increase the required retention percentage for judges to sixty percent.<sup>43</sup> Also, a term limitation amendment for judges was introduced.<sup>44</sup> Both of these proposals occurred after a Missouri appellate court refused to strike down term limitation amendments enacted against legislators. Almost simultaneously, minority groups opened the assault against the Plan. A lawsuit was filed in the federal district court in St. Louis seeking to utilize the Voting Rights Act to strike down the Missouri Plan.<sup>45</sup> In addition to these attacks, it appeared that the emergence of Ross Perot as a presidential candidate might coalesce anti-establishment and anti-incumbency forces in the 1992 elections. The fear among judges was that, to a voter, a judge on a “retention” ballot may appear as an incumbent seeking re-election.<sup>46</sup>

These cumulative events caused near panic among supporters of the Missouri Plan. The supporters of the Plan believed the selection system had worked reasonably well for fifty years. Judges, bar leaders and concerned politicians met to develop a strategy to “save” the Missouri Plan from what they believed would be its possible defeat.<sup>47</sup> The strategy implemented by supporters of the Plan was broad and multi-dimensional: a Citizens Committee, headed by former United States Senator Thomas Eagleton, raised nearly \$400,000 to run radio ads in major media markets extolling the virtues of the Plan; bar leaders conducted an extensive attorney survey of the judges rating them in various categories; the results of these judicial surveys were widely distributed

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42. James W. Scott, Editorial, *Missouri Court Plan in Danger*, KANSAS CITY STAR, Feb. 7, 1992, at C6. See also Jackman, *supra* note 41.

Under the Missouri Plan, a judge must file for retention within one year of appointment.

43. S.J. Res. 1, 87th Leg., 1st Sess. (Mo. 1992).

44. H.R.J. Res. 4, 6, 86th Leg., 1st Sess. (Mo. 1992).

45. African-American Voting Rights Legal Defense Fund, Inc. v. Missouri, No. 4:92CV00973 (E.D. Mo. 1993). See *infra* Part V.

46. Gregory Casey & David Leuthold, Voter Attitudes in the 1992 Missouri Judicial Retention Elections: Statewide Survey and Exit Poll Conducted for the Missouri Bar (1992).

47. *Id.* at 1-2.



throughout the state; bar leaders and citizen committee members spoke to groups and urged newspaper editorial boards to support the Plan; and judges embarked on a campaign to educate the public about their work and the benefits of the Missouri Plan by holding “judicial forums” or “town meetings.”<sup>48</sup> The results of the retention election gave both the attackers and the defenders of the Plan a report card on the effectiveness of their efforts. Judges received average retention percentages of sixty-two percent, with all but one judge being retained statewide.<sup>49</sup>

The 1994 retention election was somewhat less vitriolic, but contained most of the same conflicting elements as the 1992 election. The 1994 vote resulted in similar retention results and percentages as that of 1992.<sup>50</sup> The 1996 judicial retention election resulted in average favorable percentages of 66.5 percent.<sup>51</sup> It is uncertain whether this modest increase in the retention percentage signals the beginning of a return to pre-1988 retention percentage levels or is simply the result of an election year where incumbency was no longer a disadvantage.<sup>52</sup>

### III. JUDICIAL RETENTION ELECTIONS AND · VOTER ATTITUDE SURVEYS

As explained earlier, in its simplest form a non-partisan court plan is a compromise between the goals of judicial independence and accountability to the public for judicial actions. While this system of selection and retention appears popular, it remains controversial. Neither the champions of accountability nor the advocates of independence are completely satisfied with the Plan’s method of selection and retention.<sup>53</sup>

In addition to the typical criticisms of the Missouri Plan explained earlier,<sup>54</sup> there are at least five other significant criticisms of the judicial retention election process. These criticisms are that: (1) judicial retention elections insulate judges from the populace, since few judges are defeated in retention elections and the public is not a factor in enforcing judicial accountability;<sup>55</sup> (2) judicial retention elections attract the smallest voter turnout of all types of elections, apparently because many voters feel they lack sufficient information

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48. *Id.*

49. Based on a review of election results from the Missouri Secretary of State’s Office for all non-partisan judges in 1992.

50. *See supra* note 49.

51. *See supra* note 49.

52. *See infra* Part IV.

53. Jenkins, *supra* note 4, at 80.

54. *See supra* note 32 and accompanying text.

55. *See supra* note 36.

to cast an informed vote;<sup>56</sup> (3) judicial retention elections are boring, and the level of public knowledge about judges and judicial retention elections is unusually low;<sup>57</sup> (4) political guides such as party labels, which are known to play an important role in providing information to voters, are conspicuously absent;<sup>58</sup> and (5) judicial retention elections have resulted in essentially lifetime tenure for judges, as evidenced by the fact that only one percent of judges seeking retention have been defeated in retention elections.<sup>59</sup>

In one of the few studies of retention elections, Aspin and Hall analyzed affirmative retention voting in ten states from the period of 1964 through 1984.<sup>60</sup> In analyzing more than 1,864 elections, they found the mean affirmative vote for retaining judges to be 77.2 percent.<sup>61</sup> During this time period, only twenty-two judges were defeated. These twenty-two defeats in 1,864 elections support the conclusion that non-partisan court plan judges have a high degree of independence and are insulated from the public.<sup>62</sup>

An interesting trend begins to emerge from the study of this twenty year period. From 1964 to 1984, the retention vote decreased from a mean affirmative vote of approximately eighty-five percent in the early 1960's to a low of 73.8 percent in 1978.<sup>63</sup> Aspin and Hall's research indicated that one plausible explanation of the variation in the mean affirmative vote is that political trust is the major factor in judicial retention elections.<sup>64</sup> The decline in trust for all major American institutions that occurred during this same time helps to explain the changes in the mean affirmative vote. Also, the voters' lack of differentiation between the judges in the same geographical area is apparent. This lack of variation of individual judges is most evident when multiple judge districts had judges on the ballot in the same election. In Aspin and Hall's study, 1,057 elections were compared and 75.5 percent of the judges fell within three percentage points of the mean in multi-judge districts.<sup>65</sup> This finding suggests that voters are casting retention votes not based on the performance from the

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56. Larry T. Aspin & William K. Hall, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 307 (1994).

57. Philip Dubois, *Voter Turnout in State Judicial Elections: An Analysis of the Tail on an Electoral Kite*, 41 J. POL. 865 (1979).

58. Joel Goldstein, *Bar Poll Ratings as the Leading Influence on a Non-Partisan Judicial Election*, 63 JUDICATURE 377 (1980).

59. African-American Voting Rights Legal Defense Fund, Inc. v. Missouri, No. 4:92CV00973 (E.D. Mo. 1993).

60. Aspin & Hall, *supra* note 1, at 343.

61. Aspin & Hall, *supra* note 1, at 343.

62. Aspin & Hall, *supra* note 1, at 344.

63. Aspin & Hall, *supra* note 1, at 344.

64. Aspin & Hall, *supra* note 1, at 344.

65. Aspin & Hall, *supra* note 1, at 346.

bench, decisions rendered, etc., but based on generalized cues. This statistic reinforced Aspin and Hall's belief that political trust is a major voting cue in judicial retention elections.

The first state to utilize retention elections, Missouri, has displayed a similar decline in affirmative retention votes for judges.<sup>66</sup> Mean affirmative retention votes for major trial courts in Missouri declined from a high of eighty-four percent in 1968 to a low of fifty-seven percent in 1990.<sup>67</sup> The most recent mean affirmative retention vote was sixty-eight percent in 1996.<sup>68</sup> Each successive retention election does not result in declining affirmative vote totals, but the overall trend points to a declining level of affirmative votes for major trial courts, with the low point occurring in 1990.<sup>69</sup> Again, this steady decline appears to run concurrent with, and is probably related to, the decline of trust in the government, which has also been fairly steady since it was first measured in 1958.

After the dramatic decline in affirmative votes for retention of nearly eight percent from the 1988 to the 1990 election, the Missouri Bar commissioned a survey seeking to learn more about voter attitudes on judicial retention and their knowledge of the judiciary.<sup>70</sup> The survey found that voter knowledge of the judiciary was limited. The survey revealed that: two-thirds of the voters surveyed had never served on a jury; three-fourths had never been a party to a court action; over half had never watched a court in session; two-thirds did not

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66. Aspin & Hall, *supra* note 1, at 345.

67. Aspin & Hall, *supra* note 1, at 343, 345. The statistics for the years 1964-84 were based on the Aspin and Hall statistical survey. Statistics for 1986-94 were compiled by the writer from vote totals as reported to the Secretary of State of Missouri.

68. Aspin & Hall, *supra* note 1, at 345.

69. Aspin & Hall, *supra* note 1, at 345.

70. Gregory Casey & David A. Leuthold, *Voter Attitudes in the 1992 Missouri Judicial Retention Elections: Statewide Survey and Exit Poll Conducted for the Missouri Bar (1992)*. This is a report on a statewide survey conducted from September 5 to October 9, 1991. Telephone interviews were conducted by the professional staff on the Media Research Bureau, University of Missouri, utilizing a random digit dialing procedure which helped insure coverage of unlisted as well as listed telephones. Interviews were conducted weekday and evenings and Saturday mornings. The interviews completed 674 interviews, and the sample is representative of the entire state. Only registered voters who had voted in either the 1988 or the 1990 general election were interviewed. Among the respondents, seventy-nine percent claimed to have voted in both elections which was probably an overstatement. The median age of respondents was forty-five years. The median years of school completed was about twelve. The sample was fifty-five percent female, which is a slight over-representation of females. More than one-fourth were Republican, one-third were Democrat, and over one-third were Independent, a distribution quite close to national patterns. Almost half the respondents characterized themselves as "middle of the road," rather than conservative or liberal, a proportion somewhat higher than the thirty-one percent found nationally in 1988.

know a Missouri judge; four-fifths could not accurately recall a case before the state Supreme Court; and two-thirds had not read about Missouri judges in the newspaper.<sup>71</sup>

Considering voters' limited knowledge and experience with courts, the survey respondents' choice of modest terms in their evaluation of Missouri courts is not surprising. In evaluating the overall performance of the Missouri court system, three percent of respondents said it did an excellent job, ten percent said it did a poor job and the majority gave it a good or fair rating.<sup>72</sup> A more encouraging pattern for the Plan was the finding that sixty-eight percent who had personally watched a judge in court and had an opinion gave the judge an excellent or good rating.<sup>73</sup> Concerning voting on the judicial ballot, two-thirds of the survey respondents recalled seeing the judicial ballot at the last election, fifty-eight percent claimed to have voted on the question of retention of judges, fifty-four percent of those who voted indicated they voted to retain most, or all judges, twenty-eight percent said they voted to retain about half of the judges, and eighteen percent voted not to retain most, or all judges.<sup>74</sup>

In response to the decline in affirmative judicial retention votes, merit plan judges and others conducted extensive educational and public relations activities regarding the benefits of the Missouri Plan for the 1992 retention elections.<sup>75</sup> The 1992 election yielded a 62.5 percent affirmative retention percentage, an increase of nearly six percent. The Casey and Leuthold survey measured the effects of the activities of the Missouri Plan supporters. It indicated that only one-eighth of the voters were aware of the lawyer ratings of judges conducted by the Missouri Bar, and only half of those voters were influenced by them. Nearly one-quarter of the voters had heard pro-merit plan radio ads, and only half of those voters were influenced by them. Generally, those who were influenced by either the lawyer rating of judges or the radio ads were more likely to vote affirmatively for judicial retention.<sup>76</sup>

Election day exit polls indicated that the radio ads were more influential than the Casey and Leuthold survey had suggested. More than one-third of the voters were found to have been influenced by the ads, but less than one-quarter were influenced by the lawyer ratings. Also, more than forty percent of the exit poll respondents indicated that they were affected by newspaper stories about the judicial retention elections.<sup>77</sup>

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71. Casey & Leuthold, *supra* note 70, at 5.

72. Casey & Leuthold, *supra* note 70, at 2.

73. Casey & Leuthold, *supra* note 70, at 2.

74. Casey & Leuthold, *supra* note 70, at 2.

75. See *supra* notes 47-49 and accompanying text.

76. Casey & Leuthold, *supra* note 70, at 2.

77. Casey & Leuthold, *supra* note 70, at 2.

A retention election in the Clay County Circuit Court, located in a suburban area near Kansas City, also provided some interesting statistical results. Two circuit judges were on the retention ballot. Judge Michael J. Maloney received a ninety-three percent approval rating from lawyers, while Judge Hutcherson received only a twenty-eight percent approval rating.<sup>78</sup> Although "low-key" campaigns were conducted for and against Judge Hutcherson, exit polling indicated that one-third of the voters were influenced by the lawyers' ratings. Only one-third of those influenced by the lawyers' ratings voted in the same direction as the lawyers. The final result was that Judge Hutcherson was denied retention by a slim margin and Judge Maloney received the highest percentage of affirmative retention votes of any merit judge on the ballot in western Missouri.<sup>79</sup>

Of all the judicial retention elections since the passage of the Missouri Plan in 1940, the 1992 election was the most significant in many respects. This election provided the first effort by supporters of the Plan to educate the public in a coordinated fashion about judicial retention elections. Based on the survey results, this effort to influence the voters was modestly successful. The \$400,000 radio ad campaign conducted by a private group of merit plan supporters was the most successful of the efforts made, with public appearances by merit plan judges and distribution of the lawyers' poll running a distant second and third in effectiveness.

Casey and Leuthold conducted an extensive exit poll and state-wide telephone survey after the Missouri general election in 1992.<sup>80</sup> During this judicial retention election, all voters in Missouri metropolitan areas had the opportunity to vote on the retention of at least six judges.<sup>81</sup> A number of interesting statistics and trends emerged from the data gathered by Casey and Leuthold. This survey showed that thirty percent of the voters did not vote at all on the judicial retention ballot. These voters were characterized as older and having fewer years of education.<sup>82</sup> When asked about information that they had prior to voting, forty percent of those who voted in the judicial retention election said that they had no information about the judges. Another ten percent had only vague information. Those voters possessing no information, who did cast votes, reported casting about seventy percent affirmative votes on the retention of judges.<sup>83</sup>

Voters apparently relied most heavily upon their general evaluation of the courts and the judiciary in evaluating how they should vote in the judicial

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78. Casey & Leuthold, *supra* note 70, at 2.

79. Casey & Leuthold, *supra* note 70, at 2.

80. Casey & Leuthold, *supra* note 46.

81. Casey & Leuthold, *supra* note 46.

82. Casey & Leuthold, *supra* note 46.

83. Casey & Leuthold, *supra* note 46.

retention elections. This general evaluation was derived from mass media reports, personal experiences and conversations with others. Polling data indicated that voters who thought Missouri state courts were doing an excellent or good job were much more likely to vote for retention than voters who thought the courts were doing a fair or poor job.<sup>84</sup> Another significant factor was the voters' general evaluation of the government. This finding also tends to confirm the relationship between the long term decline in judicial retention voting and the long term decline in trust in the government.<sup>85</sup>

After the 1992 results, the results of the subsequent judicial retention elections in 1994 and 1996 are of particular significance. In these elections, the Missouri Bar extensively distributed the results of the state-wide lawyers' poll evaluating the judges. However, the 1994 and 1996 elections involved less extensive public relations activities by merit plan judges, and there was no radio ad campaign by private merit plan supporters. Nonetheless, the average affirmative retention vote for all judges in the state-wide retention elections of 1994 remained statistically the same as the 1992 election, with approximately sixty-three percent voting affirmatively.<sup>86</sup> The 1996 retention election resulted in an additional modest increase in voter retention percentages to sixty-eight percent.<sup>87</sup> Based upon the increase in voter retention percentages from 1990 to 1992 and 1992 through 1996, it appears that the 1992 educational activities may have been partially responsible for the leveling of affirmative judicial retention votes. Another possibility, however, is an upturn in voter trust in the judiciary and the government during this period.<sup>88</sup> It is too early to tell whether this is a definitive trend because of the lack of long-term data.

#### IV. THE MISSOURI PLAN UNDER LEGISLATIVE ATTACK

The Missouri Non-Partisan Court Plan requires a nominating commission to select three nominees for a vacant judicial position.<sup>89</sup> The nominating commission is composed of a judge and an equal number of lawyers and lay persons. From the three nominees chosen by the commission, the governor selects a judge.<sup>90</sup> The central assumption of this non-partisan plan is that the judicial nominating commission will screen the nominees free from substantial

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84. Casey & Leuthold, *supra* note 46.

85. Casey & Leuthold, *supra* note 46.

86. Based upon election results from the Missouri Secretary of State's Office for this period as reviewed by this writer.

87. *See supra* note 86.

88. Casey & Leuthold, *supra* note 46, at 2.

89. MO. CONST. art. V, § 25(a).

90. MO. CONST. art. V, §§ 24, 25(a). The composition of the Commission differs depending on which court level is involved.

political pressure, and will nominate only the best candidates based on merit.<sup>91</sup> However, critics of the Plan began to question this assumption after a highly-publicized scandal involving the Missouri Supreme Court in 1984-85. This scandal caused a loss of public confidence in the judiciary, which, as previously stated in the survey data, is the greatest predictor of retention percentages.<sup>92</sup>

The Missouri Supreme Court scandal of 1984-85 was the product of accusations of members of the Supreme Court that other members of the court were engaging in political activities for the purpose of recruiting new Supreme Court judges.<sup>93</sup> This was an abrupt departure from a court tradition that judges seldom openly bickered among themselves.<sup>94</sup> In 1982, three vacancies arose on the seven judge court within five months, and one sitting judge allegedly manipulated the merit plan to "hand-pick" three new members of the court.<sup>95</sup> Newspapers in the state carried many reports of the dispute and as press coverage grew, one of the judges resigned to be appointed to the United States District Court in St. Louis.<sup>96</sup> With his resignation, the judicial nominating commission provided the governor with three nominees, one of whom included the governor's thirty-three year old gubernatorial chief of staff, who had no judicial experience. Eventually, the governor appointed his gubernatorial aide to the vacant seat. "A hue and cry was raised in protest over the alleged violation of the spirit of the Missouri Plan, but to no avail. The gubernatorial aide was seated on the court and easily won retention in 1986."<sup>97</sup>

At the peak of the controversy, adverse publicity questioned the legitimacy of the Missouri Non-Partisan Court Plan. Prior to this time, few legislative efforts had been made to modify the Plan. However, this adverse publicity appeared to generate an annual effort by members of the legislature to propose constitutional amendments in an attempt to replace or modify the Plan.<sup>98</sup> Reconstituting judicial commissions has always been one of the primary methods reformers and opponents of merit plans have utilized to create a more equitable commission, to dilute power, or to regain control of a nominating system that is not serving their purposes.

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91. See Glick, *supra* note 30, at 513.

92. Aspin & Hall, *supra* note 56.

93. Gregory Casey, *Public Perception of Judicial Scandal: The Missouri Supreme Court 1982-1988*, 13 JUST. SYS. J. 284-85 (1989).

94. *Id.* at 285.

95. *Id.* at 289.

96. *Id.*

97. *Id.* at 289-90.

98. H.R.J. Res. 48, 85th Leg., 2d Sess. (1990); H.R.J. Res. 5, 86th Leg., 1st Sess. (1991); S.J. Res. 38, 86th Leg., 2d Sess. (1992); H.R.J. Res. 4, 6, 87th Leg., 1st Sess. (1993).

From 1990 through 1993, several bills introduced in the Missouri House of Representatives sought to exclusively or partially reconstitute the judicial nominating commissions for the Missouri Non-Partisan Court Plan.<sup>99</sup> The essence of these early bills was to keep the standard seven member judicial nominating commission: three lay members, three elected bar association members and the chief judge of the Supreme Court. However, the method of appointing the three lay members would be changed to allow the governor, lieutenant governor and president pro-tem of the Senate one appointment each.<sup>100</sup>

In 1992, Senate Joint Resolution No. 38 proposed expanding the judicial nominating commission to eleven members composed of four lay persons, six lawyers and one judge. Again, the emphasis in the bill was to delineate who would appoint the lay members of the commission. In this case, one lay member was to be appointed by the governor, lieutenant governor, president pro-tem of the Senate and the Speaker of the House.<sup>101</sup> Then in 1993, a bill was introduced in the House of Representatives to provide for the appointment of the lay members to the judicial commission by the governor for six years and staggered terms, with the advise and consent of the Senate.<sup>102</sup>

Other provisions inserted into these bills during this period include: (1) the ability of eight percent of the registered voters in a judge's geographical area to sign a petition to require a special retention election;<sup>103</sup> (2) requiring the advice and consent of the Senate for all persons selected as judges under the Missouri Plan;<sup>104</sup> and (3) a resolution that race and gender be taken into account when appointing commission members.<sup>105</sup> To date, while some of these bills have gathered support, none have been enacted into law.

After the appointment of the governor's chief of staff to the Missouri Supreme Court, members of the Missouri General Assembly became concerned with cronyism in the judicial commission appointive process. Several bills were introduced in the House of Representatives and the Senate with provisions regarding the ethics of the commission and the executive in judicial appointments. The first bill, introduced in 1989, prohibited the governor from communicating directly or indirectly with members of the judicial nominating commission when a judicial vacancy occurred, until the nominees were submitted to the governor for his selection.<sup>106</sup> Legislators also introduced bills attempting to reduce the governor's input. These bills prohibited the governor

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99. *See supra* note 98.

100. *See supra* note 98.

101. S.J. Res. 38, 86th Leg., 2d Sess. (1992).

102. H.R.J. Res. 4, 6, 87th Leg., 1st Sess. (1993).

103. H.R.J. Res. 4, 6, 87th Leg., 1st Sess. (1993).

104. H.R.J. Res. 13, 85th Leg., 1st Sess. (1989).

105. S.J. Res. 38, 86th Leg., 2d Sess. (1992).

106. S.J. Res. 38, 86th Leg., 2d Sess. (1992).



from seeking prior commitments from nominees on any issues that might come before a judge after they assumed office<sup>107</sup> and from seeking commitments from potential judicial commission nominees who might agree to support the nomination of any specific person as a judge.<sup>108</sup>

Additional changes proposed in both the House of Representatives and the Senate sought to modify the required retention percentages and place term limitations on all judges in the State of Missouri. In 1992, both the House of Representatives and the Senate introduced legislation imposing a change in the required affirmative retention percentage to sixty percent, replacing the fifty percent level of the last fifty years.<sup>109</sup> This must have appeared to be a drastic remedy to many judges, as most would have been voted out of office in 1990 had a sixty percent retention percentage been applicable at that time.<sup>110</sup> In addition to this proposed change, the House of Representatives in 1993 not only proposed the reconstituting of the judicial nominating commission with the advise and consent of the Senate, but also sought to impose a twelve year term limit for all judges in Missouri.<sup>111</sup> Again, while gathering support, none of this legislation passed.

The initial effort to have the Missouri Non-Partisan Court Plan abolished in Missouri arose in the House of Representatives in 1988. The proposed bill would cause all counties currently under the Missouri Plan to readopt the Plan, or revert to direct elections.<sup>112</sup> Subsequently, in 1991, African-American members of the House of Representatives proposed House Joint Resolution No. 25 to abolish the Missouri Non-Partisan Court Plan.<sup>113</sup> This bill sought to divide the state into sub-districts, without any two judges coming from the same sub-district.<sup>114</sup> It called for the direct election of judges in partisan elections from each of those sub-districts. Supreme Court judges would run in a particular sub-district, as would all appellate and circuit judges.<sup>115</sup> This effort to abolish the Missouri Plan died in the legislature after spirited debate.

The protests over the violation of the spirit of the Missouri Plan and the independent controversy in the Supreme Court has created rancor and dissatisfaction among certain members of the public and the legislature. To date,

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107. H.R.J. Res. 48, 85th Leg., 2d Sess. (1990).

108. S.J. Res. 1, 18, 37, 86th Leg., 1st Sess. (1992).

109. S.J. Res. 1, 18, 37, 86th Leg., 1st Sess. (1992).

110. S.J. Res. 39, 86th Leg., 2d Sess. (1992); H.R.J. Res. 53, 86th Leg., 2d Sess. (1992).

111. H.R.J. Res. 4, 6.

112. H.R.J. Res. 4, 6.

113. H.R.J. Res. 25, 86th Leg., 2d Sess. (1991). The sponsor of this bill was Representative Elbert A. Walton, Jr.

114. H.R.J. Res. 25, 86th Leg., 2d Sess. (1991).

115. H.R.J. Res. 25, 86th Leg., 2d Sess. (1991).

the various bills seeking the elimination or modification of the Plan have been unsuccessful. Based on the state's political history and its status as the state in which the Plan originated, it is likely that the various reforms proposed in the legislature face long odds for passage. It seems that further scandals and racial inequities will not change the minds of the "cynical standpatters."<sup>116</sup> "[The] lawyers' opposition to change together with the 'show-me opposition' to change in general . . . [the] passage of any constitutional amendment to alter the court's position [is] unlikely."<sup>117</sup>

## V. CHALLENGES TO THE MISSOURI PLAN UTILIZING THE VOTING RIGHTS ACT

While minority groups have attempted to utilize legislative efforts to level the judicial playing field, constitutionally based litigation has been the primary mechanism used to abolish formal, informal, legal and political barriers to racial equality in judicial selection.<sup>118</sup> In 1965, Congress passed the Voting Rights Act which effectively resurrected the Fifteenth Amendment giving African-Americans and civil rights activists a tool to use against racial discrimination.<sup>119</sup> However, passage of the Voting Rights Act did not remove all of the barriers to voting inequalities. Thus, in 1982, the Voting Rights Act was amended, "infusing the act with new life."<sup>120</sup> Section Two of the Voting Rights Act prohibits any "voting qualification or prerequisite to voting, or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color."<sup>121</sup> A violation of this Act occurs if a class of citizens protected under the Act "ha[s] less opportunity than other members of the electorate to participate in the political process and to elect representatives of [its] choice."<sup>122</sup> Since the passage of this 1982 amendment, claims based on the Voting Rights Act have increased. Recently, several of these claims have involved challenges to state and local judicial elections.<sup>123</sup>

116. Casey, *supra* note 94, at 284.

117. Casey, *supra* note 94, at 284.

118. April D. Dulaney, *A Judicial Exception for Judicial Elections: "A Burning Scar on the Voting Rights Act,"* 65 TUL. L. REV. 1223 (1991); David M. Gelfand, *Voting Rights and the Democratic Process: Ongoing Struggles and Continuing Questions*, 17 URB. LAW. 333 (1985).

119. Dulaney, *supra* note 118.

120. Dulaney, *supra* note 118.

121. 42 U.S.C. § 1973(a) (1994).

122. 42 U.S.C. § 1973(b) (1994).

123. See Dulaney, *supra* note 118; Gelfand, *supra* note 118; L. McDonald, *The Effects of the 1982 Amendments to Amendments to Section 2 of the Voting Rights Act on Minority Representation* (1990) (paper prepared for the conference on the 25th

Defenders of the judicial "status quo" have argued that the new language of Section Two exempts traditional contested judicial elections from coverage. In both *Chisom v. Edwards*<sup>124</sup> and *Mallory v. Eyrich*,<sup>125</sup> federal district courts adopted the defendant state official's argument that the new language of Section Two exempts contested judicial elections from coverage. Both of these decisions, however, were reversed on appeal.<sup>126</sup>

Litigation utilizing Section Two of the Voting Rights Act as originally enacted worked in conjunction with the Fifteenth Amendment. Prior to the amendment of Section Two, it was clear that it applied to contested judicial elections.<sup>127</sup> However, after the amendment of Section Two, there was some dispute over whether or not Section Two still applied to judicial elections.<sup>128</sup> *Martin v. Allain*<sup>129</sup> was the first post-amendment case to consider the requirements of the Voting Rights Act as it relates to judicial selection methods. In that case, a Mississippi federal district court found that a multi-member, at-large system of electing judges in Mississippi diluted black voting strength and violated Section Two of the Act.<sup>130</sup>

The application of Section Two of the Voting Rights Act to judicial elections was again questioned in 1988, when the Sixth Circuit in *Mallory v. Eyrich*<sup>131</sup> decided that Section Two of the Voting Rights Act applied to Ohio's judicial elections. In *Mallory*, it was argued that the term "representatives" in Section Two excluded judges. The defendants believed judges could never be considered representatives since judges, by definition, were to be independent.<sup>132</sup> However, the circuit court in *Mallory* stated that "everything contained in the report indicates that the 1982 amendment was intended to effect an expansion, rather than a contraction, of the applicability of the act."<sup>133</sup> In *Mallory*, the court believed that Congress was seeking a broader word to make it clear that Section

Anniversary of the Voting Rights Act of 1965 and made available by the Brookings Institution).

124. 659 F. Supp. 183 (E.D. La. 1987), *rev'd*, 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988).

125. 666 F. Supp. 1060 (S.D. Ohio 1987), *rev'd*, 839 F.2d 275 (6th Cir. 1988).

126. *See Chisom*, 659 F. Supp., 183 (E.D. La. 1987), *rev'd*, 839 F.2d 1056 (5th Cir. 1988); *Mallory*, 666 F. Supp. 1060 (S.D. Ohio 1987), *rev'd*, 839 F.2d 275 (6th Cir. 1988).

127. *Chisom v. Roemer*, 501 U.S. 380 (1991).

128. Thomas P. Prehoditch, *The Voting Rights Act and Judicial Selection Litigation; An Evaluation of Remedial Options*, 11 REV. LITIG. 523 (1992).

129. 658 F. Supp. 1183 (S.D. Miss. 1987).

130. *Id.* at 1204. *See also Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988).

131. 839 F.2d 275 (6th Cir. 1988).

132. *Id.* at 279.

133. *Id.*

Two applied not only to legislative races, but to all elected officials and elections.<sup>134</sup> Similarly, the Fifth Circuit, reversing its earlier holding in *Chisom v. Edwards*,<sup>135</sup> held in *LULAC v. Clements*<sup>136</sup> that Section Two of the Voting Rights Act does not apply to judicial elections. With these broad interpretations, challenges to judicial selection methods have increased and have involved Louisiana, Ohio, Mississippi, North Carolina, Alabama, Florida, Georgia, Illinois, Arkansas, Texas, Indiana and Missouri.<sup>137</sup>

Subsequently, in 1992, in *Houston Lawyers' Association v. Attorney General of Texas*,<sup>138</sup> the United States Supreme Court reviewed the rationale of the various lower court decisions. The lower courts had reasoned that a trial judge, unlike an appellate judge who acts as a member of a collegial body, "is a single officeholder who has the jurisdiction that is co-extensive with the geographic area from which she or he is elected and has the authority to render final opinions independently of other judges serving in the same area or on the same court."<sup>139</sup> These lower courts had concluded that exemption from Section Two of elections for single trial judges was justified and cited the state's compelling interest in linking jurisdiction to the elective base for judges who act alone.<sup>140</sup> They also explained that attempting to break that linkage might dilute minority influence by making only a few judges principally accountable to the minority electorate, rather than making all of them partly accountable to minority voters.<sup>141</sup> The United States Supreme Court, reversing the decision of the lower courts, held that judicial elections are not categorically excluded from coverage

134. *Id.*

135. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988).

136. *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991).

137. *Chisom v. Roemer*, 501 U.S. 380 (1991); *League of United Latin American Citizens Council No. 4434 v. Clements*, 902 F.2d 293 (5th Cir. 1990), *rev'd*, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, No. 4:92CV00973 (E.D. Mo. 1993); *Bradley v. Indiana State Election Bd.*, 797 F. Supp. 694 (S.D. Ind. 1992); *Hunt v. Arkansas*, No. PB-C-89-406 (E.D. Ark. 1989); *Southern Christian Leadership Conference v. Siegleman*, 714 F. Supp. 511 (M.D. Ala. 1989); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988); and *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988).

138. *Houston Lawyers' Ass'n v. Attorney General of Texas*, 501 U.S. 419 (1991).

139. *Id.* at 419.

140. *Id.* at 420.

141. *Id.*

and therefore, once a state decides to elect its trial judges, those elections must be conducted in compliance with the Voting Rights Act.<sup>142</sup>

On the same day, the Court also ruled on *Chisom v. Roemer*.<sup>143</sup> *Chisom* involved the seven-member Louisiana Supreme Court, whose members were elected from both single and multi-member districts.<sup>144</sup> The lower court had concluded that judges were not “representatives” under the terms of Section Two and that, therefore, judicial elections were not covered by Section Two.<sup>145</sup> In *Chisom*, the Supreme Court expanded upon the rationale behind *Houston Lawyers’ Association*. It determined that Section Two protected the right to vote without making any distinctions or limitations as to which elections would fall within its purview.<sup>146</sup> The Supreme Court quoted former Attorney General Katzenbach, who during hearings on the passage of the Voting Rights Act amendments in 1982 stated that the Act would cover “every election in which registered electors are permitted to vote. . . .”<sup>147</sup>

Further, the Court rejected the narrow construction of the word “representative.” It reasoned that if Congress had intended such a narrow interpretation, it would have explicitly stated that narrow definition and would have mentioned it in the unusually extensive legislative history of the 1982 amendments.<sup>148</sup> The Court further reasoned that when Congress replaced the word “legislatures” with “representatives,” it became clear that Congress intended the amendment to cover more than just legislative elections.<sup>149</sup> In closing, the Supreme Court reiterated that the Act must be interpreted in a manner that provides the “broadest possible scope” in order to combat racial discrimination in voting.<sup>150</sup>

Under these decisions, it is clear that the Voting Rights Act and its subsequent amendments are applicable to directly contested judicial elections. However, the Voting Rights Act does not apply to the purely appointive judicial selection methods utilized in many states and at the federal level, because no voting or election process is involved.<sup>151</sup> The Court stated that “[t]he word ‘representative’ refers to someone who has prevailed in a popular election.”<sup>152</sup> Because Louisiana had decided to elect its judges, it is reasonable to characterize

142. *Id.* at 426-27.

143. 501 U.S. 380 (1991).

144. *Id.*

145. *Id.* at 385-86.

146. *Id.* at 391-400.

147. *Id.* at 391.

148. *Id.* at 395.

149. *Id.* at 399.

150. *Id.* at 403. See also *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966).

151. *Roemer*, 501 U.S. at 399-401.

152. *Id.*

the winners as representatives. Specifically, the Court said, "Louisiana could, of course, exclude its judiciary from the coverage of the [Act] by changing to a system in which judges are appointed."<sup>153</sup> Therefore, states have the ability to choose whether or not their judges are subject to the Voting Rights Act by determining which selection method for judges will be utilized. If a state decides to elect judges and compels them to seek popular support like other political candidates, then the Voting Rights Act is applicable to them.<sup>154</sup>

The applicability of the Voting Rights Act to direct judicial elections and its inapplicability to appointive judicial selection methods have been resolved. However, there has been no resolution regarding the Voting Rights Act's application to various hybrid methods of judicial selection, such as the Missouri Plan and other merit plans. The Voting Rights Act has been a tool used by minority groups to remedy racial discrimination in judicial elections. These groups are now beginning to turn their attention to the hybrid judicial selection plans that have a retention vote component.

The Missouri Plan and other non-partisan methods of judicial selection have an appointive component for the first stage of judicial selection and a retention election component for the second stage. Two cases in the federal district courts may answer or address the question of whether or not appointive systems with retention election components are subject to coverage of Section Two of the Voting Rights Act.

In *African-American Voting Rights and Legal Defense Fund, Inc. v. Missouri*,<sup>155</sup> the District Court for the Eastern District of Missouri overruled the State's motion to dismiss and motion for summary judgment as to the applicability of the Voting Rights Act to the Missouri Non-Partisan Court Plan.<sup>156</sup> The State argued that the Missouri Plan is not subject to the Voting Rights Act for two primary reasons: (1) judges are appointed and appointive judicial positions are clearly not covered by the Act, and (2) retention elections are not elections in the conventional sense because the judge does not have an opponent.<sup>157</sup> In the late summer of 1995, a trial on the merits was held to determine whether or not the Voting Rights Act applies to retention elections, whether that act has been violated and if so, whether any remedies are appropriate. As of January 1997, a decision had not been rendered.

In *Bradley v. Indiana State Election Board*,<sup>158</sup> a federal district court addressed whether judicial retention elections in Indiana fall under the ambit of the Voting Rights Act. The Superior Court of Indiana, Lake County, has four

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153. *Id.*

154. *Id.*

155. No. 4:92CV00973 (E.D. Mo. 1993).

156. *Id.*

157. *Id.*

158. 797 F. Supp. 694 (S.D. Ind. 1992).

divisions. In three of those divisions, the governor selects a judge from a list of three nominees submitted by a seven member judicial nominating commission to fill vacancies on the court.<sup>159</sup> Once appointed, a judge serves for six years, but then must submit to an at-large, county-wide retention vote. If the judge fails to be retained, the commission submits another list of nominees.<sup>160</sup> However, if the judge wins retention, then he or she holds office for another six-year term. Of the thirteen judges on this court, only one is African-American.<sup>161</sup>

African-American citizens of voting age, living in Indiana, initiated a lawsuit alleging that this selection and retention system violates the Voting Rights Act by depriving the African-American voters of a fair opportunity to elect or select judges.<sup>162</sup> They argued that the practice of holding at-large, county-wide retention elections violates the Act by diluting African-American votes. The defendants, the judicial nominating committee and the judges currently on the court, filed a motion to dismiss stating that the Act does not apply to them because they are appointed by the governor and are not elected by popular vote.<sup>163</sup> The defendants argued that *Chisom v. Roemer*<sup>164</sup> defines "representatives" in Section Two of the Act as being winners of representative, popular elections. Consequently, the non-partisan judges are not "representatives" within the meaning of the Act, since they never take part in such elections. Also, the defendants argued that dicta in *Chisom* asserted that a state can "exclude its judiciary from the coverage of the [Act] by changing to a system in which judges are appointed," such as exists in non-partisan court plan states.<sup>165</sup>

The district court in *Bradley* held that the Act applies to retention elections, but that it does not govern the nomination and appointment procedures.<sup>166</sup> In applying the Act to the retention component, but not to the appointment component, the court stated, "[e]ven read narrowly, *Chisom* seems to make clear that such [appointment] processes, which do not involve 'voting,' fall outside the Act."<sup>167</sup> The *Bradley* court reasoned that Section Fourteen of the Act "defines the term 'voting' to include 'all action necessary to make a vote effective in any primary, special or general election,' including the casting of ballots 'with respect to candidates for public or party office and propositions for which votes

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159. *Id.* at 695.

160. *Id.*

161. *Id.* at 695-96.

162. *Id.* at 696.

163. *Id.* at 696-97.

164. 501 U.S. 380 (1991).

165. *Chisom*, 797 F. Supp. at 697-98.

166. *Id.*

167. *Id.* at 698.

are received in an election.”<sup>168</sup> In *Bradley*, the court found the Act employed expansive definitions and had to be interpreted with the broadest possible scope.<sup>169</sup> Thus, the Act has been interpreted to “reach[] far beyond the common understanding of these [basic electoral] terms” and “encompass[es] any ‘proposition for which votes are received in an election.’” Under this rationale, the elective decision to retain a judge easily constitutes such a “proposition.”<sup>170</sup> The court in *Bradley* recognized the persuasiveness of the defendant’s argument that retention elections cannot violate Section Two because nobody, white or black, gets to choose representatives of their choice; voters simply say “yes,” or “no” to the retention of appointed judges.<sup>171</sup> If nobody gets an opportunity to select representatives of their choice, blacks do not have “less” opportunity than whites, which is required for a violation of Section Two to exist. The court indicated that, while this argument had some appeal, it was not strong enough to sustain a motion to dismiss.<sup>172</sup>

Initially, it appeared that there would not be a full resolution of this case. After the court ruled in part on the motion to dismiss, the Indiana legislature passed a new statute that diversifies the nominating commission, requiring a mix of gender and race on the commission. For a time it appeared this action by the state legislature would satisfy the plaintiffs and result in settlement or dismissal of the case. The new statute creates a commission of nine members. It includes the Chief Justice of the Supreme Court of Indiana, four attorney members selected by the licensed attorneys of Lake County, and four non-attorney citizens of Lake County. The non-attorney members were appointed by the governor under the old law, but are now appointed by members of the Lake County Board of Commissioners. The commission recommends the “three most highly qualified candidates” to the governor who makes the selections.<sup>173</sup> Under the new law, “[i]n determining which eligible candidates shall be recommended to the governor, the commission shall consider that racial and gender diversity enhances the quality of the judiciary.”<sup>174</sup>

Subsequently, the plaintiffs did not dismiss their action but asked the court to rule on the motion for summary judgment and the motion to dismiss. The court ruled that Section Two of the Act does not apply to claims relating to the selection of attorney members of commissions in a hybrid system of judicial appointments and subsequent retention elections.<sup>175</sup> Regarding the voters’

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168. *Id.* at 697.

169. *Id.* at 698.

170. *Id.*; 42 U.S.C. § 1973 (1994).

171. *Bradley v. Indiana State Election Bd.*, 797 F. Supp. 694, 698 (S.D. Ind. 1992).

172. *Id.*

173. *Bradley v. Work*, 916 F. Supp. 1446, 1450 (S.D. Ind. 1996).

174. *Id.* at 1452.

175. *Id.* at 1455.



objection that only attorneys were allowed to vote for attorney members of the commission, the Court held that “[n]o fundamental rights are implicated nor suspect classes created by the current system, and the state’s decision . . . is rationally related to a legitimate purpose.”<sup>176</sup> Consequently, this “‘hybrid’ method of judicial selection does not fall clearly into either category of appointed judge or popularly elected judge.”<sup>177</sup> By choosing a system where its judges are appointed, Indiana has excluded the judiciary from coverage under Section Two, and that exclusion extends to the entire appointive process.<sup>178</sup> Members of the commission are not “representatives” under the act but are merely assisting the governor in the appointive process. The governor, not the commission, is accountable to the electorate for the appointment of judges.<sup>179</sup> While it appears that the retention election component of the Missouri Plan may be subject to the Voting Rights Act, it is quite uncertain the extent and type of proof that will be necessary in order to successfully invalidate such a plan.

In light of *Bradley*, a re-examination of *Chisom* is appropriate. *Chisom* held that judicial elections were covered by Section Two, as the word “representatives” describes the winners of representative, popular elections, including elected judges.<sup>180</sup> Therefore, plaintiffs can prevail on a Section Two claim by demonstrating that a challenged election practice has resulted in the denial or encroachment of the right to vote based on color or race. This application of a “results test” requires an inquiry into “the totality of the circumstances.”<sup>181</sup> Since the 1982 amendment of Section Two, discriminatory intent is no longer necessary to establish a violation of this section.<sup>182</sup> The *Chisom* court stated that the “inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that as members of the protected class they have less opportunity to participate in the political process.”<sup>183</sup>

*Chisom* also reveals that the nomination of judges by a commission, with subsequent appointment by a governor, would not fall under the Act, as that is not an “election” where popular vote is required. However, giving the Act its broadest interpretation, the retention election components *may* fall under the Act, as the terms “vote” and “voting” are defined by the Act to include “all action

176. *Id.* at 1455-56, 1474. The additional claims of the plaintiffs were denied on other grounds.

177. *Bradley v. Indiana State Election Bd.*, 797 F. Supp. 694, 698 (S.D. Ind. 1992).

178. *Bradley v. Work*, 916 F. Supp. 1446, 1454 (S.D. Ind. 1996).

179. *Id.* at 1454-55.

180. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

181. *Id.* at 393.

182. *Id.* at 396-97.

183. *Id.* at 398-99.

necessary to make a vote effective in any primary, special or general election.”<sup>184</sup> The statute further defines the word “vote” as “votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.”<sup>185</sup> It is not a stretch to derive from this that an unopposed judge in a retention election is at least in an election comparable to a vote on a proposition.

## VI. CONCLUSION AND ANALYSIS

The focus of judicial selection must be independence. In a representative democracy, the people speak directly through two branches of our government. In order to protect and ensure liberty for all citizens it is vital that judicial independence be preserved. The partial failing of the Missouri Plan as it currently exists arises from a selection and retention method that can be exclusive, secretive and political. The survival of the Plan and of judicial independence in this changing socio-legal environment requires adaptations and modifications of the selection and retention process. The changes that are made should preserve judicial independence, while simultaneously enhancing the fairness and inclusiveness of the selection and retention process.

There have been significant problems with the implementation of the Non-Partisan Court Plan in Missouri and elsewhere. Presently, the prospects for the survival of the Missouri Plan are perhaps more precarious than supporters of the Plan realize or care to admit. The recent challenges to the Plan arise from the desire for a representative judiciary that is more accountable to the public, yet retains some professional independence. However, these qualities of accountability and independence compete with each other and may ultimately be irreconcilable concepts. The non-partisan court plan method of judicial selection and retention was created in an effort to balance these competing concepts. Historically, it is clear that the Plan was designed to allow competent judges to serve long tenures with little electoral accountability. Consequently, the public could remove judges only under unusual circumstances.

The Missouri Plan has evolved into the most pervasive method of judicial selection in the country. Advocates stress the Plan’s emphasis on professional qualifications rather than political influence, pre-appointment merit screening, little need to campaign or raise funds, and promotion of judicial stability. Opponents argue that politics still play an important role at the commission and appointment levels, that the process is secretive, and that judges are seldom voted out and thus, they are not accountable to the public.

In Missouri, the Plan was created in response to corruption and machine politics. With these problems fading from the public’s memory, critics are free

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184. *Id.*

185. *Id.*; 42 U.S.C. § 1973 (1994).

to attack the Plan on its perceived failure of accountability. The three threats to the Plan outlined in this article (lack of faith in government by the general public, legislative attacks, and Voting Rights Act challenges by minorities) are each independently capable of altering or eliminating the Plan. The primary threat to the Plan may be the public's growing lack of faith in all government and public institutions. This lack of faith has spilled over into the law and the judicial retention elections. Consequently, the lower affirmative retention percentages may not be caused by any "coordinated" attack on the judiciary, but instead may merely reflect the public cynicism of the times.

Legislative efforts to reform or eliminate the Missouri Plan also appear to be in response to the public's call for accountability on the part of all government officials. Opponents of the Plan support the legislative efforts to make judicial commissions ethical, representative and open, and to limit the governor's ability to influence the commission or "hand pick" candidates. With this legislative support, renewed efforts will likely occur to place term limitations on judicial offices, or to raise the required affirmative retention percentage. At this point, the Plan has survived legislative attacks in Missouri and elsewhere because the powerful legal interest groups (trial lawyers, defense lawyers, bar associations and judges) have successfully lobbied legislatures to support the Plan. However, to ultimately ensure its survival, defenders must consider changing the Plan to mollify its critics.

The most significant basis for legal challenge to the Plan is the Voting Rights Act. Lawsuits arising from the Act are filed based on the belief that judges selected and retained under the Missouri Plan are not representative of minorities. For a Section Two violation of the Voting Rights Act to exist, the Plan must be covered the Act. If the Plan is found to be covered by the Act, the "results test" is then applied to determine whether there has been a violation of the Act. This test inquires into the "totality of the circumstances" to determine if members of the protected class have less opportunity to participate in the political process.

Those who claim the Plan results in under-representation of minorities may find it difficult to prove that the Plan violates the Act. In retention elections nobody gets to select the representatives, rather voters simply vote for or against retention of the appointed judges. If a violation is established regarding the retention component of the Plan, federal courts may create subdistricts for retention elections and leave the appointment process of the Plan intact. If a violation is established regarding the appointment process, reconstitution of nominating commissions so that they have minority and gender representation may provide a remedy.

From each of these threats to the Plan, consistent themes emerge. As originally created, the Plan emphasized the "apolitical" nomination of merit qualified persons by a "representative" commission. In Missouri, the judicial nominating commission is composed of three lay persons, three attorneys and the chief judge of the state Supreme Court. This is the typical way in which such

commissions are structured. Any attorney meeting the age and citizenship requirements imposed by the state constitution may apply for the judicial vacancy. The commission then interviews the candidates and nominates three persons. The governor selects from those three persons and at the next regular election, the people vote on retention. The challengers are concerned that the Plan is too political and lacks representation and accountability. In many respects, the challengers may be correct. A given governor may possess too much control over the commission because of his/her ability to select, pre-commit and lobby lay commissioners for their support. The white male majority of the bar effectively selects the other three lawyer members of the commission. The head of the commission, the state supreme court chief judge, is the product of the same commission on which he now sits. Along with the political and bar related lobbying of commission members, these factors, at the very least, result in a selection process that appears to some to be too secretive, undemocratic, not representative, too political, and not accountable or responsive to the public.

Based on the results of survey data and other research conducted on the loss of public confidence and decline in retention rates, the following recommendations are suggested to help eliminate the political nature, secrecy and non-representativeness aspects of the Missouri Plan, and to help insure its survival:

- (1) Reconstitute the judicial nominating commissions for greater representation from minorities and women;
- (2) Mandate ethics rules applicable to all participants in the selection process;
- (3) Open commission interviews of candidates to the public and the press;
- (4) Promote greater cooperation between the bench and bar through wide distribution of surveys by attorneys evaluating the judges' performance;
- (5) Create independent judicial assessment groups composed of lay persons, attorneys, or legal interest groups to assess and report on the judges' performance;
- (6) Utilize the mass media to educate the electorate about the benefits of the Plan;
- (7) Use professional public relations consultants to assist the courts in communicating with the public; and
- (8) Encourage further use of cameras in the courtroom to help inform the public about how courts function.

The most significant of these recommendations is the reformation of the judicial nominating commission. The commission is the cornerstone of a non-partisan merit plan. It must be apolitical and representative. To promote representation and to dilute political influence, a state should consider a model judicial commission of nine members: the chief judge of the state supreme court (when nominating for the supreme court, then use the statewide bar president);

four attorneys elected by the district bar, at least one of which must be a woman and at least one a member of the district's largest minority group; and four lay persons, two each from the largest political parties, and of these four, at least one must be a woman and at least one a member of the district's largest minority group. The lay members could be elected by the public, or the state's four highest elected officials could each appoint one. This process and composition would promote representation, reduce politics, enhance gender and minority participation, and garner wider public acceptance.

The second most important recommendation is the establishment of tough ethical rules for commission members, participating elected officials, judicial candidates and members of the bar. These rules should promote the apolitical nature of the process and discourage unethical communication between the interested parties. These rules should also prohibit the governor from communicating directly or indirectly with the commission when a judicial seat is vacant, seeking precommitments from judicial nominees on issues that might come before them as judges, and seeking prior commitments from commission nominees for support of any specific person as a judge. Regarding the commissioners, one suggested rule would require all commission members to disclose the identity and content of all contacts with judicial candidates or their supporters. The primary focus of these recommended rules is to limit or discourage political influence, and instead concentrate on the merits and qualifications of the candidates.

Another recommendation that could increase public understanding and acceptance while reducing secrecy is to open the interview process to the public and the press. The interviews could be conducted on a public access television or radio channel giving interested persons the opportunity to observe. The commission could also provide limited access to the interview room by the public and press. Again, this reduces secrecy and increases public understanding of the process.

The fourth recommendation concerns the use of the mass media to educate the electorate about the benefits of the Plan and the legal system. This recommendation is intertwined with the recommendation that large courts hire professional media relations personnel and encourage cameras in the courtroom. Judges and lawyers in Plan states are inexperienced, ill-equipped and ethically limited from communicating virtues and triumphs of the system. Professional media assistance can help courts promote stories for television, radio and print media, and take advantage of positive attitudes toward the legal system. An aggressive "corporate" image-building approach to speaking engagements, public appearances and other media contacts can effectively communicate the theme and message desired by the court. While this aggressive and pro-active approach might be distasteful to isolated and independent merit plan judges, this educational and media-oriented process is vital in order to separate public cynicism toward government from the judiciary and retention elections.

Lastly, the creation of independent judicial assessment mechanisms (bar polls and court watchers) that are believable, trustworthy and easily communicated to the public are essential. These give voters guidance in retention elections where voting cues are absent and votes are cast based on their generalized sentiments concerning the government. Many states have organized bar polls concerning judicial performance. However, fewer states employ “court watcher” groups where lay persons observe, assess and report on judicial performance. Research has shown that both of these judicial assessment tools are poorly communicated to the electorate, but when communicated are quite effective and influential. The focus of these judicial assessment efforts should be to unite these professional and lay groups. Undoubtedly, these assessment tools are useful in aggressively marketing the results to a public that wants and needs voting cues for judges on retention ballots.

The Missouri Plan was created to balance the competing concepts of judicial independence and accountability. As it currently exists, many perceive the Plan to be inadequate for the changing socio-legal landscape of today. These proposed recommendations should appease opponents of the Plan, while maintaining the independence desired by supporters of the Plan.

