

BRENNAN  

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FOR JUSTICE  

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IMPROVING  
JUDICIAL DIVERSITY

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Foreword by Susan M. Liss

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## FOREWORD

In 2007-2008, the Brennan Center for Justice at NYU Law School studied how successful those states with appointed judiciaries are at recruiting and appointing women and racial minorities. Our goal was to provide an accurate snap-shot of state courts and a roadmap of how to improve judicial diversity. We published the report in January 2009 a week before President Obama took office. Yet, hopefulness has not yet led to changes that will yield more diversity in all courts across the country.

Nowhere was the sober reality more self-evident than during the nomination process of Second Circuit Judge Sonia Sotomayor to the Supreme Court in 2009. This nomination highlighted the issue of diversity on the bench: of 111 Supreme Court Justices in the Court's history since 1789, 106 have been white men. Justice Sotomayor is the third person of color and the third woman appointed to serve on the Supreme Court in its entire 221 year history. Her nomination and confirmation provided the opportunity for a national conversation about the importance of judicial diversity. Unfortunately, this opportunity was largely missed. The public discussion of race and gender surrounding her nomination was truncated and lacking in substance.

As national attention focused on the diversity of the highest *federal* court, the homogeneity of *state* courts has gone largely unnoticed. According to the latest data available from the American Judicature Society, 27 state Supreme Courts are all white and two are all male. Although recent research by Dr. Malia Reddick published in the *ABA Judges Journal* indicates that merit selection produces slightly more diversity than other selection methods, the homogeneity of these state courts was produced by both judicial elections and nominations. No matter how we choose our state judges, we need to do better at diversifying the bench.

When we completed our study in 2008, four of the ten states we examined had Supreme Courts that were all white and two had only a single female member. Now, according to the most recent data, just two years later, six of the ten are all white and three of the Supreme Courts have a single female member. Clearly, the short term trends are going in the wrong direction.

On the other hand, there has been broad interest in the issue of judicial diversity. Our original report was reprinted in the book *Women and the Law* by Thompson Reuters West. And demands for copies of the report from grassroots groups have prompted this reprinting. This issue is being discussed around the country from Washington, D.C. to Topeka, Kansas and beyond.

We stand by the original findings of our report. As a matter of fairness, the Brennan Center urges states that appoint judges to marshal their resources and tailor their appointment processes in order to attract talented female and minority attorneys to the state bench.

***Susan M. Liss***

*Director of the Democracy Program, Brennan Center for Justice at NYU School of Law*



# EXECUTIVE SUMMARY

The United States is more diverse than ever, but its state judges are not. While we recognize that citizens are entitled to a jury of their peers who will be drawn from a pool that reflects the surrounding community, Americans who enter the courtroom often face a predictable presence on the bench: a white male. This is the case despite increasing diversity within law school populations and within state bars across the country.

Most of the legal disputes adjudicated in America are heard in state courts.<sup>1</sup> As such, they must serve a broad range of constituencies and an increasingly diverse public. So why are state judiciaries consistently less diverse than the communities they serve? Unfortunately, studies show that both merit selection systems and judicial elections are equally challenged when it comes to creating diversity.<sup>2</sup>

Today, white males are overrepresented on state appellate benches by a margin of nearly two-to-one.<sup>3</sup> Almost every other demographic group is underrepresented when compared to their share of the nation's population. There is also evidence that the number of black male judges is actually *decreasing*. (One study found that there were proportionately fewer black male state appellate judges in 1999 than there were in 1985.<sup>4</sup>) There are still fewer female judges than male, despite the fact that the majority of today's law students are female, as are approximately half of all recent law degree recipients.<sup>5</sup> This pattern is most prevalent in states' highest courts, where women have historically been almost completely absent.<sup>6</sup>

These national trends repeat themselves in the ten states we studied. For example:

- Arizona's population is 40% non-white,<sup>7</sup> but Arizona has no minority Supreme Court justices.<sup>8</sup> Minorities occupy only 18% of its Court of Appeals judgeships and 16% of its Superior Court judgeships.<sup>9</sup> Despite Arizona's constitutional provision directing appointing Commissions to reflect the diversity of the state population,<sup>10</sup> the diversity of the state bench falls short.
- Rhode Island's population is 21% non-white.<sup>11</sup> Notwithstanding the statutory requirement that the governor and nominating Commissions encourage diversity on the appointing Commissions,<sup>12</sup> it has no minority Supreme Court justices and minorities hold only two of the 22 judgeships on the Superior Court.<sup>13</sup>
- Utah's population is 18% non-white.<sup>14</sup> Yet Utah has no minority Supreme Court justices.<sup>15</sup> Minorities hold one of seven court of appeals judgeships and only four of 70 district court judgeships.<sup>16</sup> Utah has no specific constitutional or statutory diversity provision.

The problem is clear: even after years of women and minorities making strides in the legal profession, white men continue to hold a disproportionate share of judicial seats compared with their share of the general population. The question of why this pattern persists does not have an easy answer; the dynamic is created by the intersection of a number of complex factors.

But it is a situation we can fix. Fortunately, there are common-sense ways to increase awareness of openings on the judiciary and encourage diversity on the bench.

The Brennan Center for Justice at NYU School of Law undertook this study to determine how successful those states with appointed judiciaries are at recruiting and appointing women and racial minorities to sit on the bench. Our goal is to provide an accurate picture of the diversity in state courts and a roadmap of how to improve diversity on the state bench.

In the course of this study, we interviewed members serving on the judicial nominating Commissions in ten states (Arizona, Colorado, Florida, Maryland, Missouri, New Hampshire, New Mexico, Rhode Island, Tennessee and Utah) to learn if, and how diversity is taken into account during the nominating process. To contextualize our interviews, we reviewed the relevant academic literature on judicial selection as well as academic writings in the field of cognitive science on implicit bias. In addition, we investigated the demographic data and the applicable laws in each state. Based on this research, we offer of a number of best practices to attract talented female and minority attorneys to the bench.

Looking at a sample of ten states with appointive systems, we found that in most states racial and gender diversity on the bench lags behind the diversity of these states' general populations, bar memberships and law students. This is especially true on the highest courts; four of the ten states we examined had Supreme Courts that are all white.

Overall, too few states have systematic recruitment efforts to attract diverse judicial applicants. We identified two particularly interesting trends from our interviews with judicial nominating Commissioners. Commissioners who thought of themselves as “headhunters” took responsibility for recruiting candidates and keeping an eye on the diversity of the applicant pool throughout the nominating process. Commissioners who conceived of their mission as purely “background-checking” spent little time actively recruiting candidates.

Our research found that to effectively increase diversity, all nominating Commissions must add systematic recruitment to their repertoires. Expanding the pool of applicants at the start of the process is a key ingredient to ensuring a diverse “short list” and ultimately a diverse bench. On the other hand, Commissioners should also take seriously their role as background-checkers. Because judges appointed through these systems are subject to little public scrutiny, Commissions must properly vet who is eligible to sit on the bench.

In light of our research, we offer nominating Commissions a set of ten best practices to attract the brightest female and minority candidates to the judiciary, including:

1. **Grapple fully with implicit bias.** Cognitive scientists have focused attention on the widespread tendency to unwittingly harbor implicit bias against disadvantaged groups. Fortunately, these biases are mutable. Thus, by acknowledging that this tendency exists, Commissions can take steps to counteract their biases.
2. **Increase strategic recruitment.** The first step in ensuring a diverse applicant pool is making sure that an open judicial seat is widely advertised and that all candidates are welcomed to apply.



3. **Be clear about the role of diversity in the nominating process in state statutes.** Many Commissioners we interviewed felt that there was no consensus on how diversity should be considered during the nominating process. Commissions should have clear parameters of when and how diversity can come into play. Such clarity can be laid out in a statute.
4. **Keep the application and interviewing process transparent.** Let candidates know what to expect when they submit their applications, and keep interviews consistent among candidates. Outlining the nominating process for all candidates will ensure that each applicant is treated in a similar way.
5. **Train Commissioners to be effective recruiters and nominators.** Commissioners need clear standards and appropriate training.
6. **Appoint a diversity compliance officer or ombudsman.** States should hold someone accountable for a state's success or failure to achieve meaningful diversity on the bench. A diversity ombudsman would be in charge of monitoring diversity levels and improving outreach efforts.
7. **Create diverse Commissions by statute.** A diverse Commission, for various reasons, is more likely to facilitate a more diverse applicant pool. States should adopt statutes that clearly encourage a diverse Commission.
8. **Maintain high standards and quality.** Creating a diverse bench can be done without sacrificing quality. All local law schools have female and minority graduates and these can be the source of many judicial applicants. Recruitment should also expand to candidates who graduated from top national schools, as these schools often have far more diverse alumni than local law schools.
9. **Raise judicial salaries.** State leaders should keep an eye on judicial salaries to assure that they are high enough to attract the best lawyers and lure diverse candidates out of law firms and onto the bench.
10. **Improve record keeping.** Currently, many of the states we studied did not keep rigorous data on judicial applicants. Keeping a record of the racial and gender makeup of the applicant pool and how candidates advanced through the nomination process will make it much easier for Commissions to track their own progress on issues of diversity.

The good news is that law school populations over the past 20 years (from 1986 to 2006) have been steadily growing more diverse. This pipeline of diverse new talent presents a real opportunity for state courts to increase the gender and racial diversity of its judges over the coming years. However, improvements in the appointment process are necessary to avoid missing this opportunity; since diversifying the bench requires more than just the mere existence of more female and minority attorneys; it requires an intentional and systematic approach to ensure that this diversity is reflected on the bench, including leadership by Governors, Chief Justices and other high ranking officials who can set the proper inclusive tone.

As a matter of fairness, the Brennan Center urges states that nominate judges to marshal their resources and rethink their appointment processes in order to attract talented female and minority attorneys to the state bench.

# I. INTRODUCTION

## A. THE IMPORTANCE OF DIVERSITY ON THE BENCH

Diversity on the bench is intimately linked to the American promise to provide equal justice for all. Judges are the lynchpins of our system of justice. They shoulder a profound responsibility to administer the law with fairness and impartiality.

It is therefore unsurprising that the question of who is appointed or elected to serve as a judge is often a matter of considerable public interest and controversy. As part of the keen public interest, there has been much discussion of whether elective or appointive systems are better for diversity on the bench.

In general, the scholarly literature concerning the impact of judicial selection systems on diversity concludes that there is little difference between the two systems. On the one hand, data from the American Judicature Society indicates that elections do a poorer job of securing judicial diversity, concluding that “merit selection and direct appointment systems select proportionately more women and African Americans to state appellate level judgeships than do competitive elections.”<sup>17</sup>

But other studies have found that the difference is negligible. In 2008, Mark Hurwitz and Drew Lanier found through their research that “in examining the 2005 data, there are few significant

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differences in rates of diversity across the various selection systems for the broad categories, whether NWM [non-white males], women, or minorities, or for most of the more select minority groups, as diversity is not associated with selection system in the vast majority of cases.”<sup>18</sup>

What the data does show is that both elective and appointive systems are producing similarly poor outcomes in terms of the

diversity of judges. While others have studied diversity in judicial elections,<sup>19</sup> this paper focuses particularly on ways to improve diversity in appointive systems.

Diversity on the bench is important, both because a diversity of viewpoints will produce a more robust jurisprudence, and because it will enhance the legitimacy of our system of justice in the eyes of an increasingly diverse public. As Professor Jeffrey Jackson put it,

Judges are not the exclusive province of any one section of society. Rather they must provide justice for all. In order for a judicial selection to be considered fair and impartial, it must be seen as representative of the community. It is important for a selection system insofar as it is possible, to advance methods that provide for a judicial bench that reflects the diversity of its qualified applicants.<sup>20</sup>

Supreme Court Justices also believe that diversity on the bench improves judicial decision making. For example, Justice Powell noted that, “a member of a previously excluded group can bring insights to the Court that the rest of its members lack.”<sup>21</sup> And Justice Ruth Bader Ginsberg has commented that a “system of justice is the richer for the diversity of background and experience of its participants.”<sup>22</sup>

States with appointive systems should make a concerted effort to ensure that a diverse applicant pool of candidates applies for each judicial opening, that the list of judicial nominees offered to the Governor is appropriately diverse and that the Governor consider diversity when making appointments.

## B. THE NEED TO ATTRACT THE BEST AND THE BRIGHTEST FEMALE AND MINORITY LAWYERS

States that use merit selection to fill judicial vacancies are seeing less diversity on their bench than the demographics of their states, law schools or bars would predict. Our study shows that nominating Commissions in ten states are eager to have more diverse applicants, and they are making some efforts to attract and nominate more diverse candidates. There are women and minority lawyers in these states, and welcoming nominating Commissions; nonetheless, top diverse candidates are not applying for, being nominated for or appointed to judicial openings in proportionate numbers.

Even though state judgeships are prestigious and powerful positions, state nominating Commissions must appreciate that attracting the top women and minority attorneys who have a wealth of other opportunities in other sectors of the economy takes real effort and some structural changes.

Once Commissioners reach a consensus on the goal of encouraging diversity and agree to make this goal a priority, they should be systematic in implementing changes. Below are four of our key recommendations:

- **Improving Pay and Benefits:** One element in making any job attractive is setting a competitive salary and benefits package. This is a challenge, as judicial salaries tend to lag far below comparable private sector salaries. A chart of judicial salaries is available in Appendix E.
- **Creating Logical Application Processes:** The application process for a judicial opening can be daunting for all kinds of applicants. Rationalizing the process would help to attract top applicants from all demographics.
- **Public Education and Outreach:** Outreach is another critical factor in attracting the best candidates. Just as corporate law departments and top law firms pay headhunters to find the best candidates, nominating Commissions need to place institutional resources behind strategic recruitment. Because a judgeship is a niche market with few analogs, educating law students and young lawyers about the career opportunities in the judiciary will also help to create a healthy pool of diverse applicants for each judicial opening.

- **Improved Record Keeping:** Finally, keeping records of the demographics of who applies, who is nominated and who is appointed to judicial openings would help Commissions monitor and celebrate successes, and better adapt to failures.

#### WHAT ARE APPOINTIVE SYSTEMS?

In the District of Columbia and the 24<sup>23</sup> states where judges are appointed to the bench using a nominating Commission, there are five basic steps in the appointive process: (1) advertising the judicial vacancy; (2) receiving applications by interested candidates; (3) vetting and interviewing prospective candidates by the nominating Commission, (4) formulating a “short list” of recommended names to the governor, and (5) nomination by the governor of a person from the list to fill the judicial vacancy.<sup>24</sup>

Not every state follows this exact formula. In some states, every applicant is entitled to an interview; in other states, only those applicants who are likely to make it to the final “short list” receive an interview.<sup>25</sup> In some states, the governor’s choice is final.<sup>26</sup> In others, the legislature must consent to the appointment.<sup>27</sup> Appointive systems in 16 states use the “Missouri Plan” and require appointed judges to stand for a retention election. In a retention election, judges do not have to run against an opponent. Rather, the only question on ballot in a retention election is whether the judge will keep his or her seat.<sup>28</sup>

## II. A REVIEW OF THE LITERATURE ON DIVERSITY IN APPOINTIVE SYSTEMS

### A. THE MAGNITUDE OF THE PROBLEM

Just as juries should be pulled from a cross-section of the local community, so, too, should appointed state judges.<sup>29</sup> This report addresses a specific problem posed by appointive systems: how do we design the process so that a diverse bench is a probable result?

One concern raised about appointive systems is that they may tend towards class-based exclusivity or racial or gender homogeneity.<sup>30</sup> As Professor Leo Romero warns, “the possibility exists for an appointive system to be perceived... as a system that works to the disadvantage of outsiders like women and minority lawyers.”<sup>31</sup> As Professor Sherrilyn A. Ifill notes, “the Missouri Plan [of appointing judges] has been criticized for entrusting the selection of judges to ‘elitist’ panels and for producing an unrepresentative judiciary.”<sup>32</sup>

The judiciary continues to vastly underrepresent women and people of color, despite gains in law schools and 20 years of policy intended to promote diversity. Ensuring diversity is a perennial issue that policy makers should keep in mind, since by definition an appointive process (with the exception of after-the-fact retention elections) does not contain the same public input as the direct election of judges.<sup>33</sup>

Also, because most appointive systems are used to fill positions on the highest state courts and appellate state courts, there are a very limited number of appointed seats open in any given year. As judicial terms can be lengthy, failing to keep an eye out for diverse candidates for a few years can have lasting and homogenizing effects on the universe of sitting state judges.<sup>34</sup>

The word “diversity” can be a code for a number of different goals, such as including people from different racial, ethnic, gender, geographic, age, economic, educational, political, religious or professional backgrounds.<sup>35</sup> In this paper, we focus on two types of “diversity”: race and gender. Unfortunately, in both categories (race and gender) where there is not a dearth of data, there is data that is not always comparable. Using the available data, we describe relevant trends.

We included gender as a consideration because women continue to be underrepresented on the bench. Similar to minority jurists, female jurists may offer unique perspectives.<sup>36</sup> Since gender norms operate differently than racial norms, it is reasonable to infer that there are differences in each group’s experiences in the legal community as well as in their access to the bench.<sup>37</sup> If one were to look solely at the numbers, in many cases, women, and particularly white women, are closer to achieving numerical parity than many male minorities. One study found proportionately, that there were fewer black male state appellate judges in 1999 than there were in 1985. In the same period, the percentage of female state appellate judges tripled.<sup>38</sup>

One possible explanation for this divergence between women and racial minorities is purely political. Republican women jurists may be appointed by Republican governors, but because there are comparatively fewer Republican minorities, the average Democratic minority jurist is less likely to be nominated by a Republican governor for partisan reasons.<sup>39</sup> Therefore, a Republican governor might suggest that one reason he has never appointed a person of color to the bench has nothing to do with race, but rather is prompted by his desire to have only right-leaning jurists who happen to be white men and women. Over time, a series of Republican governors holding this nominating philosophy would promote more white women than racial minorities.

Still, women as a group can face different barriers than their male minority counterparts. As New York Chief Judge Judith Kaye has written, “[g]ender stereotypes are famously resilient.”<sup>40</sup> For example, fewer female attorneys make partner at private law firms.<sup>41</sup> To the extent that Commissioners view being a partner as a mark of quality for judicial nominating Commissions, the apparent discrimination inherent in the partnership track at law firms may stall the careers of more female judicial applicants. Also, female attorneys are more likely to interrupt their careers for child care or other family responsibilities.<sup>42</sup> This type of lull can unfairly impact whether Commissioners deem female applicants “ready” for the bench.

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Some argue that there are insufficient numbers of qualified women and minorities in the pipeline to provide meaningful diversity on the bench. It is true that if fewer women and minorities have law degrees, that fact will mean that even fewer of them will become judges. But women and minorities have already reached a critical mass of law school graduates—and in the case of women, now form a majority of recent law school graduates at many schools. Indeed, when the statistics from the Bureau of Labor Statistics are considered, there are at least 325,000 working female attorneys and 110,000 working minority attorneys in the U.S. So the question remains why these groups are poorly represented on state court benches.<sup>43</sup> To get a sense of proportion, consider that in the states examined by the Brennan Center, there are only 58 Supreme Court justiceships and 227 appellate judgeships among all ten states combined. The pat answer that there are just too few minority and women attorneys to fill judicial openings does not appear to match the facts in most states.

There are other structural issues that hinder women and minorities from sitting on the bench. First, those women and minorities with the most widely respected legal credentials can likely receive significantly higher pay in the private sector than in a state judgeship. While the prestige of a judgeship is high, the lower pay may act as a barrier to keep some of the best educated and best qualified women and minorities out of the judicial applicant pool, especially if they have a family. A chart of judicial salaries is available in Appendix E.

Other structural barriers are created by the ways that judges are vetted and appointed. Most appointive judicial positions are for appellate judgeships and Supreme Court justiceships. Consequently, openings on these courts are infrequent and often occur on an irregular schedule. If the openings are not widely advertised, then all potential candidates including diverse candidates are less likely to apply. Furthermore, the less transparent the vetting process is, the less likely candidates of all stripes will subject themselves to it. Moreover, historically, nominating Commissions have tended to have mostly white male members, which led to mostly white male appointments.<sup>44</sup>

Some authors are clearly alarmed by the current problem of a non-diverse bench:

Indisputably, there is a crying need to diversify the judiciary. The numbers are stark. It is not hyperbole to say that we have a country of white male judges wholly disproportionate to their percentage in the general population. A sound appointive system must be designed to overcome that national travesty...<sup>45</sup>

The national data reflect a severe disparity. White males are approximately 37.5% the general population of the United States, and yet they are, roughly speaking, 66% of judges on state appellate benches.<sup>46</sup> This is nearly a two-to-one overrepresentation.

Attempts to build a diverse bench parallel the attempts by corporations to attract diverse managers and by law firms to attract diverse attorneys. In many cases, these three spheres are competing for the same pool of diverse legal talent. The field of study of diversity in corporations is much more mature than the study of judicial diversity. We draw on corporate experiences about successful diversity enhancing practices throughout this report.

## B. NATIONAL DEMOGRAPHICS TRENDS OF THE LEGAL COMMUNITY IN 2008

For most of American history, women and racial minorities were banned from the practice of law and therefore had no opportunity to serve in the judicial branch.<sup>47</sup> In the first half of the twentieth century, despite comprising approximately half of the U.S. population, women made up a very small percentage of matriculating law school classes. Not surprisingly, this led to few women on appellate state courts. One study reported that between 1922 and 1974, a paltry *six* women served on state courts of last resort.<sup>48</sup>

Fortunately, the practice of law has changed dramatically. Since 2001, in fact, in many law schools, women make up the majority of graduates.<sup>49</sup> Yet the most recent data from the Bureau of Labor Statistics (BLS) found that in 2007, of 1,001,000 employed lawyers in the U.S., 32.6% were women.<sup>50</sup> This disparity in the percentage of female attorneys compared to their proportion in the general population, underscores a point made by New York's Chief Judge Judith Kaye: “[i]t [is] clear...that women’s advancement in the profession requires ‘conspicuous, vocal vigilance.’”<sup>51</sup>

Minority enrollment in law schools started at token levels. But over the past twenty years, several of the most elite private law schools have made a concerted effort to ensure that minority law students are a sizable portion of each incoming class.<sup>52</sup> During the last decade, many state law schools, such as those in California, Washington and Texas have been under statutory or other mandates to totally disregard race and ethnicity in the law school application process. These state schools saw drops in the admission and matriculation of minority students that never rebounded to pre-initiative levels.<sup>53</sup> And at the same time, many schools across the country have been under pressure from the *U.S. News and World Review* rankings to increase their average LSAT scores.<sup>54</sup> This push has reduced the number of minority students at certain schools over recent years.<sup>55</sup>

There are clearly some pipeline issues—by that we mean a lower supply of minority lawyers than white lawyers—since “[m]inorities make up about 30 percent of the U.S. population, according to the 2000 census. Bureau of Labor Statistics data show that in 2003, about...10 percent of lawyers were minorities.”<sup>56</sup> In 2007, BLS reported that of 1,001,000 employed lawyers in the U.S., 4.9% were Black, 2.6% were Asian, and 4.3% were Hispanic.<sup>57</sup> The smaller number of minority lawyers means the best qualified ones are in high demand. Consequently, attracting minority lawyers to judicial openings requires active recruitment efforts.

## C. INSIGHTS FROM THE LITERATURE ON DIVERSITY

Many academics and experts who study the issue of judicial selection encourage changes that foster a diverse bench.<sup>58</sup> Professor Leonard M. Baynes argues that diversity in the state courts is particularly important because “most litigation takes place in the [s]tate courts given the limited jurisdiction of the federal courts.”<sup>59</sup> And diversity is worse in the state courts than it is in federal courts.<sup>60</sup>

The reasons it is critical to create a diverse bench include the following: (1) a more diverse bench will inspire confidence in the judiciary;<sup>61</sup> (2) it will be more representative of the broader community;<sup>62</sup> (3) it will promote justice;<sup>63</sup> (4) it will promote equality of opportunity for historically excluded groups;<sup>64</sup> and (5) it will promote judicial impartiality.<sup>65</sup>

More diverse Commissions end up nominating more diverse slates of candidates than do homogeneous Commissions.<sup>66</sup> Thus, some theorists focus efforts to reform the bench by first establishing diverse nominating Commissions. Diverse nominating Commissions are important for reasons that closely parallel those that support the need for a diverse bench and include the following: (1) the Commission will be more representative and will therefore gain the public's trust;<sup>67</sup> (2) it will promote democratic ideals;<sup>68</sup> and (3) it will foster a more independent judiciary because appointed judges would not be beholden to any particular demographic group.<sup>69</sup>

Suggested changes to ensure diversity on the bench from experts include: (1) creating a provision that mandates the consideration of diversity by the judicial nominating Commission;<sup>72</sup> (2) creating a provision that mandates that the governor take the diversity of the bench into consideration when making appointments;<sup>73</sup> (3) creating a provision that mandates that the nominating Commission's membership reflects the racial, ethnic, and gender diversity of the populations within the jurisdiction;<sup>74</sup> (4) conducting outreach to potential women and minority applicants to increase their numbers in the applicant pool;<sup>75</sup> (5) measuring efforts at achieving a diverse bench on a regular basis;<sup>76</sup> (6) training members of the Commission about diversity issues and interviewing techniques;<sup>77</sup> and (7) appointing an official to monitor compliance with diversity requirements.<sup>78</sup>

Underlying many of these claims about why diversity is desirable is the understanding that the justice system will benefit from having many different types of voices on the bench. As Dean Kevin R. Johnson and Professor Luis Fuentes-Rohwer, put it: “[i]ncreased diversity does not mean appointing judges who have pre-determined positions but instead judges who have different ways of looking at the world.”<sup>70</sup> Put another way, diversity is a hedge against the dangerous trap of “group-think;” helping to ensure that the justice system reaches correct decisions more frequently.

Even though it may seem expedient to reserve slots on nominating Commissions for women or minorities, this can raise equal protection objections. As Professor Leo M. Romero notes:

[a] provision that goes beyond mandating consideration of diversity by requiring a certain percentage or number of women or minority Commissioners may result in equal protection challenges. Indeed, Florida's attempt to reserve one-third of Commission seats for women or members of a racial or ethnic minority group faced such a challenge. A federal court invalidated the Florida law on the grounds that the 1991 statute violated the equal protection clause of the Fourteenth Amendment.<sup>71</sup>

Achieving some meaningful diversity on both the bench and on nominating Commissions can be the start of a virtuous circle. As Professor Frank Wu has written, “an institution can signal its openness.”<sup>79</sup> Existing diversity indicates to other potential female and minority applicants that they have a fair chance of success; this can encourage more diverse applicants which, in turn, is likely to result in a higher number of actual diverse members on the bench.<sup>80</sup> Conversely, when diversity numbers hover just above zero, candidates may think that tokenism is at work and are more likely to look for career opportunities elsewhere.<sup>81</sup>



### III. THE PROBLEM OF IMPLICIT BIAS

New research from the field of cognitive science on the implicit biases<sup>82</sup> that all humans possess may explain in part why racial and gender disparities on the bench persist even when nominating Commissions believe they are open to all applicants. While we do not fully explore the voluminous literature about implicit bias, this area of study provides one of many reasons why a deliberate and intentional focus on diversity is necessary for real improvement.<sup>83</sup>

This body of research is built on the observation that nearly all humans stereotype others unconsciously even when they profess tolerance consciously since “[i]n sum, as perceivers, we may misperceive, even though we honestly believe we are fair and just.”<sup>84</sup> Humans usually pick up these biases in early childhood and they are never fully dislodged.<sup>85</sup>

Furthermore, “[t]he assumption that human behavior is largely under conscious control has taken a theoretical battering in recent years.”<sup>86</sup> As Professor Marybeth Hearld explains:

Recent research indicates that the task of dismantling sex and race discrimination in the workplace is more complicated than originally thought because the way we discriminate is complicated. Principles of psychology and sociology have enlightened us as to what we actually do, rather than what we think we are doing, want to do, or claim to be doing... Our stereotyping mechanism is not easily turned off, even when we want to pull the plug on it, as in the case of gender biases. Merely voicing support for gender equality is not transformative - our brain’s deeply-engrained habits do not respond on cue. To exacerbate the situation, we often labor under misleadingly optimistic notions of our decision-making capacity that hide these methodical mistakes. Therefore we need to become aware of our stereotyping mechanism, be motivated to correct it, and have sufficient control over our responses to correct them.<sup>87</sup>

Implicit bias affects women in its activation of gender-based stereotypes as well as racial minorities.<sup>88</sup> Thus, “the failure to consider developments in cognitive science leaves us ignorant of the way stereotyping may silently saturate our thinking, therefore leading to decisions that reinforce a gendered status quo.”<sup>89</sup>

As experts in the field of cognitive science explain, “[b]ecause implicit prejudice arises from ordinary and unconscious tendency to make associations, it is distinct from conscious forms of prejudice, such as overt racism or sexism. This distinction explains why people who are free from conscious prejudice may still harbor biases and act accordingly.”<sup>90</sup> And as Justice Brennan wrote

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in the plurality opinion in *Price Waterhouse v. Hopkins*, “unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination.”<sup>91</sup>

The prevalent persistence of implicit bias is one reason why nominating Commissions must be proactive and systematic in their attempts to recruit and nominate diverse candidates.<sup>92</sup> Making little or no effort in these areas may reinforce ingrained patterns of behavior which can result in fewer women and minorities being seriously considered for judicial openings.

## IV. THE BRENNAN CENTER STUDY

### A. INTERVIEWS OF STATE NOMINATING COMMISSIONERS

We examined appointive systems in ten states: Arizona, Colorado, Florida, Maryland, Missouri, New Hampshire, New Mexico, Rhode Island, Tennessee and Utah. In each state, we interviewed between one and three members who serve on its nominating Commission. In total, we interviewed 15 Commissioners. Most of the Commissions we targeted had the responsibility to vet appellate judges or state Supreme Court justices. A smaller number of Commissions also reviewed the selection of trial judges as well.

In choosing these ten states, we sought to capture states with different demographics, ranging from more homogenous to more heterogeneous, and various legal environments. In this cohort, we included some with statutes or rules addressing diversity and some without. Further, we included states that had been successful attracting a diverse bench.

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SOME COMMISSIONERS  
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During our interviews, we asked Commissioners about processes employed by their Commissions. Specifically, we asked questions exploring how applicants become jurists, what types of outreach they use, when and if they consider diversity in the process, how diverse the Commission is itself and whether the Commission is statutorily required to take diversity into consideration.

In general, most of the Commissioners we interviewed expressed interest in our research, and were pleased to share their experiences with us. Because most Commissioners believed that what they shared was truthful and important, a majority of what they reported to us remained on the record. Some of the Commissioners were especially excited about our research, and indicated that their respective Commissions were in need

of guidance in the area of diversity. Specifically, one Commissioner asked that the report provide substantive recommendations that could be adopted in even the most racially homogenous states.

Delving into the realm of politics, some Commissioners commented, that in their opinion, minority candidates are often politically ill-prepared to secure a judgeship—in other words, they did not

have the same number of political connections who could help them through the process as did white candidates. A number of Commissioners also noted that after appointment, many minority judges failed to keep their seats in subsequent retention elections. One Commissioner attributed the latter problem to the state's historical battle with racism, while most attributed the retention challenge to a lack of fundraising and/or development of political backing by and for minority judges.

Some Commissioners expressed interest in how their own state's numbers fared in comparison to the other ten states in the study, while many were unaware of their own Commission's performance in placing women and minorities on the bench. While some Commissions receive periodic reports from their state administrator's office regarding the demographic makeup of the bench, most do not. This lack of awareness led to less-than-clear responses regarding if and where data on diversity are aggregated and reported. We address data issues later in the paper.

Interestingly enough, when our questions contained the word "minority," the demographics of certain states altered how Commissioners interpreted the word. One of the Commissioners pointed out that in Arizona, Latinos are not really considered to be a minority group. He said that Latinos have always been a part of Arizona's history, and as such, are fully integrated into all of its communities. By contrast, in Tennessee, the word "minority" appears to mean "black" or "African American."

We provided interviewees with an option to remain anonymous. Only two Commissioners opted to remain anonymous. The questionnaire that the Brennan Center used is attached at Appendix A.<sup>93</sup> The names of the Commissioners that we interviewed are listed in Appendix B. We interviewed each Commissioner separately and gave them the opportunity to confirm the statements attributed to them. A few modified their quoted comments slightly upon review.

## B. LEGAL FRAMEWORKS AND DEMOGRAPHICS FOR THE TEN STATES

Among the ten states we studied, for many courts, the racial<sup>94</sup> and gender diversity of the state bench lags behind the diversity of the state population, the state's law school student population and state bar.<sup>95</sup> Racial minorities and women are underrepresented on state appellate and district courts when compared with their share of the general population in all ten states except Missouri. While the disparity on the bench reflects a problem in judicial selection, certainly the larger issue of underrepresentation in the legal community is a contributing factor.

Since membership of the state bar and state law school graduates represent the potential judicial candidate applicant pool, comparing bar membership and law school composition with appointment demographics is one way to assess the progress that judicial Commissions are making with recruiting and appointing diverse candidates.

Below are two charts showing the diversity of the students at law schools in the ten states over the past 20 years. The first chart shows gender trends and the second chart shows racial trends. The top line results are that matriculation of women and minorities at law school has increased markedly over the past 20 years (1986-2006) in all ten states, but that even 20 years ago, all of the law schools

CHART A: GENDER TRENDS AT LAW SCHOOLS IN THE TEN STATES STUDIED <sup>96</sup>

School <sup>97</sup>	State	1986 Gender Breakdown	1996 Gender Breakdown	2006 Gender Breakdown
Arizona State University	AZ	Majority Male (58% male)	Parity (50% both genders)	Majority Male (55% male)
Brigham Young University	UT	Majority Male (83% male)	Majority Male (66% male)	Majority Male (64% male)
Florida State University	FL	Majority Male (64% male)	Majority Male (55% male)	Majority Male (60% male)
Franklin Pierce Law Center	NH	Majority Male (60% male)	Majority Male (65% male)	Majority Male (62% male)
Nova University	FL	Majority Male (56% male)	Majority Male (60% male)	Parity (50% both genders)
St. Louis University	MO	Majority Male (70% male)	Majority Male (56% male)	Majority Male (51% male)
Stetson University	FL	Majority Male (55% male)	Majority Female (51% female)	Majority Female (53% female)
The University of Memphis <sup>98</sup>	TN	Majority Male (67% male)	Majority Male (58% male)	Majority Male (56% male)
University of Arizona	AZ	Majority Male (56% male)	Majority Male (51% male)	Majority Male (51% male)
University of Baltimore	MD	Majority Male (61% male)	Majority Male (53% male)	Majority Female (54% female)
University of Colorado	CO	Majority Male (52% male)	Majority Male (57% male)	Majority Female (51% female)
University of Denver	CO	Majority Male (64% male)	Majority Male (55% male)	Majority Male (53% male)
University of Florida	FL	Majority Male (63% male)	Majority Male (59% male)	Majority Male (53% male)
University of Maryland	MD	Majority Male (52% male)	Majority Female (51% female)	Majority Female (58% female)
University of Miami	FL	Majority Male (60% male)	Majority Male (57% male)	Majority Male (57% male)
University of Missouri-Columbia	MO	Majority Male (61% male)	Majority Male (62% male)	Majority Male (63% male)
University of Missouri-Kansas City	MO	Majority Male (56% male)	Majority Male (52% male)	Majority Male (58% male)
University of New Mexico	NM	Majority Female (56% female)	Majority Male (52% male)	Parity (50% both genders)
University of Tennessee	TN	Majority Male (67% male)	Majority Male (53% male)	Parity (50% both genders)
University of Utah	UT	Majority Male (63% male)	Majority Male (62% male)	Majority Male (62% male)
Vanderbilt University	TN	Majority Male (64% male)	Majority Male (62% male)	Majority Male (54% male)
Washington University	MO	Majority Male (56% male)	Majority Male (60% male)	Majority Male (58% male)

**CHART B: RACIAL TRENDS AT LAW SCHOOLS IN THE TEN STATES STUDIED<sup>99</sup>**

<b>School</b> <sup>100</sup>	<b>State</b>	<b>1986 Racial Breakdown</b>	<b>1996 Racial Breakdown</b>	<b>2006 Racial Breakdown</b>
Arizona State University	AZ	86% white	75% white	73% white
Brigham Young University	UT	93% white	87% white	82% white
Florida State University	FL	87% white	74% white	81% white
Franklin Pierce Law Center	NH	98% white	86% white	83% white
Nova University	FL	89% white	76% white	76% white
St. Louis University	MO	93% white	82% white	89% white
Stetson University	FL	93% white	84% white	82% white
The University of Memphis	TN	93% white	91% white	82% white
University of Arizona	AZ	92% white	74% white	72% white
University of Baltimore	MD	93% white	82% white	83% white
University of Colorado	CO	89% white	81% white	77% white
University of Denver	CO	93% white	87% white	81% white
University of Florida	FL	96% white	77% white	81% white
University of Maryland	MD	82% white	71% white	68% white
University of Miami	FL	80% white	67% white	77% white
University of Missouri-Columbia	MO	92% white	92% white	86% white
University of Missouri-Kansas City	MO	94% white	89% white	91% white
University of New Mexico	NM	64% white	61% white	55% white
University of Tennessee	TN	92% white	88% white	84% white
University of Utah	UT	92% white	86% white	90% white
Vanderbilt University	TN	95% white	79% white	82% white
Washington University	MO	95% white	82% white	85% white

in these states contained significant numbers of women and at least some racial minorities. Of course, there is no way of tracking whether these law students remained in the state or continued to practice law in the state. At best, these numbers provide an approximation. Still, it is important to note that several of the Commissioners we interviewed indicated that a majority of their applicants were graduates from law schools in their state. This growing cohort of female and minority attorneys provides an opportunity to diversify the bench, provided that the structural changes we recommend are implemented.

## Racial Diversity

Of the ten states surveyed for this report, New Mexico and Florida had the most racially diverse state courts. Both states have highly diverse general populations: New Mexico's general population is 57% non-white<sup>101</sup> and Florida's is 39% non-white.<sup>102</sup> Non-white attorneys represent 21% of New Mexico's bar<sup>103</sup> and 13% of Florida's bar.<sup>104</sup>

The demographic composition of both states' law schools more closely reflects the demographics of the state, although the schools also lag behind the population. New Mexico has two sitting Hispanic judges on its five-judge Supreme Court.<sup>105</sup> Non-white judges make up 15% of New Mexico's Court

of Appeals and 19% of the District Court.<sup>106</sup>

Similarly, Florida has two minority justices on its seven-member Supreme Court and 16% of its Court of Appeals judges are non-white.<sup>107</sup>

On a positive note, Peggy A. Quince became Chief Justice on June 27, 2008. She is the first African-American woman to become Chief Justice of the Florida Supreme Court.

Along with large minority populations, both Florida and New Mexico have specific state constitutional or statutory diversity provisions for the selection of judicial nominating Commissioners. New Mexico's Constitution provides that when appointing Commissioners beyond those specifically enumerated, Commissioners "shall be appointed such that the diverse interests of the state bar are represented"

and charges the Dean of the University of New Mexico Law School with deciding if those diverse interests are represented.<sup>108</sup> Florida's diversity provision is more robust; it requires that when making appointments to the Commission, "the Governor shall seek to ensure that, to the extent possible, the membership of the Commission reflects the racial, ethnic, and gender diversity, as well as the geographic distribution, of the population within the territorial jurisdiction of the court for which nominations will be considered."<sup>109</sup>

Of the states surveyed, the racial make-up of Missouri's state bench most closely reflects the demographics of the state's population. Missouri's population is 16% non-white.<sup>110</sup> Minorities make up

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MISSOURI IS ONE OF THE FEW STATES WITH A SPECIFIC PROVISION DIRECTING ITS COMMISSION BOTH TO RECRUIT DIVERSE JUDICIAL APPLICANTS AND TO CONSIDER THE INTERESTS OF A DIVERSE JUDICIARY WHEN EVALUATING JUDICIAL APPLICANTS.

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5.94% of the state's bar membership.<sup>111</sup> Correspondingly, minorities make up 14% of the Supreme Court and 16% of its Court of Appeals.<sup>112</sup>

Unlike Florida and New Mexico, Missouri does not have a specific provision that encourages diversity on the appointing Commission. But Missouri is one of the few states with a specific provision directing its Commission both to recruit diverse judicial applicants and to consider the interests of a diverse judiciary when evaluating judicial applicants.<sup>113</sup> The Missouri Supreme Court Rules direct that: “[t]he Commission shall actively seek out and encourage qualified individuals, including women and minorities, to apply for judicial office” and that “the Commission shall further take into consideration the desirability of the bench reflecting the racial and gender composition of the community.”<sup>114</sup>

The other seven surveyed states paint a less encouraging picture of minority representation on the state bench, and the often sparse applicant pool of potential state judges. By way of example, Arizona's population is 40% non-white,<sup>115</sup> but minorities account for only 8% of the state bar membership.<sup>116</sup> Further, Arizona has no minority Supreme Court justices.<sup>117</sup> Minorities occupy only 18% of its Court of Appeals judgeships<sup>118</sup> and 16% of its Superior Court judgeships.<sup>119</sup> Despite Arizona's constitutional provision directing appointing Commissions to reflect the diversity of the state population,<sup>120</sup> the diversity of the state bench falls short.

Similarly, Maryland's population is 42% non-white,<sup>121</sup> and 14% of its state bar membership is non-white.<sup>122</sup> Two of seven of its Court of Appeals judges are African American,<sup>123</sup> only 26 of its 157 Circuit Court judges<sup>124</sup> and 24 out of 112 District Court judges are minorities.<sup>125</sup> Additionally, Maryland has an Executive Order requiring the appointing Commission to encourage diverse candidates to apply for appointment<sup>126</sup> and to take into account “the importance of having a diverse judiciary” when making appointments.<sup>127</sup>

Likewise, with a minority population of 29%,<sup>128</sup> Colorado's bar is only 6% non-white.<sup>129</sup> But only one of Colorado's seven Supreme Court justices is a person of color.<sup>130</sup> Further, minorities hold only two of sixteen Appellate Court judgeships and 12% of district court judgeships. Colorado has no specific diversity provisions in appointing Commissioners or recruiting and evaluating judicial candidates. Four additional states have a smaller minority population but also struggle with minority representation on the state bench. Tennessee has a minority population of 22%<sup>131</sup> and a minority state bar membership of 6%.<sup>132</sup>

Tennessee law requires that “[e]ach group and each speaker in making lists of nominees and appointments [to state judicial selection Commissions]...shall do so with a conscious intention of selecting a body which reflects a diverse mixture with respect to race, including the dominant ethnic minority population, and gender.”<sup>133</sup> When making appointments, “[e]ach speaker...shall appoint persons who approximate the population of the state with respect to race, including the dominant ethnic minority population, and gender,” and if the chosen list of “nominees do not reflect the diversity of the state's population, the speaker shall reject the entire list of a group and require the group to resubmit its list of nominees.”<sup>134</sup>

Despite its judicial selection Commission diversity provision and the growing non-white popu-

lation at Tennessee law schools, Tennessee has struggled to achieve meaningful diversity on the bench. The state has only one African-American Supreme Court justice, one African-American criminal appeals court judge and eight African-American judges in its 151-seat trial court, while all of the rest of the judges are white.<sup>135</sup>

Rhode Island's population is 21% non-white<sup>136</sup> and its minority bar membership is only 2%.<sup>137</sup> Clearly, having a provision encouraging nominating Commission diversity does not always ensure a diverse bench. For example, despite the fact that Rhode Island has a statutory command that the Governor and nominating authorities encourage diversity on the appointing Commissions,<sup>138</sup> it has no minority Supreme Court justices and only two minorities hold seats among 22 judgeships on the Superior Court.<sup>139</sup>

Utah is 18% non-white.<sup>140</sup> Yet Utah has no minority Supreme Court justices,<sup>141</sup> and minorities only account for one of seven court of appeals seats<sup>142</sup> and four of 70 district court seats.<sup>143</sup> Utah has no specific constitutional or statutory diversity provision.

With a 7% minority population,<sup>144</sup> and a minority bar membership of 4%,<sup>145</sup> New Hampshire has the smallest minority population of the states surveyed. All of New Hampshire's five Supreme Court and twenty-eight superior court judgeships are filled by white jurists.<sup>146</sup> Contrary to other states studied, however, New Hampshire has an Executive Order specifically forbidding race and gender to be considered when appointing judges.<sup>147</sup>

## **Gender Diversity**

Although women make up approximately 50% of the population, they make up far less than half of appointed judges across all levels of state courts in the ten surveyed states. It is difficult to gauge how well the percentage of women being appointed to the state bench reflects the pool from which judicial candidates are drawn because the American Bar Association does not publish the percentage of female bar membership by state.

It may therefore be helpful to compare the percentage of J.D.'s conferred to women as a rough estimate for the available pool of judicial candidates. In 2006, nationally, women made up 48% of the 43,883 J.D.'s conferred,<sup>148</sup> and on average over the last fifteen years, make up 46% of the J.D.'s conferred.<sup>149</sup>

Utah and Tennessee have the highest percentage of female judges across their different levels of courts. Utah does not have any specific statutory or constitutional provision encouraging gender diversity on the appointing Commissions or when selection judicial appointments. Even so, in Utah two of the five Supreme Court members are women<sup>150</sup> and three of the seven members of the court of appeals are women.<sup>151</sup> In its District Court, only 13% of the judges are women.<sup>152</sup>

Tennessee has an aggressive diversity statute with regards to gender. When selecting a pool of candidates for the judicial appointing Commissions and when selecting Commissioners from that pool, Tennessee, by statute requires appointments that "approximate the population of the state with respect to...gender."<sup>153</sup> Likewise, women make up 40% of Tennessee's Supreme Court justices<sup>154</sup> and



25% of its Court of Appeals judges.<sup>155</sup> Only 8% of judges on the Court of Criminal Appeals<sup>156</sup> and 17% of its trial court judges<sup>157</sup> are women.

Of the remaining states with some type of diversity provision, Arizona, Florida and Maryland each have two female judges on their Supreme Court,<sup>158</sup> and Rhode Island has one female Supreme Court justice on its five-justice court.<sup>159</sup> Neither Colorado nor New Hampshire have any diversity provisions on the books. Colorado has three female Supreme Court justices while New Hampshire has one.<sup>160</sup>

Women also are underrepresented on the appellate and trial courts of the surveyed states. At the appellate level,<sup>161</sup> women comprise 31% of Maryland's judges.<sup>162</sup> This gender disparity is particularly noteworthy given that Maryland's Executive Order requires Commissions to encourage diversity when recruiting judicial candidates and to take "the importance of having a diverse judiciary" into account when making appointments.<sup>163</sup>

Additionally, despite the increase in female law students over the last twenty years, women account for only 25% of Missouri's Court of Appeals judges,<sup>164</sup> and only 19% of Colorado's appellate judges.<sup>165</sup> And even though Florida's aggressive diversity provision requires appointments to the judicial Commissions ensure, *inter alia*, representative gender diversity,<sup>166</sup> only 19% of Florida's appellate judges are women.<sup>167</sup>

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FOUR OF THE TEN STATES  
STUDIED HAVE NO  
MINORITIES SITTING ON  
THEIR SUPREME COURTS.

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Of the states with diversity provisions that have statistics available for their trial courts, women make up 32% of Rhode Island's judges,<sup>168</sup> 31% of Maryland's District Courts,<sup>169</sup> 27% of Arizona's Superior Courts,<sup>170</sup> 26% of Florida's Circuit Court and 36% of Florida's County Courts,<sup>171</sup> and 12% of Missouri's Circuit Court.<sup>172</sup> In the two states without diversity provisions but where statistics are available, 27% of New Hampshire's trial-level judges,<sup>173</sup> and 22% of Colorado's District Court are women.<sup>174</sup>

### C. CONCLUSIONS: A TRACK RECORD THAT NEEDS IMPROVEMENT

While the data are imperfect and at times inconclusive, it is strikingly clear that all of the surveyed states have state benches that underrepresent the racial and gender diversity of the state. Of the surveyed states with the most racially diverse state judiciaries, New Mexico, Florida and Missouri tend to have the most diverse potential applicant pools reflecting the states' large minority populations, higher minority bar membership and diverse law school populations. Although Maryland shares these characteristics, the state has been slightly less successful at achieving a racially diverse state bench.

Gender diversity on the bench was just as elusive for the surveyed states. Despite a trend approaching, but not yet reaching, gender parity in bar membership<sup>175</sup> and law school composition, state judiciaries remains predominantly male at almost every level of court.

From this survey of state-appointed judiciaries, two things are clear. First, there is a lack of statistically rigorous efforts to collect and analyze race and gender data of state judicial appointments. Without this type of statistical basis, it is impossible to infer causal relationships about the impact of diversity provisions on the resulting gender and racial make-up of the state judiciaries. Certainly, while they appear to do some good, it is far from enough to merely have such a provision on the books. These provisions need to become praxis. Secondly, in addition to focusing on the state judicial appointment process, any comprehensive plan to diversify state judiciaries must also incorporate methods to increase the state bar membership of minorities and women.

The results differ from state to state and court to court. For a side-by-side comparison of the ten states, *see* Appendix D. Four of the ten states (Rhode Island, Utah, New Hampshire and Arizona) have no minorities sitting on their respective Supreme Courts. But several state intermediate courts (such as Arizona, Colorado, Florida, Maryland, Tennessee and Utah) have more diversity than the relevant state bar membership, but still less than the diversity in the general population.

This marked difference between the general population and the bar membership raises an interesting question of what a meaningful diversity baseline should be in this context. On one hand, only members of the bar may serve on the bench. On the other hand, judges serve the entire public and the legitimacy of the court may suffer if the public perceives that the bench chronically underrepresents a large portion of the general population (such as Latinos in New Mexico, Arizona or Florida or Blacks in the South.) Relying on the bar membership percentages as the benchmark may unduly depress expectations of how many diverse candidates should be on the bench, since the number of minorities and women in the bar may be disproportionately low. As we pointed out elsewhere, there are only 58 Supreme Court justiceships and 227 appellate judgeships among all ten states combined, thus filling these few slots with more diverse candidates should be possible.

#### D. FINDINGS FROM INTERVIEWS WITH STATE NOMINATING COMMISSIONERS

In an effort to make our study as comprehensive as possible, we looked beyond statistics and the various statutory frameworks in the ten states studied. Conducting detailed interviews of Commissioners provided us with context for the statistics and grounded our recommendations. More importantly, implementation of our policy recommendations requires working with Commissioners as co-collaborators. As we sought insight into the nominating process through their experiences, the interviewer provided Commissioners with an opportunity to highlight obstacles or innovative ideas in addressing diversity.

Comparing findings across the ten states that we studied is no easy task. Although we reached out to a number of Commissioners in each state, in some states, only one Commissioner granted us an interview. Some of the Commissioners interviewed were not willing to answer all of our questions. Other Commissioners went into great detail on a particular aspect of their experience, but spoke in generalizations for the rest of the interview. Also, on most topics, there was no real consensus among the fifteen Commissioners. Nonetheless, the interviews do offer valuable evidence about

how nominating Commissions function day-to-day, and whether and how diversity is considered during the nominating process.

### **Diversity of the Nominating Commissions**

The Commissions vary from very heterogeneous (FL) to very homogeneous (NH) in terms of race and gender. *See* Appendix C for a description of each Commission. Differences in the level of diversity on each Commission were attributable to a mix of factors including: (1) the racial diversity of the state; (2) the appointment process for the Commissioners;<sup>176</sup> and (3) whether or not the Commission is legally required to be representative of the population of the state. For example, Rhode Island’s state law requires that the Governor make reasonable efforts to encourage racial, ethnic, and gender diversity within the Commission. (R.I. Stat. § 8-16. 1-2). Colorado, Maryland, Missouri, New Hampshire, and Utah have no such requirement.

Several interviewees expressed frustration that their nominating Commissions were not more diverse. Commissioner Strain (AZ) believes that the Arizona Commission needs participation from additional Hispanic women. In light of the state’s gender demographic, she also believes that half of the Commission should be women.

Commissioner Farmer (TN) echoed this sort of criticism. He highlighted that over a period of 12 years, Tennessee’s Commission has become “very male and white.” He indicated that he wished the Commission’s composition were more diverse. However, he also noted that those Commissioners who are not African American or female can properly consider diversity. He believes Tennessee’s bench is “remarkably rich in diversity” and much more so than it was prior to the adoption of the Commission.<sup>177</sup>

### **The Impact of a Diverse Commission on the Diversity of Nominees**

Experts suggest that the more diverse a Commission is, the more likely it is to produce diverse applicants and a more diverse list of judicial nominees. While some Commissioners agreed with this assessment, others were deeply skeptical.

For example, Commissioner Carlotti (RI) believes that the amount of diversity on the Rhode Island Commission indirectly impacts the amount of diversity in the applicant pool. He believes that people who otherwise would not apply, do apply for judicial openings due to the diversity of the Commission.<sup>178</sup>

Commissioner Sachs (MD) related her experience that “[a]s chair of the Commission, I feel sensitive to issues of diversity. If we want to encourage diverse individuals to apply for judgeships, it helps to have people of different backgrounds on the Commission.”<sup>179</sup>

Colorado does not have a law requiring that its Commission be representative of the people in its state. Anonymous Colorado Commissioner said that he would endorse a requirement mandating that Colorado’s Commission be representative of the people in his state. He believes that having more emphasis put on the creation of a diverse Commission would have a positive impact on the judiciary. He also believes that it would encourage more diverse applicants and help to improve diversity in the courts.<sup>180</sup>

On the other hand, Commissioner Scarnecchia (NM) does not believe that the diversity on New Mexico’s Commissions has an effect on applicants. A new Commission is assembled in New Mexico with every new vacancy. As such, applicants are not aware of the makeup of the Commission when they apply. She does believe that the diversity of the Commissions affects the kind of candidate who ends up on the nominating list because, having a diverse Commission with people who are willing to talk about the importance of diversity advances those goals on the state’s Commissions.<sup>181</sup>

Racially, there are no minorities on the New Hampshire Commission. Commissioner Waystack (NH) said this is not surprising because “[w]e are such a white state.”<sup>182</sup>

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FEW COMMISSIONERS COULD OR WOULD ARTICULATE EXACTLY HOW THE RACE OR GENDER OF APPLICANTS IS WEIGHED OR CONSIDERED DURING THE NOMINATING PROCESS.

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In states where there is an active effort among law makers to revert to judicial elections, there is resistance to placing any more emphasis on the diversity of the Commissions. Some Commissioners mentioned that doing so may cause a backlash that could lead to a repeal of the merit selection process entirely. Commissioner Scarnecchia (NM) said that putting more emphasis on creating a diverse nominating Commission would either “not have an

effect,’ or would have ‘a negative effect’ because there already is a heavy emphasis put on diversity. Any more emphasis might be negatively viewed as going ‘over the top’ since the current Governor puts a lot of emphasis on diversity.”<sup>183</sup>

Commissioner Nichols (TN) also has this concern, as he believes that any more emphasis on creating a diverse Commission would negatively impact the public’s perception of the nominating process. Commissioner Nichols perceived that there are naysayers that want to do away with the nominating Commission altogether.<sup>184</sup> He does not think that putting more emphasis on creating a diverse Commission would go over well with individuals who already feel that the Commission is too “political.”<sup>185</sup>

## **Constitutional, Statutory or Executive Order Authority**

Commissioners who work under constitutional or statutory guidance requiring that diversity be taken into account in the nominating process, or that the Commission should be representative of the state, seemed pleased with the effect of these laws.

New Mexico's state law requires that Commission members represent the diverse interests of the state (NM Const. Art. 6, § 35). When asked about the impact of the provision on the makeup of New Mexico's Commissions, Commissioner Scarnecchia (NM) said that the Commissions are definitely more diverse than they would be if the provision did not exist.<sup>186</sup> Meanwhile, Commissioner Leavitt (AZ) believes that Arizona's law<sup>187</sup> has created a "conscious[ness] of diversity" among Commissioners.<sup>188</sup>

Commissioners from states without constitutional or statutory guidance on diversity were skeptical about how such a provision might work. When asked to consider a diversity mandate at both the evaluation and appointing stages, Commissioner Carlotti (RI) wondered, "[w]hat would be the remedy if it were unenforced? I'm not for something that has no code to enforce it. Would you have to put a certain amount of a group on the list? Suppose you leave qualified people off of the list because of a system like this? A constitutional provision during the final appointment decision is problematic as well."<sup>189</sup> Anonymous Florida Commissioner shared this skepticism, saying that a diversity provision is not needed at any stage in the nomination process, and indicated that implementing such a provision would "be scary."<sup>190</sup>

## **Considering Diversity During the Nominating Process**

Few Commissioners we talked to could or would articulate exactly how the race or gender of applicants is weighed or considered during the nominating process. A few viewed a candidate's minority status or gender as a "tie-breaker" between similarly qualified candidates. Others simply looked at it as a "plus" for a candidate that might keep a candidate in the pool for longer. Still other Commissioners described diversity as a factor that they examined after the deliberations. If the "short list" of nominees for presentation to the governor was not diverse, then the Commission would reconsider candidates to see whether they could produce a more diverse short list.

Commissioner Strain (AZ) describes the Arizona Commission as an interactive group that informally discusses diversity. Commissioner Strain noted that specifically, the women on the Commission typically bring up the topic. Commissioner Strain (AZ) said, "[i]f there are women [in the pool], I'm going to make sure that a woman shows up on the [short] list. I mean, if she has reached the level of merit expected, I will send her up. Why not?"<sup>191</sup> Commissioner Briggs (AZ) simply reported that "if two candidates have otherwise substantially similar qualifications, the candidate whose qualities would add diversity to the bench would get my vote."<sup>192</sup>

When asked how the Maryland Commission factored diversity into its deliberations, Commissioner Sachs (MD) said that the Commission does not have numerical weighting, and instead openly

discusses the need to recommend a diverse group of candidates to the Governor.<sup>193</sup> In Maryland, there is an Executive Order which states:

Each Commission shall encourage qualified candidates, from a diversity of backgrounds, to apply for judicial appointment...In considering a person's application for appointment to fill a vacancy, a Commission shall consider...the importance of having a diverse judiciary.<sup>194</sup>

Commissioner Sachs believes that the text of the Maryland Executive Order places particular emphasis on diversity, but the Governor's appointment of a group of Commissioners who reflect the diversity of the state is a key tool in promoting diversity on the bench and in making the language of the Executive Order something more than mere verbiage. Commissioner Sachs added that "[i]f we don't have enough diversity among anticipated applicants for a particular vacancy, I may suggest to the Commissioners that they reach out to lawyers they know from diverse backgrounds (who are otherwise qualified) to ask them to apply for a particular vacancy."<sup>195</sup>

In Utah, there are no rules giving Commissioners guidance on how to include diversity considerations in their evaluations. When Commissioners evaluate candidates, diversity is not weighted. Commissioner Keetch (UT) said that diversity is one of many factors considered by the nominating Commission. Diversity is not the exclusive factor, nor will it override other important factors.

But having a judiciary that is representative of all of the people of Utah is certainly a significant consideration as the Commission identifies the best candidates.<sup>196</sup> This approach was shared by Commissioner Carlotti (RI) who said, "[w]e don't have a scorecard, but diversity is considered along the way. Each Commissioner puts whatever weight on the qualities they want."<sup>197</sup>

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COMMISSIONS VARY WIDELY IN THEIR ATTEMPTS TO RECRUIT CANDIDATES. SOME COMMISSIONS ENGAGE IN GENERAL OUTREACH FOR ALL TYPES OF APPLICANTS, WHILE OTHERS DO NO OFFICIAL OUTREACH AT ALL.

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Commissioner Diament (NH) said that if the Commission is dealing with "two applicants whose qualifications are equal across the board, the Commission would lean towards the diverse individual." Given that there are no directives, diversity considerations are not treated as a matter of weighting. Instead, Commissioner Diament said that conversations usually include statements such as, "[t]his person has really excelled in this area – and the fact that they are a diverse applicant is an added benefit."<sup>198</sup>

Commissioner Farmer (TN) explained that if all things are equal between a number of candidates, the Commission will look at the balance in the specific court which has the judicial vacancy. If the court is in need of diversity, the Commissioners make efforts to ensure that at least one or two of the three names sent to the governor are minorities. Generally, Commissioner Farmer's personal view is that diversity "tips the scales" when all other things are equal between candidates. While Commissioner Farmer made clear that he cannot speak for his fellow Commissioners, he believes

## Advertising and Outreach

All ten states advertised judicial openings in one way or another. But some states do a better job than others at getting the word out.

State	Where Commissions Advertise Judicial Openings
Arizona	<ul style="list-style-type: none"> <li>• Advertises openings with state bar</li> <li>• Advertises openings in newspapers</li> <li>• Posts openings on the state website</li> </ul>
Colorado	<ul style="list-style-type: none"> <li>• Posts openings on the court's website</li> <li>• Notices of vacancies are emailed directly to the media</li> <li>• General press releases</li> </ul>
Florida	<ul style="list-style-type: none"> <li>• Basic announcements are mailed to a comprehensive mailing list</li> <li>• Chairman attends various bar meetings to advertise openings</li> </ul>
Maryland	<ul style="list-style-type: none"> <li>• Posts vacancy on court website</li> <li>• Advertises openings in statewide legal and general papers</li> <li>• List of candidates published on website</li> </ul>
Missouri	<ul style="list-style-type: none"> <li>• An announcement is sent to the bar as a whole</li> </ul>
New Hampshire	<ul style="list-style-type: none"> <li>• Notify bar of vacancy</li> <li>• Advertises openings in the state's paper</li> </ul>
New Mexico	<ul style="list-style-type: none"> <li>• Notices sent to the state bar</li> <li>• Notices sent to the women and minority bar associations</li> <li>• Notices sent to state's local papers</li> <li>• Dean's office sends email flashes to the relevant sections of the bar</li> </ul>
Rhode Island	<ul style="list-style-type: none"> <li>• Vacancy published in various papers around the state</li> </ul>
Tennessee	<ul style="list-style-type: none"> <li>• Administrative Office of Courts sends notice to all Commissioners</li> <li>• An email notification is sent to representatives in the Tennessee Defense Lawyers Organization who pass it along to the membership</li> <li>• Announcement in local papers</li> </ul>
Utah	<ul style="list-style-type: none"> <li>• Notification of vacancy sent to the bar</li> <li>• Outreach by individual Commissioners and sitting appellate judges</li> <li>• Outreach by the Governor and the Chief Justice to suggest diverse candidates that should apply</li> </ul>

that the Commission as a whole considers diversity when the qualifications of the candidates are similar.<sup>199</sup>

The Florida Commission's approach appeared similar to that of the Tennessee Commission. As an informal procedure used to advance diversity considerations in the Commission's process, Commissioner Grigsby (FL) said that each Commissioner individually will look at the current composition of the court, and assess what is needed. "So, in terms of weight given to diversity, there is no consensus."<sup>200</sup> Anonymous Florida Commissioner concurred that each Commissioner in Florida is "on their own" to do what they feel is right.<sup>201</sup>

Commissioner Scarnecchia (NM) reported that after compiling an interview list, many times, Commission members will say, "[t]his is not a very diverse list, let's look at it again." There is no explicit factoring or weighting of diversity in the New Mexico Commissions' deliberations. However, Commissioner Scarnecchia noted that there is also no weighting of any of the other factors they consider.<sup>202</sup>

Missouri has no formal procedures to advance diversity considerations when screening and nominating candidates. Missouri's rules note, however, that Commissioners should give weight to reflecting the demographics of the community. Other than the rules, there are no other formal measures. According to Commissioner McLeod, Missouri's Commission uses no informal measures to advance diversity.<sup>203</sup>

### **Diversity Can Be Achieved Without Sacrificing Quality**

Three of the Commissioners wanted to make sure we understood that diversity was not a trump card in the nominating process. Commissioner Carlotti (RI) declared, "[w]e start with a threshold. Integrity and competence come first. I won't accept less."<sup>204</sup> Commissioner Diament (NH) agreed and stated that "we would never compromise on quality."<sup>205</sup> And Commissioner Leavitt (AZ) echoed this stance adding, "[d]iversity is taken very seriously and is an added plus in the merit column, but it would not overcome basic qualities."<sup>206</sup>

### **Training to Be a Commissioner**

Some states offer no training to Commissioners, while other states offer voluntary or mandatory training. In Arizona, training is required and must also be repeated annually to reinforce learning. Commissioners in Arizona must attend a one-day ethics class. Commissioner Strain (AZ) believes that the mandatory training Commissioners receive is "top-notch." In the training, Commissioners learn about ethics and how to deal with the media. Arizona's training touches only briefly on diversity.<sup>207</sup>

Anonymous Colorado Commissioner said that all Commissioners complete a non-mandatory training session run by the judicial branch. At least in the past, Colorado's Commissioners received training for half a day. They first watch a video of the Chief Justice discussing the importance of diversity. During the session, Commissioners discuss, among other things, the importance of diversity on the bench and what are appropriate and inappropriate questions to ask of applicants. Outside of the



training that Colorado Commissioners receive, they are given no other guidance on how to include diversity considerations in their evaluation of candidates.<sup>208</sup>

According to Commissioner Keetch (UT), for the most part, Utah Commissioners do not recruit candidates. Each time the Commission begins a new search, Commissioners discuss and receive training on the proper and improper areas of inquiry during their interviews of candidates, as necessary.<sup>209</sup>

Commissioner Diament (NH) said that he does not recall having received any training for his duties as a Commissioner<sup>210</sup> Similarly, Missouri Commissioners do not have required training.<sup>211</sup> As a new Commission is assembled with every new vacancy, the temporary nature of New Mexico's Commissions does not allow for any training. Commissioner Scarnecchia believes that the way New Mexico's Commissioners are prepped is sufficient, and believes that actual training is better suited for standing Commissions.<sup>212</sup>

Commissions vary widely in their approach to outreach and attempts to recruit candidates to apply for judicial openings. Commissions in Maryland and Florida do extensive outreach specially targeting underrepresented groups—this primarily involves seeking assistance with outreach from Black, Hispanic, Asian or Women bar associations. Some Commissions engage in general outreach for all types of applicants, whereas other Commissions do no official outreach at all. In many cases, individual Commissioners took the initiative to do their own informal outreach. In other instances, government officials from outside of the Commission were in charge of outreach efforts.

In New Mexico, Commissioner Scarnecchia (NM) reported that Commissioners do not play a formal role in outreach, but that, “[c]ommunities are so small, people know when positions are available. The women and minority bars also do good work in recruiting candidates.”<sup>213</sup>

A Missouri Supreme Court rule requires the Commission to actively seek out and encourage qualified individuals, including women and minorities, to apply for judicial office (Mo. Rev. Bar Rule 10.32(f)). Commissioner McLeod (MO) said that the diversity provision makes mentioning or considering diversity not taboo. He said, “it balances out the political correctness of reluctance to say anything about race or gender.” When asked how this provision impacts the recruitment efforts of the Commission, Commissioner McLeod said, “[v]ery little. I have never seen any effort in this regard.”<sup>214</sup>

Colorado's Commission does not do any general outreach. The Colorado Commission does have members that attend women and minority bar association meetings, but does not have any rules or procedures in place requiring outreach to such bar associations.<sup>215</sup>

In Maryland the women and minority bar associations have the option of interviewing judicial candidates before the nominating Commission does. The bar associations then send their comments to the Commission.

In Florida, those interviewed presented very different points of view. Anonymous Florida Commissioner said that Commissioners in her state do not recruit candidates. She noted that if any of the

Commissioners do it, it would be an individual, informal process.<sup>216</sup> By contrast, Commissioner Grigsby (FL) said, “[w]hat has affected the applicant pool are the efforts to ‘beat the bushes.’” He said that the minority bars have gotten involved in recruiting and with applications and the Governor’s general counsel has gone around the state in support of diversity. Commissioner Grigsby believes that when more effort is made to publicize a vacancy, the applicant pool will become more diverse.<sup>217</sup>

Commissioner Keetch (UT) reported that the real outreach for judicial applicants is not generally done by the Commissioners. Others fill this role, including the Governor and his staff, the Chief Justice and other jurists, and prominent members of the bar and the community. Minority bar associations and their members are encouraged to become involved in the process and to identify top-flight candidates for consideration. Both formally and informally, Commissioners make clear that the application process is open to everyone, and that all applicants will be considered on their merits. Commissioner Keetch mentioned that some of the best recruiters for diverse applicants are those who are already judges. For example, he thinks Utah’s Chief Justice, Christine Durham, has done a marvelous job in reaching out to diverse applicants and encouraging them to submit applications.<sup>218</sup>

Finally, Commissioner Briggs (AZ) noted his dissatisfaction with his Commission’s outreach efforts for all applicants. He describes it as an unsystematic, “laissez-faire” approach. His experience in Arizona is similar to Rhode Island’s, where there is no other formal outreach besides publishing notice of the vacancy.<sup>219</sup>

### **Interviewing Applicants**

Some Commissions grant interviews to all applicants, but the majority have a screening process before an applicant is granted an interview. New Mexico, Florida and Missouri interview all candidates. Arizona, Colorado, Maryland, New Hampshire, Tennessee, Utah and Rhode Island employ a screening process before interviewing candidates. There may be a causal link between this interviewing pattern and the high number of minority judges in New Mexico, Florida and Missouri or it may be serendipitous. The data are simply not clear at the present time.

### **Commissioners’ Attitudes about Diversity**

All of the Commissioners we interviewed had positive things to say about the value of creating a diverse bench in their states. They offered different reasons about the basis for their belief that diversity is a laudable goal.

Commissioner Leavitt (AZ) believes that having African Americans in the judiciary is valuable because such a person brings tools and experience unique to his or her group. He explained that because life experience is a qualification to be a judge, diversity gets an applicant a “second look” from Commissioners.<sup>220</sup> Commissioner McLeod (MO) thought that “[d]iversity is important because triangulation gives us a broader view than just one viewpoint.”<sup>221</sup>

When asked how and why diversity is important to Maryland's Commission, Commissioner Sachs (MD) said that when the bench reflects the diversity of the State's citizenry, there is greater public confidence in the judiciary.<sup>222</sup> Anonymous Florida Commissioner said that diversity on the bench helps create a court that accurately reflects society and it also diversifies the decision-making process.<sup>223</sup> Commissioner Scarnecchia (NM) believes that having a diverse judiciary is important because a judiciary should reflect the community it serves. She claims that diversity also enriches the development of the law.<sup>224</sup>

## **Barriers to Diversity**

Commissioners informed us that there are several obstacles preventing them from creating a diverse bench in their respective states. First, some Commissioners have to battle the perception among some potential female and minority candidates that applying for a judicial opening would be fruitless. The reportedly hostile attitude of some Commissioners was another impediment. Another problem, discussed at length below, is that some minority judges are having difficulty retaining their seats if they are subject to retention and/or competitive judicial elections.

One challenge in increasing diversity noted by Commissioner Grigsby (FL)<sup>225</sup> and Commissioner Keetch (UT)<sup>226</sup> is prospective applicants' pessimism. Commissioner Keetch believes that a sizeable number of minorities and women view their diversity as a liability, when precisely the opposite is true.<sup>227</sup> Commissioner Scarnecchia (NM) shared this concern, and said that the biggest obstacle in diversifying the bench is potential candidates who assume that they are not "judicial material."

Commissioner Scarnecchia (NM) added that New Mexico's Commissioners also make the mistake of assuming that certain individuals are not "judicial material." Commissioner Scarnecchia said that some Commissioners have stereotypes or biases about what a judicial candidate should look or act like. As an example, Commissioner Scarnecchia worries about the younger, female Native American candidates. "Clearly, that candidate is not going to look and seem like other judges, but her resume may show that she has all of the qualities necessary." In terms of candidates, Commissioner Scarnecchia said that some candidates do not see themselves as judges and usually do not have the kind of necessary support during the application process.<sup>228</sup>

Here we have evidence of how implicit bias works in the real world. On the one hand, disadvantaged groups may underestimate their own chances to become judges.<sup>229</sup> As Nobel Laureate Amartya Sen wrote, "deprived people...may even adjust their desires and expectations to what they unambitiously see as feasible."<sup>230</sup> Meanwhile, Commissioners may exacerbate the problem by sharing or reinforcing low expectations.<sup>231</sup>

Another obstacle Commissioner Grigsby (FL) noted is:

once minority judges are appointed, they are having problems getting re-elected in retention elections. A secondary problem is that whenever you appoint someone, they have to go into contested elections later on. A lot of minority candidates get targeted, don't have a large enough base, or are not able to raise a lot of [campaign] money.<sup>232</sup>

This obstacle is also present in New Mexico, where judges must run for election after they have been appointed. Commissioner Scarnecchia (NM) believes that this process makes it difficult to obtain diverse applicants.<sup>233</sup> Commissioner Sachs (MD) echoed this concern noting that Maryland has had African-American appointments, but when these judges ran for election, they were quickly defeated. Commissioner Sachs also said that African Americans have had little luck in certain jurisdictions or counties. She knows of an African-American judge who was appointed to the circuit court twice, and was defeated in elections after each appointment.<sup>234</sup> In Maryland, Commissioner Sachs does not believe that the problem is the lack of fundraising since members of the bar provide money to sitting judges who stand for election after their appointment. Commissioner Sachs could not pin-point what caused this difficulty with elections.

Putting current employment at risk is another barrier. Commissioner Leavitt (AZ) believes that “trying to be a judge can mean risking losing clients if an applicant is in the private sector.”<sup>235</sup> While risking the loss of clients is a risk for all judicial applicants, this burden may have a stronger gate-keeping effect on women and minority attorneys.

### **The Governor’s Role in Appointments**

Many Commissioners expressed a view that regardless of what the nominating Commission does, ultimately the final decision regarding who is appointed to the bench is in the hands of the Governor. Having a Governor who is focused on diversity or indifferent to diversity can dramatically impact who is appointed.

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“IT SOUNDS HORRIBLE, BUT I’M NOT AWARE OF ANY AFRICAN AMERICAN PRACTICING ATTORNEY IN NEW HAMPSHIRE.”

—*New Hampshire Commissioner*

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Two Florida Commissioners both noted the difference that Governors’ attitudes made. Commissioner Grigby (FL) reported that “[o]ur last Governor [Jeb Bush] made it almost his religion to get diversity on the bench. Our current Governor [Charlie Crist] doesn’t preach about diversity, but makes diversity his inspirational goal in his appointments.”<sup>236</sup> Anonymous Florida Commissioner likewise reported that the current Governor “gives diversity lip-service” and notes that there were times when the Commission would have women on the nominating list, and

the current Governor would pick all of the males.<sup>237</sup>

The relationships between nominating Commissions and Governors can become contentious over issues related to diversity. In Tennessee<sup>238</sup> and New Mexico,<sup>239</sup> Governors have sued the nominating Commission to modify the “short list” of judicial nominees. So far, one Commission has won and the other lost in these lawsuits.

### **Keeping or Failing to Keep Data on Diversity**

In compiling this report, the Brennan Center was continually hamstrung by a lack of publicly

available data. This made comparing trends in the ten states virtually impossible. State practices vary when it comes to keeping demographic statistics about its judicial applicants, the nominees and jurists on the bench. While some maintain very copious records and make those records available to the public, others keep no records on diversity at any stage of the nominating process. Rhode Island's Commission provides gender diversity statistics of nominated applicants to the State every year. These statistics are also available to the public.<sup>240</sup> Tennessee's Court Administrator retains demographic data for the applicants and candidates that are nominated and distributes the data to Commissioners periodically in a report. The data are available to the public.

Arizona's Commission keeps demographic data on: (1) its members; (2) judicial applicants; (3) nominees; and (4) appointees. These data are available to the public on Arizona's webpage.<sup>241</sup> Maryland keeps the same data and makes them available to the public.<sup>242</sup>

The Colorado Commission only keeps geographical data showing which 14 Commissioners are appointed by congressional district. The Commission does not keep any other demographic data.<sup>243</sup> Utah's,<sup>244</sup> New Hampshire's,<sup>245</sup> Florida's<sup>246</sup> and New Mexico's<sup>247</sup> Commissions do not keep any demographic data. Missouri's Commission does not record or compile demographic data and all of the applications except those that belong to the nominees are destroyed.<sup>248</sup>

### **The "Pipeline" Issue and Demographic Trends**

Many Commissioners interviewed by the Brennan Center complained that too few minority lawyers are available to apply for judicial openings in their states. Some noted the demographic trends are shifting and that in the near future they expect to have a more diverse pool of applicants to choose from. *See* Appendix D for a full list of the racial composition of bar memberships in the ten states.

Commissioner Nichols (TN) remarked that a low percentage of African-American bar members kept Tennessee from having a more diverse bench.<sup>249</sup> Commissioner McLeod (MO) indicated something similar, stating that "[t]he pool could be more diverse, but the constitutional requirements (such as the need to be a member of the bar) skew the demographics."<sup>250</sup>

Commissioner Carlotti (RI) noted that "usually, a person is not qualified enough for a judgeship in their thirties. This is why most of our applicants are in their forties." He added, "[o]nly over the last 15 years are we seeing an increase in the amount of Hispanic and Black candidates going to law school. You wouldn't apply for a judgeship right out after law school, so I think that the applicant pool is becoming and will continue to become more seasoned as time goes on."<sup>251</sup>

Commissioner Sachs (MD) said the Maryland Commission still wishes it had more minority candidates "interested in the job." She believes that this gap can be addressed through recruitment. She said, "[w]e're getting more women, but mostly white women." Commissioner Sachs reported that there are more minority lawyers in the bar than in years past. "Still, they are not yet at an age and stage where they are ready to be considered for a judgeship. The landscape will change in the next few years." Commissioner Sachs doubted that the issue of diversity and underrepresentation will exist in ten years.<sup>252</sup>

Commissioner Strain (AZ) wondered how Arizona should go about getting more women and minorities to attend law school. She has never seen an African American or Native American in the applicant pool, and is not sure why they are not applying. Commissioner Leavitt (AZ) offers one explanation by arguing, “Arizona does not have a lot of African Americans to start with. Even fewer go to law school, so the lawyer pool is small. Now, the African Americans [with law degrees] that we have, they have tremendous opportunities [in the private sector] at their disposal.”<sup>253</sup>

New Hampshire, which is the least diverse state sampled, reported an almost insurmountable problem in finding racial minority applicants. As evidence of how stark the demographic problem is in New Hampshire, Commissioner Waystack related his experience: “it sounds horrible, and it goes to show you, but I’m not aware of any African American practicing attorney in New Hampshire. I know of Asian American attorneys, and I am aware of African American attorneys outside of New Hampshire, but none in the state.” Commissioner Waystack added that, “[w]ithout sounding facetious, the only suggestion [for increasing diversity in the applicant pool] would be to increase the minority population in New Hampshire.”

New Hampshire has had better luck with gender diversity.<sup>254</sup> Commissioner Diament reported that more women are being appointed on behalf of the Governor. As a Commission, he said that they “put the word out” to attract more female applicants. He believes that this has affected the gender mix of the applicant pool.<sup>255</sup>

### **The Effect of Judicial Salaries**

Commissioners were split about whether low judicial salaries had a deleterious effect on diversity on the bench or recruitment efforts. Some thought low salaries were a huge obstacle. Others thought this was not a factor at all.

Commissioner Keetch (UT) was concerned that “we speak with candidates all the time who flatly say that they cannot afford to become a judge.” He sees this issue as a “definite” problem to increasing the diversity of the pool.<sup>256</sup> Commissioner Carlotti (RI) said that low judicial salaries certainly have an impact on who applies. He said, “[i]f you are in your mid-40’s with kids, judicial pay self-selects people out of the process. The salary doesn’t cut it.”<sup>257</sup>

Commissioners across the country noted that many applicants from underrepresented groups simply have more lucrative options besides becoming a state judge. Commissioner Leavitt (AZ) noted starkly, “[a]s an assistant police chief, I make more than a Superior Court judge. The few African Americans that we have are highly courted by law firms.”<sup>258</sup> Commissioner Nichols’ (TN) opinion is that,

the small numbers of African Americans that are highly skilled have no interest on going on the bench. This is the same for a lot of women. They probably don’t want to take a pay cut just to go on the bench. A lot of these people are parents. I think that this is a big drawback, particularly for African Americans. They are just not going to take salary cuts. And I don’t blame them.<sup>259</sup>

Commissioner Sachs (MD) believes that the possibility of being defeated in a contested election after appointment to a trial court (having given up a law practice or other rewarding legal job), coupled with the judiciary’s relatively low salary, has something to do with the low number of minority candidates, notwithstanding the fact that the judiciary’s pension is “wonderful.”<sup>260</sup>

One Commissioner was unconvinced that pay was the issue. When asked if he felt low judicial salaries have an impact on who applies, Commissioner McLeod (MO) said, “We frequently get individuals who are willing to take a pay cut. The prestige of being a public servant and a government employee outweigh those concerns.”<sup>261</sup>

### **Assumptions About the Applicants**

Some Commissioners interviewed appeared to hold certain assumptions about women and minority judicial applicants. In some cases, these assumptions seemed at times based on negative stereotypes. In other cases, the Commissioners seemed to have an overly positive view of these applicants.

The Commissioners often separated their views on gender from their views on race. Many of the assumptions they articulated were about the different types of law that women and men allegedly practice. Commissioner McLeod (MO) reports that his Commission is seeing fewer experienced trial lawyers among women than men.<sup>262</sup> Commissioner Scarnecchia noted that “New Mexico has a lot of underpopulated communities where women work for the government or work as staff on the courts—usually domestic courts.”<sup>263</sup> Commissioner Grigsby (FL) said that he assumed “that more women are involved in family law. Men tend to be in private practice.” He added that this pattern, in turn, can affect the perception of women being qualified or not for a judicial position.<sup>264</sup> In terms of career backgrounds, Anonymous Florida Commissioner said that more women tend to be in the public sector than men.<sup>265</sup>

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“IF DIVERSITY IS GOING TO BE A  
PRIORITY, IT NEEDS TO BE BOTH A TOP-  
DOWN AND BOTTOM-UP PROCESS. THE GOV-  
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VIDUALS FROM THE MINORITY AND WOMEN  
BAR ASSOCIATIONS HAVE TO RECRUIT.”

*—Florida Commissioner*

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Two Commissioners said that female applicants were stronger than their male counterparts. Commissioner Leavitt (AZ) believes that women have better backgrounds. He stated that, “women jump from firm to firm, which could be an adjustment made because of kids. But men tend to lack the practice experience because they end up staying at a firm and specializing. Overall, we get better resumes from women.”<sup>266</sup> Commissioner Nichols (TN) appeared to share this sentiment when he

stated that “most of the individuals that apply are high academic achievers. Women, particularly have better grades. Many were in the top 10% of their law school graduating class.”<sup>267</sup>

The Commissioners also held assumptions about the career paths of racial minorities. In terms of career backgrounds, Anonymous Florida Commissioner said that more minorities tend to be in the public sector than whites.<sup>268</sup> Commissioner McLeod (MO) was only able to provide an anecdotal recollection regarding minorities, but he felt that among minorities, there are fewer experienced trial lawyers.<sup>269</sup>

Commissioner Leavitt (AZ) reported that:

[i]n terms of African Americans, many go towards federal government jobs because they have better opportunities... On the contrary, Hispanic lawyers tend to go into immigration law or become a federal public defender because of the language abilities they more often have. These types of jobs are not good for a judgeship because they are removed from the state and local courts and they practice in the federal process. Local attorneys and lay people on the Commission don't know them as well as those who practice in the local courts. White government lawyers have the least problem applying.<sup>270</sup>

Commissioner Leavitt stated that, “the problem is that many [Hispanics] don't leave the federal system, and then ten years down the road, they are forgotten by the local bar. When they try to apply for a judgeship, there is no diversity seen in their record because they have limited practice experience.”<sup>271</sup>

### **Innovative Approaches to Advance Diversity**

As the foregoing snapshots from the ten state Commissions should show, there is an enormous variety in legal regimes, demographics, and approaches to diversity. Some Commissions as a whole and some individual Commissioners have taken the lead in making a diverse bench in their respective states a priority. Many have innovative approaches which work now as well as suggestions of how to improve future results.

Current practices that seem particularly effective are those which increase outreach efforts. Florida stood out in terms of its outreach efforts. When there is a vacancy, the Florida Commission sends a basic announcement using a comprehensive mailing list created to reach state, county and volunteer groups throughout Florida. Commissioner Grigsby (FL) said that the list is specialized and reaches women, African American and Cuban groups. Along with the announcement, the Chairman of the Commission offers to attend meetings or answer any questions individuals or groups may have about the process. Commissioner Grigsby said that “if diversity is going to be a priority, it needs to be both a top-down and bottom-up process. The Governor has to push the issue, and individuals from the minority and women bar associations have to recruit.”<sup>272</sup>



Making Commissioners available to candidates to answer questions is a positive solution in those states with reasonably sized applicant pools. For example, Commissioner Leavitt (AZ) personally meets with prospective applicants to discuss questions and/or concerns because “the whole thing is a humiliating process.”<sup>273</sup>

Education of potential applicants about how to become a judge is also helpful. The Arizona Commission hosts a “[d]o you want to be a judge?” program with the minority bar association at neighboring law schools. Commissioner Leavitt (AZ) thinks this program is useful because it catches students early on in their educational careers and explains how to make the correct career choices in preparation for a judgeship.<sup>274</sup> Commissioner Waystack (NH) reported favorably that, “[o]ne of our female Commissioners was a major presenter at a CLE ‘Women Becoming Judges’ program and urged anyone who even had a slight interest in a judgeship to apply.”<sup>275</sup>

Another approach to encourage underrepresented applicants is outreach by affinity groups. For example, in Maryland the women’s and minority bar associations have the option of interviewing judicial candidates before the nominating Commission does. The bar associations then send their comments to the Commission.<sup>276</sup>

Commissioner Diament (NH) thought that a certain leadership structure was helpful in fostering diversity. He believes that having co-chairs that are from both genders helps increase the diversity of the judicial nominating pool.<sup>277</sup>

Two Commissioners also had suggestions of new approaches to increase diversity. Commissioner Briggs (AZ) suggested that polling potential judicial applicants could give Commissions a better idea of how to target and attract strong candidates. He proposed that the state poll groups of people that they would like to see apply for judgeships. The poll would be facilitated by the sub-sections of the bar for women and persons of color. Questions asked in the poll would include:

- (1) Have you ever considered being a judge?
- (2) If not, why not?
- (3) Are you aware of the process to become a judge in our state?
- (4) Do you view your credentials, your occupation, judicial pay or any other factors as significant barriers to your becoming a judge?
- (5) Do you believe that you will be given a fair opportunity under our merit selection system if you apply to be a judge?<sup>278</sup>

Commissioner Scarnecchia (NM) suggested political training would help and said that, “law schools and young lawyer associations should introduce the possibility of judicial careers and help students prep for it. A lot more could be done to educate lawyers about...[the] need to be politically active and politically connected to be a nominee. Political training would improve this. The special interest bars could also do a lot more work in preparing candidates, such as mock interviews.”<sup>279</sup>

## V. BEST PRACTICES IN JUDICIAL SELECTION

As our interviews with Commissioners across the country demonstrate, the day-to-day practices of nominating Commissions vary considerably as do their perspectives. Below are our suggestions for best practices based on the existing literature on judicial nominating Commissions and our interviews.

### 1. GRAPPLE FULLY WITH IMPLICIT BIAS

As summarized above, recent research from cognitive science shows that most people are prevented from being truly egalitarian because of implicit biases picked up in childhood.<sup>280</sup> As Professors Christine Jolls and Cass Sunstein write,

[i]mplicit bias is largely automatic; the characteristic in question (skin color, age, sexual orientation) operates so quickly...that people have no time to deliberate...[P]eople are often surprised to find that they show implicit bias. Indeed, many people say in good faith that they are fully committed to an antidiscrimination principle with respect to the very trait against which they show a bias.<sup>281</sup>

The findings in this area of cognitive research are extensive. As two experts note:

[E]vidence from hundreds of thousands of individuals across the globe shows that (1) the magnitude of implicit bias toward members of out-groups or disadvantaged groups is large, (2) implicit bias often conflicts with conscious attitudes, endorsed beliefs, and intentional behavior, (3) implicit bias influences evaluations of and behavior toward those who are the subject of the bias and (4) self, situational, or broader cultural interventions can correct systematic and consensually shared implicit bias.<sup>282</sup>

Given the prevalence of implicit bias and its potential to undermine efforts to establish an open and fair appointment process, nominating Commissions must take proactive steps such as attempts to expand the applicant pool, to counteract the unconscious tendency to appoint white male judges.<sup>283</sup> One of the first steps is recognizing that a problem exists. As Professors Kang and Banaji write, “[a]s a threshold matter, in order to correct bias, decision makers in...hiring...must be made aware of their own implicit biases.”<sup>284</sup>

Another step is trying to achieve as diverse a nominating Commission as possible. As Professor Russell Robinson explains having diversity on hiring committees has the following beneficial debiasing effects.

(1) The presence of outsiders [women and minorities] on interviewing committees will help the interviewee when bias emerges during the interview; [and] (2) the presence of outsiders in decisionmaking groups concerning hiring and promotion will help the employee/interviewee in that the outsider may debias the group’s deliberations.<sup>285</sup>

## 2. INCREASE STRATEGIC RECRUITMENT

The first step in fostering a diverse applicant pool is ensuring that an open judicial seat is widely advertised.<sup>286</sup> This advertisement cannot be a single announcement in a newspaper or two. Genuinely active outreach is necessary to make sure that a wide cross-section of members of the bar knows about the opening.<sup>287</sup> As state bars become more technologically savvy, the bars should make an effort to email their members directly about openings on the bench instead of passively posting job opening on web pages that few practicing lawyers visit.

In particular, outreach to women and minorities may be necessary to ensure a diverse applicant pool. Merely relying on Commission members to spread the word about a judicial opening through their limited friend and professional networks—as one Commissioner suggested—will not ensure a diverse pool. Indeed, this may only replicate an “old-boy’s” network.<sup>288</sup> For example, sending announcements to minority bar associations and women bar associations increases the chances that members of these groups will apply.<sup>289</sup> Another approach would be to use the alumni networks of local law schools to disseminate announcements. The more widely a judicial opening is broadcasted, the more likely it is that a diverse slate of applicants will apply for the job.

Recruitment is successful if it is, as one Commissioner put it, both “top-down and bottom-up.”<sup>290</sup> When Governors, Chief Justices and other leaders in the state make an effort to advertise the fact that judicial vacancies are truly open to non-traditional candidates, a broader array of applicants is likely to apply. Also when these high officials place a priority on diversifying the bench, those involved in the nominating process are more likely to take the mandate for diversity seriously.

A diverse bench will not be achieved only by opening the door; minority and female lawyers must be willing to walk through the door. This means that minority and female attorneys need to take the risks associated with applying for judicial openings. They also have a role to play in circulating announcements and cultivating younger lawyers to be ready to apply. An excellent suggestion was Arizona’s practice of working with local law schools to plant the seed in the minds of students that a judicial career is promising.

## 3. BE CLEAR ABOUT THE ROLE OF DIVERSITY IN THE NOMINATING PROCESS IN STATE STATUTES

Many Commissioners we interviewed expressed views that there was no consensus among Commissioners about how the Commission was supposed to consider diversity during the nominating process. Many were against what they termed “weighting” but preferred thinking of diversity as a “plus” when two candidates were otherwise equal, which indicates that they thought of it as having a numerical value on a scale.<sup>291</sup>

The problem of weighting diversity is a complex one. First, unlike a college admission process where an admission committee has a numerical matrix of grade point averages and test scores, in a judicial nominating process, Commissions are largely working with resumes, publications and writing samples. If none of these factors has a numerical value, then it makes little sense to worry about the numerical weight given to diversity.

We suggest that the Commission consider racial and gender diversity as one of a number of qualities that it looks for in a judge. That way, diversity can be considered alongside a panoply of other intangible characteristics typically sought in a future judge, such as judgment, temperament, evenhandedness and collegiality. The impression we got from our interviews is that many Commissioners view diversity in this way, but many did not feel that there was a consensus on

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THE BEST WAY TO ENSURE THAT ALL COMMISSIONERS HAVE THE SAME GUIDANCE ON DIVERSITY IS BY ADOPTING A CONSTITUTIONAL OR STATUTORY REQUIREMENT THAT THE COMMISSION IS DIRECTED TO FOSTER A BENCH WHICH REFLECTS THE DIVERSITY OF THE STATE.

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their particular Commissions that this was the preferred approach to diversity. The Commission should set out the parameters of when and how diversity can come into play, so that all Commissioners understand the extent of the mandate.

The best way to ensure that all Commissioners have the same guidance on diversity is by adopting a constitutional or statutory requirement that the Commission is directed to foster a bench which reflects the diversity of the state. This would require repealing New Hampshire's Executive Order, which requires their Commission to disregard race and gender in the judicial nominating process. This would also require

states which are currently silent on the matter of diversity to change their laws to specifically cover diversity. Sample language can be found in Rhode Island, which states: "[t]he governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity...."

#### 4. KEEP THE APPLICATION AND INTERVIEWING PROCESS TRANSPARENT

The application process should be as transparent as possible.<sup>292</sup> Application packages should include a brief summary of the application process, such as who will review the applications; who will be granted an interview; will the interview be with a single Commissioner or with an entire Commission; will interviews be open to the public or in closed session; will there be a public hearing; will any part of the process be recorded or televised; what types of documents in an application are deemed public; how the applicant will be notified of the outcome of the application process; and if the applicant has questions, to whom should those questions be addressed.<sup>293</sup> Outlining this process for all applicants will ensure that each applicant is treated in a similar way and will assist potential applicants in preparing for each stage of the process.<sup>294</sup>

A problem of implicit bias may be activated by relying too heavily on resumes in the first instance, rather than giving candidates an opportunity to be interviewed. Research on implicit bias has shown candidates with "black" sounding names who submitted their resumes to private employers received 50% fewer calls to arrange an interview than their white counterparts.<sup>295</sup> Researchers sug-

gest that employers may unconsciously discount the resumes from candidates whom they presume to be black.<sup>296</sup> This research suggests the better practice is (1) careful review of all resumes and (2) opening the interview process to as many candidates as the Commission can reasonably handle given time constraints, so that this particular form of bias does not infect the nominating process.

On the other hand, interviews themselves may be a site for bias to rear its ugly head. As Professors Kang and Banaji report, “[i]nterviews are extraordinarily subjective, and for the past four decades, evidence has mounted that making decisions based on interviews produces worse outcomes than arriving at them via the paper record.”<sup>297</sup> Implicit bias can lead to awkward interviews where the interviewer comes away with a bad impression of the interviewee.<sup>298</sup> This branch of the research indicates that interviewing must be done particularly carefully. Kang and Banaji suggest, “by interviewing an extensive pool of potential candidates and evaluating them in accordance with well-specified, pre-set guidelines, decision makers can diminish interview subjectivity.”<sup>299</sup>

Nominating Commissions should rationalize interview questions.<sup>300</sup> Many of the Commissioners we interviewed stated that there was no standard list of questions applicants had to answer. When asked to give an example of questions posed to candidates, one reported asking an applicant about “their favorite novel” or “what historical figure they would most like to meet?” Given the import of the job of nominating Commissions—filling the few vacancies on state courts—this type of unproductive questioning does a great disservice to applicants as well as to the public, which relies on the Commission to act as a vetting agent.

There does not have to be a strict menu of questions because applicants are likely to have such varied life experiences. Indeed asking the same questions to all may waste the time of both the Commission and the applicant, in light of the fact that the Commission should have a full application which indicates relevant experiences. Nonetheless, interview questions should primarily focus on the substantive legal experiences of the applicant. Hypothetical or issue-spotting questions about relevant procedural, statutory or case law would also be appropriate, so that the Commission gets a sense of the applicant’s legal reasoning skills. Such questions should be standardized so that the degree of difficulty is similar across all applicants.

Balancing privacy with the public’s right to know about potential judges must be done thoughtfully. We suggest that the first stages of the application process remain confidential.<sup>301</sup> For some applicants, publicly seeking a competitive judgeship may put their current employment in jeopardy. Once the nominating Commission has decided that a particular candidate merits an interview or a hearing, he or she should be notified that the rest of the nominating process will be subject to public scrutiny. Once the applicant has consented to allow the process go forward, the Commission should publicly announce the name of the applicant and his or her credentials to the public, so that public interest groups and other interested parties can bring relevant information about the applicant to the Commission’s attention.

## 5. TRAIN COMMISSIONERS TO BE EFFECTIVE RECRUITERS AND NOMINATORS

Commissioners need clear standards, as well as training about how to be effective interviewers. For most Commissioners, choosing judicial nominees is a part-time job done a half dozen times over a few years. This is not the best environment for consistency. Setting out standards for the Commission on an annual basis will help all Commissioners maintain a high level of performance. As a part of training, publishing a manual for Commissioners that clearly outlines their duties and responsibilities would be enormously helpful. This manual should include statutory or other authority which encourages or requires the consideration of diversity.

However, we note that recent research from Harvard indicates so-called “diversity training” may be problematic.<sup>302</sup> Research in the corporate context has shown that diversity training has had a negative impact and leads to less female and minority advancement.<sup>303</sup> As a recent study explained, “some studies of diversity training suggest that it may activate rather than reduce bias.”<sup>304</sup>

Corporate diversity training appears to have caused a backlash in many instances.<sup>305</sup> Two of the Commissioners we interviewed worried that putting too much emphasis on diversity could also cause a backlash. This seems to be a reasonable concern since if the goal is increasing diversity, the steps taken to ameliorate the problem should not exacerbate it. Therefore, we do not recommend that Commissions invest in diversity training per se. On the other hand, bringing in a specialist to explain implicit bias may have a positive impact.<sup>306</sup>

The difference between diversity training and implicit bias training may seem subtle. In diversity training, classically a facilitator teaches workers about the legal liability that can be triggered by certain overtly discriminatory behaviors in the workplace such as racially derogatory remarks or sexual harassment. By contrast, implicit bias training alerts the employees to the ways in which unconscious bias may be interfering with their day-to-day decision making in allocating resources such as coveted jobs and promotions. Implicit bias training has not had a long enough history to determine its overall effectiveness. But initial clinical studies show that implicit bias can be partially minimized through heightened self-awareness.<sup>307</sup>

## 6. APPOINT A DIVERSITY COMPLIANCE OFFICER OR OMBUDSMAN

A perennial problem is determining who should be held accountable for a state’s failure to achieve meaningful diversity on the bench. As research from the private sector has shown, one way that companies have made significant progress in recruiting and retaining female and minority talent is by giving a particular individual responsibility for monitoring diversity levels and strategizing about how to maintain or improve the current levels of diversity.<sup>308</sup>

States could appoint a diversity ombudsman on the nominating Commission or an independent actor to play this monitoring and problem solving role.<sup>309</sup> This person would be in charge of outreach efforts to ensure that all types of lawyers are aware of judicial openings and the application process. This person would also spearhead special programs such as Continuing Legal Education

(CLEs) on the judiciary or events at law schools to educate potential applicants about judicial career opportunities.

## 7. CREATE DIVERSE NOMINATING COMMISSIONS BY STATUTE

Having a diverse Commission is more likely to lead to a more diverse applicant pool.<sup>310</sup> The reason for this is not totally clear. It might be that the diversity on the Commission acts as a signal to potential minority and female applicants that their applications are truly welcome. Or female and minority Commissioners may go out of their way to try to recruit diverse candidates. Another explanation is that the whites and males on the Commission may have a heightened consciousness about diversity and less implicit bias if they serve with a diverse group of peers on the Commission.<sup>311</sup>

Since both lawyers and laypersons serve as Commissioners, obtaining a law degree is not a requirement to serve as a Commissioner. As such, achieving a diverse Commission becomes an easier task. One way to ensure diversity on a Commission is to draw lay Commissioners from community groups like the NAACP, La Raza, or the League of Women Voters.<sup>312</sup> Attaining a diverse Commission can be facilitated by statutorily requiring those who appoint the members of the Commission to take the diversity of the state into consideration when making such appointments. Sample language can be found in Arizona's law which states, "[t]he makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state."

## 8. MAINTAIN HIGH STANDARDS AND QUALITY

There is no need to abandon high standards of judicial quality to ensure a diverse bench. As Professors Johnson and Fuentes-Rohwer suggest:

Many individual factors, such as ideology, judicial temperament, and life experience, as well as race, remain relevant to whether one is a suitable for judicial appointment. Just as any minority juror will be judged on factors other than race, so should prospective minority judges.<sup>313</sup>

Our demographic data show that minority and women lawyers are available from local law schools in all ten states studied. Commissioners should also make efforts to recruit the graduates of top national law schools with larger cohorts of minority graduates than most law schools in the ten states we studied.<sup>314</sup> This may require relaxing residency requirements to accommodate transplants from other states.<sup>315</sup> Increasing the quality of those sitting on the bench should supersede a desire to promote only local lawyers.

## 9. RAISE JUDICIAL SALARIES

Judicial salaries must be high enough to attract top talent. As our interviews demonstrated, low pay appears to be a significant barrier to creating a diverse bench in several states.<sup>316</sup> Often, the nominating commission has no power to change judicial salaries, which are either set by a judicial

compensation Commission or by the state legislature.<sup>317</sup> Nonetheless, state leaders should keep an eye on judicial salaries to make sure that they are high enough to attract the best candidates. Lawyers who are also parents may be particularly sensitive to the salaries offered to judges. The income from being a judge should be high enough to lure some of the best minds out of law firms and onto the bench. A list of judicial salaries is available in Appendix E.

## 10. IMPROVE RECORD KEEPING

Keeping a record of the racial and gender makeup of the applicant pool, including: who advanced to the interview/hearing stage, who was recommended to the governor and who the governor nominated, will make it much easier for Commissions to track their own progress on issues of diversity.<sup>318</sup> If no one must account for the levels of diversity at each stage, it is easier for Commissions to overlook the matter and focus only on filling the vacancy at hand. Discovering that applicant pools are nearly all white and male may prompt a Commission to make greater efforts to advertise the next opening to facilitate more female and minority applicants. The demographic data should also be in a form that is searchable and accessible to Commissioners, legislators and the public.

## VI. CONCLUSION: A PROMISING FUTURE

More and more women and minorities are entering law school than at any other time in American history. They are graduating at record numbers and entering the legal profession in large cohorts. Of course, not every first year law student learning civil procedure today will be willing or able to become a state judge in a few decades' time. But the roster of female and minority lawyers who are perfectly qualified to sit on the bench is growing larger year after year. The numbers of women and minority jurists should increase dramatically in the next two decades. If it does not, it will be apparent that states failed to make the necessary structural and attitudinal changes to create a representative, diverse bench.

Attaining a diverse bench across the nation is paramount to maintaining the legitimacy and success of state courts. Therefore, states must make judicial diversity a core policy priority. Fostering judicial diversity requires an affirmative commitment by all involved—including politicians, Commissions, applicants, and the bar.

To achieve the goal of a diverse bench, states should replicate successes and learn from failures. Implementing the best practices outlined here should create better results for applicants, Commissions and state judicial systems. With targeted effort, states can increase judicial diversity, thereby improving both judicial quality and legitimacy. Our sense of justice should demand nothing less.

*For more information on the Brennan Center's efforts to strengthen the judiciary, see its Fair Courts Project at [www.brennancenter.org/content/section/category/fair\\_courts/](http://www.brennancenter.org/content/section/category/fair_courts/).*



# APPENDIX A: QUESTIONNAIRE FOR STATE NOMINATING COMMISSIONERS

*The Brennan Center for Justice at NYU School of Law is a nonpartisan, public policy institute and public interest law firm that works on issues of democracy and justice. This research project guarantees respondent anonymity. Unless the respondent waives confidentiality for specified uses, all information identifying a respondent with his or her responses will be held as privileged and confidential.*

## PERSONAL INFORMATION

Name: \_\_\_\_\_

Commission Name and State: \_\_\_\_\_

Length of Tenure on Committee: \_\_\_\_\_

Profession: \_\_\_\_\_

Race/ethnicity (optional): \_\_\_\_\_

Gender (optional): \_\_\_\_\_

## COMMISSION COMPOSITION

**1. How many Commissioners?**

**2. How many lay people? How many lawyers on the Commission?**

- a. Is lawyer participation mandated for your Commission?
- b. If so, why are lawyers particularly suited to serve as nominators?
- c. Is lay person participation mandated for your Commission?

**3. How many women?**

**4. Are there any African Americans? Latinos? Asians or Pacific Islanders?**

**If so, how many?**

**5. Some states require that a Commission be representative of the people in its state.**

**Is this something that you would endorse?<sup>319</sup>**

**6. Do you believe that the amount of racial, ethnic and gender diversity on the Commission impacts the amount of diversity in the applicant pool and nominating list?**

- a. Do you think more emphasis on creating a diverse nominating Commission would have a positive, negative or no impact on the applicant pool and nominating list? (Please Explain)

## COMMISSION MECHANISMS AND PROCEDURES

**1. (a) What formal mechanisms and procedures, if any, does your Commission use to advance**

**diversity considerations when screening and selecting candidates?**

**(b) If there are no formal procedures in place, are any informal methods/procedures used?**

**2. If yes to 1b**

(a) What informal procedures do you have?

(b) Are there any ad hoc/informal methods used that are helpful for increasing diversity during the Commission's proceedings?

**3. Does your Commission record demographic data, including the race, ethnicity, gender and geographic background, of the (a.) appointing Commission members? (b.) Judicial applicants? (c) Nominees? (d) Judicial appointees?**

**Does your Commission aggregate and report demographic statistics on the race, ethnicity, gender and geographic background of the (a) appointing Commission?**

**(b) The applicant pool? (c) Nominated candidates? (d) Judicial appointments?**

**Are these statistics available to the public?**

**4. If no to 3**

(a) If the Commission does not keep the above information, do you know of any other place that does keep this data (State Bar Association, court administrator, other?)

(b) If yes, do they share the data with the Commission? With the public?

**5. How important or unimportant do you think keeping and publishing this information is?**

#### JUDICIAL APPLICANT OUTREACH

**1. Describe the steps that your Commission takes to inform and recruit qualified candidates to apply for open judgeships.<sup>320</sup>**

**2. What role do Commissioners play in outreach and recruitment efforts?**

**3. In your opinion, how important is active recruitment to ensuring a qualified and diverse applicant pool?**

**4. What is the initial outreach stage? Does everyone participate in this stage, or is a certain individual responsible?**

**5. Does your Commission have any rules/procedures in place requiring outreach to women and minority bar associations? Any other organizations that have women or people of color as members?**

Do any of your Commission members attend women and minority bar association meetings?

## EVALUATION, DELIBERATION AND RECOMMENDATION

1. **What do you think are the most important criteria and considerations when evaluating and nominating judges?**
2. **Who reviews applications?**
  - (a) Who gets first cut?
  - (b) Is there a checklist for what you are looking for?
3. **How important is a diverse judiciary to your evaluation and nomination of judicial candidates? Why or why is it not important?**<sup>321</sup>
  - (a) How is Diversity factored into the Commission's deliberation?  
How is diversity weighted and at what point is it factored into applicant consideration?
  - (b) Do you have any guidance (Commission rules etc.) on how to include diversity considerations in your applicant evaluation and nomination?
4. **Do you have a set of interview questions that you use with every candidate?**
  - (a) **If yes:** What questions do you ask (can you send us a copy)?  
Who created the questions?  
Are they used consistently by your Commission with every candidate?  
Are they available to the public?
  - (b) **If no:** How does the Commission moderate what questions are asked?  
How much do the questions vary from applicant to applicant?
5. **Describe the deliberation process among fellow Commissioners.**
  - We are interested in the dynamics of deliberation process (lay people v. attorneys).
  - Is there any procedure that would be useful in improving the deliberative process?
6. **In terms of producing diverse judicial appointments, how well do the Commission's procedures and processes balance your state's political culture, history with diversity, race, gender, etc.? Explain.**
7. **What are your feelings towards a constitutional or statutory provision which would require diversity to be a consideration during**
  - (a) Applicant evaluation?
  - (b) During applicant nomination?
  - (c) During final appointment decision?<sup>322</sup>

## DECISION-MAKING

1. **How important is having a diverse judiciary to the current decision-maker in your state?**
  - (a) What is the basis of your judgment?
  - (b) In your opinion, how does that affect the diversity of the judicial appointments?

2. **What type of training, if any, do Commissioners get on how to recruit, interview and select judicial candidates?**
  - (a) Are there any elements of the training you would change, add or remove?
  - (b) What is the length of training?
  - (c) In light of your duties, is the length of training sufficient in preparing Commissioners?
  
3. **Over the course of your tenure, has diversity become less or more of a consideration in applicant outreach, evaluation and appointments?**

Has this affected the level of diverse applicants that have been recruited, considered, recommended or appointed?
  
4. **Are there any differences/similarities in the educational backgrounds of**
  - (a) women and men
  - (b) whites and minorities?
  
5. **Are there any differences/similarities in the career backgrounds of**
  - (a) women and men
  - (b) whites and minorities?
  
6. **Do you think that judicial salaries have any impact on who applies to be a judge?**
  
7. **Please share any highlights/best practices for increasing the diversity of the judicial nominating pool, recommendations and/or appointments.**
  
8. **Please share any challenges or obstacles to increasing diversity from your Commission experience.**

Please offer any suggestions or ideas you may have that would increase the diversity of judicial nominations and appointments.

**APPENDIX B: NOMINATING COMMISSIONERS  
INTERVIEWED BY THE BRENNAN CENTER**

<b>State</b>	<b>Commissioner's Name</b>	<b>Race &amp; Gender</b>	<b>Commissioner's Profession</b>
Arizona	Jane Strain	White Female	Retired Army Major; Now teaches at WIU
Arizona	John Leavitt	White Male	Assistant Chief of Police
Arizona	Mark Briggs	White Male	Attorney
Colorado	Anonymous Colorado Commissioner	Not available	Attorney
Florida	Andrew Grigsby	White Male	Attorney
Florida	Anonymous Florida Commissioner	Not available	Attorney
Maryland	Sheila Sachs	White Female	Attorney
Missouri	Richard McLeod	White Male	Attorney
New Hampshire	Philip Waystack	White Male	Attorney
New Hampshire	Joseph Diament	White Male	Director of Adolescent Treatment Initiative
New Mexico	Suellyn Scarnecchia	White Female	Dean of New Mexico Law School
Rhode Island	Stephen Carlotti	White Male	Attorney
Tennessee	William Farmer	White Male	Attorney
Tennessee	Randall Nichols	White Male	Attorney
Utah	Von G. Keetch	White Male	Attorney

## APPENDIX C: DIVERSITY ON THE TEN NOMINATING COMMISSIONS STUDIED

State	Appointment Membership
Arizona	16 members; Chief Justice, 5 Attorneys, 10 Laypersons; 5 Latinos, 1 Native American; 10 Caucasians; 8 women, 8 men
Colorado	16 members; Chief Justice, 7 Attorneys, 8 Laypersons; 1 Latino, 1 Asian-American; 14 Caucasians 5 women, 11 men
Florida	9 members; 7 Attorneys, 2 Laypersons; 3 African Americans, 3 Latinos, 3 Caucasians; 4 women, 5 men
Maryland	17 members; 16 Attorneys, 1 Layperson; 5 African Americans; 12 Caucasians 9 women; 8 men
Missouri	7 members; Chief Justice, 3 Attorneys, 3 Laypersons; No minorities; 3 women, 4 men
New Hampshire	11 members; 6 Attorneys, 5 Laypersons; No minorities; 4 women, 7 men
New Mexico	Depending on the Commission being convened, anywhere between 15-19 members. There are always 3 laypersons with attorneys making up the remainder. Racial and gender representations also vary with each convened Commission.
Rhode Island	9 members; 6 Attorneys, 3 Laypersons; 2 African Americans, 1 Asian; 6 Caucasians; 3 women; 6 men
Tennessee	17 members, 15 Attorneys, 2 Laypersons; 2 African Americans; 15 Caucasians; 2 women, 15 men
Utah	8 members; Chief Justice; 5 Attorneys; 2 Laypersons; 1 Asian; 7 Caucasians; 3 women, 5 men

## APPENDIX D: TEN STATE COMPARISON OF DIVERSITY ON THE BENCH

		General Population	Bar Membership (as of 2004)	Supreme Court <sup>323</sup>	Appeals Court <sup>324</sup>	District Court <sup>325</sup>
State	Demographic					
Arizona	White	60.00%	92.00%	100.00%	82.00%	84.00%
	Non-White	40.00%	8.00%	0.00%	18.00%	16.00%
	Men	50.00%	Data unavailable	60.00%	77.00%	73.00%
	Women	50.00%	Data unavailable	40.00%	23.00%	27.00%
Colorado	White	71.00%	94.00%	85.80%	87.50%	88.00%
	Non-White	29.00%	6.00%	14.20%	12.50%	12.00%
	Men	50.30%	Data unavailable	57.14%	81.00%	77.00%
	Women	49.70%	Data unavailable	42.86%	19.00%	23.00%
Florida	White	61.00%	87.00%	71.43%	84.00%	87.60%
	Non-White	39.00%	13.00%	28.57%	16.00%	12.30%
	Men	49.10%	Data unavailable	71.43%	81.00%	73.80%
	Women	50.90%	Data unavailable	28.57%	19.00%	26.10%
Maryland	White	58.00%	86.00%	71.43%	92.30%	83.00%
	Non-White	42.00%	14.00%	28.57%	7.69%	16.90%
	Men	48.40%	Data unavailable	69.00%	69.20%	70.50%
	Women	51.10%	Data unavailable	31.00%	30.70%	29.40%
Missouri	White	84.00%	94.06%	86.00%	84.00%	99.30%
	Non-White	16.00%	5.94%	14.00%	16.00%	.70%
	Men	48.90%	Data unavailable	71.00%	75.00%	94.30%
	Women	51.10%	Data unavailable	29.00%	25.00%	5.67%
New Hampshire	White	93.00%	96.00%	100.00%	No appellate court	100.00%
	Non-White	7.00%	4.00%	0.00%		0.00%
	Men	49.30%	Data unavailable	80.00%		73.00%
	Women	50.70%	Data unavailable	20.00%		27.00%
New Mexico	White	43.00%	79.00%	60.00%	85.00%	82.00%
	Non-White	57.00%	21.00%	40.00%	15.00%	18.00%
	Men	49.40%	Data unavailable	60.00%	70.00%	84.50%
	Women	50.60%	Data unavailable	40.00%	30.00%	15.50%
Rhode Island	White	79.00%	98.00%	100.00%	No appellate court	90.91%
	Non-White	21.00%	2.00%	0.00%		9.09%
	Men	48.40%	Data unavailable	80.00%		68.00%
	Women	51.60%	Data unavailable	20.00%		32.00%
Tennessee	White	78.00%	94.00%	80.00%	91.67%	94.71%
	Non-White	22.00%	6.00%	20.00%	8.33%	5.29%
	Men	48.90%	Data unavailable	60.00%	75.00%	83.00%
	Women	51.10%	Data unavailable	40.00%	25.00%	17.00%
Utah	White	82.00%	96.00%	100.00%	85.80%	94.29%
	Non-White	18.00%	4.00%	0.00%	14.20%	5.71%
	Men	50.30%	Data unavailable	60.00%	57.20%	87.00%
	Women	49.70%	Data unavailable	40.00%	42.80%	13.00%

## APPENDIX E: JUDICIAL SALARIES<sup>326</sup>

(as of January 1, 2008, unless otherwise noted.)

State	Court <sup>327</sup>	Salary	Method Used To Set Pay
Arizona	Supreme Court	\$142,300	Commission on Salaries For Elective State Officers
	Court of Appeals	\$139,400	
	Superior Courts	\$135,824	
Colorado	Supreme Court	\$129,207	Legislative action driven by statute
	Court of Appeals	\$124,089	
	District Courts	\$118,973	
Florida	Supreme Court	\$129,207	Legislative action driven by statute
	Court of Appeals	\$124,089	
	District Courts	\$118,973	
Maryland	Court of Appeals	\$153,352	Judicial Compensation Commission
	Circuit Courts	\$134,352	
	District Courts	\$122,752	
Missouri	Supreme Court	\$133,043	Citizen's Commission on Compensation for Elected Officials
	Court of Appeals	\$124,473	
	Circuit Courts	\$106,181	
New Hampshire	Supreme Court	\$139,258	Statute
	Superior Courts	\$130,620	
New Mexico*	Supreme Court	\$120,792	Judicial Compensation Commission
	Court of Appeals	\$114,752	
	District Courts	\$109,015	
Rhode Island	Supreme Court	\$152,403	General Assembly by Request of Chief Justice
	Superior Court	\$137,212	
	District Courts	\$132,062	
Tennessee*	Supreme Court	\$154,800	Annual increases based on consumer price index
	Court of Appeals	\$149,640	
Utah	Supreme Court	\$138,450	Executive and Judicial Compensation Commission
	Court of Appeals	\$132,150	
	District Courts	\$125,850	

\*Salaries as of July 1, 2007.



## ENDNOTES

- 1 LEONARD M. BAYNES, THE RONALD H. BROWN CENTER FOR CIVIL RIGHTS AND ECONOMIC DEVELOPMENT, PUBLIC FORUM: A LASTING BLUEPRINT FOR JUDICIAL DIVERSITY, 3 (2007), <http://www.stjohns.edu/media/3/799d1cde239c48cb9dd5514161d11fba.pdf>.
- 2 Mark S. Hurwitz & Drew Noble Lanier, *Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*, 29 JUST. SYS. J. 47, 52-53 (2008); *see also id.* at 52 (showing in 2005 nationally 12.97% of merit selected state appellate judges and 11.48% of elected state appellate judges are minorities and 23.35% of merit selected state appellate judges and 28.12% of elected state appellate judges are women); *id.* at 66 (stating black women do fare somewhat better in electoral systems but Hispanic men seemed disadvantaged by elections); *see also* Mark S. Hurwitz & Drew Noble Lanier, *An Examination of Judicial Diversity in the State Courts Over Time*, 85 JUDICATURE 84, 88.(2001) (finding “by 1999 there was no tangible difference in the ability of NWMs [nonwhite males] to attain a position in the judiciary via either merit or non-merits systems.”).
- 3 Hurwitz & Lanier, *supra* note 2, at 54 (*Diversity in State and Federal Appellate Courts*) (noting that the proportion of non-white male state judges was 34 percent in 2005).
- 4 Hurwitz & Lanier, *supra* note 2, at 88 (*Judicial Diversity in the State Courts Over Time*).
- 5 Joe G. Baker, *The Influx of Women into Legal Professions: An Economic Analysis*, MONTHLY LAB. REV., Aug. 2002, at 14, *available at* <http://www.bls.gov/opub/mlr/2002/08/art2full.pdf>. (“The year 2001 was a watershed year...[f]or the first time, female law school entrants outnumbered men.”).
- 6 One study reported from 1922 to 1974, a paltry six women served on state courts of last resort. Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q., 504, 505 (2002).
- 7 U.S. CENSUS BUREAU, CENSUS STATE POPULATION ESTIMATES, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC OR LATINO ORIGIN FOR STATES: APRIL 1, 2000 TO JULY 1, 2007 (Arizona), <http://www.census.gov/popest/states/asrh/SC-EST2007-03.html> [hereinafter U.S. CENSUS 2007].
- 8 AMERICAN JUDICATURE SOCIETY, DIVERSITY ON THE BENCH (2007), [http://www.judicialselection.us/judicial\\_selection/bench\\_diversity/index.cfm?state](http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state). [hereinafter AJS]
- 9 *Id.*
- 10 ARIZ. CONST. ART. 6, § 36 (A). (“The makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state.”).
- 11 U.S. CENSUS 2007, *supra* note 7 (Rhode Island).
- 12 R.I. GEN. LAWS § 8-16.1-2 (a)(3) (2006) (“The governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the Commission”).
- 13 AJS, *supra* note 8.
- 14 U.S. CENSUS 2007, *supra* note 7 (Utah).
- 15 AJS, *supra* note 8.
- 16 *Id.*
- 17 KEVIN M. ESTERLING & SETH S. ANDERSEN, DIVERSITY AND THE JUDICIAL MERIT SELECTION PROCESS: A STATISTICAL REPORT, RESEARCH ON JUDICIAL SELECTION 12 (1999).

- 18 Hurwitz & Lanier, *supra* note 2, at 52-53 (*Diversity in State and Federal Appellate Courts*); *see also id.* at 52 (showing in 2005 nationally 12.97% of merit selected state appellate judges and 11.48% of elected state appellate judges are minorities and 23.35% of merit selected state appellate judges and 28.12% of elected state appellate judges are women); *id.* at 66 (stating black women do fare somewhat better in electoral systems but Hispanic men seemed disadvantaged by elections); *see also* Hurwitz & Lanier, *supra* note 2, at 88 (*Judicial Diversity in the State Courts Over Time*) (finding “by 1999 there was no tangible difference in the ability of NWMs [nonwhite males] to attain a position in the judiciary via either merit or non-merits systems.”).
- 19 RACHEL WEISS, NATIONAL INSTITUTE ON MONEY IN STATE POLITICS, *DIVERSITY IN HIGH COURT CAMPAIGNS 2005-2006* (2007); Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 95(2) AM. POL. SCI. REV. 315 (2001); Nicholas P. Lovrich, Jr., Charles H. Sheldon, & Erik Wasmann, *The Racial Factor in Nonpartisan Judicial Elections: A Research Note*, 41(4) W. POL. Q. 807 (1988).
- 20 Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 145 (2007).
- 21 Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICHIGAN J. OF RACE & L. 2, 23 (2004) (quoting J. Powell).
- 22 Jackson, *supra* note 20, at 141.
- 23 During the production of this report, Tennessee decided to end its nominating Commission. Therefore in 2009 it is anticipated that only 23 states will have judicial nominating Commissions.
- 24 See Rachel Paine *Caufield*, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions*, 34 FORDHAM URB. L.J. 163, 171, 182 (2007).
- 25 *Id.* at 200-01 (“In some cases, the Commission is required to interview all ‘qualified applicants,’ but most states give the Commission discretion to determine how many interviews to conduct.”).
- 26 *Id.* at 171.
- 27 *Id.*
- 28 DEBORAH GOLDBERG, SARAH SAMIS, EDWIN BENDER, & JESSE RUTLEDGE, *THE NEW POLITICS OF JUDICIAL ELECTIONS* 37 (2004).
- 29 Johnson & Fuentes-Rohwer, *supra* note 21, at 31.
- 30 *See* Jackson, *supra* note 20, at 141 (2007); *Caufield*, *supra* note 24, at 194 (2007) (“One frequent concern . . . is the extent to which nominating Commissioners advance the cause of diversity on the bench.”).
- 31 Leo M. Romero, *Enhancing Diversity in an Appointive System of Selecting Judges*, 34 FORDHAM URB. L.J. 485, 486 (2007).
- 32 Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 B.C. L. REV. 95, 131 (1997).
- 33 Even within the appointive systems, many states require judges who have been elected to face retention elections. These retention elections provide some democratic accountability.
- 34 For example, in Maryland and Colorado the highest court judges serve for ten year terms after an initial

retention election. See Maryland Court of Appeals, *Origin & Functions*, <http://www.msa.md.gov/msa/mdmanual/29ap/html/apf.html>; Colorado Judicial Branch, *Judicial Nominating Commissions: Colorado Merit Selection System*, <http://www.courts.state.co.us/supct/committees/supctnomincomm.htm>.

- 35 Norman L. Greene, *The Judicial Independence Through Fair Appointments Act*, 34 FORDHAM URB. L.J. 13, 25 (2007) (suggesting nominating Commissions should reflect diversity including, race and ethnicity, gender, geography, practice areas and practice size); Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 96 & 116 (2007) (questioning whether political party membership, legal specialization or geographic representation should be considered “diversity”); Jackson, *supra* note 20, at 142 (2007) (arguing diversity should include not just race and gender but also religion, background, geography and type of practice); Steven Zeidman, *Careful What You Wish for: Tough Questions, Honest Answers, and Innovative Approaches to Appointive Judicial Selection*, 34 FORDHAM URB. L.J. 473, 476 (2007) (questioning the range of diversity metrics).
- 36 Bratton & Spill, *supra* note 6, at 504 (noting “women bring a different set of attitudes and beliefs and areas of experience and expertise to policy making”); *see also* Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUDIES 257, 270 (2002) (concluding “[w]hether one wants better deliberation, truly meritorious selection, or legitimacy and compliance, all are served by a Court that includes women members.”).
- 37 Hurwitz & Lanier, *supra* note 2, at 56 (*Diversity in State and Federal Appellate Courts*) (“Women and racial minorities differ in their comparative success in attaining seats on the bench over time, perhaps a result of differing political dynamics as each may travel unique paths to the bench.”).
- 38 Hurwitz & Lanier, *supra* note 2, at 88 (*Judicial Diversity in the State Courts Over Time*).
- 39 Bratton & Spill, *supra* note 6, at 515 (“Women themselves are a diverse group in terms of partisanship, and thus Republican governors likely can find qualified Republican female candidates [to appoint to the bench].”); Hurwitz & Lanier, *supra* note 2, at 65 (*Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*) (“women represent a larger swath along the political/ideological spectrum, while racial minorities tend to be somewhat more homogeneous in their policy preferences; this ideological diversity may facilitate the choice of women by selectors of both major parties”) (internal citations omitted); THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, THE 2004 POLITICAL LANDSCAPE EVENLY DIVIDED AND INCREASINGLY POLARIZED (2004), <http://people-press.org/reports/display.php3?PageID=750> (showing that, in 2003, only 7% of African Americans and 22% of Hispanics identified themselves as Republicans).
- 40 Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied Or Simply Studied?*, 76 FORDHAM L. REV. 1941, 1956 (2008).
- 41 *Id.* at 1945-46.
- 42 *Id.* at 1949 n.35.
- 43 BUREAU OF LABOR STATISTICS, EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY, EMPLOYMENT AND EARNINGS, CURRENT POPULATION SURVEY (2008), <http://www.bls.gov/cps/cpsa2007.pdf>. [hereinafter BUREAU OF LABOR STATISTICS]; Marsha Lien, Bureau of Labor Statistics, *Workplace Diversity: Opportunities in the Melting Pot*, OCCUPATIONAL OUTLOOK Q., 29 (Summer 2004), available at <http://www.bls.gov/opub/ooq/2004/summer/art02.pdf>.
- 44 Caufield, *supra* note 24, at 181 (“Generally, commissioners are white and male.”); G. Alan Tarr, *De-*

*signing an Appointive System: the Key Issues*, 34 FORDHAM URB. L.J. 291, 304-05 (2007) (“Historically, the membership of Commissions substantially over-represented white males.”); LAWYERS’ COMMITTEE FOR CIVIL RIGHTS UNDER LAW, JUDICIAL INDEPENDENCE AT THE CROSSROADS: THE IMPORTANCE OF PROMOTING AND PRESERVING JUDICIAL INDEPENDENCE TO THE CIVIL RIGHTS COMMUNITY, 25 (2002) (“For people of color, part of the concern is that judicial selection committees, which tend to be comprised of non-diverse appointed officials, often fail to include minority or women candidates in the slate of individual they nominate.”).

- 45 Zeidman, *supra* note 35, at 476.
- 46 Hurwitz & Lanier, *supra* note 2, at 54 (*Diversity in State and Federal Appellate Courts: Change and Continuity Across 20 Years*) (noting that the proportion of non-white male appellate judges rose from over 27 percent in 1999 to about 34 percent in 2005).
- 47 Ifill, *supra* note 32, at 126 (“Evidence demonstrating the existence of historical discrimination against African Americans in the legal profession...would be readily available in many jurisdictions... For example, among its many historically discriminatory practices, the State of Texas denied African Americans access to the State’s law school until...1950.”).
- 48 Bratton & Spill, *supra* note 6, at 505.
- 49 Baker, *supra* note 5, at 14 (noting “[t]he year 2001 was a watershed year... [f]or the first time, female law school entrants outnumbered men.”).
- 50 BUREAU OF LABOR STATISTICS, *supra* note 43.
- 51 Kaye & Reddy, *supra* note 40, at 1941.
- 52 In 2006, Harvard Law had 30.6% minority students, Yale Law had 29.5%, University of Pennsylvania Law had 30.3%, Stanford Law had 31.5%, and Columbia Law had 29.2%. THE LAW SCHOOL ADMISSION COUNCIL AND THE AMERICAN BAR ASSOCIATION, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, 63-69 (2008) [hereinafter OFFICIAL GUIDE 2008] (recording diversity at ABA law schools in 2006). These percentages nearly mirror the percentage of minorities in the general U.S. population. See U.S. CENSUS BUREAU, CENSUS NATIONAL POPULATION ESTIMATES, ANNUAL ESTIMATES OF THE POPULATION BY SEX, RACE, AND HISPANIC OR LATINO ORIGIN: APRIL 1, 2000 TO JULY 1, 2006, <http://www.census.gov/popest/national/asrh/NC-EST2007-srh.html> [hereinafter U.S. CENSUS 2006] (showing that non-Hispanic whites make up 66% of the American population).
- 53 William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admissions, 1950-2000*, 19 HARV. BLACK LETTER L. J. 1, 29-36 (2003).
- 54 BAYNES, *supra* note 1, at 3.
- 55 *Id.* (noting black enrollment in law school in NY, FL IL, CA, VA, OH, MD, MA and DC had dropped between 2002 and 2004).
- 56 Lien, *supra* note 43, at 29.
- 57 BUREAU OF LABOR STATISTICS, *supra* note 43.
- 58 Greene, *supra* note 35, at 26-27 (Greene’s model bill suggests “[t]he judicial nominating Commission shall give due regard to diversity in the judiciary...and shall seek out members of diverse backgrounds to apply as nominees.”).

- 59 BAYNES, *supra* note 1.
- 60 See Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 179-180 (2004).
- 61 Greene, *supra* note 35, at 17 (“Diversity in the nominating process is responsive to core American values and essential to building public confidence in the appointive system.”); Ifill, *supra* note 32, at 138 (“With public confidence in the justice system plummeting, many argue that racial diversity on the bench will help disaffected racial minorities, in particular, to believe they have a voice in the administration of justice.”); Johnson & Fuentes-Rohwer, *supra* note 21, at 51 (“The quest for judicial diversity is really a quest for the representation of myriad voices on the bench.”).
- 62 Jackson, *supra* note 20, at 141 (arguing “[j]udges should reflect the diversity of the community, rather than as historically has been the case, being drawn solely from a pool of wealthy Caucasian males.”).
- 63 Johnson & Fuentes-Rohwer, *supra* note 21, at 24 (“Diversifying the judiciary will improve judicial decision-making by including different perspectives in the process.”).
- 64 Jackson, *supra* note 20, at 142 (touting “equality of opportunity” as a norm); Ifill, *supra* note 32, at 409-10 (“the creation of a racially diverse bench can introduce traditionally excluded perspectives and values into judicial decision making.”).
- 65 Johnson & Fuentes-Rohwer, *supra* note 21, at 24 (“a racially diverse bench will further the goal of judicial impartiality.”).
- 66 Zeidman, *supra* note 35, at 475-76 (“it is now generally accepted that the Commission must be diverse, both to ensure the Commission’s legitimacy by having its membership mirror the population it serves, and to ensure a vast breadth of experience and wisdom among the commissioners.”); ESTERLING & ANDERSEN, *supra* note 17, at 6 (“we give evidence that more diverse Commissions attract more diverse applicant pools and produce more diverse nominee lists.”).
- 67 Colquitt, *supra* note 35, at 81 (stating “if the Commission is representative...the public will likely support its decisions”); *see also id.* at 95.
- 68 *Id.* at 96.
- 69 Jackson, *supra* note 20, at 137 (arguing “candidates that pass through [a diverse] Commission would have to be palatable to a wider group. In so doing, these candidates would feel less of a sense of indebtedness to anyone particular group and thus would less likely to allow themselves to be subtly influenced . . .”).
- 70 Johnson & Fuentes-Rohwer, *supra* note 21, at 31.
- 71 Romero, *supra* note 31, at 489.
- 72 Greene, *supra* note 35, at 61 n.121 (2007) (referencing Romero, *supra* note 31, at 485).
- 73 Romero, *supra* note 31, at 491 (noting that Arizona is the only state that requires the governor to consider diversity when appointing a judge).
- 74 *See id.* at 489-90.
- 75 *See id.* at 493-94.
- 76 Greene, *supra* note 35, at 61 n.121 (referencing Romero, *supra* note 31, at 496-97).

- 77 Zeidman, *supra* note 35, at 479 (participant in judicial selection admitting “[w]hile I had interviewed job applicants in the past, I had no special interviewing skill or training...The interview naturally and unconsciously devolved into my own personal set of likes and dislikes...Inevitably, I found myself thinking platitudes like ‘I like her’ or ‘She’d probably make a good judge.’ What were those impression based on? It is almost impossible for me to say.”).
- 78 Romero, *supra* note 31, at 493 (suggesting a diversity ombudsman).
- 79 Frank H. Wu, Manuscript for NYU Brennan Center: Taking Thomas Seriously 6 (2004) (copy on record with the Brennan Center).
- 80 *Cf.* the reaction of black applicants who universally rejected Berkeley Law School after Prop. 209 passed in California. Arguably these students may have rejected this prestigious school for more welcoming ones that were more likely to have a critical mass of black students. “In the first year of the new policy, starting in 1997, U.C.’s Boalt Law School reported that just one African American, a deferred admission, was in the entering class of 271 students. Fourteen blacks had been admitted, but none had chosen to attend Berkeley.” The News Hour, *Redefining Diversity*, Jan. 18, 1999, [http://www.pbs.org/newshour/bb/education/jan-june99/diversity\\_1-18.html](http://www.pbs.org/newshour/bb/education/jan-june99/diversity_1-18.html).
- 81 The question of whether there is a token level of representation may be in the eye of the beholder. See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1134 (2008) (“White employees may feel that the employer has created a racially diverse workforce so long as there are a handful of visible people of color. Blacks, by contrast, might view the few people of color as tokens ...”).
- 82 Jerry Kang & Mahzarin R. Banaji, *Symposium on Behavior Realism: Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CALIF. L. REV. 1063, 1083-84 (2006) (“Unconscious stereotypes, rooted in social categorization, are ubiquitous and chronically accessible. They are automatically prompted by the mere presence of a target mapped into a particular social category. Thus when we see a Black (or a White) person, the attitude and stereotypes associated with that racial category automatically activate. Further these attitudes and stereotypes influence our judgments, as well as inhibit countertypical associations.”).
- 83 *Id.* at 1064 (explaining “[t]he science of ISC [implicit social cognition] examines those mental processes that operate without conscious awareness or conscious control but nevertheless influence fundamental evaluations of individuals and groups.”); Justin D. Levinson, *Forgotten Racial Equity: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE. L. J. 345, 351-52 (2007) (noting “[s]ince the 1990’s, a number of studies have deconstructed the complicated ways in which the human mind maintains and manifests racially biased implicit attitudes and stereotypes.”).
- 84 Kang & Banaji, *supra* note 82, at 1090; Levinson, *supra* note 83, at 354 (“studies in social cognition have illustrated that racial attitudes and stereotypes are both automatic and implicit. That is, people possess attitudes and stereotypes over which they have little of no ‘conscious, intentional control.”).
- 85 Levinson, *supra* note 83, at 363 (“psychologists have found that stereotypes arise when a person is as young as three years old and are usually learned from parents, peers, and the media.”).
- 86 Anthony G. Greenwald & Linda Hamilton Krieger, *Symposium on Behavioral Realism: Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 945 (Jul. 2006).
- 87 Marybeth Hearld, *Deceptive Appearances: Judges, Cognitive Biases, and Dress Codes*, 41 U.S.F. L. REV. 299, 301-2 (2007); *see also* Greenwald & Krieger, *supra* note 86, at 951 (noting “[i]mplicit biases are

- ...especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles.”).
- 88 Kang & Banaji, *supra* note 82, at 1072 (showing that results of over three million implicit bias tests along with other experiments show “we are not color or gender blind, and perhaps that we cannot be.”).
  - 89 Hearld, *supra* note 87, at 323-4.
  - 90 Mahzarin R. Banaji, Max H. Bazerman & Dolly Chugh, *How (Un)ethical Are You?*, HARV. BUS. REV., Dec. 2003, at 3 (“Most of us believe that we are ethical and unbiased. We imagine we’re good decision makers, able to objectively size up a job candidate...and reach a fair and rational conclusion that’s in our, and our organization’s, best interests. But more than two decades of research confirms that, in reality, most of us fall woefully short of our inflated self-perception. We’re deluded by what Yale psychologist David Armor calls the illusion of objectivity, the notion that we’re free of the very biases we’re so quick to recognize in others.”); *see also id.* at 4.
  - 91 Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law*, ANNUAL REV. OF L. & SOC. SCI., Sept. 2007, at 443 (quoting J. Brennan).
  - 92 Kang & Banaji, *supra* note 82, at 1077 (arguing “responding to discrimination means...preventing discrimination that is likely to occur without some proactive action.”).
  - 93 Commissioners were not asked exactly the same questions since some questions were tailored by state.
  - 94 Racial diversity is an inclusive term aggregating Hispanic/Latino, African American, Native American, Asian/Pacific Islander, and other non-white demographic categories.
  - 95 State bar membership broken down by gender was unavailable.
  - 96 THE LAW SCHOOL ADMISSION COUNCIL AND THE AMERICAN BAR ASSOCIATION, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, 36-43 (1987-88) [hereinafter OFFICIAL GUIDE 1988] (recording diversity at ABA law schools in 1986); The Law School Admission Council and the American Bar Association, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS, 44-53 (1998) [hereinafter OFFICIAL GUIDE 1998] (recording diversity at ABA law schools in 1996); OFFICIAL GUIDE 2008, *supra* note 52, at 63-69 (recording diversity at ABA law schools in 2006).
  - 97 This chart excludes Barry University, Florida A&M, Florida Coastal, Florida International, Roger Williams University School of Law, and St. Thomas University School of Law because these schools did not report demographic data for 1986 and/or 1996. In 2006, these schools had the following gender breakdowns: Barry University in Florida (gender parity), Florida A&M (58% female), Florida Coastal (53% male), Florida International (54% male), Roger Williams University School of Law in Rhode Island (52% male), and St. Thomas University School of Law in Florida (55% male). OFFICIAL GUIDE 2008, *supra* note 52, at 63-69.
  - 98 The University of Memphis was formerly known as Memphis State University.
  - 99 OFFICIAL GUIDE 1988, *supra* note 96; OFFICIAL GUIDE 1998, *supra* note 96; OFFICIAL GUIDE 2008, *supra* note 52.
  - 100 Chart B excludes the same schools as Chart A. In 2006, these schools had the following racial breakdowns: Barry University (80% white), Florida A&M (31% white), Florida Coastal (82% white), Florida International (46% white), Roger Williams University School of Law in Rhode Island (88%

white), and St. Thomas University School of Law in Florida (59% white). OFFICIAL GUIDE 2008, *supra* note 52.

101 U.S. CENSUS 2007, *supra* note 7 (New Mexico). The proportion of minorities in each state was determined by subtracting the number of white, non-Hispanic people in each state from the state's total population, and dividing that number by the state's total populations.

102 U.S. CENSUS 2006, *supra* note 52 (Florida).

103 AMERICAN BAR ASSOCIATION, ABA National Database on Judicial Diversity in State Courts (2004), <http://www.abanet.org/judind/diversity/home.html> (follow hyperlink to individual state, then to hyperlink "click here" for a Microsoft Excel spreadsheet containing relevant data) [hereinafter ABA]. New Mexico's bar membership is approximately 17.34% Hispanic, 1.21% black, 1.43% Native American, 0.66% Asian and 79.3% White. *Id.*

104 *Id.* Florida's bar membership is approximately 9.21% Hispanic, 3.06% African American, 0.08% Native American, 0.57% Asian and 87% White.

105 See AJS, *supra* note 8.

106 *Id.*

107 *Id.*

108 N.M. CONST. ART. 6, § 35 (2007).

109 FLA. STAT. ANN. § 43.291 (4) (2007).

110 U.S. CENSUS 2007, *supra* note 7 (Missouri).

111 ABA, *supra* note 103. In 2007, Missouri's bar membership was approximately 0.98% Hispanic, 3.93% African American, 0.26% Native American, 0.77% Asian and 94% White. *Id.*

112 AJS, *supra* note 8.

113 MO. SUP. CT. R.10.32.

114 *Id.*

115 U.S. CENSUS 2007, *supra* note 7 (Arizona).

116 ABA, *supra* note 103. Arizona's bar membership is approximately 5.23% Hispanic, 1.22% Black, 0.72% Native American, 1.14% Asian and 91.6% White. *Id.*

117 AJS, *supra* note 8.

118 *Id.*

119 *Id.*

120 ARIZ. CONST. ART. 6, § 36 (A). ("The makeup of the committee shall, to the extent feasible, reflect the diversity of the population of the state.").

121 U.S. CENSUS 2007, *supra* note 7 (Maryland).

122 ABA, *supra* note 103. Maryland's bar membership is approximately 1.54% Hispanic, 9.74% African American, 0.22% Native American, 2.21% Asian and 86.3% White. *Id.*



- 123 AJS, *supra* note 8.
- 124 *Id.*
- 125 *Id.*
- 126 Md. Exec. Order No. 01.01.2008.04 [hereinafter Md. Exec. Order] (“Each Commission shall encourage qualified candidates, from a diversity of backgrounds, to apply for judicial appointment.”); *Id.* (“[T]he Commission shall seek out qualified applicants from a diversity of backgrounds to fill the vacancy and shall review all applications submitted”).
- 127 *Id.*
- 128 U.S. CENSUS 2007, *supra* note 7 (Colorado).
- 129 ABA, *supra* note 103. Colorado’s bar membership is approximately 4.09% Hispanic, 1.12% Black, 0.24% Native American, 0.98% Asian and 93.5% White. *Id.*
- 130 AJS, *supra* note 8 (out of a seven judge court).
- 131 U.S. CENSUS 2007, *supra* note 7 (Tennessee).
- 132 ABA, *supra* note 103. Tennessee’s bar membership is approximately 1.05% Hispanic, 4.18% Black, 0.17% Native American, 0.46% Asian and 94.1% White. *Id.*
- 133 TENN. CODE ANN. § 17-4-102 (d) (2008).
- 134 *Id.* at (b)(3).
- 135 AJS, *supra* note 8. It should be noted, however that the trial court judges in Tennessee are elected, not appointed.
- 136 U.S. CENSUS 2007, *supra* note 7 (Rhode Island).
- 137 ABA, *supra* note 103. Rhode Island’s bar membership is approximately 0.70% Hispanic, 0.70% African American, 0% Native American, 0.29% Asian and 98.3% White. *Id.*
- 138 R.I. GEN. LAWS § 8-16.1-2 (a)(3)(2006) (“The governor and the nominating authorities hereunder shall exercise reasonable efforts to encourage racial, ethnic, and gender diversity within the Commission.”).
- 139 AJS, *supra* note 8.
- 140 U.S. CENSUS 2007, *supra* note 7 (Utah).
- 141 AJS, *supra* note 8.
- 142 *Id.*
- 143 *Id.*
- 144 U.S. CENSUS 2007, *supra* note 7 (New Hampshire).
- 145 ABA, *supra* note 103. New Hampshire’s bar membership is approximately 1.7% Hispanic, 0.67% African American, 0% Native American, 1.3% Asian and 96.5% White. *Id.*
- 146 AJS, *supra* note 8.

147 N.H. Exec. Order No. 2005-2 (Gov. John H. Lynch), available at <http://www.nh.gov/governor/orders/index.htm>. (“In evaluating applicants for judicial office...Applicants for judicial office shall be considered without regard to race, religion, gender national origin, sexual orientation or political affiliation.”). As will be discussed later in the best practices section, New Hampshire should consider repealing this Executive Order and replacing it with one that values diversity.

148 American Bar Association, Section of Legal Education & Admissions to the Bar, J.D. and LL.B. Degrees Awarded, <http://www.abanet.org/legaled/statistics/stats.html> (follow hyperlink “J.D. and LL.B. Degrees Awarded”).

149 *Id.*

150 AJS, *supra* note 8.

151 *Id.*

152 *Id.*

153 TENN. CODE ANN., *supra* note 124.

154 AJS, *supra* note 8.

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.* Two of Arizona’s five Supreme Court justices are female, and Florida and Maryland each have two female members of their seven-member Supreme Court. *Id.*

159 *Id.*

160 *Id.*

161 Rhode Island and New Hampshire do not have intermediate appellate courts.

162 AJS, *supra* note 8.

163 Md. Exec. Order, *supra* note 113.

164 AJS, *supra* note 8.

165 *Id.*

166 FLA. STAT. ANN. § 43.291 (4).

167 AJS, *supra* note 8.

168 *Id.*

169 *Id.*

170 *Id.*

171 *Id.* It should be noted that Florida’s Circuit and County Courts have elected not appointed judges.

172 *Id.*

- 173 *Id.*
- 174 *Id.*
- 175 Again, gender statistics on bar membership are not available for each state. According to the ABA, J.D.s conferred to women nationally are nearly at parity as of 2006. We presume that most female J.D.s go on to become members of the bar.
- 176 Brennan Center interview with Commissioner Jane Strain of the Arizona Commission on Appellate Court Appointments (Oct. 17, 2007) (Commissioner Strain describes confirmation by the committee as a humiliating process that was “all politics.” Arizona Commissioners are confirmed by the Senate Judiciary Committee.).
- 177 Brennan Center interview with Commissioner Bill Farmer of the Tennessee Judicial Selection Commission (Nov. 5, 2007).
- 178 Brennan Center interview with Commissioner Stephen Carlotti of the Rhode Island Judicial Nominating Commission (Nov. 7, 2007).
- 179 Brennan Center interview with Commissioner Sheila Sachs of the Maryland Appellate Courts Judicial Nomination Commission (Oct. 11, 2007).
- 180 Brennan Center interview with Anonymous Commissioner of the Colorado Supreme Court Nominating Commission (Nov. 27, 2007).
- 181 Brennan Center interview with Commissioner Suellyn Scarnecchia of the New Mexico Judicial Nominating Commission (Oct. 25, 2007).
- 182 Brennan Center interview with Commissioner Philip Waystack of the New Hampshire Judicial Selection Commission (Oct. 3, 2007).
- 183 Brennan Center (Scarnecchia), *supra* note 181.
- 184 During the time this report was being written, Tennessee declined to renew authority for its nominating Commission. The Commission will wind down its activities over the next year and Tennessee will return to judicial elections in 2009. Kleinheider, *Wilder’s Last Act: Quest to Revive the Tennessee Plan Dies for Session*, NASHVILLE POST, May 20, 2008, available at <http://politics.nashvillepost.com/2008/05/20/wilders-last-act-quest-to-revive-the-tennessee-plan-dies-for-the-session/>.
- 185 Brennan Center interview with Commissioner Randall Nichols of the Tennessee Judicial Selection Commission (Oct. 24, 2007).
- 186 Brennan Center (Scarnecchia), *supra* note 181.
- 187 “The Commission shall consider the diversity of the state’s population, however the primary consideration shall be merit. Voting shall be in a public hearing.” ARIZ. CONST. art. VI, § 36.
- 188 Brennan Center interview with Commissioner John Leavitt of the Arizona Commission on Appellate Court Appointments (Oct. 5, 2007).
- 189 Brennan Center (Carlotti), *supra* note 178.
- 190 Brennan Center interview with Anonymous Commissioner of the Florida Supreme Court Judicial Nominating Commission (Oct. 19, 2007).
- 191 Brennan Center (Strain), *supra* note 176.

- 192 Brennan Center interview with Commissioner Mark Briggs of the Arizona Commission on Appellate Court Appointments (Oct. 3, 2007).
- 193 Brennan Center (Sachs), *supra* note 179.
- 194 Md. Exec. Order No. 01.01.2007.08.
- 195 Brennan Center (Sachs), *supra* note 179.
- 196 Brennan Center interview with Commissioner Von Keetch of the Utah Appellate Nominating Commission (Feb. 13, 2008).
- 197 Brennan Center (Carlotti), *supra* note 178.
- 198 Brennan Center interview with Commissioner Joseph Diament of the New Hampshire Judicial Selection Commission (Oct. 5, 2007).
- 199 Brennan Center (Farmer), *supra* note 177.
- 200 Brennan Center interview with Commissioner Andrew Grigsby of the Florida Supreme Court Judicial Nominating Commission (Oct. 11, 2007).
- 201 Brennan Center (Anonymous Florida Commissioner), *supra* note 190.
- 202 Brennan Center (Scarnecchia), *supra* note 181.
- 203 Brennan Center interview with Commissioner Richard McLeod of the Missouri Appellate Judicial Commission (Nov. 8, 2007).
- 204 Brennan Center (Carlotti), *supra* note 178.
- 205 Brennan Center (Diament), *supra* note 198.
- 206 Brennan Center (Leavitt), *supra* note 188.
- 207 Brennan Center (Strain), *supra* note 176.
- 208 Brennan Center (Anonymous Colorado Commissioner), *supra* note 180.
- 209 Brennan Center (Keetch), *supra* note 196.
- 210 Brennan Center (Diament), *supra* note 198.
- 211 Brennan Center (McLeod), *supra* note 203.
- 212 Brennan Center (Scarnecchia), *supra* note 181.
- 213 Brennan Center (Scarnecchia), *supra* note 181.
- 214 Brennan Center (McLeod), *supra* note 203.
- 215 Brennan Center (Anonymous Colorado Commissioner), *supra* note 180.
- 216 Brennan Center (Anonymous Florida Commissioner), *supra* note 190.
- 217 Brennan Center (Grigsby), *supra* note 200.
- 218 Brennan Center (Keetch), *supra* note 196.
- 219 Brennan Center (Briggs), *supra* note 192.

- 220 Brennan Center (Leavitt), *supra* note 188.
- 221 Brennan Center (McLeod), *supra* note 203.
- 222 Brennan Center (Sachs), *supra* note 179.
- 223 Brennan Center (Anonymous Florida Commissioner), *supra* note 190.
- 224 Brennan Center (Scarnecchia), *supra* note 181.
- 225 Brennan Center (Grigsby), *supra* note 200.
- 226 Brennan Center (Keetch), *supra* note 196.
- 227 *Id.*
- 228 Brennan Center (Scarnecchia), *supra* note 181.
- 229 Robinson, *supra* note 81, at 1146 (commenting on system justification theory and noting sometimes disadvantaged people “are motivated to justify the status quo”).
- 230 Christine Jolls & Cass Sunstein, *Symposium on Behavioral Realism: the Law of Implicit Bias*, 94 *Calf. L. Rev.* 969, 991 (Jul. 2006) (quoting Sen).
- 231 Banaji et al., *supra* note 90, at 4 (arguing “implicit biases may exact costs by subtly excluding qualified people from the very organizations that seek their talents.”).
- 232 Brennan Center (Grigsby), *supra* note 200.
- 233 Brennan Center (Scarnecchia), *supra* note 181.
- 234 Brennan Center (Sachs), *supra* note 179.
- 235 Brennan Center (Leavitt), *supra* note 188.
- 236 Brennan Center (Grigsby), *supra* note 200.
- 237 Brennan Center (Anonymous Florida Commissioner), *supra* note 190.
- 238 Commissioner Nichols reported: “In the summer of 2006, there was a vacancy on Tennessee’s Supreme Court. [The Commission nominated three names including a black nominee.] After the black nominee withdrew his name from consideration, Governor Bredesen rejected the Commission’s list saying that he wanted to keep diversity on the court since the retiring justice was black. The Commission forwarded the governor a second list with three names. On the list, the Commission included the name of a candidate whose name also appeared on the first list the Governor rejected. The Governor sued the Commission claiming that the Commission was trying to “force his hand” on a particular candidate. The Governor ended up winning his case on the grounds that once a nomination list is rejected, none of the names that appear on the original list can show up on the new list. In the end, Governor Bredesen appointed a white Republican male.” See *Bredesen v. Tennessee Judicial Selection Comm’n*, 214 S.W.3d 419 (Tenn. 2007).
- 239 Commissioner Scarnecchia (NM) reported that Governor Richardson sued the Fifth Judicial District Nominating Commission in February 2007 arguing that the Commission must send more than one name for him to choose from. The Supreme Court of New Mexico ruled against the governor saying that the Commission can send whoever is qualified so long as they send at least one name. See *STATE ex*

*rel Richardson v. Fifth Judicial Nominating Comm'n*, 141 N.M. 657, 160 P.3d 566 (N.M. 2007).

- 240 Brennan Center (Carlotti), *supra* note 178.
- 241 Brennan Center (Leavitt), *supra* note 188.
- 242 Brennan Center (Sachs), *supra* note 179.
- 243 Brennan Center (Anonymous Colorado Commissioner), *supra* note 180.
- 244 Brennan Center (Keetch), *supra* note 196.
- 245 Brennan Center (Waystack), *supra* note 182.
- 246 Brennan Center (Grigsby), *supra* note 200.
- 247 Brennan Center (Scarnecchia), *supra* note 181.
- 248 Brennan Center (McLeod), *supra* note 203.
- 249 Brennan Center (Nichols), *supra* note 185.
- 250 Brennan Center (McLeod), *supra* note 203.
- 251 Brennan Center (Carlotti), *supra* note 178.
- 252 Brennan Center (Sachs), *supra* note 179.
- 253 Brennan Center (Strain), *supra* note 176.
- 254 Brennan Center (Waystack), *supra* note 182.
- 255 Brennan Center (Diament), *supra* note 198.
- 256 Brennan Center (Keetch), *supra* note 196.
- 257 Brennan Center (Carlotti), *supra* note 178.
- 258 Brennan Center (Leavitt), *supra* note 188.
- 259 Brennan Center (Nichols), *supra* note 185.
- 260 Brennan Center (Sachs), *supra* note 179.
- 261 Brennan Center (McLeod), *supra* note 203.
- 262 *Id.*
- 263 Brennan Center (Scarnecchia), *supra* note 181.
- 264 Brennan Center (Grigsby), *supra* note 200.
- 265 Brennan Center (Anonymous Florida Commissioner), *supra* note 190.
- 266 Brennan Center (Leavitt), *supra* note 188.
- 267 Brennan Center (Nichols), *supra* note 185.
- 268 Brennan Center (Anonymous Florida Commissioner), *supra* note 190.

- 269 Brennan Center (McLeod), *supra* note 203.
- 270 Brennan Center (Leavitt), *supra* note 188.
- 271 *Id.*
- 272 Brennan Center (Grigsby), *supra* note 200.
- 273 Brennan Center (Leavitt), *supra* note 188.
- 274 *Id.*
- 275 Brennan Center (Waystack), *supra* note 182.
- 276 Brennan Center (Sachs), *supra* note 179.
- 277 Brennan Center (Diament), *supra* note 198.
- 278 Brennan Center (Briggs), *supra* note 192.
- 279 Brennan Center (Scarnecchia), *supra* note 181.
- 280 Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1576 (2005) (concluding that “implicit racial meanings have simply attached like barnacles since our infancy.”).
- 281 Jolls & Sunstein, *supra* note 230, at 975.
- 282 Kang & Banaji, *supra* note 82, at 1064.
- 283 Lane et al., *supra* note 91, at 437 (noting a study that “suggests that both motivation to be egalitarian and the opportunity to control one’s behavior affect whether implicit bias is manifested behaviorally . . . [and] [t]he path from implicit bias to negative behavior does not appear immutable.”).
- 284 Kang & Banaji, *supra* note 82, at 1090; *see also* Kang, *supra* note 280, at 1529 (“in order to counter otherwise automatic behavior, one must accept the existence of the problem in the first place.”).
- 285 Robinson, *supra* note 81, at 1170; *see also id.* at 1179 (“the role of the outsider is not to favor or prefer the outsider candidates. Rather, it is to debias the decisionmaking process – to level the playing field, not tilt it in favor of outsider candidates.”)
- 286 Jackson, *supra* note 20, at 159 (“the notice of the judicial opening along with a detailed account of the selection process should be widely disseminated”).
- 287 Donald L. Burnett, Jr., *A Cancer on the Republic: The Assault Upon Impartiality of State Courts and the Challenge to Judicial Selection*, 34 FORDHAM URB. L.J. 265, 281 (2007) (“nominating Commissions should undertake professionalized search processes similar to those utilized by business organizations when hiring senior executives...”).
- 288 *Cf.* Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 591-92 (2006) (individuals “stick to the familiar [and] old ways of doing things...for instance, academic departments have abandoned the old-boy system of hiring in favor of open job advertisement, but department chairs still ask their pals for leads.”) (discussing hiring in the private sector).
- 289 Romero, *supra* note 31, at 494 (advocating that “special notices should be sent to women’s and minority bar associations to communicate that the appointive system welcomes their...candidacies.”).

- 290 Brennan Center (Grigsby), *supra* note 200.
- 291 Kang & Banaji, *supra* note 82, at 1064 (suggests ties should go to the minority or woman candidate because “any candidate who registers a tie on an instrument that is biased against her is likely to be the stronger candidate.”).
- 292 Caufield, *supra* note 24, at 183 (“Because they serve such a fundamental role in any Commission-based appointment system, nominating Commissions should ideally establish procedures that encourage fair and independent assessments of applicants.”).
- 293 *Id.* at 194 (“the Utah Judicial Council distributes an instructional packet to all applicants, which explicitly outlines evaluative criteria and explains the role of diversity in Commission decision-making...”). *Cf.* When there is a vacancy in Rhode Island; the state publishes the vacancy along with the directions for completing the application in various papers. Brennan Center (Carlotti), *supra* note 178.
- 294 Caufield, *supra* note 24, at 192 (noting “[g]iven the primacy of evaluative criteria, it is particularly striking that fewer than half the states that use nominating Commissions have any formal statutory language that specifies the criteria to be used to evaluate candidates.”).
- 295 Kang, *supra* note 280, at 1515-16 (“Behavior economists Marianne Bertrand and Sendhil Mullainathan responded to over 1300 help-wanted ads in Boston and Chicago... The sole difference was that half of the resumes were randomly assigned African-American-signaling names..., while the other half were assigned “White” names.... The White resumes received 50% more callbacks.”).
- 296 *Id.* at 1516. See also Levinson, *supra* note 83, at 360 (discussing the same Bertrand and Mullainathan research that “a White name yielded as many callbacks as an additional eight years of experience.”).
- 297 Kang & Banaji, *supra* note 82, at 1095.
- 298 *Id.* at 1095-96; *see also* Greenwald & Krieger, *supra* note 86, at 962 (studies show “implicit bias may affect interviews in ways that can disadvantage Black job applicants.”).
- 299 Kang & Banaji, *supra* note 82, at 1095-96.
- 300 *Id.* at 1096 (urging “structured interviews do better than unstructured interviews at predicting on-the-job success. ... the more unstructured the interview, and hence the greater the chance for individual preferences to play a role in decision-making, the poorer the outcome.”).
- 301 Caufield, *supra* note 24, at 184 (in eighteen states, records of the nominating Commission must be kept confidential and interviews of applicants are confidential.).
- 302 *Cf.* Kalev et al., *supra* note 288, at 611 (“diversity training, which 39 percent of [corporate] establishments had adopted, and which is quite costly, was not very effective”).
- 303 *Id.* at 604 (finding “[d]iversity training is followed by a 7 percent decline in the odds for black women [in corporations].”).
- 304 *Id.* at 593; *see also id.* at 595 (noting that “diversity training and diversity evaluations ‘may even backfire, leading to exaggerated stereotyping.’” White males “report that they are ‘tired of being made to feel guilty in every discussion of diversity... of being cast as oppressors.’”).
- 305 Frank Dobbin, Alexandra Kalev & Erin Kelly, *Diversity Management in Corporate America*, Contexts 21, 24 (2007) (“field studies show that it is difficult to train away stereotypes, and that white men often respond negatively to training—particularly if they are concerned about their own careers.”).



- 306 Banaji et al., *supra* note 90, at 7 (“Managers can make wise, more ethical decisions if they become mindful of their unconscious biases...”).
- 307 *Id.*
- 308 Kalev et al., *supra* note 288, at 590 (finding “[s]tructures establishing responsibility (affirmative action plans, diversity committees, and diversity staff positions) are followed by significant increases in managerial diversity.”).
- 309 Dobbin et al., *supra* note 305, at 25 (stating “[m]anagement experts have long argued that if a firm wants to achieve a new goal, it must make someone responsible for that goal.”).
- 310 Zeidman, *supra* note 35, 475-76.
- 311 Levinson, *supra* note 83, at 411-12 (it is possible that exposure to minority and female peers reduces the bias of the Commission since certain studies found that “exposure to diversity or viewing minority exemplars...can sometimes temporarily reduce people’s implicit biases...”); *see also* Lane et al., *supra* note 91, at 438 (“Exposure to counterstereotypical outgroup members often reduces implicit bias.”).
- 312 Shira J. Goodman & Lynn A. Marks, *A View from the Ground: A Reform Group’s Perspective on the Ongoing Effect to Achieve Merit Selection of Judges*, 34 *FORDHAM URB. L.J.* 425, 434 (2007) (suggesting choosing “representatives of well-recognized, well-regarded established civic groups, such as the League of Women Voters, the NAACP, and other groups that garner trust and credibility with the average person.”).
- 313 Johnson & Fuentes-Rohwer, *supra* note 21, at 53.
- 314 *Compare* findings about the Ivy League law school populations in OFFICIAL GUIDE 2008, *supra* note 52 with Chart B: Racial Trends at Law Schools in the Ten States Studied.
- 315 All of the states we considered, except 3 states (Colorado, Rhode Island and New Hampshire) require its appointed judges to be state residents. The residency requirements range from 5-10 years in duration. See ARIZ. CONST. art. VI, § 6; COLO. CONST. art VI, § 8; FLA. CONST. art. V, § 8; MD. CONST. art. IV, § 8; N.M. CONST. art. VI, § 8; TENN. CONST. art. VI, § 3; UTAH CONST. art. VIII, § 7.
- 316 This issue has also reared its head in other states such as New York where the Chief Judge is now suing to get judicial salaries raised. *See Anemona Hartocollis, New York’s Top Judge Sues Over Judicial Pay*, N.Y. TIMES, Apr. 11, 2008.
- 317 NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES, [http://www.ncsconline.org/D\\_KIS/Salary\\_Survey](http://www.ncsconline.org/D_KIS/Salary_Survey).
- 318 Romero, *supra* note 31, at 497 (quoting Conn. Gen. Stat. §51-44a(3) (2006) and citing Connecticut as an example of a state that requires reports of “the statistics regarding the race, gender, national origin, religion and years of experience as members of the bar of all such candidates.”).
- 319 In our ten state study, Arizona, Florida, New Mexico, Rhode Island, and Tennessee have provisions that require that its appointing authorities appoint Commissioners that reflect the diversity of the people in the state. Consequently, Commissioners in these states were asked if in their view, their Commissions were indeed representative, and if the provision has an impact that would not be present without its existence.
- 320 Maryland’s executive order establishing its judicial nominating Commissions has a provision that the Commission shall encourage qualified candidates from a diversity of backgrounds to apply for judgeships. Missouri has a Supreme Court rule that encourages its Commission to do the same.

Commissioners in these two states were asked how, if at all, the provision impacts outreach, and if the provision has been successful in increasing the number of women and minority applicants.

321 Missouri Supreme Court rules and Maryland's executive orders each have provisions that provide that their Commissions should take into consideration the importance of diversity and having a diverse judiciary when evaluating candidates. Commissioners in these two states were asked how and at what point is diversity factored into Commission deliberations.

322 As noted *supra*, notes 320-321, Missouri and Maryland both have provisions that require diversity be a consideration during applicant evaluations. In light of their diversity provisions, Commissioners in these two states were asked how well minorities and women fared in the latest nominating process.

323 This column features data on the court of last resort in each state's judicial system. Maryland's court of last resort is its "Court of Appeals."

324 This column features data on the intermediate appellate court in each state's judicial system. Rhode Island and New Hampshire do not have appellate courts. Maryland's intermediate appellate court is its "Court of Special Appeals."

325 Although certain states do not refer to their trial court as a "district court," this column features data on the trial court in each state's judicial system.

326 NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES, [http://www.ncsconline.org/D\\_KIS/Salary\\_Survey](http://www.ncsconline.org/D_KIS/Salary_Survey).

327 Salaries listed for Supreme Court are for Associate Justices. Typically Chief Justices received a higher salary. Also several states have multiple lower courts. Here "district court" refers to the lower courts having the most general jurisdiction. In some states, juvenile or other lower courts have different salary scales from other more general jurisdiction trial courts.

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