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## Women Judges: A Preface to Their History

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# WOMEN JUDGES: A PREFACE TO THEIR HISTORY

Beverly B. Cook\*

Only a preface can be written to the history of women on the bench in the United States. Since 1870 women gradually have desegregated every kind and level of court from Justice of the Peace to the United States Supreme Court.<sup>1</sup> However, the degree of integration has remained token for over one hundred years.<sup>2</sup> Women held as of 1983 only 6% of the attorney judge-ships, a percentage which is disproportionate to the 13% in practice, the 38% in law school, and the majority status of women as citizens.<sup>3</sup> Women will exceed tokenism in the courts only if three simultaneous conditions take place — an increase in the number of judicial positions to be filled; an increase in the

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1. Women without law degrees who have served on non-attorney courts with minor jurisdictions are not covered in the body of this article because they lack the credentials to aspire to higher courts. The first woman judge, Esther Morris, a JP in Wyoming in 1870, was not a member of the bar. Gressley, *Esther Morris*, in *NOTABLE AMERICAN WOMEN, 1607-1950, VOL. II* at 583-85 (E. James ed. 1971).

2. The definition of tokenism comes from the Kanter model of integration and denotes occupancy by members of a recognizable class of less than 20% of available positions. The first stage of the Kanter model is total exclusion; there is no historical record of an American woman judge before 1870. The second stage of token inclusion has lasted from 1870 to date. The third stage exists when the outsider class gains a minority status of between 20% and 40%; and the stage of integration occurs when the outsider class controls forty to sixty percent of the positions. Unlike any other "minority" group in the United States, women have the potential based upon their population percentage to integrate the courts and all other public institutions. R. KANTER, *MEN AND WOMEN OF THE CORPORATION* 206-210 (1977); Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 *HARV. WOMEN'S L.J.* 1 (1978).

3. The 6% figure is based upon my updated data file of women judges, created for 1977-78 and 1982-83 surveys of women judges. Cook, *Political Culture and the Selection of Women Judges in Trial Courts and Women Judges and Public Policy*, in *WOMEN IN LOCAL POLITICS* (Stewart ed. 1980); Cook, *Will Women Judges Make a Difference in Women's Legal Rights?*, in *WOMEN, POWER, AND POLITICAL SYSTEMS* (Rendel, ed. 1981); and in Cook, *Women on the State Bench: Correlates of Access*, in *WOMEN IN STATE AND LOCAL POLITICS* (Flammang, ed. 1984) (forthcoming Sage Publications). The percentage of women in practice has been variously estimated as 13% and 15%, depending upon whether women in the bar who are inactive are included or not. The figure for 1982 was 12%; see Cook, *The Path to the Bench: Ambitions and Attitudes of Women in the Law*, 19 *TRIAL* 48, at 50, Table 1 (1983). The percentage in law school was computed from the data reported upon ABA accredited law schools. *AMERICAN ASSOCIATION OF LAW SCHOOLS, LAW SCHOOL ADMISSIONS COUNCIL, PRE-LAW HANDBOOK* (1983) [hereinafter cited as *PRE-LAW HANDBOOK*].

number of women eligible for judgeships; and an increase in the number of gatekeepers<sup>4</sup> who are positively inclined to give women fair consideration.

The notion that women will fill legal positions, from the entry level to the most prestigious judgeships, in proportion to their presence in law school and the bar takes account of the eligibility factor only and does not fit the historical experience of women.<sup>5</sup> It is also not likely that women will “filter up” the court hierarchy in the contemporary period as a mechanical theory would predict, because the attitude of gatekeepers does not become more favorable to women in direct relationship to the increase in number of judgeships or of eligible women. The availability of positions is as important as the eligibility of women, but these two conditions are also unrelated.

The above three-variable model offered to explain the status of women in the judiciary centers upon the opportunity structure or the set of qualifications individuals need in order to prove their eligibility for judgeships. For each position in an opportunity structure, there are gatekeepers who apply the customary and official rules to screen out candidates and to select among the most promising. These gatekeepers will ordinarily replace those retiring from positions — whether they are graduating seniors, professors, partners, prosecutors, or judges — with persons of “their own kind” from the next generation, unless several factors are present.

Focusing upon the judicial positions at the top of this opportunity structure, the first factor to consider is court size — or the total number of judgeships available and their distribution within courts and judicial districts. Second is the pool factor or the number of women qualified to apply to the gatekeepers for

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4. “Gatekeepers” refers to those who select among candidates for law jobs.

5. For example, in 1920 with the passage of the suffrage amendment, women entered law schools, medical schools, and doctoral programs in larger numbers than previously with the expectation that they would be accepted as equals and share the rewards of the professional status with men. By the end of the decade the influx of women declined in the face of resistance to their presence. See generally P. HUMMER, *THE DECADE OF ELUSIVE PROMISE: PROFESSIONAL WOMEN IN THE UNITED STATES, 1920-1930* (1979).

each judgeship. The pool of eligible women becomes smaller for each successive office in the opportunity structure to the extent that the gatekeepers at lower levels do not select women to get the training and experience for the next level. Third is the attitude of the gatekeepers toward the presence of women in the specific position they control. The general proposition which fits this model is that the number of women judges will increase as the pool of eligible women and the number of positions in the opportunity structure increase, and to the extent that the gatekeepers recognize the presence of eligible women for the positions and the legitimacy of their claims for those positions.

If a gatekeeper strongly favors the sex integration of the courts, then one might predict the presence of a token woman judge despite a small pool and few positions. Although such a token woman in a highly visible and powerful office may provide a "role model" for women, there must be a large enough pool of women entering the profession to recognize her as such. Because of the absence of such a pool of eligibles, the first women judges were often not replaced by other women, or at best their seats became designated for a successor without any thought of considering women for a second position in the same court or judicial district. In the 1980's, however, there is a large professional base of women to emulate those who have reached the prestigious judgeships.

An active and successful women's movement provides a impetus for young women to focus their ambitions upon the legal profession and to exert pressure upon the gatekeepers to recognize their entitlement to compete for places in law schools. Without a women's movement and specialized organizations of women lawyers and judges, the pool of women eligible for law jobs would not increase and the gatekeepers would not be reminded of their claims. No direct relationship exists between a women's movement and the growth of the legal system, however. It was serendipitous that the movement for women's equality coincided with the expansion of law jobs during the period of the mid-1960's into the 1980's. The increase in number of judicial positions from 1955 to 1978 was over 200%.<sup>6</sup> In contrast, the increase between 1925 and 1955, after the suffrage movement,

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6. Percentage increase was calculated from data on the number of judgeships by

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was less than 10%.<sup>7</sup> A women's movement stimulates two of the factors necessary for women to integrate the courts, but is not sufficient in the absence of new legal positions.

The concept of opportunity structure implies a hierarchy of offices, with many identical positions at the bottom which require few credentials and offer less rewards than the unique and scarce positions at the top which require more credentials and offer greater rewards. Inclusion of women at the lower ranks is less unsettling to the legal system because lawyers and judges in the higher positions can supervise and monitor the behavior of practicing lawyers and lower court judges. Women may therefore

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state and by court level. See COUNCIL OF STATE GOV'TS, BOOK OF THE STATES (1935-83) [hereinafter cited as BOOK OF THE STATES] (annual reference book prepared by the Council of State Governments, and published since 1935 with tables on court types, sizes, selection procedures, and salaries.)

7.

Table I

Women on the Bench: Disparity from Pool of Women Lawyers

% Bar		State Trial			State Appellate			Federal Trial			Federal Appellate			
Date	Female	Date	N	Fem %	Disp	N	Fem %	Disp	N	Fem %	Disp	N	Fem %	Disp
1925	1.5	1925	4000	1.0	-20	350	1.0	-1	121	0.0	-2	45	0.0	-1
1955	3.0	1955	4150	1.5	-63	493	1.0	-10	250	1.0	-5	77	1.5	-1
1972	4.0	1977	9500	3.5	-47	806	4.5	+4	390	1.5	-10	106	1.0	-3
1978	9.5	1983	10500	5.5	-420	982	5.5	-39	541	7.5	-10	158	9.0	-1

Code: N = Number of judgeships

Disp = Disparity is number of positions expected by women on the basis of the percentage of the female bar but which are held by men.

Fem % = Percentage of women judges.

Sources: DIRECTORY OF AMERICAN JUDGES (C. Liebman ed. 1955); C. WHITEHURST, WOMEN IN AMERICA Table 4.4 (1977); Cook, *The Path to the Bench: Ambition and Attitudes of Women in the Law*, 19 TRIAL 48, 49 (1983). NATIONAL ROSTER OF WOMEN JUDGES, 1980 (Berkson & Vandenberg, eds. 1980).

Note: Figures for the size of the judiciary have been rounded from estimates for 1925 and from data presented in the BOOK OF THE STATES, *supra* note 6, for 1955, 1977, and 1983. Figures for the 1925 percentage of women judges have been calculated from the number of women identified as judges in the 1920's in directories and histories collected in the author's data file. Figures for the 1977 and 1983 percentage of judges are based upon the names of women judges collected for surveys in those years from state bluebooks, state court administrative offices, and various directories and biographical references. Since the figures are estimates from the best available information, the percentages are rounded to the nearest .5%. Figures on the percentage of women lawyers vary by source as explained in C. EPSTEIN, WOMEN IN LAW 4, Tables 1.1 and 1.2 (1983).

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intrude into the lower ranks without challenging male domination as they would if they took higher positions. The entrance of women at the bottom of a court system, therefore, does not necessarily imply future integration at the top.

A special concern of this paper, then, is the presence of women at the top of the judicial hierarchy. Understanding why women are (or are not) able to move up the opportunity structure requires data on the number and percentage of women on these prestigious courts. Appendix I provides a list arranged by state of every woman who has served on a prestigious court. Fifteen women are listed under the federal appellate court heading, and thirteen are now serving. They constitute 8% of the total number of U.S. Supreme Court and Circuit judges.<sup>8</sup> The first woman entered at this level in 1934; the second in 1968. Forty-nine women appointed between 1928 and 1984 are in the federal trial judge category; the forty-two who are now in active status are 8% of the total now serving.<sup>9</sup> On the highest state courts there have been thirty-three women; twenty-two, who constitute two-thirds of all female judges on those courts, are now in office.<sup>10</sup> The first woman was recruited to a federal trial bench in 1922. Of the ninety-three individual women who have taken these positions, seventy-seven are now on the bench.

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8. Percentage calculated from the number of federal judgeships reported in the ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR (1940 to date) [hereinafter cited as ANNUAL REPORT]. Judges listed by name in the front pages of every volume of West's *Federal Reporter*.

9. See ANNUAL REPORT, *supra* note 8; The National Women's Political Caucus (NWPC) keeps a running tally of women appointed to federal judgeships in its Washington D.C. office. Ness, *Women and the Federal Judiciary* (NWPC Appointments Project, 1980).

Two women, Burnita Matthews (D.C. District) and Sarah T. Hughes (Northern District of Texas) are in senior status; Shirley B. Jones resigned from her position in the Maryland District. Mary Anne Richey (District of Arizona) is the only woman federal judge not now living. See Federal Judicial Center, *The Third Branch*, a monthly newsletter reporting on appointments, retirements, resignations, and deaths.

10. Percentage calculated from base number of judgeships reported for each state in the BOOK OF THE STATES, *supra* note 6. Judges are listed by name in West's *Regional Reporters* for each state. For a list of all women justices appointed to state supreme courts, see Allen, *Conditions and Consequences of Presence of Women Justices on State Supreme Courts*, Appendix I (1984) (submitted as doctoral dissertation, University of Wisconsin-Milwaukee).

Four women state Supreme Court Justices are retired, Mary Coleman from Michigan, Susie Sharp from North Carolina, Rhoda Lewis from Hawaii, and Catherine Kelly from the District of Columbia. Two have died—Florence Allen of Ohio and Lorna Lockwood of Arizona. See *infra* Appendix 1.

Very few of these women were able to improve their status once they reached a prestigious court. Two of the state supreme court justices moved to federal judgeships.<sup>11</sup> One federal district judge accepted appointment to her state's supreme court;<sup>12</sup> another was elevated to the federal court of Appeals.<sup>13</sup> The first woman on the U.S. Supreme Court, appointed in 1981, did not come up from a prestigious court. Unlike her male predecessor, she "skipped" a step in the opportunity structure to move directly from a state intermediate court of appeals. This willingness to ignore the opportunity structure pattern occurs only when the gatekeeper has determined to find a woman for a woman's seat; in this case President Reagan was fulfilling a campaign promise.<sup>14</sup> In appointing Justice O'Connor he ended the period of exclusion and began the period of token status for women on the highest court in the judicial opportunity structure.

The following section examines the relationship between the increase in the number of positions in the courts and the presence of women. The next section examines the steps in the opportunity structure to prestigious judgeships, and the gatekeeping devices which control the movement of individuals from one position to another higher one.

#### A. THE COURT SIZE FACTOR

The court size factor represents the number of positions in the judiciary and the way they are clustered.<sup>15</sup> More positions open up new opportunities for outsiders, while an organization

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11. Elsjane Roy of Arkansas Supreme Court in 1977 and Florence Allen of the Ohio Supreme Court in 1934. See *infra* Appendix 1, and Cook, *The First Woman Candidate for the Supreme Court: Florence E. Allen*, THE SUPREME COURT HISTORICAL SOCIETY YEARBOOK 1935 (1981).

12. Patricia Boyle in Michigan in 1983. See *infra* Appendix 1.

13. In 1979, Cornelia Kennedy moved from the Eastern District of Michigan to the Sixth Circuit Court of Appeals in Cincinnati, where Florence Allen sat previously. See COOK, O'CONNOR, & TALARICO, WOMEN IN THE JUDICIAL PROCESS 25 (1983).

14. Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314-26 (1982).

15. The observations and conclusions which follow draw from analyses of the author's data based on courts and judges.

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which does not grow or which operates through decentralized single offices reduces such opportunities. The huge growth in the number of judgeships in the United States, which occurred fortuitously at the same time as the modern women's movement, created a situation hospitable to the ambitions of women to participate in the courts. These new positions were established for federal circuit and district courts and for lower state courts. The courts of last resort at the top of the federal and state hierarchies did not increase in size. Thus the size factor helps women candidates only for subordinate courts.

The more offices, particularly at lower levels, the more likely it is that some will be allotted to women by the appointing authority or by voters. The scarcer and more powerful judgeships attract the most intense interest and competition; men, the "insiders," have a much larger pool of eligibles actively pursuing such positions than do the female outsiders. High court judges' power over public policy also makes the positions valuable to those gatekeepers who want to maintain the status quo. Further, a great deal of attention can be given to the choice of the one chief justice or the one high court vacancy; such a spotlight means that gatekeepers must satisfy the traditional expectations of their constituents. In contrast, the many limited-jurisdiction judges are less visible and powerful. Therefore the gatekeepers can afford to invest less effort in trying to keep every position for the male insiders and can placate female outsiders with minimum distress to the system's stability.

The other aspect of size is the clustering of offices in a collegial court or in a judicial district. In the collegial courts the presence of one outsider does not jeopardize control by the majority. One woman in a judicial district which contains many judges makes little difference in how the court looks to observers or in its policy output. A rural district with one judgeship will value that single office more highly than a metropolitan district with twenty or even one hundred identical positions. For solitary and independent authority figures in a local community, the public expects the traditional, white male image in a judge. However, in a courthouse with many judges, restrained by a pyramid of superior judges and a staff of administrators, no judge has much importance and the inclusion of women does not jeopardize male dominance of the system.



The rate of turnover of judge incumbents also affects the acceptability of assigning such a position to a woman. With only one vacancy a position appears unique. When several vacancies occur at the same time for the same office in the same district, however, the assignment of one of those positions to a woman appears less threatening. A sudden increase in the number of positions presents the most advantageous situation for the female outsider. Such an increase occurs when a new court is inserted into the hierarchy, or an omnibus judgeship act creates a large number of new seats, and the same authority or gatekeeper fills the new seats within a short time period. Although President Carter deserves a great deal of credit for responding to the pressures of women lawyers and politicians for female nominees to federal court vacancies, his ability to do so without ignoring obligations to provide patronage to political party workers was due to the passage of the 1978 Omnibus Judgeship Act.<sup>16</sup> Omnibus positions are not just vacancies but new positions. Therefore, the tradition of male incumbents often associated with particular public offices is not present. In the short run they may also be perceived as "extra" positions to which old entitlements do not apply as strongly. Once a seat on a large court is assigned to a woman, those who want female representation can claim a new entitlement to that seat as a "woman's seat."

### *Court Size and Trial Courts*

The relationship between court size and women's access to judicial positions can be appreciated by examining the California trial courts in order of judge size on Table II.<sup>17</sup> The size range of courts is from the one-judge justice courts to the Los Angeles Superior Court with over 200 judges. As the size of the superior and municipal courts increases, so does the percentage of women on the bench; up to 11% on the Los Angeles Superior Court and 27% on the Los Angeles Municipal Court. The cutting point before a "woman's seat" is created seems to be

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16. L. BERKSON & S. CARBON, *THE UNITED STATES CIRCUIT JUDGE NOMINATING COMMISSION: ITS MEMBERS, PROCEDURES AND CANDIDATES* (1980); Goldman, *Should There Be Affirmative Action for the Judiciary?*, 62 *JUDICATURE* 488 (1979).

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twenty-five judges for superior court and five judges for municipal court.

The same table also reveals a relationship between the importance of the jurisdiction of the courts and the proportion of women judges. Even on multi-judge courts, women find fewer places in the general than in the limited-jurisdiction courts. Below the court size of twenty-five, women do not exceed 3% on superior courts but reach 18% on municipal courts. No woman sits on a superior court with less than five judges. However, of the ten single-judge municipal courts, one court has a woman; of the ninety one-judge justice courts, twelve have a woman judge. Given a pool of eligible women, the size of the trial court in combination with its power and rank in the opportunity structure explains the proportion of women judges.

### *Court Size and Collegial Appellate Courts*

Table III shows the relationship between court size and female presence on federal appellate courts.<sup>18</sup> The percentage of women on appellate courts is slightly higher than on the trial courts, but this difference does not necessarily indicate more acceptance. Just one woman constitutes a substantial percentage of a court with five to nine seats. These percentages exaggerate

17.

Table II

Court Size and Women Judges: California in 1983

Number of Judges	GJ—Superior		LJ—Municipal		Rural LJ—Justice	
	N Courts	% Fem	N Courts	% fem	N Courts	% Fem
200 +	1	.11	0	—	0	—
50-199	1	.10	1	.27	0	—
25-49	5	.09	0	—	0	—
20-24	1	.00	3	.18	0	—
15-19	1	.00	2	.15	0	—
10-14	5	.03	7	.17	0	—
5-9	8	.02	19	.12	0	—
2-4	17	.00	43	.04	0	—
1	11	.00	10	.10	90	.03

Note: GJ = General Jurisdiction  
LJ = Limited Jurisdiction

Source: Compiled from data in ARNOLD, CALIFORNIA COURTS AND JUDGES HANDBOOK (1983 Supp.) [hereinafter cited as ARNOLD].

women's share in the judiciary.<sup>19</sup> The appellate percentages for each circuit are artifacts of small court size, while the trial percentages based upon a much larger number better reflect the contemporary acceptance of women as judges. Women hold about 9% of the federal appellate court seats in contrast to about 7.5% on the trial level; but the appellate percentage is still within the bounds of tokenism.<sup>20</sup>

Table IV shows the relationship between size of courts of last resort and the presence of women.<sup>21</sup> On state courts of last resort, there is now or has been a woman on 40% of the small

18.

Table III

Size of Federal Appellate Courts and Presence of Women, 1983

Court Size	N of Courts <sup>@</sup>	N with Woman Judge	N of Judges	N of Woman Judges	% Judges
4	1	0	4	0	0
8 to 10	6	3	55	3	5%
11 to 14	6	6	71	7	10%
23	1	1	23	3	13%
Total:	14	10	153	13	8.5%

@ Includes eleven circuits; D.C. and Federal Circuit; and Supreme Court.

Source: Court and judge lists in FEDERAL REPORTER (West ed. 1983).

19. The one woman supreme court justice in Rhode Island and the one in Utah, each on five-person courts, take 20% of the available seats, but are still a minority. Even in systems with none or few women at the trial level such as Mississippi, Maine, Kansas, Utah, a single woman may be present on the supreme court. The three women on the Ninth Circuit, each from a different state and therefore taking only one seat from the male eligibles in that state, take 13% of the positions. The one woman on the Tenth Circuit constitutes 12.5% of the eight-person bench; and the one woman on the U.S. Supreme Court holds 11% of the voting power. The one woman on the ten-person Third Circuit holds 10% and the one on the eleven-person Sixth Circuit 9% of the seats. The First Circuit, in which each of the four judges enjoys 25% of the court power, has never had a woman judge.

20. *Supra* note 7, Table I.

21.

Table IV

Size of State Courts of Last Resort and Presence of Women

Court Size	Number of Courts <sup>@</sup>	Number with Woman Judge Ever	% Courts
3 to 6	20	8	40%
7	24	17	71%
9	9	8	89%
Total:	53	33	62%

@ Includes two high courts in Texas and Oklahoma and the D.C. Court of Appeals.

Source: REGIONAL REPORTERS (West ed. 1920-1983).

courts with three to six seats. Women have gained a place on 71% of those courts with seven positions, and on 89% of those courts with nine positions. There is a clear relationship between the amount of voting power wielded per seat on collegial courts — one-third on the smallest and one-ninth on the largest — and the generosity of the gatekeepers in distributing the judgeships.

The collegial feature of the appellate level, in which every vote is equal in weight, allows for some integration without risk to the status quo. Admission of one woman to a group which deliberates and decides by consensus or by majority vote is relatively safe. Every court system has at least one collegial court at the top of the hierarchy where a woman can be placed without giving her too much authority. This argument applies even where the court handles cases in panels, since the court can meet *en banc* to reconsider the panel decision.

Size very clearly makes a difference in the willingness of appointing authorities to place a woman on a bench.<sup>22</sup> President Reagan's failure to nominate a woman to the circuit level during his 1981-1984 term may be understood as a court size problem.<sup>23</sup> The courts of appeals with no women are the smaller courts: the First Circuit with four seats, the Seventh and Eighth Circuits with nine seats, and the Fourth Circuit with ten seats.<sup>24</sup> He could place one woman on three of these courts without exceeding tokenism but if a second woman is placed on the other circuits, the female proportion would rise close to minority status. To date only a few collegial courts have two or more women sitting together.<sup>25</sup> Only one state, Minnesota, has two women on the court of last resort. These two may be considered the token Democratic woman and the token Republican woman.<sup>26</sup>

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22. Custom may also prevent a governor from choosing a justice from an outsider group; see Adomeit, *Selection by Seniority: How Much Longer Can a Custom Survive that Bars Blacks and Women from the Connecticut Supreme Court?*, 51 CONN. B.J. 295 (1977).

23. A more typical explanation for the background characteristics of judges is the ideological posture of the President formed by campaign promises and party platform commitments; see Goldman, *Reagan's Judicial Appointments at Mid-Term: Shaping the Bench in His Own Image*, 66 JUDICATURE 334, 347 (1983).

24. ANNUAL REPORT, *supra* note 8.

25. The federal courts are the Ninth Circuit (where a panel of three women sat at least once) and the D.C. Circuit. The state courts are Minnesota and the D.C. Court of Appeals.

26. Rosalie Wahl was appointed by a Democratic governor and M. Jeanne Coyne by

The small court systems are less likely to have a woman on their appellate courts than the larger court systems. The size of the court system also seems to explain the historical timing of the introduction of the first woman justice to that court. Before 1980, 57% of those court systems with more than 500 judges had experimented with a female member on the court of last resort; 41% of the systems with 250-500 judges; 31% of those with 50-250 judges; and only 18% of the small systems.<sup>27</sup>

### *The Single Executive in the Courts*

The position of chief judge stands out from the other judgeships as more visible and powerful.<sup>28</sup> Although for purposes of deciding cases, the chiefs have the same power as their peers, they enjoy considerable symbolic authority as leaders of the entire court system. In very large systems, such as the United States and California, the chief justice may affect public policy through administrative powers to direct the court bureaucracy, to chair court policy groups, and to assign judges to temporary service outside their own courts.

Of the thirty-two women who have ever sat on the highest state courts, four have served as chiefs.<sup>29</sup> Where the judges choose their own chief, as they do in seventeen states, women are present and therefore potentially available in Colorado, Michigan, Oklahoma, and Oregon.<sup>30</sup> In eleven states the chief

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a Republican governor. MINNESOTA BLUEBOOKS (J. Anderson Growe, ed. 1978, 1983).

27. Analysis of data on number of judgeships per state from BOOK OF THE STATES, *supra* note 6, and the presence of women justices from West's *Regional Reporters*.

28. No woman has yet served as Chief Justice of the United States. However, Florence Allen reached the position of Chief Judge of the Sixth Circuit by seniority before her retirement. On the district level, Cornelia Kennedy was Chief Judge in Detroit and Constance Motley is now Chief Judge in New York City. Both are large federal trial courts which require strong management. Barbara Crabb became Chief Judge in Madison (Wisconsin) when the court size grew from one to two judges; her presence on such a small court is in itself unusual. See court and judge lists in West's *Federal Reporters* in 1959, 1978, and 1983, which identify chief judges.

29. BOOK OF THE STATES, *supra* note 6.

30. In only two states with this form of selection have women judges been chosen. Fellow justices selected Lorna Lockwood in Arizona and Mary Coleman in Michigan. The selection laws are reported annually in the BOOK OF THE STATES, *supra* note 6; and the names of the judges are from author's data file on women judges.

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takes a turn by seniority or rotation; and women now sitting will probably attain status as chiefs in Kansas, Mississippi, Utah, Washington, and Wisconsin. The chief justiceship is a separate position on the U.S. Supreme Court and in twenty-three states and the District of Columbia. Susie Sharp of North Carolina is the only woman elected chief by voters. Rose Bird of California is the only woman appointed to the chief's seat by a governor.<sup>31</sup>

Metropolitan trial courts also have chief judges who enjoy power and prerequisites greater than those of the other trial judges. In the federal system, the judges take the chief judge role in order of seniority. In many state courts, however, the chief is appointed by the chief justice or elected by peers. Very few women have served in this capacity in trial courts. The principle is the same as the inclusion of women in collegial legislative bodies and the exclusion of women from executive offices.

## B. THE OPPORTUNITY STRUCTURE AND ITS GATEKEEPERS

An opportunity structure is a hierarchical set of positions in which any person ambitious for an important office usually serves consecutively, becoming visible and gaining credentials in each lower office to earn eligibility for higher office.<sup>32</sup> The oppor-

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31. Bird came from the cabinet and not from the judiciary, while the other women chiefs moved up from their state trial courts. Bird has faced strong resistance to her occupancy of an office which carries exceptional power and prestige in comparison to that enjoyed by the other women chiefs. Bird's vigorous exercise of her authority has stimulated the opposition of groups who do not agree with her views on judicial administration and on substantive policy matters. However, it has also stirred the jealousies of those available for the position. When men have achieved this prized position in the past, the game of skill and chance was considered over until a natural vacancy reopened the contest. But the woman chief has been treated as if she won the game unfairly, because many male judges and lawyers did (do) not see women as legitimate contestants for such a high position. Perhaps a woman who had earned her credentials on the judicial ladder would have suffered less overt and persistent opposition. See Hepperle, Book Review, 14 *GOLDEN GATE U.L. REV.* 505 (1984) (reviewing B. MEDSGER, *FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS*).

32. In *AMBITION AND POLITICS*, the author develops the thesis that opportunity structures exist for high public offices and describes, by state, the patterns of advancement through public offices to the state governor and U.S. senator positions. See J. SCHLESINGER, *AMBITION AND POLITICS* (1966). Patterns of advancement have also been identified for judges. See H. JACOB, *JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS* (1972) (state judges); and J. SCHMIDHAUSER, *JUDGES AND JUSTICES* (1979) (federal judges). The contemporary opportunity structure for women in federal judgeships is described in Martin, *Women on the Federal Bench: A Comparative Profile*, 65 *JUDICATURE* 306 (1982); and in Slotnick, *The Paths to the Federal Bench: Gender, Race*

tunity structure for a prestigious judicial office can be visualized as two parallel ladders, attached at every rung, one ladder consisting of private law jobs and the other of public law jobs. The largest number of positions are at the bottom of the ladders; every year there are thousands of new law school students and bar admittees. These entry positions are almost mandatory to achieve any of the higher positions, which are fewer in number at every step. It is not necessary, however, to serve in the position of trial judge to reach the position of Supreme Court Justice. Some judges have followed a public office route, taking positions in the prosecutor's office or the state attorney-general's office before entering and moving up the court hierarchy.<sup>33</sup> Other judges have taken professorships in law schools and partnerships in private law firms before moving to important judgeships.<sup>34</sup>

There is a "fast track" to the prestigious courts which is narrower and more difficult to follow than the broad track to the lesser courts. The backgrounds and professional experiences of members of the U.S. Supreme Court fit a narrow spectrum of the range of possibilities.<sup>35</sup> The first woman on the Supreme Court fit the male pattern of elite university and law school training and partisan experience, but she had missed those opportunities barred to women during her professional life, such as the Rhodes scholarship, the U.S. Supreme Court clerkship, the U.S. Department of Justice office, and the elite law firm partnership.<sup>36</sup> There is some evidence that the federal circuit judges follow a faster track than their colleagues on the district level.<sup>37</sup> Like the U.S. Supreme Court Justices, the circuit judges are more likely than the district judges to have attended elite law schools, to have earned honors there, to have accepted impor-

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*and Judicial Recruitment Variation*, 67 JUDICATURE 370 (1984).

33. See, e.g., authority cited *supra* note 32. Information on judges' careers is available in biographical directories. See, e.g., DIRECTORY OF AMERICAN JUDGES (Liebman ed. 1955) and THE AMERICAN BENCH (Reinlee ed. 1979).

34. See, e.g., authority cited *supra* notes 32, 33.

35. SCHMIDHAUSER, *supra* note 32, at 44-99.

36. Cook, *Women as Supreme Court Candidates: From Florence Allen to Sandra O'Connor*, 65 JUDICATURE 314, 316-20 (1982).

37. Slotnick, *Federal Trial and Appellate Judges: How Do They Differ?*, 36 W. POL. Q. 570, 573-76 (December 1983).

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tant clerkships, to have high status law practices, and to write and speak for elite audiences.<sup>38</sup> The women appointed to the circuit level by President Carter had not followed that same pattern.<sup>39</sup> Exceptions to the customary expectations for career experience were made for the first and token women on these courts. We do not yet know whether the entry of women will change the informal rules for male applicants or whether future women appointees will be required to show career preparations more similar to the historical pattern set by men.

There are gatekeeping arrangements at every level of the opportunity structure to provide and apply standards in selecting among candidates. The standards are not by any means ideal Weberian bureaucratic standards,<sup>40</sup> but rather describe what the incumbents are like. The gatekeeping process produces more of the same kind in education, experience, personality, and family/friendship networks. Since women were excluded entirely from the profession of law until 1869, it has been very difficult for women to present themselves as viable candidates at any entry point from law school admission to federal appellate vacancies.

### *Entering the Opportunity Structure: Training for the Bar*

Since the formal or informal qualification for the prestigious judgeships is membership in a state bar, entering the opportunity structure for the judiciary requires bar admission. During the nineteenth century when the few existing law schools were not able to produce the number of lawyers needed by society, preparation for the bar was unstructured and decentralized.<sup>41</sup>

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38. *Id.*

39. Martin, *supra* note 32.

40. Max Weber conceptualizes a "rational" bureaucratic judiciary, chosen for competence on the basis of blind tests or credentials and independent of the political branches of government. In the opposite ideal model the judges are not independent of politicians and are selected for characteristics which do not guarantee task performance such as family ties, political affiliation, or class membership. MAX WEBER: *ESSAYS IN SOCIOLOGY* (1958); SCHMIDHAUSER, *supra* note 32 at 2-9, 42-43.

41. Histories of the legal profession and of the development of law schools include J. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); A. BLAUSTEIN & C. PORTER, *THE AMERICAN LAWYER* (1954); A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* (1965); R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953); and C. WARREN, *A HISTORY OF THE AMERICAN BAR* (1911). See generally Weisberg, *Barred from the Bar: Women and Legal Education in the United States, 1870-1890*, 28 J. LEGAL EDUC. 485 (No. 4 1977) for a description of women's admission to



An individual could "read law" with a practicing lawyer or a judge and take an exam made up by the local judge. The standards varied according to the local gatekeepers, but generally did not place onerous demands upon the applicant's time, money, or ability. Women could prepare for the bar in a protected, socially approved environment with their fathers or husbands. The first woman known to have won admission to a state bar, Arabella Mansfield in Iowa in 1869, studied law in her brother's office and passed the bar with her husband.<sup>42</sup> Her legal career also ended at this entry level. Even with the necessary credential, women lawyers in the last century had limited opportunities to appear in court, to find clients, to join law firms, or to attend bar association meetings.

In the twentieth century law schools have gradually come to monopolize the training of potential lawyers and control over entry to the opportunity structure has come into the hands of admissions committees at law schools. As the generalist gatekeepers in every county are replaced by specialists, law school professors, and administrators, the formerly broad-based entry points have narrowed. In the 1870's, very soon after women discovered that they could prepare for this profession with appropriate privacy in their own communities, the American Bar Association, founded in 1878, began its efforts to require a law degree for bar admission.<sup>43</sup> Women then had to enter the public world of higher education which, with few exceptions, excluded women, in order to earn a degree before taking the bar.

Due to the growing prestige of law schools in this century, in most states a law degree became an informal requirement for judgeships before it became a formal requirement for law practitioners. By excluding women or setting a low quota for their admission, elite law schools cut off women from opportunities for clerkships with appellate judges and from associate positions with elite firms. The revision in admissions policies of law

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law school and the bar.

42. Thomas, Arabella Mansfield, in *NOTABLE AMERICAN WOMEN, 1607-1950*, VOL. II at 492-93 (E. James ed. 1971).

43. Fossum, *Law Professors: A Profile of the Teaching Branch of Legal Profession*, 3 *AM. B. FOUND. RESEARCH J.* 501, 502 (1980).

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schools since the 1960's has been nothing short of revolutionary. As Table V shows,<sup>44</sup> from 1971 to 1982 the female share of approved law school seats increased four-fold from less than one-tenth to over one-third. By 1985 the percentage of women law students nationally may reach the competitive level of 40%. For the first time in American history there will soon be enough women with law degrees to take more than a token proportion of the judgeships.

From 1920 through 1930 the percentage of women in graduating classes of approved law schools was 2.8% and of non-approved law schools was 6.8%.<sup>45</sup> A degree received from a night or part-time law school, which accepted women's tuition with the same alacrity as men's, was a weaker investment in future legal opportunities than a degree from a better school. Yet women had no option but to go where they were welcome. The same form of discrimination continues at a different level into the present; approved non-elite schools accept women in larger proportions than do elite schools. By the early 1980's the elite law schools were just exceeding tokenism for women students,<sup>46</sup>

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Table V

Comparison of Women's Proportion of Law Classes and Supreme Court Clerkships

Date	% Women		
	Approved Law Schools	Supreme Court Clerks	Law Professors
1971	9.4	3.0	2.9
1972	12.0	9.1	3.7
1973	15.8	3.0	4.7
1974	19.7	12.1	5.9
1975	22.9	9.1	6.9
1976	25.5	9.1	7.5
1977	27.4	21.2	8.6
1978	30.3	15.6	9.5
1979	31.5	18.8	10.5
1980	33.5	9.4	11.0
1981	35.0	25.0	—
1982	37.5	17.6	12.7
1983	—	21.2	13.5

Sources: The Docket Sheet 16 (January 1980); Nat'l L.J., Aug. 4, 1980, at 3, col. 1; Nat'l L.J., Aug. 10, 1981, at 3, col. 2; Nat'l L.J., Jul. 9, 1982, at 3, col. 1; Nat'l L.J., Aug. 15, 1983, at 7, col. 1; Nat'l L.J., Jan. 9, 1984, at 1, col. 1; Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RESEARCH J. 903, 906. EPSTEIN, *supra* note 7, at 246.

45. HUMMER, *supra* note 5, at 148, Table 4.

46. EPSTEIN, *supra* note 7, at 58, Table 3.2.

while some approved non-elite schools were close to equality.<sup>47</sup>

Of the fifteen law schools ranked as elite by three or more evaluative reports, all now admit more than a token proportion of women, although only two give women competitive status. Those two are Northwestern with 45% female law students in 1983 and New York University with 47%.<sup>48</sup> Twelve of the fifteen elite law schools admit less than the national average percentage of women.<sup>49</sup>

As compared with the percentages of women admitted by non-elite schools in the same geographical area and with a similar size student body, the non-elite schools have a higher percentage in all but two cases. Eight of the non-elite schools pro-

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Table VI

## Admission of Women by Elite and Non-Elite Law Schools, 1982

Elite			Non-Elite		
Law Schools@	N	Fem %	Matching Schools	N	Fem %
Harvard	1782	29.3	Boston	1286	38.8
Chicago	515	30.1	DePaul	1100	38.9
Michigan	1150	31.4	Wayne State	965	41.5
Columbia	955	31.6	Brooklyn	1292	44.7
Stanford	520	31.7	Golden Gate	848	46.9
Duke	555	33.0	Wake Forest	504	31.9
Yale	620	33.4	Bridgeport	740	40.5
Pennsylvania	700	34.1	Temple	1282	43.0
Virginia	1145	34.6	American	1267	39.5
Cornell	530	34.7	Albany	709	39.1
UCLA	1103	36.9	Southwestern	1500	39.0
Texas	1600	37.1	Houston	1174	43.1
UC-Berkeley	926	37.7	Santa Clara	932	43.2
Northwestern	575	45.0	Loyola	716	45.8
New York U	1115	47.1	St. John's	1177	34.9

@ As defined by Slotnick, *supra* note 37, at 574 n.6.

Source: PRE-LAW HANDBOOK, *supra* note 3.

48. The acceptance of women students by NYU is not surprising as the law school established a reputation for its support of women before 1920. The first woman to reach a prestigious position in the judiciary, Florence Allen, who served on the Ohio Supreme Court and the Sixth Circuit, left the University of Chicago Law School after experiencing discrimination there and later recalled her good experience at NYU. F. ALLEN, *TO DO JUSTLY* 24-25 (1956). See also EPSTEIN, *supra* note 7, at 51; and C. FEINMAN, *WOMEN IN THE CRIMINAL JUSTICE SYSTEM* 94-95 (1980).

49. The national average, calculated from data on the accredited schools in PRE-LAW HANDBOOK, *supra* note 3, was 37.5%.

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vide women with more than 40% of the available places. The average difference between the two groups of schools is 5.5%. This difference means that more men than women will have an advantage in moving onto the fast track of the legal profession, into the important apprenticeships as judge clerks or associates in elite firms, where lawyers win their credentials to enter the law jobs with prestige, power and income. Graduation from a parochial law school sets the student on the path to trial judgeship; but graduation from an elite school is a credential which facilitates entry to the appellate bench.

### *Clerking for the Justices*

After graduation from an elite law school, the next position on the fast track is a clerkship on a prestigious bench. Until recently, U.S. Supreme Court Justices selected their clerks among law journal editors and honor students. Now the pool of eligibles draws from the law clerks serving on other prestigious courts, who were students the year before.<sup>50</sup> By changing the direction of their recruiting, the Justices have added another step to the opportunity structure. Making the ladder longer provides the Justices with more experienced clerks but requires the potential applicant to please another mentor. The prospective clerk now needs a supportive and influential federal or state judge as well as law professor to receive consideration. For women who, against the odds, have matriculated and made their mark in an elite law school, this new practice means finding a prestigious judge without prejudice and with a positive inclination toward women clerks.<sup>51</sup>

In finding their clerks, the Justices appear to place particular confidence in certain circuits and judges. Over the five terms 1979 to 1983, the District of Columbia and Second Circuits pro-

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50. The change in the practice of the Justices has been widely noted, and the new practice is exemplified in the careers of new law clerks as described in the *National Law Journal* articles, *supra* note 44.

51. The Supreme Court Justices have made the "opportunity structure" or ladder to a clerkship one step longer by recruiting from other judges' clerks, instead of directly from law school senior classes. Therefore, the federal circuit judges, and occasionally federal district judges and state supreme court justices, act as gatekeepers who establish the pool of eligibles for U.S. Supreme Court clerkships.

vided more than half the clerks for the Supreme Court.<sup>52</sup> The circuits in which federal judges sponsored women for more than a token proportion of their selected clerks are the Seventh (40% female), the Ninth (30%), and the Fourth (20%).<sup>53</sup> The Second, Third, Fifth, and District of Columbia Circuits provided token proportions of women clerks.<sup>54</sup> Several judges have successfully recommended two women as clerks for the Supreme Court.<sup>55</sup> Three-fourths of the women circuit judges and one-third of the men who mentored clerks for the Supreme Court during this period sent up a least one woman.<sup>56</sup>

The total number of women clerks, beginning with the first one who served Justice Douglas in 1944, has been sixty-one through the 1983 term.<sup>57</sup> The total number of male clerks ever at the Supreme Court is estimated at more than 1,500.<sup>58</sup> The number of women clerks per term was one in 1944, 1966, 1968, 1971, and 1973; three or four in 1972, 1974, 1975, and 1976.<sup>59</sup> Since 1977 there have been five to eight per term.<sup>60</sup> The highest percentage (25%) was in 1981, by happenstance the year Justice O'Connor joined the Court.<sup>61</sup> Only three terms exceeded tokenism, as shown on Table V<sup>62</sup> — 1977, 1981, and 1983. The propor-

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52. Analysis of data reported by the *National Law Journal*. Table V, *supra* note 44.

53. *Id.*

54. *Id.*

55. Wilfred Feinberg and James Oakes on the Second Circuit; Collins Seitz on the Third; John Butzner on the Fourth; Skelly Wright and Abner Mikva on the District of Columbia Circuit; and Charles Renfrew on the district bench in San Francisco. Three women judges have sponsored women clerks—Shirley Hufstедler for Justice Marshall; Betty Fletcher for Justice Blackmun; and Ruth Ginsburg for Justice Stewart. Judge Amalya Kearse provided two male clerks. See Table V, *supra* note 44.

56. Nat'l L.J., Aug. 4, 1980, at 3, col. 1; NAT'L L.J., Aug. 10, 1981, at 3, col. 2; Nat'l L.J., Jul. 19, 1982, at 3, col. 1; Nat'l L.J., Aug. 15, 1983, at 7, col. 1.

57. Author's data file on women law clerks has been constructed from information reported in Table V, *supra* note 44.

58. This approximation is based upon the number of Justices and the number of clerks allotted since the first male law clerk served Justice Horace Gray in 1882. Congress provided salaries for a law clerk for each Justice in 1886. The Associate Justices may now select four law clerks per term, although not all choose to do so. H. ABRAHAM, *THE JUDICIAL PROCESS* 257 (4th ed. 1980).

59. Table V, *supra* note 44.

60. *Id.*

61. Percentages calculated from data in file, *supra* note 57.

62. See Table V, *supra* note 44.

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tion of women law clerks on the Supreme Court has not increased in relation to the proportion of women law graduates. Even taking into account the lower percentage of women finishing at the elite schools from which clerks are drawn, there has clearly been some barrier to the fair consideration of available women.

Unlike the more formal process of selecting students, the screening of prospective clerks is highly personal and subjective, as managed by the Justice or chosen surrogates. Besides Justice O'Connor, only Justices Douglas, Marshall, and Blackmun ever selected two women for the same term (out of the four clerks which most Justices use).<sup>63</sup> None of the male Justices average one woman clerk per term for their respective tenures, although Justice Marshall comes close.<sup>64</sup> Justices Blackmun and White average one woman every two terms.<sup>65</sup> In contrast, Justice O'Connor selected two women for the 1981 and 1982 terms and one woman for the 1983 term.<sup>66</sup> The gatekeepers for the law clerk positions are the Justices themselves or the law professor, judge, or small group of lawyers in whom they have personal confidence. The three women hired for the 1980 term attributed the underrepresentation of women to covert prejudices institutionalized by the system of channeling candidates to the Justices.<sup>67</sup> Their complaint was against the gatekeepers.

### *Law Professors in the Opportunity Structure*

In the United States there is a direct link between clerkships and law faculty positions. Some women who served as Supreme Court clerks moved from there into teaching at elite law schools.<sup>68</sup> About the same proportion of the female as the male clerks now become professors, but because of the small share of the positions at one step of the opportunity track such as the

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Marcus, *Few Women at Highest Court*, Nat'l L.J., Aug. 4, 1980, at 3, col. 1.

68. Martha Field (1968 term) to Harvard; Barbara Underwood (1971 term) to Yale; Virginia Kerr (1978 term) to Pennsylvania; Mary Ellen Becker (1981 term) to Chicago; Rochelle Dreyfuss (1982 term) to NYU. The *National Law Journal* also reports on the first jobs accepted by law clerks. See, e.g., articles listed *supra* note 44.

Supreme Court clerkship, only a small pool of eligibles for the next step on the law faculty is created. The personalized gatekeeping for the Supreme Court clerk contrasts to the formal procedures of search and screening for new faculty under the pressure of conformance to Title IX guidelines and procedures.

The proportion of women law professors is still at the token level. Table V<sup>69</sup> shows that the percentage of women on law faculties remains below 20% and that every year since 1971 the percentage has been one-third that of women law students. The percentage of women professors has increased in relation to the percentage of women in practice, but with the end of the period of expanding student bodies and new law schools, the percentage of women law professors is slipping behind as the percentage of practitioners continues to increase.

In 1950 five women and in 1960 eleven women were on tenure track at approved law schools, less than 1% of the total number of tenure track professors. By 1970 the number of women had increased five-fold and the percentage just exceeded 2%; by 1979 it had reached 10.5%<sup>70</sup> The elite law schools have fewer women on tenure track than the non-elite schools. In 1976, when the national average of female law faculty was 7.5%, of ten elite schools only New York University matched or exceeded that proportion.<sup>71</sup> In 1980, when the national average was 11%, NYU was still the only elite school exceeding the norm. By 1980 Chicago had chosen its first full-time woman professor, but Virginia and Pennsylvania did not increase their percentage of female faculty between 1974 and 1979.<sup>72</sup>

The new and progressive schools just building their faculties in the 1970's hired more women than would be expected given the percentage of women in the bar. As late as 1974, one-fourth

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69. *Supra* note 44.

70. EPSTEIN, *supra* note 7, at 219, Table 12.1, reports 2.2% for 1970. Weisberg, *Women in Law School Teaching: Problems and Progress*, 30 J. LEGAL EDUC. 226, 230, Table 1 (1979). Data reported in ASSOCIATION OF AMERICAN LAW SCHOOLS, *DIRECTORY OF LAW TEACHERS* (1980) utilized to calculate 1980 percentage.

71. EPSTEIN, *supra* note 7, at 223, Table 12.2.

72. *Id.*

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of law schools had all-male faculty; another fourth had a token woman.<sup>73</sup> The percentage of law faculties with no women was 65% in 1970, 10% in 1976, and 2% in 1983; the percentage with six or more women was zero in 1970, 5% in 1976, and 17% in 1983.<sup>74</sup> In 1979, 17% of the law schools had one woman and 80% had more than one woman.<sup>75</sup> The period of exclusion was almost at an end and the period of tokenism well established.<sup>76</sup>

The position of dean of a law school carries somewhat more honor and responsibility than the professorship. The number of women deans throughout history can easily be counted: Dorothy Nelson, University of Southern California; Judith Younger, Syracuse, now law professor at Cornell; Jean C. Cahn, Antioch; Sonia Mentschikoff, University of Miami; Judith G. McKelvey, Golden Gate; Susan W. Prager, UCLA; and Janet A. Johnson, Pace.<sup>77</sup> Only one of the law schools headed by a woman, UCLA, is on the list of fifteen elite law schools. The visibility of a law school dean means that when a public official is looking for a woman to appoint, the name of a woman dean of the appropriate political party and age will probably go on the screening list.<sup>78</sup>

The presence of women as law deans or professors at the elite school may improve the chances of women students to enter the fast legal track. These women may participate in the making of policy on admissions, in the choice of new students, in the advising of law reviews, and in the recommendation of graduates for clerkships and associate positions. They are likely to propose women students who might not be as visible to male faculty for these opportunities. Women students in turn demand

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73. Fossum, *Women Law Professors*, 3 AM. B. FOUND. RESEARCH J. 903, 905-6 (1980).

74. Lauter, *Gender Gap Gets Wider on Law Faculties*, Nat'l L.J., Jan. 9, 1984, at 1, col. 4.

75. Fossum, *supra* note 73, at 913.

76. EPSTEIN, *supra* note 7, at 222.

77. Dorothy Nelson is now on the Ninth Circuit. Janet A. Johnson, however, came from the Iowa intermediate court of appeals to the deanship. EPSTEIN, *supra* note 7, at 225; and Pace University Law School Bulletin, (1983-84).

78. Dorothy Nelson was widely considered to be a candidate for the Stewart vacancy on the United States Supreme Court. However, as an "independent" who had been placed on the Ninth Circuit by President Carter, her ideological credentials were not as good as Justice O'Connor's. Most likely Prager, McKelvey, and Pow will be considered for circuit positions in the future.



more women faculty to provide role models and mentors. Since most of the judges on the prestigious courts have graduated from elite law schools, it is particularly important for women to play gatekeeping roles at the elite schools to monitor the fair treatment of women applicants and students, and thus create a pool of eligibles for future consideration for the prestigious courts.

### *Law Firms*

The new admissions and placement practices of law schools, reinforced by Titles VII and IX of The Civil Rights Act of 1964, as revised in 1972, are beginning to have an impact upon the sex ratios of public and private law offices.<sup>79</sup> Law schools, which select one-third of their student body every year, can change their sex composition quickly; in contrast, it takes a generation or more to equalize the sex ratio in the personnel of an organization with long tenure and little turnover. Just as women as "outsiders" first found places at unapproved and less elite law schools, they find opportunities to practice law in the less lucrative and visible law areas. Therefore, the impact of women law graduates is first found in the public defender and legal aid offices and other government positions with rapid turnover of young lawyers.<sup>80</sup> In the major law firms young women may join the associate rank, where the seven year up-or-out policy allows for regular recruiting. But women are having a more difficult time reaching and integrating at the level of partner in the top law firms.

In the fifty largest law firms in the country in 1981, women claimed 24% of the associate positions.<sup>81</sup> This percentage fit the law class sex ratio of five years earlier.<sup>82</sup> Women made up 2.8% of the total number of partners in these fifty law firms in 1981, a

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79. In her book, Epstein discusses the impact of congressional legislation and the entry of women into government practice, law practice, and corporate practice. EPSTEIN, *supra* note 7, at 94-95, 112-29, 175-218.

80. *Id.* at 99, 112-19.

81. *National Law Journal Survey of Black and Women Lawyers*, Nat'l L.J., Apr. 20, 1981, at 11, col. 1-4.

82. EPSTEIN, *supra* note 7, at 53, Table 3.1.

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percentage similar to the number of women in practice in 1955.<sup>83</sup> The proportion of partners was slightly higher (4.1%) in Washington, D.C. where the largest number of women lawyers is concentrated.<sup>84</sup> The connection between graduation from an elite law school and an invitation to join a prestigious law firm is not as close for women as for men.<sup>85</sup> Women who have the necessary credential are not recruited as seriously as men.<sup>86</sup> Of Harvard law school graduates from 1974 to 1981, only 1% of the women graduates had become partners by 1983, in contrast to 25% of the men graduates.<sup>87</sup>

Movement from one step to the next in the opportunity structure is much more difficult for women than men for two reasons — the number of women chosen and trained at one step provides a small pool of eligibles for the gatekeepers at the next step, and the actual minority status of women combines with their cultural invisibility as viable candidates. For instance, a partnership in a well-established law firm is an important credential for those ambitious for a prestigious bench. The gatekeepers who choose only male or mostly male partners in private firms directly affect the opportunities of women for judicial office in a negative way.

### *Trial Judge Positions*

If women had equal opportunity for the positions which require a law degree, then one would expect the same percentage of women judges as women lawyers. One would also expect that the sex integration of the bar would be followed within a reasonable period of time by the sex integration of the courts. The gatekeepers for judgeships, however, kept their barriers high long after women penetrated the bar. Table VII illustrates the time intervals from female eligibility to first presence on the

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83. *Id.*; Table I, *supra* note 7.

84. EPSTEIN, *supra* note 7, at 53; Table I, *supra* note 7.

85. EPSTEIN, *supra* note 7, at 94-95, 100, 107, 221.

86. *Id.* at 184, 186-87.

87. News Note Column, NOW (National Organization for Women) News 5 (September 1981) (on file with author at University of Wisconsin-Milwaukee).

bench.<sup>88</sup> The denial to women of the opportunity to take the step from bar to bench is dramatically illustrated by the 104 year interval between Mansfield's admission in Iowa and the presence of the first woman trial judge in Iowa.<sup>89</sup> The longest wait for women to take a major trial judgeship after admission to the bar was 110 years in Missouri; the average period for all states is half a century.<sup>90</sup>

For women and men, entrance to the bar was a necessary qualification for important judgeships. But the unwritten qualification for a judgeship was that the applicant be male. If women had received fair consideration, then there should be a relationship between the dates of admission to the bar by the states and the dates of first female presence on a major trial court.<sup>91</sup> The insignificant relationship between the dates ( $r=.31$ ) means that the dates of entry into the opportunity structure

88.

Table VII

Time Intervals from Female Eligibility to First Presence on Bench

Number of States &amp; D.C.

<u>Time Interval</u>	<u>Bar to Trial Bench</u>	<u>Bar to Appellate Bench</u>	<u>Trial to Appellate Bench</u>
0 - 9 Years	0	0	5
10 - 19	4	0	5
20 - 29	3	0	7
30 - 39	6	0	5
40 - 49	14	1	4
50 - 59	8	5	6
60 - 69	4	5	1
70 - 79	4	3	0
80 - 89	4	5	0
90 - 99	2	7	0
100 - +	2	7	0
Not Yet	0	18	18
Average Interval	52 years	85 years	31 years

Source: Time intervals calculated from dates of admission of first woman to state bar, in Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 206 at 290, Table 1 (1982); and dates of selection of women to trial and appellate courts in Cook (1984), *supra* note 3.

89. Berkson, *supra* note 88, at 290, Table 1.90. Table VII, *supra* note 88.91. *Id.*

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provide only a small part (10%) of the explanation for the delay—generations later—until women finally reached the state courts.

*Prestigious State Courts: Court of Last Resort*

The period of time which elapsed in each state from women's entrance into the opportunity structure through the bar to their presence on the state's highest court provides a measure of the resistance of appellate level gatekeepers. The average time span from state bar to state supreme court was eighty-five years;<sup>92</sup> the longest was 111 years in Maine.<sup>93</sup> The eighteen states which have never had a woman at this level are requiring even longer waiting periods of their women lawyers.<sup>94</sup> In eight of these eighteen states, women in the legal profession had already waited eighty or more years for the trial bench, but have not gained the appellate level — Missouri, Montana, Nebraska, New Hampshire, South Dakota, Virginia, and Wyoming.<sup>95</sup>

The progress of women as a class through the opportunity structure is very similar to the successive position-holding of individuals. One or more women have served as a state trial judge in every state which has accepted a woman on its supreme court.<sup>96</sup> The average time lag between the presence of women on the trial level and the appellate level is thirty years.<sup>97</sup> Pennsylvania provides a typical example: after the first woman was admitted to the bar, an interval of forty-seven years elapsed before a woman served on a minor court, fifty-eight years until a major trial court, and seventy-eight years until the appellate bench.<sup>98</sup>

The access of women to the highest court is predictable from women's presence on the trial court. The willingness of bar gatekeepers to admit women did not influence the gatekeepers at the trial level, as was demonstrated above, but entry to the trial court does improve women's chances for elevation. The

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92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

dates of women's first presence on state trial courts correlate with the dates of women's first presence on the supreme court ( $r=.58$ ), which means that one-third of the explanation for women's success rests with the pool of eligibles.

A few states excluded women from their courts until the late 1970's when women won places on the major trial and appellate levels in quick succession.<sup>99</sup> The same woman was quickly elevated from the trial to the supreme court in Kansas, Utah and Washington states.<sup>100</sup>

### *Prestigious Federal Courts*

Admission to the state bar is a prerequisite for selection to the federal as well as the state bench, but there is little relationship between the dates when women first join the state bar and claim a federal court judgeship. Of the twenty-three states and the District of Columbia with women on the federal benches, eight (33%) had women judges on the federal bench before a woman reached the state's prestigious level.<sup>101</sup> Five states with female federal judges — Georgia, Illinois, Louisiana, Tennessee and West Virginia — still do not have women on their state high courts.<sup>102</sup>

In those states where women showed their competence on state benches before winning the more prestigious federal posts, the longest waiting period was twenty-seven years.<sup>103</sup> The first serious woman candidate for the federal bench, Mabel Walker Willebrandt, worked assiduously from 1923 through the 1930's for a district seat in California.<sup>104</sup> President Harding, before his

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99. These states include Connecticut, Indiana, Iowa, Kansas, Maine, Minnesota, New Mexico, Utah, Washington, Wisconsin, and Washington, D.C. See Cook (1984), *supra* note 3.

100. Cook (1984), *supra* note 3.

101. See *infra* Appendix 1.

102. See *infra* Appendix 1.

103. In Pennsylvania Judge Alpern went on the supreme court for a short tenure in 1961, and Norma Shapiro became the first federal judge in 1978. See *infra* Appendix 1.

104. BROWN, MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY AND LAW 109-16, 216-18 (1984).

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last trip to the west coast, had almost been persuaded by women leaders of his party to show women appropriate recognition before the 1924 election. However, his successor, President Coolidge, did not feel that the contributions of women to the party justified a federal judgeship.<sup>105</sup> It was not until 1950 that President Truman rewarded Burnita Matthews with a district judgeship for the contributions she had made thirty years earlier in the suffrage movement.<sup>106</sup>

Only three women have held prestigious state and federal positions in succession, thus using their credentials at one level of the opportunity structure to move to the next level.<sup>107</sup> About half of the women on federal courts first served on the less important state intermediate or trial courts, and inside the federal hierarchy, only three women have been elevated.<sup>108</sup> The pool of women at the district level was too small prior to the Carter administration to provide any competition to the numerous male candidates for circuit level vacancies. With seniority accumulated since 1980, the Carter appointees will be available for elevation by the next Democratic president. President Reagan, with no omnibus bill as an impetus, has chosen too few women for federal district positions to create a pool of Republican eligibles for elevation to the circuit bench.

### *The Opportunity Structure in California*

A more detailed analysis of the movement of women lawyers through the California state courts and their passage into the

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105. *Id.*

106. Cook (1978), *supra* note 3, at 85.

107. Florence Allen left the Ohio Supreme Court to accept President Roosevelt's appointment to the Sixth Circuit in 1934, and Elsjane Roy, daughter of a federal judge retired from the bench she joined, served on the Arkansas Supreme Court before taking the district bench in 1977. Patricia Boyle moved in the opposite direction in 1983, from the district bench in Detroit to the Michigan Supreme Court. *See infra* Appendix 1. Data from author's files and *THE AMERICAN BENCH*, *supra* note 33.

108. Barbara Crabb was elevated from magistrate to district court in Wisconsin; Cynthia Hall from tax court to district court in Los Angeles; and Cornelia Kennedy from district court in Detroit to the Sixth Circuit. *See infra* Appendix 1; List of U.S. Magistrates from Federal Judicial Center, Washington D.C.; tax court judges are listed in *Federal Tax Court Reporters*.



have been elevated inside the hierarchy.<sup>112</sup> This pattern is stronger for women; over 70% proved their competence on the minor courts before reaching the major trial courts.<sup>113</sup>

The municipal bench is the starting point for the judicial careers of California women, while a larger proportion of men begin at the next level.<sup>114</sup> For 80% of the women, the first judicial position after preparation in some kind of law job — private practice, government service, or a law faculty — was at the limited jurisdiction level.<sup>115</sup> A small proportion (12%) with more experience at the bar went directly to superior court.<sup>116</sup> Over one-third of the women inferior court judges succeeded in moving up to superior court, but none has gone directly to an appellate court. Only one-sixth of the women who reach superior court go higher inside the state system.<sup>117</sup> All the women lawyers on California's intermediate appeals courts in 1983 had served an apprenticeship in the courts below.<sup>118</sup> The one woman who serves on the California Supreme Court was selected by the governor from his cabinet, a political route directly into the court of last resort which is not typical for women on the highest courts of other states.<sup>119</sup>

The federal courts located in California have drawn half their women judges from law practice and half from state courts.<sup>120</sup> President Carter moved two women directly from the state municipal bench to the federal trial bench,<sup>121</sup> jumping them across superior court where most male candidates are found. The small pool of eligibles at the appropriate level forced

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112. *Id.* at 205, Table 9-2.

113. Analysis of data on women judges' career patterns from biographies in ARNOLD, *supra* note 17.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. Nineteen or 60% of all women state justices moved up from lower courts. In addition to Bird only two others, in Colorado and Pennsylvania, or 9% altogether had political backgrounds. See Appendix 1. Biographical information from WHO'S WHO IN AMERICAN LAW (Marqui's Who's Who, Inc. 2d. Ed. 1979.) and THE AMERICAN BENCH, *supra* note 33.

120. See Figure 1, *supra* note 109.

121. Martin, *Women on the Federal Bench: A Comparative Profile* 65 JUDICATURE 306-13 (1982). These two women are Judith Keys and Marilyn Patel. See *infra* Appendix 1 and ARNOLD, *supra* note 17.



the gatekeeper (President Carter), who was favorable to affirmative action appointments for women, to ignore some traditional standards, just as President Reagan did later in his selection of Justice O'Connor.

*Measuring Underrepresentation of Women in the Opportunity Structure*

Women found a place on the non-prestigious courts much earlier than on the prestigious courts. Table VIII<sup>122</sup> shows that before 1930 thirteen states had seated women on limited-jurisdiction courts; two states on general jurisdiction courts, one state on its supreme court, and one state on a federal trial court. By 1950, over half the states had found places for women on their minor courts. But in 1983 about a third of the states did not have women on appellate courts, and over half of the states did not have women on the federal courts located within their boundaries.

The analysis so far has looked at the treatment of women lawyers at different levels of the opportunity structure within

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Table VIII

Period	State Trial		State Appellate (N)	Federal	
	Limited	General		Trial	Appellate
	(N)	(N)		(N)	(N)
Pre-1930	13	2	1	1	0
1930-1949	12	8	1	0	1
1950-1969	9	9	6	2	1
1970-1983	14	26	25	20	9
	(%)	(%)	(%)	(%)	(%)
Pre-1960	67	37	16	6	4
1970-1983	27	51	49	39	18
Post-1983	6	12	35	55	78

Note: 50 states and D.C. First federal trial judge included is Genevieve R. Cline of Customs Court, appointed in 1928.

Source: Compiled from data file on women judges, Cook (1980) *supra* note 3, and Cook (1984) *supra* note 3; Cook, *The End of Tokenism*, in *WOMEN IN THE COURTS* 84-105 (Hepperle & Crites ed. 1978).

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the states. Another way of examining women's status in the courts is to aggregate the state data to the national level and compare across levels. Table 1<sup>123</sup> treats the percentage of women in the bar as the basic pool of eligibles and then reports the disparity between the number of judgeships expected and achieved. For 1925 and 1955 the comparison is between the percentage of women in the bar and those on the bench in the same year, because the percentage of women by age cohort did not vary. However, for the later comparison the percentages of women in the bar in 1972 and 1978 are compared to the percentages of women on the bench five years later. The time lag is necessitated by the skewing of ages of women lawyers toward the younger cohorts. In 1975, 43% of women lawyers were under thirty and 53% under thirty-five.<sup>124</sup> In 1980, 75% of women lawyers were under forty and half were under thirty-three.<sup>125</sup> Since most candidates for minor judgeships are at least thirty years of age, and those ready for prestigious courts closer to fifty, at least a five year time lag makes sense.

Across time, the relationship between the percentage of women on the bar and bench was closer for the prestigious courts than the lower courts. In 1925 female bar strength indicated that women could claim twenty more state trial seats but only one or two more federal and state appellate seats.<sup>126</sup> The representation of women on state courts in relation to their bar presence actually improved between 1955 and 1977, while representation did not decline by more than a few potential positions on the federal courts.<sup>127</sup>

From the 1970's into the 1980's however, the state court gatekeepers did not choose women as judges in proportion to their increasing numbers in the bar. The number of seats on the state trial and appellate level to which women had an unrealized claim increased ten-fold.<sup>128</sup> On the other hand, the Carter affirmative action policy and introduction of nominating commis-

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123. *Supra* note 7.

124. Speech by Curran, American Bar Association Annual Meeting, New Orleans, (August 8, 1981) (discussing lawyer demographics) (on file with author at the University of Wisconsin-Milwaukee).

125. *Id.*

126. Table 1, *supra* note 7.

127. *Id.*

128. *Id.*

sions kept the level of underrepresentation steady on the federal courts.

The rapid transformation of law schools from male to integrated institutions is creating a large pool of women eligible for the bench in 1990 and later. A projection of the estimated 1985 percentage of women lawyers onto the 1990 bench, assuming no increase in court size, indicates that the state courts should select more than 1,000 additional women trial judges.<sup>129</sup> The figures are less startling for the prestigious courts. Ninety more women should go on the state appellate courts, forty more on federal district courts, and ten more on federal appellate courts.<sup>130</sup> Unless the number of judgeships continues to increase, particularly at the trial court level, and the attitude of the selecting authorities toward women improves, it is not likely that the goal of a close correspondence of bar percentages and judge percentages will occur for women.

### *Conclusion*

Women's token status in the courts has lasted over one hundred years. Female success in achieving minority status in law schools will be translated to other positions in the judicial opportunity structure only over a long period of time, as the large student cohorts move into practice and politics. However, time is not the only barrier to integration. The opportunity structure includes positions in organizations outside of government which are resistant to the incursion of women. In particular, elite law faculties and major law firms lag behind the average for the profession in their acceptance of women as colleagues. Some of the positions in the opportunity structure are not open to competition of the kind involved in group admission to law schools or in large hirings by law bureaucracies. There is a strong element of subjectivity in the choice of junior colleagues as court clerks, as tenure-track professors, and as new firm partners, and the men who hold the senior positions are not generally comfortable

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129. The figures are calculated on the basis of an estimated 15% women in practice in 1985.

130. *Id.*

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choosing a young woman as a protégé.

There is nothing in this preface to the history of women on the bench which suggests that the increasing percentages of women at the bottom of the opportunity structure will automatically bring about integration at the middle or top of the court hierarchies. The resistance will be especially strong at the appellate level where the number of positions is scarce and the power great. The number of women now sitting on these courts is token; yet opening up one seat to female candidacy and winning that seat for a specific individual costs a great deal of time, energy, and money of those involved in the effort. Gaining one woman's seat and one woman incumbent on a prestigious court has proved an expensive enterprise with a payoff more symbolic than real. When the addition of more women to a court means a real rather than a symbolic shift in the balance of power between the sexes, then the price attached to that seat will be considerably higher than the price attached to the token seat. Integration at the population ratio (53-47) is far in the future.

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## APPENDIX 1

Women Judges on Prestigious Courts:  
Historical Compilation, 1920-1983

State	Federal		State
	Appellate	Trial	Court of Last Resort
	N=15	N=49	N=33
ALA			Janie L. Shores 1975-
ARIZ	Sandra D. O'Connor* 1981- SCt  Mary M. Schroeder* 1979- 9th	Mary Anne Richey* 1976-83	Lorna E. Lockwood* 1961-75 CJ
ARK		Elsijane T. Roy* 1977-	Elsijane T. Roy* 1975-77
CAL	Shirley Hufstedler* 1968-79 9th  Dorothy Nelson 1979- 9th	Mariana Pfaelzer 1978- CD  Judith Keep* 1980- SD Marilyn Patel* 1980- ND Consuelo Marshall* 1980- CD Cynthia Hall* 1981- CD Pamela Rymer 1983- CD	Rose Bird 1977- CJ
COLO		Zita Weinshienk* 1979-	Jean Dubofsky 1979-
CONN		Ellen B. Burns* 1978-	Ellen A. Peters 1978-
FLA		Susan H. Black* 1979- MD Elizabeth Kovachevich* 1982- MD Lenore C. Nesbitt* 1983- SD	
GA	Phyllis Kravitch* 1979- 11th	Orinda Evans 1979- ND	
HAW			Rhoda Lewis 1959-67
ILL		Susan Getzendanner 1980- ND	
KAN			Kay McFarland* 1977-
LA		Veronica Wicker 1979- ED	
ME			Caroline Glassman 1983-
MD		Shirley B. Jones* 1979-82	Rita C. Davidson* 1978-

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State	Federal		Trial	State
	Appellate			Court of Last Resort
MASS			Rya W. Zobel 1979-	Ruth I. Abrams* 1977-
MICH	Cornelia Kennedy* 1979- 6th		Cornelia Kennedy* 1970-79 CJ ED Patricia Boyle* 1978-1983 ED Anna Diggs-Taylor 1979- ED	Mary S. Coleman* 1973-82 CJ Dorothy Comstock-Riley* 1982-83 Patricia Boyle* 1983-
MINN			Diana E. Murphy* 1980-	Rosalie Wahl 1977- M. Jeanne Coyne 1982-
MISS				Lenore Prather* 1982-
N.J.			Anne Thompson 1979- Maryanne T. Barry 1983-	Marie L. Garibaldi 1982-
N.Y.	Amalya Kearse 1979- 2d Ruth Ginsburg 1980- DC		Genevieve Cline 1928-54 IT Mary Alger Donlon 1955-56 IT Constance Motley 1966- CJ SD Mary J. Lowe* 1978- SD Shirley W. Kram* 1983- SD Jane A. Restani 1983- IT	Judith Kaye 1983-
N.C.				Susie M. Sharp* 1962-79 CJ
OHIO	Florence E. Allen* 1934-66 6th		Ann Aldrich 1980- ND	Florence E. Allen* 1922-34 Blanche Krupansky* 1981-82
OKLA	Stephanie Seymour 1979- 10th			Alma Bell Wilson* 1982-
OR			Helen J. Frye* 1980-	Betty Roberts* 1982-
PA	Delores Sloviter 1979- 3d		Norma Shapiro 1978 ED Sylvia H. Rambo 1979- MD Carol LosMansman 1982- MD	Anne X. Alpern 1961-61
R.I.				Florence K. Murray* 1979-
TENN			Julia S. Gibbons* 1983- WD	

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<u>State</u>	<u>Federal</u> <u>Appellate</u>	<u>Trial</u>	<u>State</u> <u>Court of Last Resort</u>
TEX	Carolyn Randall 1979- 5th	Sarah T. Hughes* 1962- ND Mary Lou Robinson* 1979- ND Gabrielle McDonald 1979- SD	Ruby K. Sondock* 1982-82
UTAH			Christine M. Durham* 1982-
WASH	Betty B. Fletcher 1979- 9th	Barbara Rothstein* 1980- WD	Carolyn Dimmock* 1981-
W. VA		Elizabeth Hallanan 1984- SD	
WIS		Barbara Crabb* SD 1979- CJ WD	Shirley Abrahamson 1976-
D.C.	Patricia Wald 1979- DC Helen Nies 1980- Fed@	Burnita Matthews 1950- June Green 1968- Joyce Green* 1979- Norma Johnson* 1980- Charlotte Murphy 1982- CC Christine Nettlesheim 1982- CC	Catherine B. Kelly* 1967-1983 Julia C. Mack 1975- Judith M. Rogers 1983-
P.R.		Carmen Cerezo 1980-	

\*Prior Judgeship

IT—Court of International Trade

CC—Claims Court

@Federal Circuit created 1982, former Court of Customs & Patent Appeals.

Source: Judge lists in West's Federal Reporter and regional reporters for 1920 through 1984.

Note: No women on prestigious courts over time in Alaska, Delaware, Idaho, Indiana, Iowa, Kentucky, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, South Carolina, South Dakota, Vermont, Virginia, West Virginia, Wyoming, and the Virgin Islands.

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