# The Consequences of Judicial Selection: A Review of the Supreme Court of Missouri, 1992–2007

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*By William G. Eckhardt & John Hilton**

## I. Preamble

Judicial selection is on the public agenda in Missouri. Leaders in all three branches of state government — executive, legislative, and judicial — agree that the current process is ripe for reform. According to Speaker of the House Rod Jetton, "It doesn't appear to me that the nonpartisan court plan is working very well. It appears to be partisan."[1] Reflecting on his own two terms as governor, United States Senator Kit Bond agrees.[2] Governor Matt Blunt favors the federal model for appointment of judges.[3] In his most recent State of the Judiciary address, Chief Justice Michael Wolff asked the Missouri Bar to devise a judicial evaluation system that is independent, nonpartisan, and more easily accessible to the public.[4] The vacancy on the supreme court created by Judge Ronnie White's resignation makes this topic all the more relevant.[5]

### *The Missouri Nonpartisan Court Plan*

Currently, Missouri uses the Nonpartisan Court Plan (the "Plan") to select judges for the supreme court, court of appeals, and trial courts in Jackson, Platte, Clay, and St. Louis counties, and in the City of St. Louis. In Missouri's 110 remaining counties, judges are directly elected. Under the Plan, a seven-member Appellate Judicial Commission (the "Commission") presents three candidates (the "Panel") to the Governor to fill a vacancy on the supreme court or court of appeals.[6] If the Governor does not select one of the three panelists within sixty days, the Commission selects the individual to fill the vacancy.[7] The Commission is composed of three lawyers appointed by the Missouri Bar Association, three citizens selected by either a past or present Governor (depending on term), and the Chief Justice of the Supreme Court.[8] A similarly-structured commission with five members selects trial judges. No hearings are held, and public input is not solicited. Retention is by non-partisan judicial election ("yes" or "no" vote), every twelve years for appellate judges and every six years for trial judges.

### *Proposed Reforms*

Last session the legislature considered three proposals to reform the Missouri Plan. Each bill would authorize a vote in a general election on a constitutional amendment to make the change. House Joint Resolution 31 would follow the federal model for appointing judges.[9] The Governor would nominate judges, who would be confirmed or rejected by a majority vote of the state Senate after public hearings held by the Senate Judiciary Committee. House Joint Resolution 33 would authorize a judicial commission to select judges.[10] This commission would be composed of three members of the Missouri Bar selected by the Governor, two Bar members who are currently serving members of the General Assembly appointed by the Speaker of the House, and two Bar members currently serving in the General Assembly appointed by the President Pro Tempore of the Senate. After public hearings, the commission would select the judge by majority vote. House Joint Resolution 34 affects judicial retention and removal.[11] Every ten years, judges would stand for retention by the General Assembly. After hearings before the House and Senate Judiciary Committees, a majority vote would be required in both legislative chambers. In special cases, a judge could be removed from office at the Governor's request and with a two-thirds vote of both legislative chambers.



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## II. Purpose

The debate over how to reform Missouri's judicial selection process has begun. At bottom, the question facing Missourians is how open and democratic this process should be. Changing the selection process is a policy question that should not be influenced by partisan politics. Nor is there any room for "court bashing" in the current debate. This Paper does not advance a partisan agenda and does not undermine the authority of the judiciary or attack the integrity of any judge.

The purpose of this Paper is to provide information that will be useful to Missourians as they consider how judges ought to be selected. This Paper examines the Supreme Court of Missouri's jurisprudence since 1992. The cases discussed illustrate differences among members of the court in areas of the law that are recurrent topics of contention. This Paper shows that shifts in the court's jurisprudence have followed changes in its composition. Simply put, judicial selection has consequences.



The reader may or may not prefer the court circa 1992 to the status quo — the purpose of this Paper is to describe, not to criticize or to persuade. The reader must determine if the changes described herein are to be lauded or lamented. Such a determination, after all, is the proper place for politics in the current debate.

## III. The Birth of the Ashcroft Court: 1991 and 1992

When Edward D. Robertson, Jr., became Chief Justice of the Supreme Court of Missouri in July 1991, three of the court's seven members had been appointed by Governor John Ashcroft. Within a month, William Duane Benton, then director of the Missouri Department of Revenue, made a majority for Ashcroft appointees. Ashcroft appointed his fifth supreme court judge in September: Elwood L. Thomas, a practicing attorney and former law professor. In 1992 Ashcroft filled out the court, appointing Kansas City attorney William Ray Price, Jr., and Stephen N. Limbaugh, Jr., a state trial judge from Cape Girardeau. The court was relatively young, too: Judges Benton, Price, and Limbaugh were forty years-old when they were appointed. Judge Ann K. Covington — the first woman to serve on the court — was forty-six when she was appointed in 1988. Judge John C. Holstein, appointed in 1989, was forty-four. At sixty-one, Judge Thomas was the oldest Ashcroft appointee; Judge Robertson was the youngest, only thirty-three when he was appointed in 1985.

Ashcroft is the first Missouri governor to select every judge on the state supreme court by constitutionally irreproachable means. After the Civil War, Governor Thomas C. Fletcher used the state militia to evict the entire court when Radical Republicans took control of the state government.[12] Although his methods were obviously less drastic than Governor Fletcher's, Ashcroft was criticized for his selections. According to future Chief Justice Michael Wolff (then a law professor at St. Louis University), "More than any other governor, Ashcroft's personal ideological interests are represented in his appointments."[13] In the sixty-five-year history of the Missouri Nonpartisan Court Plan, no appellate judge has been voted out of office.[14] With a mandatory judicial retirement age of seventy, Ashcroft's appointees were poised to dominate the Missouri judiciary for several decades. [15]

Today, only two of Ashcroft's seven appointees remain on the court. Constitutionally barred from serving a third term,[16] Ashcroft left the governor's office in 1992, and was replaced by Mel Carnahan, a Democrat. In October 1995 Carnahan appointed Ronnie White, then a member of the Missouri Court of Appeals, to replace Judge Thomas, who died of complications related to Parkinson's disease. Judge Robertson chose not to stand for retention in 1998, and Carnahan replaced him with his chief counsel, Michael Wolff (formerly of the St. Louis University School of Law). When Laura Denvir Stith of the Missouri Court of Appeals replaced Judge Covington in March 2001, the Ashcroft appointees clung to a four-to-three majority. With the retirement of Judge Holstein later that year, the balance of power shifted. In 2004 Judge Benton joined the federal bench, leaving Judges Price and Limbaugh to defend the work of the Ashcroft Court.

## IV. The Early Years: 1992 to 1995

In the early 1990s, legal experts predicted that the court would dispense "increasingly conservative court rulings: longer prison sentences, shorter reviews of death penalty cases, smaller jury awards in civil cases and unsympathetic attitudes towards lifestyles differing from the traditional family."[17] The court's decisions were generally, although not uniformly, in keeping with this prediction. The court resisted efforts to expand Missouri's tort law, upheld criminal convictions, and enforced Missouri's death penalty statute. The following survey of cases, although not exhaustive, is a representative sample of the court's jurisprudence between August 1992 and October 1995.

During this time, the court tightened Missouri's post-conviction relief rules (a collateral attack on the judgment analogous to habeas proceedings in the federal system). After firing two attorneys, an appellant filed a motion for post-conviction relief after the 90-day time limit had expired. In Missouri, a motion for post-conviction relief "is relatively informal, and need only give notice to the trial court, the appellate court, and the State that movant intends to pursue relief under Rule 29.15." Because "legal assistance is not required in order to file the original motion, the absence of proper legal assistance does not justify an untimely filing." The court rejected the appellant's claim that the ninety-day time limit violated his right to due process of law under the federal constitution. ***Bullard v. State***, 853 S.W.2d 921 (Mo. banc 1993).

Post-Conviction Relief
1993

In one case challenging the court's supposed "unsympathetic attitudes towards lifestyles differing from the traditional family," the court upheld a statute allowing a court to order grandparent visitation rights over the wishes of the child's natural parents. Recognizing that "parents have a constitutional right to make decisions affecting the family," the court held that the law did not "significantly interfere" with this fundamental right. In a dissent joined by Judge Limbaugh, Judge Covington found that although strict scrutiny was appropriate, and even under the majority's "undue burden" test, the statute should fail, because it allows "a significant intrusion into the traditional family unit." ***Herndon v. Tuhey***, 857 S.W.2d 203 (Mo. banc 1993).

Family Law
1993

When faced with a choice between creating a new rule in Missouri tort law or upholding a substantial jury award to a plaintiff, the court unanimously chose the latter. In ***Callahan v. Cardinal Glennon Hospital***, 863 S.W.2d 852 (Mo. banc 1993), a baby developed a visible abscess after receiving a polio vaccine. The child's legs and left arm were permanently paralyzed as a result of the examining doctors' negligence. The defendant urged the court to impose liability only on joint tortfeasors whose conduct was a "substantial factor" in causing the injury. Rejecting the defendant's proposed new rule, the court held, "the 'but for' test for causation is applicable in all cases except those involving two independent torts, either of which is sufficient in and of itself to cause the injury." The court also declined to adopt a "pure foreseeability test," holding that for liability to attach "the injury must be a reasonable and probable consequence of the act or omission of the defendant." The court unanimously upheld the plaintiff's $16 million judgment.

Tort: Causation
1993

In ***R.L. Nichols Insurance, Inc. v. Home Insurance Co.***, 865 S.W.2d 665 (Mo. banc 1993), the court declined to create a private right of action when the statute already specified a remedy. In deference to the people's elected representatives, the court held, "when the legislature has established other means of enforcement rather than by a private cause of action, the courts will not recognize a private civil action unless it appears to be a clear implication that the legislature intended to create a private cause of action."

Statutory Construction
1993

In one case, tension surfaced between the court's alleged status as a vanguard of family values and its reluctance to modify tort law in Missouri. In ***Thomas v. Siddiqui***, 869 S.W.2d 740 (Mo. banc 1994), the court abolished the tort of criminal conversation (defined as sexual intercourse with the plaintiff's spouse). "Criminal conversation is the civil counterpart to the criminal offense of adultery," and the court observed that the legislature repealed the crime of adultery in

1979, which "evidenced society's intent no longer to punish adultery." Judge Price concurred, adding that he would also abolish the tort of alienation of affection, because it implies the existence of a "'property right' in another person," an idea that Judge Price hoped "is long since passed." Judge Robertson dissented, arguing that in Missouri marriage is a contract, and alienation of affection and criminal conversation are "of the tort genus interference with contract."

Tort & Family Law
1994

Venue can be crucial to the outcome of a case. In ***State ex rel. Shelton v. Mummert***, 879 S.W.2d 525 (Mo. banc 1994), the court held that the joinder of an underinsurance carrier was pretensive. The underinsurer would only pay if the insurer's policy was exhausted, and so the plaintiff did not have a present cause of action against the underinsurer. The court ordered the case transferred to the proper venue.

Tort:
venue
1994

In ***State ex rel. McHaffie v. Bunch***, 891 S.W.2d 822 (Mo. banc 1995), the court limited the application of the tort of negligent entrustment. The court unanimously held, "once an employer has admitted *respondeat superior* liability for a driver's negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability." When an employer admits that the employee was acting within the scope of his employment at the time of the accident, the negligent entrustment claim is discarded, and "[t]he liability of the employer is fixed by the amount of liability of the employee."

Tort:
*respondeat superior*
1995

In ***Luethans v. Washington University***, 894 S.W.2d 169 (Mo. banc 1995), the court maintained the traditional distinction between tort and contract law. There, a contractual employee sued for wrongful discharge after he was told that his contract would not be renewed (the employee was paid through the end of the contract period). The court reasoned that an employer can dismiss an at-will employee if "the act of discharge is not otherwise 'wrongful.'" But a contractual employee "has a relationship with the employer that is covered by express or implied terms" (i.e., a contract). "Because a wrongful discharge action is only available to an employee at will," the court unanimously upheld summary judgment for Washington University.

Tort & Contract
1995

A Bible study group member broke his leg after slipping on a patch of ice outside of the group leader's home, and a lawsuit followed (1 Corinthians, Chapter 6 notwithstanding). The case turned on what duty of care the defendant owed to the plaintiff, which depended on the plaintiff's status: trespassor, licensee, or invitee. The court declined to expand Missouri's tort law by creating a fourth class of entrants ("social guests") to whom yet another duty of care would be owed. The court unanimously held that the plaintiff was a licensee, not an invitee, because the defendant did not invite the plaintiff "with the expectation of a material benefit from the visit" and had not "extend[ed] an invitation to the public generally." Because a possessor owes licensees the duty to make safe only those dangers of which the possessor is aware, summary judgment for the defendant was affirmed unanimously. ***Carter v. Kinney***, 896 S.W.2d 926 (Mo. banc 1995).

Tort:
duty of care
1995

The court regularly upheld death sentences in capital murder cases by unanimous decision. *See, e.g.*, ***State v. Mease***, 842 S.W.2d 98 (Mo. banc 1992); ***State v. Ramsey***, 864 S.W.2d 320 (Mo. banc 1993); ***State v. Wise***, 879 S.W.2d 494 (Mo. banc 1994); ***State v. Gray***, 887 S.W.2d 369 (Mo. banc 1994); ***State v. Chambers***, 891 S.W.2d 93 (Mo. banc 1994). Recognizing "the death penalty differs from all other forms of criminal sanction," the court's opinions in these cases are thorough, even lengthy, methodically addressing each issue raised by the appellant. ***State v. Isa***, 850 S.W.2d 876, 902 (Mo. banc 1993). But the court did not summarily affirm every death sentence that came before it. *See, e.g.*, ***State v. Debler***, 856 S.W.2d 641 (Mo. banc 1993) (upholding defendant's first-degree murder conviction, but unanimously reversing the death sentence because trial court admitted — and prosecution emphasized — "extensive evidence" of bad acts for which defendant had not been convicted); ***State v. Storey***, 901 S.W.2d 886 (Mo. banc 1995) (upholding

Capital Punishment
1992 – 1995

first-degree murder conviction but overturning death sentence; during penalty phase defense counsel failed to object when prosecutor argued facts outside the record ("This case is about the most brutal slaying in the history of this county"), personalized the case ("Try to put yourself in [the victim's] place"), and asked jurors to weigh the lives of defendant and victim against one another); ***Isa***, 850 S.W.2d at 903 (upholding defendant's conviction for first-degree murder, but reversing unanimously the death sentence because jury instructions permitted consideration of co-defendant's conduct when deciding defendant's sentence: "As to punishment, Isa must stand alone.").

The court ruled on two cases implicating abortion rights. In one, a motorist was convicted of involuntary manslaughter when she crossed the center line and struck the car of a pregnant woman, killing her unborn child. The defendant appealed, arguing that an unborn child is not a person for the purpose of Missouri's involuntary manslaughter statute (section 565.024, RSMo Supp. 2005). The court noted that under Missouri law, "the life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being." Section 1.205, RSMo 2000. Applying traditional rules of statutory construction (plain meaning, *in pari materia*, rule of lenity), the court held that section 1.205 applies to section 565.024, and unanimously upheld the conviction. ***State v. Knapp***, 843 S.W.2d 345 (Mo. banc 1992). A divided court extended *Knapp* to civil suits for wrongful death in ***Connor v. Monkem Co.***, 898 S.W.2d 89 (Mo. banc 1995).

Statutory Construction 1992, 1995

## V. White *vice* Thomas: 1995 to 1998
## The Passing of a "Gentle Giant"

In July 1995 Judge Elwood Thomas died of complications related to Parkinson's disease, and Missouri mourned the loss of an outstanding jurist. Judge Robertson described him as "one of the best legal minds in the state," and Judge Limbaugh praised his "uncanny ability to make complex, abstract ideas understandable for the rest of us."[18] The dean of the University of Missouri School of Law, where Judge Thomas once taught, said, "He was a fine teacher when he was here at the law school, a lawyer's lawyer when he went into practice in Kansas City and a judge that other judges looked to when he was on the bench."[19] Judge Robertson delivered a tearful eulogy, predicting that the supreme court building itself would miss Judge Thomas: "For nearly four years, far too short a time, a gentle giant walked its halls. God bless you, Elwood."[20]

### *Judge Ronnie White: Alone in Dissent*

In October 1995 the Commission recommended three nominees to Governor Carnahan: attorney Dale Doerhoff of Jefferson City; Gene Hamilton, a trial judge from central Missouri; and Ronnie White, an appellate judge from St. Louis.[21] Appointed by Carnahan just five months earlier, Judge White then was the only African-American on the Missouri Court of Appeals.[22] When Carnahan chose White to replace Thomas, he became the first African-American supreme court judge in state history.[23] Prior to joining the bench, Judge White was elected to three terms in the state House of Representatives, where he chaired the Judiciary Committee. Judge White also worked as a public defender, and served as city counselor to St. Louis Mayor Freeman Bosley, Jr. When Governor Carnahan selected Judge White for the supreme court, Mayor Bosley described him "one of the most astute, capable and talented individuals ever to put on a robe." Judge White's former colleagues in the legislature were similarly complimentary: "Integrity is a great word for Ronnie," said one; "On a scale of one to 10, he'd be a 10," said another.[24]



The next vacancy on the court did not occur until July 1998, and so for nearly three years Judge White was the only member of the court not appointed by Governor Ashcroft. Judge White dissented alone in nine cases between October 1995 and August 1998. Judge White's dissents are important not only for what they reveal about his judicial philosophy, but also as a harbinger of the jurisprudence of the current court.

The plaintiff in ***Rodriguez v. Suzuki Motor Corp.***, 936 S.W.2d 104 (Mo. banc 1996) was seriously injured when the car she was driving rolled over during an accident. The jury awarded Rodriguez $30 million in compensatory damages, and $60 million in punitive damages (reduced on remittur to $20 million

compensatory and $20 million punitive). Suzuki appealed the trial court's decision to exclude all evidence of alcohol consumption, which Suzuki planned to use to impeach nonparty witnesses and to show comparative fault by Rodriguez. Under Missouri's old contributory negligence regime, evidence of alcohol consumption "was admissible only if coupled with evidence of erratic driving or some other circumstance from which it might be inferred that the driver's physical condition was impaired at the time of the accident." *See* ***Doisy v. Edwards***, 398 S.W.2d 846, 849-50 (Mo. banc 1966). But Missouri became a comparative fault state in 1983, and the court reasoned, "A comparative fault system can better accommodate alcohol evidence than a contributory negligence system." Thus, the court held, "Evidence of alcohol consumption is admissible, if otherwise relevant and material." The court also established a higher standard of proof for punitive damages, following the trend in other states. "Because punitive damages are extraordinary and harsh, this Court concludes that a higher standard of proof is required: For common law punitive damages claims, the evidence must meet the clear and convincing standard of proof." Alone in dissent, Judge White agreed with overturning *Doisy* and with the clear-and-convincing-evidence rule for punitive damages, but argued that both rules should apply prospectively, and that the verdict in this case should stand.

Tort: damages
1996



Because they involve a seizure without "individualized suspicion of wrongdoing," random drug checkpoints violate the Fourth Amendment. *See* ***City of Indianapolis v. Edmond***, 531 U.S. 32 (2000). In an effort to capture drug couriers traveling through Missouri, law enforcement officers posted road signs declaring, "DRUG ENFORCEMENT CHECKPOINT 1 MILE AHEAD" at odd hours (e.g., 4 a.m.) on highways in remote areas of the state. Immediately following the sign was an exit to a lightly traveled road in a sparsely-populated area, offering no services to travelers. Waiting at the top of the off-ramp, of course, was the real drug checkpoint. All motorists who took the exit were questioned briefly, and those who acted suspiciously were detained longer. A drug dog was on hand. The court upheld this practice against a federal constitutional challenge by a vote of 6-1. The court held that the state's interest in drug interdiction was sufficiently strong, the checkpoint effectively advanced the state's interest, and the intrusion upon individual motorists was minimal.

Search & Seizure
1996

Judge White dissented, decrying "attempts by local sheriffs to trick highway travelers into leaving the highway in the middle of the night, so they can be interrogated in remote areas by armed, camouflage-clad men with dogs." Judge White objected to the majority's standard of review, arguing that the facts should be taken "in the light most favorable to the trial court's ruling" (which granted defendant's motion to suppress). While agreeing that "trafficking in illegal drugs is a national problem of the most severe kind," Judge White disagreed that the checkpoints are an effective solution to the problem, or that the intrusion on citizen's privacy is sufficiently minimal. ***State v. Damask***, 936 S.W.2d 565 (Mo. banc 1996).

In ***Warren v. Paragon Technologies Group***, 950 S.W.2d 844 (Mo. banc 1997), the plaintiff recovered $38,000 from her landlord after slipping on an icy sidewalk outside of her apartment. In his pleadings, the defendant invoked the lease's non-liability clause as an affirmative defense, and the plaintiff never replied. The judge concluded the clause was void as against public policy, and the jury found for the plaintiff. The court reversed. In Missouri, a non-liability clause must be "clear, unambiguous, unmistakeable, and conspicuous." *See* ***Alack v. Vic Tanny Int'l of Mo., Inc.***, 923 S.W.2d 330, 337 (Mo. banc 1996). Here, the plaintiff signed the lease with the clause in it. Because "parties are presumed to read what they sign," the court found that the landlord should have been allowed to argue the clause, reversed the judgment, and remanded for a new trial.

Contract Law
1997

In dissent, Judge White argued that the clause "was not conspicuous as *Alack* requires." Judge White noted that the clause was in the twentieth paragraph of a thirty-three paragraph lease, and suggested several methods for making a clause conspicuous per *Alack*: "rendering language in all capital letters, in larger type, of in other contrasting type or color." Judge White would have held that the clause violated public

policy, concluding, "Remanding the case for a full trial merely to require the plaintiff to plead that the clause is inconspicuous is the height of artificial technicality."

Judge White was not always, however, unalterably opposed to enforcing strict textual construction. In ***Lewis v. City of Marceline***, 934 S.W.2d 280 (Mo. banc 1996), a plaintiff sued the city for injuries when she fell after stepping into a hole on a city street. The trial court granted summary judgment to the city, because the plaintiff did not give written notice of her claim to the mayor. Section 77.600, RSMo 2000. The plaintiff argued that she described the incident to the city clerk, who typed a report. The supreme court overturned the dismissal, holding that because "the statute does not say who must write the notice," it was sufficient that the plaintiff gave an oral statement to the city clerk, and that the city clerk then "reduced the statement to writing." Judge White believed that the majority's holding "frustrates the purpose of the statute, undermines the rule of strict compliance, and is not supported by law." Concluded Judge White, "The legislature can define the waiver of sovereign immunity as narrowly as it chooses, and it is beyond the scope of our power to broaden the statute."

Statutory Construction
1996

As Olga Maxiaeva was driving home early one morning, fifteen-year-old Shawn Twine heaved a twenty-pound chunk of concrete onto her car from an overpass, killing her. Twine pled guilty to involuntary manslaughter, and Maxiaeva's family sued the Missouri Highway and Transportation Commission. They argued that the Commission was negligent for not building a tall fence on the overpass and for allowing pieces of concrete to come loose. The plaintiffs argued that because the injury was caused by a dangerous condition of public property, sovereign immunity was waived. *See* 537.600.1(2), RSMo Supp. 2005. The majority disagreed, holding that Twine's intervening act was the cause of Maxiaeva's death, and that the Commission was shielded by sovereign immunity. Judge White dissented, arguing that the jury should have been allowed to decide the issue of causation, i.e., "whether the Commission's alleged negligence set into motion the chain of events that caused the injury." ***State ex rel. Mo. Highway & Transp. Comm'n v. Dierker***, 961 S.W.2d 58 (Mo. banc 1998).

Tort:
Causation
1998

In three cases, Judge White dissented alone when the majority upheld a death sentence for first-degree murder. On the evening of December 8, 1991, Moniteau County Deputy Sheriff Les Roark responded to a domestic disturbance call at the home of James R. Johnson. After being assured by Johnson, his wife, and their daughter that all was well, Deputy Roark turned to leave. Completely unprovoked, Johnson shot Deputy Roark twice in the back, and again in the forehead as he lay wounded on the ground, killing him. Johnson gathered guns and ammunition and drove to the home of Moniteau County Sheriff Kenny Jones. The sheriff was not home, but his wife was hosting a Christmas party. Johnson opened fire sniper-style at the group through the bay window, fatally shooting Pam Jones, the sheriff's wife, in front of her friends and family. Johnson proceeded to the home of Moniteau County Deputy Sheriff Russell Borts, shooting Borts four times as the deputy talked on the phone. Borts survived, but Johnson wasn't finished. Johnson next drove to the sheriff's department, where local law enforcement had gathered. As Cooper County Sheriff Charles Smith left the building, Johnson fatally shot him in an ambush. When Miller County Deputy Sheriff Sandra Wilson arrived on the scene minutes later, Johnson fatally shot her through the heart. Johnson then took a local elderly woman hostage in her home, and surrendered after a stand-off.

Capital
Punishment
1995–1998

The court upheld Johnson's death sentence for the quadruple-murder, but Judge White dissented. Judge White found ineffective assistance of counsel in the defense counsel's failure to interview two witnesses, which undermined Johnson's defense that he suffered from post-traumatic stress disorder caused by his service in the Vietnam War. Judge White concluded that Johnson was prejudiced by this decision, arguing that the majority's "reasonable probability of a different result" test is "too high," that such a standard is not equal to "outcome-determinative prejudice," and that had counsel interviewed the witnesses there was a

"reasonable likelihood of a different result." ***State v. Johnson***, 968 S.W.2d 123 (Mo. banc 1998). *See also* ***White v. State***, 939 S.W.2d 887 (Mo. banc 1997) (arguing that defendant's late-filed Rule 29.15 motion for an evidentiary hearing alleging ineffective assistance of counsel should be allowed, and that the majority's decision "elevates the form of pleadings over their substance."); ***Kinder***, *infra*.

Accusations of racism figured prominently in two of Judge White's opinions during this period, both of which were suits for post-conviction relief under Rule 29.15. In ***State v. Kinder***, 942 S.W.2d 313 (Mo. banc 1996), the judge presiding over the murder trial of an African-American had issued a press release before the trial began announcing that he was switching to the Republican Party because "the Democrat party places far too much emphasis on representing… people with a skin that's any color other than white." The majority upheld the jury's conviction and the death sentence, but Judge White disagreed. In dissent, Judge White argued that it does not matter that the judge "made no obviously unfair rulings during the trial," rejecting the majority's argument that the statement was "a political act, not a judicial one, and as such, they do not necessarily have any bearing on the judge's in-court treatment of minorities." Judge White found the statement to be "a calculated attempt to influence voters by appealing to their racial prejudice," and that it "created a reasonable suspicion that he could not preside over this case impartially."

Post-Conviction Relief 1996

And in ***State v. Smulls***, 935 S.W.2d 9 (Mo. banc 1996), Judge White (over the dissent of Judge Limbaugh, joined by Judge Price) wrote the majority opinion, holding that Judge William Corrigan erred in refusing the motion to recuse himself from hearing the defendant's Rule 29.15 motion alleging racial bias in the jury panel. *See* ***Batson v. Kentucky***, 476 U.S. 79 (1986). At trial, Judge William Corrigan overruled the defendant's motion for a mistrial because the jury was all-white, explaining, "Years ago they used to say one drop of blood constitutes black. I don't know what black means. Can somebody enlighten me of what black is? I don't know; I think of them as people." In his opinion for the majority, Judge White wrote Judge Corrigan's "mental processes are irrevocably tainted with prejudice," and his statement "reeks of racial animus."[25] After criticism in the press for using "intemperate language"[26], Judge White revised the opinion by deleting this language.[27]

## VI. The White-Wolff Alliance: 1998 to 2001
### *From Robertson to Wolff*

In 1998 Governor Carnahan had the opportunity to make another appointment. Still young at forty-five, Judge Robertson announced in July that he was resigning from the court to join a firm that had been hired by the attorney general to oversee Missouri's lawsuit against the tobacco industry.[28] To replace Judge Robertson, the Commission recommended: Cole County Prosecuting Attorney Richard G. Callahan; Michael W. Manners, president of the Missouri Association of Trial Attorneys; and, Michael Wolff, Carnahan's legal counsel and a law professor at St. Louis University.[29]

Carnahan did not hesitate, appointing Wolff one week later. Before joining the faculty at St. Louis University, Wolff directed legal aid services in Rapid City, South Dakota, and worked as a reporter and editor for the *Minneapolis Star* while a law student at the University of Minnesota.[30] Wolff ran unsuccessfully for attorney general as a Democrat in 1988. He ran again in 1992, but was defeated in the August primary. Later that year Wolff led Carnahan's transition team and became the Governor's legal counsel.[31] After returning to St. Louis University in 1994, Wolff continued to assist the Governor's office with negotiations to settle the Kansas City and St. Louis school desegregation cases.[32] A fellow member of the bench said Wolff was "a perfect appointment because of that intersection of law, academic theory and practical application." A colleague at St. Louis University predicted that on the court, Wolff "will be a listener and a consensus builder."[33]

#### *The White-Wolff Alliance*

Between August 1998 and March 2001, Judges Wolff and White dissented together in six opinions (and separately in three more cases). The significance of this alliance is not in the frequency of their dissents, but rather in what it revealed about where Judges Wolff

and White would take the court if their dissents ever became majority opinions.

Judge Wolff authored five dissents in death penalty cases, and Judge White concurred (alone) each time. In ***State v. Ervin***, 979 S.W.2d 149 (Mo. banc 1998), the dissent argued to uphold the conviction for first-degree murder but to overturn the death sentence because "there is no evidence that Ervin intended to cause [victim] unnecessary or prolonged suffering, or that Ervin inflicted pain for its own sake, so as to support the finding of the trial court that there was torture and depravity of mind."

Capital Punishment 1998

In ***State v. Barton***, 998 S.W.2d 19 (Mo. banc 1999), a local newspaper published an article about the murder before the trial began. Venirpersons who acknowledged having heard about the case were questioned about "the presence of bias, prejudice, and impartiality as a consequence of pretrial publicity," but not specifically about whether they had read the article. The dissent argued, "the *voir dire* was inadequate to assure that Barton would be tried only on properly admitted evidence." The dissent also cited *Time* magazine and the *St. Louis Post-Dispatch* for statistics showing "the number of death row inmates later found to have been wrongfully convicted is thus about one-seventh of the number of prisoners executed. Even a process as laudable as the American jury system gets it wrong a substantial number of times, as these data show, even though its findings are made unanimously and beyond a reasonable doubt." For these reasons, the dissent argued that the defendant should be given a new trial (his fourth).

Capital Punishment 1999

On appeal, the court "accepts as true all evidence favorable to the State, including all favorable inferences from the evidence, and disregards all evidence and inferences to the contrary. This Court does not sit as a thirteenth or super juror, voting 'guilty' or 'not guilty' on the charge." ***State v. Grim***, 854 S.W.2d 403, 405 (Mo. banc 1993). In ***State v. Wolfe***, 13 S.W.3d 248 (Mo. banc 2000), the dissent argued that "a careful review of the record in this case leaves considerable doubt as to whether or not Dannie Wolfe committed these murders," and that "in death penalty cases, section 565.035 calls on this Court to make a review of the whole record, independent of the findings and conclusions of the judge and jury, and to assess, among other matters, 'the strength of the evidence.'" Judges Wolff and White argued that the law requires the court to act as a "super juror" in death penalty cases. Thus, the dissent concluded that "a review of all the evidence, not just the evidence favorable to the verdict, should be constitutionally required as a matter of due process of law."

Capital Punishment 2000

In ***State v. Smith***, 32 S.W.3d 532 (Mo. banc 2000), the prosecutor, while a private practitioner, represented the defendant sixteen years earlier in two petty criminal cases (work permit revocation and felony stealing). The work permit case "amounted to a single appearance made on the day on which the trial court ordered the permit revoked," and as to the felony stealing charge, "the record does not provide support for appellant's assumption that the prosecutor was engaged in any communication with appellant that had any relevance whatsoever to the later murders of the victims in this case." Nevertheless, the dissent argued that "the determination of whether to seek the death penalty… is in essence a judgment on the overall character of the defendant, who happens in this case to have been the prosecutor's former client." The fact that this was a death penalty case, coupled with "[t]he fact is that he [the prosecutor] had a confidential relationship with Smith in which Smith was encouraged to disclose to the attorney the darkest secrets of his life… makes such a dual representation unacceptable."

Capital Punishment 2000

In ***State v. Johns***, 34 S.W.3d 93 (Mo. banc 2000), the trial court refused to admit evidence that the victim had a reputation for violence when he drank, because the defendant had not testified that he was aware of the victim's reputation. The dissent argued that the defendant did not need to personally testify that he had this knowledge, and that "there was a reasonable inference that John's had such knowledge." The trial court also refused to allow the defendant to mention in his closing argument that the

Capital Punishment 2000

murder followed a car chase. The dissent argued that there was evidence in the record to support this claim, the defendant was prejudiced by its exclusion, and that the defendant was entitled to a new trial.

Judge Wolff concurred in the dissenting opinion of Judge White in the case of ***Clay v. Dormire***, 37 S.W.3d 214 (Mo. banc 2000). There, defendant was sentenced as a prior offender to twenty years in prison for forcible rape. The prior conviction that the judge considered at sentencing, however, had been expunged. But the petitioner did not raise this issue until habeas proceedings, after his direct appeal and post-conviction motions were denied. The court observed that "the relief available under a writ of habeas corpus has traditionally been very limited," and does not extend to claims "that would have been raised, but were not raised, on direct appeal or in a post-conviction proceeding." The court further noted, "errors during sentencing in non-capital cases are only actionable in habeas corpus if it is shown that the court had no jurisdiction to impose the sentence in question, as in the case where a court imposes a sentence that is in excess of that authorized by law, or where the sentencing court utilized a repealed and inapplicable statute." Thus, the court held that "habeas relief is unwarranted." In dissent, Judge White argued, "Procedural default in remedies previously available *may* provide the basis for denying a petition in habeas corpus, but this limitation may be overcome by establishing the grounds relied on were unknown during the postconviction relief proceedings." The dissent continued, "Mr. Clay's lack of knowledge of this claim until after all procedural remedies were time-barred was the precise reason the court of appeals granted Mr. Clay's habeas writ…. Mr. Clay's claim had not lingered due to lack of diligence, nor was it a deliberate trial strategy justifying waiver of his habeas remedy." The dissent emphasized in conclusion, "*With the judge clearly exceeding his jurisdiction in the sentencing phase of Mr. Clay's trial, habeas corpus relief is available by this Court's own standard in Edwards* [983 S.W.2d 520 (Mo. banc 1999)]."

Post-Conviction Relief
2000

Judge White dissented alone in ***State v. Neff***, 978 S.W.2d 341 (Mo. banc 1998). After defense counsel objected to another statement made in the prosecution's closing statement, the prosecutor said to the judge (in the presence of the jury), "Well, he didn't take the stand, Judge." The defendant immediately moved for a mistrial. The judge overruled the motion, and said, "The Court will admonish the jury that the last remark made by the Prosecutor will be disregarded by the jury." The majority did not order a new trial, because "the prosecutor's comment is isolated, not directed at the jury, and not obviously intended to poison the minds of the jurors against the defendant."

Post-Conviction Relief
1998

Judge White argued that Missouri courts have "found it extremely difficult to fashion a remedy that corrects the clear prejudice created by a prosecutor's direct, certain comment on a defendant's failure to testify." Judge White was not satisfied with the court's direction to the jury, because literally the prosecutor's last remark was "There is no evidence of that." Judge White felt that a trial court has "few effective weapons to the prejudice [created by reference to a defendant's failure to testify], short of mistrial." Judge White allowed, "There may be, as the principal opinion holds, some conceivable circumstance where a direct, certain reference by the prosecutor to the defendant's failure to testify does not require a mistrial." But Judge White concluded, "the admonishment here was not just insufficient, it was nonexistent."

In the case of ***Linton v. Missouri Veterinary Medical Board***, 988 S.W.2d 513 (Mo. banc 1999), Judge Price joined Judges White and Wolff in dissent. The principal opinion upheld section 340.240.6, RSMo 1994, disqualifying anyone who failed the veterinary license exam more than three times from getting a license in Missouri, against Dr. Linton's equal protection argument. Dr. Linton failed the exam in Missouri three times before passing in Illinois. The majority held that the statute is rationally related to a legitimate state interest ("healthy domestic animals, a safe food supply and a sound agricultural economy").

Constitutional Law
1999

The dissent, authored by Judge Wolff, detected "something inherent in the American culture about three strikes, probably because of our national pastime." But "even in baseball, a batter is allowed more than

three swings because a foul ball, which normally counts as a strike, do not count when it occurs on the third strike." Relying on the plaintiff's expert testimony, Judge Wolff believed, "There is simply no basis to believe that a person who scores a 483 on the examination [on the fifth taking] is less qualified than a person who scores 483 (or even 425) on the first time." Judge Wolff did "not mean to imply that an applicant must be allowed to take the examination an unlimited number of times," but simply held that "there must be some reasonable basis for believing that a particular limit would protect the public from unqualified practitioners." Because the statute imposed an "arbitrary three-times-and-out limit," the dissent would have ordered the Board to grant Dr. Linton a license to practice veterinary medicine in Missouri.[34]

The 1996 punitive damage ***Rodriguez*** case returned in 1999, and the court again reversed and remanded for a new trial. The court took ***Rodriguez II*** on direct appeal from the trial court, because Suzuki challenged the constitutionality of three statutes.[35] The plaintiff argued that Suzuki's challenge to these statutes was pretextual, and that the appeal should be heard first in the court of appeals. The majority disagreed, and proceeded to rule on Suzuki's objection to the trial court's refusal to admit government reports that contradicted consumer reports used by the plaintiff. The majority held that the reports satisfied the public records exception to the hearsay doctrine and remanded the case for a new trial.

Tort & Evidence Law 1999

In dissent, Judge White disagreed with the court's exercise of jurisdiction. As to the reports, Judge White noted that "a trial judge has wide discretion to exclude cumulative evidence," and that the majority's rule amounts to a rule that "such a report, indeed everything in the federal register, is per se admissible, regardless of any concerns about its trustworthiness." Judge White accused the principal opinion of creating "the most liberal government documents rule in the country, and an unworkable one, at that." In conclusion, Judge White reminded the majority, "Kathryn Rodriguez is a real person. She is thirty-four years old and has spent the last nine years of her life paralyzed from the shoulders down." Judge White finally lamented that the principal opinion "seriously undermines the appearance of justice for Ms. Rodriguez, who now faces the ordeal of a third marathon trial." ***Rodriguez v. Suzuki Motor Corp.***, 996 S.W.2d 47 (Mo. banc 1999).

## VII. Stith *vice* Covington: 2001 to 2002

In December 2000 Judge Covington announced that she would resign effective January 31, 2001.[36] The first woman appointed to Supreme Court of Missouri and to the Court of Appeals, Judge Covington served for 12 years.[37] According to one member of the bar, "She brought a quiet, thoughtful presence to the court. She was not an active questioner, but her questions were always right to the heart of the issue."[38] Chief Justice Price agreed, saying Covington "played a major role in the history of Missouri. She served with absolute dignity and grace."[39] After leaving the court, Judge Covington joined Bryan Cave as a partner in the firm's appellate department.[40]

### *"A Bridge Builder"*

To replace Judge Covington, the Commission nominated three members of the Missouri Court of Appeals: Judges Mary Rhodes Russell and Richard B. Teitelman from the Eastern District, and Judge Laura Denvir Stith from the Western District. Within three years, all three would sit on the supreme court. It was assumed that, because the appointment was to replace Judge Covington, "the choice is probably between Judge Russell and Judge Stith."[41] Governor Holden chose Judge Stith. A graduate of Tufts University and of the Georgetown University Law Center, Judge Stith clerked on the Supreme Court of Missouri and practiced for fifteen years in Kansas City at Shook Hardy & Bacon before joining the Missouri Court of Appeals.[42] One of Judge Stith's colleagues on the court of appeals praised her ability to "analyze[] issues carefully and [] write with clarity and bring focus to difficult legal issues."[43] Another described her as "a bridge builder."[44] For her part, Judge Stith was complimentary of Covington's service on the court, pledging to "do my best to follow in her footsteps."[45]



Tort: venue 2001

During her first year on the court, Judge Stith joined Judges White and Wolff in dissent in two

notable cases. In ***State ex rel. Linthicum v. Calvin***, 57 S.W.3d 855 (Mo. banc 2001), the plaintiff was injured in a ferris wheel accident at the St. Francois County Fair. Plaintiff filed a negligence claim in St. Francois County in August 1998, and, after substantial discovery, voluntarily dismissed the suit without prejudice on June 13, 2000. One week later, plaintiff re-filed in St. Louis City Circuit Court (generally regarded at the time as a plaintiff-friendly venue[46]), naming only Harold Linthicum, an employee of the ferris wheel company and a resident of Arkansas, in her petition. Under Missouri venue law at the time, "When all defendants are nonresidents of the state, suit may be brought in any county in this state." Section 508.010(4), RSMo Supp. 2005. The next day (and before process was served on Mr. Linthicum) the plaintiff amended her petition to include the other defendants, one of whom was a Missouri resident.

The question was when suit was "brought" under Missouri law: when the original petition was filed, or when the new defendants were added. In a per curiam opinion, the majority began, "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." The court held, "a suit instituted by summons is 'brought' whenever a plaintiff brings a defendant into a lawsuit, whether by original petition or by amended petition. This interpretation protects all party defendants equally and gives effect to the intent of the legislature." Judges Stith, Wolff, and White each filed separate dissents, and concurred in one another's opinions.

In dissent, Judge Stith tried to determine the legislature's intent, observing, "the term 'brought' has been equated with 'instituted' or 'commenced,' by the legislature, the Revisor, and even Black's *Law Dictionary*." Judge Stith continued, "Had the legislature wanted venue to be redeterminable whenever parties were added, it would have been easy to provide for such a mechanism." Judge Stith argued that the legislature intended that "the time suit is brought as the time to determine venue." Judge Stith noted that the case could be decided on narrower grounds, suggesting the court hold, "when an amended pleading has been filed before service of the original petition, or the filing of the original defendant's answer, then the amended pleading, rather than the original pleading, becomes the basis for determining venue, as that is the pleading which defendant must answer."

In ***State v. Callen***, 45 S.W.3d 888 (Mo. banc 2001), the court's four remaining Ashcroft appointees voted to uphold Missouri's hate crime statute, while Judges Wolff, White, and Stith argued in dissent that it is unconstitutionally vague. The statute, section 557.035.2, RSMo 2000, allowed for increased penalties for certain crimes "which the state believes to be knowingly motivated because of race, color, religion, national origin, sex, sexual orientation or disability of the victim." The defendant argued that the "state believes" portion of the statute is unconstitutionally vague because "'no person is on notice as to what the state believes, and no person could ever have a fair warning as to what the state believes regarding the motive element of a crime.'"

Statutory Construction 2001

The court held although the statute was "poorly worded," it was clear that the "state believes" portion was not an element of the crime. Rather, "the prosecutor's verification of a complaint or information — is simply a procedural prerequisite to the filing of the charge in the first place, a mechanism designed to ensure the prosecutor's 'good faith' in bringing the charge." Judge White worried in dissent that "a would-be offender would not have notice of when his or her legally protected thoughts might cross into the no-man's land of the 'state's beliefs' and subject them to enhanced criminal penalties for actions wholly unrelated to those thoughts." Judge White concluded that, "since the statute seeks punishment for motives stemming from beliefs and biases which are lawful to hold and express, application of the vagueness doctrine in construing this statute requires greater legislative clarity than in statutes where fundamental rights are not so seriously implicated."

Judge Stith wrote for a unanimous court in two cases between March 2001 and February 2002. *See* ***State v. Mayes***, 63 S.W.3d 615 (Mo. banc 2001) (upholding first-degree murder conviction but reversing death sentence when the

Capital Punishment 2001

court refused to instruct the jury during the penalty phase that no adverse inference could be drawn from the defendant's failure to testify); ***State ex rel. Nixon v. Kelly***, 58 S.W.3d 513 (Mo. banc 2001) (denying habeas corpus to defendant who sought credit for time served between when he began serving his sentence and when he was convicted of a second crime, because the time he spent in custody was not related to the second conviction).

Post-Conviction Relief 2001

In ***State v. Whalen***, 49 S.W.3d 181 (Mo. banc 2001), the defendant fired a shotgun in a hallway at a police officer, seriously injuring him. Two officers nearby were injured as well. Judge Stith (joined by Judges Wolff, White, and Limbaugh) upheld the assault conviction related to the first officer, but overturned the assault conviction related to the other officers, because "the State failed to present evidence from which the jury could find beyond a reasonable doubt that Defendant attempted to cause serious physical injury to the two officers who were the subjects of the two counts of class B assault in the first degree." And in ***Fisher v. Waste Management of Missouri***, 58 S.W.3d 523 (Mo. banc 2001), Judge Stith joined Judge Wolff's principal opinion (along with Judges White, Benton, and Price), to hold that a surveillance videotape made of an employee was a "statement" per section 287.215, RSMo Supp. 2005, and could not be considered at a workers' compensation administrative hearing because it was not given to the employee during discovery.[47]

Criminal Law 2001

Statutory Construction 2001

## VIII. The Tipping Point and Beyond: The Court Since 2002

### *From Holstein to Teitelman*

In January 2002 Judge John C. Holstein announced his retirement, effective March 1. With twenty-seven years of service in Missouri's judicial system, one colleague described Judge Holstein as "a legend in Missouri law."[48] After retiring from the court, Judge Holstein joined the Springfield office of Shughart, Thomson & Kilroy.[49] Holstein's retirement marked the end of the "Ashcroft Court," and to replace him the Commission recommended: Judge Richard B. Teitelman of the Missouri Court of Appeals; Michael W. Manners, now serving as a trial judge on the Jackson County Circuit Court; and Clifton M. Smart III, a Springfield attorney.[50] The Commission previously had recommended Judges Teitelman and Manners for appointment to the court in 2001 and 1998, respectively.

Two days after the Commission announced its panel, Governor Holden picked Judge Teitelman. Legally blind since birth, Judge Teitelman is also the court's first Jewish member. After graduating from law school at Washington University, Judge Teitelman worked for twenty-three years at Legal Services for Eastern Missouri. According to a fellow bar member, "There isn't anybody who doesn't like him, doesn't think he's an eminent jurist."[51] Others described Judge Teitelman as "an outstanding person and just a wonderful human being," and as "a good listener" who "devotes himself to making sure that all views are heard."[52]



As a member of the Missouri Court of Appeals, Judge Teitelman perhaps was best known for his opinion in ***Scott v. SSM Healthcare St. Louis***, 70 S.W.3d 560 (Mo. App. 2002). In that case, Judge Teitelman held that Missouri's $528,000 statutory cap for non-economic damages caused by medical malpractice applied to each "occurrence" of malpractice, not to each "occurrence" of death or injury sustained by the plaintiff. Section 538.210, RSMo Supp. 2005. Because Matthew Scott suffered two acts of malpractice during treatment for one injury, he was entitled to recover $1,056,000.[53] Judge Teitelman's opinion in *Scott* was prominently featured in literature and e-mails distributed by groups opposing his retention in 2004.[54]

### *Russell Replaces Benton*

In June 2003, Judge Theodore McMillian on the United States Court of Appeals for the Eighth Circuit took senior status, and President Bush nominated Judge Benton for the open seat in February 2004. At a time when many of the President's nominees to the federal bench experienced long delays in the Senate, Judge Benton was confirmed unanimously by a voice vote in June. To replace Benton, the Commission's panel

included two repeat candidates: Judge Mary Rhodes Russell; attorney Clifton Smart; and Nannette A. Baker, a state trial judge from St. Louis.[55] Governor Holden picked the "unpretentious and enthusiastic" Judge Russell to become the second woman on the court.[56] A graduate of the University of Missouri School of Law and a former law clerk on the Missouri Supreme Court, Judge Russell practiced law for ten years before joining the court of appeals in 1994.

*The Tipping Point*

Because he brought the Carnahan-Holden appointees into the majority, Judge Teitelman's appointment in 2002 is the crucial tipping point in the court's jurisprudence over the past fifteen years. The court since has become more willing to modify Missouri tort law, to overturn criminal convictions and death sentences, and to overturn legislative and executive acts as unconstitutional (often over dissents by Judges Limbaugh, Price, and/or Benton/Russell). What follows is a sample of the court's major decisions since 2002.

In 2004 the legislature voted to put a constitutional amendment defining marriage as the union of one man and one woman on the ballot. Governor Holden, a Democrat, issued a proclamation calling for the issue to appear on the August primary ballot, rather than in November. Mo. Const. art. XII, sec. 2(b). Under Missouri law the secretary of state must send an official copy of the amendment to local election officials within ten weeks of the election. Section 116.240, RSMo 2000. But the presiding officers of the Missouri House and Senate (both Republicans) did not sign the resolution proposing the amendment until May 28, after the ten-week deadline. Attorney General Jay Nixon, a Democrat, sued for a writ of mandamus to compel Secretary of State Matt Blunt, the Republican Party's candidate for governor in 2004, to put the issue on the August ballot. The court noted that nothing in Missouri law *prohibits* the secretary of state from sending notice to local election officials after the ten-week mark has passed. The court held that the Governor's constitutional authority to set the date of an election trumps statutory technicalities like the timing of the act's delivery to the secretary of state. Although the court denied the writ of mandamus, the court held that Blunt had "a duty to take such actions as are necessary, in an expedited manner, to prepare SJR 29 for submission to the people of Missouri at the August 3, 2004, election in accordance with the Governor's proclamation."

Constitutional Law
2004

In a concurring opinion, Judge Benton stressed, "No court shall have the authority to order an individual or issue be placed on the ballot less than six weeks before the date of the election." Here, "because the Governor constitutionally called a special election over 10 weeks before the election, because all four statewide officers involved agree that all required acts will be completed more than six weeks before the election, and because local election authorities had notice 10 weeks before the election," Judge Benton concurred in the majority's per curiam opinion.

Judge Limbaugh dissented, observing, "By ordering the secretary of state to proceed with an August 3rd election regardless of the ten-week deadline, the Court effectively renders section 116.240 unenforceable, and I suppose unconstitutional, at least in relation to the governor's power to call special elections." Instead, Judge Limbaugh proposed to hold that the ten-week deadline "is a prerequisite to the conduct of this or any other election." ***State ex rel. Nixon v. Blunt***, 135 S.W.3d 416 (Mo. banc 2004).[57]

Missouri law holds parents responsible for ensuring that their children attend school regularly. Section 167.031.1, RSMo Supp. 2005. In ***State v. Self***, 155 S.W.3d 756 (Mo. banc 2005), the court overturned the conviction of a parent whose child missed 40 days of school over six months. The court did not reach the plaintiff's void-for-vagueness challenge, holding instead that the state must prove that the parent acted "purposely or knowingly." The court rejected the state's strict liability interpretation, noting, "where a specific mental state is not prescribed in a statute, 'a culpable mental state is nonetheless required and is established if a person acts purposely or knowingly….'" Because 23 of the student's absences were the result of illness and doctor's appointments, there was not enough evidence in the record to convict the child's mother of knowingly

Statutory Construction
2005

violating the law. In dissent, Judge Price argued that a trial court's judgment should be upheld "if there is substantial evidence to support its findings." Here, the student had missed seventeen days of school unexcused, and there was evidence that the parent was aware of these absences. Judge Price, joined by Judge Limbaugh, rejected the state's strict liability argument, but believed there was sufficient evidence to infer that the parent had the requisite mental state to be convicted.

Statutory Interpretation 2006

The case of ***Reed v. Director of Revenue***, 184 S.W.3d 564 (Mo. banc 2006), turned on the definition of "accident." Nicholas Reed backed his truck into a ditch while intoxicated and walked home. Reed was arrested without a warrant three hours later, after police found the truck where Reed left it. Missouri law "provides that an arrest without a warrant for driving while intoxicated or driving with an excessive blood alcohol content is lawful when 'made within one and one-half hours after such claimed violation occurred, unless the person to be arrested has left the scene of an accident or has been removed from the scene to receive medical treatment.'" Section 577.039, RSMo 2000. In an opinion joined by Judges White, Wolff, and Stith, Judge Teitelman held that in Missouri an accident must entail "either property damage or personal injury." Because Reed caused neither, his arrest was unlawful, and the blood alcohol tests that were taken after his arrest were inadmissible.

In dissent, Judge Limbaugh looked to Webster's Dictionary for the "plain and ordinary meaning" of "accident." "If a word in a statute has a plain and ordinary meaning, and if there is no specific statutory definition to the contrary, the plain and ordinary meaning controls, and there is no need to apply rules of statutory construction" (as Judge Teitelman did). Because the case obviously involved an accident under the plain meaning of the word, Reed's arrest was lawful. Judges Price and Russell concurred in Judge Limbaugh's dissenting opinion.

Statutory Interpretation 2006

Missouri law prohibits public funding of abortion. Section 188.205, RSMo 2000. For several years in the 1990s the state department of health entered into contracts with Planned Parenthood to provide non-abortion services (e.g., gynecological exams). In 1999, the legislature added language to an appropriations bill to ensure that none of the money Planned Parenthood received from the state was used to subsidize the organization's abortion-related activities. Specifically, the legislation stated, "an organization that receives these funds and its independent affiliate that provides abortion services may not share any of the following: (a) The same or similar name; (b) Medical or non-medical facilities, including but not limited to business offices, treatment, consultation, examination, and waiting rooms; (c) Expenses; (d) Employee wages or salaries; or (e) Equipment or supplies, including but not limited to computers, telephone systems, telecommunications equipment and office supplies." The legislation also specified that the two organizations must be separately incorporated. Planned Parenthood restructured its operations and continued to receive state funds for non-abortion services ($168,900 in FY2000, $499,950 in FY2003). Daniel Shipley brought a taxpayer suit claiming that the director of the Department of Health should not have disbursed this money, because Planned Parenthood's re-organization did not comply with the statute. Planned Parenthood subsequently chose to forego state funding altogether, and the only issue remaining was whether it should repay the money it had already received.



The court held that restitution was improper, because the contract was neither void nor voidable. The contract was not void because the director did not lack the authority to enter into the contract — Shipley merely argued that the director had misapplied the statute's criteria. The contract was not voidable because "[t]here is no evidence that the director or Planned Parenthood acted fraudulently or in bad faith in contracting for the services." Ultimately, "Planned Parenthood under the law is not responsible for knowing whether the director's interpretation was correct."

In dissent, Judge Limbaugh (joined by Judges Price and Russell), argued that the contracts were void from their inception, because the director had misinterpreted the law. The majority opinion disposed of the claim that the contracts were void *ab initio* in two sentences, but Judge Limbaugh argued emphatically that the director's interpretation of the contracts (although

possibly reasonable) was incorrect. It did not matter to the dissent that the services had been performed already. "In short, the Director had no authority to enter into the contracts with the Planned Parenthood defendants because the defendants were too intertwined with their abortion providers, and consequently, they were not eligible for funding under the appropriations statute." ***Shipley v. Cates***, 200 S.W.3d 529 (Mo. banc 2006).

In response to the filing of fraudulent voter registration cards and to the presence of deceased persons and fake addresses on the state's voter rolls, in 2006 the legislature passed a law requiring voters to show a government-issued photo ID before casting a ballot. But the court struck down the law in a per curiam opinion, holding that it violated the Missouri Constitution's Equal Protection Clause.[58] While recognizing that the state has a "compelling interest in preserving electoral integrity and combating voter fraud," the court held that the law could not withstand strict scrutiny.

Constitutional Law
2006

The court first deferred to the trial court's factual findings that "voter impersonation fraud" has not been a problem in Missouri since 2002, undermining the state's asserted interest. It also held that the photo ID requirement would not work to prevent other types of alleged fraud, such as "absentee ballot fraud, voter intimidation, and inflated voter registration rolls." Thus, the court concluded that the law was not narrowly tailored. Alone in dissent, Judge Limbaugh argued that the issue was not yet ripe. Limbaugh noted that the law's two-year transition period meant that no citizen's right to vote would be burdened until the 2008 general election, and so the plaintiffs lacked standing until then. ***Weinschenk v. State***, 203 S.W.3d 201 (Mo. banc 2006).



The court's recent decisions in capital murder cases indicate a greater willingness to overturn death sentences. Judges Price, Limbaugh, and Benton frequently dissented. In ***State v. Baumruk***, 85 S.W.3d 644 (Mo. banc 2002), the defendant shot and killed his wife (and wounded his attorney, her attorney, a police officer, and a courthouse security officer) during a hearing at the St. Louis County courthouse. The defendant was convicted of first-degree murder at a trial held at the same courthouse, and sentenced to death. The court overturned the conviction, holding that the defendant's motion for change of venue should have been granted. The majority believed that having the trial at the same courthouse where the crime occurred violated the Sixth and Fourteenth Amendments: "the physical setting of the trial was a constant reminder of the horrible events that occurred in the very place where the trial was being held."

Capital Punishment
2002

Judge Benton, joined by Judge Price and Limbaugh, dissented. Judge Benton stressed that the problem could not be the physical location of the trial, "but whether the actual jurors have fixed opinions such that they could not judge impartially whether the defendant was guilty." Here, nine years passed between the shooting and the trial, and voir dire was extensive, leading the dissent to conclude that, "the defendant received a fair and impartial trial, free of the influence of pretrial publicity, a huge wave of public passion or an inflammatory atmosphere."

In ***State ex rel. Amrine v. Roper***, 102 S.W.3d 541 (Mo. banc 2003), the court overturned the death sentence of an inmate convicted of killing another prisoner: "a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment." In other words, a habeas petition could be supported by a claim of actual innocence based purely on the evidence, "freestanding" of any constitutional defect in the trial.

Capital Punishment
2003

Judge Benton dissented, proposing that a master be appointed to consider Amrine's claims, because allegations "do not prove themselves." Judge Price agreed with Judge Benton's dissent, adding that the court could set aside Amrine's death sentence without reaching the question of actual innocence under section 565.035.3(3), RSMo 2000 (allowing the supreme court to set aside a death sentence on "the strength of the evidence").

In ***State ex rel. Simmons v. Roper***, 112 S.W.3d 397 (Mo. banc 2003), the court held that the Eighth Amendment prohibited the execution of a defendant who committed murder when he was a juvenile. The

court found that a "national consensus" had emerged on this issue, similar to the "national consensus" discovered by the U.S. Supreme Court regarding the execution of the mentally disabled in ***Atkins v. Virginia***, 536 U.S. 304 (2002). In dissent, Judge Benton (joined by Price and Limbaugh) argued that Missouri's death penalty statute, which allows the execution of sixteen-year-olds, "is the enacted will of the people of Missouri and must be enforced unless it is in violation of either the Missouri or the United States Constitutions." The Court upheld the execution of a juvenile in ***Stanford v. Kentucky***, 492 U.S. 361 (1989), and the dissent argued that the majority had no authority to overrule this decision.[59]

Capital Punishment 2003

In ***State v. Johnson***, 968 S.W.2d 123 (Mo. banc 1998), Judge White dissented alone, arguing that a quadruple-murderer's death sentence should be overturned for ineffective assistance of counsel. In ***Hutchinson v. State***, 150 S.W.3d 292 (Mo. banc 2004), Chief Justice White joined the majority opinion of Judge Wolff in overturning the death sentence of a convicted double murderer for ineffective assistance of counsel. The majority found that "Hutchison's counsel were overwhelmed, under-prepared and under-funded by the time they arrived at the penalty phase." Thus, "the jury did not hear compelling evidence for mitigation in the penalty phase," such as that Hutchinson has a low IQ and was abused as a child.

Capital Punishment 2004

Judge Limbaugh, joined by Judge Price, argued in dissent that the majority's decision ran counter to the U.S. Supreme Court's admonition against the "distorting effects of hindsight" when considering an ineffective-assistance-of-counsel claim. *See* ***Strickland v. Washington***, 466 U.S. 668 (1984). The dissent reviewed the evidence that was admitted during the penalty phase, and argued, "the majority's conclusion that counsel 'did not investigate Hutchison's medical, educational, family, and social history and did not present available evidence of Hutchison's emotional and intellectual impairment' is a gross mischaracterization of the record." *See also* ***State v. McFadden***, 191 S.W.3d 648 (Mo. banc 2006) (overturning a death sentence and remanding for new trial when the state used peremptory strikes against African-American venirpersons. Although the state offered individually valid explanations, when taken together it was clear that the state's true purpose was racial discrimination. Judges Price and Russell join Limbaugh in dissent); ***State v. Barriner***, 111 S.W.3d 396 (Mo. banc 2003) (reversing death sentence because trial court abused its discretion by excluding the introduction of hair evidence found at the crime scene, which could have helped defendant prove that another person committed the murders. Judge Price joins Judge Benton's dissenting opinion).

During the last four years the court also has become more willing to overturn criminal convictions because of alleged errors by the trial court, often by five-to-two and four-to-three votes. *See, e.g.*, ***State v. Seibert***, 93 S.W.3d 700 (Mo. banc 2002) (defendant was arrested for arson that resulted in one death, confessed before being read her Miranda rights, and confessed again after being Mirandized; the court held that the tactic of interrogating before and after the Miranda warning weakened the defendant's ability to exercise her right against self-incrimination, and that neither statement was admissible; Judge Benton dissents, joined by Price and Limbaugh); ***State v. Langdon***, 110 S.W.3d 807 (Mo. banc 2003) (overturning conviction for receiving stolen property because there was insufficient evidence to permit an inference of knowing possession of stolen property; Judge Price concurs in Limbaugh's dissent); ***State v. Blocker***, 133 S.W.3d 502 (Mo. banc 2004) (reversing the conviction of a persistent controlled substance offender because he was denied a continuance to secure the testimony of a pharmacist who would testify that the pills were for the defendant's grandmother; Judges Benton and Price concur in Limbaugh's dissent); ***State v. Long***, 140 S.W.3d 27 (Mo. banc 2004) (granting new trial to a defendant who was not allowed to introduce evidence of prior false allegations of a rape victim, when the defendant chose not to cross-examine the victim; Judges Price and Limbaugh, joined by Benton, file separate dissents).

Criminal Law 2002–2004

In the area of tort law, the court's decisions since 2002 have followed a different track than

Tort: Duty of Care 2002

the court of the 1990s. In ***L.A.C. v. Ward Parkway Shopping Center Co.***, 75 S.W.3d 247 (Mo. banc 2002), a twelve-year-old girl claimed that she was raped in a deserted catwalk at a shopping mall. While the rape was occurring, her friend tried to get help from two different security guards, neither of whom took the report seriously. Although many material facts were disputed, the court held that the girl could pursue a negligence claim against the mall's owners and the security company, and reversed summary judgment. The girl was a business invitee, and so she "must show evidence that would cause a reasonable person to anticipate danger and take precautionary actions to protect its business invitees against the criminal activities of unknown third parties." Because the record showed seventy-five violent crimes on the premises over the last three years, 62% of which involved solely female defendants, the court held that the alleged rape was foreseeable, and allowed the suit to go forward. The court also held that plaintiff could sue the security company for breach of contract as a "creditor beneficiary" of its contract with the mall's owner, and for negligence.



Judge Limbaugh filed a dissent, joined by Judge Benton. As to the claims against the mall owner, the dissent worried that "the violent crimes exception, which by definition should be applied only under extraordinary circumstances, swallows up the general rule that 'there is no duty to protect business invitees from the criminal acts of unknown third persons.'" Specifically, the dissent questioned the empirical evidence of past criminal activity on the premises, pointing out that none of the crimes were "remotely similar" to the alleged rape. The dissent also would have held that the security company was not liable to the plaintiff, for negligence or for breach of contract.

In ***State ex rel. Doe Run Resources Corp. v. Neill***, 128 S.W.3d 502 (Mo. banc 2004), a class action suit was filed against the owner of a lead smelter for negligence and negligence per se, strict liability, private nuisance, and trespass. The defendant argued that the company's chief financial officer was joined pretensively so that venue could be in St. Louis City. Defendants argued that the CFO was not a proper defendant, because his acts were carried out as a corporate officer, not in his individual capacity. The majority held that the CFO was properly joined, because the plaintiffs alleged that he had "actual or constructive knowledge of, and participated in, an actionable wrong."

Tort: Venue 2004

The dissent stressed that the exception to individual liability for a corporate officer is actually much narrower: "Nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the prejudice of the party complaining will give origin to individual liability." Because the CFO was "staff officer," and not a person with discretion to make decisions for the company like the president or the owner, he could not be held personally liable. The dissent also noted that the allegations against the CFO in the petition merely restated the words of the exception. Because the CFO "did not actively participate in making environmental decisions," the dissent concluded that joinder was pretensive.

The court extended its decision in ***Thomas v. Siddiqui***, 869 S.W.2d 740 (Mo. banc 1994) (abolishing the tort of criminal conversation) in ***Helsel v. Noellsch***, 107 S.W.3d 231 (Mo. banc 2003). For the majority, Judge Teitelman argued that the tort of alienation of affection was grounded in "the antiquated concept that husbands had a proprietary interest in the person and services of their wives." Judge Teitelman also doubted that the tort is "a useful means of preserving marriages and protecting families," because suits were usually brought after the marriage was dissolved. "Revenge, not reconciliation, is often the primary motive." Finally, the majority cited the need for consistency with its decision in *Thomas*: "If a spouse cannot recover because of an adulterous affair under a criminal conversation theory, a spouse should likewise be barred from recovery by simply attaching the moniker of 'alienation of affection' to the petition."

Tort & Family Law 2003

In dissent, and joined by Judge Limbaugh, Judge Benton pointed out that the majority's rationale could also be used to abolish a claim for loss of consortium. Noting that the Restatement defines loss of consortium as an "Indirect Interference with Marriage Relation," and alienation of affection as a "Direct Interference with Marriage Relation," Judge Benton argued, "It is inconsistent that the law compensates for indirect interference with the marriage relation, but (after this opinion) not for direct interference." And loss

of consortium has its roots in the same "antiquated property concepts" that so troubled the majority. As to the need for "consistency," the dissent noted that, "a rationale for abolishing criminal conversation [in *Thomas*] was that the tort of alienation of affection would still compensate for interference with the marriage relation." Preferring to "leave further action to the General Assembly," Judge Benton and Limbaugh dissented.

The statute of limitations on a tort claim does not begin to run until "the damage resulting [from the breach of duty] is sustained and is capable of ascertainment." Section 516.100, RSMo 2000. In ***Powel v. Chaminade College Preparatory, Inc.***, 197 S.W.3d 576 (Mo. banc 2006), a forty-two-year-old man recovered memories of childhood sexual abuse, and argued that the statute of limitations should not begin to run until the memory was recovered. The defendant argued that the abuse was "capable of ascertainment" when it happened, and so the statute of limitations had long since expired. The court adopted what it labeled an objective test, holding that the statute of limitations begins to run "when a reasonable person would have been put on notice that an injury and substantial damages may have occurred and would have undertaken to ascertain the extent of the damages." The court held that there were questions of fact to be resolved, overturned summary judgment, and remanded the case. In his concurrence, Judge Wolff agreed with the court's test, but doubted that the plaintiff should survive summary judgment, because he admitted that he always remembered the abuse, even when the specific memories were repressed.

Tort: Statute of Limitations 2006

In dissent, Judge Price accused the majority of "stat[ing] an 'objective' standard, but apply[ing] a 'subjective' one." Judge Price allowed an exception for "victims who are so young or lacking in understanding that they might not ascertain that they have been abused or harmed," but argued that this was not such a case. Judge Price also noted that the party who argues for avoidance of the statute bears the burden of proof, and here the plaintiff did not meet this burden.

On May 11, 2001, Fred Schoemehl injured his knee at work, and died soon afterward from unrelated causes. His wife and sole dependant, Annette Schoemehl, sued for workers' compensation benefits. An ALJ ruled that the deceased had suffered a total permanent disability, and awarded Annette benefits until Fred's death. The widow appealed, claiming that she should receive his workers' compensation benefits for the rest of her life, and the court agreed. The court was forced to reconcile two apparently inconsistent statutes. Section 287.230.2, RSMo 2000, required that disability payments would cease upon the death of the disabled, "unless there are surviving dependents at the time of death." But Section 287.200.1, RSMo 2000, stated that PTD disability benefits should be paid "during the continuance of such disability for the lifetime of the employee". Respondents argued that, because the disability ceased at death, the widow could not collect the benefits. The majority held that, as a dependent of the deceased, the widow is included in the definition of an "employee" under Section 287.020.1, RSMo Supp. 2005.

Statutory Construction 2007

The majority construed the "continuance of such disability" language to apply to situations where the disabled employee recovered. The dissent responded that even if the requirement that benefits were only payable "for the lifetime of the employee" could be overcome by defining dependents as employees, the majority "improperly excises from section 287.200.1 the additional requirement that the compensation is payable for the lifetime of the employee only 'during the continuance of such disability.'" ***Schoemehl v. Treasurer of State***, 217 S.W.3d 900 (Mo. banc 2007).



In an unsigned, unanimous per curiam opinion, the court narrowly construed a statute creating a civil cause of action against anyone who "shall intentionally cause, aid, or assist a minor to obtain an abortion" without parental consent or a valid court order. *See* section 188.250, RSMo Supp. 2005. After establishing that Planned Parenthood has standing and that the case is ripe, the court observed, "[t]he information and counseling provided by Planned Parenthood do not fall into any unprotected category, but rather are core protected speech." Rather than find that the statute infringed on Planned Parenthood's

Statutory Construction 2007

protected First Amendment activity, the court used a "narrowing construction," which is "the preferred remedy in First Amendment cases." Presuming the legislature "would not pass laws in violation of the constitution," the court held that the phrase "aid or assist" does not "include protected activities such as providing information or counseling." The court upheld the statute against vagueness, Commerce Clause, Due Process Clause, and Right to Travel Clause challenges. Further, because "the Untied States Supreme Court has upheld Missouri's parental consent statute," as well as other states' "parental consent with judicial bypass statutes," the court held that the statute was not an "undue burden" on a minor to obtain an abortion, per ***Planned Parenthood v. Casey***, 505 U.S. 833 (1992). ***Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon***, 2007 WL 1260923 (Mo. banc May 1, 2007).

Collective bargaining for public-sector employees has been a contentious issue in Missouri for decades. The legislature has considered, and rejected, legislation granting public-sector employees collective bargaining rights nearly on an annual basis. Within six months of taking office in 2001, Governor Holden issued an executive order giving state government employees collective bargaining rights.[60] Then-Secretary of State Matt Blunt refused to publish the resulting administrative rule, and was sued by AFSCME, a public-sector union.[61] Collective bargaining for public employees was a major issue in the 2004 gubernatorial campaign.[62] Blunt, the Republican candidate, pledged to repeal the order on his first day in office, if elected.[63] He was, and he did.[64]





The Missouri Constitution guarantees, "employees shall have the right to organize and to bargain collectively through representatives of their own choosing."[65] For sixty years, the law in Missouri was that this provision applies to private-sector employees only, not to employees in the public sector. *See* ***City of Springfield v. Clouse***, 206 S.W. 539 (Mo. banc 1947). Three employee organizations, including a local chapter of the National Education Association, sued the Independence School District for "chang[ing] the terms of employment of the employees represented by these associations." The district adopted a "Collaborative Team Policy" conflicting with an existing "memorandum of understanding," without consulting the employee associations. The district "acknowledges that its unilateral adoption of the new policy constituted a refusal to bargain collectively with these employee associations."

The majority held, "'Employees' plainly means employees. There is no adjective; there are no words that limit employees to private sector employees." The majority explained that the court does not have the authority "to read into the Constitution words that are not there." As for *Clouse*, stare decisis "is not absolute, and the passage of time and the experience of enforcing a purportedly incorrect precedent may demonstrate a compelling case for changing course." The majority explained, "If the people want to change the language of the constitution, the means are available to do so. This Court will not change the language the people have adopted. *Clouse* is overruled." The majority also overruled ***Sumpter v. City of Moberly***, 645 S.W.2d 359 (Mo banc 1982), which it described as holding "that a city was free to disregard agreements made with employee associations or unions." Thus, the majority established a constitutional right for public-sector employees to engage in collective bargaining (although not to strike, "unlike their private-sector counterparts").

In dissent, Judge Price (joined by Judge Limbaugh) noted, "[t]he decision in *Clouse*, that public employees do not enjoy the right to collective bargaining under the constitution, was handed down only two years following the convention [that wrote and adopted the current Missouri constitution]. There is no doubt the Court then knew the intent of the framers and the mood of the 1945 electorate better than the Court does now." Judge Price argued that "the appellants are entitled to relief on most, but not all, of their claims," under the existing labor law in Missouri and without overruling *Clouse* or *Sumpter*. Failing a narrower resolution of the case, Judge Price argued that *Clouse* should not be overruled, but that *Sumpter* could be: "while a governmental entity may not be forced to enter into a labor agreement, once it does so, it should be bound accordingly." As Judge Price explained, *Sumpter* "acknowledged that a governing body may adopt the proposal of an employee group by way of an ordinance, resolution or other appropriate form, depending on the nature of the

public body." Therefore, "*Sumpter* held that governing bodies are free to disregard the agreement so long as the agreement is rescinded by appropriate action."

Under Missouri law, however, there is a "long recognized prohibition of one legislative body from binding a subsequent legislative body." For the dissent, overruling *Sumpter* would have a limited effect: "the only difference in result from overruling *Sumpter* is the extent of time that may be found to exist between one school board and its successor. The appellants are entitled to relief on their claim that any given Board may not unilaterally change agreements it votes to adopt. However, any subsequent Board cannot be bound by a previous board's vote." *See* ***Independence-Nat. Educ. Ass'n v. Independence Sch. Dist.***, 2007 WL 1532737 (Mo. banc May 29, 2007).

## IX. Conclusion

In 1992, it appeared that Governor Ashcroft's appointees would dominate the Supreme Court of Missouri for many years. Today, only two of those judges remain on the court. And the court's jurisprudence has tracked this shift in the balance of power. The court of the 1990s enforced Missouri's post-conviction relief rules;[66] recently, the court has relaxed the law of habeas corpus in Missouri.[67] The current court has modified Missouri tort law to relax the causation requirement,[68] and takes a more liberal approach to federal and state constitutional law.[69] The court exhibits less deference to the legislature and to precedent,[70] and has expanded Missouri's venue rules[71] and statute of limitations,[72] while relaxing traditional contract law.[73] The current court is also more willing to overturn death sentences for ineffective assistance of counsel[74] and for lack of a fair trial caused by pre-trial publicity,[75] and to overturn other criminal convictions for insufficient evidence.[76]

This Paper is descriptive, not argumentative. Its purpose is to provide information about the jurisprudence of the Supreme Court of Missouri since 1992 and about the backgrounds of its members, in order to inform the current public debate. Some readers may prefer the current court's jurisprudence, while others may look to yesterday's court for inspiration and guidance. It is clear, however, that the court has taken a new direction in recent years, and this shift followed changes in the court's composition. The seeds of some of today's majority opinions can be found in earlier dissenting opinions. Partisanship and personal preferences aside, the obvious lesson is that judicial selection definitely has consequences.

## Endnotes

1 David Lieb, *Top Republicans Frustrated with Mo. Court System*, The Associated Press State & Local Wire, 2/18/2007.

2 *Id*.

3 Jo Mannies, *Battle Brews Over Judges*, St. Louis Post-Dispatch, 5/1/2007.

4 "My hope is that the group of citizens convened by the The Missouri Bar will propose a judicial evaluation system that is driven by nonlawyers as well as by the members of the Bar; that is independent and nonpartisan; and that produces credible results made widely available to the voting public." *Chief Justice Michael A. Wolff: 2007 State of the Judiciary Address*, *available at* http://www.mobar.org/851b6221-fd7a-4878-8234-8342a15c6317.aspx (last accessed 6/3/2007).

5 Virginia Young & Jeremy Kohler, *Judge White to Resign from State High Court*, St. Louis Post-Dispatch, 5/19/2007.

6 Mo. Const. art. V, sec. 25(a).

7 *Id*.

8 Mo. Const. art. V, sec. 25(d).

9 HJR 31, *available at* http://www.house.mo.gov/bills071/bills/HJR31.HTM (last accessed May 25, 2007).



10 HJR 33, *available at* http://www.house.mo.gov/bills071/bills/HJR33.HTM (last accessed May 25, 2007).

11 HJR 34, *available at* http://www.house.mo.gov/bills071/bills/HJR34.HTM (last accessed 5/25/2007).

12 William C. Lhotka, *Benchmark: Ashcroft Appointees Ensure Judicial Legacy*, St. Louis Post-Dispatch, 5/26/1991.

13 *Id*.

14 Two trial judges have been voted out of office: Judge Marion D. Waltner of Jackson County in 1942, and Judge John R. Hutcherson of Clay County in 1992. *See* "Missouri Nonpartisan Court Plan," *available at* http://www.courts.mo.gov/index.nsf/b820afdc4fc4737f86256c0900633c6a/3febf2c901768abe862564ce004ba8a1?OpenDocument (last accessed 2/1/2007).

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16 Mo. Const. art IV, § 17.

17 Lhotka, *supra* note 12.

18 Will Sentell, *Missouri Mourns Loss of Admired Judge*, Kansas City Star, 7/31/1995.

19 *Id*.

20 AP, *Colleagues Remember State Judge*, Kansas City Star, 8/3/1995.

21 AP, *Carnahan Could Name Black to High Court*, Kansas City Star, 10/4/1995.

22 *Id*.

23 Fred W. Lindecke, *St. Louisan Named to Court*, St. Louis Post-Dispatch, 10/24/1995. The Plan has been criticized for under-representing minorities because it prevents voters in Missouri's two main urban areas from directly electing local judges. *See* State Sen. J.B. "Jet" Banks, *The Case For, Against Missouri Court Plan*, St. Louis Post-Dispatch, 3/12/1992.

24 *Id*.

25 *Dissonance in Black and White*, St. Louis Post-Dispatch, 6/29/1996.

26 *Id*.

27 *Judge White's Judicious Revision*, St. Louis Post-Dispatch, 11/26/1996.

28 Dan Margolies, *Robertson Leaves Supremes to Sing Big Tobacco Blues*, Kansas City Business Journal, 7/10/1998.

29 Virginia Young, *Finalists are Announced for a Supreme Court Vacancy*, St. Louis Post-Dispatch, 8/6/1998.

30 Virginia Young, *Mike Wolff Takes Oath of Office as State Supreme Court Judge*, St. Louis Post-Dispatch, 9/9/1998.

31 Terry Ganey, *Governor Picks SLU Professor to Fill Vacancy on High Court*, St. Louis Post-Dispatch, 8/11/1998.

32 Young, *supra* note 30.

33 Ganey, *supra* note 31.

34 Following the court's decision, in 1999 the legislature repealed the three-strike rule, formerly section 340.240.6. *See* S.B. 424, *available at* http://www.senate.mo.gov/99info/bills/SB424.htm (last viewed 2/27/2007).

35 Mo. Const. art. V, sec. 3: "The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of… a statute or provision of the constitution of this state…."

36 Bill Bell, Jr., *Ann Covington, 1st Woman on State High Court, Resigns*, St. louis Post-Dispatch, 12/15/2000.

37 *Covington's Solid Record*, Kansas City Star, 12/27/2000.

38 David A. Lieb, *Retiring Judge Says She Has Job Offers in Private Sector*, The Associated Press State & Local Wire, 12/15/2000.

39 Bell, *supra* note 36.

40 *For the Defense, A Little Reshuffling*, Kansas City Star, 4/17/2001.

41 *Three Solid Candidates*, St. Louis Post-Dispatch, 3/1/2001.

42 Virginia Young, *New Judge on Missouri Supreme Court Says She'll Try to Follow in Footsteps of the Woman She's Replacing*, St. Louis Post-Dispatch, 3/3/2001.

43 *Id*.

44 Virginia Young, *State Supreme Court Swears in Newest Member*, St. Louis Post-Dispatch, 4/13/2001.

45 Young, *supra* note 42.

46 "Bringing Justice to Judicial Hellholes 2003," American Tort Reform Association, *available at* http://www.atra.org/reports/hellholes/2003/report.pdf (last accessed 2/26/2007).

47 In 2005 the legislature amended section 287.215 to overturn the court's decision, adding the words, "The term 'statement' as used in this section shall not include a videotape, motion picture, or visual reproduction of an image of an employee. *See* SBs 1 & 130, *available at* http://www.senate.mo.gov/05info/BTS_Web/Bill.aspx?SessionType=R&BillID=126 (last accessed 2/27/2007).

48 Aaron Deslatte, *State High Court Jurist, an Ozarker, to Retire*, Springfield News-Leader, 1/4/2002.

49 Erin Suess, *Retired Missouri Supreme Court Judge Joins Law Firm*, St. Louis Daily Record, 3/2/2002.

50 Virginia Young, *Teitelman is Finalist for Missouri High Court*, St. Louis Post-Dispatch, 2/20/2002.

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52 Tim Bryant & Virginia Young, *New High Court Judge Is a Good Listener, Overcame Obstacles, Friends Say*, St. louis Post-Dispatch, 2/25/2002.

53 In 2005 the legislature amended section 538.210 to overturn the *Scott* decision. The statute now reads, "no plaintiff shall recover more than three hundred fifty thousand dollars for non-economic damages irrespective of the number of defendants." *See* HB 393, *available at* http://www.house.mo.gov/bills051/bills/HB393.htm (last accessed 2/27/2007).

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56 Virginia Young, *Appeals Judge is Named to High Court*, St. Louis Post-Dispatch, 9/21/2004.

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59 On appeal, the Supreme Court of the United States upheld the court's decision. *See* Roper v. Simmons, 543 U.S. 551 (2005).

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61 Kelly Wiese, *Union Goes to Court over Collective Bargaining Rule*, The Associated Press State & Local Wire, 8/19/2004.

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63 David A. Lieb, *Governor's Candidates Squabble Over Cost-Savings in Government*, The Associated Press State & Local Wire, 3/4/2004.

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65 Mo. Const. art. I, sec. 29.

66 Bullard v. State, 853 S.W.2d 921 (Mo. banc 1993) (all concur); White v. State, 939 S.W.2d 887 (Mo. banc 1997) (6-1 decision) (White, J. dissenting); Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000) (5-2 decision) (White, J., dissenting).

67 State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc 2003) (4-3 decision) (Benton and Price, JJ., dissenting).

68 *Compare* Callahan v. Cardinal Glennon Hosp., 863 S.W.2d 852 (Mo. banc 1993) (all concur), *and* Carter v. Kinney, 896 S.W.2d 926 (Mo. banc 1995) (all concur) (Price, J., concurring in the result), *and* State ex rel. Mo. Highway & Transp. Comm'n v. Dierker, 961 S.W.2d 58 (Mo. banc 1998) (6-1 decision) (White, J. dissenting), *with* L.A.C. v. Ward Parkway Shopping Ctr. Co., 75 S.W.3d 247 (Mo. banc 2002) (4-2 decision) (Limbaugh, C.J., dissenting).



69 *Compare* State v. Damask, 936 S.W.2d 565 (Mo. banc 1996) (6-1 decision) (White, J., dissenting), *and* Linton v. Mo. Veterinary Med. Bd., 988 S.W.2d 513 (Mo. banc 1999) (4-3 decision) (Wolff, J., dissenting), *with* State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. banc 2003) (4-3 decision) (Price, J., dissenting), *and* Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006) (6-1 decision) (Limbaugh, J., dissenting).

70 *Compare* R.L. Nichols Ins., Inc. v. Home Ins. Co., 865 S.W.2d 665 (Mo. banc 1993) (all concur), Linton v. Mo. Veterinary Med. Bd., 988 S.W.2d 513 (Mo. banc 1999) (4-3 decision) (Wolff, J., dissenting), *and* State v. Callen, 45 S.W.3d 888 (Mo. banc 2001) (4-3 decision) (White, J., dissenting), *with* State ex rel. Simmons v. Roper, 112 S.W.3d 397 (Mo. banc 2003) (4-3 decision) (Price, J., dissenting), Weinschenk v. State, 203 S.W.3d 201 (Mo. banc 2006) (6-1 decision) (Limbaugh, J., dissenting), Schoemehl v. Treasurer of State, 21 S.W.3d 900 (Mo. banc 2007), Planned Parenthood of Kan. & Mid-Mo., Inc. v. Nixon, 2007 WL 1260923 (Mo. banc May 1, 2007), *and* Independence-Nat'l Educ. Ass'n v. Independence Sch. Dist., 2000 WL 1532737 (Mo. banc May 29, 2007).

71 *Compare* State ex rel. Shelton v. Mummert, 879 S.W.2d 525 (Mo. banc 1994) (all concur), *and* State ex rel. Linthicum v. Calvin, 57 S.W.3d 855 (Mo. banc 2001) (4-3 decision) (White, Wolff, and Stith, JJ., dissenting), *with* State ex rel. Doe Run Res. Corp. v. Neill, 128 S.W.3d 502 (Mo. banc 2004) (4-3 decision) (Benton, J., dissenting).

72 Powel v. Chaminade Coll. Preparatory, Inc., 197 S.W.3d 576 (Mo. banc 2006) (6-1 decision) (Price, J., dissenting).

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74 *Compare* State v. Johnson, 968 S.W.2d 123 (Mo. banc 1998) (6-1 decision) (White, J., dissenting), *with* Hutchinson v. State, 150 S.W.3d 292 (Mo. banc 2004) (5-2 decision) (Limbaugh, J., dissenting on ineffective assistance of counsel issue).

75 *Compare* State v. Barton, 998 S.W.2d 19 (Mo. banc 1999) (5-2 decision) (Wolff, J., dissenting), *with* State v. Baumruk, 85 S.W.3d 644 (Mo. banc 2002) (4-3 decision) (Benton, J., dissenting).

76 State v. Whalen, 49 S.W.3d 181 (Mo. banc 2001) (4-3 decision) (Price, J., dissenting), State v. Langdon, 110 S.W.3d 807 (Mo. banc 2003) (5-2 decision) (Limbaugh, J., dissenting), State v. Self, 155 S.W.3d 756 (Mo. banc 2005) (5-2 decision) (Price, J., dissenting on sufficiency of the evidence issue).

# Appendix A

**DUANE BENTON** was born September 8, 1950, in Springfield and grew up in Mountain View, Willow Springs and Cape Girardeau.

Judge Benton is a 1972 graduate of Northwestern University, Evanston, Illinois, graduating *summa cum laude* and Phi Beta Kappa. He received a law degree from Yale Law School in 1975, distinguishing himself as editor and managing editor of the *Yale Law Journal*. Selected as a Danforth fellow, he completed the Senior Executives Program at Harvard University, John F. Kennedy School of Government. He has also accomplished the post-graduate Appellate Judges Course at the Institute of Judicial Administration, New York University. He holds a Master of Laws degree from the University of Virginia and honorary Doctor of Laws degrees from Central Missouri State University and Westminster College.

From 1975 to 1979 served with the U.S. Navy as a judge advocate. While in the Navy, he attended Memphis State University and earned a master's degree in business administration and accountancy. He became a certified public accountant in Missouri in 1983 and is the only Certified Public Accountant serving on any supreme court in America. Judge Benton is a member of the American Institute of Certified Public Accountants; and the Missouri Society of Certified Public Accountants.

Before joining the Supreme Court, Judge Benton practiced law as a private attorney in Jefferson City for six years. He is admitted to practice before the United States Supreme Court, United States Tax Court, United States Court of Appeals for the Armed Forces and all Missouri Courts. From 1980 through 1982 he served as chief of staff to then-Congressman Wendell Bailey in the U.S. House of Representatives.



Judge Benton served as director of the Missouri Department of Revenue from 1989 to 1991. He also served on the Multistate Tax Commission, with tax administrators from 32 other states, who elected him chair, and as president of the Midwestern States Association of Tax Administrators.

Judge Benton, a Vietnam veteran, retired from the U.S. Naval Reserve as the rank of captain, after 30 years of active and reserve duty. He belongs to the Veterans of Foreign Wars, the American Legion, the Navy League, the Vietnam Veterans of America, the Military Order of the World Wars and served on the Missouri Military Advisory Commission.

From 1987 through 1989 Judge Benton was a member of the board of regents for Central Missouri State University in Warrensburg. He has also served as chair of the board of trustees for the Missouri State Employees' Retirement System, the Missouri Commission on Intergovernmental Cooperation, the Council for Drug-Free Youth and as director of the Jefferson City United Way.

Judge Benton is an adjunct professor at both Westminster College and the University of Missouri-Columbia School of Law. A deacon and trustee of the First Baptist Church in Jefferson City, he is former counsel to the Missouri Baptist Convention. Duane and his spouse, Sandra, a registered nurse, have two children: Megan and Grant.

Judge Benton was appointed to the Missouri Supreme Court on August 16, 1991, and retained at the November 1992 election. His term expires December 31, 2004. He served as Chief Justice of the Missouri Supreme Court from July 1, 1997 through June 30, 1999.

**ANN K. COVINGTON** was born in Fairmont, West Virginia, on March 5, 1942. She received her education in the public schools of Fairmont, West Virginia. She obtained her bachelor of arts degree at Duke University, Durham, North Carolina, in 1963. Following her graduation, Judge Covington joined the teaching staff at Oxfordshire Schools, Oxford, England, from 1963 to 1965. She then attended Rutgers University for graduate work in English literature. Judge Covington earned a juris doctorate in May 1977, from the University of Missouri School of Law. She has accomplished the post-graduate Appellate judges Course at the Institute of Judicial Administration, New York University.

From 1977 to 1979, Judge Covington served as an Assistant Attorney General of Missouri. She then entered the private practice of law in Columbia. While practicing law there Judge Covington served on the board of directors of Mid-Missouri Legal Services Corporation and Ellis Fischel State Cancer Hospital. She was chair of the Juvenile Justice Advisory Board, the City of Columbia Industrial Revenue Bond Authority and committees of the Missouri United Methodist Church.

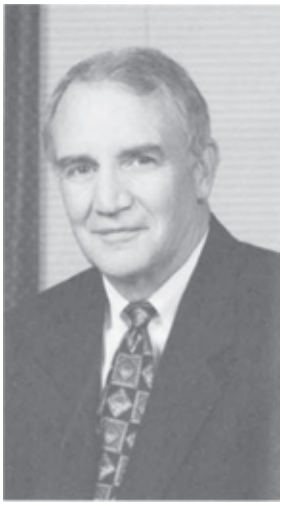
Judge Covington is a member of the American Law Institute, elected in 1998. She serves on the Board of the National Center for State Courts. She is a member of the American, Missouri and Boone County Bar Associations, as well as the American Judicature Society. Judge Covington has served as a member of the Advisory Committee on Evidence Rules of the Judicial Conference of the United States and as vice president of the Conference of Chief Justices of the United States.



Judge Covington was a Council of State Governments' 1988 Toll Fellow. She is a member of the Academy of Missouri Squires. She received the Citizen of Merit Award from the University of Missouri Law School and the Faculty-Alumni Award from the University of Missouri. In 1995, the Robert C. Goshorn Foundation named Covington "Statesman of the Year," an award for the State of Missouri's outstanding public servant. She also received the Spurgeon-Smithson Award from the Foundation of The Missouri Bar for outstanding contributions to the profession. She is an honorary member of the Order of the Coif, Mortar Board and Phi Alpha Delta legal fraternity.

Judge Covington is married to Charles J. McClain. She has two children, Elizabeth and Paul.

Judge Covington was appointed to the Missouri Court of Appeals, Western District, in September of 1987. In December of 1988, she was appointed to the Missouri Supreme Court. She was the first woman in Missouri to serve in each capacity. Judge Covington served as Chief Justice of the Missouri Supreme Court from July of 1993 through June of 1995. She was retained in office by Missouri voters in the November 1990 election. Her term expires December 31, 2002.



**JOHN C. HOLSTEIN** was born January 10, 1945, in Springfield. He attended Springfield public schools and graduated from Parkview High School in 1963. He attended Kansas State College and earned degrees from Southwest Missouri State University (B.A., political science); University of Missouri-Columbia (J.D.); and University of Virginia (LL.M.).

Judge Holstein was married August 26, 1967, to Mary Brummell. They have three children. He is a member of the Second Baptist Church of Springfield. He was commissioned in the U.S. Army in 1969 and served on active duty, in the Army Reserve and National Guard, attaining the rank of lieutenant colonel. A graduate of the Army's Command and General Staff College, he commanded National Guard units in West Plains and Jefferson City.

Holstein began practicing law in 1970 in West Plains and taught business law at Southwest Missouri State University, 1974-1975. While in private law practice, he served as city attorney for the city of Mountain View, 1972-1975. He also chaired the Howell County Chapter of the American Red Cross and served on its board of directors. For several years he served as chair of the Ozark Area Care and Counseling Services in West Plains. He served on the Board of Trustees of Southwest Baptist University.



As a circuit judge, he was a member of the Circuit Courts Budget Committee. Holstein also served on the Legislative Steering Committee and Judicial Records Committee while on the Court of Appeals. He chaired the Supreme Court Task Force on Abused and Neglected Children and was a member of the Missouri Bar Committee on Public Perception of the Judiciary and the Bar's Foresight Committee. He has served as chair of the Supreme Court Critical Issues Committee and the executive council of the Judicial Conference. He also chaired the Central States Judicial Conference on Child Support Enforcement. He is an honorary member of the Order of the Coif and Phi Alpha Delta legal fraternity.

Judge Holstein was appointed probate and *ex officio* magistrate in 1975 and was elected probate judge to fill an unexpired term in 1976. He was elected associate circuit judge of Howell County, 1978, and circuit judge of the 37th Judicial Circuit, 1982, where he also served as presiding circuit judge. He was appointed to the Missouri Court of Appeals, Southern District, by Governor John Ashcroft in April 1987. He became chief judge of that court in 1988. He was appointed to the Supreme Court by Governor Ashcroft in October 1989. Judge Holstein served as Chief Justice from July 1995-June 1997. Retained at the 1990 general election, his term expires December 31, 2002.

**STEPHEN N. LIMBAUGH JR.** was born January 25, 1952, in Cape Girardeau.

Judge Limbaugh was educated in the Cape Girardeau public schools and later graduated from Southern Methodist University (Bachelor of Arts, 1973; Juris Doctor, 1976) and the University of Virginia (Master of laws in Judicial Process, 1998).

Judge Limbaugh was admitted to the State Bar of Texas and The Missouri Bar in 1977. He was engaged in private practice with the Cape Girardeau law firm of Limbaugh, Limbaugh and Russell from 1997-1978. In November 1978 he was elected prosecuting attorney of Cape Girardeau County and served from 1979-1982. He then returned to private practice with the Limbaugh firm from 1983 until September 1987 when he was appointed Circuit Judge, 32nd Judicial Circuit, for a portion of an unexpired term. He was elected in 1988 for the remainder of the unexpired term and re-elected in 1990 for a full six-year term. While circuit judge, he served as Presiding Judge of the 32nd Judicial Circuit and as judge of the Juvenile Court.

Judge Limbaugh has served on the Missouri Division of Youth Services Advisory Board and the governing boards of Southeast Missouri Hospital, Southeast Missouri Council and Great Rivers Council of the Boy Scouts of America, Southeast Missouri Symphony, Cape Girardeau United Way, Cape Girardeau Civic Center, Cape Girardeau and Jefferson City Community Concert Associations, Cape Girardeau Rotary Club, Cape Girardeau Jaycees, Greater Cape Girardeau Development Corporation, Centenary United Methodist Church, William Woods University, Southern Methodist University Law Alumni Association and Friends of the Missouri State Archives. He is a member, and past president, of the Cape Girardeau Rotary Club and is a Paul Harris Fellow. He is also a member of the American Bar Association and the American Judicature Society and is a Follow of the American Bar Foundation. He is a recipient of the University of Missouri-Columbia School of Law Distinguished Non-Alumnus Award, the Distinguished Eagle Scout Award from the National Eagle scout Association and the honorary degree of Legum Doctorem from William Woods University.



He was married on July 21, 1973, to the former Marsha D. Moore. They have two sons, Stephen III and Christopher. His father, Stephen N. Limbaugh, is a senior United States District Judge in St. Louis.

Judge Limbaugh was appointed by Governor John Ashcroft to the Supreme Court in August 1992. He was retained at the November 8, 1994 general election for a term expiring December 31, 2006. Judge Limbaugh served as Chief Justice, July 1, 2001 to June 30, 2003.

**WILLIAM RAY PRICE JR.**, Kansas City. Born January 30, 1952 in Fairfield, Iowa.

Judge Price was educated at Keokuk, Iowa public schools; University of Iowa, B.A. *with high distinction*, religion, 1974; Yale University Divinity School, 1974-1975; Washington and Lee University School of Law, J.D., *cum laude*, 1978. He is the recipient of the Hancher-Finkbine Undergraduate Man of the Year Award from University of Iowa, 1974; Burks Scholar Individual Winner at Washington and Lee University School of Law, 1976.

Price was married to Susan Marie Trainor on January 4, 1975. They have two children: Emily Margaret Price and William Joseph Dodds Price.

Admitted to the Bar in 1978, Judge Price practiced law with a Kansas City law firm, 1978-1992. He served as chair of the Business Litigation Section and was a member of the executive committee.

He was president of the Kansas City Board of Police Commissioners; member of the *G.L. v. Zumwalt* monitoring committee in the United States District Court for the Western District of Missouri; member of the board of directors of the Truman Medical Center, the Together Center and the Family Development Center; chair of the Merit Selection Commission for United States Marshal, Western District of Missouri, 1990.

He is a member of Christian Church (Disciples of Christ), Phi Beta Kappa, Omicron Delta Kappa, Phi Eta Sigma and Kappa Sigma.



Judge Price served as Chief Justice of the Missouri Supreme Court from July 1, 1999 through July 1, 2001, and as vice president of the Conference of Chief Justices of the United States from August 1, 2000 through August 1, 2001. He is presently chairman of the Missouri Drug Court Commission.

Judge Price was appointed to the Supreme Court by Governor John Ashcroft on April 7, 1992. He was retained in 1994 for a term expiring December 31, 2006.

**EDWARD D. ROBERTSON JR.**, Jefferson City. Born May 1, 1952, in Durham, N.C.

Robertson was educated in the public schools of Charleston, S.C.; North Kansas City and Hickman Mills, graduating from Ruskin High School in 1970.

He continued his education at Westminster College, Fulton (B.A., *cum laude*, 1974); Perkins School of Theology, Southern Methodist University, Dallas; University of Missouri-Kansas City School of Law (J.D., *with distinction*, 1977). While in law school, Robertson was an editor of the law review and was elected to the scholastic honorary, Order of the Bench and Robe.

Robertson earned a Master of Laws degree from the University of Virginia (1990), was a Danforth Fellow at Harvard University's, John F. Kennedy School of Government (1983), and was awarded a Doctor of Laws degree by Westminster College (1989). He currently serves as adjunct professor of constitutional law at Westminster College.

Robertson served as an assistant attorney general of Missouri, 1978, 1979; practiced law in Kansas City, 1979-1981, during which time he also served as the municipal judge of Belton; returned to government service as the deputy attorney general of Missouri, 1981-1985, and prior to his appointment to the Supreme Court, served as Governor John Ashcroft's chief of staff. Governor Ashcroft appointed Robertson a judge of the Missouri Supreme Court on June 26, 1985.



Robertson has served as a member of the Freedom's Foundation National Awards Jury and is a member of Omicron Delta Kappa, Phi Alpha Theta, Zeta Tau Delta, and Phi Alpha Delta. He was selected an Outstanding Young Man of America in 1984 and holds the Alumni Achievement Award from the University of Missouri-Kansas City and the Decade Award of the University of Missouri-Kansas City School of Law. In 1992, the Robert C. Goshorn Foundation named Robertson Statesman of the Year, an award for the State of Missouri's outstanding public servant. The Missouri Bar awarded Robertson its President's Award for outstanding contributions to the Bar in 1992. Robertson is the first sitting member of the judiciary to receive the award in the Bar's history.

Robertson is a member of the First United Methodist Church of Jefferson City where he chairs the Administrative Board, is a member of the Board of Trustees and teaches an adult Sunday School class. Robertson is an ordained deacon of the United Methodist Church and a member of the board of curators of Central Methodist College in Fayette.

Robertson and his wife, Renee are the parents of three children: Edward III (Kip), Matthew and Meredith. They reside in Jefferson City.

Judge Robertson assumed office on June 28, 1985. Retained in office by the voters of Missouri at the general election, November 4, 1986, his term expires December 31, 1998.

**MARY R. RUSSELL** was born July 28, 1958, in Hannibal, a seventh-generation Missourian, one of five children. Educated in Hannibal public schools; Truman State Univ., graduating summa cum laude with a B.S. and B.A.; University of Missouri-Columbia School of Law, 1983.

Upon graduation from law school, Judge Russell clerked for the Honorable George Gunn, of the Supreme Court of Missouri. She practiced law in Hannibal until her appointment to the Court of Appeals, Eastern District, 1995, where she served as Chief Judge from 1999-2000.

Active in many professional organizations, she is currently a member of the Missouri Bar Association; the American Bar Association; the National Association of Women Judges; the Bar Association of Metropolitan St. Louis; the Lawyers' Association; the Kansas City Metropolitan Bar Association; the Springfield Metropolitan Bar Association; the Cole County Bar Association; the 10th Circuit Bar Association; the Women Lawyers Association of St. Louis; and the Mid-Missouri Women Lawyers Association.

Always promoting the administration of justice, Judge Russell has served on the Commission on Retirement, Removal and Discipline of Judges; Missouri Lawyer's Trust Account Foundation; Commission to Select a Federal Judge for the Eastern District of Missouri, 1993; House of Delegates to the American Bar Association; Young Lawyers Council; numerous Missouri Bar committees; the Missouri Press-Bar Commission; and the Supreme Court Civil Rules Committee and Appellate Practice Committee. She is a past co-chair of the Appellate Practice Committee of BAMSL and has served as chair on other committees in BAMSL.



She has served on a variety of statewide boards and commissions including: the Board of Governors of Truman State Univ., president, 1996; Mo. State Senate Reapportionment Commission, 1991; the Mo. Council on Women's Economic Development; and Mo. Job Training Council.

Judge Russell is the recipient of numerous awards including: Faculty/Alumni Award, Univ. of Mo.-Columbia; Citation of Merit Award, UMC Law School; Distinguished Alumni Award, Truman State Univ.; Legal Services of Eastern Mo. Equal Justice Award; Soroptomist International Women Helping Women Award; Matthews-Dickey Boys' & Girls' Club Appreciation Award; and Kirkwood Citizen of the Year in 2003. She was named a Henry Toll Fellow in 1997 and a member of the Missouri Academy of Squires in 2002.

Active in many community organizations, Judge Russell is a member of the Jefferson City Rotary Club, PEO, the St. Louis Forum, and Grace Episcopal Church. She currently serves on the Board of Directors of the Matthews-Dickey Boys' and Girls' Clubs and the Missouri CASA Bd. She also volunteers at the Samaritan Center and as a Truancy Court Judge at Lewis and Clark Middle School, in Jefferson City. She was active in many organizations in Hannibal and Kirkwood prior to her move to Jefferson City. An easily approachable judge, she devotes much time to mentoring young women.

Judge Russell and her husband, Jim, a governmental consultant, live in Jefferson City. She was sworn in as a Supreme Court Judge, October 8, 2004, her term expires Dec. 31, 2006.

**LAURA DENVIR STITH** was born in St. Louis, on October 30, 1953. She was raised in St. Louis and graduated with honors from the John Burroughs School, in 1971. She received a National Merit Scholarship to attend Tufts University in Boston, Mass. While there, she was an Iglauer Fellowship Intern in Washington, D.C. for Sen. Thomas Eagleton, in 1973. She studied at the Univ. of Madrid through a program administered by the Institute of European Studies. In 1975, she graduated *magna cum laude* from Tufts, receiving her B.A. in political science and social psychology. She then attended the Georgetown Univ. Law Center, distinguishing herself as an editor of *Law and Policy in International Business Journal*. Judge Stith graduated *magna cum laude* from Georgetown in 1978.

Following her graduation from law school, Judge Stith served for one year as a law clerk to the Hon. Robert E. Seiler of the Missouri Supreme Court. In 1979, she moved to Kansas City and practiced law with the firm of Shook Hardy & Bacon, becoming a partner of the firm in 1984 and later co-founding the firm's appellate practice group.

In the fall of 1994, Governor Mel Carnahan appointed Judge Stith to the Missouri Court of Appeals, Western District. She was retained at the Nov. 1996 general election. During her time on the court of appeals, Judge Stith authored over 400 opinions in cases involving nearly every area of state law.

Governor Bob Holden appointed Judge Stith to the Supreme Court of Missouri effective March 7, 2001. She is the second woman in Missouri history to serve on the Supreme Court.



Judge Stith has been involved in many organizations in the legal community. She has served as chair of the Gender and Justice Jt. Committee of the Missouri Bar and the Missouri Supreme Court. She was a founding director of Lawyers Encouraging Academic Performance (LEAP), an inter-bar lawyers' public service organization. She has served as president and member of the board of directors of the Assn. for Women Lawyers (AWL) of Greater Kansas City; chair and vice chair of the Missouri Bar Civil Practice and Procedure Committee; chair of the Appellate Practice Committee and vice chair of the Tort Law Committee of the Kansas City Metropolitan Bar Association (KCMBA); and a member of the American Bar Association (ABA).

Judge Stith has served as a speaker on appellate practice at the annual conventions of ABA, Missouri Bar, Missouri Association of Trial Attorneys (MATA), and Missouri Organization of Defense Lawyers (MODL). She has also served as a speaker or moderator on civil procedure and evidence at Missouri Bar, KCMBA, AWL and Univ. of Missouri-Kansas City (UMKC) Continuing Legal Education programs; and as a speaker on gender bias at the Missouri New Judges School. She has authored many CLE publications, including a law review article, *Stith, A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 Valparaiso Law Rev. 421 (Spring 2004).

Judge Stith has been involved in many community activities in Kansas City; serving as a mentor and tutor to young students at St. Vincent's Operation Breakthrough; and as guest speaker at many local civic organizations, talking about the law, the role of the courts and public service.

Judge Stith is married to fellow attorney Donald G. Scott. He served as a law clerk for Judge Warren D. Welliver of the Missouri Supreme Court. He is a shareholder in McDowell, Rice, Smith and Buchanan, P.C. in Kansas City. They have three daughters.

**RICHARD TEITELMAN** was born in Philadelphia, Pa. He received a bachelor's degree in mathematics, 1969 from the University of Pennsylvania.

After graduating from Washington University School of Law, St. Louis in 1973 he opened a solo law practice. In 1975 he joined Legal Services of Eastern Missouri, serving for 23 years, 18 of those as executive director and general counsel. His dedication to the Legal Services programs, which provides a wide range of programs for Missourians unable to pay for civil legal services, earned him many honors, including the prestigious Missouri Bar President's Award, the American Council for the Blind's Durward K. McDaniel Ambassador Award, the Women's Legal Caucus Good Guy Award, the Mound City Bar Association's Legal Service Award, the Bar Association of Metropolitan St. Louis, Young Lawyers Section Award of Merit, the St. Louis Bar Foundation Award, and the American Bar Association's Make a Difference Award.

Judge Teitelman served as president of the Young Lawyers Section of the St. Louis Bar Association and as the St. Louis Bar Association's president. He served as president of the St. Louis Bar Foundation. He serves as a board member, executive committee member, and past-president of the Bar Association of Metropolitan St. Louis. He served as a member of the Board of Governors, vice president and president-elect of The Missouri Bar. Her served as trustee of the National Council of Bar Foundations of the ABA and is a lifetime member of the Fellows of the ABA. He was chair of the ABA's Commission on Mental and Physical Disability Law. He is a member of the executive committee of the American Judicature Society.



Judge Teitelman serves in a variety of roles in his pursuit of equality and access to justice for all. He is a member of the African-American/Jewish Task Force. He served on the midwest board of the American Federation for the Blind, the board of Paraquad, and the United Way Government Relations Committee. He is a board member of the St. Louis Public Library and a lifetime member of the Urban League of Metropolitan St. Louis.

He has received several honors, including the Missouri Bar's Purcell Award for Professionalism; the American Jewish Congress' Democracy in Action Award; the Lawyer's Association of St. Louis Award of Honor; and the St. Louis Society for the Blind's Lifetime Achievement Award.

He is an honorary dean of St. Louis University School of Law's DuBourg Society. He is an honorary member of the Order of the Coif of Washington University School of Law and its Eliot Society. He was honored as a Distinguished Alumnus at Washington University's 2002 Founders Day celebration and has been selected by The Council of State Governments to participate in the 2003 Toll Fellowship Program.

Judge Teitelman served on the Missouri Court of Appeals from 1998 to 2002. Richard Teitelman was appointed to the Missouri Supreme Court in 2002, becoming the first legally blind and first Jewish judge to serve on Missouri's highest court. He was retained at the 2004 general election.

# In Memoriam

Missourians lost a great legal mind and a respected teacher on July 30, 1995, with the death of Judge Elwood L. Thomas.

Judge Thomas was respected both as a "lawyer's lawyer" and as a "judge's judge." He was known as an expert in jury instruction and regarded as an effective communicator who could make complex legal issues clear. He taught many hundreds of law students during a 13-year tenure at the University of Missouri Law School, including two contemporaries on the state's high court, and was a frequent lecturer and guest instructor.

Judge Thomas was sworn in to the court on October 1, 1991, after being appointed by then-Governor John Ashcroft. Prior to his appointment, he was a partner in the Kansas City law firm of Shook, Hardy & Bacon.

Judge Thomas was born July 24, 1930, in Council Bluffs, Iowa. He attended Simpson College (B.A., 1954) and Drake University (J.D., 1957). During law school, he served as co-editor of the Drake Law Review, was elected to the Order of the Coif and received Iowa State Bar Association's Certificate of Merit as Outstanding Law Student. He practiced law in Iowa from 1957-1965 before coming to Missouri.

Judge Thomas was a major force on the Missouri Supreme Court Committee on Civil Instructions from 1976-1991, chairing the committee from 1981-1991. He also chaired The Missouri Bar Task Force on Evidence, 1982-1985. His leadership developed approved instructions for Missouri, which became a national model. In addition, he served as faculty for the National Judicial College in Reno, Nevada, for 12 years, as faculty for the National Institute for Trial Advocacy in 1982 and 1983, and from 1973-1992 as faculty for Missouri's Judicial College.

The author of numerous legal texts, Judge Thomas also received recognition including the Faculty-Alumni Award and the Distinguished Faculty Award from the University of Missouri-Columbia, the Missouri Bar President's Award, the Charles Evans Whittaker Award from the Lawyers Association of Kansas City, the 10 Year Faculty Service Award from the National Judicial College, the Spurgeon Smithson Award from The Missouri Bar Foundation, the Distinguished Non-Alumni Award from the University of Missouri-Columbia School of Law, the 1992 Drake University Law School Outstanding Alumni Award and the 1993 Simpson College Alumni Achievement Award.

Judge Thomas is survived by his wife Susanne; sons Mark Thomas of Seattle and Steven Thomas of Kansas City; and one daughter, Sandra Thomas Hawley of Kansas City.

**RONNIE L. WHITE** was born May 31, 1953 in St. Louis.

He attended elementary school in St. Louis and graduated from Beaumont High School in 1971. Judge White received an Associate of Arts degree from St. Louis Community College in 1977. Two years later he earned a Bachelor of Arts degree in political science from St. Louis University.

Judge White graduated from the University of Missouri-Kansas City Law School in 1983. During law school he served as a legal intern for the Jackson County prosecutor. He later worked as a legal assistant for the Department of Defense Mapping Agency. White served as a trial attorney for the public defender's office in both the City of St. Louis and St. Louis County. In 1987 Judge White entered private practice as a principal for the law firm of Cahill, White and Hemphill. While in private practice he was elected to serve three terms in the Missouri House of Representatives.

In 1993 Mayor Freeman Bosley Jr. appointed Judge White city counselor for the City of St. Louis. While serving as city counselor, Judge White argued his first case before the Missouri Supreme Court in April 1994. One month later, Governor Mel Carnahan appointed Judge White to the Missouri Court of Appeals, Eastern District. In September 1995 he served as a special judge for the Missouri Supreme Court. During that same year he served as an adjunct faculty member for the National Institute of Trial Advocacy.

Governor Carnahan appointed Judge White to the Missouri Supreme Court in October 1995. He was retained in the November 5, 1996 election. His term expires December 31, 2008. Judge White served as Chief Justice from July 1, 2003 through June 30, 2005.

**MICHAEL A. WOLFF** served on the faculty of St. Louis University School of Law for 23 years before being appointed to the Supreme Court of Missouri in August 1998. His term as chief justice is from July 1, 2005 to June 30, 2007.

During his time in St. Louis, Judge Wolff was active in trial practice and was co-author of *Federal Jury Practice and Instructions, (4th edition)*, which is used by lawyers and judges throughout the country. As a law school teacher, he taught Civil Procedure, Trial Advocacy, Health Law, Criminal Sentencing, Constitutional Law and Administrative Law, among other courses. He was a recipient of the law school's Teaching Excellence Award. Judge Wolff was on the faculty of the University's School of Medicine and School of Public Health. He is a member of the American Law Institute. Judge Wolff is a member of the Missouri Sentencing Advisory Commission and served as its chair in 2004 and 2005.

In 1992, while on leave from the University, Judge Wolff was Transition Director for Governor-elect Mel Carnahan, served as Chief Counsel to the governor in 1993-1994, and was Special Counsel to the governor 1994-1998 after returning to the law school. As special counsel, Wolff was active in seeking solutions, including legislation that passed in 1998, for dealing with the problems of urban schools after the end of court ordered desegregation.



Wolff also served from 1993-1998 as chairman of the Board of Trustees of the Missouri Consolidated Health Care Plan, the health insurance program for public employees. Wolff was a candidate for attorney general in 1988 and 1992.

In addition to The Missouri Bar, Judge Wolff is a member of the Lawyers Association of St. Louis and the Bar Association of Metropolitan St. Louis. He has also served several charitable and educational organizations in various capacities.

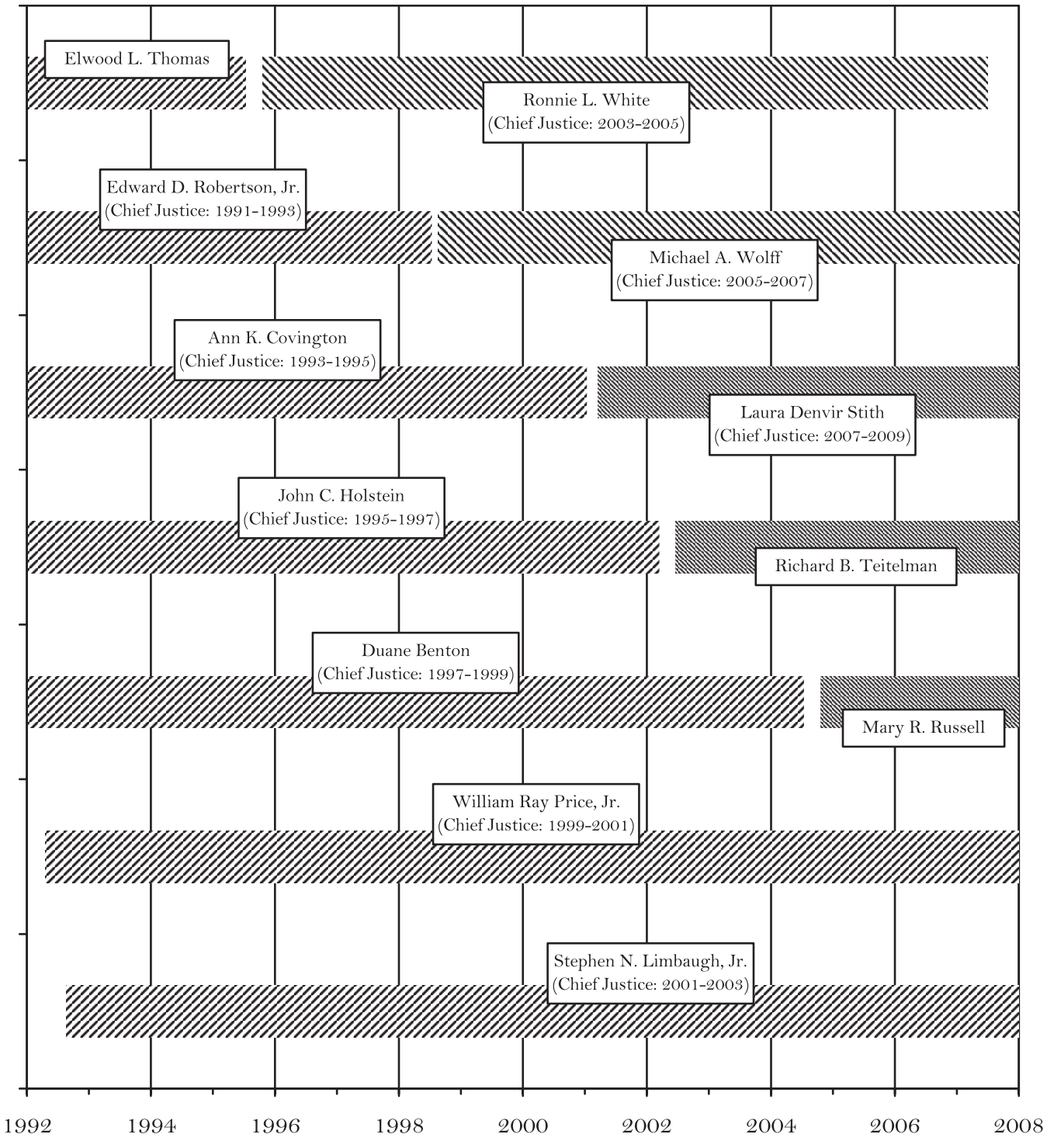
In his early legal career, Wolff was a federal court law clerk in 1970-1971 and served in legal services programs in St. Paul, Minnesota, and Denver, Colorado, and was director of Black Hills Legal Services in Rapid City, South Dakota, from 1973 to 1975. He joined the St. Louis University faculty in 1975.

Judge Wolff was born April 1, 1945, in La Crosse, Wisconsin, and was educated in Catholic grade schools and Lourdes High School in Rochester, Minnesota. He graduated in 1967 from Dartmouth College, Hanover, New Hampshire, where he was editor-in-chief of *The Dartmouth*, the student daily newspaper. He received his law degree with honors from the University of Minnesota law school in 1970. During law school, he worked as a reporter and copy editor for *The Minneapolis Star*. He and his wife, Patricia B. Wolff, M.D., who is a pediatrician, have been married since 1968. They have two grown sons, Andrew Barrett Wolff, born in 1974, and Benjamin Barrett Wolff, born in 1977.

# Appendix B

This table and the chart on the next page show how the Supreme Court of Missouri has changed over the last 15 years. From 1992 to 1995, every judge on the court had been appointed by Governor John Ashcroft. A majority of the current court's members were selected by Governors Mel Carnahan and Bob Holden. On May 18, 2007, Judge White (a Carnahan appointee) announced his resignation, effective July 6. The two-year term for chief justice runs from July 1 to June 30. Judge Thomas never served as chief justice.

| Name | Governor | Appointed | Retained | Left Office | Chief |
|---|---|---|---|---|---|
| Edward D. Robertson, Jr. | Ashcroft | June 1985 | 1986 | Resigned July 1998 | 1991–1993 |
| Ann K. Covington | Ashcroft | December 1988 | 1990 | Resigned Jan. 2001 | 1993–1995 |
| John C. Holstein | Ashcroft | October 1989 | 1990 | Resigned March 2002 | 1995–1997 |
| Duane Benton | Ashcroft | August 1991 | 1992 | Resigned July 2004 | 1997–1999 |
| Elwood L. Thomas | Ashcroft | October 1991 | 1992 | Died July 1995 | — |
| William Ray Price, Jr. | Ashcroft | April 1992 | 1994 & 2006 | *Still Serving* | 1999–2001 |
| Stephen N. Limbaugh, Jr. | Ashcroft | August 1992 | 1994 & 2006 | *Still Serving* | 2001–2003 |
| Ronnie L. White | Carnahan | October 1995 | 1996 | Resigned July 2007 | 2003–2005 |
| Michael A. Wolff | Carnahan | August 1998 | 2000 | *Still Serving* | 2005–2007 |
| Laura Denvir Stith | Holden | March 2001 | 2002 | *Still Serving* | 2007 – |
| Richard B. Teitelman | Holden | June 2002 | 2004 | *Still Serving* | — |
| Mary R. Russell | Holden | October 2004 | 2006 | *Still Serving* | — |


Elwood L. Thomas
Ronnie L. White
(Chief Justice: 2003-2005)
Edward D. Robertson, Jr.
(Chief Justice: 1991-1993)
Michael A. Wolff
(Chief Justice: 2005-2007)
Ann K. Covington
(Chief Justice: 1993-1995)
Laura Denvir Stith
(Chief Justice: 2007-2009)
John C. Holstein
(Chief Justice: 1995-1997)
Richard B. Teitelman
Duane Benton
(Chief Justice: 1997-1999)
Mary R. Russell
William Ray Price, Jr.
(Chief Justice: 1999-2001)
Stephen N. Limbaugh, Jr.
(Chief Justice: 2001-2003)
1992
1994
1996
1998
2000
2002
2004
2006
2008
Appointed by Ashcroft
Appointed by Carnahan
Appointed by Holden

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