Legislative Testimony of Stephen Ware
regarding SCR 1601
Before the House and Senate Judiciary Committees
Jan. 16, 2013

My name is Stephen Ware. I am a professor of law at the University of Kansas. I submit this testimony in support of SCR 1601, not on behalf of KU, but on my own as a concerned citizen.

I have been a lawyer since 1991 and a law professor since 1993. I began my scholarly research and writing on judicial selection and retention in the 1990's and have increasingly focused on the topic in the last several years. I have been invited to speak on the topic by a variety of organizations, from universities to chambers of commerce to bar associations to citizen's groups. I have spoken on the topic throughout Kansas and in states ranging from Missouri, Iowa, and Indiana to Florida and Texas. I consider myself one of a handful of law professors in the country with significant expertise on the various methods of judicial selection and retention used around the United States.

I published articles that researched how all 50 states select their supreme court justices.[1] This research shows that the Kansas Supreme Court selection process is:

(1) undemocratic,

(2) extreme,

and

(3) secretive.

All three of these problems would be fixed by SCR 1601 so I strongly support it.

I. The Kansas Supreme Court Selection Process is Undemocratic

No one can become a justice on the Kansas Supreme Court without being one of the three finalists chosen by the Kansas Supreme Court Nominating Commission. The Commission is the gatekeeper to the Kansas Supreme Court. However, the Commission is selected in a shockingly undemocratic way.

Most of the members of the Commission are picked in elections open to only about 10,000 people, the members of the state bar. The remaining 2.9 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system concentrates tremendous power in one small group and treats everyone else like second-

[1] Stephen J. Ware, Selection to the Kansas Supreme Court, 17 Kan. J. L. & Pub. Pol'y 386 (2008); Stephen J. Ware, The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court, 18 Kan. J. L. & Pub. Pol'y 392 (2009): Stephen J. Ware, The Missouri Plan in National Perspective, 74 Mo. L. Rev. 751 (2009).

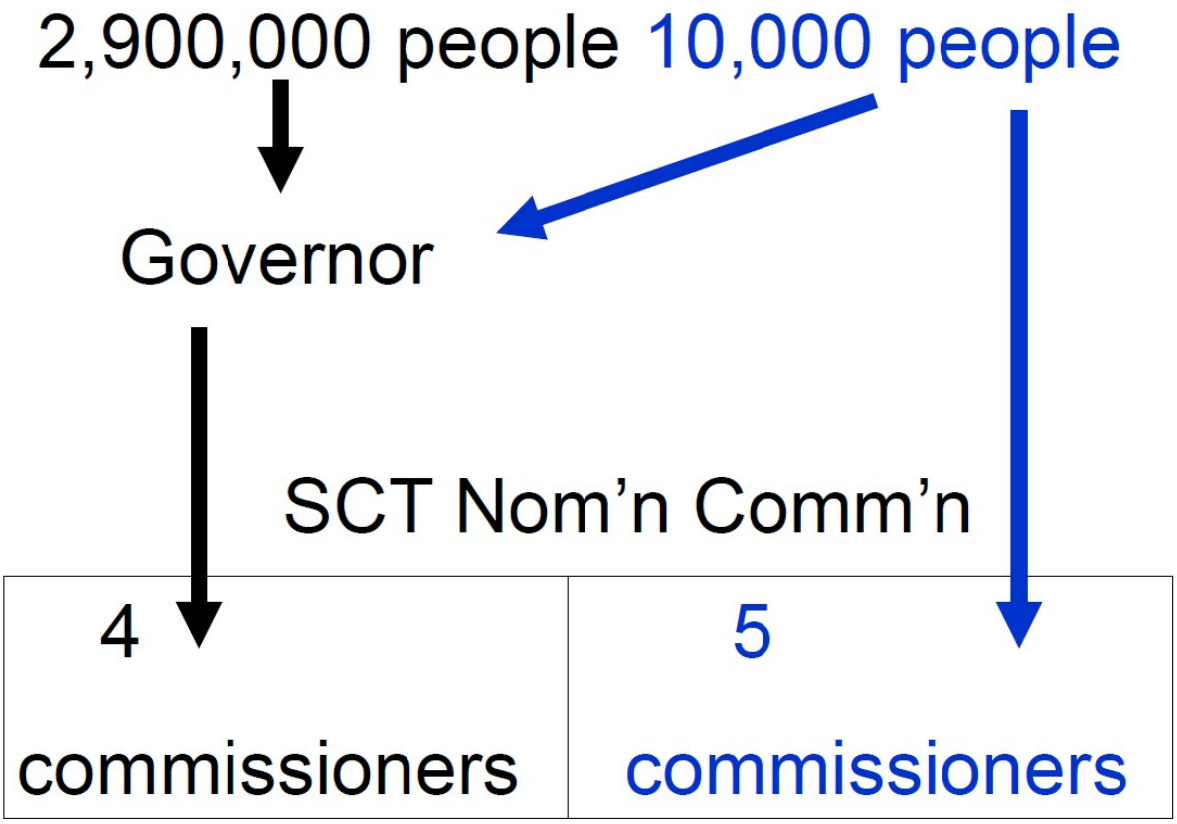
class citizens. In a democracy, a lawyer's vote should not be worth more than any other citizen's vote. As Washburn University School of Law professor Jeffrey Jackson wrote, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission, because they do not fit within the democratic process."[2]

Some Kansas lawyers try to distract attention away from their preferred system's lack of democratic legitimacy by noting that a federal appellate court found this system constitutional.[3] However, the federal court did not hold that the current Kansas system is constitutional because it conforms to one-person, one-vote; rather the court held that the system is constitutional even though it does not conform to one-person, one-vote.

To put it another way, federal courts have interpreted the U.S. Constitution to require that some, but not all, elections be conducted in accord with "one-person, one-vote." So as constitutional case law stands today, states are free to adopt a judicial selection system that violates basic democratic equality (like the status quo in Kansas) or one that respects basic democratic equality (judicial elections or judicial appointments by democratically-elected officials like the governor and legislature). We cannot count on federal courts to make our state do the right thing; we need to be responsible citizens and do it ourselves.

The following diagram shows the undemocratic manner in which the Kansas Supreme Court Nominating Commission is selected.

[2] Jeffrey D. Jackson, Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System, 34 Fordham Urb. L.J. 125, 154 (2007).
[3] Dool v. Burke, 2012 WL 4017118 (10th Circuit).



II. Kansas is Extreme; No Other State is as Undemocratic as Kansas

Kansas is the only state that allows its bar to select a majority of its supreme court nominating commission. None of the other 49 states gives its bar so much power. Kansas stands alone.

Kansas lawyers defending their extremely high level of power often try to distract from this fact by pointing out that some other states also have nominating commissions with some seats reserved for lawyers. But the important question for democratic legitimacy is not whether a member of the commission is a lawyer; the important question is *who selects* that member of the commission. No other state allows its bar to select a majority of its supreme court nominating commission. No other state's commission is as undemocratic as Kansas's.

Examining judicial selection elsewhere in the country reveals two main approaches. Nearly half the states elect their supreme courts. Elections are direct democracy. They put power directly in the hands of the people, the voters, and give each voter equal power. A lawyer's vote is worth no more than any other citizen's.

The second common method of selecting state supreme court justices is the one used to select federal judges: executive nomination followed by senate confirmation. In twelve states, the governor nominates state supreme court justices but the governor's nominee does not join the court unless confirmed by the state senate or by a similar democratically-elected body. A senate confirmation system is a form of indirect democracy. It has democratic legitimacy because the governor and state senate are elected democratically, according to the principle of one person, one vote.

The indirect democracy of a senate confirmation system is, I believe, better suited to judicial selection than is the direct democracy of judicial elections. At both the state and federal levels, we generally use indirect democracy — appointment by elected officials — to select the leaders of the various government departments and boards. The practical reasons for doing so also counsel for using that indirectly democratic system to select judges.

Our Nation's Founders adopted this wise approach in the United States Constitution, and we Americans have used it at the federal level for well over 200 years. That our federal courts are widely respected in the U.S. and around the world is surely due in part to the caliber of judges selected in the process the Founders adopted and the incentives that process creates. Similarly, about a dozen states also select their supreme courts with confirmation by the senate or similar body. Experience in these states suggests that senate confirmation of judicial nominees works well at the state, as well as the federal, level.

No process of judicial selection is perfect but my research and reflection has convinced me that the senate confirmation is the least imperfect process. That is the best we can achieve so long as — to use James Madison's words — men are not angels.

In short, senate confirmation of Kansas Supreme Court justices is a prudent reform that would move Kansas judicial selection from an extreme to position to the mainstream of the country. As a lawyer who cares deeply about our court system, I commend the legislators who crafted SCR 1601 for taking such a measured and thoughtful approach to an issue on which Kansas has for too long been so extreme.

III. Secrecy in Kansas's Current System

The current process for selecting Kansas Supreme Court justices is not only undemocratic but also secretive. Not only does the bar currently exercise a tremendous amount of power, but that power is exercised behind closed doors. The Kansas Supreme Court Nominating Commission's votes are secret. There is no public record of who voted which way. This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our highest judges. In contrast, senate confirmation votes are public. By replacing the Commission with senate confirmation, SCR 1601 would increase the openness of the process and increase accountability to the public.

Defenders of the status quo in Kansas often claim that all members of the Nominating Commission consistently succeed in making unbiased assessments of judicial applicants' merits

and Commission members are never swayed by inappropriate considerations. If that is true, then why not allow the public to see the votes those members of the Commission cast? Why keep those votes in the dark? Defenders of the status quo have, for over a generation, fought to keep those votes hidden.[4]

IV. Possible Counterarguments

I expect that opponents of SCR 1601 will make the arguments that defenders of the status quo have made in the past. Several of these arguments are misleading.

A. "If it ain't broke, don't fix it"

Some members of the Kansas bar defend the current Kansas Supreme Court selection process with the assertion that it is not "broken." However, the previous paragraphs show that it is broken because it is (1) undemocratic, (2) extreme, and (3) secretive. Each of these problems can and should be fixed.

B. The Empty Claim of "Merit"

Defenders of Kansas's current lawyer-favoring system often claim that it selects judges based on merit, rather than politics. But this is just an empty assertion. They provide no facts showing that Kansas does better than senate-confirmation states at selecting meritorious judges. In fact, sometimes they point to measures that suggest otherwise. For example, a recent column by the Kansas Bar Association president noted that the U.S. Chamber's assessment of "lawsuit climates" ranked Kansas highly, but failed to note that the highest-ranked state, Delaware, uses a senate confirmation system to select its supreme court.

It is misleading to suggest that the bar must select members of the Nominating Commission in order to ensure that lawyers' expertise is brought to bear on judicial selection. In states with senate confirmation, the governor and senate avail themselves of lawyers' expertise with respect to potential judges. Calling the current Kansas system "merit selection" is propagandistic rhetoric, rather than an accurate statement with factual support. Senate confirmation is as much "merit selection" as is a bar-dominated commission system.

C. The Misleading Phrase, "Non-Partisan"

Defenders of Kansas's current system often describe it with the word "non-partisan." But one of Governor Sebelius's appointees to the Kansas Supreme Court, Dan Biles, was a personal friend of, and campaign contributor to, the governor who appointed him. And nine of the previous 11

[4] A 1982 opinion by the Kansas Attorney General concluded "the Supreme Court Nominating Commission may conduct its meeting in full public view, however, the legislature is without authority to require that meetings of the Commission be open or closed. Nor may the legislature require the Commission to meet in a particular place." XVI Op. Att'y Gen. Kan. 95 (1982).

people appointed belonged to the same political party as the governor who appointed them. These are highly partisan outcomes from a system advertised as "non-partisan."

What makes Kansas's current system unusual is not that it's political, but that it gives so much political power to the bar. Compared to a senate confirmation system, there is no evidence that Kansas's current system involves less politics rather than just a different kind of politics: the politics of the bar, as opposed to the politics of the citizenry.

In both the current system and a senate-confirmation system, the governor has significant power. The difference between the two systems is who serves as the check on the governor's power and whether that check is exercised in secret or in public. Kansas's current system makes the bar the check on the governor's power and allows the bar to exercise that check in secret. SCR 1601 would make the Senate the check on the governor's power and that check would be exercised in a public vote.

D. Senate Confirmation Works Well in the Many States that Use It

Some claim that senate confirmation in Kansas would be a "circus" or present large practical challenges. Rather than speculating about this, one can examine the experience of the twelve states with judicial selection systems that have senate confirmation or confirmation by a similar popularly-elected body. One of my articles researched the last two votes for initial supreme court confirmation in each of these twelve states.[5] In all twenty four of these cases, the governor's nominee was confirmed. In nearly eighty percent of these cases, the vote in favor of confirmation was unanimous. In only two of these twenty four cases was there more than a single dissenting vote. These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus. Nor do these facts suggest that senators always do what governors want. Rather, these facts suggest that governors know that senate confirmation of controversial nominees may be difficult so governors consider, in advance, the wishes of the senate in deciding who to nominate.

For many years, Kansas governors have cooperated with the Kansas Senate to secure confirmation of a wide variety of gubernatorial nominees. Appointments to the Kansas Supreme Court similarly deserve the consent of the executive and legislative branches of government.

E. The Irrelevant "Triple Play"

Some senior members of the Kansas bar like to recall the story of how Kansas got its current Supreme Court selection process, the story of the "triple play" in which a governor essentially got himself appointed to the Court in the mid-1950's. The moral of this story is that governors should not have unchecked power over the selection of supreme court justices. But neither Kansas's current system nor the senate-confirmation system of SCR 1601 would give the governor such power so the "triple play" story is irrelevant to the issue now before your Committee.

[5] Stephen J. Ware, Selection to the Kansas Supreme Court, 17 Kan. J. L. & Pub. Pol'y 386, App. B (2008).

F. Judicial Independence Would Not Be Affected by SCR 1601

In defending Kansas's current system for selecting justices, some members of the bar suggest that senate confirmation would reduce the independence of the Kansas appellate courts. By contrast, bar groups have not charged that senate confirmation of federal judges reduces the independence of federal courts. All seem to agree that federal judges enjoy a tremendous degree of independence because they have life tenure. By contrast, it is judges who are subject to reelection or reappointment that have less independence because they are accountable to those with the power to reelect or reappoint them. Judicial independence is primarily determined, not by the system of judicial *selection*, but by the system of judicial *retention*, including the length of a justice's term. SCR 1601 makes no change to Kansas's system of judicial retention and does not affect judicial independence.

V. Conclusion

The Kansas Supreme Court selection process is broken because it is (1) undemocratic, (2) extreme, and (3) secretive. Each of these problems can and should be fixed. SCR 1601 would do so and thus deserves your support.

Thank you very much for your time and attention. I would be happy to respond to any questions or comments you have today or in the future.

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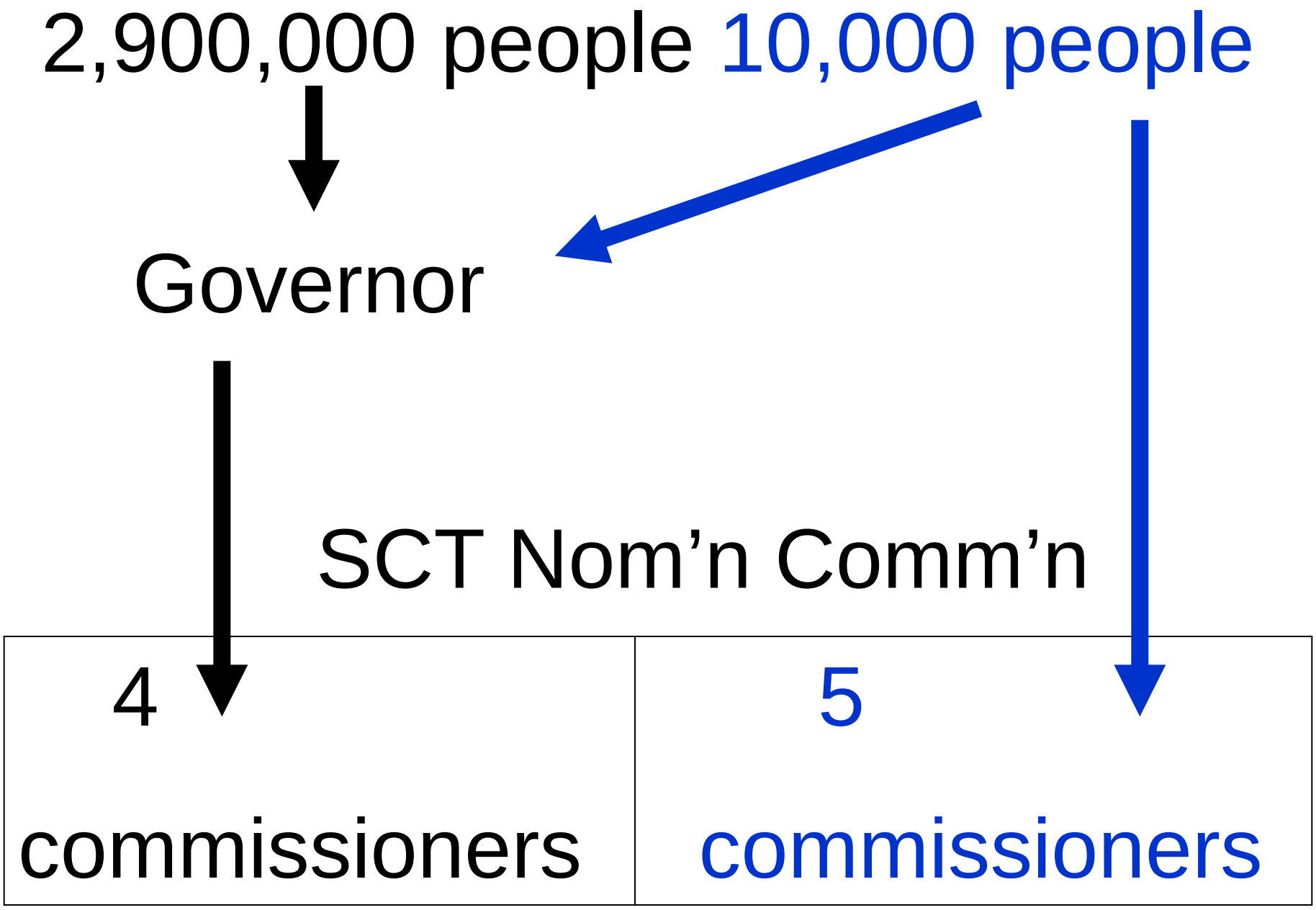
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5
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Opinion: State's judge selection undemocratic

By Stephen J. Ware

November 29, 2012

In a democracy like ours, should lawmakers be selected democratically? Not according to the Journal-World ("Court, politics," Nov. 23), which wants some of our state's most important lawmakers selected in a deeply undemocratic process that makes the votes of some residents count far more than the votes of others.

The lawmakers in question are our state's appellate court judges.

Judges are lawmakers? Yes. Judges have routinely made law throughout our country's history and even earlier, going back to England. This judge-made law, called the "common law," has generally worked well and continues today to govern thousands of cases including those involving contracts, property rights and bodily injuries.

Common law rules differ from state to state. States with more liberal judges tend to have more liberal common law, while states with more conservative judges tend to have more conservative common law. The political leanings of appellate judges, rather than trial judges, are especially important because appellate judges have much more power over the direction of the law.

In short, the appellate judges of Kansas, like those of other states, are tremendously important lawmakers. What is unusual about the lawmaking judges of Kansas is how they are selected. None of the other 49 states uses the system Kansas uses to pick its two appellate courts. And for good reason, because the Kansas system is a shockingly undemocratic way to select lawmakers.

At the center of the Kansas system is the Supreme Court Nominating Commission; most of the members of this commission are picked in elections open to only 10,000 people, the members of the state bar. The remaining 2.8 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system elevates one small group and treats everyone else like second-class citizens.

Kansas lawyers tend to be fine people but they're not superheroes. They don't deserve more power than lawyers have in any of the other 49 states. In a democracy, a lawyer's vote should not be worth more than any other resident's vote.

So the problem is not that Kansas has a nominating commission but how that commission is selected. As Washburn law professor Jeffrey Jackson wrote, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government."

Bar groups in Kansas claim that this violation of our democratic principles is the only way to get competent judges. But the bar provides no evidence that judges selected in lawyer-favoring systems are better than judges selected in the more open and democratic appointment systems used by a dozen other states. Kansas should follow those states' lead so that our state's courts can have democratic legitimacy as well as professional competence.

— Stephen J. Ware is a professor in the Kansas University School of Law.

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Guest column: Disorder in the court

Created *Mar 15 2011 - 5:05pm*

In a democracy like ours, should lawmakers be selected democratically?

Not according to Judge Richard Greene.

In the judge's Feb. 2 guest column in The Capital-Journal, he supported a process in which some of our state's most important lawmakers are selected in a deeply undemocratic process that makes the votes of some citizens count far more than the votes of others.

The lawmakers in question are our state's appellate court judges.

Judges are lawmakers? Yes.

Judges have routinely made law throughout our country's history and even earlier, going back to England. This judge-made law, called the "common law," has generally worked well and continues today to govern thousands of cases including those involving contracts, property rights and bodily injuries.

Common law rules differ from state to state. States with more liberal judges tend to have more liberal common law, while states with more conservative judges tend to have more conservative common law. The political leanings of appellate judges, rather than trial judges, are especially important because appellate judges have much more power over the direction of the law.

In short, the appellate judges of Kansas, like those of other states, are tremendously important lawmakers.

What is unusual about the lawmaking judges of Kansas is how they are selected. None of the other 49 states uses the system Kansas uses to pick its two appellate courts — and for good reason, because the Kansas system is a shockingly undemocratic way to select lawmakers.

At the center of the Kansas system is the Supreme Court Nominating Commission. Most of the members of this commission are picked in elections open to only 9,000 people — the members of the state bar. The remaining 2.8 million people in Kansas have no vote in these elections.

This plainly violates basic equality among citizens, the principle of one-person, one-vote. The current system elevates one small group into a powerful elite and treats everyone else like a second-class citizen.

Kansas lawyers tend to be fine people, but they're not superheroes. They don't deserve more power than lawyers have in any of the other 49 states.

In a democracy, a lawyer's vote should not be worth more than any other citizen's vote. As Washburn law professor Jeffrey Jackson writes, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process."

Kansas should break the grip its bar holds on the selection of our state's lawmaking judges. Fortunately, the Kansas House of Representatives has passed a bill that would do just that.

Will this responsible, moderate reform be enacted by the Kansas Senate?

Or will our state senators defend the deeply undemocratic view that a lawyer's vote should count far more than another Kansas citizen's vote?

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Kansas.com

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Sunday, August 22, 2010

Posted on Sun, Aug. 22, 2010

Stephen J. Ware: Process for selecting judges is undemocratic

By Stephen J. Ware

Lawyers have much more power than their fellow citizens in selecting the Kansas Supreme Court, and Wichita lawyer Richard Hite argued for keeping it that way ("Don't change process for selecting justices," Aug. 15 Opinion). But he is simply wrong in claiming "no viable reason has been shown" to reform this system.

The reason for reform begins with the fact that judges make law. This has been true throughout our country's history and even earlier, going back to England. Judge-made law, called the "common law," continues today to govern thousands of cases including those involving contracts, property rights and bodily injuries.

State supreme court judges play an especially large lawmaking role because they are the final word on their state's common law. Also, state supreme court judges have enormous lawmaking power because of their role in interpreting their state's constitution.

The power to interpret constitutions enables the Kansas Supreme Court to hold unconstitutional, and thus nullify, laws approved by the Legislature and governor on a variety of topics. The Kansas Supreme Court has done this to laws on public school funding and the death penalty.

In short, judges on the Kansas Supreme Court are, like judges on other state supreme courts, tremendously important lawmakers. What is unusual about the lawmaking judges of Kansas is how they are selected. None of the other 49 states uses the system Kansas uses to pick its Supreme Court. And for good reason, because the Kansas system is a shockingly undemocratic way to select lawmakers.

At the center of the Kansas system is the Supreme Court Nominating Commission; most of the members of this commission are picked in elections open to only 9,000 people, the members of the state bar. The remaining 2.7 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system elevates one small group into a powerful elite and treats everyone else like second-class citizens.

Kansas lawyers tend to be fine people, but they're not superheroes. They don't deserve more power than lawyers have in any of the other 49 states. In a democracy, a lawyer's vote should not be worth more than any other citizen's vote.

So the problem is not so much that Kansas has a nominating commission but how that commission is selected. As Washburn University School of Law professor Jeffrey Jackson wrote, democratic legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission, because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government."

Kansas should break the grip its bar holds on the selection of the judges who have more lawmaking power than any other in the state. To defend the status quo is either to deny the fact that supreme court judges make law or to argue that these powerful lawmakers should be selected in a deeply undemocratic way.

Stephen J. Ware is a professor at the University of Kansas School of Law.

OPEN UP PROCESS OF PICKING JUSTICES

Wichita Eagle, The (KS) - Friday, January 23, 2009

Author: *Stephen J. Ware*

Gov. Kathleen Sebelius recently appointed Dan Biles to the Kansas Supreme Court, showing once more what an unusually secretive and clubby process our state uses to select its highest judges.

Biles is the law partner of the Kansas Democratic Party's chairman, and the governor is, of course, a Democrat. Sebelius said that she and Biles have been friends for more than three decades, and he has made campaign contributions to her.

Importantly, Biles is a member of the former Kansas Trial Lawyers Associat ion, now called the Kansas Association for Justice. Sebelius used to be state director of that group of lawyers who most aggressively push to increase lawsuits and expand liability.

People can decide for themselves whether that is the direction they want for Kansas courts, but what is unusual about Kansas is how little the people's views matter. All the power in selecting the justices of the Supreme Court belongs to the governor and the bar (the state's lawyers). So if the governor and bar want to push the state's courts in a particular direction, there are no checks and balances in the judicial-selection process to stop them.

After Kansas justices have gained the advantages of incumbency, they are subject to retention elections. But these "elections" lack rival candidates and thus rarely include any public debate over the direction of the courts. In fact, a retention election is nearly always a rubber stamp, and no Kansas justice has ever lost one. With these judges so entrenched once they are on the court, the process for initially selecting them is all the more decisive.

Kansas is unusual in limiting Supreme Court selection to the governor and the bar. By contrast, when a federal judge is nominated, a Senate confirmation process allows citizens and their representatives to learn about the nominee and play more of a role in selecting judges.

Many states around the country use that process, too. But in Kansas the governor and the bar get all the power, and they exercise that power through a commission's secret vote. There is no public record of who voted which way.

This secrecy prevents journalists and other citizens from learning about crucial decisions in the selection of our highest judges. In this closed process, a small group of insiders (members of the Kansas bar) have an extremely high level of control. In fact, Kansas is the only state in which the bar selects a majority of the Supreme Court nominating commission. Why does the division of power between lawyers and nonlawyers lean further toward the lawyers in Kansas than in any of the other 49 states?

The Kansas bar defends this with the claim that the bar keeps judicial selection from being "political." But when the process results in a governor appointing one of her own friends and campaign contributors, you have to wonder what kind of politics goes on behind closed doors or at trial lawyers' cocktail parties.

Politics are inevitable when it comes to picking judges. The question is whether the politics will remain largely confined to the bar or become more open to the public and its elected representatives.

Stephen J. Ware is a professor at the University of Kansas School of Law in Lawrence.

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LJWorld.com

Professor questions judge selection

By Stephen J. Ware

December 8, 2007

State Rep. Paul Davis, speaking for the Kansas Bar Association, says the current judicial selection process allows the Kansas Supreme Court to maintain its independence from politics ("Judicial selection process criticized," Journal-World," Dec. 1). But nine of the last 11 people appointed to that court belonged to the same political party as the governor who appointed them. This is a highly partisan outcome from a system advertised as "non-partisan." Moreover, governors consistently appoint only members of their party to the Supreme Court Nominating Commission.

What makes the Kansas Supreme Court selection process unusual is not that it's political, but that it gives so much political power to the bar (the state's lawyers). Kansas is the only state that gives its bar majority control over the commission that nominates Supreme Court justices. It's no surprise that members of the Kansas bar are happy with the current system because it gives them more power than the bar has in any of the other 49 states and allows them to exercise that power in secret, without any accountability to the public.

I recently published a paper (available at www.fed-soc.org/kansaspaper) that researched how all 50 states select their supreme court justices. Based on this research, I recommend that Kansas move toward the mainstream of states by reducing the power of its bar and increasing the openness and accountability of the process for selecting Kansas Supreme Court justices.

While some states have individual quirks, three basic methods prevail around the country: commissions, elections and senate confirmation. The commission system is the most elitist system because it tends to concentrate power in the bar, a narrow, elite segment of society, (although no state gives the bar quite as much power as Kansas). The other extreme — electing judges — is the most populist method of selecting a supreme court. It risks turning judges into politicians and thus weakening the rule of law. In between these extremes is the more moderate approach of having the governor's nominee win senate confirmation before joining the court.

Our nation's founders adopted this approach in the U.S. Constitution, and today more than a dozen states also select their supreme courts with confirmation by the state senate or similar body. While some claim that senate confirmation in Kansas would be a political "circus," experience in the states that use it contradicts this claim. Experience in these states suggests that senate confirmation of judicial nominees works well and avoids both the extreme of elitist, bar-controlled courts and the extreme of populist courts swaying with the prevailing winds rather than standing firm for the rule of law. In short, senate confirmation of Kansas Supreme Court justices is a worthwhile reform.

— Stephen J. Ware is a professor in the Kansas University School of Law.

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The Wichita Eagle

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Thursday, Nov 29, 2

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STEPHEN J. WARE: BAR HAS TOO MUCH POWER IN PICKING STATE'S JUSTICES

BY STEPHEN J. WARE

Kansas is the only state that gives its bar association -- the state's lawyers -- majority control over the selection of state Supreme Court justices. As a result, lawyers may have more control over the judiciary in Kansas than in any other state. Not only do Kansas lawyers have an extreme amount of power over judicial selection, they exercise this power in secret.

I recently published a paper that researched how all 50 states select their Supreme Court justices. Based on this research, I recommend that Kansas move toward the mainstream of states by reducing the power of its bar and increasing the openness and accountability of the process for selecting Kansas Supreme Court justices.

The Supreme Court Nominating Commission is now at the center of this process. When there is a vacancy on the Kansas Supreme Court, the commission assesses applicants and submits its three favorites to the governor. The governor must pick one of the three nominees, and that person is thereby appointed a justice on the state Supreme Court, without any further checks on the power of the commission. Therefore, the commission is the gatekeeper to the state Supreme Court.

The bar has majority control over this gatekeeper. The commission consists of nine members, five selected by the bar and four selected by the governor. None of the other 49 states gives its bar majority control over its Supreme Court Nominating Commission.

Kansas has 2.7 million people and only 7,666 lawyers. Yet those few lawyers have more power in selecting our highest court than all other Kansans combined. The bar's majority on the commission can prevent the appointment of an outstanding individual to the Supreme Court, even if that individual is the unanimous choice of the governor, the Legislature and every nonlawyer in Kansas.

Further reducing accountability, the commission's votes are secret. The public can learn the pool of applicants and the three chosen by the commission, but cannot discover which commissioners voted for or against which applicants.

Defenders of this largely secret system claim it selects justices based on merit rather than politics. But 9 of the past 11 people appointed to the Kansas Supreme Court belonged to the same political party as the governor who appointed them. That is a highly partisan outcome from a system advertised as "nonpartisan."

In short, the system gives one small segment of our state (the bar) tremendous power and allows it to exercise that power in secret. Those who hope to join the Kansas Supreme Court -- often lower-court judges -- know they must curry favor with the bar because that interest group holds the key to advancement. We should not be surprised if this system, controlled by a narrow few, begins to resemble a "good ol' boys" club in which members of the club pick those like themselves, rather than being open to diversity and fresh ideas.

Reform of this system should increase its openness and reduce the bar's power. Options for reform can be found in my paper surveying the 50 states' methods for selecting Supreme Court justices, which can be found on the Web site www.fed-soc.org/kansaspaper.

Stephen J. Ware is a professor of law at the University of Kansas in Lawrence.

SELECTION TO THE KANSAS SUPREME COURT

Stephen J. Ware[*]

Kansas is the only state in the union that gives the members of its bar majority control over the selection of state supreme court justices. The bar consequently may have more control over the judiciary in Kansas than in any other state. This process for selecting justices to the Kansas Supreme Court is described by the organized bar as a "merit," rather than political, process. Other observers, however, emphasize that the process has a political side as well. This paper surveys debate about possible reforms to the Kansas Supreme Court selection process. These reforms would reduce the amount of control exercised by the bar and establish a more public system of checks and balances.

I. BAR CONTROL

The Supreme Court Nominating Commission is at the center of judicial selection in Kansas.[1] When there is a vacancy on the Kansas Supreme Court, the Nominating Commission assesses applicants and submits its three favorites to the Governor.[2] The Governor must pick one of the three nominees and that

[*] © Stephen J. Ware. Professor of Law, University of Kansas. For excellent research assistance, I thank Chris Steadham (who primarily prepared Appendix A), Beth Dorsey (who primarily prepared Appendix B), and Cheri Whiteside. I also appreciate helpful comments on a draft of this paper from Steve McAllister and Lance Kinzer. Finally, I thank the Federalist Society for commissioning this paper. The author is responsible for all views expressed herein.

1. KAN. CONST. art. 3 § 5. *See also* KAN. STAT. ANN. §§ 20-119 to -125 (2006).
2. The Kansas Constitution provides that:

> (a) Any vacancy occurring in the office of any justice of the supreme court and any position to be open thereon as a result of enlargement of the court, or the retirement or failure of an incumbent to file his declaration of candidacy to succeed himself as hereinafter required, or failure of a justice to be elected to succeed himself, shall be filled by appointment by the governor of one of three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted to the governor by the supreme court nominating commission established as hereinafter provided.
>
> (b) In event of the failure of the governor to make the appointment within sixty days from the time the names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees.

KAN. CONST. art. 3 § 5(a), (b).

person is thereby appointed a justice on the Kansas Supreme Court,[3] without any further checks on the power of the Commission. Therefore, the Commission is the gatekeeper to the Kansas Supreme Court. The bar (lawyers licensed to practice in the state) has majority control over this gatekeeper. The Commission consists of nine members, five selected by the bar and four selected by the Governor.[4]

No other state in the union gives its bar majority control over its supreme court nominating commission. Kansas stands alone at one extreme on the continuum from more to less bar control of supreme court selection. Closest to Kansas on this continuum are the eight states in which the bar selects a minority of the nominating commission but this minority is only one vote short of a majority.[5] In these eight states, members of the commission not selected by the bar are selected in a variety of ways. Six of them include a judge (and a seventh includes two judges) on the nominating commission. In six of these eight states, as in Kansas, all the non-lawyer members of the commission are selected by the governor, while in two of these states the governor's selections are subject to confirmation by the legislature.

3. If the Governor does not pick one of the three, which has never happened, the duty to pick one of the three falls to the Chief Justice of the Supreme Court. *Id.*

4. The Kansas Constitution provides that:

> The supreme court nominating commission shall be composed as follows: One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.

KAN. CONST. art. 3 § 5(e). As Kansas currently has four congressional districts, the Commission currently has nine members. The term of office for each member of the commission is "for as many years as there are, at the time of their election or appointment, congressional districts in the state." KAN. STAT. ANN. § 20-125.

5. *See* ALASKA CONST. art. IV, §§ 5, 8 (commission consists of 7 members: chief justice, three lawyers appointed for six-year terms by the governing body of the organized bar, three non-lawyers appointed for six-year terms by the governor subject to confirmation by legislature); IND. CONST. of 1851, art. VII, §§ 9−10 (1970); IND. CODE ANN. §§ 33-27-2-2, -2-1 (LexisNexis 2007) (7 members: chief justice; 3 lawyers, 1 from each court of appeals district, elected by members of the bar association in each district; 3 nonlawyers, 1 from each court of appeals district, appointed by governor); IOWA CONST. of 1857, art. V, § 16 (1962); IOWA CODE §§ 46.1−.2, .15 (2006) (15 members: chief justice; 7 lawyers elected by members of bar association, 7 nonlawyers appointed by governor and confirmed by senate); MO. CONST. of 1945, art. V, § 25(a)-(d) (1976); MO. SUP. CT. R. 10.03 (7 members: 1 supreme court judge chosen by members of court; 3 lawyers elected by members of bar; 3 nonlawyers appointed by governor); NEB. CONST. of 1875, art. V, § 21 (1972); NEB. REV. STAT. ANN. §§ 24-801−24-812 (LexisNexis 2007) (9 members: chief judge, 4 lawyers elected by members of bar association, 4 nonlawyers appointed by governor); OKLA. CONST. art. VII-B, § 3 (13 members: 6 lawyers elected by members of bar, 6 nonlawyers appointed by governor and 1 nonlawyer elected by other members); S.D. CODIFIED LAWS § 16-1A-2 (2007) (7 members: 3 lawyers appointed by president of bar, 2 circuit judges elected by judicial conference, and 2 nonlawyers appointed by governor); WYO. CONST. art. V, § 4; WYO. STAT. ANN. § 5-1-102 (2007) (7 members: chief justice, 3 lawyers elected by members of bar, 3 nonlawyers appointed by governor).

In sum, nine states allow the bar to select some of the commission's members and Kansas is the only state in which the bar selects a majority of the commission. By contrast, forty one states either give the bar no official power in the initial[6] selection of supreme court justices or balance the bar's role with power exercised by publicly-elected officials. For example, in Colorado the bar has no role in selecting the nominating commission.[7] In three states, the bar's role is limited to merely suggesting names for a minority of the commission and those suggested do not become commissioners unless approved by the governor and/or legislature.[8]

Fifteen states divide the power to appoint supreme court justices among several publicly-elected officials rather than concentrating this power in the governor. In two of these states justices are appointed by the legislature.[9] In thirteen of these states (ten with a nominating commission[10]) the governor

6. In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. *See* Judicial Selection in the States, http://www.ajs.org/js/select.htm (last visited Aug. 16, 2007). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id.*

7. COLO. CONST. art. VI, §§ 20, 24 (15 voting members: 7 lawyers appointed through majority action of governor, attorney general, and chief justice, 8 nonlawyers appointed by governor).

8. *See* ARIZ. CONST. art. VI, § 36 (16 members: chief justice, 5 lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, 10 nonlawyers appointed by governor with advice and consent of senate); FLA. CONST. of 1968 art. V, § 11 (1998); FLA. STAT. ANN. § 43.291 (LexisNexis 2007) (9 members: 4 lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, 5 other members appointed by governor with at least 2 being lawyers or members of state bar); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (17 members: speakers of senate and house each appoint 6 lawyers, 12 total, from lists submitted by Tennessee Bar Association (2), Tennessee Defense Lawyers Association (1), Tennessee Trial Lawyers Association (3), Tennessee District Attorneys General Conference (3), and Tennessee Association for Criminal Defense Lawyers (3); the speakers also each appoint 1 lawyer not nominated by an organization, each appoint 1 nonlawyer, and jointly appoint a third nonlawyer).

9. These states are: South Carolina and Virginia. *See* Judicial Selection in the States, http://www.ajs.org/js/select.htm (last visited Oct. 6, 2007). South Carolina uses a nominating commission. S.C. CONST. art. V, § 27; S.C. CODE ANN. § 2-19-10 (2006) (10 members appointed by speaker of house or president of senate, General Assembly may reject all the commission's nominees, but cannot elect a candidate who has not been nominated by commission).

10. *See* CAL. GOV'T CODE § 12011.5(b) (West 2007) (commission's "membership . . . shall consist of attorney members and public members with the ratio of public members to attorney members determined, to the extent practical, by the ratio established in Sections 6013.4 and 6013.5 of the Business and Professions Code"); CONN. GEN. STAT. § 51-44a (2007) (12 members: 3 lawyers appointed by governor, 3 nonlawyers appointed by governor, 3 lawyers, 1 appointed by each senate president, house majority and minority leaders, and 3 nonlawyers, one appointed by each of house speaker, senate majority and minority leaders); Del. Exec. Order No. 4 (Jan. 5, 2001) (9 members: 8 appointed by governor (4 lawyers and 4 nonlawyers) and 1 appointed by president of bar association, with consent of governor); HAW. CONST. art. VI, §§ 3-4 (9 members: 2 appointed by governor, 2 by senate president, 2 by house speaker, 1 by chief justice, 2 by state bar, no more than 4 members may be lawyers); Md. Exec. Order No. 01.01.2007.08 (Apr. 27, 2007) (17 members, 12 appointed by governor, 5 by president of bar association); Mass. Exec. Order No. 477 (Jan. 12, 2007) (21 members, all appointed by

nominates justices but the governor's nominee does not join the court unless confirmed by the legislature[11] or other publicly-elected officials.[12] Finally, twenty-two states elect their supreme court justices.[13] The various methods of

governor); N.Y. CONST. art. VI, § 2 (12 members: 4 appointed by governor, 4 by chief judge, 4 by leaders of legislature); R.I. GEN. LAWS § 8-16.1-2 (2006) (9 members: 3 lawyers and 1 nonlawyer appointed by governor, governor also appoints 5 additional members from lists submitted by leaders of legislature); UTAH CODE ANN. § 20A-12-102 (2007) (7 members: chief justice or designee of chief justice, 6 members appointed by governor, 2 lawyers appointed by governor from list submitted by state bar; no more than 4 lawyers total); VT. STAT. ANN. tit. 4, §§ 71, 601, 603 (2007) (11 members: 2 nonlawyers appointed by governor; house and senate each select 3 members, 2 nonlawyers and 1 lawyer; and 3 lawyers elected by members of bar).

11. *See* CONN. CONST. art. V, § 2 (legislature); DEL. CONST. of 1897 art. IV, § 3 (1983) (senate); HAW. CONST. art. VI, § 3(senate); ME. CONST. art. V, Pt. 1, § 8 (senate); MD. CONST. art. II, § 10 (senate); N.J. CONST. art. VI, § VI, Para. 1 (senate); N.Y. CONST. art. VI, § 2, Para. e (senate); R.I. CONST. art. X, § 4 (house and senate); UTAH CONST. art. VIII, § 8 (senate); VT. CONST. § 32 (senate).

12. Massachusetts and New Hampshire require confirmation by the governor's council, which in Massachusetts consists of the lieutenant governor and eight persons elected biennially, MASS. CONST. Pt. 2, Ch. 2, § 1, art. 9; *Id.* Amend. XVI, and in New Hampshire consists of one person elected from each county biennially. N.H. CONST. Pt. 2, art. 46, 60-61. California's system is unique and experience under it exemplifies the possible consequences of subordinating the nominating commission (and thus the bar) to publicly elected officials. "Although the California Constitution provides that judges of the Supreme Court and Court of Appeal are to be elected for a twelve-year term (CAL. CONST. art. 6, sec. 16, subd. (a)), the practice is that they are appointed by the Governor to fill unexpired terms, and then must go through a non-contested retention election." Stephen B. Presser et al., *The Case for Judicial Appointments*, 33 U. TOL. L. REV. 353, 365 (2002). *See also* Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*, 18 J.L. & POL. 643, 646-47 (2002); CAL. CONST. art. VI, § 16 (retention elections). Under this practice, the governor's nominee is confirmed by a three-person commission made up of the chief justice, the state attorney general, and whoever is the most senior presiding justice of the various district Court of Appeals. CAL. CONST. art. VI, § 7. Before this commission can approve the nominee, the governor must submit the nominee to the Judicial Nominees Evaluation (JNE) Commission, an agency of the State Bar of California. CAL. GOV'T CODE § 12011.5(a) (West 2007); CAL. ST. B. R.P. 2(2.72). Until 1996, no governor had ever nominated an individual ranked unqualified by the JNE. In that year,

> Governor Pete Wilson, for the first time in JNE's history, disregarded a "not qualified" rating and appointed to the California Supreme Court a remarkable African-American woman, Janice Brown. Wilson had previously appointed Brown to the Court of Appeal with JNE rating her "qualified" for that position. Moreover, she had previously served as Wilson's Legal Affairs Secretary; unlike other candidates, Wilson was personally familiar with Brown's legal abilities and qualifications. Brown's appointment to the California Supreme Court despite JNE's opposition created a furor because she is an outspoken and eloquent conservative. JNE's "not qualified" rating was widely perceived as motivated by political or ideological considerations.
>
> Wilson defied JNE twice more as governor, appointing to the Superior Court and the Court of Appeal candidates he believed to be well-qualified, even though they were rated "not qualified" by JNE.

Presser et al., *supra*, at 372. In 2003, President Bush appointed Janice Brown to the United States Court of Appeals for the District of Columbia. *See* 151 CONG. REC. S 6208, 6217 (daily ed. June 8, 2005). The Senate voted fifty-six to forty-three in favor of her confirmation. 151 CONG. REC. S 6208, 6218 (daily ed. June 8, 2005).

13. Seven states use partisan elections: Alabama, Illinois, Louisiana (uses a blanket primary

selecting state supreme court justices are summarized in Table 1, which follows.

Table 1

Bar Control of Supreme Court Selection

High Bar Control						Low Bar Control
Nom'n Comm'n majority selected by bar	Nom'n Comm'n near majority selected by bar	Nom'n Comm'n w/ no or little role for bar	Legislative Appointment	Governor's Nominee Confirmed	Non-Partisan Elections	Partisan Elections
Kansas	Alaska Indiana Iowa Missouri Oklahoma Nebraska South Dakota Wyoming	Arizona Colorado Florida Tennessee	South Carolina Virginia	California Connecticut Delaware Hawaii Maine Maryland Massachusetts New Hampshire New Jersey New York Rhode Island Utah Vermont	Arkansas Georgia Idaho Kentucky Michigan Minnesota Mississippi Montana Nevada North Carolina North Dakota Ohio Oregon Washington Wisconsin	Alabama Illinois Louisiana New Mexico Pennsylvania Texas West Virginia

To recap, more than four-fifths of the states either give the bar no official power in the initial selection of supreme court justices or balance the bar's role with power exercised by publicly-elected officials. These states generally select their justices through:

(1) appointment by the legislature,

(2) confirmation of the governor's nominees by the legislature,[14]

or

(3) elections in which a lawyer's vote is worth no more than any other citizen's vote.

where all candidates appear with party labels on the ballot and the top two vote getters compete in the general election), New Mexico, Pennsylvania (if more than one seat is available all candidates run at large and the top two vote getters fill the open seats), Texas, and West Virginia. *See* Judicial Selection in the States, http://www.ajs.org/js/select.htm (last visited Oct. 6, 2007). Fifteen states use (purportedly) non-partisan elections: Arkansas, Georgia, Idaho, Kentucky, Michigan (non-partisan general election, but partisan nomination), Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio (non-partisan general election, but partisan nomination), Oregon, Washington, and Wisconsin. *See id.* With respect to Michigan and Ohio, *see also* Herbert M. Kritzer, *Law is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DE PAUL L. REV. 423, 456-60 (2007).

14. Or other publicly-elected officials.

Less than one-fifth of states allow the bar to select members of a nominating commission that has the power to ensure that one of its initial nominees becomes a justice.[15] And Kansas alone allows the bar to select a majority of such a commission.

II. DOES SECRECY YIELD MERIT?

While the President nominates federal judges, these judges are not confirmed without a majority vote of the United States Senate[16] and these votes on the confirmation of federal judges have long been public.[17] In contrast, the votes of the Kansas Supreme Court Nominating Commission are secret, as are the Commission's interviews of applicants.[18] The public can learn of the pool of applicants and the three chosen by the Commission, but cannot discover which commissioners voted for or against which applicants.[19] By statute, the Commission "may act only by the concurrence of a majority of its members."[20] But no statute requires that the votes of the Commission be made public.[21]

15. The importance of this power was recently demonstrated in Missouri where the governor publicly considered the possibility of refusing to appoint any of the three nominees submitted to him by the supreme court nominating commission. *See* Editorial, *Blunt Trauma*, WALL ST. J., Sept. 17, 2007, at A16. The governor ultimately did appoint one of the nominees and his capitulation to the commission has been explained by the fact that if he did not appoint one of those three then the commission would exercise its power to appoint one of the three. *Id*. By contrast, the commission lacks this power to ensure that one of its nominees becomes a justice where appointment requires confirmation by the legislature of other publicly-elected officials. The body with the power to withhold confirmation has the power to send the commission "back to the drawing board" to identify additional nominees if none of the original nominees wins confirmation.

16. U.S. CONST. art. II, §2.

17. U.S. CONST. art. I, § 5 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.") "Until 1929 the practice was to consider all nominations in closed executive session unless the Senate, by a two-thirds vote taken in closed session, ordered the debate to be open." Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146, 1157 (1988). *See also* JOSEPH P. HARRIS, THE ADVICE AND CONSENT OF THE SENATE: A STUDY IN THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE 253-55 (1953).

18. Laura Scott, *Keep Politics Out of the Selection of Judges*, KANS. CITY STAR, Feb. 11, 2008, at B7. "That's troubling, as these are the top positions in the judiciary and the people picked for them make decisions that impact many lives." *Id*.

19. Research for this paper found no evidence of any dissenting votes on the Commission or of any disagreement on the Commission at all.

20. KAN. STAT. ANN. § 20-123.

21. A 1982 opinion by the Kansas Attorney General concluded "the Supreme Court Nominating Commission may conduct its meeting in full public view, however, the legislature is without authority to require that meetings of the Commission be open or closed. Nor may the legislature require the Commission to meet in a particular place." XVI Op. Att'y Gen. Kan. 95 (1982), 1982 WL 187743. A recent survey of judicial nominating commissions lists Kansas among the "five states [that] have no written rules about whether or not commission deliberations

Defenders of this largely-secret system describe it as "non-partisan" or "merit" selection,[22] and contend that it selects applicants based on their merits rather than their politics.[23] There is, however, a remarkable pattern of governors appointing to the Commission members of the governor's political party. Research for this paper examined the twenty-year period from 1987 to 2007. During this period, twenty-two people appointed by the governor served on the Commission. In all twenty-two cases, the governor appointed a member of the governor's party.[24] This is depicted in Table 2, which follows.

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will be confidential, and [the] seven states [that] have no written rules that govern whether commission voting will be confidential." Rachel Paine Caufield, *How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commission*, 34 FORDHAM URB. L.J. 163, 184 & n.118 (2007).

22. *See, e.g.,* Paul T. Davis, *The Time for Merit Selection Will Come*, 70 J. KAN. B. ASSOC. 5 (2001) ("For the past two years, the Kansas Bar Association has been leading the effort for the passage of a constitutional amendment providing for statewide, non-partisan merit selection of district court judges."); Fred Logan, *Kansas Should be Served by an Independent Judiciary*, 70 J. KAN. B. ASSOC. 3 (2001) ("The Kansas Commission on Judicial Qualifications took the rare step of endorsing merit selection of judges."). This terminology is used nationally by bar associations and other lawyers' groups. *See, e.g.*, Alfred P. Carlton, Jr., *Justice In Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary*, July 2003 (a portion of which is reproduced as Appendix C); Norman Krivosha, *In Celebration of the 50th Anniversary of Merit Selection*, 74 JUDICATURE 128 (1990); American Judicature Society, *Merit Selection: The Best Way to Choose the Best Judges*, http://www.ajs.org/js/ms_descrip.pdf (last visited Oct. 6, 2007).

23. *See, e.g., Minutes of the House Federal and State Affairs Committee: Hearing on HCR – 5008 Before the H. Fed. and State Affairs Comm.*, (Kan. 2007) (statement of Richard C. Hite, Chair, Supreme Court Nominating Commission) ("Almost fifty years ago the citizens of this State mandated by constitutional amendment that election of Supreme Court Justices should be taken out of the political arena and based solely on merit."); F. James Robinson Jr., Op-ed, *Don't Put Politics Back into Selection of Justices*, WICHITA EAGLE, Feb. 21, 2007, at 7A ("Merit selection is a process that uses a nonpartisan commission of lawyers and nonlawyers to investigate, evaluate and occasionally recruit applicants for judgeships. Applicants are chosen on the basis of their intellectual and technical abilities and not on the basis of their political or social connections."); John Hanna, *Father Wants Justices Confirmed; Senate Nixes Penalty Fix*, HAYS DAILY NEWS, Feb. 22, 2005 ("Retired Supreme Court Justice Fred Six said the current system has 'banished politics from the judicial playing field.'"); Editorial, *Keep Judges Exempt From Elections*, KAN. CITY STAR, May 21, 2006 (current system achieves "[t]he separation of judges from the political process."). Members of the Commission say that politics plays no role in their deliberations. "'We never talk about politics in those meetings. It just doesn't come up,' said Richard Hite, chairman of the nominating commission." James Carlson, *Method for Choosing High Court Justices Would Change With Resolution*, TOPEKA CAPITAL-JOURNAL, Feb. 14, 2007, at 4. *See also* David Klepper, *Judge Applicants Face Panel*, KAN. CITY STAR, May 23, 2005, at B1 ("The nominating commission - consisting of nine attorneys and lay persons - tries to take the politics out of the process. Questions of party loyalty or views on issues such as abortion are never asked, according to Hite. 'We ignore everything except merit,' Hite said. 'The object is to find the best judge, period.'); Chris Grenz, *Critics Question Democratic Majority on High Court*, HUTCHINSON NEWS, Aug. 9, 2005 ("Dodge City attorney David J. Rebein, president-elect of the Kansas Bar Association and a member of the nominating commission, said the current selection system was put in place specifically to filter out politics. "At the nominating commission level, it doesn't even come up," Rebein said. "It is by design strictly merit based.").

24. *See infra* Appendix A (listing party of non-lawyer commissioners appointed by Democratic governors in 1979-86, 1991-94 and 2003-07 and by Republican governors in 1987-90

Table 2
Governor's Appointments to
Kansas Supreme Court Nominating Commission, 1987 – 2007

Governor's Party	Republican Commissioners	Democratic Commissioners
Republican	8	0
Democrat	0	14

In addition to consistently partisan appointments to the Commission, there is a strikingly partisan record of appointments to the Supreme Court itself. During the twenty-year period from 1987 to 2007, eleven new justices were appointed to the court.[25] Nine of the eleven justices belonged to the same political party as the governor who appointed them.[26] In one of the other two cases the governor could not appoint a justice from his party because none of the three individuals submitted to the governor belonged to that party.[27] In other words, in nine of the ten cases in which the governor could pick a member of the governor's party, the governor did so. So the governor's role—in this allegedly "non-partisan" process—has been quite partisan, although not invariably so.[28] And in one of the last eleven cases, the Commission forced the governor to select an individual who did not belong to the governor's party.[29] This data on the appointment of justices is depicted in Table 3, which follows.

and 1995-2002.) By contrast, research for this paper was not able to identify the party affiliation of all the lawyer members of the Commission. Of those lawyer members for whom party affiliation was available, there were seven Democrats, thirteen Republicans and zero Independents or members of third parties. *See id.* This translates into 35% Democrats, 65% Republicans and 0% Independents or members of third parties. The Kansas electorate as a whole consists of 26.8% Democrats, 46.2% Republicans and 27% Independents or members of third parties. *See* MICHAEL BARONE, ALMANAC OF AMERICAN POLITICS 677 (2006).

25. *See infra* Appendix A.

26. *Id.*

27. *Id*. (Justice Luckert).

28. This is not a fluke of Kansas. According to scholars assessing judicial selection around the country, "Few deny that the Governor, although limited in his or her choice, applies political criteria in judging the three nominees submitted by the nominating commission. Assuming that the three are nearly equal in terms of qualifications, the one most politically attractive receives the Governor's nod." CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 131 (1997).

29. *See infra* Appendix A (Justice Luckert).

Table 3
Governor's Appointments to Kansas Supreme Court,
1987 – 2007

	Governor appointed justice from governor's party	Governor appointed justice not from governor's party
At least one of Commission's nominees in governor's party	9	1
None of nominees in governor's party	0	1

III. THE DEBATE OVER REFORM

There is a nationwide debate over whether "non-partisan," "merit" selection of judges should be reformed to achieve two goals: first, to reduce the amount of control exercised by the bar, and, second, to subject the political side of the judicial selection process to a more public system of checks and balances.[30] This paper provides a brief history of selection to the Kansas Supreme Court before discussing possible reforms.

A. The 1958 Kansas Plan

Until 1958, Kansans elected their supreme court justices. The establishment of the Kansas Supreme Court Nominating Commission in 1958 was a reaction to events that had occurred after the most recently preceding general election.

30. *See, e.g.*, Editorial, *Show Me the Judges*, WALL ST. J., Aug. 30, 2007, at A10; *Blunt Trauma*, *supra* note 15. The same process currently used to select justices for the Kansas Supreme Court is also currently used to select all judges on the Kansas Court of Appeals. *See* KAN. STAT. ANN. §20-3004 (2006). In most of the state's judicial districts, a similar process is used to select district judges. *See generally* Stacie L. Sanders, Note, *Kissing Babies, Shaking Hands, and Campaign Contributions: Is This the Proper Role for the Kansas Judiciary?*, 34 WASHBURN L. J. 573 (1995). Accordingly, the case for reforming this process applies to all these courts but it applies most strongly to the Kansas Supreme Court simply because it is the state's highest court and lower courts follow its precedents.

> A resolution for the submission of a constitutional amendment which would adopt the commission plan [for the selection of supreme court justices] was introduced in 1953, but defeated in the house judiciary committee. Again proposed in 1955, the resolution was defeated in the senate judiciary committee. However, subsequent events were to lead to the adoption of the commission plan for the selection of supreme court justices: The intensive lobbying efforts of the Kansas Bar Association; and public outcry over the infamous "triple play" of 1956.
>
> The "triple play" involved Chief Justice of Kansas Supreme Court Bill Smith, Governor Fred Hall, and Lieutenant Governor John McCuish. In 1956, Governor Hall was defeated in the Republican Primary by Warren Shaw, who then lost the general election to Democrat George Docking. In December of that year, Chief Justice Smith, who was seriously ill, forwarded his resignation to Governor Hall. Hall then immediately resigned his post of Governor in favor of Lieutenant Governor McCuish, who prematurely returned from a Newton Hospital to make his first and only official act of his 11 day tenure as Governor: The appointment of Hall to the supreme court. Such a result would have been avoided under the commission plan, as the nominating commission would have determined which candidates to send to the governor for appointment, rather than allowing the governor to appoint replacement justices in between elections.
>
> The legislature submitted a proposal to amend the constitution to adopt the commission plan for the selection of supreme court justices only, and this amendment was passed by a wide margin in the 1958 general election.[31]

In short, the current Commission system was rejected in 1953 and 1955 but—after the "triple play" of 1956—was passed in the next general election. The "intensive lobbying efforts of the Kansas Bar Association" combined with the "triple play" to give Kansas its current supreme court selection process.

The lesson of the "triple play" is that governors should not have absolute power over the selection of supreme court justices. "Power tends to corrupt, and absolute power corrupts absolutely."[32] The Framers of the United States Constitution were acutely aware of this risk and their masterful achievement was designing a system of government in which power was divided and constrained by a system of checks and balances.[33] In appointing justices to the

31. Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASSOC. 32, 34 (2000) (citations omitted).

32. Letter from Lord Acton to Bishop Mandell Creighton (1887), *see* http://www.phrases.org.uk/meanings/288200.html (last visited Mar. 14, 2007).

33. *See generally* THE FEDERALIST NOS. 47, 48, 49, 50, 51 (James Madison) (Clinton Rossiter ed., 1999) (discussing and explaining the need for separation of powers and checks and balances).

United States Supreme Court, the president's power is checked by the power of the United States Senate. The Constitution requires a majority vote of the Senate in order to confirm a justice to the United States Supreme Court.[34] By contrast, at the time of the "triple play" the Kansas Constitution lacked this check on the Governor's power to appoint a justice to the Kansas Supreme Court.

Anger over the "triple play" prompted the addition of a check on the governor's power to select justices. This new check on the governor's power was given, not to the Kansas Senate, but to the bar (lawyers licensed to practice in the state). Rather than following the United States Constitution to make the Legislature the check on the Executive's power, the 1958 change made the bar the check on the Executive's power.[35]

B. Is The Bar an Interest Group or "Faction"?

Lawyers, because of their professional expertise and interest in the judiciary, are well-suited to recognizing which candidates for a judgeship are especially knowledgeable and skilled lawyers. But lawyers assessing applicants for a judgeship are also human beings. Can we be confident that all the lawyers on a nominating commission will be willing and able to put aside completely all their personal views in favor of some non-political conception of "merit"? Scholars who have studied judicial nominating commissions around the United States conclude that the commissions are very political, but that their politics—rather than being the politics of the citizenry as a whole—are "a somewhat subterranean politics of bar and bench involving little popular control."[36]

34. U.S. CONST. art II, § 2.

35. Technically, of course, it is the Commission rather than the bar that is the check on the governor. But the governor appoints four of the nine commissioners so, except insofar as they are holdovers appointed by a previous governor of a different party, those four are unlikely to serve as much of a check on the governor. The check on the governor, if it comes from the Commission at all, is more likely to come from the five commissioners elected by the bar. *See supra* Part II, Table 2 (showing, from 1987 to 2007, all fourteen of the commissioners appointed by Democratic governors were Democrats and all eight of the commissioners appointed by Republican governors were Republicans).

36. HARRY P. STUMPF & KEVIN C. PAUL, AMERICAN JUDICIAL POLITICS 142 (2d ed. 1998). Judicial selection through a nominating commission was first adopted in Missouri and is often called "the Missouri Plan." The classic study of the first twenty-five years of this process in Missouri is a book by Richard A. Watson & Rondal G. Downing, THE POLITICS OF THE BENCH AND THE BAR (1969). A textbook summarizes their findings as follows:

> [F]ar from taking judicial selection out of politics, the Missouri Plan actually tended to replace Politics, wherein the judge faces popular election (or selection by a popularly elected official), with a somewhat subterranean politics of bar and bench involving little popular control. There is, then, a sense in which merit selection does operate to enhance the weight of professional influence in the selection process (one of its stated goals) in that lawyers and judges are given a direct, indeed official, role in the nominating process. On close examination, however, one finds raw political considerations masquerading as professionalism

> The conclusion is inescapable: "merit" selection has little or no merit, if by merit we mean that nonpolitical (that is, professional) considerations dominate the selection process.
>
> . . .
>
> Not only is there little evidence of the superiority of judges selected by the "merit" system (although there is some evidence to the contrary), but also there is little to show that judicial selection mechanisms make any difference at all. . . .
>
> . . .
>
> Where are we then? If the lay, the professional, and even the political inputs built into the Missouri Plan[37], do not work as advertised, and if the plan in general cannot be shown to produce superior judges, what is left of the argument? The answer is, not much. In a thorough examination of the Missouri Plan undertaken by Henry Glick, other avenues of analysis were pursued, but the results in no instance reveal redeeming support for the claims made for merit selection. Why, then does bar, bench, and general public support for the plan continue, and why is the plan being adopted in more and more states? The specific reasons are many, but they ultimately boil down to an aggrandizement of national and state bar associations.
>
> The legal profession desires a larger voice in judicial selection for the same reason that other interest groups do—to advance their cause through judicial policymaking. "Merit" selection gives them that added leverage. All the better if they can sell their old line of increased political influence over the courts by using the attractive, but phony, label of "neutral professionalism."[38]

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via attorney representation of the socioeconomic interests of their clients.

STUMPF & PAUL, *supra*, at 142.

37. Judicial selection through a nominating commission was first adopted in Missouri and is often called "the Missouri Plan."

38. STUMPF & PAUL, *supra* note 36, at 142-47. *See also* Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744 (2002) (citation omitted) ("This review of social scientific research on merit selection systems does not lend much credence to proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems. Evidence shows that many nominating commissioners have held political and public offices and political considerations figure into at least some of their deliberations. Bar associations are able to influence the process through identifying commission members and evaluating judges . . . . Finally, there are no significant, systematic differences between merit-selected judges and other judges."); HARRY P. STUMPF & JOHN H. CULVER, THE POLITICS OF STATE COURTS 41 (1991) ("The primary appeal of the merit plan for judicial selection rests with the implication that it is a nonpartisan mechanism. Additionally, proponents claim that judges of a higher 'quality' are more likely to reach the bench via this system than any other. However, experience with the merit plan indicates that it is a very political one, with state and local bar politics substituting for public politics.").

Practicing lawyers and judges confirm the scholars' conclusion. *See* Robert L. Brown, *From Whence Cometh our State Appellate Judges: Popular Election Versus the Missouri Plan*, 20 U. ARK. LITTLE ROCK L. REV. 313, 321 (1998) ("Even in states which use the Missouri Plan, nominating commissions are subject to considerable lobbying by single-issue groups and political parties in the development of a slate of judicial candidates. So is the governor once the slate is prepared and presented. It is politics, but politics of a different stripe."); Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B.J. 20, 24 (1996) ("Merit selection does not take

Critics of "merit" selection point out that lawyers comprise an interest group just like other interest groups. Bar associations aggressively lobby for the interests of their lawyer-members. While they may articulate reasons why the policies that favor lawyers also serve the public interest, bar associations have repeatedly advocated policies that favor lawyers and that have been viewed by others as harming the public as a whole.[39] The selection of supreme court justices through a process controlled by the bar is just one example of this form of advocacy.[40] Relatedly, members of the Kansas Supreme Court Nominating Commission could be lobbied and influenced by some of that lobbying.[41]

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politics out of the judicial selection process. It merely changes the nature of the political process involved. It substitutes bar and elitist politics for those of the electorate as a whole.").

39. *See, e.g.,* DEBORAH L. RHODE, ACCESS TO JUSTICE 69 (2004) ("Bar efforts to restrain lawyers' competitive practices have inflated the costs and reduced the accessibility of legal assistance. Although the courts have increasingly curtailed these efforts through constitutional rulings, the bar's regulatory structure has remained overly responsive to professional interests at the expense of the pubic."); *id.* at 87 ("Giving qualified nonlawyers a greater role in providing routine legal assistance is likely to have a . . . positive effect, but the organized bar is pushing hard in the opposite direction."); Norman W. Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983, 994 (2004) (with respect to access to justice for people of modest means, "Bar associations have behaved more like rent-seeking interest groups than the self-policing, public-minded regulatory bodies they purport to be; state legislatures and state supreme courts have too long caved to patently self-serving claims by bar associations for insulation from direct public regulation . . . ."); George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 105 (2003) (with respect to accreditation of law schools, American Bar Association lobbies for a set of rules that "forces one style of law training, at Rolls-Royce prices" which reduces the supply of lawyers); Jonathan R. Macey & Geoffrey P. Miller, *An Economic Analysis of Conflict of Interest Regulation*, 82 Iowa L. Rev. 965, 967 (1997) ("some [legal] ethics rules can indeed be understood as serving the interest of the organized bar at the expense of social wealth."); Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 Case W. Res. L. Rev. 531, 567 (1994) ("the organized bar, beginning in the 1930s, negotiated treaties with organized groups of competitors that had the effect of dividing the market for services in areas reserved for lawyers, on the one hand, and accountants, architects, claims adjusters, collection agencies, liability insurance companies, lawbook publishers, professional engineers, realtors, title companies, trust companies, and social workers, on the other. The growth of the consumer movement and the evolution of federal antitrust law brought an end to this market division strategy.") *id*. at 575 (discussing organized bar's opposition to group legal service arrangements).

40. The American Bar Association has lobbied for judges selected by nominating commissions since 1937. STUMPF & PAUL, *supra* note 36 at 138. *See also infra* Appendix C, JUSTICE IN JEOPARDY, REPORT OF THE AMERICAN BAR ASS'N COMMISSION ON THE 21ST CENTURY JUDICIARY (2003).

41. *See, e.g.,* Joseph A. Colquitt, *Rethinking Judicial Nominating Commissions: Independence, Accountability, and Public Support*, 34 FORDHAM URB. L.J. 73, 100 (2007).

> The commission needs to be open to, and receptive of, external input. Rules of conduct should help reduce political control, not eliminate public input. Nevertheless, a code of ethics must address the external pressures that may exert themselves upon the commissioners. Political pressure may come from individuals, political parties, and industry and special interest groups that exist within the constituency. Commissioners should receive information from

The Framers of the United States Constitution recognized a danger from interest groups, or "factions" as they were then called[42] The Federalist Papers propose several cures for the "mischiefs of faction."[43] The most famous is the system of "checks and balances," which divides power and sets factions against one another, ensuring that none can gain control for itself.[44] The question is whether such a system is in place in Kansas: are the critics correct that the process for judicial selection gives too much control to a single faction? The executive branch's power to appoint members of the judicial branch is checked, not by the legislative branch, but by a nine-person commission in which a majority are selected by the bar.

C. Reduce Bar Control of the Nominating Commission?

Several possible reforms would reduce the control a single faction, the bar, has over the process of selecting justices to the Kansas Supreme Court. One such reform would simply reduce the portion of the Commission selected by the bar. The majority of the twenty-four states with supreme court nominating commissions allow the bar to select less than one-third of the commission's members.[45] Kansas could move toward the mainstream of states by, for instance, allowing the Speaker of the House and President of the Senate

> constituents, whether those constituents speak individually or collectively through organizations. Such information, however, should be properly channeled to the commission as an entity and not to individual commissioners by way of surreptitious meetings or ex parte communications.

Id. at 100-01. In Kansas, House Speaker Melvin Neufeld said the bar played too large a role and the system needs to be reformed so a Governor's nominee to the high court faces Senate confirmation. *See* Tim Carpenter, *Appeals Court Judge Named to High Court*, TOPEKA CAPITAL-JOURNAL, Jan. 6, 2007, at A1. Neufeld said, "That setup that we now have has evolved to a good-old-boy club." *Id.* A "good-old-boy club," with its associations of exclusivity and privilege, is an apt description of how the Commission looks to many of those who are not members of the bar. This is a shame because of the good faith and hard work exhibited by those the bar elects to the Commission. But when a single interest group controls an important governmental process -- and exercises that control in a largely secret manner -- outsiders can be excused for being suspicious and resentful. Courts have held such interest-group control unconstitutional when the interest group in question were not lawyers. *See* Senator Susan Wagle, *Confirm Justices*, WICHITA EAGLE, Mar. 6, 2005, at 15A ("The nominating committee is controlled by a majority of attorneys, the very individuals who appear before the courts seeking favor. In a similar situation in 1993, the federal courts declared the process by which Kansas selected its secretary of agriculture unconstitutional. The secretary used to be selected by the farm groups that the secretary regulated. The Legislature changed the position to one selected by the governor and subject to the Senate confirmation process.").

42. *See* THE FEDERALIST No. 9 (Alexander Hamilton), No.10 (James Madison) (Clinton Rossiter ed., 1999).

43. THE FEDERALIST No. 10, (James Madison), *supra*, note 42.

44. *See* THE FEDERALIST No. 51 (James Madison), *supra* note 42.

45. The thirteen states allowing the bar to select less than one-third are Arizona, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New York, Rhode Island, South Carolina, Tennessee, Utah, and Vermont, *see supra* notes 8 & 10, while the eleven states allowing the bar to select more than one-third are: Alaska, California, Florida, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, and Wyoming. *See supra* notes 4-5 and 8.

to select two commissioners each, while the bar and Governor select three and two commissioners, respectively. In addition to moving Kansas toward the mainstream of states with respect to bar control, this reform would also bring Kansas in line with the ten states in which the legislature selects some of the commissioners or has confirmation power over those the governor selects.[46] According to Professor (and former judge) Joseph Colquitt, allowing the legislature to select some of the commissioners "diverts the power from the governor, who usually will be charged with appointing judges from the slate nominated by the commission. Placing the power to appoint or elect commissioners in hands other than the appointing authority for judges better addresses both democratic ideals and commission-independence concerns."[47]

A reform to allow the Kansas Legislature to appoint members of the Kansas Supreme Court Nominating Commission would reduce the bar's control over the Kansas Supreme Court selection process. But, it would not open up the process by exposing the commissioners' votes to the public. It is possible to require that the votes of the Commission be made public—so everyone can learn which commissioners voted for or against which applicants—but most judicial nominating commissions around the country vote in secret.[48] Other ways to expose the political side of the judicial selection process include judicial elections and senate confirmation of judicial nominees. These are discussed next.

D. Electing Supreme Court Justices

Kansans elected supreme court justices prior to 1958 and a recent proposal in the Legislature sought to revive this process.[49] While electing supreme court justices reduces bar control, it also has many drawbacks. These include:

> the appearance of impropriety caused by judges taking money from those who appear before them, the threat to judicial independence resulting from a judge's dependence on campaign contributions and party support, the reduced perception of impartiality caused by statements of judicial candidates on political or social issues, the elimination of qualified lawyers

46. These states are: Alaska, Arizona, Connecticut, Hawaii, Iowa, New York, Rhode Island, South Carolina, Tennessee and Vermont. *See supra* notes 5, 8, and 10.

47. Colquitt, *supra* note 41, at 94-95.

48. "Most commissions vote by secret ballot in closed, executive session. . . . In a few jurisdictions, a non-binding vote is done in closed, executive session and then conducted again in public." AMERICAN JUDICATURE SOCIETY, HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS, 25 (2d ed. 2004) http://www.ajs.org/selection/docs/JNC_Handbk-Ch2.pdf (citations omitted) (citing, for the latter proposition, Section 8 of the New Mexico Rules Governing Judicial Nominating Commissions).

49. Sarah Kessinger, *Proposal calls for electing judges to high court*, HUTCHINSON NEWS, Feb. 12, 2005. That proposal was House Concurrent Resolution No. 5012 (2005), introduced by Representative Lynne Oharah, and hearings were held before the House Committee on Federal and State Affairs on March 17, 2005. No action was taken.

> who would otherwise be willing to serve as jurists, and the loss of public confidence caused by the vile rhetoric of judicial campaigns.[50]

The appearance of impropriety and threat to judicial independence are exacerbated by the fact that judicial campaign contributions tend to come from those who seek favorable decisions from the court. As Professor Paul Carrington explains:

> Judicial candidates receive money from lawyers and litigants appearing in their courts; rarely are there contributions from any other source. Even when the amounts are relatively small, the contributions look a little like bribes or shake-downs related to the outcomes of past or future lawsuits. A fundamental difference exists between judicial and legislative offices in this respect because judges decide the rights and duties of individuals even when they are making policy; hence any connection between a judge and a person appearing in his or her court is a potential source of mistrust. . . . There have been celebrated occasions . . . when very large contributions were made by lawyers or parties who thereafter secured large favorable judgments or remunerative appointments such as receiverships.[51]

The Chief Justice of the Texas Supreme Court similarly asked, "when a winning litigant has contributed thousands of dollars to the judge's campaign, how do you ever persuade the losing party that only the facts of the case were considered?"[52]

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50. Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 276 (2002).

51. Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 91-92 (1998) (citations omitted).

52. Presser et al., *supra* note 12, at 378 (quoting Thomas R. Phillips). A distinction should be drawn

> when the campaign contributor is not a single lawyer or litigant, but rather a large group of people who band together to advance their political philosophy. A single contributor may seek only victories in cases in which the contributor appears as a party or lawyer. In contrast, an interest group may have a broad policy agenda, such as protecting the environment or deregulating the economy. Such an interest group may contribute to the campaigns of judges who share its political philosophy, just as it may contribute to the campaigns of like-minded candidates for other public offices. If such an interest group succeeds, it affects the results in many cases in which the winning parties and lawyers are not members of the interest group. In short, the interest group succeeds, not by buying justice in individual cases, but by buying policy that influences a range of cases.

Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 653-654 (1999), *reprinted in*, 30 CAP. U. L. REV. 583 (2002). The possibility of contributors "buying justice" in individual cases is the primary concern about judicial elections. The possibility of contributors "buying policy" over a range of cases is a secondary concern and one that raises more nuanced issues. No plausible system of judicial selection can be completely insulated from the efforts of interest groups to influence policy. Even the federal system of judicial appointment with life tenure is subject to these efforts as interest

E. Senate Confirmation of Supreme Court Justices

Proposals to elect Kansas Supreme Court justices have received less support in recent years than proposals to require Senate confirmation of them. In 2005, Senators Derek Schmidt and Susan Wagle proposed a constitutional amendment that would have kept the Supreme Court Nominating Commission but, after the governor picked one of the three names submitted by the Commission, that person would be appointed to the Supreme Court only with consent of the State Senate.[53] This proposal is similar to the law in the ten states that have both a supreme court nominating commission and confirmation by the legislature or other publicly-elected officials.[54]

Under this proposal, if the Senate did not confirm the governor's nominee then the governor would pick one of the other two names submitted by the Commission. If the Senate did not confirm any of the three individuals then the Commission would submit three additional names to the governor and the process would continue until a nominee received the consent of the Senate. In 2005, this proposal passed the Senate Judiciary Committee on a 6-4 vote,[55] but did not go to a vote in the Senate.[56] In 2006, it did go to a vote in the Senate. A 22-17 majority of senators voted for it, but that was still five votes short of the two-thirds necessary for a constitutional amendment.[57]

In both 2006 and 2007, Representative Lance Kinzer proposed abolition of the Supreme Court Nominating Commission. Instead, justices would be nominated by the governor and appointed to the Supreme Court after

groups contribute to the presidential and senatorial campaigns of candidates likely to appoint and confirm the judges expected to advance the interest group's preferred policy positions. The difference between the federal system and a system of electing judges is that in the federal system interest-group influence over judge-made policy is indirect because it operates through the president and senators and these intermediaries campaign on a range of issues besides judicial selection. *See id.* By contrast, judicial selection is the only issue in judicial campaigns so interest-group influence over judge-made policy is more direct in a system of elected judges. *See infra* text accompanying notes 77-78 (contrasting political theory behind judicial elections with that behind federal system of judicial selection).

53. *See* S. Con. Res. 1606 (Kan. 2005). *See also* David Klepper, *Nomination Process Scrutinized*, KAN. CITY STAR, Feb. 10, 2005, at B3.

54. *See supra* notes 10-12 and accompanying text.

55. Steve Painter, *Senators Seek Say in Judge Selection: A Proposed Constitutional Amendment Would Change the Way Kansas Picks Its Supreme Court Justices*, WICHITA EAGLE, Mar. 20, 2005, at 1B.

56. Steve Painter, *Topeka Judge To Join High Court: The Governor's Choice Wins Praise From Legislators*, WICHITA EAGLE, July 23, 2005, at 1A.

57. *See* KAN. CONST. art. XIV, §§ 1-2. An amendment to the constitution can originate in either house. It must then be approved by two-thirds of the members of each house, and then at the next or through a special election the majority of voters must approve. A revision can also occur through constitutional convention to revise all or part of the document. Each house must approve this by a two-thirds vote. At the following election the majority of voters must approve the convention. At the next (or a special) election, delegates are elected from each district. After meeting and reaching consensus, the proposals of the convention are submitted to the voters for majority approval. *See id.*

confirmation by the Senate.[58] This proposal is similar to the process used in three states and at the federal level.[59] This proposal was the subject of committee hearings,[60] but did not receive a vote of the full House.[61]

The push for Senate confirmation came shortly after two controversial Kansas Supreme Court decisions, one on school finance and the other on the death penalty.[62] This timing led many people to view the push for Senate confirmation as, to use the words of Senator John Vratil, "an overreaction to our discontent with two decisions."[63] According to this view, the process for selecting justices should not be amended just because many people disagree with a couple of the court's decisions. As Senator Vratil said, "We need to take a much longer viewpoint and not just react in knee-jerk fashion to a couple of decisions that are unpopular."[64]

So the question is, when taking the long view, did the Framers of the United States Constitution get it right? They created three co-equal branches of government (executive, legislative and judicial) and a system of checks and balances that has stood the test of time longer than any other written constitution in human history.[65] A cardinal virtue of the United States Constitution is that, at crucial points, each branch is checked by both of the other two branches. For example, a member of the judicial branch is nominated by the executive and confirmed by the legislature.[66] These checks come from elected officials, responsible to the public as a whole, not a single interest group or "faction." Also, these checks take the form of public votes. As a result, citizens can hold their president and senators accountable for these important decisions on election day.[67] By contrast, the Kansas Supreme Court

58. H.R. Con. Res. 5033 (Kan. 2006); H.R. Con. Res. 5008 (Kan. 2007).

59. These states are Maine, New Hampshire and New Jersey. *See supra* notes 10-12.

60. James Carlson, *Method for Choosing High Court Justices Would Change with Resolution*, TOPEKA CAPITAL-JOURNAL, Feb. 14, 2007, at 4. The Feb. 8, 2006 hearing on H.R. Con. Res. 5033 was before the House Judiciary Committee. *See infra* note 68. The Feb. 13, 2007 hearing on H.R. Con. Res. 5008 was before the House Federal and State Affairs Committee. *See infra* note 70.

61. A motion to favorably report it out of the House Judiciary Committee failed by a vote of ten to eight on March 23, 2006.

62. *See generally* John Hanna, *'Triple Play' Should Guide Legislators*, HAYS DAILY NEWS, Feb. 14, 2005 ("The proposal to modify justices' selection is a response to recent court decisions striking down the state's death penalty law and ordering legislators to improve education funding. Some Republicans complain the court now has an activist streak and believe Senate confirmation of members would make it more accountable.").

63. Carl Manning, *Proposed Amendment to Require Senate Confirmation of Justices Shot Down*, HAYS DAILY NEWS, Mar. 10, 2006 (quoting Senator John Vratil).

64. Hanna, *supra* note 62.

65. *See, e.g.,* David A.J. Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 811 (1986).

66. *See supra* note 16 and accompanying text.

67. *Id.* In addition, the United States Constitution promotes accountability by placing the appointment responsibility solely on the president, the individual in whom executive power is vested. By contrast, Kansas currently spreads that responsibility among the governor and the nine-member Commission. As John McGinnis explains:

Nominating Commission's votes are secret. Consequently, even the few privileged citizens entitled to vote for commissioners cannot hold them individually accountable for these important decisions.[68]

IV. OPPOSITION TO SENATE CONFIRMATION

Officials of the Kansas Bar Association defend Kansas' current system of Supreme Court selection and resist reform.[69] In addition to arguing (as discussed above) that the current system emphasizes merit rather than politics,[70] they have argued that Senate confirmation would be a "circus."[71]

> The principal concern of the Framers regarding the Appointment Clause, as in many of the other separation of powers provisions of the Constitution, was to ensure accountability while avoiding tyranny. Hence, following the example of the Massachusetts Constitution drafted by John Adams, the Framers gave the power of nomination to the President so that the initiative of choice would be a single individual's responsibility but provided the check of advice and consent [of the Senate] to forestall the possibility of abuse of this power.

John McGinnis, *Appointments Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION (David F. Forte, ed. 2005) (emphasis added).

68. *See supra* notes 18-21 and accompanying text.

69. *See, e.g., Hearing on S. Con. Res.* 1606 *Before the S. Judiciary Comm.* (Kan. 2005) (statements by Jack Focht, Past President of the Kan. Bar Ass'n, on Feb. 21, 2005); *Hearing on H. Con. Res.* 5033 *Before the H. Judiciary Comm.* (Kan. 2006) (statements by Richard F. Hayse, Past President of the Kan. Bar Ass'n, on Feb. 8, 2006); *Hearing on H. Con. Res.* 5008 *Before the H. Comm. on Federal and State Affairs* (Kan. 2007) (statements by Richard Hayse on Feb. 13, 2007). *See also* Tim Carpenter, *Senators Want to Have Say Under Plan, Justices Would Require Senate Confirmation*, TOPEKA CAPITAL-JOURNAL, Feb. 10, 2005 at 1C ("Gov. Kathleen Sebelius said there was no reason to alter the appointment process. 'I think that the system that we've had in place for a number of years has worked extremely well,' she said. 'I think the system works.'"); Klepper, *supra* note 53 (responding to a proposal for Senate confirmation, "Supreme Court spokesman Ron Keefover said the court is happy with the current method of selection.").

70. *See supra* notes 22-29 and accompanying text.

71. *See, e.g., Hearing on H. Con. Res.* 5008 *Before the H. Comm. on Federal and State Affairs* (Kan. 2007) (statements by Richard F. Hayse, Past President of the Kan. Bar. Ass'n, on Feb. 13, 2007). *See also* Editorial, *Senate right to retain status quo*, MANHATTAN MERCURY, Mar. 12, 2006 at C8 (quoting Senator John Vratil, "'Is the circus that masquerades as the confirmation process in the United States Senate a process we want to emulate?'"); John D. Montgomery, Editorial, *No problem*, HAYS DAILY NEWS, Feb. 11, 2005 ("So, would a state Supreme Court selection process mirroring the federal process be better in Kansas? Maybe not. Consider how political judicial confirmation is in Washington. Extremely political. Do we want that in Kansas?"); *Infra* Appendix C, ("The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states, has led the Commission not to recommend such an approach."). Also, some opponents of senate confirmation express concern that the Kansas Legislature, unlike the United States Congress, is a part-time legislature. *See, e.g., Hearing on H. Con. Res.* 5008 *Before the H. Comm. on Federal and State Affairs* (Kan. 2007) (statements by Retired Justice Fred N. Six on Feb. 13, 2007). Several states with senate confirmation, however, have part time legislatures. *See* National Conference of State Legislatures, http://www.ncsl.org/programs/press/2004/backgrounder_fullandpart.htm (last visited Oct. 4, 2007) (listing Maine, Rhode Island, Utah and Vermont as part-time). If a vacancy on the Kansas Supreme Court occurred when the Kansas Legislature was not in session then a special session could be called or the seat could simply remain vacant until the Legislature's regular session.

One commentator went further and wrote:

> It's not hard to imagine a scenario, similar to what takes place in the U.S. Senate, where state senators, with liberal and conservative litmus tests, end up politicizing the confirmation hearings and the final vote on a nominee.
>
> However, the consequences of this battle in Kansas may be unlike the national level. A Kansas justice, wounded by his or her confirmation battle, will be ripe for an acrimonious retention vote. Ideologically motivated groups, who lost their battles in the state Senate, might go gunning for that justice in the ballot box. At the national level, U.S. Supreme Court justices don't face a retention vote. Thus, time has a chance to heal the wounds inflicted by their confirmation hearings.[72]

Is this war-like vision of battling senators and wounded justices likely to occur if Kansas adopts senate confirmation? To assess that, one can look to the experience of the twelve states that have senate confirmation or confirmation by a similar popularly-elected body.[73] Research for this paper examined the last two votes for initial supreme court confirmation in each of these twelve states.[74] In all twenty-four of these cases, the governor's nominee was confirmed. In nearly eighty percent of these cases, the vote in favor of confirmation was unanimous.[75] In only two of these twenty four cases was there more than a single dissenting vote.[76] These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus, let alone a war.

The opposite concern about senate confirmation is that it is merely a rubber stamp so governors routinely appoint whoever they want. There are indications, however, that—rather than acting as a rubber stamp—senate confirmation may be a deterrent. Governors know that senate confirmation of controversial nominees may be difficult,[77] so governors consider, in advance,

72. Joseph A. Aistrup, *Supreme Court Confirmation Amendment*, HAYS DAILY NEWS, Feb. 28, 2005.

73. Ten of these twelve states have supreme court nominating commissions. *See supra* notes 10-12 and accompanying text. For discussion on California's unique system, see *supra* note 12.

74. *See infra* Appendix B. The votes presented in Appendix B are for the state's highest court regardless of whether or not it is named the supreme court. The votes examined are the last two votes for *initial* supreme court confirmation, rather than retention or elevation of an associate justice to chief justice. In Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. *See* Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT, Mar. 17, 2007, at A1.

75. Seventeen of the twenty-four votes were unanimous and two were effectively unanimous because they were voice votes with no tally recorded.

76. *See infra* Appendix B.

77. The Founders recognized that Senate confirmation would deter the executive from controversial nominees. As Alexander Hamilton wrote, "The necessity of [Senate] concurrence would have a powerful though in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to preventing the appointment of

the wishes of the senate in deciding who to nominate.[78] Of course, whether this generalization is accurate or not, ultimate responsibility for the tenor of the senate confirmation process rests on the senators themselves. Similarly, ultimate responsibility for the outcome of the senate confirmation process—whether a nominee is confirmed or not—also rests with the senators who are accountable to the citizens on election day.

In short, senate confirmation makes judicial selection accountable to the people. It does so without judicial elections, which embody the passion for direct democracy prevalent in the Jacksonian era.[79] Rather, senate confirmation exemplifies the republicanism of our Nation's Founders. The Framers of the United States Constitution devised a system of indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities.[80] Senate confirmation strives to make judicial selection accountable to the people while protecting the judiciary against the possibility that the people may act rashly.

V. JUDICIAL INDEPENDENCE

In defending Kansas' current system for selecting justices, some members of the bar suggest that Senate confirmation would reduce the independence of the Kansas Supreme Court.[81] By contrast, bar groups have not charged that Senate confirmation of federal judges reduces the independence of federal

unfit characters . . . ." THE FEDERALIST No. 76 (Alexander Hamilton), *supra* note 42.

78. In addition to deterring controversial nominations, the requirement of senate confirmation may also lead executives to withdraw controversial nominations. Some suggest this is what led President Bush to withdraw Harriet Miers' nomination to the Supreme Court. *See, e.g.,* John Cochran, *A Troubled Nomination Implodes*, CQ WKLY, Oct. 29, 2005. Similarly, in Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee withdrew his name. At least one commentator attributes the withdrawal in part to the prospect of a "grilling," (i.e., "rough" questioning,) before the state senate. *See* Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT, Mar. 17, 2007, at A1.

79. "In the early nineteenth century, states switched to the election of judges in a fervor of Jacksonian democracy." DANIEL BECKER & MALIA REDDICK, JUDICIAL SELECTION REFORM: EXAMPLES FROM SIX STATES 20 (2003), *available at* http://www.ajs.org/js/jsreform.pdf. *See also* STUMPF & PAUL, *supra* note 36, at 134-35; JUDICIAL REFORM IN THE STATES 4-5 (Anthony Champagne & Judith Haydel eds., 1993).

80. *See* THE FEDERALIST No. 10, at 49-52 (James Madison) (Clinton Rossiter ed. 1999) (for Madison's classic distinction between republics and democracies). The Framers "understood that despotism of the many could be as dangerous to government and to individual liberty as despotism of the few, and they designed their democracy to ensure against both evils. The Framers' fear of majority faction is evident: their constitution is countermajoritarian in numerous respects. The document clearly is founded in part on permitting and expecting the populace to speak through its elected representatives. By the same token, the Constitution is shot through with provisions that in effect might defeat the decisions of a popular majority." Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 619-20 (1993) (footnotes omitted).

81. *See, e.g.*, Memorandum from Jim Robinson to House Committee on the Judiciary (Feb. 6, 2005), *available at* http://www.kadc.org/Testimony/Robinson_JudicialSelection.pdf ("Senate confirmation introduces a political element into the selection process that diminishes judicial independence.").

courts. All seem to agree that federal judges enjoy a tremendous degree of independence because they have life tenure.[82] By contrast, judges who are subject to reelection or reappointment have less independence because they are accountable to those with the power to reelect or reappoint them. Judicial independence is primarily determined, not by the system of judicial *selection*, but by the system of judicial *retention,* including the length of a justice's term.[83]

The current system of judicial retention for the Kansas Supreme Court is as follows. When first appointed, a justice holds office for a short initial term.[84] To remain on the bench, a justice must stand for retention at the next general election which occurs after one year in office and, if retained in that election, must stand for retention every six years thereafter.[85] In these retention elections, the justice does not face an opposing candidate; instead, the voters' choose simply to retain or reject that particular justice.[86] A justice must retire at the end of the term during which the justice reaches the age of 70.[87]

This system of judicial *retention* is perfectly compatible with a judicial *selection* process that includes senate confirmation. Three states combine retention elections with initial selection through confirmation by the senate or other publicly-elected officials.[88] Accordingly, supporters of senate

82. U.S. CONST. art. III, § 1 ("during good behaviour").

83. "Life tenure acts to insulate justices from political pressure because, short of the drastic and difficult step of impeachment, justices cannot be removed from the Court for making unpopular decisions. Nonrenewable terms insulate justices in the same way." James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1127 (2004) (referring to the United States Supreme Court) (footnote omitted). "Appointing justices to renewable terms, however, would move the Court in the direction of a legislative body and undermine judicial independence." *Id*. *See also* Presser et al., *supra note* 12, at 369-70; Behrens & Silverman, *supra* note 50, at 305 ("Life tenure, as Alexander Hamilton recognized, is the best means of assuring judicial independence. Short of life tenure, the longer the term, the greater the potential for judicial independence.") (footnote omitted); Lee Epstein, et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 12 (2001) ("[W]hile the U.S. Framers gave federal jurists life tenure presumably to maximize judicial independence, other nations opted for renewable terms presumably to maximize accountability.").

84. KAN. CONST. art. 3 § 5(c) (A new justice "shall hold office for an initial term ending on the second Monday in January following the first general election that occurs after the expiration of twelve months in office. Not less than sixty days prior to the holding of the general election next preceding the expiration of his term of office, any justice of the supreme court may file in the office of the secretary of state a declaration of candidacy for election to succeed himself.").

85. KAN. CONST. art. 3 §§ 2, 5(c).

86. *Id.*

87. KAN. STAT. ANN. § 20-2608(a) (2006) ("Any judge upon reaching age 75 shall retire, except that any duly elected or appointed justice of the supreme court shall retire upon reaching age 70. Upon retiring, each such judge as described in this subsection shall receive retirement annuities as provided in K.S.A. 20-2610 and amendments thereto, except, that when any justice of the supreme court attains the age of 70, such judge may, if such judge desires, finish serving the term during which such judge attains the age of 70.").

88. These states are California, Maryland and Utah. *See* CAL. CONST. art. VI, § 16 (retention election every 12 years), MD. CONST. art. IV, § 5A (retention election every 10 years),

confirmation in Kansas argue that there is no need to change our state's system of judicial retention.[89] The balance Kansas has struck between judicial independence and judicial accountability is quite reasonable and well within the national mainstream.[90] If, however, greater judicial independence was desired, Kansas could extend the length of a justice's term (the time between retention elections) or even abolish retention elections altogether so justices could serve until reaching the mandatory retirement age. On the other hand, if greater judicial accountability was desired then Kansas could reduce the length of a justice's term.

VI. CONCLUSION

The bar has an unusually high degree of control over the selection of supreme court justices in Kansas. None of the other forty nine states gives the bar as much control. To move Kansas from this extreme position toward the mainstream, several possible reforms have been debated in recent years. The least ambitious reform would merely change the composition of the Kansas Supreme Court Nominating Commission. Rather than allowing the bar to select a majority of the Commission's members, some of those members could, instead, be selected by the Kansas Legislature. While this would reduce the amount of control the bar has over the judicial selection process, it would not open up the process by exposing the commissioners' votes to the public. Other states open the judicial selection process to the public by using judicial elections or senate confirmation of judicial nominees. Proposals to elect supreme court justices have received little support in Kansas in recent years. By contrast, proposals to institute senate confirmation have received significant support in the Kansas Legislature. Senate confirmation would both reduce the amount of control the bar has over the judicial selection process and open up that process to a more public system of checks and balances. The worry that senate confirmation in Kansas would be a political "circus" or a "battle" finds little support in the experience of the many states that use senate

UTAH CONST. art. VIII, § 9 (retention elections every ten years).

89. H.R. Con. Res. 5033 (Kan. 2006) and H.R. Con. Res. 5008 (Kan. 2007), which would move to the federal system of senate confirmation without a nominating commission, making no change to judicial retention except to eliminate the use of masculine pronouns.

90. *See, e.g.*, Behrens & Silverman, *supra* note 50.

> Life tenure, as Alexander Hamilton recognized, is the best means of assuring judicial independence. Short of life tenure, the longer the term, the greater the potential for judicial independence. The public's desire for accountability, however, necessitates some checks on appointed judges. Few states opt for a lifetime appointment system because the people or the political establishment want to be able to remove judges who lose sight of society's values. For this reason, most states with appointive systems set a full term of between four and twelve years.
>
> Those states that use merit selection provide for nonpartisan retention elections that usually occur within one to two years of appointment and after each full term.

Id. at 305 (footnotes omitted).

confirmation. In short, senate confirmation of Kansas Supreme Justices is a reform worthy of serious consideration.

Appendix A[91]

Kansas Supreme Court Appointments, 1987 - 2007

Allegrucci, Donald L., (D[92]) Pittsburg, appointed vice Schroeder, Jan. 12, 1987 to Jan. 8, 2007.

- Governor John Carlin (D) [8 Jan 1979 – 12 Jan 1987]
- Supreme Court Nominating Commission:
  - Robert C. Foulston [Chair, 1985 – 1992][93]
  - Aubrey G. Linville [First District Lawyer, 1983 – 1988] (R)
  - Donald Patterson [Second District Lawyer, 1979 – 1989] (R)
  - John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
  - Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
  - Morris D. Hildreth [Fifth District Lawyer, 1977 – 1987][94]
  - Bill Jellison [First District Non-Lawyer, 1983 – 1988] (D[95])
  - Joan Adam [Second District Non-Lawyer, 1979 – 1989] (D[96])
  - Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D[97])
  - John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D[98])
  - Kenneth D. Buchele [Fifth District Non-Lawyer, 1982 – 1987] (D[99])
- Co-Nominees:
  - William Cook (D[100])
  - Jerry Gill Elliott (U[101])

Six, Frederick N., (R[102]) Lawrence, appointed vice Prager, Sept. 1, 1988 to Jan. 13, 2003.

- Governor Mike Hayden (R) [12 Jan 1987 – 14 Jan 1991]
- Supreme Court Nominating Commission:

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[91] Unless noted otherwise, all party affiliations are derived from the Kansas VoterView database available at the Kansas Secretary of State website, https://myvoteinfo.voteks.org/.
[92] Chris Grenz, *Critics Question Democratic Majority on High Court*, HUTCHINSON NEWS, Aug. 9, 2005.
[93] Deceased. No party affiliation available.
[94] Deceased. No party affiliation available.
[95] GOV. CARLIN RECORDS, BOX 59-1-2-19.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Carlin Picks Allegrucci for Court*, WICHITA EAGLE, Dec. 25, 1986, at 1A.
[101] *Id.*
[102] *Two Judges, Lawyer Nominated for Position on State High Court*, WICHITA EAGLE, July 8, 1988, at 4D.

  - Robert C. Foulston [Chair, 1985 – 1992][103]
  - Aubrey G. Linville [First District Lawyer, 1983 – 1988] (R)
  - Donald Patterson [Second District Lawyer, 1979 – 1989] (R)
  - John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
  - Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
  - Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
  - Bill Jellison [First District Non-Lawyer, 1983 – 1988] (D[104])
  - Joan Adam [Second District Non-Lawyer, 1979 – 1989] (D[105])
  - Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D[106])
  - John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D[107])
  - Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)
- Co-Nominees:
  - Bob Abbott (R[108])
  - Charles Henson (R[109])

Abbott, Bob, (R[110]) Junction City, appointed vice Miller, Sept. 1, 1990 to June 6, 2003.

- Governor Mike Hayden (R) [12 Jan 1987 – 14 Jan 1991]
- Supreme Court Nominating Commission:
  - Robert C. Foulston [Chair, 1985 – 1992][111]
  - Selby S. Soward [First District Lawyer, 1988 – 1991][112]
  - Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)
  - John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
  - Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
  - Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
  - Lon E. Pishny [First District Non-Lawyer, 1988 – 1993] (R)
  - Judith Nightingale [Second District Non-Lawyer, 1989 – 1993] (R)
  - Norman E. Justice [Third District Non-Lawyer, 1980 – 1990] (D[113])

[103] Deceased. No party affiliation available.
[104] GOV. CARLIN RECORDS, BOX 59-1-2-19.
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Two Judges*, *supra* note 102, at 4D.
[109] *Id.*
[110] *Id.*
[111] Deceased. No party affiliation available.
[112] Deceased. No party affiliation available.
[113] GOV. CARLIN RECORDS, BOX 59-1-2-19.

  - John C. Oswald [Fourth District Non-Lawyer, 1981 – 1991] (D[114])
  - Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)
- Co-Nominees:
  - Joseph Pierron Jr. (R[115])
  - Elwaine Pomeroy (R[116])

Davis, Robert E., (D[117]) Topeka, appointed vice Herd, Jan. 11, 1993—.

- Governor Joan Finney (D) [14 Jan 1991 – 9 Jan 1995]
- Supreme Court Nominating Commission:
  - Jack E. Dalton [Chair, 1992 – 1993] (R)
  - Constance M. Achterberg [First District Lawyer, 1992 – 1993] (R)
  - Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)
  - John E. Shamberg [Third District Lawyer, 1985 – 1993] (D)
  - Dennis L. Gillen [Fourth District Lawyer, 1986 – 1993] (R)
  - Jack L. Lively [Fifth District Lawyer, 1987 – 1993] (R)
  - Lon E. Pishny [First District Non-Lawyer, 1988 – 1993] (R)
  - Judith Nightingale [Second District Non-Lawyer, 1989 – 1993] (R)
  - Emmett J. Tucker, Jr. [Third District Non-Lawyer, 1990 – 1993] (R)
  - Evangeline S. Chavez [Fourth District Non-Lawyer, 1991 – 1993] (D)
  - Betty Buller [Fifth District Non-Lawyer, 1987 – 1993] (R)
- Co-Nominees:
  - Kay Royse (D[118])
  - Franklin Theis (D[119])

Larson, Edward, (R) Hays, appointed vice Holmes, Sept. 1, 1995 to Sept. 4, 2002.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Lynn R. Johnson [Chair, 1993 – 2001] (D)
  - Lowell F. Hahn [First District Lawyer, 1994 – 2002] (R)
  - Jerry R. Palmer [Second District Lawyer, 1989 – 1995] (D)

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[114] Id.
[115] *Owen Case Given to Second Judge*, HUTCHINSON NEWS, Nov. 7, 1989.
[116] STATE OF KANSAS LEGISLATIVE DIRECTORY OF THE SEVENTIETH LEGISLATURE 1983 REGULAR SESSION.
[117] Grenz, *supra* note 92.
[118] Al Polczinski, *Weigand Fights Rich-Guy Image*, WICHITA EAGLE, May 25, 1990, at 3D.
[119] *Finney Fills Spot on State's High Court*, WICHITA EAGLE, Dec. 15, 1992, at 3D.

  - Patrick D. McAnany [Third District Lawyer, 1993 – 1995] (R)
  - Arden J. Bradshaw [Fourth District Lawyer, 1993 – 1997] (D)
  - Carolyn Bird [First District Non-Lawyer, 1993 – 1998] (D)
  - Edwin Watson [Second District Non-Lawyer, 1993 – 1995] (D[120])
  - John Strick, Jr. [Third District Non-Lawyer, 1993 – 1996] (D)
  - Pat Lehman [Fourth District Non-Lawyer, 1993 – 1997] (D[121])
- Co-Nominees:
  - Robert J. Lewis Jr. (R)
  - Steve A. Leben (D)

Nuss, Lawton R., (R[122]) Salina, appointed vice Larson, Sept. 4, 2002—.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - Lowell F. Hahn [First District Lawyer, 1994 – 2002] (R)
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - Marla Luckert (D[123])
  - Warren M. McCamish (R)

[120] Telephone Interview by Christopher Steadham with Linda Chalfant, Atchison County, Kansas Clerk's Office (Aug. 16, 2007).
[121] Kansas Democratic Party, Announcing the Kansas Democratic Party Speakers Bureau, http://www.ksdp.org/node/1210 (last visited Aug. 16, 2007).
[122] Grenz, *supra* note 92.
[123] *Id.*

Luckert, Marla J., (D[124]) Topeka, appointed vice Six, Jan. 13, 2003—.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[125])
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - David L. Stutzman (U[126])
  - Stephen D. Hill (D[127])

Gernon, Robert L., (R[128]) Topeka, appointed vice Lockett, Jan. 13, 2003 to March 30, 2005.

- Governor Bill Graves (R) [9 Jan 1995 – 13 Jan 2003]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[129])
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)

[124] *Id.*
[125] *Id.*
[126] Jim McLean, *Appointed: Governor Tabs Shawnee County District Court Judge to Replace Retiring Justice Six*, TOPEKA CAPITAL–JOURNAL, Nov. 21, 2002, at A1.
[127] *Id.*
[128] *Hayden to Pick Appeals Judge*, WICHITA EAGLE, Oct. 31, 1987, at 15A.
[129] Grenz, *supra* note 92.

  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - Warren M. McCamish (R)
  - David L. Stutzman (U[130])

Beier, Carol A., (D[131]) Wichita, appointed vice Abbott, Sept. 5, 2003—.
- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[132])
  - Thomas E. Wright [Second District Lawyer, 1995 – 2003] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)
  - James S. Maag [Second District Non-Lawyer, 2000 – 2003] (R)
  - Suzanne S. Bond [Third District Non-Lawyer, 1996 – 2004] (R)
  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - Steve A. Leben (D)
  - Patrick D. McAnany (R)

Rosen, Eric S., (D[133]) Topeka, appointed vice Gernon, Nov. 18, 2005—.
- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - David J. Rebein [First District Lawyer, 2002 – 2006] (R[134])
  - Patricia E. Riley [Second District Lawyer, 2003 – 2007] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Debbie L. Nordling [First District Non-Lawyer, 1998 – 2006] (R)

[130] McLean, *supra* note 126.
[131] Grenz, *supra* note 92.
[132] *Id.*
[133] *Id.*
[134] *Id.*

  - Dale E. Cushinberry [Second District Non-Lawyer, 2003 – 2007] (D)
  - Vivien Jennings [Third District Non-Lawyer, 2004 – 2008] (D)
  - Dennis L. Greenhaw [Fourth District Non-Lawyer, 1997 – 2005] (R)
- Co-Nominees:
  - Robert Fairchild (R[135])
  - Martha Coffman (D[136])

Johnson, Lee A., (R[137]) Caldwell, appointed vice Allegrucci, Jan. 8, 2007—.

- Governor Kathleen Sebelius (D) [13 Jan 2003 – present]
- Supreme Court Nominating Commission:
  - Richard C. Hite [Chair, 2001 – 2009] (R)
  - Kerry E. McQueen [First District Lawyer, 2006 – 2010] (R)
  - Patricia E. Riley [Second District Lawyer, 2003 – 2007] (D)
  - Thomas J. Bath [Third District Lawyer, 2000 – 2008] (R)
  - Lee H. Woodard [Fourth District Lawyer, 2001 – 2009] (D)
  - Janet A. Juhnke [First District Non-Lawyer, 2006 – 2010] (D)
  - Dale E. Cushinberry [Second District Non-Lawyer, 2003 – 2007] (D)
  - Vivien Jennings [Third District Non-Lawyer, 2004 – 2008] (D)
  - David N. Farnsworth [Fourth District Non-Lawyer, 2005 – 2009] (D)
- Co-Nominees:
  - Robert Fairchild (R[138])
  - Tom Malone (D[139])

[135] Chris Moon, *Local Judge a Finalist*, TOPEKA CAPITAL – JOURNAL, May 25, 2005, at B1.
[136] *Id*.
[137] Tim Carpenter, *Appeals Court Judge Named to High Court*, TOPEKA CAPITAL – JOURNAL, Jan. 6, 2007, at 1A.
[138] Moon, *supra* note 135.
[139] Nickie Flynn, *GOP Rivals for Judgeship are Old Allies*, WICHITA EAGLE, July 31, 1992, at 3D.

Appendix B

Most Recent State Supreme Court Confirmation Votes[140]

State	Nominee	Governor	Confirm	Vote tally
CT[141]	Justice Peter T. Zarella	John G. Rowland	Y	(Senate:35-1; House: 136-0, 14 absent or not voting)
CT	Chief Justice Chase T. Rogers	M. Jodi Rell	Y	(Senate: 33-0, 3 absent or not voting; House: 149-0, 2 absent or not voting)
DE[142]	Justice Jack Jacobs	Ruth Ann Minner	Y	(19-0, 2 absent or not voting)
DE	Justice Henry DuPont Ridgely	Ruth Ann Minner	Y	(21-0)
HI[143]	Justice James E. Duffy	Linda Lingle	Y	(25-0)
HI	Justice Simeon R. Acoba Jr.	Benjamin Cayetano	Y	(25-0)
MA[144]	Justice Robert J. Cordy	Paul Cellucci	Y	(8-0, vacancy on the Council at the time)
MA	Justice Judith Cowin	Paul Celluci	Y	(9-0)
MD[145]	Justice Clayton Greene Jr.	Robert Ehrlich	Y	(45-0, 2 absent)
MD	Justice Lynne Battaglia	Parris N. Glendening	Y	(40-3, 4 absent)
ME[146]	Justice Andrew M. Mead	John Baldacci	Y	(33-0, with 2 members absent; 13-0, in judiciary committee)
ME	Justice Warren M. Silver	John E. Baldacci	Y	(30-0, with 5

140. This Appendix reports the two most recent supreme court confirmation votes prior to August 1, 2007 in the states that have such votes. The votes reported are for the state's highest court regardless of whether or not it is named "the supreme court." The votes reported are the last two votes for initial supreme court confirmation, rather than retention or elevation of an associate justice to chief justice. In Connecticut, the 2006 nomination of an associate justice for chief justice was not put to a vote because the nominee asked to have his name withdrawn. See *supra* note 74 (citing Lynne Tuohy, *Court Saga Left Bruises, Balm*, HARTFORD COURANT, Mar. 17, 2007, at A1).

141. Interview by Beth Dorsey with Legislative Library, Conn. Gen. Assembly (Aug. 14, 2007), *available at* www.cga.ct.gov/.

142. Interview by Beth Dorsey with Bernard Brady, Sec'y of the Senate, Del. Gen. Assembly (Aug. 16, 2007).

143. Interview by Beth Dorsey with Pub. Access Room, Haw. State Legislature (Aug. 16, 2007).

144. Email from Ethan Tavan, Constituent Services Aide, Office of the Governor, Mass. to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (July 30, 2007).

145. Letter from Marilyn McManus, Dept. of Legislative Serv., Office of Policy Analysis, Md. Gen. Assembly to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 16, 2007).

146. Email from Mark Knierim, Reference Librarian, Me. State Law and Legislative Reference Library to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (July 30, 2007).

				members absent; 12-0, with 1 absent in judiciary committee)
NH[147]	Justice Gary E. Hicks	John Lynch	Y	(5-0)
NH	Justice Richard E. Galway	Craig Benson	Y	(5-0)
NJ[148]	Justice Helen E. Hoens	Jon S. Corzine	Y	(35-0, 2 members did not vote)
NJ[149]	Chief Justice Stuart Rabner	Jon S. Corzine	Y	(36-1, dissenting vote Senator Nia Gill)
NY[150]	Justice Eugene F. Pigott, Jr.	George E. Pataki	Y	(no tally available - confirmed by voice vote)
NY	Justice Theodore T. Jones	Eliot Spitzer	Y	(no tally available – confirmed by voice vote)
RI[151]	Justice P. Robinson III	Donald L. Carcieri	Y	(House: 65-5, 5 absent or not voting; Senate: 37-0, 1 absent or not voting)
RI	Justice Paul A. Suttell	Donald L. Carcieri	Y	(House: 65-0, 10 absent or not voting; Senate: 30-0, 8 absent or not voting)
UT[152]	Justice Jill N. Parrish	Michael O. Leavitt	Y	(28-0, 1 absent)
UT	Justice Ronald E. Nehring	Michael O. Leavitt	Y	(27-1, 1 absent)
VT[153]	Justice Brian L. Burgess	James H. Douglas	Y	(29-0, 1 absent or not voting)
VT	Chief Justice Paul L. Reiber	James H. Douglas	Y	(27-0, 3 absent or not voting)

147. Email from Raymond S. Burton, Member of the N.H. Executive Council to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 4, 2007).

148. Email from James G. Wilson, Assistant Legislative Counsel, Office of Legislative Services, N.J. State Legislature to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 7, 2007).

149. Email from Legislative and Info. and Bill Room, Office of Legislative Services, N.J. State Legislature to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (July 30, 2007).

150. Interview by Beth Dorsey with Legislative Journal Room, N.Y. Assembly (Aug. 25, 2007). Interview by Beth Dorsey with Liz Carr, N.Y. Governor's Office (Sept. 12, 2007).

151. Interview by Beth Dorsey with R.I. Legislative Library, R.I. State Legislature (Aug. 15, 2007).

152. Interview by Beth Dorsey with Shelley Day, Legislative Info. Liaison, Utah State Legislature Research Library and Information Center (Aug. 24, 2003). *See also* http://le.utah.gov/.

153. Email from Michael Chernick, Legislative Council, Vt. State Legislature to Beth Dorsey, Research Assistant to Professor Stephen J. Ware, University of Kansas School of Law (Aug. 15, 2007).

Appendix C

Pages 70-73 of:

JUSTICE IN JEOPARDY

REPORT OF THE

AMERICAN BAR ASSOCIATION

COMMISSION ON THE 21ST CENTURY

JUDICIARY

July 2003

Alfred P. Carlton, Jr.

American Bar Association President, 2002-2003

THE RECOMMENDATIONS OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY WERE APPROVED BY THE AMERICAN BAR ASSOCIATION HOUSE OF DELEGATES IN AUGUST 2003. THE COMMENTARY CONTAINED HEREIN DOES NOT NECESSARILY REPRESENT THE OFFICIAL POSITION OF THE ABA. ONLY THE TEXT OF THE RECOMMENDATIONS HAS BEEN FORMALLY APPROVED BY THE ABA HOUSE OF DELEGATES AS OFFICIAL POLICY (SEE APPENDIX A). THE REPORT, ALTHOUGH UNOFFICIAL, SERVES AS A USEFUL EXPLANATION OF THE RECOMMENDATIONS.

I. The Preferred System of Judicial Selection

•The Commission recommends, as the preferred system of state court judicial selection, a commission-based appointive system with the following components:

•The Commission recommends that the governor appoint judges from a pool of judicial aspirants whose qualifications have been reviewed and approved by a credible, neutral, nonpartisan, diverse deliberative body or commission.

•The Commission recommends that judicial appointees serve a single, lengthy term of at least 15 years or until a specified age and not be subject to a reselection process.[154] Judges so appointed should be entitled to retirement benefits upon completion of judicial service.

•The Commission recommends that judges not otherwise subject to reselection, nonetheless, remain subject to regular judicial performance evaluations and disciplinary processes that include removal for misconduct.

The American Bar Association has long supported appointive-based or so-called "merit selection" systems for the selection of state judges, and in the Commission's view, rightly so, for several reasons. First, the administration of justice should not turn on the outcome of popularity contests. If we accept the enduring principles identified in the first section of this report, then a good judge is a competent and conscientious lawyer with a judicial temperament who is independent enough to uphold the law impartially without regard to whether the results will be politically popular with voters. Second, initial appointment reduces the corrosive influence of money in judicial selection by sparing candidates the need to solicit contributions from individuals and organizations with an interest in the cases the candidates will decide as judges. Some argue that in appointive systems, campaign contributions are simply redirected from judicial candidates to the appointing governors, but that is an important difference because it is the money that flows directly from contributors to judicial candidates that gives rise to a perception of dependence. Third, the escalating cost of running judicial campaigns operates to exclude from the pool of viable candidates those of limited financial means who lack access to contributors with significant financial resources. The potential impact of this development on efforts to diversify the bench is especially troublesome. Fourth, the prospect of soliciting contributions from special interests and being

154. The American Bar Association House of Delegates adopted a recommendation stating, "Judicial appointees should serve until a specified age."

publicly pressured to take positions on issues they must later decide as judges threatens to discourage many capable and qualified people from seeking judicial office. For these and other reasons upon which the ABA has relied in the past, the Commission believes that judges should initially be selected by appointment.

Consistent with an earlier recommendation in this Report, the Commission likewise recommends that an independent deliberative body evaluate the qualifications of all judicial aspirants and that candidates eligible for nomination to judicial office be limited to those who have been approved by such a body. In grounding its support for appointive judiciaries on the principle that the viability of a would-be judge's candidacy should not turn on her or his political popularity, the Commission does not mean to suggest that appointive systems are apolitical. Any method of judicial selection will inevitably be political because judges decide issues of intense social, cultural, economic, and political interest to the public and the other branches of government. In this inherently political environment, however, the requirement that independent commissions review the qualifications of and approve all would-be judges provides a safety net to assure that all nominees possess the baseline capabilities, credentials, and temperament needed to be excellent judges.

Despite the occasional tendency to regard "politics" as a bad word, at its root, politics refers to the process by which citizens govern themselves. In that regard, it is not only inevitable but also perhaps even desirable that judicial selection have a "political" aspect to ensure that would-be judges are acceptable to the people they serve. Because judges, by virtue of their need to remain independent and impartial, serve a role in government that is fundamentally different from that of other public officials, the Commission has recommended against the use of elections as a means to ensure public acceptability.

The Commission did, however, consider another possibility: legislative confirmation of gubernatorial appointments. Requiring that judges be approved by an independent commission and *both* political branches of government could conceivably increase public confidence in the judges at the point of initial selection and serve as a form of prospective accountability that reduces the need for resorting to more problematic reselection processes later. A majority of the Commission ultimately decided, however, not to recommend legislative confirmation as a component of its preferred selection system. The protracted and combative confirmation process in the federal system, coupled with the highly politicized relationship between governors and legislators in many states, has led the Commission not to recommend such an approach.

The last of the Commission's recommendations with respect to the selection system it regards as optimal is that states not employ

reselection processes. Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. When nonincumbents run for judicial office in contested elections, the threat that elections pose to their future independence and impartiality—though extant—is limited. Granted, nonincumbent candidates can be made to appear beholden either to their contributors, to positions they took on the campaign trail, or more generally to the electoral majority responsible for selecting them. But unlike incumbent judges, first-time judicial office seekers are not at risk of being removed from office because they made rulings of law that did not sit well with voters.

A similar point can be made with respect to judges initially selected by appointment. The process by which those candidates are first chosen may be partisan and political, and some judges may feel a lingering allegiance to whoever appointed them. But they are not put in danger of losing jobs they currently hold on account of judicial decisions made in those positions.

In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection. It is then that judges who have declared popular laws unconstitutional, rejected constitutional challenges to unpopular laws, upheld the claims of unpopular litigants, or rejected the claims of popular litigants are subject to loss of tenure as a consequence. And it is then that judges may feel the greatest pressure to do what is politically popular rather than what the law requires. Public confidence in the courts is, in turn, undermined to the extent that judicial decisions made in the shadow of upcoming elections are perceived—rightly or wrongly—as motivated by fear of defeat.

The problems with reselection may be most common in contested reelection campaigns but are at risk of occurring in any reselection process—electoral or otherwise. Thus, for example, the issue arises in states that delegate the task of judicial reselection to legislatures, whose enactments judges are to interpret and, if unconstitutional, invalidate. For that reason, the Commission recommends against resort to reselection processes.

While the Commission recommends that judges be appointed to the bench without the possibility of subsequent reappointment, reelection, or retention election, the Commission has remained flexible as to the optimal length of a judge's term of office. Most states that appoint judges without the possibility of subsequent reselection cap judicial terms at a specified age. States could also set judicial terms at a fixed number of years. In either case, however, it is important that states take pains to preserve judicial retirement benefits because judicial office will lose its appeal to the best and brightest lawyers if judges are obligated to conclude judicial service before their

retirement benefits vest.

If states opt for a single term, it is important that the term be of considerable length—at least fifteen or more years—for several reasons. First, there are obvious advantages that flow from experience on the bench that will be lost if judges are confined to short terms of office. Second, the most qualified candidates for judge will often be lawyers with very successful private practices that they may be reluctant to abandon if they are obligated to return to practice after only a few years on the bench. Third, to the extent that lawyers view judicial service as the culmination of their legal careers and not simply as a temporary detour from private practice, short terms may discourage younger lawyers from seeking judicial office. Fourth, insofar as judges are obligated to reenter the job market at the conclusion of their judicial service, their independence from prospective employers who appear before them as lawyers and litigants in the waning years of their judicial terms may become a concern.

In earlier recommendations, the Commission urged that systems of judicial discipline be actively enforced and that regular and comprehensive judicial evaluation programs be instituted. These recommendations are critically important to ensuring accountability in a system that does not rely on reselection processes. All states have procedures for judicial removal, typically including but not limited to those subsumed by the disciplinary process.

The Commission believes that judges must be removable for cause to preserve the institutional legitimacy of the courts. It is beyond the scope of this report to describe in detail the nature and extent of "for cause" removal. By way of general guidance, however, the Commission points to the enduring principles discussed in the first part of this report. An overriding goal of our system of justice is to uphold the rule of law. Judges should never be subject to removal for upholding the law as they construe it to be written, even when they are in error, for then the judge's decision-making independence—so essential to safeguarding the rule of law in the long run—will be undermined. On the other hand, we do not want judges who are so independent that they are utterly unaccountable to the rule of law they have sworn to uphold. Thus, judges who disregard the rule of law altogether by taking bribes or committing other crimes that undermine public confidence in the courts should be removed. One could reach a similar conclusion with respect to judges who, despite the best efforts of nominating commissions to weed out unqualified candidates, manifest an utter lack of the competence, character, or temperament requisite to upholding the law impartially.

THE BAR'S EXTRAORDINARILY POWERFUL ROLE IN SELECTING THE KANSAS SUPREME COURT

Stephen J. Ware∗

In its summer 2008 issue, the Kansas Journal of Law and Public Policy published my article, *Selection to the Kansas Supreme Court*,[1] and three commentaries on it.[2] I appreciate the Journal now giving me an opportunity to reply to those commentators and to document the extraordinarily powerful role the Kansas bar has in selecting our state's highest court.

The first part of this article puts the Kansas Supreme Court selection process in national perspective by discussing the supreme court selection processes of all fifty states.[3] This discussion shows that, in supreme court selection, the bar has more power in Kansas than in any other state. This extraordinary bar power gives Kansas the most elitist and least democratic supreme court selection system in the country.

Members of the Kansas bar make several arguments in defense of the extraordinary powers they exercise under this system. The second part of this article shows that those arguments rest on a one-sided view of the role of a judge.

The bar's arguments rest on the view that judging involves only the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). The bar's arguments overlook the fact that judging also involves the exercise of discretion and that, within the bounds of this discretion, the judge makes law. At least since the Legal Realists, we have known that judges do not always *find* the law; sometimes they *make* the law and make it in accord with their own political views.

∗ © Stephen J. Ware. Professor of Law, University of Kansas. Thanks to Rick Levy for constructive criticism and to Caroline Bader for excellent research assistance.

1. Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J. L. & PUB. POL'Y 386 (2008).

2. Robert C. Casad, *A Comment on "Selection to the Kansas Supreme Court,"* 17 KAN. J.L. & PUB. POL'Y 424 (2008); Patricia E. Riley, *Merit Selection: The Workings of the Kansas Supreme Court Nominating Commission: A Response to Professor Ware's Article—From the Perspective of a Supreme Court Nominating Commission Member*, 17 KAN. J.L. & PUB. POL'Y 429 (2008); Janice D. Russell, *The Merits of Merit Selection: A Kansas Judge's Response to Professor Ware's Article*, 17 KAN. J.L. & PUB. POL'Y 437 (2008).

3. Much of Sections I.A-C and II.C-D of this article appears in Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. (forthcoming 2009).

The political/lawmaking side of judging is especially important with respect to state supreme courts because these courts are the last word on their states' constitutions and common law doctrines. So the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the judges in question are supreme court justices. While Kansas has the least democratic supreme court selection system in the country, the accumulated wisdom of the other 49 states suggests that Kansas's system overvalues the technical/lawyerly side of supreme court judging and undervalues the political/lawmaking side of supreme court judging. Kansas can correct these problems and increase the democratic legitimacy of its supreme court by reducing the power of its bar.

I. KANSAS IS EXTREME - NO OTHER STATE GIVES THE BAR AS MUCH POWER

A. Democratic Selection Methods

Judicial *selection* should be distinguished from judicial *retention.* We should distinguish the process that initially selects a judge from the process that determines whether to retain that judge on the court. Judicial selection and judicial retention raise different issues.[4] In this paper, I primarily focus on selection.[5]

While some states have individual quirks, three basic methods of supreme court selection prevail around the country: contestable elections, senate

4. While differing views about judicial independence are central to the debate over judicial retention, they are at most peripheral to the issues involved in judicial selection. *See* Ware, *supra* note 1, at 406-07, 407 n.83; *see also* Alfred P. Carlton, Jr., JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 72 (American Bar Association) (2003) ("Discussions of judicial selection often overlook a distinction that the Commission regards as absolutely critical, between initial selection and reselection. . . . In the Commission's view, the worst selection-related judicial independence problems arise in the context of judicial reselection."); Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 460 (2008) ("Initial selections--whether by election or appointment--present quite different, and less substantial, hazards to judicial independence than do reelections and reappointments."); id. at 453-54 ("[T]he threat to judicial independence in the thirty-nine states that elect some of their judges comes primarily not from the system of initial judicial selection, but from the reelections that those judges are forced to contemplate and endure if they are to remain in office." (footnote omitted)); Charles Gardner Geyh, *The Endless Judicial Selection Debate and Why It Matters for Judicial Independence*, 21 GEO. J. LEGAL ETHICS 1259, 1276 (2008) ("[T]he primary threat to independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."); David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 285 (2008) ("Prejudging judges may raise any number of problems, but it is the postjudging of them that systematically threatens individual and minority rights and the rule of law."); Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009) ("[U]nlike judges facing retention decisions, judges who do not need to appeal to voters shape their rulings to voters' preferences less. For example, voters' politics has little effect on the rulings of judges with permanent tenure or who plan to retire before the next election.").

5. Although I discuss retention *infra* at Section II.D.

confirmation, and the Missouri Plan.[6] The most common method, used by twenty-two states, is the contestable election.[7] Allowing two or more candidates to run for a seat on the supreme court is the most populist of the three methods because it puts power directly in the hands of the people, the voters.[8] Importantly, members of the bar get no special powers: "[A] lawyer's vote is worth no more than any other citizen's vote."[9]

The second common method of selecting state supreme court justices is the one used to select federal judges: executive nomination followed by senate confirmation.[10] In twelve states, the governor nominates state supreme court justices but the governor's nominee does not join the court unless confirmed by the state senate or similar popularly-elected body.[11]

Senate confirmation is a less populist method of judicial selection than contestable elections because senate confirmation is less directly dependent on the "wisdom . . . of the common people."[12] While contestable judicial elections "embody the passion for direct democracy prevalent in the Jacksonian era . . . senate confirmation exemplifies the republicanism of our Nation's Founders."[13] Senate confirmation is part of the Founders' "system of

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6. *See infra* notes 7, 11 & 35 and accompanying text. In two states, Virginia and South Carolina, supreme court justices are appointed by the legislature. Ware, *supra* note 1, at 388 n.9.

7. Ware, *supra* note 1, at 389, 389 n.13. In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. *See* American Judicature Society, Methods of Judicial Section, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Apr. 20, 2009). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id*.

8. A populist is "a believer in the rights, wisdom, or virtues of the common people." Merriam-Webster OnLine Dictionary: Populism, http://www.merriam-webster.com/dictionary/populism (last visited Apr. 16, 2009).

9. Ware, *supra* note 1, at 390.

10. U.S. CONST. art. II, §2.

11. Confirmation is done by the state senate in Delaware, Hawaii, Maine, Maryland, New Jersey, New York, Utah and Vermont, by the entire legislature in Connecticut and Rhode Island, and by the governor's council in Massachusetts and New Hampshire. Ware, *supra* note 1, at 388-89, 389 nn.11-12. A thirteenth state can be added, California. *Id*. at 389 n.12. Its confirmation body is a three-person commission made up of the chief justice, attorney general and most senior presiding justice of the court of appeals in California. *Id*.

The previous paragraph's categorization of states is similar to that found in Joshua C. Hall & Russell S. Sobel, IS THE 'MISSOURI PLAN' GOOD FOR MISSOURI? THE ECONOMICS OF JUDICIAL SELECTION 10-11 (Show-Me Institute) (2008). However, Hall and Sobel distinguish the "executive council[s]" used for confirmation in California, Massachusetts and New Hampshire from the legislatures used for confirmation in other states on the ground that those three councils are "usually governor-appointed." *Id*. at 11. In fact, however, Massachusetts and New Hampshire elect their councils. *See* MASS. CONST. amend. XVI; N.H. CONST. Pt. 2, art. 46, 60-61. And California elects its attorney general. CAL. CONST. art. 5, § 11.

12. Merriam-Webster OnLine Dictionary, *supra* note 8.

13. Ware, *supra* note 1, at 406. For 19th Century debates about contestable elections versus senate confirmation and legislative appointment of judges, see Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190 (1993); Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges*, 1850-1920, 1984 AM. B.

indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities."[14]

Although not as populist as the direct democracy of contestable judicial elections, senate confirmation does make judicial selection indirectly accountable to the people because, at the federal level, the people elect their senators,[15] and, through the Electoral College, the President.[16] Similarly, in states that use this method of judicial selection, the people elect their governors and state senators.

In other words, senate confirmation is—like contestable elections—fundamentally *democratic*,[17] although it is less populist than contestable elections. Senate confirmation is democratic because it facilitates the "rule of the majority"[18] by adhering to the principle of one-person-one-vote. At the federal level, one-person-one-vote is tempered by federalism, as both the U.S. Senate and Electoral College give disproportionate weight to voters in low-population states.[19] But at the state level nothing similarly tempers the democratic nature of senate confirmation. In those states in which the governor may appoint to the court whomever he or she wants,[20] subject only to confirmation by a popularly-elected body such as the state senate, judicial selection is laudably democratic because governors and state senators are elected under the principle of one-person-one-vote. In these elections, members of the bar get no special powers. Again, a lawyer's vote is worth no more than any other citizen's vote.

FOUND. RES. J. 345 (1984); F. Andrew Hanssen, *Learning About Judicial Independence: Institutional Change in State Courts*, 33 J. LEGAL STUD. 431, 445-48 (2004); Roy Schotland, *Myth, Reality Past and Present, and Judicial Elections*, 35 IND. L. REV. 659, 661-62 (2002).

14. Ware, *supra* note 1, at 406. Prior to the direct election of senators, they were chosen by the state legislatures, so popular accountability was even more indirect. *See* U.S. CONST. art. 1, § 3; *id.* Am. XVII.

15. U.S. CONST. amend. XVII.

16. U.S. CONST. art. 2, §1.

17. Democracy is "1 a: government by the people; *especially*: rule of the majority; b: a government in which the supreme power is vested in the people and exercised by them directly or indirectly through a system of representation usually involving periodically held free elections." Merriam-Webster OnLine Dictionary: Democracy, http://www.merriam-webster.com/dictionary/democracy (last visited Apr. 16, 2009). As Professor Jeffrey Jackson puts it:

> Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.

Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 146 (2007).

18. Merriam-Webster OnLine Dictionary, *supra* note 17.

19. U.S. CONST. art. 1, §3 (Senate); *id.* art. 2, §1 (Electoral College).

20. *See infra* note 33.

B. Departures From Democracy: Varying Levels of Elitism in Judicial Selection

Some senate-confirmation states, however, have supreme court selection processes that do give special powers to members of the bar. As the bar is an elite segment of society,[21] states that give lawyers more power than their fellow citizens are rightly described as *elitist*. Indeed the rationale for giving lawyers special powers over judicial selection—lawyers are better than their fellow citizens at identifying who will be a good judge[22]—is openly elitist.[23] A mixture of this elitism (special powers for lawyers) and democracy (senate confirmation of gubernatorial nominees) characterizes the states discussed in the following four paragraphs.

While the President may nominate anyone to the U.S. Supreme Court, in some senate-confirmation states the governor is restricted in whom he or she may nominate to the state supreme court. For example, New York restricts whom the governor may nominate to its highest court, the Court of Appeals.[24] The New York Constitution provides that "[t]he governor shall appoint, with the advice and consent of the senate, from among those recommended by the judicial nominating commission."[25] The judicial nominating commission in New York consists of twelve members: four appointed by the governor, four by the chief judge of the Court of Appeals, and four by leaders of legislature.[26] Of these twelve members, at least four must be members of the New York bar.[27] This special quota for lawyers is the only one in New York; no other

21. Among the dictionary definitions of "elite" is "a group of persons who by virtue of position or education exercise much power or influence." *See* Merriam-Webster OnLine Dictionary: Elite, http://www.merriam-webster.com/dictionary/elite (last visited Apr. 16, 2009). In the United States, of course, lawyers tend to have above-average levels of education and income. According to the Bureau of Labor Statistics, the average lawyer in the U.S. earns $118,280, while the average person earns $40,690. Bureau of Labor Statistics, Occupational Employment Statistics, http://www.bls.gov/oes/2007/may/oes_nat.htm#b00-0000 (last visited Apr. 16, 2009). Nearly all lawyers have a post-graduate degree, while only 10% of Americans do. SARAH R. CRISSEY, EDUCATIONAL ATTAINMENT IN THE UNITED STATES: 2007 3 (U.S. Census Bureau 2009), *available at* www.census.gov/prod/2009pubs/p20-560.pdf. Lawyers tend to be powerful and influential. (Is it just a coincidence that every Democratic nominee for President or Vice President since 1984 has had a law degree?)

22. *See, e.g.*, Linda S. Parks, *No Reform is Needed*, 77 J. KAN. B.A. 4 (Feb. 2008) ('"Lawyers, because of their professional expertise and interest in the judiciary, are well suited to recognize which candidates for judgeship are especially knowledgeable and skilled lawyers.' That's exactly why lawyers serve on the Commission. If you have a serious medical condition, you don't turn to a neighbor or a politician to find a specialist.") (quoting Ware, *supra* note 1, at 396).

23. Among the definitions of "elite" is "the best of a class." Merriam-Webster OnLine Dictionary: Elite, http://www.merriam-webster.com/dictionary/elite (last visited Apr. 16, 2009). The argument is that lawyers are the best (among the class of citizens) at assessing potential judges.

24. N.Y. CONST. art. VI, § 2.

25. N.Y. CONST. art. VI, § 2(e).

26. N.Y. CONST. art. VI, § 2(d)(1).

27. *Id*. ("Of the four members appointed by the governor, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state. Of the four members appointed by the chief judge of the court

occupational group (or other group) is guaranteed representation on the state's judicial nominating commission.[28] The "lawyers' quota" guarantees that lawyers, compared to their percentage of the state's population, will be over-represented on the commission.[29] As a result, New York gives the members of its bar disproportionate power in the selection of the state's high court judges. In judicial selection, New York gives its lawyers a special power not given to other citizens.

New York is not alone. Three other states with senate confirmation of supreme court justices also (1) require their governors to nominate only someone recommended by a nominating commission, and (2) give lawyers a quota on that commission.[30] By introducing these two factors, these states make judicial selection less democratic and more elitist than it would otherwise be.[31] In these states (including New York), however, the movement from democracy to elitism is relatively small because all members of the commission are appointed by popularly-elected officials or by judges who have been nominated and confirmed by popularly-elected officials. In other words, the populace retains ultimate control over appointments to the judicial nominating commission. The democratic principle of one-person-one-vote is followed, albeit indirectly.

By contrast, two other states with senate confirmation go further down the road from democracy to elitism by allowing the bar to *select* some members of the nominating commission.[32] In these states, not all of the commissioners—who exercise the important governmental power of restricting the governor's choice of judicial nominees—are selected under the democratic principle of one-person-one-vote. Rather, some of the commissioners are selected by a small, elite group: the bar.[33]

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of appeals, no more than two shall be enrolled in the same political party, two shall be members of the bar of the state, and two shall not be members of the bar of the state."). No such restrictions are placed on the members appointed by leaders of the legislature. *Id.*

28. N.Y. CONST. art. VI, § 2.

29. As of the end of calendar year 2008, there were a total of 244,418 registered New York attorneys, and of that total, 153,552 reported an address within New York state. Email to Professor Stephen J. Ware from Sam Younger, Deputy Director, New York State Office of Court Administration, Apr. 21, 2009. New York State has over 19 million people. National State and Population Estimates, U.S. Census Bureau, http://www.census.gov/popest/states/NST-ann-est.html (last visited May 10, 2009).

30. *See* Ware, *supra* note 1, at 388 n.10. These states are Connecticut, Rhode Island, and Utah. As noted above, Connecticut and Rhode Island require confirmation by the entire legislature, not just the senate. *See supra* note 11.

31. Some states have one, but the other, of these two factors. *See infra* note 33.

32. *See* Ware, *supra* note 1, at 388 n.10. These states are Hawaii and Vermont.

33. More democratic and less elitist are states that give lawyers a quota on the nominating commission and/or allow the bar to select some of the commission but do not require their governors to nominate someone recommended by the nominating commission. In these states, the bar's disproportionate influence over the commission may give lawyers greater power than other citizens, but the greater power of lawyers is clearly subordinate to the power of the popularly-elected governor. The governor is not required to nominate someone recommended by the commission because the commission's existence derives, not from the state constitution, but

This is really quite startling. Where else in our federal or state governments are public officials selected in such an undemocratic way? Where else do members of a particular occupation have, by law, greater power than their fellow citizens to select public officials? When this sort of favoritism for an occupational group other than lawyers has been attempted, it has, in at least one instance, been found unconstitutional.[34]

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merely from an executive order which the governor may rescind. *See* Del. Exec. Order No. 4 (Mar. 27, 2009), available at http://governor.delaware.gov/orders/exec_order_4.shtml (commission consists of nine members: eight appointed by governor—four lawyers and four nonlawyers—and one appointed by president of bar association, with consent of governor); Me. Exec. Order No. 9 FY 94/95 (Feb. 10, 1995) (five members, all appointed by the governor**)**; Mass. Exec. Order 500 (March 13, 2008), *available at* http://www.mass.gov/?pageID=gov3terminal&L=3&L0=Home&L1=Legislation+%26+Executive+Orders&L2=Executive+Orders&sid=Agov3&b=terminalcontent&f=Executive+Orders_executive_order_500&csid=Agov3 (twenty-one members, all appointed by Governor); Md. Exec. Order No. 01.01.2007.08 (Apr. 27, 2007) *available at* http://www.gov.state.md.us/executiveorders/01.07.08JudicialNominatingCommissions.pdf (seventeen members, twelve appointed by governor, five by president of bar association); N.H. Exec. Order, 2005-2, *available at* http://www.nh.gov/governor/orders/documents/Exec_Order_Judicial_Selection_Comm2.pdf (eleven members, all appointed by governor consisting of six lawyers and five nonlawyers,); N.J. Exec. Order No. 36 (Sept. 22, 2006), *available at* http://www.state.nj.us/infobank/circular/eojsc36.htm. (seven members, all appointed by governor: five retired judges). Also, California probably belongs in this category of states that do not require their governors to nominate someone recommended by the commission. *See* Ware, *supra* note 1, at 388-89 nn.10 & 12.

34. *See* Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994). In *Hellebust*, the Tenth Circuit found that Kansas's statutory procedure for electing members to the Kansas State Board of Agriculture (Board) violated the Fourteenth Amendment of the U.S. Constitution. That Amendment's Equal Protection Clause requires states to follow the principle of "one-person, one vote" in most elections. Reynolds v. Sims, 377 U.S. 533 (1964). Kansas violated this principle by giving the power to elect the Board to delegates from private agricultural associations including:

> county agricultural societies, each state fair, each county farmer's institute, each livestock association having a statewide character, and each of the following with at least 100 members: county farm bureau associations, county granges, county national farmer's organizations, and agricultural trade associations having a statewide character.

42 F.3d at n.1. As the Tenth Circuit explained, "In the line of cases stemming from *Reynolds*, '[t]he consistent theme . . . is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.'" *Hellebust*, 42 F.3d at 1333 (quoting Hadley v. Junior College Dist., 397 U.S. 50, 54 (1970)). "The Court has fashioned a narrow exception to this rule . . . . [T]he Court held the one person, one vote rule does not apply to units of government having a narrow and limited focus which disproportionately affects the few who are entitled to vote. *Id.* (citations omitted).

After the Kansas statute was declared unconstitutional,

> . . . much attention . . . focused on the possibility that agricultural groups might be given the power to provide the Governor a list of nominees from which the Board must be selected. Such an option appeared attractive to many legislators as a means of

C. The Most Elitism: The Missouri Plan

While the states discussed in the previous section have departed from the democratic principle of one-person-one-vote (and from the U.S. Constitution's model) to give special powers to the bar, they have nevertheless retained senate confirmation of the governor's nominees for supreme court. In other words, they have introduced an element of elitism to the early part of the judicial-selection process (who can the governor pick?), while keeping the later part of the process (will the governor's pick be confirmed?) in the hands of democratically-elected officials. By contrast, the third common method of supreme court selection, the "Missouri Plan,"[35] has the early-stage elitism without the later-stage democracy.[36] The Missouri Plan gives disproportionate power to the bar in selecting the nominating commission, while eliminating the requirement that the governor's pick be confirmed by the senate or similar popularly-elected body.[37] Thus Missouri Plan states are less democratic (and more elitist) than senate confirmation states.[38]

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preserving the essence of the former system. A similar method of selection is used for various professional organizations and, most prominently, the Kansas Supreme Court.

Richard E. Levy, *Written Testimony of Richard E. Levy Before the House Agriculture Committee, State of Kansas*, 42 U. KAN. L. REV. 265, 282 (1994) (footnotes omitted). Professor Levy opines that "this approach might pass equal protection scrutiny on the grounds that 'appointment' rather than 'election' is involved" because "[m]any cases suggest that the 'one person, one vote' principle does not apply to appointments." *Id*. at 282, n.118. However, he notes that "these cases involve appointments by elected officials who themselves are chosen in compliance with that principle." *Id*. Levy concludes that "[t]he example of private nominations that severely limit gubernatorial appointments is not necessarily controlled by those cases." *Id.* "So long as the Governor's appointment is not legally constrained by private nominations, there can be no conflict between their consideration and the 'one person, one vote' principle." *Id*. at 282 n.115.

35. The "Missouri Plan" states are Alaska, Arizona, Colorado, Florida, Indiana, Iowa, Kansas, Missouri, Oklahoma, Nebraska, South Dakota, Tennessee and Wyoming. *See* Ware, *supra* note 1, at nn.4-8 and accompanying text. The "Missouri Plan" was named after the first state to adopt it, in 1940. Unfortunately, some people call this method of selecting judges "merit selection." *See infra* n.39 and accompanying text.

36. Some readers may wonder if the Missouri Plan's retention elections provide later-stage democracy. Here, then, we can remind ourselves of the crucial distinction between judicial selection and judicial retention. *See supra* note 4. The "later stage" discussed here is the later stage of judicial selection. Judicial retention is a separate topic and retention elections are discussed below. *See infra* Part II.D.

37. *See* Ware, *supra* note 1, at 386 nn.4-8 and accompanying text (citing constitutions of Missouri Plan states).

38. *See supra* notes 17 & 21 and accompanying text. In senate confirmation states, if the senate refuses to confirm any of the nominating commission's first group of nominees then the commission must propose one or more additional nominees to get someone appointed to the court. By contrast, in states lacking senate confirmation (Missouri Plan states) if the governor refuses to appoint any of the commission's first group of nominees then one of those nominees joins the court anyhow. *See, e.g.*, MO. CONST. of 1945, art. V, § 25(a)("If the governor fails to appoint any of the nominees within sixty days after the list of nominees is submitted, the nonpartisan judicial commission making the nomination shall appoint one of the nominees to fill the vacancy."); KAN. CONST. art.3 §5(b)("In event of the failure of the governor to make the appointment within sixty days from the time the names of the nominees are submitted to him, the chief justice of the supreme court shall make the appointment from such nominees.") So even

This important distinction between Missouri Plan states and senate confirmation states is obscured when all judicial selection methods are reduced to two types: elective and appointive. In fact, the choice is not just between electing judges and appointing them. As this Article has shown, many appointive systems exist and they vary widely in the extent to which they depart from democratic principles to give special powers to the bar. Clarity requires distinguishing Missouri Plan states from senate confirmation states. Unfortunately, prominent bar groups use the term "merit selection" to describe all of these states so long as they use a nominating commission of any sort.[39]

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though governors, like state senators, are democratically elected, a commission/governor system is less democratic (more elitist) than a commission/governor/senate system because the latter system gives the commission less power to force one of its favorites on the democratically-elected officials.

The importance of this power was demonstrated in Missouri where the governor publicly considered the possibility of refusing to appoint any of the three nominees submitted to him by the supreme court nominating commission. *See* Editorial, *Blunt Trauma*, WALL ST. J., Sept. 17, 2007, at A16. The governor ultimately did appoint one of the nominees and his capitulation to the commission has been explained by the fact that if he did not appoint one of those three then the commission would exercise its power to appoint one of the three. *Id.* By contrast, the commission lacks this power to ensure that one of its original nominees becomes a justice where appointment requires confirmation by the senate or other publicly-elected officials. The body with the power to withhold confirmation has the power to send the commission "back to the drawing board" to identify additional nominees if none of the original nominees wins confirmation.

39. The leader in this regard seems to be the American Judicature Society (AJS). Under the heading "Judicial Selection in the States . . . 'Initial Selection: Courts of Last Resort,'" AJS claims that at the supreme court level, three states select judges by gubernatorial appointment, two by legislative appointment, eight by partisan election, thirteen by non-partisan election, and twenty-five (including the District of Columbia) by merit selection.
AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (American Judicature Society) (2007), http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf. Among the 24 states, AJS claims for "merit selection" are ten states with confirmation by the senate or similar popularly-elected body: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah, Vermont. *Id.*

> While today AJS conducts a wide variety of programs, the advocacy of and education about the merit selection of judges as an alternative to the elective system has, since its formation, been the cornerstone of its activities. AJS was formed in 1913 with the general progressive mission of improving the 'efficiency' of the administration of justice.
>
> The founders of AJS shared the commonplace Progressive belief that the solution to most of the country's problems lay in more efficient public administration. The Society's negative attitude toward the election of judges, for example, was part of a widespread denigration of partisan politics. Progressives tended to view partisanship as productive of inefficiency in governance and to believe that government should be run like a business corporation.

Jona Goldschmidt, *Merit Selection: Current Status, Procedures, and Issues*, 49 U. MIAMI L. REV. 1, 7-8 (1994).

This term, "merit selection," is "propagandistic"[40] and obscures important distinctions among appointive systems. Accordingly, I suggest that people reject the term "merit selection" in favor of the more-neutral "Missouri Plan," and that people reserve the term "Missouri Plan" for states that lack confirmation by the senate or similar popularly-elected body.

With this terminology established, we can then make a further distinction, a distinction among Missouri Plan states. These states can be placed into two categories, which I call "soft" Missouri Plan and "hard" Missouri Plan. (*See infra* pages 426-27, Table 1.) The four soft Missouri Plan states have a lawyers' quota on the nominating commission, but *all* members of the commission are selected by a process that includes popularly-elected officials.[41] In these states—Arizona, Colorado, Florida and Tennessee—the

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In 1928, AJS endorsed a process in which nominations presented to the governor would come from a committee of the bar. *Id*. at 9.

> Then, in 1937, the [American Bar Association] adopted the merit plan. It proposed:
>
> (a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.
>
> (b) *If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body* of appointments made through the dual agency suggested.
>
> (c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?

Id. at 9-10 (emphasis added).

40. *See* Michael R. Dimino, *The Futile Quest for a System of Judicial "Merit" Selection*, 67 ALB. L. REV. 803 (2004) ("merit selection--purely, so far as I can tell, a propagandistic misnomer").

41. *See* COLO. CONST. art. VI, § 24 (commission consists of fifteen voting members: seven lawyers appointed through majority action of governor, attorney general, and chief justice, eight nonlawyers appointed by governor); ARIZ. CONST. art. VI, § 36 (sixteen members: chief justice, five lawyers nominated by governing body of bar and appointed by governor with advice and consent of senate, ten nonlawyers appointed by governor with advice and consent of senate); FLA. CONST. of 1968 art. V, § 11 (1998); FLA. STAT. ANN. § 43.291 (LexisNexis 2007) (nine members: four lawyers appointed by governor from lists of nominees submitted by board of governors of bar association, five other members appointed by governor with at least two being lawyers or members of state bar); TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization, each appoint one nonlawyer, and jointly appoint a third nonlawyer). Tennessee is the "hardest" of the soft Missouri Plan states because popularly-elected officials have the least power (relative to the bar) in selecting commissioners.

bar's role in selecting members of the commission is either non-existent or limited to "merely suggesting names for . . . the commission and those suggested do not become commissioners unless approved by the governor and/or legislature."[42] So the elitism of the lawyers' quota on the commission is balanced to some extent by the role of popularly-elected officials in appointing the commission.

Even that balance is lacking in the "hard" Missouri Plan states. These nine states go further than any others in maximizing the power of the bar. Not only do these states have a lawyers' quota on the commission, but the quota is a majority of the commission. Each of these states' constitutions requires that a majority of the commissioners be lawyers or judges.[43] More importantly, popularly-elected officials play no role in selecting *which lawyers* fill the lawyers' quota on the commission. Instead, the bar selects the lawyers on the commission.[44] To reiterate, the lawyer-commissioners (who exercise the important governmental power of restricting the governor's choice of judicial nominees) are not selected in accordance with democratic principles of equality. These commissioners are not selected by officials elected under the democratic principle of one-person-one-vote. Rather, they are selected by a small, elite group: the bar.[45]

For this reason, judicial selection under the Missouri Plan lacks democratic legitimacy.

Professor Jeffrey Jackson explains:

> A commission system [of judicial selection] carries an even greater burden to demonstrate legitimacy than other systems, such as elections or appointments. Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.
>
> Commission systems, on the other hand, do not fit so neatly within this democratic framework. While judges in a commission

42. Ware, *supra* note 1, at 388.

43. *See* Ware, *supra* note 1, at 387 nn.4-5 (Alaska, Indiana, Iowa, Kansas, Missouri, Nebraska, Oklahoma, South Dakota, Wyoming).

44. *Id*.

45. Mary L. Volcansek, *The Effects of Judicial-Selection Reform: What We Know and What We Do Not*, *in* THE ANALYSIS OF JUDICIAL REFORM 79, 87 (Philip L. Dubois ed., Lexington Books 1982) ("Officials of state bar associations have been the first to admit that the merit selection system provides them with the most effective means of influencing the choice of who will serve on the bench."). Perhaps they have admitted this less readily in recent years as bar control over judicial selection has become more controversial.

> system are appointed by a popularly-elected official, the official's choice is not unfettered. Rather, the choice is made from a pool selected by an unelected commission. Further, although some members of the commission are generally appointed by an elected official, others are not. In particular, many commissions have lawyer members that gain their seats, either through election by a minority of the persons, i.e. lawyers in their area, or through nomination by special interest groups. The composition of nominating commissions thus raises some serious concerns with regard to legitimacy.[46]

As Professor Jackson says, contestable elections and senate confirmation (at least of the sort found in the U.S. Constitution) have democratic legitimacy. And even commission systems have democratic legitimacy insofar as members of the nominating commission are appointed by a popularly-elected official. Democratic principles are violated, however, when members of the commission are selected by "a minority of the persons, i.e. lawyers in their area."[47] This, of course, is the core of the Missouri Plan–allowing the bar to select some of the commission and then declining to offset that bar power with confirmation by the senate or other popularly-elected body.[48] And it is this core that deprives the Missouri Plan of democratic legitimacy.

Professor Jackson continues:

> The idea of mandating lawyer participation in the selection of judges is unique to the commission system and also unique in the democratic system. As a result, it requires special justification if it is to be considered legitimate.[49] . . . .
>
> Most of the commission systems in the United States use the state bar, either through its board of governors or through direct election of its members, to select the lawyer members. From a legitimacy standpoint, this is a questionable system. Membership in the state bar does not have a connection to the democratic function, and judges selected through the use of this system are open to charges that they are simply tools of the lawyers running the state bar.[50]
>
> Moreover, this problem is not entirely solved by placing the final selection in the hands of the governor, an elected official, or by juxtaposing the non-lawyer members with lay members who are appointed through some other process. Rather, because the governor's choices are generally limited to the slate given to her

46. Jackson, *supra* note 17, at 146 (footnotes omitted).
47. *Id.*
48. *See supra* notes 35-39 and accompanying text.
49. Jackson, *supra* note 17, at 148.
50. *Id*. at 153 (footnote omitted).

> by the commission, the system can be perceived as vulnerable to "panel stacking," wherein the commission submits a combination of nominees that offers the governor little real choice. Even if lay members are added to the process, there is the problem that a large part of the selection system is being delegated to persons who are not subject to the democratic process.[51]

So the Missouri Plan's lack of democratic legitimacy is not cured by the fact that the governor gets to choose among the commission's nominees and gets to appoint some members of the commission. The Missouri Plan nevertheless violates basic democratic principles of equality because some members of the commission are selected by the bar. The problem is not that there is a nominating commission, nor even so much that lawyers get a quota of seats on that commission. The core problem with the Missouri Plan is how those lawyers are selected.

Professor Jackson rightly concludes that democratic legitimacy

> would appear to favor a reduction in the influence of the state bar and its members over the nominating commission because they do not fit within the democratic process. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government.[52]

To ensure the democratic legitimacy of a nominating commission, none of its members should be selected by the bar. All members should be selected by popularly-elected officials or by judges nominated and confirmed by such officials. The democratic legitimacy of a nominating commission is especially important in Missouri Plan states because these states fail to offset the commission's power with confirmation of judges by the senate or other popularly-elected body.

D. Kansas Alone At the Extreme

The Missouri Plan's lack of democratic legitimacy is most pronounced in Kansas. Kansas is the "hardest" Missouri Plan state of all because it gives the bar more power than even the other hard Missouri Plan states. The Kansas bar selects five of the nine members of the Kansas Supreme Court Nominating Commission.[53] As I explained in *Selection to the Kansas Supreme Court,*

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51. *Id.* at 153-54 (footnote omitted).
52. *Id.* at 154.
53. KAN. CONST. art. 3 § 5(e).

> No other state in the union gives its bar majority control over its supreme court nominating commission. Kansas stands alone at one extreme on the continuum from more to less bar control of supreme court selection. Closest to Kansas on this continuum are the eight states in which the bar selects a minority of the nominating commission but this minority is only one vote short of a majority. In these eight states, members of the commission not selected by the bar are selected in a variety of ways. Six of them include a judge (and a seventh includes two judges) on the nominating commission. In six of these eight states, as in Kansas, all the non-lawyer members of the commission are selected by the governor, while in two of these states the governor's selections are subject to confirmation by the legislature.[54]

In sum, Kansas is the only state that allows the bar to select a majority of "a nominating commission that has the power to ensure that one of its initial nominees becomes a justice."[55]

II. DEFENSES OF KANSAS'S EXTREME DEGREE OF BAR POWER

A. Introduction

The previous section of this article showed that Kansas has the least democratic and most elitist supreme court selection system in the country. In supreme court selection, the Kansas bar has more power than the bar has in any of the other 49 states. This degree of power can be put in perspective with some statistics. While members of the Kansas bar constitute less than one percent of the state's population, they have over fifty-five percent of the power in selecting the Kansas Supreme Court Nominating Commission. Kansas has about 2,000,000 adults,[56] about 9000 of whom are licensed to practice law in Kansas.[57] Yet in selecting the Nominating Commission, those 9000 people have more power than everyone else in the state combined.[58] In other words, a member of the Kansas bar has more than 200 times as much power as his or

54. Ware, *supra* note 1, at 387 (footnote omitted).

55. *Id*. at 391.

56. U.S. Census Bureau, State & County Quickfacts: Kansas, http://quickfacts.census.gov/qfd/states/20000.html (last visited Apr. 17, 2009) (according to the Census Bureau, in 2007 Kansas had 2,775,997 people, and 25.1% were under the age of 18).

57. Casad, *supra* note 2, at 425 ("On March 13, 2008 the 'bar' had 8,900 members.").

58. Of course, members of the Kansas bar (like other Kansans) may vote for the governor. So the governor's selections to the Commission are the (indirect) selections of lawyers as well as non-lawyers. Even leaving this point aside and treating all four of the governor's selections to the Commission as non-lawyers' selections, members of the Kansas bar alone select a larger proportion of the Commission. KAN. CONST. art. 3 § 5(e). So in selecting the Commission the 9000 Kansas lawyers have more power than the remaining two million adults in the state. Two million divided by 9000 is over 222.

her neighbor. This is not just a slight departure from the democratic principle of one-person-one-vote; this is elitism with a vengeance. In this extremely undemocratic system, a lawyer's vote is not only worth more than any other citizen's vote; it is worth over 200 times more.

Who defends this extremely undemocratic system? Kansas lawyers, by and large. Among the members of the Kansas bar defending the system that gives them so much power are (1) Robert C. Casad, an emeritus professor at the University of Kansas School of Law;[59] (2) Patricia E. Riley, a bar-selected member of the Kansas Supreme Court Nominating Commission;[60] (3) Janice D. Russell, a recently-retired trial-court judge in Kansas;[61] and (4) Linda Parks, former president of the Kansas Bar Association.[62]

B. Kansas is Not Colorado (or Even Missouri)

What arguments do these Kansas lawyers make in defense of their extraordinary powers? They often start by denying that their powers are extraordinary. For example, Professor Casad objects to my "suggest[ion] that Kansas somehow stands alone among the states."[63] According to Professor Casad, my statement that "Kansas is the only state in the union that gives the members of its bar majority control over the selection of state supreme court justices" is "contradicted by [one of my own footnotes] which points out that lawyers comprise a majority of the nominating commissions in Alaska, Indiana, Iowa, Missouri, Nebraska, South Dakota and Wyoming as well."[64]

In fact, there is no contradiction. Professor Casad is off point because he is discussing how many members of the bar are on the commission, while my point about Kansas' uniqueness is about how many commissioners are *selected by* the bar.[65] This distinction may be easily overlooked by those whose experience is limited to Kansas[66] because in Kansas all the members of the bar

59. *See generally* Casad, *supra* note 2, at 424 n.a1 (biographical information of author).

60. *See generally* Riley, *supra* note 2, at 429 n.a1 (biographical information of author).

61. *See generally* Russell, *supra* note 2, at 437 n.a1 (biographical information of author).

62. Parks, *supra* note 22, at 4 n.a1 (biographical information of author); Linda Parks, *Judicial Selection Counterpoint*, 77 J. KAN. B.A. 7 (Apr. 2008); Linda Parks, *Keep Selecting Justices on Merit, Not Politics*, THE WICHITA EAGLE, Dec. 6, 2007, at 7A.

63. Robert C. Casad, Letter to the Editor, *Court Selection*, LAWRENCE JOURNAL WORLD, Jan. 22, 2008, at A7, *available at* http://www2.ljworld.com/news/2008/jan/22/court_selection/.

64. Casad, *supra* note 2, at 425.

65. *See* Ware, *supra* note 1, at nn.4-5 and accompanying text.

66. *See, e.g.*, Parks, *Judicial Selection Counterpoint*, *supra* note 22, at 7 (asserting that my "contention that Kansas gives more power to the lawyers than any other state is just plain wrong. Twelve states have the same balance of power as that followed by Kansas. The only difference is that one of the 'majority' lawyers is also a judge. Newsflash, judges are members of the bar."). Ms. Parks is, like Professor Casad, off point because she is discussing how many members of the bar are on the commission, while my point about Kansas' uniqueness is about how many commissioners are *selected by* the bar. *See* Ware, *supra* note 1 at nn.4-5 and accompanying text. Ms. Parks has conflated the number of commissioners selected by the bar with the number of lawyers on a commission. Even had she not made this mistake, though, it still would have been she who "is just plain wrong" due to her erroneous assertion that "[t]welve states have the same balance of power [between lawyers and non-lawyers on the commission] as that followed by

on the Nominating Commission are selected by the bar and none of the other commissioners are selected by the bar.[67] But a nominating commission does not have to be set up this way. As explained above, in many states some members of the bar on the commission are selected by individuals or groups other than the bar.[68] For example, in Colorado, members of the bar on the commission are selected through majority action of the governor, attorney general, and chief justice.[69]

This difference between Colorado and Kansas is especially pertinent in light of Professor Casad's accusation that my point about Kansas' uniqueness "is very misleading. Our merit selection system, often called the Missouri Plan, is basically the same as that of 12 other states, including our sister heartland states of Colorado, Indiana, Iowa, Nebraska, Oklahoma and, of course, Missouri."[70] In other words, Professor Casad misleadingly asserts that Kansas (in which a majority of the commission is selected by the bar) and Colorado (in which none of the commission is selected by the bar) have "basically the same" system.[71]

Similarly, what of the other states in Professor Casad's group of twelve that he say are "basically the same" as Kansas?[72] In addition to Colorado, they include one in which the governor can effectively pick which members of the bar to put on the commission,[73] one in which the governor picks among

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Kansas." In fact, among the twelve Missouri Plan states (besides Kansas) are Colorado and Arizona, neither of which have lawyer majorities on their commissions. *See* Ware, *supra* note 1, at 388 nn.7-8.

67. KAN. CONST. art. 3, § 5(e).

68. *See supra* Part I.B and note 41.

69. COLO. CONST. art. VI, § 24.

70. Casad, *supra* note 63, at A7; *see also* Casad, supra note 2, at 425.

71. Kansas would move away from its tops-in-the-nation level of bar control and toward the national mainstream if it replaced bar-selection of lawyer commissioners with Colorado's system of selection by majority action of the governor, attorney general and chief justice. That move to Colorado's "soft" Missouri Plan would increase the democratic legitimacy of Kansas Supreme Court selection, although not as much as if Kansas adopted that reform plus senate confirmation of supreme court justices. *See supra* note 38.

72. He does not name all twelve of the states to which he refers. Presumably, they are the eight hard Missouri Plan states (Alaska, Indiana, Iowa, Missouri, Nebraska, Oklahoma, South Dakota and Wyoming) plus the four soft Missouri Plan states (Arizona, Colorado, Florida and Tennessee). *See infra* pp. 426-27, Table 1.

73. *See* FLA. STAT. ANN. § 43.291 (LexisNexis 2007).

> (1) Each judicial nominating commission shall be composed of the following members:
>
> (a) Four members of The Florida Bar, appointed by the Governor, who are engaged in the practice of law, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed. The Board of Governors of The Florida Bar shall submit to the Governor three recommended nominees for each position. The Governor shall select the appointee from the list of nominees recommended for that position, but *the Governor may reject all of the nominees recommended for a position and request that the Board of Governors submit a new list*

lawyers nominated by the bar for the commission,[74] and one in which the governor appoints, with the "advice and consent of the senate," the minority of the commission nominated by the bar.[75] These four "soft" Missouri Plan states differ from Kansas in that they reduce the power of the bar and increase democratic legitimacy by allowing popularly-elected officials to play a role in selecting *all* members of the commission, including the lawyer-members. None of them supports Professor Casad's attempt to show that Kansas is in the national mainstream.[76]

"Closest to Kansas," as I wrote in *Selection to the Kansas Supreme Court*, ". . . are the eight states in which the bar selects a minority of the nominating commission but this minority is only one vote short of a majority."[77] In these eight states, members of the commission not selected by the bar are selected in a variety of ways. "Six of them include a judge (and a seventh includes two judges) on the nominating commission."[78] In six states, for example, a supreme court justice is on the commission and the justice plus the bar-selected members comprise a majority of the commission.[79] How does supreme-court selection in these states differ from Kansas? In other words, what is the difference between having a justice on the commission and having another bar-selected member on the commission?

There is some difference because supreme court justices are different from other members of the bar. Even in "hard" Missouri Plan states, to become a justice one must be chosen (over other nominees) by the popularly-

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> *of three different recommended nominees for that position who have not been previously recommended by the Board of Governors*.
>
> (b) Five members appointed by the Governor, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed, of which at least two are members of The Florida Bar engaged in the practice of law.

Id. (emphasis added).

74. TENN. CODE ANN. §§ 17-4-102, -106, -112 (2007) (seventeen members: speakers of senate and house each appoint six lawyers, twelve total, from lists submitted by Tennessee Bar Association (two), Tennessee Defense Lawyers Association (one), Tennessee Trial Lawyers Association (three), Tennessee District Attorneys General Conference (three), and Tennessee Association for Criminal Defense Lawyers (three); the speakers also each appoint one lawyer not nominated by an organization, each appoint one nonlawyer, and jointly appoint a third nonlawyer).

75. *See* ARIZ. CONST. art. VI, § 36; 1987 Op. Att'y Gen. Ariz. 81, No. I87-043 (Mar. 26, 1987) ("pertaining to the appointment of attorney members of the Commission on Appellate Court Appointments . . . who, under [this section], are nominated by the Board of Governors of the State Bar. . . . [T]he Governor has the discretion to accept or reject the nominations submitted to him by the Board of Governors.").

76. Professor Jeffrey Jackson has previously highlighted the differences among Kansas, Colorado and Arizona. Jackson, *supra* note 17, at 153.

77. Ware, *supra* note 1, at 387. These states are Alaska, Indiana, Iowa, Missouri, Nebraska, Oklahoma, South Dakota and Wyoming. *Id.* n.5

78. *Id.*

79. *See* Ware, *supra* note 1, n.5. In Alaska, Indiana, Iowa, and Wyoming, it is the Chief Justice. In Nebraska and Missouri it may be another justice. *Id.*; NEB. REV. STAT. § 24-2804.

elected governor and to remain a justice one must win a retention election open to all registered voters.[80] So although these factors do not confer upon justices as much democratic legitimacy as advocates of the Missouri Plan sometimes claim,[81] they do confer some degree of democratic legitimacy. Thus the states whose nominating commissions include a justice (rather than another bar-selected commissioner, as in Kansas,) do have a supreme-court selection process with a bit more democratic legitimacy than Kansas.[82] They are, as my *Selection to the Kansas Supreme Court* says, close to the end of the bar-control continuum[83] but not at the end.[84] There, Kansas stands alone, the one state in which the bar selects a majority of the supreme court nominating commission. Despite the claims of Kansas lawyers to the contrary, Kansas has the least democratic and most elitist system of supreme court selection in the country.

C. Judges Are Lawmakers, Not Just Technicians

1. Judges' Political Views Matter

So members of the Kansas bar are wrong when they deny that the system giving them so much power differs from the systems used in all of the other 49

80. ALASKA CONST. art. IV, § 5 (governor shall fill any vacancy on supreme court "by appointing one of two or more persons nominated by the judicial council"); *see also id.* § 6 (justice subject to approval or rejection at first general election held more than three years after his appointment, and thereafter every ten years); IND. CONST. of 1851, art. VII, § 10 (1970) (governor shall fill vacancy on supreme court "from a list of three nominees presented to him by the judicial nominating commission"); *see also id.* § 11 (justice subject to approval or rejection at general election two years after appointment, and thereafter every ten years); IOWA CONST. of 1857, art. V, § 15 (1962) (governor fills vacancies on the supreme court from list of three nominees submitted by judicial nominating commission); *see also id.* § 17 (justice subject to retention or rejection at first judicial election held more than one year after appointment, and thereafter every eight years); MO. CONST. art. V, § 25(a) (1976) (governor shall fill vacancy in supreme court by appointing one of three persons nominated by judicial commission); *see also id.* §§ 25(c)(1), 19 (justice subject to approval or rejection at first general election held more than twelve months after appointment, and thereafter every twelve years); NEB. CONST. art. V, § 21(1) (2008) (governor shall fill any vacancy in the supreme court "from a list of at least two nominees presented to him by the . . . judicial nominating commission"); *see also id.* § 21(3) (justice subject to approval or rejection at next general election more than three years from the date of appointment, and thereafter every six years); OKLA. CONST. art. VII-B, § 4 (1967) (governor shall fill vacancy on supreme court with one of three nominees chosen by Judicial Nominating Commission); *see also id.* § 5 (justice subject to approval or rejection at first general election more than one year after appointment, and thereafter every six years); S.D. CONST. art. V, § 7 (governor shall fill vacancy on supreme court from list of nominees chosen by the judicial qualifications commission); *see also id.* (justice subject to approval or rejection at "first general election following the expiration of three years from the date of his appointment," and thereafter every eight years); WYO. CONST. art. 5, § 4(b) (1976) (governor shall fill vacancy on supreme court from list of three nominees submitted by judicial nominating commission); *see also id.* § 4(f), (g) (justice subject to approval or rejection at next general election more than one year after his appointment, and thereafter every eight years).

81. *See supra* n.38 & *infra* Part II.D.

82. *See supra* Part I.D.

83. *See infra* pp. 426-27, Table 1; Ware, *supra* note 1, at 390 (Tbl. 1).

84. Ware, *supra* note 1, at 387.

states. Kansas is at the undemocratic extreme, that is, the extreme of bar power. But why is that a reason to reform? So what if Kansas has the least democratic system of supreme court selection in the country? So what if Kansas is extreme in giving power to the bar? "Extremism in the defense of liberty is no vice," proclaimed Barry Goldwater.[85] Perhaps extremism in the defense of bar power over judicial selection is no vice, either.

The problem with bar-power extremism in judicial selection is that it rests on a one-sided view of the role of a judge. It emphasizes the judge's role as legal technician at the expense of the judge's role as lawmaker. Of course, judging does involve the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). But judging also involves the exercise of discretion. Within the bounds of this discretion, the judge makes law.

This point is not new or controversial. Our common law system—going back centuries to England—rests on judge-made law.[86] And judges do not always *find* the law; sometimes they *make* the law and make it in accord with their own political views. This, of course, is the basic reality exposed by Legal Realism nearly a hundred years ago.[87] And it is virtually impossible to find anybody who disputes it today. That "we are all realists now" is so thoroughly accepted as to be a cliché.[88] "It is a commonplace that law is 'political.'"[89]

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85. GREGORY L. SCHNEIDER, CADRES FOR CONSERVATISM: YOUNG AMERICANS FOR FREEDOM AND THE RISE OF THE CONTEMPORARY RIGHT 83 (New York University Press) (1999).

86. *See, e.g.*, Maimon Schwarzschild, *Keeping It Private*, 44 SAN DIEGO L. REV. 677, 680 (2007) ("For many centuries in England, and well into the twentieth century there and in other English-speaking jurisdictions, the law of tort and contract—the heart of private law—was mostly judge-made common law, with statutes few and far between. Even today, much of the law of tort is common law, and although contract law in the United States is substantially governed by the Uniform Commercial Code, the UCC itself is largely a codification or restatement of common law doctrines and rules."); James E. Herget, *Unearthing The Origins of a Radical Idea: The Case of Legal Indeterminacy*, 39 AM. J. LEGAL HIST. 59, 64 (1995) ("unlike the continental legal tradition, the common law tradition recognized and accepted as authoritative, the proposition that judges make law").

87. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960, 169-212 (Harvard University Press) (1992) (positing that legal realism's most important legacy was its challenge to the notion that law has an autonomous role separate from politics); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 274 (1998) ("[T]he program of unmasking law as politics [was] central to American Legal Realism. . . ."); Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 88 (1998) ("We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decision-maker."); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006)("Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common law decisionmaking, and we routinely brand those who do as "formalists." It is thus no longer especially controversial to insist that common law judges make law.").

88. Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudenc*e, 76 TEX. L. REV. 267, 267 (1997).

89. Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985).

So let us bring the debate over Kansas judicial selection into the modern, Realist world. Let us frankly acknowledge that judges are not merely technicians; they are also lawmakers. Just as it is one-sided to denigrate the technical, lawyerly side of judging by claiming that judges are simply "politicians in robes,"[90] so it is one-sided to denigrate the lawmaking side of judging by claiming that the political views of a judge are irrelevant to his or her job as a judge.

Yet claiming that the political views of a judge are irrelevant is what leaders of the Kansas bar often do in defending their extraordinary powers under the state's un-democratic and elitist system of supreme court selection. For example, former Kansas Bar Association President Linda Parks stated:

> Ware seems particularly upset by the fact that there is a bare majority of lawyers serving on the Commission. Imagine that, lawyers on a commission that discusses lawyers and their qualifications for a job about which lawyers know the most. Even Ware admits, "Lawyers, because of their professional expertise and interest in the judiciary, are well suited to recognize which candidates for judgeship are especially knowledgeable and skilled lawyers." That's exactly why lawyers serve on the Commission. If you have a serious medical condition, you don't turn to a neighbor or a politician to find a specialist.[91]

Here, Parks analogizes a judge to a medical doctor. In selecting among doctors, we should consider their technical skills, not their political views, and so (Ms. Parks suggests) we should do likewise when selecting among potential judges. This analogy suggests that a judge's politics are no more relevant to judging than a doctor's politics are to reading an X-ray. In other words, this analogy rests on the myth that the Realists exposed nearly a century ago, the myth that judges never make law, but rather are mere technicians applying law made by others.[92]

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90. *See, e.g.*, David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (describing "two popular narratives about the way Supreme Court Justices decide cases: one that treats Justices as neutral and nonpolitical 'umpires,' and another that views Justices as pervasively ideological 'politicians' in robes."); Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1419 (2003) (referring to "the cynical view that judges are merely 'Politicians in Judges' Robes'").

91. Parks, *supra* note 22, at 4.

92. The arguments of other Kansas bar leaders, such as Professor Robert Casad and Judge Janice Russell, are similarly flawed. These arguments emphasize judging's technical/lawyerly side while minimizing (perhaps even denying) its political/lawmaking side. *See e.g.*, Casad, *supra* note 2, at 428 ("The fact that none of our appellate judges has ever lost a retention-election is strong evidence that our selection system has produced the kind of *competent, unbiased judges* the people of Kansas want and need.")(emphasis added); Russell, *supra* note 2, at 441 ("Judges from municipal courts right up through the Supreme Court must follow the rule of law in deciding cases.").

2. Supreme Court Justices Have the Most Lawmaking Discretion

In contrast, more balanced discussions of judicial selection recognize not only that judging consists of both a technical/lawyerly side and a political/lawmaking side, but also that the relative mix of these two sides depends on the judge's level in the court system. The political/lawmaking side of judging is especially important for state supreme court justices because they are the final word on their state constitutions and common law.[93] Accordingly, the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the judges in question are supreme court justices because justices' lawmaking powers far exceed those of the "professional technicians who sit on lower courts."[94] As Professor Paul Carrington explains, so-called "merit selection" of judges

> was popular in numerous states in the twentieth century, but *in its application to courts of last resort* it is linked to a vision of judicial office that is technocratic and apolitical. Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.[95]

Similarly, Professor Michael Dimino concludes:

> Public involvement in the staffing of high courts is beneficial from a democratic perspective because of the greater discretion and policy-making authority exercised by high courts. Lower courts, by contrast, are more often bound by settled law, and the judges on such courts do not make policy to the extent that other courts do. As a result, there is less need for public involvement in the selection of lower-court judges, and such involvement may well be a negative influence if it encourages those judges to depart from the application of settled law.[96]

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93. Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well.").

94. Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002).

95. *Id*. (emphasis added) (footnote omitted).

96. Dimino, *supra* note 4, at 451-52. *See also* John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499, 511 (2002) ("Perhaps, then, different judges should be chosen in different ways. Judges who decide cases that lack interest to the People could be chosen by simple executive appointment or merit selection; judges who rule on the most

So the case for democracy is strongest (and the case for elitism weakest) with respect to supreme court justices because the political/lawmaking side of judging is especially important at the supreme court level. Yet Ms. Parks and other leaders of the Kansas bar defend the extreme elitism of Kansas's supreme court selection process by relying on arguments refuted nearly a century ago.[97] Parks et al. defend the least democratic judicial selection method in the country as used to select the level of court at which the case for democracy is at its strongest.

For this reason alone, the case made by leaders of the Kansas bar fails. The elitism of the Missouri Plan (as used in Kansas and several other states) may be somewhat defensible in the context of trial courts. But at the supreme court level, the vastly unequal power between a member of the bar and her fellow citizens is unacceptable in a democracy. Whether the bar's extraordinary power affects the political leanings of the court is beside the point. With respect to judges who have the political power of a state supreme court justice, a system that counts a lawyer's vote more than 200 times as much as her neighbor's vote simply lacks democratic legitimacy.

That said, leaders of the Kansas bar often deny that their extraordinary power has any effect on the Kansas Supreme Court's political leanings. They strenuously assert that members of the bar have a wide variety of political views.[98] So, although it matters not for the (il)legitimacy of the Kansas Supreme Court's selection process, we can ask whether the extremely undemocratic nature of that process affects the political direction of that court.

3. Empirical Data, Scholarly Studies and Self-Serving Assertions

There is some evidence that the political views of the lawyers on the Kansas Supreme Court Nominating Commission are more liberal than the political views of their fellow Kansans. While Democrats regularly receive less than 40% of the total federal campaign contributions from Kansas,[99] a recent study found that Democrats received over 83% of the federal campaign

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controversial questions affecting social policy could be elected or appointed by the executive with legislative confirmation designed to probe judicial philosophy."); G. Alan Tarr, *Designing an Appointive System: The Key Issues*, 34 FORDHAM URB. L.J. 291, 299 & n.42 (2007) ("In most civil law countries in Europe, the judiciary is a career service, akin to the American civil service system. . . . Competitive examinations are used to banish political considerations and personal favoritism from the selection process . . . . Yet even these countries use an overtly political process in selecting the members of their constitutional courts.").

97. *See supra* notes 86-96 and accompanying text.

98. *See, e.g.*, Casad, *supra* note 2, at 425-26 (the bar "is a diverse group of persons who have in common an interest in competent and unbiased judges."); Russell *supra* note 2, at 442-43 ("Are lawyers a unified faction? As anybody who has actually spent time with lawyers can tell you—NO!. . . Lawyers occupy the entire spectrum of political positions and beliefs, from ultraconservative to moderate to liberal.").

99. Open Secrets.Org: The Center for Responsive Politics, http://www.opensecrets.org/bigpicture/statetotals.php?cycle=2006 (last visited Apr. 17, 2009). The Center for Responsive Politics tracks contribution data by state over two-year election cycles. *Id.* (see drop-down menu next to "Election cycle.").

money contributed by lawyers on the Nominating Commission.[100] This startling difference raises intriguing questions about whether the Kansas bar is pushing supreme court selection to the Left of the state as a whole, as argued in an op-ed by Professor Kris Kobach.[101]

But at least two members of the Kansas bar are apparently not intrigued. In response to Professor Kobach, Professors James Concannon and Robert Casad wrote an op-ed pointing out that most of the lawyers on the Nominating Commission are registered Republicans and that the bulk of contributions to Democrats were made by a just a few lawyers.[102] Professors Concannon and Casad conclude that: "Total dollars contributed and the number of contributions made by one member, or even four members, are not rational measures a *reputable scholar* would use to determine the 'political allegiances' of the 22 lawyers who were members on the commission."[103] What then would be rational measures a "reputable scholar" would use to determine political allegiances? Concannon and Casad do not say.[104]

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100. SAMSON R. ELSBERND, KANSAS SUPREME COURT NOMINATING COMMISSION LAWYERS, 1987-2007 (2009), http://www.fed-soc.org/doclib/20090211_KSWPFeb2009.pdf (The Elsbernd study of Nominating Commission lawyers was prepared by running each individual's last name and state through the "Advanced Transaction Query by Individual Contributor" search engine on the Federal Election Commission's website. For purposes of this article, the individual contributions were then added by individual and by political affiliation to arrive at the totals cited).

101. Kris W. Kobach, Op-Ed., *Budget Woes Linked to How Justices are Chosen*, WICHITA EAGLE, Mar. 3, 2009, at 7A, *available at* http://kansasprogress.com/wordpress/index.php/2009/03/08/kris-w-kobach-budget-woes-linked-to-how-justices-are-chosen/.

102. James M. Concannon & Robert C. Casad, Op-Ed, *Data Does Not Support Claim of Radical Lawyers*, WICHITA EAGLE, Mar. 11, 2009, at 9A. In fact, of those lawyer commissioners for whom party affiliation was available, there were seven Democrats, twelve Republicans and zero Independents or members of third parties. *See infra* note 109. This translates into 37% Democrats, 63% Republicans and 0% Independents or members of third parties. The Kansas electorate as a whole consists of 26.8% Democrats, 46.2% Republicans and 27% Independents or members of third parties. *See* MICHAEL BARONE, ALMANAC OF AMERICAN POLITICS 677 (2006). So the lawyers on the Commission differ from their fellow citizens in that the lawyers are less likely to be Independents or members of third parties.

103. Concannon & Casad, *supra* note 102. (emphasis added).

104. Do Professors Concannon and Casad live up to their own "reputable scholar" standard? Their reply to Kobach begins by describing him as "a law professor at a school outside Kansas." *Id*. Does the fact that Kobach's university is outside Kansas somehow undercut his interpretation of the data? If not, why would a "reputable scholar" mention it in a Kansas newspaper op-ed?

Perhaps Concannon and Casad believe that only those immersed in the Kansas legal system can know enough about Kansas Supreme Court selection to speak about it. For example, another of Casad's writings cites as authority the fact that he has "been a member of the Kansas bar for over fifty years." *See* Casad, *supra* note 2, at 426 (emphasis added). But if Casad's membership in the Kansas bar is relevant, would not the fact that Kobach is also a member of the Kansas bar be relevant, too? Although Casad and his co-author choose to mention that Kobach works outside Kansas, they choose not to mention that Kobach is a member of the Kansas bar and lives in Kansas. *See* THE AALS DIRECTORY OF LAW TEACHERS 692 (2007-08).

If Professors Concannon and Casad believe that only those immersed in the Kansas legal system can know enough about Kansas Supreme Court selection to speak about it then they are

In fact, federal campaign contributions are a telling indicator of political allegiances because actions speak louder than words. If I claim to support one political philosophy or another, a skeptic can rightly ask me to "put my money where my mouth is." And that is what several lawyers on the Kansas Supreme Court Nominating Commission have done. Of the twenty-two lawyer-commissioners from 1987-2007, thirteen made contributions reported in the database studied.[105] Of these, nine contributed more to Democrats while only four contributed more to Republicans.[106] So even leaving aside the drastic difference in dollar amounts (83% for Democrats and 17% for Republicans) and just counting heads, nine Democrats to four Republicans is a striking result in a state whose population as a whole is heavily Republican[107] and whose overall federal campaign contributions are heavily Republican.[108]

Interestingly, of the twenty-two lawyer-commissioners studied, seven were registered to vote as Democrats, while twelve were registered as Republicans.[109] In other words, the Nominating Commission's Democratic lawyers were more likely than its Republican lawyers to contribute to their party's federal candidates. And, in fact, some of the Republican lawyers made more contributions to *the other party's* federal candidates,[110] while none of the Democratic lawyers did this. See Table 2.

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not alone. For example, retired Kansas Judge Janice Russell says my views should "be entitled to very little weight" because I am licensed to practice law in a state other than Kansas. Russell, *supra* note 2, at 449. This belief–that only the views of Kansas lawyers deserve significant weight–exhibits disdain for the views of non-Kansas lawyers and for the views of Kansans who are not lawyers. The disdain for the views of non-Kansas lawyers risks insulating the legal system of Kansas from that of other states and thus inhibiting the interstate communication from which states can learn from each others' experiences. The disdain for the views of Kansans who are not lawyers feeds the impression of some non-lawyers, such as the former Speaker of the Kansas House, that the Kansas bar's extraordinarily powerful role in supreme court selection is a "good old-boy club." *See* Tim Carpenter, *Appeals Court Judge Named to High Court*, TOPEKA CAPITAL-JOURNAL, Jan. 6, 2007, at A1 (quoting Rep. Melvin Neufeld). The views of those who are not members of the club are, according to insiders like Judge Russell, "entitled to very little weight". Russell, *supra* note 2, at 449. Of course, debate would be biased in favor of the status quo if only views expressed by members of the powerful in-group were entitled to significant weight.

105. ELSBERND, *supra* note 100.

106. *Id.*

107. The Kansas electorate as a whole consists of 26.8% Democrats, 46.2% Republicans and 27% Independents or members of third parties. *See* MICHAEL BARONE, ALMANAC OF AMERICAN POLITICS 677 (2006).

108. *See supra* note 99.

109. Ware, *supra* note 1, App. A (Democrats: Shamberg, Palmer, Johnson, Bradshaw, Woodard, Wright, and Riley; Republicans: Linville, Patterson, Gillen, Lively, Dalton, Achterberg, Hahn, McAnany, Hite, Bath, Rebein, and McQueen).

110. These lawyer-commissioners are Thomas J. Bath and Dennis L. Gillen.

Table 2
Federal Campaign Contributions by Lawyer Members of the Kansas Supreme Court Nominating Commission

	Democratic lawyers on Commission	Republican lawyers on Commission	Lawyers on Commission with no party affiliation available	Total
Contributions primarily to Democrats	7	2	0	9
Contributions primarily to Republicans	0	4	0	4
No contributions	0	6	3	9
Total	7	12	3	22

This data suggests that the Commission's Democratic lawyers tend to be more politically active and partisan than its Republican lawyers. In fact, this data suggests that the Democratic lawyers are *all* politically active and partisan. While only a small percentage of Americans make federal campaign contributions,[111] all of the Democratic lawyers made federal campaign contributions during the period studied. And they all made their contributions primarily to their own party's candidates. In fact, of the 162 studied contributions made by these individuals, 161 went to Democrats. Only 1 of these 162 contributions went to a Republican.[112] In sum, this data suggests that the Democratic lawyers on the Commission tend to be deeply and actively partisan Democrats.

By contrast, the data suggests that the Commission's Republican lawyers are much more of a mixed bag. These Republican lawyers include many who made no campaign contributions in the database studied. These lawyers presumably tend to be less politically active and partisan than those who do make contributions. Second, some of the Republican lawyers who did make contributions in the data studied, made their contributions primarily to Democrats.

111. According to the Center for Responsive Politics, less than 1% of Americans made contributions to political candidates, parties or PACs in 2008. *See* OpenSecrets.org, http://www.opensecrets.org/overview/DonorDemographics.php.

112. ELSBERND, *supra* note 100.

So the data presents the picture of lawyers on the Commission consisting of two relatively large groups (9 contributors to Democrats and 9 non-contributors) and one smaller group (4 contributors to Republicans).[113] This data supports the hypothesis that the political views of the lawyers on the Commission are more liberal than the political views of their fellow Kansans. Perhaps the Kansas bar's majority control over the Commission results in a more liberal Kansas Supreme Court than would result from a more democratic selection process, in which the bar had less power.[114]

Of course, leaders of the Kansas bar maintain that, even if the lawyers on the Nominating Commission tend to be more liberal than their fellow Kansans, this does not affect supreme court selection because these lawyers are always able to put aside politics and focus entirely on merit. For example, one of the Democratic lawyers on the Commission, Ms. Patricia Riley, writes that "the focus of the entire process is upon merit selection, without regard to political issues and without any attempt to determine how the applicants would vote on issues that might come before the court."[115] But this statement is consistent with the hypothesis that a liberal (for Kansas) Commission tends to result in more liberal applicants being selected by the Commission. It is possible that liberal commissioners tend to see more merit in liberal applicants than conservative ones (and that conservative commissioners tend to see more merit in conservative applicants than liberal ones.) In other words, it is possible that commissioners honestly believe that they invariably succeed in disregarding applicants' political views when in fact their subconscious sometimes gets the best of them.[116]

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113. Note that this picture is not refuted by assertions that the Kansas Bar is politically diverse, i.e., one can find Kansas lawyers at all points in the political spectrum. *See, e.g.*, Casad, *supra* note 2, at 425-26 (the bar "is a diverse group of persons who have in common an interest in competent and unbiased judges."); Russell *supra* note 2, at 442-43 ("Are lawyers a unified faction? As anybody who has actually spent time with lawyers can tell you—NO!. . . Lawyers occupy the entire spectrum of political positions and beliefs, from ultraconservative to moderate to liberal."). Why does Judge Russell describe the spectrum as "ultraconservative" to "liberal"? Why add "ultra" to the former but not the latter?

114. As noted above, a more democratic process is warranted regardless of whether it would change the political leanings of the court. *See supra* notes 97-98 and accompanying text.

115. Riley, *supra* note 2, at 436. In fact, the most recent appointment to the Kansas Supreme Court is a campaign contributor to, and personal friend of, the governor who appointed him. *See* Stephen J. Ware, Op-Ed, *Open Up the Process of Picking Justices*, WICHITA EAGLE, Jan. 23, 2009. And nine of the previous eleven justices appointed to the court belonged to the same political party as the governor who appointed them. Ware, *supra* note 1, at 393. Furthermore, a study of all gubernatorial appointments to the Nominating Commission over a period of twenty years showed that all twenty two individuals appointed during that period belonged to the same political party as the governor who appointed them. *Id*. at 392.

116. In conducting interviews, lawyers, like other humans, must guard against the tendency to process the information they are acquiring in a way that confirms their preconceptions. *See, e.g.*, Jean R. Sternlight & Jennifer Robbennolt, *Good Lawyers Should be Good Psychologists: Insights for Interviewing and Counseling Clients*, 23 OHIO ST. J. ON DISP. RESOL. 437 (2008).

> Social psychologists have shown that "preconceptions can be important to interpreting data and therefore can strongly influence all other tasks that depend on this most basic

So in assessing the role of politics within the Commission, one might want better evidence than self-serving claims by members of the Commission. An empirical test of such claims would benefit from data showing which members of the Commission voted for and against which applicants for positions on the Kansas Supreme Court. Unfortunately, that data is unavailable because of the Commission's secrecy.[117] We do, however, have the conclusions of scholars who have studied judicial nominating commissions around the country. I quoted some of them in the following two passages from my *Selection to the Kansas Supreme Court* where I wrote:

> Scholars who have studied judicial nominating commissions around the United States conclude that the commissions are very

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> inferential undertaking." Specifically, preconceptions and expectations can influence how information is labeled and understood, how ambiguous information is interpreted, and the degree to which information is scrutinized.
> . . .
> Relatedly, psychology also teaches that individuals tend to exhibit a confirmatory bias in the ways in which they seek out and evaluate information. As a general matter, people unconsciously tend to seek out additional information that confirms their already existing views and disregard conflicting information, rather than attempting to systematically gather accurate information. Moreover, when evaluating information once it is obtained, there is a tendency for assessments of the information to be influenced by the extent to which the information is consistent with the attitudes or expectations of the person doing the evaluation-a tendency known as biased assimilation. Information that is inconsistent with expectations or beliefs is discounted and scrutinized more carefully than is expectation-congruent data.

Id. at 452-53 (quoting RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 67 (1980)).

117. Ware, *supra* note 1, at 391. Because of the secrecy of Commission's votes, we cannot know what sort of voting blocs form on the Commission. For example, Patricia Riley says "[s]upport for applicants has never broken down along lawyer/non-lawyer lines, or along issues unrelated to merit." Riley, *supra* note 2, at 435. But she cites no data to support this claim.

Professor Casad asserts that data on the party affiliation of members of the Commission "shows quite clearly that the commissioners do not vote in blocs." Casad, *supra* note 2, at 425. But blocs can divide along many lines. And even with respect to ideological blocs, party affiliation may not be as telling as campaign contributions.

As to blocs dividing along many lines, one recent letter on behalf of a candidate for the Commission is telling:

> As chair of the Supreme Court Nominating Commission, Anne can be counted on to serve the interests of all lawyers of the State of Kansas. She would not discriminate between plaintiff or defense attorneys, female or male attorneys, private practitioners or public sector attorneys. Her interest in and devotion to the profession are the reasons for her interest in this position.

Letter attached to email from Susan G. Saidian to listserv of Kansas bankruptcy lawyers (April 13, 2009). This letter clearly contemplates the possibility of blocs along lines such as plaintiff v. defense, female vs. male or private vs. public sector. This letter also includes the campaign promise that "[a]s chair of the Supreme Court Nominating Commission, Anne can be counted on to *serve the interests of all lawyers* of the State of Kansas." *Id*. (emphasis added). No mention is made of serving the interests of Kansans who are not lawyers.

> political, but that their politics—rather than being the politics of the citizenry as a whole—are "a somewhat subterranean politics of bar and bench involving little popular control."[118]

This passage quotes Political Science Professors Harry Stumpf and Kevin Paul, as does the following:

> [F]ar from taking judicial selection out of politics, the Missouri Plan actually tended to replace Politics, wherein the judge faces popular election (or selection by a popularly elected official), with a somewhat subterranean politics of bar and bench involving little popular control. There is, then, a sense in which merit selection does operate to enhance the weight of professional influence in the selection process (one of its stated goals) in that lawyers and judges are given a direct, indeed official, role in the nominating process. On close examination, however, one finds raw political considerations masquerading as professionalism via attorney representation of the socioeconomic interests of their clients.[119]

Professor Robert Casad seems uncomfortable with these conclusions. He does not like me attributing them to "scholars," and says I "should have said, '*Some* scholars,'"[120] implying that he is aware of other scholars who disagree with these conclusions. Indeed, Professor Casad asserts that "[c]ertainly not all [scholars] have reached that conclusion."[121] Yet he cites not even one scholar in support of his claim.[122] Instead, he offers his own unsupported, personal assertion: "I have been a member of the Kansas bar for over fifty years, and I have never encountered any underground 'politics of bench and bar.'"[123]

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118. Ware, *supra* note 1, at 396 (quoting HARRY P. STUMPF & KEVIN C. PAUL, AMERICAN JUDICIAL POLITICS 142 (2d ed. 1998)).

119. *Id*. at 396 n.36 (quoting STUMPF & PAUL, *supra* note 118, at 142).

120. Casad, *supra* note 2, at 426 (emphasis added).

121. *Id*.

122. *Id*.

123. *Id*. For an example of the campaign literature circulated among members of the Kansas bar, *see supra* note 117.

As a member of the Kansas bar, Professor Casad has more power in supreme court selection than he would have in any of the other forty-nine states. *See supra* section I. In selecting the Nominating Commission, his vote is worth over 200 times as much as a non-lawyer's. *See supra* section II.A. Yet he says that it is me, not him, who can have "no claim of objectivity" in assessing this system. Casad, *supra* note 2, at 424. He says this because my *Selection to the Kansas Supreme Court* was originally published by the Federalist Society. He goes on to say that I "come[] up with the Federalist Society's recommendation of state senate confirmation of all appellate judges." *Id*. at 427.

For the record, Professor Casad is wrong in asserting that senate confirmation is the Federalist Society's recommendation. "The Federalist Society takes no position on particular legal or public policy questions," http://www.fed-soc.org/doclib/20071126_KansasPaper.pdf. In fact, the Federalist Society has published papers taking a variety of positions on judicial selection.

Although Professor Casad may not be interested in Ph.D political scientists and their studies, my *Selection to the Kansas Supreme Court* did quote one more:

> This review of social scientific research on merit selection systems does not lend much credence to proponents' claims that merit selection insulates judicial selection from political forces, makes judges accountable to the public, and identifies judges who are substantially different from judges chosen through other systems. Evidence shows that many nominating commissioners have held political and public offices and political considerations figure into at least some of their deliberations. Bar associations are able to influence the process through identifying commission members and evaluating judges . . . . Finally, there are no significant, systematic differences between merit-selected judges and other judges.[124]

That is from Malia Reddick, of the American Judicature Society, which is perhaps the leading organization in favor of the Missouri Plan.[125]

4. Summary

So does the bar's extraordinary power over Kansas Supreme Court selection affect the political leanings of that court? In assessing this question, we can examine objectively-verifiable data (like campaign contributions), we can read the conclusions of scholars who have studied judicial nominating commissions around the country and we can contrast these with the unsupported assertions of those who exercise extraordinary power in the Kansas Supreme Court selection process. But however one assesses this issue, one's assessment does not alter the conclusion that the process lacks democratic legitimacy.[126] Giving a member of the bar far more power in selecting the supreme court than her fellow citizens have is unacceptable in a

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Some favor contestable elections, while others oppose them. *Compare, e.g.*, Michael DeBow, et al., *The Case for Partisan Judicial Elections*, Jan. 1, 2003, *available at* http://www.fed-soc.org/publications/pubID.90/pub_detail.asp; Brian T. Fitzpatrick, A Report on Reauthorization of the Tennessee Plan, *available at* http://www.fed-soc.org/doclib/20080225_ReauthorizationofTennesseePlan.pdf
with Stephen B. Presser, et al., *The Case for Judicial Appointments*, Jan. 1, 2003, *available at* http://www.fed-soc.org/publications/pubID.89/pub_detail.asp; Ware, *supra* note 1.

Strikingly, there is far more diversity of opinion among authors published by the Federalist Society than among the leaders of the Kansas bar who have published on the subject. Among the former group one can find support for contestable elections and senate confirmation, systems used by about 75% of the states in selecting their supreme courts. By contrast, among leaders of the Kansas bar one finds nearly unanimous support for a system used by only one state.

124. Ware, *supra* note 1, at 397 n.38 (quoting Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 744 (2002)) (citation omitted).

125. *See supra* note 39.

126. *See supra* section I.C-D.

democracy, regardless of whether this inequality results in a more liberal or conservative court than would result from a more democratic selection process.[127]

To recap, the Kansas Supreme Court selection process lacks democratic legitimacy because of "the influence of the state bar and its members over the nominating commission."[128] To ensure the democratic legitimacy of a nominating commission, none of its members should be selected by the bar. All members should be selected by popularly-elected officials or by judges nominated and confirmed by such officials. The democratic legitimacy of a nominating commission is especially important in a state like Kansas that fails to offset the Commission's power with confirmation of judges by the senate or other popularly-elected body.

D. Retention Elections and Democratic Legitimacy

When confronted with the lack of democratic legitimacy in the supreme court selection processes of Kansas and other Missouri Plan states, lawyers defending this elitist selection system often assert that it is offset by the popular elections used to retain sitting judges.[129] In other words, advocates of the Missouri Plan portray it as a mix of elitism (which they would call "professional merit") at the initial selection stage and democratic legitimacy at the retention stage.[130] This argument, however, vastly overstates the degree of democratic legitimacy provided by retention elections. In fact, retention elections are largely toothless and thus rarely provide significant democratic legitimacy.

The retention elections used by Kansas and other Missouri Plan states are unusual in that the sitting judge does not face an opposing candidate; instead, the voters choose simply to retain or reject that particular judge.[131] For this and other reasons, retention elections are nearly always rubber stamps, and no Kansas Supreme Court justice has ever lost one.[132]

Predictably, members of the Kansas bar argue that this is because no Kansas justice has ever deserved to be removed from the bench; they have always been so meritorious. For example, Professor Casad says, "The fact that none of our appellate judges has ever lost a retention-election is strong

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127. *See supra* section II.C.1-2.

128. Jackson, *supra* note 17, at 154.

129. *See, e.g.*, Casad, *supra* note 2, at 427 ("In Kansas, our judges have fixed terms of office. The judges of the supreme court and courts of appeals must face retention elections periodically. Their 'accountability' is thus publicly tested directly before the people. Since we cannot provide the kind of independence protections that federal judges enjoy, we have to take steps to provide some measure of independence from partisan politics at the nomination level.").

130. *See id.*

131. *See supra* note 80. *See also* Ware, *supra* note 1, at 407.

132. In fact, only one Kansas judge at any level has ever lost one. *See* Eric Weslander, *Lyon County Judge Faced Assorted Allegations in 1980 Ouster Campaign*, LAWRENCE JOURNAL WORLD, Oct. 28, 2004, *available at* http://www2.ljworld.com/news/2004/oct/28/lyon_county_judge/.

evidence that our selection system has produced the kind of competent, unbiased judges the people of Kansas want and need."[133] But this "disingenuous"[134] argument conveniently ignores the fact that retention elections are nearly always rubber stamps everywhere they are used and that this outcome was intended by those who invented them.

Data on retention elections around the country (as summarized by Professor Brian Fitzpatrick) indicate that sitting judges win retention 98.9% of the time,[135] while—in stark contrast—incumbent supreme court justices running for reelection in states that use partisan elections win only 78% of the time.[136] This rubber-stamp aspect of retention elections is intentional. As Professor Charles Geyh puts it, "[I]t is somewhat disingenuous to say that merit selection systems preserve the right to vote. Retention elections are designed to minimize the risk of non-retention, by stripping elections of features that might inspire voters to become interested enough to oust incumbents."[137] Professor Michael Dimino explains:

> [R]etention elections protect incumbency in multiple, related ways: They minimize the incentives for opposing forces to wage antiretention campaigns by preventing any individual from opposing the incumbent directly; they eliminate indications of partisanship that allow voters to translate their policy preferences cost-effectively into votes; and they increase voter fears of uncertainty by forcing a choice of retaining or rejecting the incumbent before the voter knows the names of potential replacements.[138]

Dimino concludes that "retention elections seek to have the benefit of appearing to involve the public, but in actuality function as a way of blessing the appointed judge with a false aura of electoral legitimacy."[139] In other words, retention elections are something of a fraud.[140] They create a false

133. Casad, *supra* note 2, at 428.

134. *See* Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 55 (2003).

135. *See* Brian T. Fitzpatrick, *Election as Appointment: The Tennessee Plan Reconsidered*, 75 TENN. L. REV. 473, 495 (2008). ("Even that incredibly high number is misleading, however, because over half of the defeats were from Illinois, a state that requires judges to win 60% of the vote rather than a mere majority (as do Tennessee and most other states) in order to stay on the bench. Removing the Illinois defeats from the data where the judges won more than 50% but less than 60% of the vote yields a retention rate of 99.5%.") (footnotes omitted).

136. *Id*.

137. Geyh, *supra* note 134, at 55.

138. Dimino, *supra* note 40, at 807-08.

139. *Id*. at 811.

140. *See* Fitzpatrick, *supra* note 135, at 495 ("[T]he architects of merit selection came up with what some scholars have concluded was a 'sop' to the public: the retention referendum. That is, the retention referendum was designed to make the public feel as though they had a role

veneer of democracy at the judicial retention stage that the bar can use to distract the populace from the elitism of bar power at the initial selection stage, which is where the real action is.[141]

That said, retention elections are not always toothless. On rare occasions, a judge loses one. So retention elections do provide some (however small) measure of democratic legitimacy. Unfortunately, they do this at the judicial-retention stage, when it does the most harm to judicial independence. A wide array of scholars and other commentators agree that "the primary threat to [judicial] independence arises at the point of re-selection, when judges are put at risk of losing their jobs for unpopular decisions that they previously made."[142] This problem is especially acute when a few of the judge's decisions, although well-reasoned in a technical, lawyerly sense, are easy to caricature in a "sound bite" television ad.[143] Accordingly, as Professor Dimino says, "[J]udicial terms of office should be long and non-renewable, such that there are neither reelections nor reappointments. Where judges know that their ability to stay in office depends on how politicians or voters view their decisions, there is the potential for decisions to be made on the basis of those political calculations rather than on the merits."[144] In sum, retention elections, like other forms of judicial re-selection, do not protect judicial independence.

So the Missouri Plan and its retention elections may be the worst of both worlds. While contestable elections threaten judicial independence (especially at the retention stage[145]), contestable elections at least have the virtue of conferring significant democratic legitimacy on the judiciary.[146] By contrast,

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in selecting their judges but make it unlikely they would exercise that role by voting a judge off the bench.") (footnotes omitted).

141. For example, an op-ed by former Kansas Bar Association President Linda Parks refers to my mention of the federal system of judicial selection and retention as follows: "Ware mentions the option of changing the system by taking the retention vote away from the citizens and instead giving the power to decide the qualifications of the justices to politicians. More power to politicians? That's not what most Kansas citizens support." Parks, *Keep Selecting Justices on Merit, Not Politics*, *supra* note 62, at 7A.

142. *See supra* note 4.

143. *See* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 650 (1999) ("[In retention elections,] voters have removed from the bench several judges after high-profile campaigns focusing on the judge's votes on a single issue, often the death penalty."); Shepherd, *supra* note 4, at 644 (citing examples); Jackson, *supra* note 17, at 133-34 ("Justice White's experience shows a danger of the commission system that should be addressed: the possibility that one decision, because of unfortunate timing or a highly coordinated special interest attack, could cause a judge to lose her position."); Roy A. Schotland, *New Challenges to Judicial Selection*, 95 GEO. L.J. 1077, 1099 (2007) ("California's Justice Kaus memorably described the dilemma of deciding controversial cases while facing a retention election, comparing it to 'finding a crocodile in your bathtub when you go in to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving.'") (quoting Gerald F. Uelmen, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133 (1997)).

144. Dimino, *supra* note 4, at 451.

145. *Id.* at 457.

146. *Id.* at 459-60.

retention elections also threaten judicial independence but without the upside of conferring significant democratic legitimacy on the judiciary. So the Missouri Plan (as used in Kansas and other states) initially selects judges in a manner more elitist than democratic and then brings in a sliver of democratic legitimacy at the retention stage, precisely when it does the most harm to judicial independence.

By contrast, the best of both worlds can be attained with a more democratic (less elitist) method of initially-selecting judges followed by terms of office that are long and non-renewable. Such a system avoids the elitism of the Missouri Plan (taken to the extreme in Kansas) while best preserving judicial independence. Such a system is found in the United States Constitution.[147]

III. CONCLUSION

In supreme court selection, the bar has more power in Kansas than in any other state. This extraordinary bar power gives Kansas the most elitist and least democratic supreme court selection system in the country. While members of the Kansas bar make several arguments in defense of the extraordinary powers they exercise under this system, these arguments rest on a one-sided view of the role of a judge.

The bar's arguments rest on the view that judging involves only the narrow, lawyerly task of applying to the facts of a case the law made by someone other than the judge (e.g., a legislature). The bar's arguments overlook the fact that judging also involves the exercise of discretion and that, within the bounds of this discretion, the judge makes law. At least since the Legal Realists, we have known that judges do not always *find* the law; sometimes they *make* the law and make it in accord with their own political views.

The political/lawmaking side of judging is especially important with respect to state supreme courts because they are the last word on their states' constitutions and common law doctrines. So the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the

147. Professor Casad may agree with me on this point. He writes:

> The Framers provided a politically partisan system for selection of federal judges, but once the political hurdle of Senate confirmation has been overcome, the judges are independent of partisan politics. Judicial independence provided by life tenure and irreducible salary is an essential feature of the Framers' plan. A Senate-confirmation requirement makes sense if the judges are to become, as the federal judges are, free of any further "accountability" (to use the Federalist Society's buzzword). It does not follow, however, that state senate confirmation would make sense in a state setting where judges do not have independence protections of life tenure and irreducible salary.

Casad, *supra* note 2, at 427. Does this express Professor Casad's preference for the "Framers' plan" over the Missouri Plan? If so, then we agree on at least that much.

judges in question are supreme court justices. While Kansas has the least democratic supreme court selection system in the country, the accumulated wisdom of the other forty-nine states suggests that Kansas's system overvalues the technical/lawyerly side of supreme court judging and undervalues the political/lawmaking side of supreme court judging. Kansas can correct these problems and increase the democratic legitimacy of its supreme court by reducing the power of its bar.

TABLE 1
BAR CONTROL OF SUPREME COURT SELECTION

More Elitist, High Bar Control 				
"Hard" MO Plan, majority of comm'n selected by bar	"Hard" MO Plan, near majority of comm'n selected by bar	"Soft" MO Plan, sub-ordinate role for bar in selecting mm'n	"Senate" Confirm., bar selects some of comm'n	"Senate" Confirm., "lawyers' quota" on comm.'n
KS	AR IN IA MO OK NE SD WY	AZ CO FL TN	HI VT	NY CT RI UT

			More Populist, Low Bar Control
"Senate" Confirm., comm'n does not restrict Gov.	"Senate" Confirm., comm'n w/o special power for bar	Legis. Appt.	Contest-able Elections
CA DE ME MD NH NJ	MA	SC VA	22 states

ORIGINALISM, BALANCED LEGAL REALISM AND JUDICIAL SELECTION: A CASE STUDY

Stephen J. Ware*

Abstract: *The "balanced realist" view that judging inevitably involves lawmaking is widely accepted, even among originalists, such as Justice Scalia, Randy Barnett and Steven Calabresi. Yet many lawyers are still reluctant to acknowledge publicly the inevitability of judicial lawmaking. This reluctance is especially common in debates over the Missouri Plan, a method of judicial selection that divides the power to appoint judges between the governor and the bar.*

The Missouri Plan is one of three widely-used methods of selecting state court judges. The other two are: (1) direct election of judges by the citizenry, and (2) appointment of judges by democratically elected officials, typically the governor and legislature, with little or no role for the bar. Each of these two methods of judicial selection respects a democratic society's basic equality among citizens — the principle of one-person, one-vote. In contrast, the Missouri Plan violates this principle by making a lawyer's vote worth more than another citizen's vote.

This Article provides a case study of the clash between the inevitability of judicial lawmaking and the reluctance of lawyers to acknowledge this inevitability while defending their disproportionate power under the Missouri Plan. The Article documents efforts by lawyers in one state, Kansas, to defend their version of the Missouri Plan by attempting to conceal from the public the fact that Kansas judges, like judges in the other 49 states, inevitably make law. The case study then shows examples of Kansas judges making law. The Article concludes that honesty requires lawyers participating in the debate over judicial selection in the United States to forthrightly acknowledge that judges make law. Lawyers who seek to defend the power advantage the Missouri Plan gives them over other citizens can honestly acknowledge that this is a power advantage in the selection of lawmakers and then explain why they believe a departure from the principle of one-person, one-vote is justified in the selection of these particular lawmakers.

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ORIGINALISM, BALANCED LEGAL REALISM AND JUDICIAL SELECTION: A CASE STUDY

I. INTRODUCTION

Judges make law. It is not the only thing judges do. They also run courtrooms, hire clerks and attend meetings. But amidst these other sorts of activities, judges also make law. We have known this at least since the legal realists of the early 20th Century. With the growth, and then dominance, of legal realism over the course of the last century, it is now a truism that judges make law.[1]

Yet many judges and lawyers are still reluctant to acknowledge publicly the inevitability of judicial lawmaking. In fact, judges and lawyers sometimes publish statements that tend to conceal from the public the fact that judges make law — for example, statements describing the judicial role in a way that omits the lawmaking part of this role. These omissions are especially common in debates

[1] *See infra* notes 40–41 and accompanying text.

over the Missouri Plan, a method of judicial selection that divides the power to appoint judges between the governor and the bar.[2]

The Missouri Plan is one of three widely-used methods of selecting state court judges.[3] The other two are: (1) direct election of judges by the citizenry, and (2) appointment of judges by democratically elected officials, typically the governor and/or legislature, with little or no role for the bar. Each of these two methods of judicial selection respects a democratic society's basic equality among citizens — the principle of one-person, one-vote. Judicial elections directly vindicate this principle and appointment of judges indirectly vindicates it if the appointment is by officials who themselves were elected under the principle of one-person, one-vote.[4] In contrast, the Missouri Plan violates this principle by making a lawyer's vote worth more than another citizen's vote.[5] The Missouri Plan's central problem is that it is undemocratic.

This problem's importance, however, is apparent only to those who realize that judges are lawmakers. We all realize that governors and legislators are lawmakers so each of the fifty United States selects governors and legislatures democratically, in direct elections. We also generally use a form of democracy — the indirect democracy of appointment by governors and legislatures — to select the leaders of the various government departments, boards and commissions that administer a modern state because we understand that these officials also make law. In contrast, we do not select our doctors, plumbers and hairdressers democratically because we understand that these jobs do not entail making law.

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[2] Several variants of the Missouri Plan are in use but they have the following in common: When a vacancy on the bench occurs, a nominating commission assesses applicants and narrows the pool of applicants from which the governor may select, typically to three; the governor then must pick one of those three and that person is thereby appointed to the court without any further process, such as a confirmation vote in the legislature; crucially, some members of the commission are selected by the bar. *See infra* notes 68–71 and accompanying text (describing the process in greater detail). Unfortunately, prominent bar groups use the term "merit selection" rather than "Missouri Plan" to describe all judicial appointment systems with a nominating commission of any sort, regardless of who selects the commission or whether the commission's power is checked by a confirmation vote in the legislature. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 760–61 (2009). "This term, 'merit selection,' is 'propagandistic' and obscures important distinctions among appointive systems. Accordingly, I suggest that people reject the term 'merit selection' in favor of the more-neutral 'Missouri Plan' and that people reserve the term 'Missouri Plan' for [judicial selection systems] that lack confirmation by the senate or similar popularly elected body." *Id.* at 761–62 (internal citations omitted).

[3] *See id.* at 752–64 (describing the various methods used).

[4] *See id.* at 753–54 ("In those states in which the governor may appoint to the court whomever he or she wants, subject only to confirmation by a popularly elected body such as the state senate, judicial selection is laudably democratic because governors and state senators are elected under the principle of one-person-one-vote. In these elections, members of the bar get no special powers.")

[5] *See supra* note 2.

In general, lawmakers in our society are selected democratically and non-lawmakers are not selected democratically. However, judges selected by the Missouri Plan are incongruous; they are lawmakers but they are not selected democratically. They are not selected in accord with the basic democratic principle of one-person, one-vote.

Quite simply, the Missouri Plan is an aberrant violation of our society's practice of selecting *lawmakers* democratically. This undemocratic aberration empowers lawyers at the expense of non-lawyers so it is disappointing, but perhaps not surprising, that lawyers are prominent among those who defend the Missouri Plan. Unfortunately, their defense sometimes includes statements that may mislead the public into believing that judges do not make law. Rather than candidly educating the public about the judicial role, some lawyers arguing for a judicial selection system that especially empowers them make arguments based on a mythical view of judging that was refuted nearly a century ago by the legal realists.

The first section of this article briefly outlines the standard, "balanced realist" view that judging inevitably involves lawmaking. In doing so, it explains how widely accepted this view is, even among originalists, such as Justice Scalia, Randy Barnett and Steven Calabresi. Section II documents efforts by lawyers and judges in one state, Kansas, to defend their (especially undemocratic) version of the Missouri Plan by attempting to conceal from the public the fact that Kansas judges, like judges in the other 49 states, inevitably make law. Section III shows examples of Kansas judges making law. Section IV concludes that honesty requires lawyers participating in the debate over judicial selection in the United States to forthrightly acknowledge that judges make law. Lawyers who seek to defend the power advantage the Missouri Plan gives them over other citizens can honestly acknowledge that this is a power advantage in the selection of *lawmakers* and then explain why they believe a departure from the principle of one-person, one-vote is justified in the selection of these particular lawmakers.[6]

II. THE STANDARD ("BALANCED REALIST") VIEW THAT JUDGES INEVITABLY MAKE LAW

A. Realism 101

[6] For example, they might argue that judicial independence is better protected by the Missouri Plan than alternative systems. This argument is, I believe, refuted by Ware, *supra* note 2, at 751 n.2 & 769–74.

Judges are sometimes reluctant to acknowledge publicly that they inevitably make law.[7] Why this reluctance? Perhaps because the notion that judges should not "legislate from the bench"[8] is popular among some segments of the public.[9]

This popularity is surely due, in part, to the efforts of originalists[10] — those who contend that judges should interpret the U.S. Constitution's text as it was originally understood, rather than according to evolving social norms. For example, an organization that has done much to advance the cause of originalism, the Federalist Society, says "that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be."[11] Under this view, roughly stated, if evolving social norms warrant constitutional change then those changes should be enacted through amendments to the constitution's text,[12] rather

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[7] Chief Justice Roberts, for example, likened judging to an umpire calling balls and strikes without, of course, playing the game. *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

[8] *See, e.g.*, President George W. Bush, Address to the Nation Announcing the Nomination of John G. Roberts, Jr., To Be an Associate Justice of the United States Supreme Court, 41 WEEKLY COMP. PRES. DOC. 1192, 1192 (July 19, 2005) ("[Judge Roberts] will strictly apply the Constitution and laws, not legislate from the bench."); Todd E. Pettys, *Judicial Retention Elections, The Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 BUFF. L. REV. 69 (2012) ("prominent jurists do sometimes speak of adjudication as if it involved nothing more than the objective application of determinate rules").

[9] Judge Richard Posner refers to "the allure [for judges] of being able to pose as a discerner rather than a creator of law, for that is the less controversial position and also flatters the laity's ignorant expectation of what a judge is supposed to do." RICHARD A. POSNER, HOW JUDGES THINK 262 (2008); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?,* 45 LAW & SOC'Y REV. 195, 207 (2011) (finding that some Americans believe in "mechanical jurisprudence," but that this belief is not particularly widespread); John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 929 (2000) ("The myth of legality holds that cases are decided by the application of legal rules formulated and applied through a politically and philosophically neutral process of legal reasoning [T]he myth of legality is deeply ingrained in American culture.").

[10] On the connection between originalist scholarship and popular notions about the illegitimacy of judicial lawmaking, s*ee, e.g.*, Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 777-78 (2011) (quoting Rush Limbaugh's praise for originalism); Justin Driver, *Ignoble Specificities*, THE NEW REPUBLIC, April 5, 2012, at 35 ("originalism has, in a shockingly short period of time, dramatically altered the terms of public constitutional discourse").

[11] http://www.fed-soc.org/aboutus/page/our-background. *See also* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."); THE FEDERALIST NO. 78 (Alexander Hamilton) ("The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.")

[12] *See, e.g.*, Renee Lettow Lerner, *Enlightenment Economics and the Framing of the U.S. Constitution*, 35 HARV. J. L & PUB POL'Y 37, 45 (2012) ("If the enumerated powers set out in the

than through the process of non-originalist judicial interpretation, which practically invites "activist" judges to convert their own policy preferences (political views) into law.

Yet even Justice Scalia, perhaps the leading originalist, "has repeatedly stated that judges 'make the law,' resolving policy issues in the process."[13] That judges make law does not much trouble Justice Scalia and other "great worriers over judicial usurpation" because they "typically draw a sharp distinction between constitutional judicial review and the common law process."14 In other words, activist judges injecting their policy preferences into constitutional law is deeply troubling to originalists but activist judges injecting their policy preferences into the common law is not.[15]

This distinction follows from the premise that law should be made democratically. Democratic worries about judicial activism are far more severe when judges invoke a constitution to nullify statutes[16] than when judges make

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Constitution are thought to be too restrictive, the proper solution is to amend the Constitution, not to distort certain provisions beyond recognition. Although amendments to the Constitution have become very rare, in earlier times--when judges and other officials and citizens took the language of the Constitution more seriously--amendments were more frequent.")

[13] Brian Z. Tamanaha, *The Distorting Slant in Quantitative Studies of Judging*, 50 B.C. L. REV. 685, 710 (2009) (citing ANTONIN SCALIA, *Common Law Courts in a Civil Law System*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 6, 9, 12 (Amy Gutmann ed., 1997)). *See also* Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) (Scalia, J.) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular." (internal citation omitted)); James B. Bean Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment))("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it *as judges make it*, which is to say *as though* they were 'finding' it-discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow be*. Of course this mode of action poses 'difficulties of a ... practical sort,' when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law-making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches." (internal citation omitted) (emphasis in original)); ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (Amy Gutmann ed., 1997)("It is only in this [20th] century, with the rise of legal realism, that we came to acknowledge that judges in fact 'make' the common law, and that each state has its own.").

[14] Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L.J. 350, 414 (2011)

[15] Of course, originalists—like others—engage in a variety of different debates about *how* judges should make the common law. *See infra* note 20.

[16] The practice of judges trumping statutes raises the "counter-majoritarian difficulty" that "continues to be an obsession of constitutional theorists." Kenneth Ward, *The Counter-Majoritarian Difficulty and Legal Realist Perspectives of Law: The Place of Law in Contemporary*

common law, which can be overturned by statute. The common law — made by judges[17] — has served as the foundation of our law for centuries going back to England,[18] but legislatures (now democratically-elected) can trump the common law by enacting statutes.[19] And the ultimate trump card, the Constitution, is made

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Constitutional Theory, 18 J.L. & POL. 851, 851 (2002) (referring to "the counter-majoritarian difficulty: how to justify judicial review, a non-democratic institution, in a government that derives its legitimacy from majority rule.") (citing ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS, 16–18 (2d ed. 1986)). The opposite problem — judges declining to hold a statute unconstitutional because the statute embodies the judge's policy preferences — raises somewhat different concerns.

[17] It is routine to treat the "common law" and "judge-made law" as equivalents. *See* Lueck v. Superior Court In & For Cochise Cnty., 469 P.2d 68, 70 (Ariz. 1970), *superseded by statute on other grounds*, ARIZ. REV. STAT. ANN. § 12-612(C) ("When we find that the common law or 'judge-made law' is unjust or out of step with the times, we have no reluctance to change it."); Butcher v. Superior Court, 139 Cal. App. 3d 58, 64, (Ct. App. 1983) ("When it is determined that the common law or judge-made law is unjust or out of step with the times, we have no reluctance to change it." (citing City of Glendale v. Bradshaw, 503 P.2d 803, 805 (Ariz. 1972))); Aluli v. Trusdell, 508 P.2d 1217, 1221 (Haw. 1973) (stating that "common law or judge-made law is the functional equivalent of statutory law"); Woodman v. Kera LLC, 785 N.W.2d 1, 21 (Mich. 2010) ("Given that the common law develops through judicial decisions, it has been described as 'judge-made law.'" (citing Placek v. Sterling Heights, 275 N.W.2d 511 (Mich. 1979))); Werner v. Hartfelder, 342 N.W.2d 520, 521 (Mich. 1984) ("the Court has recognized . . . that the common law is judge-made law").

[18] *See*, *e.g.*, Marie K. Pesando, 15A AM. JUR. 2D *Common Law* § 3 (2012) ("The common law migrated to this continent with the first English colonists, who claimed the system as their birthright; it continued in full force in the 13 original colonies until the American Revolution, at which time it was adopted by each of the states as well as the national government of the new nation. As new states were formed, they too adopted, by express provision or force of judicial decision, the principles of the common law insofar as applicable to their conditions" (internal citations omitted)); William D. Bader, *Some Thoughts on Blackstone, Precedent, and Originalism*, 19 VT. L. REV. 5, 5 (noting that "the English common law was the seminal influence on the formative generation of American lawyers."); NORMAN F. CANTOR, IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM, 352–380 (1997) (explaining how the United States appropriated English common law as the basis of the its legal system); DANIEL J. BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE 35–42 (1965) (describing English common law as the foundation of America's legal system).

For examples of reception statutes, *see, e.g.*, Virginia General Convention Ordinance of May 6, 1776, ch. 5, § 6, 1776 Va. Colony Laws 33, 37 ("And be it further ordained, that the common law of England, all statutes and acts of Parliament made in aid of the common law prior to the fourth year of the reign of King James the first [1607], and which are of a general nature, not local to that kingdom, together with the several acts of the General Assembly of this colony now in force, so far as the same may consist with the several ordinances, declarations and resolutions of the General Convention, shall be the rule of decision, and shall be considered as in full force, until the same shall be altered by the legislative power of this colony."); MO. REV. STAT. § 1.010 (2000) ("The common law of England and all statutes and acts of parliament made prior to the fourth year of the reign of James the First, of a general nature, which are local to that kingdom and not repugnant to or inconsistent with the Constitution of the United States, the constitution of this state, or the statute laws in force for the time being, are the rule of action and decision in this state, any custom or usage to the contrary notwithstanding").

[19] *See, e.g.*, Marie K. Pesando, 15A AM. JUR. 2D *Common Law* § 10 (2012) ("The English common law has been adopted as the basis of jurisprudence in all the states of the Union with the

by the highest lawmaking authority in a democratic society, the People themselves. Therefore, it is entirely consistent to want judges continuing to make the common law evolve to incorporate what the current generation of judges believes to be good policy, while forbidding judges from interpreting statutes and constitutions in that judge-emboldening way.[20] In short, originalism's concerns about judicial activism focus on constitutional and statutory cases and are no obstacle to acknowledging that judges inevitably make the common law.[21]

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exception of Louisiana, where the civil law prevails in civil matters. The common law prevails generally throughout the United States, except as modified, changed, or repealed by statute or constitutional provisions of an individual state"); John F. Duffy, *Administrative Common Law in Judicial Review*, 77 TEX. L. REV. 113, 116 (1998) ("[L]egislators are the lawgivers... [and so] courts deciding statutory cases are bound to follow commands and policies embodied in the enacted text—commands and policies the courts did not create and cannot change."); Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 189 (1986) ("In our system of government the framers of statutes... are the superiors of the judges. The framers communicate orders to the judges through legislative texts . . . .If the orders are clear, the judges must obey them."); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 415 (1989) ("According to the most prominent conception of the role of courts in statutory construction, judges are agents or servants of the legislature. . . . The judicial task is to discern and apply a judgment made by others, most notably the legislature.")

[20] *See* ANTONIN SCALIA, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 12 (Amy Gutmann ed., 1997)(praising the common law method: "It has proven to be a good method of developing the law in many fields — and perhaps the very best method."); *id.* at 38 (defending "original meaning" constitutional interpretation against "The Living Constitution").

> The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and "find" that changing law. Seems familiar, doesn't it? Yes, it is the common law returned, but infinitely more powerful than what the old common law ever pretended to be, for now it trumps even the statutes of democratic legislatures.

Id. at 38.

[21] Of course, originalists—like others—engage in a variety of different debates about *how* judges should make the common law. One of these debates is the pace at which the common law should evolve. Perhaps originalist judges tend to be conservative and perhaps conservative judges generally have a Burkean or Hayekian respect for longstanding common law as embodying the accumulated wisdom gained from many generations of trial-and-error experience. *See, e.g.*, Todd J. Zywicki & Anthony B. Sanders, *Posner, Hayek, and the Economic Analysis of Law*, 93 IOWA L. REV. 559, 582 (2008) ("Hayek shares the traditional view that cases are merely illustrations of more abstract legal principles; cases are not 'law' in and of themselves. The independent efforts of many judges deciding many cases over time generates legal principles, and it is those principles that matter, not the constituent cases themselves. The legal principles that emerge from this implicit collaboration among many judges reflect greater wisdom and consensus than any individual judge deciding any individual case. Thus, it is that Hayek characterizes the common law as a spontaneous order in the same way that the market is a spontaneous order.")

The acknowledgment that judges inevitably make the common law became routine with the growth, and then dominance, of legal realism, over the course of the last century.[22] While the Legal Realists had many, and sometimes divergent, views, their "most basic insight" is "that common-law judges make public policy in deciding cases no less than legislators do in enacting laws."[23] Like most everyone else, Justice Scalia says that it was with the 20th Century rise of legal realism "that we came to acknowledge that judges in fact 'make' the common law."[24]

Perhaps such judges tend to subordinate their own policy preferences to the policies already embodied in the common law and thus hew closely to precedents, resulting in a common law that evolves slowly and cautiously. In contrast, progressive judges may tend to see longstanding common law less positively and thus be more willing to replace it with new law reflecting the policy preferences of current judges, resulting in a common law that evolves more rapidly.

[22] "In the early part of the twentieth century, the hard-headed and clear-eyed Justice Holmes, the leader of the legal realists, insisted that it was a myth that judges decided controversial cases by 'finding' rather than making the law. That contention was a step in the direction of a more mature and honest legal system." Lino A. Graglia, *Originalism and the Constitution: Does Originalism Always Provide the Answer?*, 34 HARV. J.L. & PUB. POL'Y 73, 84–85 (2011). *See also* Charles Gardner Geyh, *Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 435, 438 (2008) ("The legal realism movement of the 1920s challenged the traditional view that judges were essentially value-neutral automatons who mechanically divined and applied the true meaning of the law. Rather, legal realists asserted that judges are influenced by their education, upbringing, ambitions, experiences, and values to no less an extent than anyone else."); Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 886 (2006) ("Now, having for generations bathed in the teachings of Holmes and the Realists, we heed their lessons. We no longer deny the creative and forward-looking aspect of common law decisionmaking, and we routinely brand those who do as 'formalists.' It is thus no longer especially controversial to insist that common law judges make law.").

[23] David L. Franklin, *Justice Ginsburg's Common-Law Federalism* 43 NEW ENG. L. REV. 751, 757 (2009). *See also* George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1601 (2008) ("Common law courts are certainly engaged in the business of making law and policy. . . . [A]nyone who contends otherwise is falling into the trap of magisterial visions of the judiciary that have been discredited by legal realism and the work of political scientists.") (citing Michael R. Dimino, *Pay No Attention to That Man Behind the Robe: Judicial Elections, the First Amendment, and Judges as Politicians*, 21 YALE L. & POL'Y REV. 301, 357–67 (2003)); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 504 (1994) ("[T]he fundamental insight of [Holmes's] legal realism is that judges can make and unmake law (though they customarily deny that this is what they are doing) . . . ."); John Hasnas, *The Depoliticization of Law*, 9 THEORETICAL INQUIRIES L. 529, 543 (2008) ("the legal realists established that the rules of law do not bind common law judges to decide controversial appellate cases one way rather than another. The existence of contradictory rules of law and construction and the open textured nature of legal language always provide the judge sufficient leeway to arrive at the legal conclusion that he or she believes to be correct — something that is determined by his or her pre-existing moral and ideological commitments.")

[24] "It is only in this [20th] century, with the rise of legal realism, that we came to acknowledge that judges in fact 'make' the common law, and that each state has its own." Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the*

Realism about judicial lawmaking is not, however, confined to the common law.[25] As nearly everyone (including Justice Scalia[26]) recognizes, statutory language is sometimes vague or ambiguous.[27] Such statutes do not compel a single result in each case that might arise, as reasonable people can disagree about the best interpretation of the statute and therefore the best result of the particular case. "The legal realists saw the interpretation of statutory ambiguities as necessarily involving judgments of policy and principle. They insisted that when courts understand statutes to mean one thing rather than another, they use judgments of their own, at least in genuinely hard cases."[28] This realist view that

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Constitution and Laws, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 10 (Amy Gutmann ed., 1997). Brian Tamanaha's more detailed and nuanced histories suggest that realism actually predated the Realists, that is, 19th Century judges were aware that they were making law. *See generally* Brian Z. Tamanaha, *Balanced Realism on Judging*, 44 VAL. U. L. REV. 1243 (2010); BRIAN Z. TAMANAHA, BEYOND THE FORMALIST–REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 18–20 (2009)(in the late 19th Century, "[e]ven judges openly acknowledged that they made law."); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731 (2009).

[25] "The Core Claim of Legal Realism consists of the following descriptive thesis about judicial decision-making: judges respond primarily to the stimulus of facts. Put less formally—but also somewhat less accurately—the Core Claim of Realism is that judges reach decisions based on what they think would be fair on the facts of the case, rather than on the basis of the applicable rules of law." Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 275 (1997).

[26] *See* W. Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100-01 (1991) (Scalia, J.), *superseded by statute on other grounds*, 42 U.S.C. § 1988(c) (2000) ("Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. We do so not because that precise accommodative meaning is what the lawmakers must have had in mind (how could an earlier Congress know what a later Congress would enact?), but because it is our role to make sense rather than nonsense out of the *corpus juris*.") (internal citations omitted); BFP v. Resolution Trust Corporation, 511 U.S. 531 (1994) (Scalia, J.) ("the 'plain meaning' of [the statutory language] 'reasonably equivalent value' continues to leave unanswered the one question central to this case, wherein the ambiguity lies: *What is a foreclosed property worth?* Obviously, until that is determined, we cannot know whether the value received in exchange for foreclosed property is 'reasonably equivalent.' We have considered three possible answers to this question-fair market value.")(parenthetical omitted); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1183 (1989) ("One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade.").

[27] On the distinction between vague and ambiguous, see E. Allan Farnsworth, *"Dmeaning" in the Law of Contracts*, 76 YALE L.J. 939, 953 (1967) ("Ambiguity, properly defined, is an entirely distinct concept from that of vagueness. A word that may or may not be applicable to marginal objects is vague. But a word may also have two entirely different connotations so that it may be applied to an object and be at the same time both clearly appropriate and inappropriate, as the word 'light' may be when applied to dark feathers. Such a word is ambiguous.")

[28] Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law Is*, 115 Yale L.J. 2580, 2591 (2006). The classic is perhaps Karl Llewellyn's legal-realist critique of statutory interpretation showing that the canons of construction are often inconsistent. *See* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules or Canons About How*

statutory interpretation often involves "substantial judicial discretion" and therefore constitutes "judicial lawmaking, not lawfinding," had by the 1950s, "become deeply rooted."[29]

These realist points about judicial lawmaking in *statutory* interpretation apply as well to judicial lawmaking in *constitutional* interpretation. That constitutional provisions are sometimes vague or ambiguous is acknowledged by just about everyone, including prominent originalists like Randy Barnett, who explains as follows.

> [O]riginalism is a method of constitutional interpretation that identifies the meaning of the text as its public meaning at the time of its enactment. The text of the Constitution may say a lot, but it does not say everything one needs to know to resolve all possible cases and controversies. Originalism is not a theory of what to do when original meaning runs out. This is not a bug; it is a feature. Were a constitution too specific, its original meaning probably would become outdated very quickly. A constitution with a degree of vagueness delegates some decisions of application to the judgment of future actors, provided these decisions do not conflict with the information that is provided by the text.[30]

To the same effect are the writings of another well-known originalist, Steven Calabresi,[31] Chairman of the Federalist Society.[32] After noting that the United

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Statutes Are To Be Construed, 3 VAND. L. REV. 395 (1950). *See also* M. R. COHEN, *The Process of Judicial Legislation*, *in* LAW AND THE SOCIAL ORDER 112–13, 121–24 (1933), *reprinted in* COHEN AND COHEN'S READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 241 (Philip Shuchman ed. 2d ed. 1979) ("[N]ot only is the common law changed from time to time by judicial decisions . . . the courts also make our statute law; for it is the court's interpretation of the meaning of a statute that constitutes the law.").

[29] Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 248 (1992) ("Because neither statutory text nor legislative intent was universally determinate and confining, the legal realists insisted that statutory interpretation often involved substantial judicial discretion and constituted judicial lawmaking, not lawfinding. . . . By the 1950s, the legal realists' critique of interpretive formalism had become deeply rooted."); Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455, 469 (2002), ("Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.")

[30] Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 69–70 (2011).

[31] *See* Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 Tex. L. Rev. 1, 16
(2011) (referring to the "undeniable ambiguity" of Section 1 of the Fourteenth Amendment); Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment was Ratified in 1868: What Rights are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 81 (2008) ("One ambiguity of the Cruel and Unusual Punishment Clause is whether it forbids all disproportionate punishments or only a certain set of punishments that were thought to be cruel and unusual 200 years ago, like drawing and

States Constitution consists not only of rules, but also of standards and principles,[33] Professor Calabresi says "[a]dopters use rules because they want to limit discretion; they use standards or principles because they want to channel politics but delegate the details to future generations."[34] While rules are relatively determinate, with respect to at least some standards "different reasonable constitutional interpreters will differ on how the standard should be applied."[35]

Do these differences among reasonable constitutional interpreters (judges) correlate with the judges' policy preferences? The consensus is that they do, especially at the supreme court level. Most everyone "recognize[s] that the constitutional opinions of Supreme Court Justices are affected by their political proclivities."[36] Even Justice Scalia acknowledges that high-court judges have "immense power to shape" constitutions.[37] As Suzanna Sherry puts it, "[s]ince at least the time of the Legal Realists, lawyers, judges, and legal scholars have recognized that judges do make law, especially in cases that are difficult or ambiguous enough to require Supreme Court adjudication."[38] In sum, "[t]he insights of legal realism have important consequences for constitutional law. If legal doctrine can no longer be counted on to insulate judicial decisions from the normative preferences of the judges who render them, the constitutional law that is being announced by judges will ultimately be shaped by the normative values of the judges themselves."[39]

B. Balanced Realism and the Multifaceted Role of a Judge

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quartering."); Steven G. Calabresi, Text, Precedent, and the Constitution: *Some Originalist and Normative Arguments for Overruling* Planned Parenthood of Southeastern Pennsylvania v. Casey, 22 CONST. COMMENT. 311, 328 (2005) (stating that precedent should be given determinative weight in constitutional cases only where "the text is vague and all three branches of the federal government are content with" governing precedent).

[32] http://www.fed-soc.org/aboutus/page/board-of-directors

[33] Steven G. Calabresi & Livia Fine, Two Cheers for Professor Balkin's Originalism, 103 NW. U. L. REV. 663, 672 (2009).

[34] *Id.*

[35] *Id.* at 673. This reasonable-people-can-disagree point is even stronger with respect to constitutional principles, which are even less determinate than constitutional standards.

[36] Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1834 (2009) .

[37] *See* Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular." (internal citation omitted)).

[38] Suzanna Sherry, *The Four Pillars of Constitutional Doctrine*, 32 CARDOZO L. REV. 969, 974 (2011).

[39] Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709, 714 (2005).

To recap, it is a "truism that judges make law."[40] That "we are all realists now" is so thoroughly accepted as to be a cliche.[41]

Of course, this does not mean that each branch of government — legislative, executive and judicial — plays an equally large role in making law (as distinguished from applying and enforcing law). As noted above, the common law is an important realm for judicial lawmaking but whatever law judges make in this realm can be overturned by the other two branches, through enactment of a statute. And even when the other branches leave an area of lawmaking to the judiciary, the common law process tends to minimize the extent to which any individual judge's policy preferences become law. The common law evolves one case at a time and following precedent is the norm, so major changes in the common law tend to require sustained consensus of many judges across time.[42] In

[40] "Post-realist jurisprudence must depart from the truism that judges make law and begin instead with the question of how they make law." *See* Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 636 (1993).

[41] Leiter, *supra* note 25, at 267. *See also* Charles Gardner Geyh, S*traddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence*, 22 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 435, 438, 444 (2008) ("In an age when '[w]e are all legal realists now,' it is too late in the day to pretend that when judges adjudicate disputes between adversaries, both of whom support their positions with credible-seeming legal arguments, the value preferences of the judges never factor into the choices they make."); Thomas W. Merrill, *High-Level, "Tenured" Lawyers*, 61 LAW & CONTEMP. PROBS. 83, 88 (1998) ("We live in a post-Legal Realist Age, when most legal commentators take it for granted that law cannot be disentangled from politics and that legal judgment is driven by the political beliefs of the decisionmaker."); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985)("It is a commonplace that law is 'political.'"); Jerry Elmer, *Legal Realism, Legal Formalism and the D'Oench Duhme Doctrine: A Perspective on* R.I. Depositors Econ. Prot. Corp. v. NFD, 53 R.I. B.J. 9, 11 (2004) ("Today, we are all Legal Realists. Being Realists, we understand two things: that judges do make law, not just find it, and that public policy considerations may properly enter into a judge's deliberations."); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 169–212 (1992) (legal realism's most important legacy was its challenge to the notion that law has an autonomous role separate from politics); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 274 (1998) ("[T]he program of unmasking law as politics [was] central to American Legal Realism . . . .").

[42] Randy E. Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273, 286–87 (1987) ("The judicially-driven common law system develops substantive standards that are as much a product of collective wisdom as the statutory output of Congress, perhaps more. With the many real constraints a common law system places on judges, it is perhaps astounding that any evolution of law actually occurs, that creative judicial 'lawmaking' (beyond individual cases) exists at all. Maybe this is why the progress of the common law has sometimes seemed to be so painfully slow."); GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 4 (1982) ("The incremental nature of common law adjudication meant that no single judge could ultimately change the law, and a series of judges could only do so over time and in response to changed events or to changed attitudes in the people."); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 867 (2012) ("notwithstanding respect for precedent, common law courts reconsider prior precedents in response to changing needs or evolving norms; often, this occurs

contrast, major changes in statutory and regulatory law can occur quickly and this is especially likely to occur when the same political party gains control of the legislative and executive branches.[43]

Shifting our focus from common law cases to statutory and regulatory cases, we again see that realism about judicial lawmaking does not imply that the content of legal rules is determined as much by judges' policy preferences as by the policy preferences of those leading the other two branches of government. Judicial deference to the enactments of the legislative and executive branches is the norm[44] and judicial interpretation of these enactments generally occurs in the context of adjudicating a dispute that has already arisen between particular parties[45] so this fact-specific context tends to minimize the extent to which any individual judge's policy preferences become law.[46]

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gradually as prior decisions are distinguished and new decisions slowly accumulate until ultimately a high court announces a new rule"); Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 781 (2012) ("While common law decision-making proceeds incrementally … statutory change, though more difficult to achieve, can be avulsive")

[43] "Social scientists have found that important and noteworthy laws are far more likely to emerge when the same political party controls both Congress and the executive branch; a divided government, in contrast, impairs the lawmakers' ability to enact consequential law." Lee Epstein, Barry Friedman, & Nancy Staudt, *On the Capacity of the Roberts Court to Generate Consequential Precedent*, 86 N.C. L. REV. 1299, 1332 n.39 (2008).

Judge-made law can change significantly in the year or two following a change in the political party or interest group in control of the judicial branch. *See* Stephen J. Ware, Money, *Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 656–60 & n.78 (1999)(1998 shift in Alabama Supreme Court's majority from Democrats receiving campaign contributions primarily from plaintiffs' trial lawyers to Republicans receiving campaign contributions primarily from businesses "marked a major turning point. Cases that plaintiffs had previously won five-votes-to-four now turned into defendant victories by the same margin"); *id.* at 684 ("arbitration cases indicate that the court often splits along predictable, and highly partisan, lines. Justices whose campaigns are funded by plaintiffs' lawyers are all Democrats and oppose arbitration, while justices whose campaigns are funded by business are nearly all Republicans and favor arbitration. There is a strong correlation between a justice's source of campaign funds and how that justice votes in arbitration cases."); *id.* at 685 ("arbitration law in Alabama seems to have no doctrinal integrity that survives the vicissitudes of the interest group battle. This law is indeed politics, in a very real and direct sense. This law provides evidence for the strong strain of Legal Realism which 'contends that law is politics through and through and that judges exercise broad discretionary authority.'").

[44] *See supra* note 19.

[45] *See, e.g.*, George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. 1543, 1560, 1603–04 (2008); Paul Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 79, 91–92 (1998) ("A fundamental difference exists between judicial and legislative offices … because judges decide the rights and duties of individuals even when they are making policy").

[46] James B. Bean Distilling Co. v. Georgia, 501 U.S. 529, 549 (1991) (Scalia, J., concurring) ("I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense "make" law. But they make it as judges make it, which is to say as though they were 'finding' it-discerning what the law is, rather than decreeing what it is today changed to, or what it will

In sum, the realist truism that "judges make law" is very different from a claim that all judicial decisions consist entirely of the judge's political views. A "balanced realism," to use Brian Tamanaha's appealing label,[47] recognizes both that judges' policy preferences have little or no influence on many judicial decisions and that judges' policy preferences have a significant influence on other judicial decisions. Empirical studies tend to support this balanced view.[48] As

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tomorrow be. Of course this mode of action poses 'difficulties of a ... practical sort,' when courts decide to overrule prior precedent. But those difficulties are one of the understood checks upon judicial law-making; to eliminate them is to render courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three branches.")

[47] Brian Z. Tamanaha, *Balanced Realism on Judging*, 44 VAL. U. L. REV. 1243, 1258–59 (2010).

[48] As Charles Gardner Geyh summarizes, "influences on judicial decision-making are complex and multivariate." CHARLES GARDNER GEYH, WHAT'S LAW GOT TO DO WITH IT? 3 (2011). *Accord* Charles Gardner Geyh, *Can the Rule of Law Survive Judicial Politics?*, 97 CORNELL L. REV. 191, 206–14 (2012) (summarizing empirical studies of judicial behavior by political scientists and legal scholars). *See also* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1482 (2003) ("The weight of the empirical evidence clearly reveals some role for ideology in judicial decisionmaking. As Charles Songer and others have articulated, '[t]he general picture presented by these studies is clear: across a wide variety of courts and issue areas, Democratic judges are more likely to support the liberal position in case outcomes than their Republican colleagues.' The evidence for the political model is 'abundant and convincing.' But while the empirical evidence on the political model may conflict with the legal model, it is not so strong as to demonstrate that the legal model has no practical importance."); Ward Farnsworth, *Signatures of Ideology: The Case of the Supreme Court's Criminal Docket*, 104 MICH. L. REV. 67, 71 (2005) ("The better interpretation [of the data] is that every case provokes competition between a justice's preferences on the one hand and the legal materials on the other. When the legal materials are very strong, they can produce unanimity despite conflicting preferences. But when the legal materials aren't so strong—when they don't point to a clear answer and leave room for discretionary judgment—the competition is won by the justice's underlying preferences and views of the world."); Gregory C. Sisk & Michael Heise, *Judges and Ideology: Public and Academic Debates About Statistical Measures*, 99 NW. U. L. REV. 743. 771–72 (2005)("while the basic empirical finding that political ideology explains some of the variation among judges in reaching an answer in certain categories of court cases cannot be denied, neither should the influence of the ideological variable be overstated. Review of recent studies in terms of the actual margin of difference between judges of different political associations suggests the effect of this variable is more often moderate than large."); Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges on the United States Courts of Appeals*, 51 B.C. L. REV. 1133, 1143 (2010) ("Even the most ardent supporters of strategic and legal models of decision making acknowledge that a portion of decisions are best explained by ideology.")

Caution about empirical studies of judges' ideologies, attitudes and policy preferences is warranted because "[t]hese beliefs, like any other beliefs, are concealed inside the believer's head. … Because a judge's attitude can never be known to anyone but the judge, political scientists have had to use other data as proxies for 'attitude.' Such data include: party affiliation, background experiences and social characteristics, prior votes, speeches, and newspaper editorials." Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 648 (1999). Therefore, it is more careful to say that judges' rulings in a particular category of cases correlate with the judge's political party, for example, than with the judge's

Tamanaha puts it, "[i]n a well-functioning legal system, judges largely abide by and apply the law, there are practice-related, social and institutional factors that constrain judges and judges render generally predictable decisions consistent with the law."[49] However, it is equally true "that judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political views and personal biases."[50] Tamanaha explains that "the legal realists viewed judging in similarly balanced terms. They did not assert that judges routinely manipulated the law to produce desired outcomes."[51] As Judge Richard Posner notes, successful reconciliation of legal realism "with the undoubted fact that there is a fair degree of predictability" in the law occurred at least as long as ago as 1960.[52]

To reiterate, the realist truism that "judges make law" is very different from a claim that all judicial decisions consist entirely of the judge's political views. Perhaps most, or even all, judges usually succeed in subordinating their policy preferences to those of some other lawmaker, such as the legislature that enacted the relevant statute[53] or the higher court that decided the relevant case law precedents.[54] However, even if most cases are unaffected by the judge's political views, the standard, realist view that "judges make law" nevertheless rests

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ideology or policy preferences. *See generally* Joshua B. Fischman & David S. Law, *What is Judicial Ideology, and How Should We Measure It?*, 29 WASH. U. J.L. & POL'Y 133 (2009).

> different measures of ideology vary greatly in their ability to explain judicial voting, and ... the choice of one measurement approach over another can significantly influence the findings that scholars reach. If empirical scholarship involving the concept of judicial ideology is to realize its scientific potential or gain greater acceptance from a wider audience, those of us who produce such scholarship must learn both to speak clearly about what is meant by "judicial ideology," and to give careful thought to the methods that are employed to measure it.

Id. at 213-14. On the challenges of measuring case outcomes, see Tonja Jacobi & Matthew Sag, *Taking the Measure of Ideology: Empirically Measuring Supreme Court Cases*, 98 GEO. L.J. 1 (2009).

[49] Tamanaha, *supra* note 47, at 1258–59.

[50] *Id. See also* BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 6 (2010).

[51] *See also* Leiter, *supra* note 25, at 268 ("it is . . . quite misleading to think of Realism as committed to the claim that judges exercise 'unfettered' discretion"); *id.* at 273 ("the Realists, unlike [Critical Legal Studies] writers, did not generally view the law as 'globally' indeterminate, that is, as indeterminate in all cases. To the contrary, Realists were mainly concerned to point out the indeterminacy that exists in those cases that are actually litigated, especially those that make it to the stage of appellate review—a far smaller class of cases, and one where indeterminacy in law is far less surprising.").

[52] POSNER, *supra* note 9, at 213 (citing KARL LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960)).

[53] *See supra* note 19.

[54] *See infra* notes 61–62 and accompanying text.

securely on the premise that some judicial decisions — perhaps the "hard cases" (Ronald Dworkin[55]) or the "penumbral cases" (H.L.A. Hart[56]) — are, to some extent, affected by judges' political views.[57] Only someone far outside the mainstream of our country's 20th and 21st Century legal thought would seriously dispute that premise. "In a post-realist age," as Charles Gardner Geyh says, "the ideological orientation of judicial aspirants matters."[58]

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[55] Ronald Dworkin, Hard Cases, 88 HARV. L. REV. 1057, 1060 (1975) (defining "hard cases" as those in which "no settled rule dictates a decision either way").

[56] H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593 (1958).

> A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? . . . [T]he general words we use—like "vehicle" in the case I consider— must have some standard instance in which no doubts are felt about its application. There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.
> * * *
> We may call the problems which arise outside the hard core of standard instances or settled meaning "problems of the penumbra"; they are always with us . . .

Id. at 607.

[57] *See, e.g.*, Todd E. Pettys, *Judicial Retention Elections, The Rule of Law, and the Rhetorical Weaknesses of Consequentialism*, 60 BUFF. L. REV. 69 (2012).

> There are, of course, instances in which judges do little more than apply the plain requirements of the law, as when a case calls for the application of unambiguous thresholds (like ages and speed limits) or when a dispute plainly falls within a well-developed line of uncontested and homogeneous precedent. [In contrast,] matters like abortion, same-sex marriage, and the rights of criminal defendants [are] matters governed by legal texts whose open- ended wording is reasonably susceptible to competing interpretations. When the relevant legal texts speak at a high level of abstraction, or when the identification of the relevant legal texts is itself contested, judges must—by necessity—exercise interpretive discretion. This does not mean that judges are free to select any outcomes and rationales that suit their fancy. Rather, it means that in cases of the sort that are likely to trigger public controversy, there often are multiple ways in which a judge who conscientiously applies the interpretive conventions of the legal profession could resolve the given dispute.

Id. at 101–02 (internal quotation marks omitted). *See also* Adam M. Samaha, *On Law's Tiebreakers*, 77 U. CHI. L. REV. 1661, 1710 (2010) ("it is conventional wisdom to believe that many interpretive issues are resolved by conventional legal argument while a more difficult set of controversies—perhaps made unavoidable by selection effects in litigation—are influenced by judicial discretion or ideology.")

[58] Charles Gardner Geyh, *Judicial Selection Reconsidered: A Plea for Radical Moderation*, 35 HARV. J.L. & PUB. POL'Y 623, 638 (2012).

To put it another way, it is well established that judging has both a professional/technical side and a political/lawmaking side.[59] The professional/technical side may include applying to the facts of a case law made by someone other than the judge (e.g., a legislature,) as well as running a courtroom and so forth. But judging also involves lawmaking, the political side highlighted by the Legal Realists. "Just as it is one-sided to denigrate the technical, lawyerly side of judging by claiming that judges are simply 'politicians in robes,' it is also one-sided to denigrate the lawmaking side of judging by claiming that the political views of a judge are irrelevant to his or her job as a judge."[60]

The political/lawmaking side of judging looms larger, the higher the court. In other words, the extent to which (inevitable) judicial lawmaking allows judges to inject their political views into law rises, the higher the court. Trial judges play less of a lawmaking role than appellate judges, especially supreme court justices, simply because court systems are hierarchical and trial courts are at the bottom.[61] The legal rulings of trial courts can be reversed, de novo, by appellate courts.[62] In contrast, appellate courts are often the final word, as a practical matter, on issues of law. Appellate courts' common law rulings can be overturned by statute but

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[59] For this reason, "When discussing appointments to the Bench, we distinguish different kinds of desireable characteristics judges should possess. We value their knowledge of the law and their skills in interpreting laws and in arguing in ways showing their legal experience and expertise. We also value their wisdom and understanding of human nature, their moral sensibility, their enlightened approach, etc." JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 48 (1979)

[60] Ware, *supra* note 2, at 757 (citing David R. Stras & Ryan W. Scott, *Navigating the New Politics of Judicial Appointments*, 102 NW. U. L. REV. 1869, 1871 (2008) (describing "two popular narratives about the way Supreme Court Justices decide cases: one that treats Justices as neutral and nonpolitical 'umpires,' and another that views Justices as pervasively ideological 'politicians' in robes."); Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1419 (2003) (referring "to the cynical view that judges are merely 'Politicians in Judges' Robes'")). *See also* DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW 39 (2009) (rejecting "the 'if not the heavens, then the abyss' syndrome" in which judges are subject either to "complete constraint" or "boundless leeway").

[61] "Trial judges tend to confront more 'easy cases,' with less ideological contestation, than appellate judges do, and trial judges' decisions have less precedential impact. As a result, their opinions are somewhat less ideological than those of appellate courts." Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1481 n.162 (2003).

[62] *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S.Ct. 1740, 1752 (2011) ("Questions of law are reviewed de novo and questions of fact for clear error."); Estate of Holl v. C.I.R., 54 F.3d 648, 650 (10th Cir. 1995) ("Questions of law are subject to a de novo standard of review."); Bonin v. Vannaman, 929 P.2d 754, 775(Kan. 1996) ("This court may review questions of law with an unlimited de novo standard of review."); In re Marriage of Vandenberg, 229 P.3d 1187, 1195 (Kan. Ct. App. 2010) ("to the extent the parties' arguments require statutory interpretation, this court exercises unlimited review over such questions of law."); Randall H. Warner, *All Mixed Up About Mixed Questions*, 7 J. APP. PRAC. & PROCESS 101, 113 (2005) ("Questions of law are always for judges to decide and always reviewed de novo on appeal.").

enacting any legislation requires overcoming the inertia of a legislature with many issues competing for its attention. Similarly, overcoming that inertia is also needed to overturn judicial interpretations of statutes. This inertia point is even stronger with respect to judicial decisions interpreting constitutions. These decisions can be overturned, not by statute, but by constitutional amendment. Unless and until that burdensome process is completed, United States Supreme Court justices are the final word on the United States Constitution and state supreme court justices are the final word on their state constitutions.[63] In short, all appellate judges are, as one of them puts it, "occasional legislators"[64] and justices on our federal and state supreme courts are tremendously important and powerful lawmakers.

C. The Missouri Plan's Discomfort with Legal Realism

As just explained, all appellate judges are "occasional legislators" and justices on our federal and state supreme courts are tremendously important and powerful lawmakers. Accordingly, the democratic imperative to select lawmakers in a manner that respects the basic equality among citizens — the principle of one-person, one-vote — is especially strong with respect to the judges with the greatest lawmaking role, that is appellate judges, especially supreme court justices. Conversely, the Missouri Plan's discrimination against non-lawyers — its greater weighting of a lawyer's vote than another citizen's vote[65] — makes it an especially inappropriate way to select such judges.[66]

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[63] *See, e.g.*, Republican Party of Minn. v. White, 536 U.S. 765, 784 (2002) (Scalia, J.) ("Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well. Which is precisely why the election of state judges became popular." (internal citation omitted)).

[64] POSNER, *supra* note 9, at 81.

[65] *See supra* note 2 and *infra* notes 68–71 and accompanying text.

[66] *See* Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 CAP. U. L. REV. 455 (2002).

> [The Missouri Plan] was popular in numerous states in the twentieth century, but in its application to courts of last resort it is linked to a vision of judicial office that is technocratic and apolitical. Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.
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> As applied to highest state courts making decisions laden with political consequences, merit selection [the Missouri Plan] is therefore an increasingly difficult idea to sell, especially in an era in which the Supreme Court of the United States has undertaken so visibly to exercise such enormous political power and discretion with inconsistent regard for legal texts. The citizenry is quick to see that political power would be transferred from themselves to those who do the merit selecting. Despite the considerable advantages of merit

The victims of this discrimination, however, may not be troubled by the inappropriateness of the Missouri Plan for selecting lawmakers because they may not realize that it is being used to select lawmakers.[67] While most people likely would object to a lawyer's vote counting more heavily than a non-lawyer's vote in the selection of governors and legislatures, that is because most people know that governors and legislators are lawmakers. In contrast, many non-lawyers may not know that judges are lawmakers. Many non-lawyers may believe the myth that judges apply law made by others but do not, or at least should not, make law themselves. These non-lawyers may, therefore, believe that judges should be selected entirely on their professional competence and ethics and that assessments of these factors are best left to lawyers.

Thus lawyers defending the power advantage the Missouri Plan gives them over other citizens benefit from minimizing public awareness of the fact that judges inevitably make law. Regrettably, lawyers defending the Missouri Plan sometimes make their defense with published statements describing the judicial role in a way that omits the lawmaking part of that role. The following pages provide examples of such statements from the state whose version of the Missouri Plan goes farther than any other state supreme court selection process in discriminating against non-lawyers.

III. OMISSIONS OF JUDICIAL LAWMAKING IN KANSAS

> selection for selecting professional technicians who sit on lower courts, its time as a politically viable alternative to judicial elections has passed.

Id. at 469–70 (internal citations omitted). *See also* Michael R. Dimino, Sr., *Accountability Before the Fact*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 451, 451–52(2008)("Public involvement in the staffing of high courts is beneficial from a democratic perspective because of the greater discretion and policy-making authority exercised by high courts. Lower courts, by contrast, are more often bound by settled law, and the judges on such courts do not make policy to the extent that other courts do. As a result, there is less need for public involvement in the selection of lower-court judges, and such involvement may well be a negative influence if it encourages those judges to depart from the application of settled law."); Ware, *supra* note 2, at 768 ("the political/lawmaking side of judging is especially important for state supreme court justices because they are the final word on their state constitutions and common law. Accordingly, the case for democracy in judicial selection is at its strongest (and the case for elitism at its weakest) when the judges in question are supreme court justices because justices' lawmaking powers far exceed those of the 'professional technicians who sit on lower courts.'")

[67] Of course, non-lawyers may not even realize that the Missouri Plan discriminates against them, let alone that it discriminates against them in the selection of lawmakers. The discrimination of the Missouri Plan is concealed by those who describe the nominating commission as a body of "lawyers and non-lawyers," while omitting explanation of who selects these lawyers and non-lawyers.

Kansas gives the members of its bar more power than their fellow citizens in selecting the state's two appellate courts.[68] As in a handful of other states,[69] appellate judges in Kansas are selected in a Missouri Plan process that centers on a nominating commission some of whose members are picked in elections open only to lawyers.[70] This discrimination against non-lawyers — taken farther in

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[68] KAN. CONST. art. 3 § 5(E); KAN. STAT. ANN. §§ 20-119 to -125 (2006). For an overview of these provisions, s*ee* Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J. L. & PUB. POL'Y 386 (2008).

> The Supreme Court Nominating Commission is at the center of judicial selection in Kansas. When there is a vacancy on the Kansas Supreme Court, the Nominating Commission assesses applicants and submits its three favorites to the Governor. The Governor must pick one of the three nominees and that person is thereby appointed a justice on the Kansas Supreme Court, without any further checks on the power of the Commission. Therefore, the Commission is the gatekeeper to the Kansas Supreme Court. *The bar (lawyers licensed to practice in the state) has majority control over this gatekeeper. The Commission consists of nine members, five selected by the bar and four selected by the Governor.*

Id. at 386–87 & nn.1–4 (emphasis added).

[69] While individual state variations can make categorizing difficult, about forty states' highest courts are selected in broadly democratic ways: in contestable elections or through appointment largely controlled by democratically elected officials, typically the governor and legislature. *See* Ware, *supra* note 2, at 752–64; Brian Fitzpatrick & Stephen Ware, *How does your state select its judges?*, INSIDE ALEC (American Legislative Exchange Council, D.C.), March 2011, at 9. Other than Kansas, only eight states' highest courts are selected in a process that substantially departs from democratic principles to give a member of the bar significantly greater power than one of his or her fellow citizens. *See* ALASKA CONST. art. IV, §§ 5, 8 (nominating commission consists of seven members: chief justice, three lawyers appointed by governing body of the organized bar, three non-lawyers appointed by governor subject to confirmation by legislature); IND. CONST. of 1851, art. VII, §§ 9–10 (1970); IND. CODE ANN. §§ 33-27-2-2, -2-1 (LexisNexis 2007) (seven members: chief justice, three lawyers elected by members of bar, three nonlawyers appointed by governor); IOWA CONST. of 1857, art. V, § 16 (1962); IOWA CODE §§ 46.1-.2, .15 (2006) (fifteen members: chief justice, seven lawyers elected by members of bar, seven nonlawyers appointed by governor and confirmed by senate); MO. CONST. of 1945, art. V, § 25(a)–(d) (1976); MO. SUP. CT. R. 10.03 (seven members: one supreme court judge chosen by members of court, three lawyers elected by members of bar, three nonlawyers appointed by governor); NEB. CONST. of 1875, art. V, § 21 (1972); NEB. REV. STAT. ANN. §§ 24-801to 24-812 (LexisNexis 2007) (nine members: chief judge, four lawyers elected by members of bar, four nonlawyers appointed by governor); OKLA. CONST. art. VII-B, § 3 (fifteen members: six lawyers elected by members of bar, six nonlawyers appointed by governor and three nonlawyers selected by elected officials and/or other members); S.D. CODIFIED LAWS § 16-1A-2 (2007) (seven members: three lawyers appointed by president of bar, two circuit judges elected by judicial conference, and two nonlawyers appointed by governor); WYO. CONST. art. V, § 4; WYO. STAT. ANN. § 5-1-102 (2007) (seven members: chief justice, three lawyers elected by members of bar, three nonlawyers appointed by governor).

[70] *See supra* note 69. For arguments that these lawyer-only elections violate the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment, see Nelson Lund, *May Lawyers Be Given the Power to Elect Those Who Choose Our Judges? "Merit Selection" and Constitutional Law*, 34 HARV. J.L. & PUB. POL'Y 1043 (2011); Joshua Ney, Note, *Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?*, 49 Washburn L.J. 143 (2009). That constitutional issue was previously spotted by Richard E. Levy. Richard E. Levy,

Kansas than in any other state[71] — is often defended on the ground that appellate judging has no political/lawmaking dimension, but rather is a purely professional/technical activity. Therefore, (this faulty argument continues,) assessment of potential appellate judges ought to focus only on their professional competence and ethics, while disregarding their political views. In short, defenders of Kansas's current appellate court selection process often build their case on a foundation that crumbled about a century ago: the myth that judges do not make law.

For example, former Kansas Bar Association President Linda Parks describes the Kansas Supreme Court Nominating Commission, not as a body that selects lawmakers, but rather as a body "that discusses lawyers and their qualifications for a job about which lawyers know the most."[72] Ms. Parks goes so far as to analogize the role of Kansas lawyers in selecting appellate judges to the role of medical doctors in referring patients to other, more specialized, physicians. Parks says: "If you have a serious medical condition, you don't turn to a neighbor or a politician to find a specialist."[73] Similarly, why would you want appellate judges to be selected by your neighbors (in democratic elections[74]) or by politicians (in a form of indirect, representative democracy[75])? Democracy, Parks implies, is no more appropriate in selecting appellate judges than in selecting medical specialists.

Written Testimony of Richard E. Levy Before the House Agriculture Committee, State of Kansas, 42 U. KAN. L. REV. 265, 282 (1994) (discussing Hellebust v. Brownback, 42 F.3d 1331 (10th Cir. 1994), which held that Kansas's statutory procedure for electing members to the Kansas State Board of Agriculture violated the Equal Protection Clause).

[71] Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J. L. & PUB. POL'Y 392, 406–09 (2009).

[72] Linda S. Parks, *No Reform is Needed*, 77 J. KAN. B.A. 4 (Feb. 2008).

[73] *Id.*

[74] Nearly half the states use contestable elections to select their highest courts. Ware, *supra* note 68, at 389 & n.13. In some states, interim vacancies (that occur during a justice's uncompleted term) are filled in a different manner from initial vacancies. *See* AM. JUDICATURE SOC'Y, METHODS OF JUDICIAL SECTION, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state= (last visited Apr. 20, 2009). Several states that use elections to fill initial vacancies use nominating commissions to fill interim vacancies. *Id.*

[75] Senate confirmation of the executive's nominee has, for over two centuries, been the method by which federal judges are selected. U.S. CONST. art. II, § 2, cl. 2. Similarly, in a dozen states the governor nominates state supreme court justices, but the governor's nominee does not join the court unless confirmed by the state senate or similar popularly elected body. Ware, *supra* note 68, at 388–89 & nn.11–12. Confirmation is done by the state senate in Delaware, Hawaii, Maine, Maryland, New Jersey, New York, Utah and Vermont; by the entire legislature in Connecticut and Rhode Island; and by the governor's council in Massachusetts and New Hampshire. A thirteenth state, California, can be added. Its confirmation body is a three-person commission made up of the chief justice, attorney general and most senior presiding justice of the court of appeals in California. *Id.*

The major flaw in this analogy between appellate judges and physicians, of course, is that appellate judging is not just about professional expertise and ethics. It is also about lawmaking. As the first section of this article explained, we have known at least since the Legal Realists of the early 20th Century that judges not only apply law made by others, but also inevitably engage in lawmaking themselves. The job of an appellate judge, unlike the job of a medical doctor, involves making law. Fine for doctors, plumbers, hairdressers, and countless other occupations to be selected entirely on the basis of technical expertise, without any role for democracy. But in a society like ours, lawmakers should be selected democratically simply because the People are sovereign.[76]

The power of this point against judicial selection processes that violate a democratic society's basic equality among citizens — the principle of one-person, one-vote — may be lost on those who do not realize that *judicial* selection is *lawmaker* selection. So members of the Kansas bar defending their power advantage (over other Kansas citizens) in judicial selection benefit from minimizing public awareness of the fact that judges inevitably make law.

Ms. Parks is not the only lawyer defending the current Kansas appellate court selection process by publishing statements describing the appellate judge's role in a way that omits the lawmaking part of this role. Such statements have also been made by Kansas judges, sitting and retired,[77] who have not seen their judgeships as inhibiting them from advocating in that most political of arenas, the legislature. Most conspicuous in this regard may be the sitting chief judge of the Kansas Court of Appeals, Richard Greene, who chose to testify before the Kansas

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[76] When the lawmakers in question are judges, I prefer the indirect democracy of a senate confirmation appointment process to the direct democracy of contestable elections. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 772–74 (2009). See also Richard A. Posner, *Judicial Autonomy in a Political Environment*, 38 ARIZ. ST. L.J. 1, 3–5 (2006) (endorsing Joseph Schumpeter as "[t]he best theorist of our actual existing democratic system").

> The election of judges violates Schumpeter's conception of democratic rule. In that conception, the people vote only on the top officials, the ones who make the really consequential decisions, so that the people have some sense of whether those are the officials they want ruling them. The people are not busy monitoring the activities of the civil servants. That is not their function. They are not to waste their time trying to master issues and to figure out whether the dog catcher is catching enough dogs.
> . . .
> [T]he election of judges even at the state or local level is contrary to the core of Schumpeter's insight, which is that we do not want our citizens to spend their time trying to master technical issues of governance. That is not an efficient division of labor. Most of what courts do is opaque to people who are not lawyers. It is completely unrealistic to think that the average voter will ever know enough about judicial performance to be able to evaluate judicial candidates intelligently.

Id.

[77] *See infra* notes 85–86 and accompanying text.

Legislature against a bill that would have reduced the extent to which the state discriminates against non-lawyers in judicial selection.[78]

In opposition to that bill, Judge Greene also published a newspaper op-ed praising the current Kansas appellate court selection process. In doing so, he described this process — which selected him to the Court of Appeals — as a process designed "to ensure that only the best and brightest were selected to the Court of Appeals."[79]

"Kansas enjoys one of the best intermediate appellate courts in the nation," the chief judge of that court informs us.[80] The high quality of the Kansas Court of Appeals, Judge Greene says, is due to the nominating commission's focus on prospective judges' "merit," rather than their politics. In fact, Judge Greene asserts that judges' politics are "of no relevance."[81] He says Kansans need "judges whose sole allegiance is to the applicable law of our state, as well as our state and federal constitutions."[82]

Yes, of course judges' allegiance should be to the law, including our state and federal constitutions. But that allegiance does not ineluctably guide the judge to make a particular choice among various reasonable interpretations of a vague or ambiguous constitutional or statutory provision. Judge Greene does not acknowledge the reality that reasonable people of good faith, including judges, can disagree about the best interpretation of such provisions and therefore the best result of the particular case. Judge Greene does not acknowledge the reality that the first section of this article showed has been "deeply rooted" for generations

[78] The bill, HB 2101, would have eliminated such discrimination with respect to the Kansas Court of Appeals but left it in place with respect to the Kansas Supreme Court.

[79] Judge Richard D. Greene, Don't politicize judicial appointment system, Feb. 24, 2011 http://www.kansas.com/2011/02/24/1733731/dont-politicize-judicial-appointment.html#ixzz1ZCLAP7wA

[80] *Id.*

[81] *Court of appeals judges appointed by the governor, confirmed by the Senate; eliminating the nominating commission for the court of appeals: Hearing on HB 2101before H. Comm. on Judiciary,* 2011 Leg. (Ks. 2011) (written testimony of Chief Judge Richard D. Greene, at ¶ 11) ("Judges should be chosen based on the criteria set forth in K.S.A. 20-3004 to bring intelligent, experienced, well-reasoned, and impartial justice to every case before them. Their politics — their allegiance to a Governor or to the Senate — are not only of no relevance, but should never take the front seat to merit based qualifications.") The false dichotomy between "politics" and "merit" in judicial selection is discussed *infra* Section IV. http://www.kansas.com/2011/02/24/1733731/dont-politicize-judicial-appointment.html#ixzz1ZCLAP7wA.

[82] Judge Richard D. Greene, Don't politicize judicial appointment system, Feb. 24, 2011 http://www.kansas.com/2011/02/24/1733731/dont-politicize-judicial-appointment.html#ixzz1ZCLAP7wA

now — that judicial interpretation of constitutional and statutory ambiguities necessarily involves judgments of policy by the court.[83]

And what of the common law, which goes unmentioned in Judge Greene's anti-realist argument that judges' politics are "of no relevance"?[84] He says "[w]e need . . . judges who will fairly and impartially interpret and apply Kansas law without regard to political ideology."[85] Can this description of the judicial role account for the way the common law is made and by whom it is made? Judge Greene does not acknowledge the existence of the common law, let alone the fact that judges make it, not just "interpret and apply" it. In sum, the chief judge of one of Kansas's two appellate courts publicly describes the role of an appellate judge in a way that omits the lawmaking part of that role.

Like Judge Greene, other defenders of the current Kansas appellate court selection system similarly ignore about a century of legal realism to assert the irrelevance of judges' political views[86] and the absence of judicial lawmaking.[87] A particularly striking example of anti-realism, by Kansas District Court Judge Janice D. Russell, says that judges research to "reveal what the law is" and then simply "must follow the rule of law in deciding cases."[88] According to Judge Russell:

> courts are fair and impartial only when they unflinchingly apply the rule of law to their cases. Application of the rule of law requires knowledge of the law; this requires the willingness and ability to research caselaw and statutes, which reveal what the law is. These abilities are essential for every level of the legal

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[83] *See supra* Section I.

[84] *See supra* note 81.
http://www.kansas.com/2011/02/24/1733731/dont-politicize-judicial-appointment.html#ixzz1ZCLAP7wA.

[85] Judge Richard D. Greene, Don't politicize judicial appointment system, Feb. 24, 2011
http://www.kansas.com/2011/02/24/1733731/dont-politicize-judicial-appointment.html#ixzz1ZCLAP7wA

[86] Retired Kansas Supreme Court Justice Fred Six says of his colleagues on both of the Kansas appellate courts:
"We served on the Court as judges, not as Republicans or Democrats." *Court of appeals judges appointed by the governor, confirmed by the Senate; eliminating the nominating commission for the court of appeals: Hearing on HB 2101before H. Comm. on Judiciary,* 2011 Leg. (Ks. Feb. 16, 2011) (written testimony of Justice Fred N. Six (ret.), at 4). *See also Court of appeals judges appointed by the governor, confirmed by the Senate; eliminating the nominating commission for the court of appeals: Hearing on HB 2101before H. Comm. on Judiciary,* 2005 Leg. (Ks. Feb. 21, 2005) (written testimony of Justice Fred N. Six (ret.), at 6-3) (substantially the same testimony).

[87] *Court of appeals judges appointed by the governor, confirmed by the Senate; eliminating the nominating commission for the court of appeals: Hearing on HB 2101before H. Comm. on Judiciary,* 2011 Leg. (Ks. Feb. 16, 2011) (written testimony of Eugene Balloun, Kansas Association of Defense Counsel, at 2) (we want judges to "make principled decisions based only on the law and the facts of the case").

[88] Janice D. Russell, *The Merits of Merit Selection*, 17 KAN. J.L. & PUB. POL'Y 437, 441 (2008).

> system from the lawyers to the judges. Lawyers therefore are in a better position than any other group of people to determine which applicants possess the proper combination of professional knowledge, skill, integrity, and work ethic to carry out the duties of a judge.
>
> Judges from municipal courts right up through the Supreme Court must follow the rule of law in deciding cases.[89]

In what sense "must" the Supreme Court do *anything* in deciding cases? As noted above, unless and until the burdensome process of constitutional amendment is completed, U.S. Supreme Court justices are the final word on the U.S. Constitution and state supreme court justices are the final word on their state constitutions.[90] And, of course, this includes the power to hold unconstitutional laws enacted by the other two branches of government. These basic realities are notably absent from Judge Russell's description of the judicial role. Also absent are the more mundane realities of judges inevitably making law in their choices among various reasonable interpretations of vague or ambiguous statutory provisions and their choices among various possible common law rules.[91]

Examples of mundane these realities follow. They get beyond headline-grabbing cases and the oft-studied Supreme Court of the United States to identify and analyze the judicial lawmaking embedded in the routine work of state's court system, the sort of judicial work that weaves most of the threads in the fabric of law.

IV. EXAMPLES OF JUDICIAL LAWMAKING IN KANSAS

A. Kansas Supreme Court

This section consists of examples of lawmaking by Kansas judges. The first subsection consists of several examples from the Kansas Supreme Court and the second subsection consists of several examples from the Kansas Court of Appeals.

1. Workers Compensation

A crystal clear case of lawmaking by the Kansas Supreme Court is a workers compensation case, *Coleman v. Armour Swift-Eckrich*.[92] As the court's opinion by Justice Beier explained,

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[89] Janice D. Russell, *The Merits of Merit Selection*, 17 KAN. J.L. & PUB. POL'Y 437, 441 (2008).
[90] *See supra* note 63 and accompanying text.
[91] *See supra* Section I.
[92] 130 P.3d 111 (Kan. 2006).

> The pertinent facts are simple and undisputed. While waiting for the start of a meeting required by her employer, Armour Swift-Eckrich, Coleman sat on a chair with rollers, with her feet propped up on another chair. A coworker came up behind Coleman, took hold of the back of her chair, and dumped her out of it and onto the floor. The fall injured her back. There was no ill will between Coleman and her coworker, nor had Coleman done anything to provoke or encourage him. There was no evidence that such horseplay was common at Armour Swift-Eckrich or that the company had in some way condoned the coworker's actions.[93]

Was Coleman entitled to Workers' Compensation? Not under Kansas law as it stood at the time of this 2006 case. As Justice Beier's opinion for the court candidly acknowledged, "Armour Swift-Eckrich is correct that our precedent dealing with situations similar to Coleman's is clear and, if adhered to, would deny her relief."[94]

So Coleman would clearly lose this case if, as the above quote from Kansas Judge Russell argues, judges merely research to "reveal what the law is" and then simply "must follow the rule of law in deciding cases."[95] Under this unrealistically narrow description of judging, the *Coleman* case would end in a simple ruling for the defendant. If judges do not engage in lawmaking — as Judge Russell, Judge Greene and the other Kansas lawyers quoted in section II argue — then Coleman would clearly lose this case. As Justice Beier said, "The rule is clear, . . .: An injury from horseplay does not arise out of employment and is not compensable unless the employer was aware of the activity or it had become a habit at the workplace."[96] A clear rule like this — according to Judge Greene's narrow description of the judicial role quoted above — compels a court to "apply [that] rule without regard to political ideology."[97]

But this is not, in fact, what Justice Beier and her colleagues on the Kansas Supreme Court did. Rather they did what Kansas Judges Greene and Russell say never happens. Justice Beier and her colleagues engaged in lawmaking. They changed the legal rule from one contrary to their ideologies to one consistent with their ideologies.

Justice Beier's opinion doing this started by criticizing the old rule, while acknowledging that it was, in fact, the rule prior to her opinion by which the Supreme Court made new law. Here again is the above quote from *Coleman,* but now with the formerly omitted words restored and italicized: "The rule is clear*, if a bit decrepit and unpopular*: An injury from horseplay does not arise out of

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[93] *Id.* at 112.
[94] *Id.* at 114.
[95] Janice D. Russell, *The Merits of Merit Selection*, 17 KAN. J.L. & PUB. POL'Y 437, 441 (2008)
[96] *Coleman*, 130 P.3d at 114.
[97] *See supra* note 85.

employment and is not compensable unless the employer was aware of the activity or it had become a habit at the workplace."[98]

Who decided that this rule is "decrepit and unpopular" and so should be changed? Was it the Kansas Legislature? No, it was the Kansas Supreme Court. It was judges, not legislators, who decided that this legal rule was bad policy. It was judges, not legislators, who changed the law to bring it in line with what the lawmaking judges thought was good policy. As Justice Beier candidly stated:

> Coleman cannot prevail on this appeal unless we are willing to do now what this court was unwilling to do … in 1946: Reevaluate the wisdom of the horseplay rule. Sixty years later, we think it is time to do so.
>
> Coleman is correct that the climate has changed since [an earlier case] was decided. The Kansas rule, once in the clear majority [around the country], is now an anachronism.
>
> Courts of last resort, such as this one, are not inexorably bound by their own precedents. They follow the rule of law established in earlier cases unless clearly convinced that the rule was originally erroneous *or is no longer sound*. State v. Marsh, 278 Kan. 520, Syl. ¶ 23, 102 P.3d 445 (2004). We are clearly convinced here that our old rule should be abandoned. *Although appropriate for the time in which it arose, we are persuaded by the overwhelming weight of contrary authority in our sister states and current legal commentary*.[99]

Contrary to Judge Russell's anti-realist statement quoted above, Justice Beier acknowledges that nothing tells "courts of last resort"[100] what they "must"[101] do in deciding cases. Rather than being compelled to "follow the rule of law," as Judge Russell claims, Justice Beier rightly says the Kansas Supreme Court may change the state's common law if the judges on this court believe some aspect of that law "is no longer sound."[102] Those sitting on the Kansas Supreme Court, like judges sitting on other states' high courts, make common law based on what they are "persuaded" is "appropriate for the time."[103]

Those are the words of a unanimous opinion of the Kansas Supreme Court and they are not earth-shattering. They are merely describing something virtually every lawyer has seen since the first year of law school. State supreme courts make common law based on what they are persuaded is appropriate for the time. Changing the law is what state supreme courts do with common law rules they believe to be "decrepit and unpopular." They overturn the decrepit and unpopular

[98] *Coleman*, 130 P.3d at 114.
[99] *Id.* at 115 (emphasis added).
[100] *Id.* at 116.
[101] *Id.* at 115.
[102] *Id.*
[103] *Id.* at 116.

old law and make new law, which they believe will be more in keeping with contemporary society. This lawmaking by state supreme courts is not always done as openly as it was by the Kansas Supreme Court in *Coleman*, but it is done from time to time. It is part of the job. We have known this at least since the legal realists of the early 20th Century.

2. Product Liability

The *Coleman* opinion may be one of the clearest examples of Kansas judges making common law because of the duality of the court's choice: whether to keep or reject an existing rule. In contrast, legal rules are not always so "black or white," but often more like "shades of gray." That is, courts sometimes make law, not by changing a legal rule to its polar opposite in a single case, but rather by changing it gradually over several cases, spread over many years.[104] Product liability law is an example of this incremental judicial lawmaking in Kansas, as it is in other states.

Must a product liability plaintiff prove the defendant's negligence in order to recover? No, the Kansas Supreme Court held in *Brooks v. Dietz*,[105] which brought strict products liability into Kansas law. The *Brooks* court deemed "correct" the assertion that it had "never explicitly adopted the doctrine of strict liability,"[106] but pointed out that it had "for years recognized something closely akin to strict liability in the food and body preparation cases."[107] Continuing this history, the *Brooks* court said: "In recent years we have gone beyond the 'food and body preparation' cases and have held manufacturers and sellers strictly liable for other dangerously defective products."[108] *Brooks* then endorsed what it rightly called the "seminal" case of *Greenman v. Yuba Power Products, Inc.*[109] This California case, according to the Kansas Supreme Court, "recognized that liability for damages resulting from putting in commerce a dangerously defective product is not the result of contract but, like other tort liability, is imposed by public policy."[110]

Yes, "public policy," indeed. Public policy as determined by a California court, which (along with other factors) persuaded courts elsewhere in the country,

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[104] *See* Widiss, *supra* note 42, at 867 ("notwithstanding respect for precedent, common law courts reconsider prior precedents in response to changing needs or evolving norms; often, this occurs gradually as prior decisions are distinguished and new decisions slowly accumulate until ultimately a high court announces a new rule").
[105] 545 P.2d 1104 (Kan. 1976) ("We have concluded the time has come for this court to adopt the rule of strict liability").
[106] *Id.* at 1107–08.
[107] *Id.* at 1107.
[108] *Id.*
[109] 377 P.2d 897 (Cal. 1963).
[110] *Brooks*, 545 P.2d 1104, 1108.

including the Kansas Supreme Court, to change their states' laws to adopt this policy as well. In *Brooks*, the Kansas Supreme Court recounts the history of Kansas product liability law changing, incrementally, through a series of judicial decisions. It is a very typical story of how judges make the common law. And it is a story, told by the highest judges in Kansas, of how their court made an important part of the common law of Kansas.

Adopting strict liability was not the end of the Kansas Supreme Court's lawmaking role in product cases. I will not mention all the twists and turns but note only two. First, in a case alleging defective design of a product, can a manufacturer be liable for a danger that is "open or obvious"? Yes, according to the Kansas Supreme Court decision in *Siruta v. Hesston Corp.*[111] This ruling was reaffirmed 17 years later in *Delaney v. Deere and Co.*,[112] which acknowledged that "the open and obvious rule barring recovery in a design defect case" was "still recognized in a few jurisdictions."[113] In other words, *Siruta*'s rejection of the "open and obvious" rule barring recovery was a lawmaking choice by the Kansas Supreme Court. It had the option to retain that legal rule — as some other states' courts had done — but it chose to reject that rule.

The *Delaney* court continued the Kansas Supreme Court's role in making product liability law as *Delaney* held that in a design-defect case the plaintiff is not required to show evidence of a reasonable alternative design. The court chose this rule, while acknowledging that a few states chose the opposite rule.[114] In choosing how to make Kansas law on this subject, the court relied in part on a law review article in which the author "states that the reasonable alternative design requirement is not supported by public policy or economic analysis."[115]

In short, *Delaney* is yet another example of judges making law based on what they think is good policy. *Delaney* and these other product liability cases are examples of high court judges making law based on what they are persuaded is, as Justice Beier put it, "appropriate for the time."[116] Although these product cases may have been more gradual than *Coleman*, (the workers compensation case), they are similarly solid examples of the Kansas Supreme Court *making* law, not just applying or interpreting it. Thus they stand in refutation of descriptions (quoted in section II) of a judge's role that omit the lawmaking part of that role.

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[111] 659 P.2d 799, 806 (Kan. 1983).
[112] 999 P.2d 930 (Kan. 2000).
[113] *Id.* at 939.
[114] *Id.* at 946 (citing Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Products Liability Design Defects-A Survey of the States Reveals a Different Weave*, 26 U. MEM. L.REV. 493 (1996)).
[115] *Id.* at 942.
[116] *See supra* note 99 and accompanying text.

A few more brief examples of lawmaking by the Kansas Supreme Court follow.

3. Parolees

Does the state have a legal duty to control the conduct of parolees to prevent harm to other persons or property? When the Kansas Supreme Court confronted this question in *Schmidt v. HTG, Inc.*, it noted a split of authority in other states.[117] For example, a Washington court held that, yes, "a parole officer takes charge of the parolees he or she supervises despite the lack of a custodial or continuous relationship" and this had the effect of imposing liability on the state.[118] However, the Kansas Supreme Court "reject[ed]" this rule and said "The better-reasoned and more logical approach is that taken in [a Virginia case] which held that state parole officers did not take charge"[119] of a parolee in the relevant sense.

So Kansas law on this topic (as in the workers compensation and product liability examples above) was made, not by the legislative or executive branches, but by the judges on the Kansas Supreme Court. In *Schmidt*, (as in the workers compensation and product liability cases above,) the lawmaking judges did not pretend that they were compelled by the legislature or anyone else to choose one possible legal rule over another possible legal rule. Instead, the judges decided which view was "better-reasoned" and then made that view the law.

4. Malpractice Actions Against Criminal-Defense Attorneys

May a convicted criminal defendant pursue a legal malpractice action against his criminal-defense attorney without first obtaining any post-conviction relief? No, he may not, the Kansas Supreme Court held in *Canaan v. Bartee*,[120] adopting what is known as the "exoneration rule."[121] In so holding, the Kansas Supreme Court acknowledged that it was making law. The *Canaan* court said that "Whether a plaintiff must be exonerated in postconviction proceedings before bringing a legal malpractice action against his criminal defense attorney is an issue of first impression in Kansas."[122] The court discussed earlier Kansas cases and concluded that they did not resolve the issue: "Thus, we are left to decide

[117] 961 P.2d 677 (Kan. 1998).
[118] *Id.* at 686–87.
[119] *Id.*
[120] 72 P.3d 911, 914–21 (Kan. 2003).
[121] *See generally* Amy L. Leisinger, *A Criminal Defendant's Inability to Sue His Lawyer for Malpractice: The Other Side of the Exoneration Rule* (Canaan v. Bartee, 72 p.3d 911 (Kan. 2003)), 44 WASHBURN L.J. 693, 706–09 (2005).
[122] *Canaan*, 72 P.3d at 914.

whether we will apply the exoneration rule in legal malpractice actions in Kansas."[123]

The *Canaan* court reviewed decisions from courts around the country and noted that most adopted the exoneration rule but some did not. The court also summarized what it candidly called "Policy Reasons Behind the Exoneration Rule."[124] The *Canaan* court's punchline was: "After consideration of these authorities, the varying policy justifications, and the shortcomings of the various approaches, we find the majority view persuasive. We hold that before Canaan may sue his attorneys for legal malpractice he must obtain postconviction relief."[125]

Who considered "varying policy justifications" in deciding what Kansas law should be? Was it the Kansas Legislature? No, it was the judges on the Kansas Supreme Court did. As in all the examples discussed above, when it comes to the exoneration rule Kansas law is what it is because high court judges chose for that to be law based on what they considered "persuasive."

5. Negligence Per Se

An important tort law doctrine is negligence per se. As the Kansas Court of Appeals said in *Shirley v. Glass*,[126]

> the doctrine of negligence per se in Kansas differs from the negligence per se recognized in other states.
> …
> In Kansas, the doctrine of negligence per se ... recognizes the creation of an individual cause of action from a criminal statute or administrative regulation. An individual cause of action does not arise from every statute or regulation, but only from those which were enacted or promulgated with legislative intent to create an individual cause of action as opposed to a statute or regulation intended merely to protect the safety or welfare of the public at large. In every other state, the doctrine refers to the judicial process in negligence actions of taking a specific standard of care from a criminal statute or ordinance or from an administrative regulation that is in fact silent about issues of civil liability.[127]

Who were the Kansas lawmakers who made this aspect of Kansas law different from the law of other states? The judges on the two Kansas appellate courts.[128]

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[123] *Id.* at 915.
[124] *Id.* at 916.
[125] *Id.* at 921.
[126] 241 P.3d 134 (Kan. Ct. App. 2010).
[127] *Id.* (quoting William E. Westerbeke & Stephen R. McAllister, *Survey of Kansas Tort Law: Part I*, 49 U. KAN. L. REV. 1037, 1053 (2001)).
[128] Such as the judges who decided *Pullen v. West*, 92 P.3d 584 (Kan. 2004), and *Estate of Pemberton v. John's Sports Center, Inc.*, 135 P.3d 174 (Kan. Ct. App. 2006).

That this lawmaking is done by the Kansas Supreme Court was recognized by Kansas Court of Appeals Judge Malone who acknowledged that "in order to recover under negligence per se in Kansas, the plaintiff must establish that the legislature intended to create an individual right of action arising from the violation of a statute."[129] But Judge Malone went on to criticize this law and asked the Kansas Supreme Court to change it:

> There is no rational basis for requiring a party to establish that the legislature intended to create an individual right of action to recover under negligence per se. The Kansas Supreme Court should reevaluate this requirement. At the very least, the court should reevaluate the two-part test used in Kansas in determining whether a private right of action is created.[130]

Why did Judge Malone ask the Kansas Supreme Court, rather than the Kansas Legislature, to change this law? Because Judge Malone knows that the legislature is not the only lawmaker. Judge Malone knows that judges make law too, and that a state supreme court is an especially powerful lawmaker. In short, Judge Malone acknowledged legal realism. Unlike the Kansas judges quoted in section II of this article, Judge Malone did not make the anti-realist claims that judges just "interpret and apply"[131] law made by others or that judges research to "reveal what the law is" and then simply "must follow the rule of law in deciding cases."[132] Judge Malone acknowledged that the Kansas Supreme Court makes the law on negligence per se. The Kansas Supreme Court does not merely "follow" the law or "interpret" the law or "apply" the law; it "makes" the law.

In fact, Judge Malone explained that the Kansas Supreme Court had already made the law on negligence per se by choosing the legal rule Judge Malone prefers and then the Kansas Supreme Court changed the law on negligence per se by choosing the rule Judge Malone opposes.[133] In a 1971 case,[134] the Kansas Supreme Court did not require a negligence-per-se plaintiff to establish that the legislature intended to create an individual right of action. But then in later cases, the Kansas Supreme Court imposed this requirement.[135] According to Judge Malone, the Kansas Supreme Court made the law on negligence per se. Then the Kansas Supreme Court re-made the law on negligence per se. And in the recent case of *Shirley v. Glass*, Judge Malone asks the Kansas Supreme Court to re-make the law on negligence per se again.

6. Uniform Commercial Code

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[129] *Shirley*, 241 P.3d at 158 (Malone, J., concurring).
[130] *Id.* at 161.
[131] *See supra* text accompanying note 85.
[132] Janice D. Russell, *The Merits of Merit Selection*, 17 KAN. J.L. & PUB. POL'Y 437, 441 (2008)
[133] *Shirley*, 241 P.3d at 158 (Malone, J., concurring).
[134] Noland v. Sears, Roebuck & Co., 483 P.2d 1029 (Kan. 1971).
[135] *Shirley*, 241 P.3d at 158-59 (Malone, J., concurring).

All the above examples of lawmaking by the Kansas Supreme Court might be characterized as common law, rather than statutory law. But the Kansas Supreme Court makes law in its interpretation of statutes as well. An example of such a statute is the Kansas Uniform Commercial Code. Several sections of this statute were interpreted by the Kansas Supreme Court in *Wachter Management Co. v. Dexter & Chaney, Inc.*,[136] which involved the following facts:

- A software company in the State of Washington (DCI) sought to sell software to a construction company in Kansas (Wachter).
- "After detailed negotiations, DCI issued a written proposal to Wachter … for … installation of the software, a full year of maintenance, and a training and consulting package."
- "An agent for Wachter signed DCI's proposal."
- DCI shipped the software and assisted Wachter in installing it on Wachter's computer system.
- Enclosed with the software, DCI included a software licensing agreement, also known as a "shrinkwrap" agreement, which provided (among other things) that any disputes would be resolved by courts in Washington.

The Kansas Supreme Court held that the parties' contract did not require that disputes be resolved by Washington courts. In reaching this conclusion, the court interpreted the Kansas Uniform Commercial Code (UCC) as providing that a contract was formed when Wachter's agent signed DCI's proposal,[137] so the later delivery of the shrinkwrap agreement made the shrinkwrap agreement an offer to modify an existing contract. That offer was never accepted by Wachter, the Kansas Supreme Court said, so the original contract (with no terms on where disputes would be resolved) continued to state the parties' rights and duties.[138]

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[136] 144 P.3d 747 (Kan. 2006).

[137] *Id.* at 751.

> DCI's proposal requested Wachter to accept its offer to sell Wachter software by signing the proposal above the words "[p]lease ship the software listed above." Accordingly, Wachter accepted DCI's offer to sell the software to it by signing the proposal at Wachter's office in Lenexa. Thus, a contract was formed when Wachter accepted DCI's offer to sell it the software, indicating agreement between the parties.

Id.

[138] "Proposed amendments that materially alter the original agreement are not considered part of the contract unless both parties agree to the amendments. UCC 2-209 requires express assent to the proposed modifications." *Id.* at 752 (citations omitted). "DCI argues that Wachter expressly consented to the shrinkwrap agreement when it installed and used the software rather than returning it. However, continuing with the contract after receiving a writing with additional or different terms is not sufficient to establish express consent to the additional or different terms." *Id.*

In contrast, a dissenting opinion by Justice Luckert argued that the parties' contract required that disputes be resolved by Washington courts because the UCC should be interpreted as providing that Wachter's acceptance of DCI's proposal included acceptance of the license. Justice Luckert wrote:

> I disagree with the majority's analysis that the license agreement was a modification of the contract. Rather, the original offer included the license or, at least, expressed the intent of the parties that a license was a part of the offer. Wachter assented to and accepted these terms by its conduct.
>
> DCI's letter transmitting the proposal notified Wachter that "[t]he proposal includes modules and licenses." Wachter did not question, object to, or offer an alternative to the proposal. Instead Wachter signed the proposal, thus accepting the offer which included licenses.[139]

Importantly, Justice Luckert's dissent cited and analyzed two sections of the Kansas UCC, § 2-204 and § 2-209,[140] and these two sections were also among those cited and analyzed by the majority opinion.[141] In short, both majority and dissent were interpreting the same statutory language but they came to different conclusions about the law.

This is not shocking. As the first section of this article explained, the language of statutory and constitutional provisions is sometimes vague or ambiguous. Such provisions do not compel a single result in each case that might arise, as reasonable people can disagree about the best interpretation of the provisions and therefore the best result of the particular case. "The legal realists saw the interpretation of statutory ambiguities as necessarily involving judgments of policy and principle. They insisted that when courts understand statutes to mean one thing rather than another, they use judgments of their own, at least in genuinely hard cases."[142]

This case, *Wachter*, was a genuinely hard case. Confirming this, both the majority and dissent were able to cite cases from other jurisdictions interpreting the same statutory language in other states' versions of the UCC.[143] Just as this

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[139] *Id.* at 755 (Luckert, J., dissenting).
[140] *Id.* at 756.
[141] *Id.* at 755.
[142] Sunstein, *supra* note 28, at 2591.
[143] The majority cited *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 98 (3d Cir.1991) (refusing to uphold a shrinkwrap license agreement as an amendment to the parties' contract); *Arizona Retail Systems v. Software Link*, 831 F. Supp. 759, 764 (D. Ariz. 1993) (concluding that a software company could not unilaterally change the terms of a preexisting contract by including a shrinkwrap license agreement with the software when it shipped); *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1341–42 (D. Kan. 2000) (denying the application of an arbitration clause contained in a form with standard terms packaged inside a computer box); *United States Surgical Corp. v. Orris, Inc.*, 5 F. Supp. 2d 1201, 1206 (D. Kan. 1998) (rejecting "single use only" language on the packaging because there was no evidence that the parties agreed

statutory interpretation split the Kansas Supreme Court, it similarly split judges elsewhere in the country. In some parts of the country the law is that a shrinkwrap license is part of the original contract and thus enforceable, while in other parts of the country the law is that a shrinkwrap license is not part of the original contract so it is only enforceable if the parties modify their original contract to include the license.[144] The same statutory language around the country results in different law because different judges have made different law while interpreting the same statutory language.

This is no more surprising than the aforementioned examples of judges making the common law. Judges making law in interpreting statutes is also inevitable and routine. It is simply part of what judges do.

Interestingly, three members of the Kansas Supreme Court dissented from *Wachter*. Justices Nuss and Beier joined Justice Luckert's dissenting opinion. So it was a 4-3 decision. Had one more member of the court been persuaded by the dissent's interpretation of the UCC then that interpretation would have become Kansas law. This shows the lawmaking power of each individual appellate judge. Just as a single state legislator's vote can mean the difference between a state's law including one rule or another, so a single judge's vote can mean the difference between a state's law including one rule or another.[145]

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on this limitation in the contract), while the dissent cited *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149–50 (7th Cir.), cert. denied 522 U.S. 808, 118 S.Ct. 47, 139 L.Ed.2d 13 (1997); *ProCD, Inc. v. Zeidenberg,* 86 F.3d at 1452–53; *Brower v. Gateway 2000*, 246 A.D.2d 246, 250–51, 676 N.Y.S.2d 569 (1998); and *Mortenson Co. v. Timberline Software*, 140 Wash.2d 568, 583–84, 998 P.2d 305 (2000).

[144] *See supra* note 143.

[145] *See also* State v. Marsh, 102 P.3d 445 (Kan. 2004).

> In State v. Kleypas, 272 Kan. 894, 40 P.3d 139 (2001), [this court] unanimously upheld the constitutionality of K.S.A. 21–4624(e). Now, without any intervening change in substantive law, the majority opinion overrules Kleypas, not because the statute as construed is unconstitutional, but because the majority decides the Kleypas court exceeded its judicial authority in construing the statute. Kleypas was a 4 to 3 decision, consisting of a majority opinion and two written dissents. None of the three opinions took the position that the Kansas death penalty law must be struck down as constitutionally impermissible. The majority opinion upheld the law with an extremely minor judicial construction relative to equipoise, with the three dissenters upholding the law as written. In the case before us, another 4 to 3 decision, the majority concludes the death penalty is fatally flawed and rejects the majority's action in Kleypas which remedied the perceived equipoise flaw. There has been no change in relevant constitutional law as expressed by the United States Supreme Court. The only change has been the composition of the Kansas Supreme Court occasioned by the retirements of Justices Larson, Six, Lockett, and Abbott. While fidelity to the doctrine of stare decisis is not an "inexorable command," we should be highly skeptical of

B. Kansas Court of Appeals

The cases just discussed show that the Kansas Supreme Court (like any other state's high court) inevitably makes law. This might be conceded by Kansas Court of Appeals Chief Judge Greene (quoted in section II) but he might say that he was only talking about his intermediate court when he described judges who merely "interpret and apply" the law, rather than make the law.[146] He might concede that judges on the Kansas Supreme Court are lawmakers but reiterate his claim that judges on the Kansas Court of Appeals are not lawmakers. In fact, however, Kansas Court of Appeals judges are lawmakers, too. This was acknowledged by soon-to-be-Justice Lawton Nuss in 2002.[147] As Nuss said, when the Court of Appeals was created some

> believed that the new court primarily would make a "simple review of trial records" and correct the trial errors, e.g., evidentiary rulings. It would not develop and interpret the law. That function would remain with a supreme court that, now freed from its time-consuming "correction of trial error" function, would have time for "more deliberate and mature consideration of cases having significant precedential value."[148]

The reality, Nuss explained, has been quite different:

> The [appeals] court has not acted solely as a corrector of routine trial error, however. For the first eight months of 2001, for example, 150 of its opinions were published. During this same time frame, the Supreme Court published 118 of its own opinions, revealing that a large percentage of the precedential cases in Kansas that year came from a court whose only reason for existence originally had been to provide more accessible, speedier and less costly appellate review for Kansas litigants. Since the Supreme Court has granted petitions for review in less than 3% of the court of appeals' opinions - which include the published ones - the higher court has apparently endorsed this additional function of the lower court. While the court of appeals obviously is not replacing the Supreme Court, it nevertheless has clearly been allowed to assist the higher court as an important developer and interpreter of Kansas law.[149]

Confirming Justice Nuss's assessement of the Court of Appeals as "an important developer" of Kansas law, we now turn to examples of lawmaking by the Kansas Court of Appeals.

> reversing an earlier decision where nothing has changed except the composition of the court.

Id. at 482 (McFarland, C.J., dissenting).
[146] *See supra* note 85.
[147] Lawton M. Nuss, *This Learned and Versatile Court*, 71 J. KAN. B. ASS'N 22, 28 (2002).
[148] *Id.*
[149] *Id.*

1. Pleading Constructive Fraud

"Notwithstanding the general liberality of notice pleading, a claim of fraud is one of those matters that must be pleaded 'with particularity,'" explained the Kansas Court of Appeals in *Hemphill v. Shore*.[150] "Our Supreme Court, however, has not determined 'whether the heightened standard of pleading fraud with particularity applies when constructive fraud is being pled' in Kansas."[151] Here, the judges on the Kansas Court of Appeals acknowledge that the judges on the Kansas Supreme Court make law. The appeals judges in *Hemphill* did not say that the Kansas Legislature has not made the law on the pleading standard for constructive fraud. The appeals court judges evidently do not expect the legislature to make such law. The appeals court judges do expect the Kansas Supreme Court to make such law.

However, the Kansas Supreme Court has not yet made such law, so what did the appeals court judges do? They made the law on the pleading standard for constructive fraud. They held that the heightened standard applies: "we are persuaded by the reasoning in the numerous court decisions [mostly outside Kansas] that have held that the specificity in pleading requirement applies to a constructive fraud claim."[152] Did the Court of Appeals have the power to rule the other way and thus make Kansas law different? Yes, the judges on the Court of Appeals did not claim they were compelled to apply the heightened standard; they said they were "persuaded" to apply the heightened standard. They had lawmaking power and acknowledged it.

2. Economic Loss

In *Louisburg Bldg. & Development Co., L.L.C. v. Albright*,[153] plaintiffs asserted both a breach of contract claim and a fraud-in-the-inducement claim. The district court granted defendant a judgment on the fraud–in–the–inducement claim because of the economic–loss doctrine.[154] Was this district court ruling

[150] 239 P.3d 885 (Kan. Ct. App. 2010).
[151] *Id.*
[152] *Id.* at 893.
[153] 252 P.3d 597 (Kan. Ct. App. 2011).
[154] The Court of Appeals summarized the economic loss doctrine as follows:

> The economic-loss doctrine originated in products-liability law, preventing purchasers from suing in tort where the damages claimed were purely economic—stemming from product-repair costs, product-replacement costs, inadequate product value, or lost profits resulting from product defects. To recover in tort, the product purchaser with merely disappointed economic expectations had to demonstrate some "harm above and beyond a broken contractual promise." The doctrine initially aimed to prevent contract law from

correct or in error? In answering this question, the Court of Appeals cited Kansas cases[155] but did not suggest that these precedents were right on point. That is, the appeals court judges did not suggest that these precedents compelled them to rule one way or the other. Instead, the appeals court judges pointed out that:

> In the context of claims for fraud in the inducement, the economic-loss doctrine has produced exceptional inconsistency. On one hand, a majority of states have held that the economic-loss doctrine never applies to fraud-in-the-inducement claims. … On the other hand, a minority of states have applied the economic-loss doctrine to fraud-in-the-inducement claims that merely attempt to recover damages resulting from unfulfilled contractual promises.[156]

The Court of Appeals then adopted the minority approach because "The minority's approach is logical."[157] As it may well be. But a majority of states adopted the contrary approach so many courts must see logic in that approach, as well. In short, reasonable people can disagree about whether it is good policy for the economic loss doctrine to apply to any fraud-in-the-inducement claims. Who got to convert their views on this policy question into Kansas law? The judges on the Kansas Court of Appeals. In doing so, they made Kansas law on the economic loss doctrine.

3. Settlement Agreements

Similar lawmaking by the Kansas Court of Appeals is evident in *Roof-Techs Intern., Inc. v. State*,[158] which involved a particular sort of settlement agreement.

> dissolving into tort law by drawing a distinction between commercial transactions, where contract law protects economic expectations, and consumer transactions, where tort law remedies physical injuries to individual consumers. The doctrine has since expanded to serve as the dividing line between contract and the broader array of tort claims, including claims for negligence and strict liability. Three policies seem to be driving the expansion of the doctrine: (1) protecting parties' expectations with respect to their bargained-for limited liability; (2) encouraging the buyer to insure against the risk of economic loss; and (3) preventing "unnecessary complexity" resulting from the assertion of tort claims that merely duplicate breach-of-contract claims. This court has recognized similar policies in its own applications of the economic-loss doctrine. This court has also held that these policies remain applicable when the purchaser is an individual consumer, as opposed to a sophisticated commercial purchaser.

Id. at 621–22(citations omitted).

[155] *See, e.g*., *id.* at 623 ("The Kansas Supreme Court has previously recognized the importance of this policy, warning against the 'danger' of allowing claims that attempt to turn every breach of contract into a tort. *See* Gerhardt v. Harris, 261 Kan. 1007, 1021, 934 P.2d 976 (1997)").

[156] *Id.* at 622.

[157] *Id.* at 623.

[158] 57 P.3d 538 (Kan. Ct. App. 2002).

The agreement purportedly assigned, from one settling party to another settling party, claims against a non-settling party. The Court of Appeals said that "The legality of this kind of agreement has been, heretofore, undetermined in Kansas."[159] The Court of Appeals then made law by enforcing the agreement before it.[160]

In *Roof-Techs*, the Court of Appeals did not suggest that its hands were tied by a statute or by prior rulings of the Kansas Supreme Court. To its credit, the Court of Appeals' opinion frankly recognized that it was in uncharted territory. So the appellate judges did what appellate judges do when in uncharted territory, they stepped up to their role as "occasional lawmakers"[161] and made the law on these sorts of settlement agreements.

4. Medical Devices

All the above examples of lawmaking by the Kansas Court of Appeals might be characterized as common law, rather than statutory law. But the Kansas Court of Appeals makes law in its interpretation of statutes as well. An example is § 360k(a) of the Medical Device Amendments to the Food, Drug, and Cosmetic Act.[162]

Does this statute preempt state common-law tort claims alleging liability as to Class III medical devices? Ultimately, this question could be resolved by the U.S. Supreme Court. Until then, different jurisdictions may have different laws because different courts may rule differently. In *Troutman v. Curtis*,[163] the Kansas Court of Appeals made Kansas law by holding that state common-law tort claims alleging liability as to a Class III medical device are preempted by § 360k(a).[164]

5. Legal Duty to Support a Negligence Claim

A final example of lawmaking by the Kansas Court of Appeals, *Berry v. National Medical Services, Inc.*,[165] is a mixture of judges making common law and judges making law by interpreting statutes. Berry, a nurse licensed by the Kansas State Board of Nursing, admitted to the Board that she had a problem with alcohol dependency and agreed to submit to random testing to confirm that she

[159] *Id.* at 550.
[160] *Id.* at 554.
[161] *See* POSNER, *supra* note 9, at 81.
[162] 21 U.S.C. § 301 et seq. (2000 ed. & Supp. III 2003)
[163] 143 P.3d 74 (Kan. Ct. App., 2006).
[164] Except for a claim that the manufacturer failed to comply with the approved federal standards.
[165] 205 P.3d 745 (Kan. Ct. App. 2009).

was abstaining from alcohol.[166] The Board contracted with defendant Compass Vision, Inc., to administrator this program and Compass engaged defendant, NMS, to provide alcohol testing for nurses and to report its test results to the Board.[167] Berry's test results were positive and the Board revoked Berry's nursing license.[168] Berry brought negligence actions against Compass and NMS.[169] Defendants denied they owed a legal duty to Berry and persuaded the district court to dismiss Berry's negligence claim.[170]

The Kansas Court of Appeals majority reversed, holding that defendants did owe a legal duty to Berry.[171] In so holding, the judges made law. The Court of Appeals majority acknowledged this in noting that "Whether a legal duty exists is an issue of law over which appellate courts have unlimited review."[172]

While the majority resolved this issue of law in Berry's favor, Judge Buser's dissenting opinion would have resolved it in favor of the defendants.[173] In short, different judges on the Court of Appeals favored different legal rules. The majority of the three judges deciding the case got to make the law simply because they outnumbered the dissenting judge. Just as a single state legislator's vote can mean the difference between Kansas law including one rule or another, so a single Court of Appeals judge's vote can mean the difference between Kansas law including one rule or another.

While negligence law, including the duty element of a negligence claim, is generally common law, Kansas case law on whether to impose a duty considers (among other factors) whether there is a "public policy against imposing the claimed duty on the defendant."[174] Judge Buser's dissenting opinion concluded that there was and reached that conclusion by interpreting certain Kansas statutes.[175] By contrast, the majority interpreted the statutes differently and thus

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[166] *Id.* at 748–49.
[167] *Id.*
[168] *Id.*
[169] *Id.* at 749.
[170] *Id.*
[171] *Id.* at 750.
[172] *Id.* at 749.
[173] Judge Buser "would hold that laboratory testing facilities and third-party administrators do not owe a duty to nurses addicted to alcohol whose specimens they test under a contract with the administrative agency empowered by the legislature to regulate the professional competency of nurses." *Id.* at 753.
[174] *Id.* at 749.
[175] "It is the public policy of this state, as decided by the Kansas Legislature in its enactment of K.S.A. 65–1120, that the Kansas State Board of Nursing (Board) has authority to establish, regulate, and enforce the professional competency of nurses. Moreover, pursuant to K.S.A. 77–621(c), the legislature has granted the judiciary a limited power to review (using a deferential standard) the Board's disciplinary actions against impaired nurses. These legislatively established

concluded that those statutes did not indicate a public policy against imposing the duty.[176] The point, of course, is not to assess whether the majority or dissent better interpreted the statutes. The point is to note another example in which judges make law in the course of interpreting statutes.

IV. CONCLUSION

What do these examples from Kansas's two appellate courts show? Only judges making law. No surprise, of course. We have known, at least since the Legal Realists of the early 20th Century, that judges make law. And it is similarly well-established that, although judging has a professional/technical side, as well as a political/lawmaking side, the latter's importance rises, the higher the court. All appellate judges are "occasional legislators"[177] and supreme court justices are tremendously important and powerful lawmakers. So no one within the mainstream of our country's 20th and 21st Century legal thought will be surprised by this article's demonstration of repeated lawmaking by the judges on the Kansas Supreme Court and the Kansas Court of Appeals.[178]

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public policies are undermined by the majority's decision of first impression in Kansas." *Id.*at 752-53.

[176]

> Finally, there is no public policy against imposing liability. We defer to our legislature in establishing public policy and find no expression by our legislature that urinalysis providers are exempt from liability for their negligence in providing faulty results or interpretations. These defendants, as testing providers to the Board, do not argue that they are protected by sovereign immunity. We find no public policy that would immunize these defendants from the consequences of their actions. Therefore, the third element for establishing a duty has been satisfied.
>
> In this regard we note the dissent's public policy argument which is predicated upon the fact that this claim arose in the context of administrative proceedings to determine Berry's fitness to practice her profession. The dissent seems to confuse the wrongful conduct Berry complains of with the product of that wrongful conduct. The wrongful conduct in this action is the claimed negligence of Compass and NMS, not the action of the Board in revoking Berry's nursing license. The consequence of this claimed negligence was the loss of Berry's license and the damages that followed.
>
> We conclude that under Kansas law Berry has alleged the breach of a recognizable duty, and she has pled a cause of action for which relief may be granted.

Id. at 750.

[177] POSNER, *supra* note 9, at 81.

[178] As then-State Senator, now-Attorney General of Kansas, Derek Schmidt, said:

The decisions summarized in this article show Kansas's two appellate courts making law in the course of deciding cases. Whether the law made in any of these cases is good or bad policy is, of course, beside the point. The point is that the policy views of appellate judges matter because appellate judges are lawmakers — so the Kansas judges and lawyers who omit lawmaking from their description of the appellate judge's role omit something significant. A published statement describing the appellate judge's role as though it does not include lawmaking encourages non-lawyers to believe the myth that judges apply law made by others but do not inevitably make law themselves.

Those non-lawyers who (wrongly) believe that judges are not lawmakers cannot be troubled by the fact that the Missouri Plan — even Kansas's uniquely extreme version of it[179] — is an aberrant violation of our society's practice of selecting lawmakers democratically. Non-lawyers who believe in the principle that lawmakers should be selected democratically need to know that *judicial* selection is *lawmaker* selection to be troubled by the Missouri Plan's violation of this principle. Non-lawyers who do not know that judges inevitably make law may believe that the role of a judge consists only of its professional/technical side and, therefore, believe that judges should be selected entirely on their professional competence and ethics and that assessments of these factors are best left to lawyers. In short, a lawyer who omits lawmaking from a published statement about the judicial role is furthering a misimpression that helps empower lawyers at the expense of non-lawyers, in violation of basic democratic equality, the principle of one-person, one-vote.

> [T]he law is not always black-and-white — particularly when it presents itself in the form of the difficult issues that confront the Supreme Court [of Kansas]. If the difficult questions of law could always - or even usually - be settled with a clearly correct answer merely by reading and applying the constitutions, statutes and cases, then there would be no need to have seven justices on the Supreme Court. One would suffice - so long as that one was sufficiently learned in the law.
>
> But, of course, that is not the nature of the law - as evidenced, inter alia, by the many split decisions of our Supreme Court. Being properly experienced and credentialed in the law is a necessary but not sufficient condition for being an excellent justice. Judgment also is required as is a sensitivity to societal norms, trends, conditions and expectations. To put the point another way, justices *require* a certain amount of political savvy.
>
> Judicial philosophy matters. Of *course* it does. To pretend otherwise is to believe the law is a math or science rather than an art or social studies.

Constitutional amendment to have the supreme court justices appointments subject to consent by the senate: Hearing on SCR 1606 before S. Comm. on Judiciary, 2005 Leg. (Ks. Feb. 21, 2005) (written testimony of Senator Derek Schmidt, at 6).

[179] *See supra* Section II (describing the Kansas process).

Lawyers (in Kansas or elsewhere) who seek to defend the power advantage the Missouri Plan gives them over other citizens can honestly acknowledge that this is a power advantage in the selection of *lawmakers* and then explain why they believe a departure from the principle of one-person, one-vote is justified in the selection of these particular lawmakers. But no honest Kansas lawyer who has been exposed to the cases discussed in this article can defend the state's current method of appellate court selection with a description of the judicial role that omits lawmaking. Honesty requires those who believe the Kansas bar should select any member of a judicial nominating commission to acknowledge that they are advocating discrimination against non-lawyers in the selection of lawmakers. The same point undoubtedly applies as well in the other 49 states. Debate over judicial selection in the United States can be honest if it forthrightly acknowledges that *judicial* selection is *lawmaker* selection.