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TO:	Sen. Jeff King, Chair And Members of the Senate Judiciary Committee
FROM:	Nathan D. Leadstrom On behalf of the Kansas Association of Defense Counsel
DATE:	March 3, 2016
RE:	KADC's opposition to SB 439

SB 439 represents a misguided attack upon the fair and impartial courts of the Judicial Branch by singling out the Judiciary for different treatment from the Executive and Legislative Branches and then expanding the bases for impeachment beyond the scope and intent of our Kansas Constitution. The written constitution is paramount law because it emanates directly from the people. *In re Tax Application of Lietz Constr. Co.*, 273 Kan. 890, 903, 47 P.3d 1275 (2002). The legislature may enact legislation to facilitate or assist in the operation of a constitutional provision, but such legislation must be in harmony with and not in derogation of the constitution. *State, ex rel., v. Board of Education*, 212 Kan. 482, 488, 511 P.2d 705 (1973). Passage of SB 439 is not in harmony with our Constitution but threatens the very foundation of our government and the system of justice that holds it together. KADC strongly urges the committee to reject the proposal.

I. The House has the sole power to impeach.

First, this bill usurps the power of the House of Representatives to decide the grounds for impeachment by enumerating a number of politically-motivated offenses which find no basis in our Constitution. While there is some debate over the scope of the impeachment clause, particularly the "high crimes and misdemeanors" language as described below, it is inappropriate for any sitting Legislature to define grounds for impeachment for all future legislative sessions when the Kansas Constitution gives to only one chamber – the House of Representatives – the sole power to impeach at the time they decide to exercise such power. The Kansas Constitution is explicit on this point:

> § 27: Impeachment. The house of representatives shall have the ***sole*** power to impeach. All impeachments shall be tried by the senate; and when sitting for that purpose, the senators shall take an oath to do justice according to the law and the evidence. No person shall be convicted without the concurrence of two-thirds of the senators then elected (or appointed) and qualified.

KAN. CONST. Art. II, § 27 (emphasis added).

Under this process, the Senate has no role in determining when or if impeachment can be considered – only whether to convict if the House exercises its power. Thus, the impeachment power remains at all times with the House of Representatives which has the "sole power" to

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impeach.

Only after the House has voted (by majority vote) to impeach an official for a specified offense under the Constitution, will the Senate then be sworn under oath to do justice according to the law and the evidence in a trial of impeachment. *Id.* The trial in the Senate is then decided upon 2/3 supermajority. *Id*. However, SB 439 proposes to define the circumstances under which the House can decide to exercise the power. This is an improper usurpation of legislative power limited solely to the House of Representatives to consider. Further, considering this bill arises in the Senate and, if passed, would then be approved or vetoed by the Governor, by its nature it would be an unconstitutional exercise of power by another chamber and the executive neither of whom have any right, privilege or power to define circumstances to impeach in the first instance.[1]

II. SB 439 usurps the power of the Supreme Court to exercise the judicial power in the discipline or removal of lower court judges.

The Kansas Constitution sets up a system of checks and balances within the three branches of government – the executive, the legislature, and the judiciary – nearly identical to the U.S. Constitution upon which it was modeled.[2] The doctrine of independent governmental branches is firmly entrenched in United States and Kansas constitutional law. As early as *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 410, 1 L. Ed. 436 (1792), the United States Supreme Court declared that "by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either." A century later, in *Kilbourn v. Thompson*, 103 U.S. 168, 19091, 13 Otto 168, 26 L. Ed. 377 (1880), the Court stated:

> "It is believed to be one of the chief merits of the American system of written constitutional law, that all the powers intrusted to government, whether State or national, are divided into the three grand departments, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments shall be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the

[1] The Kansas Senate has the sole power to convict under an oath to render a decision "according to the law and the evidence," after the House exercises its power. Kan. Const. Art. II, § 27. However, the Governor has no role in this process but, in fact, is specifically named within Article 2 as subject to impeachment. *See* Kan. Const. Art. II, § 28.
[2] *Cf.* Kan. Const. Arts. I, II & III *with* U.S. Const. arts. I, II & III. Note, legislative power in the Congress is named first in the U.S. Constitution whereas legislative power is listed second in the Kansas Constitution.

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> others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other."

As it pertains to the doctrine of separation of powers, the Kansas Constitution is almost identical to the federal Constitution. *Gleason v. Samaritan Home*, 260 Kan. 970, 982, 926 P.2d 1349 (1996). The doctrine is an inherent and integral element of the republican form of government and is expressly guaranteed to the states by the federal Constitution. 260 Kan. at 982. Further, like the U.S. Supreme Court, the Kansas Supreme Court "in the exercise of its jurisdiction given to it by the constitution and the statutes, may protect its own jurisdiction, its own process, its own proceedings, its own orders, and its own judgments; and may, in cases pending before it, prohibit or restrain the performance of any act which might interfere with the proper exercise of its rightful jurisdiction in such cases." *C.K.&W. Rld. Co. v. Comm'rs of Chase Co.*, 42 Kan. 223, Syl. ¶ 1, 21 P. 1071 (1889).

The Kansas Constitution "exclusively" grants "judicial power" to the Supreme Court including, without limitation, general administrative authority over all courts in this state, providing:

> § 1: Judicial power; seals; rules. The judicial power of this state shall be vested ***exclusively*** in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state.

KAN. CONST., Art. I, § 1 (emphasis added).

Furthermore, with regard to lower judges in our Judicial Branch, our Constitution provides:

> …Other judges [constitutionally defined as other than Supreme Court justices] shall be subject to retirement for incapacity, and to discipline, suspension and removal for cause by the supreme court after appropriate hearing.

KAN. CONST. Art. III, § 15.

However, despite this clear directive, SB 439 attempts to usurp judicial power by overriding the authority granted exclusively to the Supreme Court to define improper judicial conduct "in a proceeding for discipline, suspension or removal for cause against an appointed judge of the district court." SB 439, § 1. This invasion into the Supreme Court's exclusive authority and the wall of separation between the Legislature and the Judicial Branch is particularly egregious given one of the specific grounds under the bill is any purported judicial act "attempting to usurp the power of the legislative or executive branch of government." SB 439, § 1(h). Quite hypocritically, that is precisely what this bill attempts to do to the judiciary.

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However, as far as can be determined, no legislator has proposed a like amendment for the executive or legislative branches attempts to usurp judicial power – such as this act is designed to do.

In his recent concurring opinion, Justice Stegall aptly addressed the need to keep clear lines of separation of powers due to the dangers in the accumulation of power in one branch over another:

> Knowing this—and having a healthy fear of consolidated power—the drafters of both our national and our state constitutions structured our government to be crisscrossed by numerous "walls of separation." The most important of these walls of separation are those that both hem in and protect the exercise of the three distinct forms of governmental power in our constitutional system—the executive, the legislative, and the judicial powers.
>
> This "separation of powers" that divides our three co-equal departments of government—while nowhere explicitly set forth in the United States or Kansas constitutions—has been variously described as "inherent," "integral," and "firmly entrenched in United States and Kansas constitutional law." *See Solomon v. State*, slip op. at 18-19; *see also* James Madison, The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) ("No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than [the separation of powers]. . . .The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny."). But as Frost understood, walls fall down. And within our constitutional system, **it is the duty of the courts to not only stand guard over the integrity of our governmental walls of separation, but also, as time and neglect may require, to rebuild them.**

Solomon v. State, slip op. at 30 (J. Stegall, concurring op.) (emphasis added).

Unlike the more restrained majority of the Court, Justice Stegall advocates for a clear delineation of power between the branches of government to prevent the withering and degradation of judicial power over time. In his view, he would like to "return this court to the active judicial role and obligation to guard and protect a clear and strong wall of separation between each of the three great departments of government—keeping each within its proper province and protecting those provinces from colonization by the other two departments." *Id*. at 42.

It would seem that line of judicial temperament in defending the Constitution of Kansas

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against attacks by other branches of government would potentially set him up to be a target of legislative ire under SB 439 where the Legislature seeks to define its own powers under threat of impeachment to the judiciary for not towing the party line. That is, of course, the very nature of tyranny that needs to be held in check and prevented under our constitutional separation of powers.

III. SB 439 expands the basis for impeachment of Supreme Court Justices beyond Constitutional grounds and violates separation of powers.

The Kansas Constitution has an impeachment provision providing for the removal of Supreme Court Justices as follows:

> § 15: Removal of justices and judges. Justices of the supreme court may be removed from office by impeachment and conviction as prescribed in article 2 of this constitution. In addition to removal by impeachment and conviction, justices may be retired after appropriate hearing, upon certification to the governor, by the supreme court nominating commission that such justice is so incapacitated as to be unable to perform adequately his duties. Other judges shall be subject to retirement for incapacity, and to discipline, suspension and removal for cause by the supreme court after appropriate hearing.

Kan. Const. Art. III, § 15.

In addition to the process for impeachment (described above), Article II of the Kansas Constitution provides the grounds therefore, as follows:

> § 28: Officers impeachable; grounds; punishment. The governor and all other officers under this constitution, shall be removed from office on impeachment for, and conviction of ***treason, bribery, or other high crimes and misdemeanors***.

Kan. Const. Art. II, § 28 (emphasis added).

This language mirrors the language of the U.S. Constitution upon which the Kansas Constitution is based, albeit the language in the U.S. Constitution was directed at the executive and legislative officers. *Cf.* U.S. CONST. art. II, § 4. In other words, through a combination of Article III § 15 and Article II § 28, the Kansas Constitution sets forth the same basis for impeachment of all constitutional officers in the executive, legislative and judicial branches. However, as shown below, the historical basis for impeachment of officers of the judicial branch has been much narrower than that applied to the executive branch and, to a lesser extent, to that of the legislative branch.

Under the U.S. Constitution, "high crimes and misdemeanors" has traditionally been considered a "term of art," like such other constitutional phrases as "levying war" and "due

process." The Supreme Court has held that such phrases must be construed, not according to modern usage, but according to what the farmers meant when they adopted them.[3] The Blackstone's *Commentaries on the Laws of England*—a work cited by delegates in other portions of the Constitutional Convention's deliberations and which Madison later described (in the Virginia ratifying convention) as "a book which is in every man's hand,"[4]—included "high misdemeanors" as one term for positive offenses "against the king and government" with the "first and principal" being "mal-administration of such high officers, as are in public trust and employment," usually punished by the method of parliamentary impeachment. 4 Blackstone's *Commentaries* * 121 (emphasis omitted).

During the Constitutional Convention, George Mason objected to the original draft which limited impeachment grounds to treason and bribery arguing that treason would "not reach many great and dangerous offences" including "[a]ttempts to subvert the Constitution." 2 Farrand 550. Mason moved to add the "maladministration" to treason and bribery which was a term used in six of the original thirteen state constitutions, including his home state of Virginia.[5] When James Madison objected to the term as too vague, Mason withdrew "maladministration" and substituted "high crimes and misdemeanors." 2 Farrand 550. His willingness to substitute "high crimes and misdemeanors" suggests that he believed that phrase would cover the offenses about which he was concerned.

Contemporaneous comments on the scope of impeachment are also persuasive as to the intention of the framers. In Federalist No. 65, Alexander Hamilton described the subject of impeachment as:

> those offences which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL, as they relate chiefly to injuries done immediately to the society itself.[6]

The context of the catchall category likewise suggests the reading that appears to have been intended by Mason and Madison relating to serious offenses against the state. "[H]igh crimes and misdemeanors" is best interpreted in context, *noscitur a sociis*,[7] with other words

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[3] *See Murray v Hoboken Land Co.*, 52 U.S. (18 How.) 272 (1856); *Davidson v New Orleans*, 96 U.S. 97 (1878); *Amith v Alabama*, 124 U.S. 465 (1888).
[4] 3 Elliot 501.
[5] The grounds for impeachment of the Governor of Virginia were "mal-administration, corruption, or other means, by which the safety of the State may be endangered." 7 Thorpe, *The Federal and State Constitution* 3818 (1909).
[6] The Federalist No 65 at 423-24 (Modern Library ed) (A Hamilton) (emphasis in original); *see also* 1 J. Story Commentaries on the Constitution of the United States, 764, at 559 (5th ed 1905) (describing the scope of impeachment as "not but crimes of a strictly legal character fall within the scope of the power; but that it has a more enlarged operation, and reaches, what are aptly termed political offenses.").
[7] "A latin term for 'it is known by the company it keeps', it is the concept that the intended meaning of an ambiguous word depends on the context in which it is used." Black's Law Dictionary Online 2d Ed., available at http://thelawdictionary.org/noscitur-a-sociis/.

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"of the same kind," *ejusdem generis*.[8] This is because the words immediately preceding "high crimes and misdemeanors" are "treason, bribery, or" and include serious indictable crimes. This usage allows the reasonable inference that the framers "remained focused on the common attribute" of at least the seriousness of the offense when employing the general words "other high crimes and misdemeanors."[9] Accordingly, the text suggests that the framers intended "other high crimes and misdemeanors" to apply only to serious misconduct of the same general nature or kind as treason and bribery, albeit not necessarily strictly of a legally defined criminal nature.[10]

On the other hand, Edmund Randolph – originator of the Federal Judicial Branch adopted in Article III of the U.S. Constitution – clarified that impeachment would never reach errors of judgment:

> "**No man ever thought of impeaching a man for an opinion**. It would be impossible to discover whether the error in opinion resulted from a wilful mistake of the heart, or an involuntary fault of the head."[11]

Joseph Story's survey of English impeachments led him to conclude that "many offences, not easily definable by law, and many of purely political character, have been deemed high crimes and misdemeanors worthy of this extraordinary remedy."[12] But the United States, unlike England, embraced a trinity of separated powers. In an English parliamentary system, it is not alien to allow impeachment for any number of offenses and, no matter how broad, they could not

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[8] "Of the same kind, class, or nature. In statutory construction, the 'ejusdem generis rule' is that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. Black, Interp. Laws, 141 ; Cutshaw v. Denver, 19 Colo. App.341, 75 Pac. 22; Ex parte Le- land, 1 Nott & McC. (S. C.) 462; Spalding v. People, 172111. 40, 49 N. E. 993." Black's Law Dictionary Online 2d Ed., available at http://thelawdictionary.org/ejusdem-generis/.

[9] *See e.g., Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 224–25 (2008) (describing application of *ejusdem generis* in the statutory context to "a list of specific items separated by commas and followed by a general or collective term"); *see also* 4 Blackstone's Commentaries * 121 (defining "high misdemeanor" as offenses against the state).

[10] Interestingly, however, an intratextual analysis of other clauses in the U.S. Constitution may be read to categorize impeachable offenses as a subset of indictable crimes. For instance, the Criminal Jury Trial Clause provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2, cl. 3 (emphasis added). The Clause's jury trial right for "all Crimes" extends only to criminal offenses; that cases of impeachment are a subset suggests that they too are criminal in nature. Similarly, the Pardon Clause grants to the President "Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." *Id*. at art. II, § 2, cl. 1. Again, the pardon power, which extends only to criminal "Offences against the United States," treats impeachment as a subset of criminal offenses exempt from its operation. *See, e.g., United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833) (describing a pardon as "an act of grace, proceeding from the power entrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed").

[11] 3 Elliot 401 (emphasis added).

[12] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 800, at 556 (3d ed. 1858).

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tread on the separation of powers in such a unitary system.[13] In the American system, however, such broad understandings of the impeachment power would permit the legislative power to swallow the judicial power thereby destroying separation of powers between the branches—the most important and fundamental of all the checks and balances in our system of government.[14]

The danger of broadly interpreting the impeachment power to include the right to remove justices for most of the categories identified in SB 349 is that it would pervert the system by allowing the legislature to swallow the separations of powers anytime it wanted to de-select one or more justices due to ideological differences of opinion. The Constitution clearly vests each branch with its own sphere of power to separate the departments of government. This basic plan of organization, to which impeachment is only a limited exception, aimed to limit the possibility of tyranny by dividing powers among different political actors. If the Legislature were capable of exercising broad removal power over the judiciary, beyond the limited grounds provided, it would raise the specter of legislative control of the judicial function contrary to the intentions of the people in adopting the Constitution.[15] The capacity to remove is a potent tool for control[16] and as discretionary power to remove becomes broader, so too does the potency of control.

Ensuring that democracy, liberty and the rule of law were not hollow promises, our Framers created a form of government aimed at avoiding the concentration of power in a single authority. They made the Judiciary an institution "not under the thumb of other branches of Government."[17] James Madison, while introducing in Congress the amendments that became the Bill of Rights, eloquently noted that the Judiciary "will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights."[18] Alexander Hamilton argued in Federalist No. 78 that "there is no liberty, if the power of judging be not separated from the legislative and executive powers.... The complete independence of the courts of justice is ... essential...."[19] As Hamilton explained, if the legislature judged the validity of its own laws, then its members would substitute their will for the will of the people:

> It is not ... to be supposed that the constitution could

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[13] *See id.* § 800, at 556–57.
[14] *See* Tuan Samahon, *Impeachment as Judicial Selection?*, 18 WM. & MARY BILL RTS. J. 595, 632 (2010).
[15] *Cf.* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 71 (Max Farrand ed., 1937) (statement of Edmund Randolph) (claiming broad impeachment power would make the President "dependent on the Legislature— such an Unity w[oul]d be ag[ainst] the fixed Genius of America.").
[16] *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986) (characterizing qualified power to remove as creating "here-and-now subservience").
[17] Hon. Ruth Bader Ginsburg, Judicial Independence: The Situation of the U.S. Federal Judiciary, 85 NEB. L. REV. 1 (2006).
[18] James Madison, Address to the House of Representatives (June 8, 1789), in THE MIND OF THE FOUNDER 224 (Marvin Meyers ed., 1973).
[19] 3 THE FEDERALIST No. 78, at 502 (Alexander Hamilton) (Edward Mead Earle ed.). (Without judicial independence, Hamilton argued, "all the reservations of particular rights or privileges would amount to nothing.").

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> intend to enable the representatives of the people to substitute their will to that of their constituents. It is far more rational to suppose that that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority.[20]

Historically, as a result, impeachment has not been permitted due to political or ideological differences of opinion. In the earliest attempt to invoke the impeachment clause against a sitting Supreme Court Justice in 1805, Jeffersonians charged that Justice Chase had breached judicial impartiality by making brazenly partisan statements from the bench. This public justification for his impeachment, however, thinly veiled naked partisan and ideological motivation which stood in the way of his conviction. This example has generally been understood for the proposition that "a judge's *judicial* acts may not serve as a basis for impeachment."[21] The naked partisan attempt to impeach Chase was defeated as Chase was capable of carrying out the duties of his office.

It would be a slippery slope to allow impeachment to extend to judicial acts where the legislature usurps the role of the Judicial Branch by impeaching and convicting a justice with whom it disagrees on a particular issue or series of cases. For instance, the standard of "attempting to usurp the power of the legislative or executive branch of government" appears to put the Legislature in the role of Super-Arbitrator over Court decisions with which it disagrees.[22] This finds no textual or historical basis, but would destroy the separation of power and constitutional law placing the Supreme Court as the final interpreter of the Constitution which has been firmly established since *Marbury v. Madison*, 5 U.S. 137 (1803). There can be no doubt that the framers of the Kansas Constitution understood and appreciated this point in adopting the federal model nearly 60 years after that decision was rendered. If the Supreme Court is through to be wrong in its interpretation, is it proper in our system for the Legislature to wrestle control from the Courts or is it expected that the Legislature would go back to the people to decide the issue through an amendment to the Constitution? Our Constitution envisions the latter, while SB 439 perceives the former.

Putting this issue in the context of the school financing cases, which appears to be one of the impetuses for this bill, the Supreme Court has consistently interpreted the Kansas

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[20] 4 THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 285 (Alexander Hamilton) (David Wooton, ed., 2003).

[21] WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6 (2005), available at http://www.supremecourt.gov/publicinfo/year-end/2004year-endreport.pdf. Chief Justice Rehnquist is a leading authority on impeachment and authored GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON (1992).

[22] Normally, only acts are impeachable offenses, not mere attempts. This begs question: Would an "attempt" be voting against the Legislature or Executive when either of the other two branches disagree with the decision of the Supreme Court or, since the Court can only act through its majority, would the "attempt" be joining a majority that voted against the Legislature or Executive Branch on such a decision?

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Constitution as requiring the Legislature to adequately fund schools. If the Legislature disagrees, can it then impeach and convict the Justices voting on those cases against it? If so, what becomes of our system of justice if the Legislature – the very law-making body every citizen in this State looks to for the rules of conduct to be followed – thumbs its nose at the rule of law decided against it? Why does the Legislature not have to follow the Supreme Law of this State set forth in the Constitution by the people? If the Legislature believes the Supreme Court has overstepped its power, is the remedy to threaten, intimate and remove those who are deciding cases against it? Again, the people of this state envisioned a system wherein the Legislature would turn the issue back to the people to decide whether to amend the Constitution to correct an interpretation by the Court, not create a political tug-of-war match with the Supreme Court over its interpretation.

Such "offenses" could reach good faith reasoning expressed in judicial work product that opponents find objectionable. Even assuming all reasonable jurists agreed that there is only one fixed, knowable, best interpretation of each provision of the Constitution to resolve ambiguity (and most do not), many originalists would acknowledge that adjudication also involves the separate act of construction to resolve the problem of vagueness.[23] As such, even stringent methodological adherence to the most formal models of adjudication leaves leeway for discretion. The exercise of this discretion, in turn, may become an opponent's hook for impeachment. After all, reversal on the basis of discretion is considered "an abuse of discretion." There really is no limiting principle between what might fairly be characterized a political offense from judicial usurpation of legislative prerogative. It is a small matter to say that a decision with which one disagrees is "activist" and impeachable.

The fact that SB 439 is a most brazen direct attack upon the separation of powers and impartiality of our courts is shown by the simple fact that it applies solely and distinctly to the judiciary, but not the other two branches of government. Despite the fact that the same standards for impeachment apply to all constitutional officers equally,[24] SB 439 proposes to redefine what impeachment is for the judiciary alone thereby placing justices on the Supreme Court to a different and more stringent standard than the legislature applies to its own members or that of the executive. The hypocrisy of judging others under such differing standards has never been accepted throughout civilized history.[25]

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[23] See, e.g., Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 973 (2009) (drawing a distinction between constitutional interpretation and construction in the context of the Second Amendment).

[24] KAN. CONST. Art. II, § 28; KAN. CONST. Art. III, §15.

[25] The Book of Matthew provides the best example of the hypocrisy of judging others under differing standards:

> 1"Do not judge, or you too will be judged. 2 For in the same way you judge others, you will be judged, and with the measure you use, it will be measured to you.
> 3 "Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye? 4 How can you say to your brother, 'Let me take the speck out of your eye,' when all the time there is a plank in

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IV. Risks of re-defining impeachment as "anything we want it to be."

The Framers divided the impeachment power across two legislative chambers to safeguard against its abuse, providing "a complete security" against the legislative body retaliating against the judiciary.[26] By dividing the impeachment power between the two chambers, the Framers pitted the Senate against the House, two chambers originally elected by, and representing, different constituencies.[27] Even so, Alexander Hamilton recognized the potential danger that "the comparative strength of parties" might prove more important than "the real demonstrations of innocence or guilt."[28] In other words, the passions of the day exemplified through the political beliefs of a dominant party threaten to destabilize the fairness and impartiality of the judiciary and the separation of powers intended in the Constitution. Impeachment used to deselect jurists on the basis of their work product or ideology undermines decisional independence, which is the principal means by which adjudicative impartiality is secured.

An ideological impeachment process also has costs for the rule of law. The rule of law, defined as the impartial adjudication of disputes by reference to rules and standards articulated in advance, requires that similarly situated parties be treated similarly without regard to their identities.[29] The rules and standards should remain predictably in force and change only in accordance with the rules for changing rules. The identity of the adjudicator should matter little. To the extent it matters, it should principally influence construction, and not interpretation. The rule of law may be undermined if political actors are able to use impeachment to obtain constitutional amendment by judicial fiat rather than by resort to the amendment procedure. Ideological impeachment, like ideological appointment, raises the concern that political actors will attempt to revise the Constitution under the guise of interpretation – the very form of activism normally decried by those against whom the prior decisions were made. That erosion of judicial power weakens the entire system along with the rights of the people who rely upon it.

On behalf of our members and the citizens of Kansas we serve, KADC strongly opposes SB 439 and urges this committee to reject it in any form.

> your own eye? 5 You hypocrite, first take the plank out of your own eye, and
> then you will see clearly to remove the speck from your brother's eye.

The Holy Bible, Matthew 7:1-5 (NIV).

[26] THE FEDERALIST NO. 81, at 420 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[27] However, as originally envisioned, the U.S. Senate was elected by the States whereas the U.S. House by the people, but this was subsequently changed by amendment. In Kansas, both the House and Senate are popularly elected by the people.

[28] THE FEDERALIST NO. 65, at 338 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

[29] See generally, RONALD H. CASS, THE RULE OF LAW IN AMERICA XI (2001).