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# **MAY LAWYERS BE GIVEN THE POWER TO ELECT THOSE WHO CHOOSE OUR JUDGES? “MERIT SELECTION” AND CONSTITUTIONAL LAW**

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**George Mason University Law and Economics  
Research Paper Series**

**10-59**

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# **May Lawyers Be Given the Power to Elect Those Who Choose Our Judges? “Merit Selection” and Constitutional Law**

**Nelson Lund<sup>†</sup>**

## **I. Introduction**

Imagine that Congress enacted a law under which the nation’s bank presidents elect three people to serve as candidates for Secretary of the Treasury, and the President is required to appoint one of these candidates. Or suppose that a state required its governor to choose the chief of the state police from a slate of three candidates elected by the state troopers (and provided that no one may serve as chief without having been included on such a slate).

Most people would have an immediate gut reaction to these hypotheticals: “That can’t be right.” This response has a sound basis in self-evident principles of political economy.

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The Secretary of the Treasury has a great deal of discretionary authority over the regulation of banks. Allowing the presidents of these institutions to elect the candidates for Secretary would create a conflict of interest that nobody could fail to perceive. Similarly, the head of the police force is the supervisor of the troopers, and they would have a similar conflict of interest in deciding who could be their boss.<sup>1</sup>

But don't bank presidents and state troopers have a lot of information, unavailable to the general public, about the qualifications of people who might serve as Secretary of the Treasury and head of the police force respectively? Surely they do! But it is equally certain that they would have overwhelming incentives to use that information to serve their own private interests. The general public and their elected representatives may have less information about the qualifications of candidates for these public offices, but they are also less prone to undervalue the public interest.

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<sup>1</sup> The interests of the bank presidents in the one case and the troopers in the other will of course not be identical. Large banks will not have exactly the same interests as small banks, for example, and lower ranking troopers will not have exactly the same interests as those of higher rank. The multitude of conflicting interests within these groups, however, cannot obscure the very large common interests that they share — common interests that will often conflict with the public interest. Moreover, the conflicts of interest within the groups might exacerbate the underlying problem that such elections would create. The private interests of the more numerous small banks and lower ranking troopers, for example, might conflict with the public interest to a greater degree than the private interests of larger banks and higher ranking troopers.

Accordingly, those with strong private interests in appointments to public office are generally left free to share their information and preferences with the public and with appointing officials, and even to throw all their political weight behind their preferred candidates. But that is a very long way from giving special-interest groups the legal power to choose the nominees to appointed offices.

The conflicts between the public interest and the private interests of those who control political power is one of the central problems that the republican form of government is meant to address. As James Madison memorably explained:

It is *essential* to [a republican] government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified [i.e. during pleasure, for a limited period, or during good behavior].<sup>2</sup>

The U.S. Constitution scrupulously respects the principle

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<sup>2</sup> *Federalist No. 39.*

that Madison articulated, and my hypothetical constraint on the President's discretion to choose the Secretary of the Treasury would violate the Appointments Clause.<sup>3</sup> But what about the state police hypothetical? Here the law is not quite as clear, and the example is not quite so hypothetical.

Many states choose their judges under a “merit selection” system (often referred to as the Missouri Plan) that gives a preferred role to lawyers.<sup>4</sup> Under the Kansas

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<sup>3</sup> U.S. Const. art. II, § 2, cl. 2. The President is free to seek the advice of bank presidents, or anyone else who he thinks may have useful information, before choosing his nominee. And he may be subjected to various kinds of political pressure in making his choice. But the only legal constraint on his power of appointment is provided by the requirement of Senate confirmation.

In a less extreme case than my hypothetical, the Supreme Court struck down a statute that assigned executive powers to the Comptroller General, an official nominated by the President from a list of three candidates provided by congressional leaders, confirmed by the Senate, and removable only at the initiative of Congress. *Bowsher v. Synar*, 478 U.S. 714 (1986) (invalidating the appointment because of the removal provision). *See also* *Buckley v. Valeo*, 424 U.S. 1 (1976) (Federal Election Commission's members must be appointed in accordance with the Appointments Clause); *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482-89 (1989) (Kennedy, J., concurring in the judgment) (statutory intrusion on President's access to information and advice in exercising his exclusive responsibility to nominate federal judges violates the Appointments Clause).

<sup>4</sup> The term “Missouri Plan” is used to describe a variety of legal devices that give lawyers a preferred role in judicial selection. For a useful review and classification of the various arrangements, see Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 Mo. L. Rev. 751 (2009). The extent to which Missouri Plan selection devices actually succeed in substituting considerations of “merit” for “politics”

constitution, for example, the governor fills vacancies on the state's supreme court. The governor, however, is required to appoint one of three nominees presented to him by a "supreme court nominating commission." The commission comprises nine members, chosen as follows. The chairman is elected at large by the members of the state bar. One member is elected from each of the state's four congressional districts by the bar members in that district. The governor appoints a non-lawyer from each of the congressional districts. Thus, a majority of the commission is elected by the state's lawyers. The governor, in turn, is required to appoint one of the three nominees selected by this bar-controlled commission.<sup>5</sup>

Because the Kansas constitution was adopted by the people of that state, who are free to amend it, the provision in question may technically be in compliance with Madison's description of republican government. In any event, there can be little doubt that the procedure would be upheld under the federal Constitution's Republican Form of Government Clause.<sup>6</sup> The Supreme Court has stressed its extreme reluctance to invoke this Clause as authority for

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has been hotly debated. The actual evidence of this effect might charitably be described as inconclusive. *See, e.g.*, Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 Dickinson L. Rev. 729 (2002); Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. Miami L. Rev. 509 (1978).

<sup>5</sup> Kan. Const., art. III, § 5.

<sup>6</sup> U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government").

adjudicating political disputes in the states.<sup>7</sup> Perhaps that reluctance reflects an appropriate respect for the principles of federalism and a prudent recognition of the Court's very limited capacity for converting the finer points of political theory into law.

Until recent times, that would probably have been that. The Kansas nominating commission, like my hypothetical involving the election of candidates for chief of the state police, may be a bad idea, but it is one that the federal courts would have left the people of Kansas to deal with.

During the past half century, however, the Supreme Court has grown more willing to constrain state choices about the structure of government. Rather than use the Republican Form of Government Clause, however, the Court has turned to the Equal Protection Clause. Whether or not the resulting decisions have been consistent with the original meaning of the Fourteenth Amendment,<sup>8</sup> there is now a large and well-settled body of case law strongly indicating that the Kansas nominating commission should be struck down.

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<sup>7</sup> See, e.g., *Luther v. Borden*, 48 U.S. 1 (1849) (claim under Republican Form of Government Clause held nonjusticiable); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912) (same); *New York v. United States*, 505 U.S. 144, 183-85 (1992) (suggesting that some claim of some kind may someday be found justiciable).

<sup>8</sup> For a detailed argument (unrebutted by the majority opinion) that the seminal decisions are inconsistent with the original meaning of the Constitution, see *Reynolds v. Sims*, 377 U.S. 533, 589-632 (1964) (Harlan, J., dissenting).

The inferior federal courts that have reviewed such mechanisms have consistently upheld them, but these courts have all relied on dubious legal analyses. An equal protection challenge to the Kansas system is now before the federal courts. This case provides an opportunity to apply the Supreme Court's precedents correctly, and to bring that state's judicial selection procedures into closer conformity with republican principles of government. Lawyers may not like the outcome, but that is no reason to disregard the Court's settled doctrine.

## II. Supreme Court Precedent

### A. The Governing Principle

The Supreme Court decision most closely on point in the Kansas litigation is *Kramer v. Union Free Sch. Dist. No. 15*.<sup>9</sup> This case involved a state law under which local school boards were elected solely by voters who either (a) owned or leased taxable property within the school district, or (b) had children who were enrolled in the local schools. The school boards exercised significant control over the schools and their budgets, and village governments were required to levy taxes on real property for the support of the schools in their villages.

Invoking the “one person, one vote” equal protection decision in *Reynolds v. Sims*,<sup>10</sup> the *Kramer* Court applied

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<sup>9</sup> 395 U.S. 621 (1969).

<sup>10</sup> 377 U.S. 533 (1964).

strict scrutiny.<sup>11</sup> Noting that this case involved a complete denial of the franchise to certain otherwise qualified voters — and distinguishing it from cases involving vote dilution (like *Reynolds* itself)<sup>12</sup> — the Court held that the challenged statute could not be upheld unless it was both “necessary to promote a compelling state interest” and “sufficiently tailored” to serve that interest.<sup>13</sup> In holding that strict scrutiny applied, the Court specifically observed that the limited jurisdiction of the school boards was irrelevant:

Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not. For example, a city charter might well provide that

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<sup>11</sup> “(S)ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.” *Kramer*, 395 U.S. at 626 (quoting *Reynolds*, 377 U.S. at 562). The one person, one vote principle had been announced in *Gray v. Sanders*, 372 U.S. 368 (1963), but *Reynolds* is more commonly cited.

<sup>12</sup> 395 U.S. at 626 & n.6. “Vote dilution” involves giving some votes more weight than others, as when a legislature is elected from districts that are not equipopulous. “Vote denial” cases typically involve the disenfranchisement of persons otherwise qualified to vote on the basis of age, citizenship, and residence. *See, e.g.*, *Hill v. Stone*, 421 U.S. 289 (1975) (invalidating denial of vote in city bond elections to persons not paying property tax); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (invalidating denial of vote to persons unable to pay a poll tax); *Carrington v. Rush*, 380 U.S. 89 (1965) (invalidating denial of vote to military personnel temporarily stationed within a jurisdiction).

<sup>13</sup> *Id.* at 627, 633.

the elected city council appoint a mayor who would have broad administrative powers. . . . [but] if the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.<sup>14</sup>

The state defended its statute by arguing that it had a strong interest in limiting the franchise to those “primarily interested” in school affairs — namely the taxpayers who financed the schools and the parents whose children attended the schools — because other residents are less likely to be fully informed about local school affairs. The Court declined to decide whether such considerations could ever constitute a compelling government interest. Even assuming that it might, the statute at issue in *Kramer* was insufficiently tailored to serve such an interest: it denied the franchise to interested and affected persons like the plaintiff in the case (an unmarried adult who was living with his parents), while granting the franchise to an uninterested and childless adult who rented an apartment in the district.<sup>15</sup>

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<sup>14</sup> *Id.* at 629-30.

<sup>15</sup> *Id.* at 632 & n.15. Similar statutes were invalidated in *Cipriano v. City of Houma*, 395 U.S. 7011 (1969) (restricting franchise in municipal revenue bond elections to property taxpayers), and *City of Phoenix v Kolodziejski*, 399 U.S. 204 (1970) (restricting franchise in municipal general obligation bond elections to property taxpayers).

The *Kramer* strict scrutiny regime does not always apply when the franchise is denied to persons living outside the geographic

The statute struck down in *Kramer* resembles the Kansas law under which candidates for the state supreme court are selected. If anything, the Kansas law is far less narrowly tailored to serve the state's interest in restricting the franchise to those "primarily interested" in the outcome. Every citizen has a very substantial interest in the activities of the state supreme court, which has enormous powers to affect the welfare of all who are subject to its jurisdiction. A state supreme court certainly has far more power to affect the general public than a local school board has over a childless man who does not pay local taxes.

The Kansas case may at first seem quite different than *Kramer* because the Kansas supreme court justices do not fill their offices as a direct result of elections that violate the one person, one vote principle. This superficial difference between direct and indirect elections, however, is not itself significant. Presidential elections, for example, are subject to scrutiny under *Reynolds*, notwithstanding the intermediating role of the electoral college.<sup>16</sup>

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boundaries of the governmental entity concerned. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978). That exception is not applicable in the Kansas case.

The Supreme Court has upheld a statute under which changes in the form of local governments having overlapping jurisdictions require approval of a majority of voters in each of the affected jurisdictions. *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977). This decision has no bearing on the Kansas case, which involves elections to a nominating commission whose activities have state-wide effect.

<sup>16</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

If *Kramer* can be distinguished, it would have to be on the ground that the Kansas nominating commission does not select the supreme court justices, but only selects the three “finalists” from among whom the governor must choose. To characterize this as a gubernatorial appointment, however, would elevate form over substance, and leave the *Kramer* principle an empty, easily evaded shell.

The Kansas governor’s choice is so severely constrained that the real power to determine who will sit on the court is effectively in the hands of the bar-controlled nominating commission. The governor is not able to appoint someone other than the three candidates presented to him. Nor may he declare all of the candidates unacceptable, and demand a new list. Indeed, as a practical matter, the nominating commission can effectively force the governor to appoint a specific person. It might, for example, nominate its preferred candidate along with two manifestly unqualified individuals. Or it might nominate its preferred candidate along with two individuals who subscribe to a judicial philosophy that the governor strongly opposes on principle.

Because the Kansas nominating commission exercises overwhelming power to determine who fills these judicial offices, and because the bar-controlled commission is chosen in elections that do not comply with the one person, one vote principle, it must be subject to strict scrutiny unless it fits within an exception to *Kramer* recognized in other cases.

A variety of post-*Kramer* decisions have been invoked to defend the Kansas scheme, and similar Missouri Plan judicial selection procedures in other states. Upon examination, all of these cases appear to be inapposite.

## B. Exceptions to the *Kramer* Principle

There are four main exceptions to *Kramer* or *Reynolds* that might be relevant here. (1) One person, one vote does not apply to elections to certain “special purpose” governmental units. (2) Appointments by validly elected officials may often be substituted for elections. (3) In certain restricted circumstances, appointments may sometimes be made by entities that have neither been elected in a *Reynolds*- and *Kramer*-compliant election nor chosen by validly elected officials. (4) Elections to judicial office are not subject to the vote-dilution rules in the *Reynolds* line of case law. This section analyzes the principal Supreme Court opinions that have recognized these four exceptions.

### 1. *Salyer and Ball v. James*

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,<sup>17</sup> the Supreme Court upheld an election in which the franchise was limited to those “primarily interested” in the result of the election. The case involved a governmental unit whose sole responsibility was to acquire, store, and distribute water for farming in a limited geographic area. All of the unit’s expenses were paid by assessments against landowners in the special-interest district. The governing board of this unit was elected by those who owned land in the district (including nonresident owners), and their votes were proportionate to the assessed value of the land they owned.

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<sup>17</sup> 410 U.S. 719 (1973).

The *Salyer* Court found that the costs and benefits of the activities performed by this special-purpose district fell overwhelmingly on the landowners, and did so in proportion to the value of their lands. The Court distinguished *Kramer* on the ground that this water district, “although vested with some typical governmental powers, has relatively limited authority,”<sup>18</sup> and that “its actions disproportionately affect landowners.”<sup>19</sup> Because of that difference, the Court held that the strict scrutiny analysis applied in *Kramer* was inapplicable.<sup>20</sup>

This case resolved the issue left open in *Kramer*, and held that there can indeed be “functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* might not be required.”<sup>21</sup> In *Salyer*, however, the effects on different groups were extremely disproportionate, and the effects on the disenfranchised residents were extremely remote or specu-

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<sup>18</sup> *Id.* at 728 (footnote omitted).

<sup>19</sup> *Id.* at 729.

<sup>20</sup> After concluding that *Kramer* was inapplicable, *Salyer* held that the statute survived rational basis review under general principles of equal protection analysis. 410 U.S. at 730-35. In *Ball v. James*, the Court confirmed that the crucial distinction between *Kramer* and *Salyer* was whether strict scrutiny or rational basis review applied. 451 U.S. 355, 364-65 n.8 (1981). Accordingly, strict scrutiny should apply in the Kansas case unless the case falls within an exception, like the one found in *Salyer*, to the *Reynolds/Kramer* principle.

<sup>21</sup> *Salyer*, 410 U.S. at 727-28 (quoting *Hadley v. Junior College Dist.*, 397 U.S. 50, 56 (1970)).

lative.<sup>22</sup> This is hardly comparable to an election involving a state’s supreme court, a tribunal that has enormous effects on every citizen, notwithstanding the court’s additional effects on the lawyers who practice in the state.<sup>23</sup>

Nor does the multi-step process leading to the judicial appointments in Kansas render *Salyer* applicable. Elections to the electoral college are subject to *Reynolds* and *Kramer* the one person, one vote rule,<sup>24</sup> notwithstanding the fact that the presidential electors themselves exercise only “relatively limited authority.”<sup>25</sup> The Kansas supreme court nominating commission, like the electoral college and *unlike* the water district in *Salyer*, performs a governmental function with broad, if indirect, effects on the general population.

*Salyer* is decisively distinguished from the Kansas case by the fact that the Kansas lawyers, unlike the land-owners in *Salyer*, are not solely responsible for financing the operations of the state judiciary, by the fact that the Kansas nominating commission virtually controls the selection of the supreme court, and by the fact that the Kansas lawyers have a strong incentive to externalize the costs of an

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<sup>22</sup> See, e.g., *Salyer*, 410 U.S. at 728-29 & nn.8-9.

<sup>23</sup> In addition to all of the obvious ways in which judges affect lawyers, the Kansas Supreme Court controls admissions to the bar and discipline of bar members. See, e.g., Kansas Supreme Court Rules 201-227, 701-723.

<sup>24</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>25</sup> *Salyer*, 410 U.S. at 728.

excessively lawyer-friendly judiciary onto the public at large.<sup>26</sup>

*Ball v. James*<sup>27</sup> involved special-purpose water districts similar to the one at issue in *Salyer*. In *Ball*, however, the water districts also generated electricity that was sold to a large swath of the state's population, so they had a much greater effect on persons ineligible to vote in its elections. The Court nonetheless upheld the *Ball* scheme because the districts were not performing traditional governmental functions:

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<sup>26</sup> The most obvious way for this externalizing effect to take place is by selecting supreme court candidates who can be expected to enforce the bar's cartel by maintaining inefficient barriers to entry into the profession, along with lax discipline of those already admitted. But it is not by any means the only way. Elections by lawyers can also be expected to lead to a bias in favor of supreme court candidates who are likely to create legal rules that generate more business for lawyers, and perhaps to make decisions that favor the economic interests of the most numerous segments of the legal profession. *See, e.g.*, Michael E. DeBow, *The Bench, the Bar, and Everyone Else: Some Questions about State Judicial Selection*, 74 Mo. L. Rev. 777, 779 & n.10 (2009).

If, moreover, the bar has ideological preferences that differ substantially from the public at large, elections by lawyers should be expected to result in an ideologically skewed set of candidates, especially but not only when there is a reasonably close correlation between the ideological and economic interests of the dominant elements of the legal profession. For some empirical evidence tending to confirm this hypothesis, see Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 Mo. L. Rev. 675 (2009); Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 Kan. J.L. & Pub. Pol'y 392, 413-21 (2009).

<sup>27</sup> 451 U.S. 355 (1981).

“[T]hough the state legislature has allowed water districts to become nominal public entities in order to obtain inexpensive bond financing, the districts remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners.

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[N]o matter how great the number of nonvoting residents buying electricity from the District, the relationship between them and the District’s power operations is essentially that between consumers and a business enterprise from which they buy. Nothing in the *Avery*, *Hadley*, or *Salyer* cases suggests that the volume of business or the breadth of economic effect of a venture undertaken by a government entity as an incident of its narrow and primary governmental public function can, of its own weight, subject the entity to the one-person, one vote requirements of the *Reynolds* case.<sup>28</sup>

Once again, the Kansas procedure for selecting supreme court justices cannot fit within this exception from *Reynolds* and *Kramer*. The state’s supreme court obviously performs quintessentially governmental functions, and it bears no resemblance at all to the nominally public business enterprises at issue in *Ball v. James*. The Kansas supreme

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<sup>28</sup> *Id.* at 368-70 (citations and footnotes omitted).

court nominating commission, for its part, also performs a critical governmental function, namely that of choosing the three candidates from among whom a gubernatorial appointment must be made. This has to be regarded as a governmental function, and subjected to strict scrutiny, for the same reason that primary elections conducted by political parties are subject to strict scrutiny,<sup>29</sup> and for the same reason that elections to the electoral college are also subject to such review.<sup>30</sup>

Neither the Kansas Supreme Court nor the state's supreme court nominating commission bears any relevant resemblance to the nominally public business enterprises at issue in *Salyer* and *Ball v. James*. One would hope that our courts will never be regarded as a business to be operated primarily for the benefit of the lawyers who practice before them. Analogizing the selection of judges (or of those who choose them) to the selection of those who operated the water districts in these two cases is inconsistent with the Supreme Court's reasoning, and it is offensive to boot.

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<sup>29</sup> *Gray v. Sanders*, 372 U.S. 368 (1963). *Gray* was a vote-dilution case involving primary elections for statewide offices. The Court specifically held that "the action of [the state's Democratic] party in the conduct of its primary constitutes state action within the meaning of the Fourteenth Amendment." *Id.* at 374.

<sup>30</sup> *Bush v. Gore*, 531 U.S. 98 (2000). Like the U.S. Senate, of course, the electoral college itself is malapportioned, contrary to *Reynolds'* anti-vote-dilution rule; but this is legitimated by specific constitutional provisions. The states, moreover, need not hold elections at all in selecting presidential electors. But once a state chooses to hold elections for presidential electors, *Reynolds* applies, as *Bush v. Gore* confirms.

## 2. *Sailors*

In *Sailors v. Board of Education*,<sup>31</sup> the Court considered a challenge to a state law under which county school boards were chosen by local school boards. The local school boards were elected by the local residents, consistently with *Reynolds* and *Kramer*. Because the county school boards were appointed through an “election” in which the popularly elected local school boards were the “voters,” the Court held the appointments valid: “We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election.”<sup>32</sup>

Thus, not surprisingly, the Court has recognized that many offices — presumably including judicial offices — can be filled by appointments made by a governor, or by an “election” in which the state’s legislators are the “voters.” Governors and state legislators are themselves elected in conformance with *Reynolds* and *Kramer*, just like the members of the local school boards in *Sailors*. But the Kansas selection process is different in a crucial respect. Although the Kansas governor technically appoints the

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<sup>31</sup> 387 U.S. 105 (1967).

<sup>32</sup> 387 U.S. at 108. As the Court correctly recognized, an appointment does not become an “election” in the constitutionally relevant sense just because it results from voting by a multi-member body. Conversely, *Reynolds* and *Kramer* cannot become inapplicable to a genuine election just because those who are elected subsequently exercise a power of appointment or election, as *Bush v. Gore* illustrates.

members of the supreme court, his choice is constrained almost to the point of being meaningless. He may only appoint one of three candidates selected by a body whose controlling majority is elected by members of the state bar.<sup>33</sup> This controlling majority is neither appointed by validly elected officials nor elected in accord with *Reynolds* and *Kramer*.

The *Sailors* Court was careful to note that a “State cannot of course manipulate its political subdivisions so as to defeat a federally protected right . . . . *Nor can restraints imposed by the Constitution on States be circumvented by local bodies to whom the State delegates authority.*”<sup>34</sup> That is exactly what Kansas appears to have done. By delegating to the state’s lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, the state has virtually given the state bar the authority to choose the justices. The fact that this is done through a complex procedure that obscures its actual effect cannot alter the reality of that effect.<sup>35</sup>

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<sup>33</sup> The nominating commission acts by a concurrence of a majority of its members. Kan. Const. art. 3, § 5(g).

<sup>34</sup> 387 U.S. at 108 & n.5 (emphasis added).

<sup>35</sup> The Court has repeatedly reaffirmed that “[c]onstitutional rights would be of little value if they could be . . . indirectly denied. . . . The Constitution nullifies sophisticated as well as simple-minded modes of infringing on constitutional protections.” *U.S. Term Limits v. Thornton*, 514 U.S. 779, 829 (1995) (citations and internal quotation marks omitted).

Because the local school boards in *Sailors* were elected in accordance with the principle of *Reynolds* and *Kramer*, whereas the supreme court nominating commission in Kansas is not, the *Sailors* precedent is inapposite to the Kansas case.

### 3. *Rodriquez*

*Sailors* rests on the intuitively plausible premise that appointments to non-legislative offices are presumptively valid when made by persons or bodies that have themselves been elected in accordance with the *Reynolds/Kramer* principle. But what about the converse? Are appointments always *invalid* unless made by a person or body elected in accordance with that principle? *Rodriquez v. Popular Democratic Party*<sup>36</sup> rejects this proposition.

Under Puerto Rican law, vacancies in the legislature were filled, on an interim basis until an election could be held, by the political party to which the departed legislator had belonged. The *Rodriquez* Court observed that the right to vote is not itself a constitutionally protected right, and that the Constitution does not specify a fixed method of choosing state and local legislators.<sup>37</sup> The question in an equal protection case is whether, once elections have been provided for, the right to participate has been granted on an

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<sup>36</sup> 457 U.S. 1 (1982).

<sup>37</sup> *Id.* at 8-9.

equal basis.<sup>38</sup>

The Court then upheld Puerto Rico's procedure. Filling vacancies on an interim basis by appointment, rather than by election, was approved on the ground that its effect on the right of voters to elect their legislators was minimal and did not disproportionately disadvantage any "discrete group of voters, candidates, or political parties."<sup>39</sup> The harder question was whether appointment by a political party — rather than by a person or group that had been directly or indirectly elected in compliance with *Reynolds* and *Kramer* — was constitutionally permissible.

The Court resolved this question through a fact-intensive analysis. The principle underlying the challenge to the Puerto Rico procedure was that "legitimacy [requires] derivative voter approval and control."<sup>40</sup> The Court believed that this principle was too broad because the presumed control would sometimes be illusory. In this case, for example, Puerto Rico's governor belonged to a different political party than the departed legislator, and the departed incumbent's political party would be expected to make a choice more fairly reflecting the will of the voters. Party control over the appointment was in general more likely than a gubernatorial appointment to reflect the

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<sup>38</sup> *Id.* at 10. *The Sailors* Court reserved the more general question whether legislatures must be elected rather than appointed. 387 U.S. at 109-110.

<sup>39</sup> *Sailors*, 457 U.S. at 12.

<sup>40</sup> *Id.* at 12 (quoting Reply Brief of Appellants).

mandate of the previous election and preserve the existing balance in the legislature. Or at least Puerto Rico could reasonably so conclude in light of its peculiarly strong interest in protecting the role of minority political parties “in order to provide a democratic forum and an outlet for the radically different views of the various political parties as to the ultimate status of Puerto Rico.”<sup>41</sup>

*Rodriguez* certainly does reject the general proposition that every appointment must be made by officials chosen (directly or indirectly) through an election that conforms with *Reynolds* and *Kramer*. The case, however, does *not* stand for the equally general proposition that appointments to public office can be delegated to any group that seems reasonably (or even exceptionally) well qualified to make good appointments. If it did, *Rodriguez* would effectively have overruled *Kramer*, which it instead cited with approval.<sup>42</sup> Furthermore, *Rodriguez* also approvingly cited *Gray v. Sanders*,<sup>43</sup> which had applied the “one person, one vote” rule to primary elections. In *Rodriguez* itself, the Popular Democratic Party chose the interim legislator through a primary election in which only party members were permitted to participate.<sup>44</sup> If this were *generally* permissible, *Rodriguez* would also have overruled *Gray*, which it obviously did not do.

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<sup>41</sup> *Id.* at 13 & n.13 (quoting Brief for Appellees).

<sup>42</sup> *See id.* at 10.

<sup>43</sup> 372 U.S. 368 (1963).

<sup>44</sup> 457 U.S. at 5 n.3.

*Rodriquez* can only be understood as a narrow, fact-specific decision that creates an exception from the *Reynolds/Kramer* principle for certain interim appointments designed to reflect the will of the voters in a previous election for the particular office to which the appointment is made. The Kansas method of selecting supreme court justices is not remotely analogous. The appointments are not interim in nature. They do not fill an office to which the departed incumbent had been elected. And perhaps most important, the Kansas method entrenches the power of a discrete special interest group, the state’s lawyers. The disenfranchising effect of the Kansas law, unlike that of the Puerto Rico law, is *not* “minimal” and its effects *do* “fall disproportionately on [a] discrete group of voters, candidates, or political parties.”<sup>45</sup> The discrete group of voters in question, of course, comprises the numerous Kansas voters who are not lawyers.

#### 4. *Wells v. Edwards*

A different kind of exception to the *Reynolds* principle was recognized in a vote-dilution case involving judicial elections. In *Wells v. Edwards*,<sup>46</sup> the Supreme Court summarily affirmed a district court decision holding that the vote-dilution principle of *Reynolds* was inapplicable to elections to judicial office. That decision is binding on the lower courts, but its precedential effect is extremely limited. Summary affirmances merely “prevent lower courts from coming to opposite conclusions on the *precise issues* pre-

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<sup>45</sup> *Id.* at 12.

<sup>46</sup> 409 U.S. 1095 (1973), *aff’g* 347 F. Supp. 455 (M.D. La 1972).

sented and necessarily decided by those actions. . . . The precedential significance of the summary action . . . is to be assessed in the light of all of the facts in that case.”<sup>47</sup>

The “precise issue” decided in *Wells* was whether direct elections to multi-member courts must comply with the vote-dilution rulings in the *Reynolds* line of case law. In *Wells*, Louisiana’s supreme court was elected from districts that were not equipopulous. The district court rejected the applicability of *Reynolds* because it believed that judges are not “representatives” in the sense that legislative and executive officials are. Judges, according to that court, do not represent the interests of constituents, or exercise the kind of discretion involved in such representation, but simply administer the law.<sup>48</sup>

The district court’s reasoning was repudiated by the Supreme Court in a subsequent case interpreting the Voting Rights Act.<sup>49</sup> Because there were no constitutional claims at issue in that case, the Court had no occasion to reconsider *Wells*, which “held the one-person, one-vote rule inapplica-

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<sup>47</sup> *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (emphasis added). *See also* *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) (“[A]n unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument.”) (quoted with approval in *Mandel*, 432 U.S. at 176)).

<sup>48</sup> 347 F. Supp. at 454-55.

<sup>49</sup> *Chisom v. Romer*, 501 U.S. 380 (1991).

ble to judicial elections.”<sup>50</sup> But the Supreme Court’s subsequent rejection of the reasoning in the *Wells* district court opinion reinforces the importance of respecting the limited scope of summary affirmances. Such decisions have precedential effect only with respect to the precise issues necessarily decided on all of the facts presented in the case.

The laws at issue in *Wells* and in the Kansas case are substantially dissimilar. The Kansas case does not involve an election to judicial office. Instead, it virtually displaces an *executive* official’s appointing discretion as a result of elections from which part of the population (and a very large part at that) is excluded. Even if one accepts the proposition that judges do not perform “representative” functions because they do not exercise the kind of discretion typically associated with such functions, the Kansas nominating commission *does* exercise such discretion. Furthermore, the Kansas case involves a denial of the vote, not dilution of votes, two categories that were expressly distinguished in *Kramer*. Unlike the judicial elections at issue in *Wells*, the Kansas elections for the nominating commission entail a complete exclusion of many otherwise qualified voters.

For these reasons, the summary affirmance in *Wells* cannot be read to imply that *Kramer*’s mandate of strict scrutiny review is inapplicable to a nominating commission like the one used in Kansas.

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<sup>50</sup> *Id.* at 402. Language in the *Wells* district court opinion that might suggest a wider holding is without precedential effect. *See Mandel v. Bradley*, 432 U.S. at 176 (“Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.”).

### III. Lower Court Decisions

#### A. The Ninth Circuit

Although Missouri Plan judicial selection procedures resembling the one used in Kansas are quite common, only the Ninth Circuit has issued a precedential decision on the constitutionality of such a mechanism. In Alaska, the Governor appoints judges from a list of nominees chosen by a commission. The commission comprises the state's chief justice along with three lay members appointed by the Governor and three attorneys appointed by the state bar's board of governors.

In *Kirk v. Chief Justice Walter Carpeneti*,<sup>51</sup> the Ninth Circuit upheld this method of selection. The court concluded that the case fell within the exceptions recognized in *Rodriguez* and *Sailors*, rather than under the principle of *Reynolds* and *Kramer*, because the attorneys were appointed to the commission, not elected. Although its opinion is lengthy, the court simply cited *Rodriguez* and *Sailors* for this crucial point, without further explanation.<sup>52</sup> Thus, the court appears to have assumed that *Rodriguez* and *Sailors* permit virtually any mode of selection that can be formally characterized as an appointment rather than an election. As explained earlier in this paper, that is an untenably broad reading of these cases.

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<sup>51</sup> See *Kirk v. Chief Justice Walter Carpeneti*, — F. 3d — (9th Cir. 2010).

<sup>52</sup> [slip op. at 16659.]

At the very least, the Ninth Circuit’s decision could not be justified without a much more detailed analysis. Under Alaska law, for example, nine of the twelve members of the board of governors of the Alaska bar are *elected* by active members of the state’s organized bar.<sup>53</sup> Because this board selects a near majority of the nominating commission, which in turn selects the judicial nominees from among whom the governor must choose, it is not at all obvious that this process is correctly characterized as one involving only “appointments.” Such a characterization assumes that the elections to the board of governors are somehow made irrelevant by the subsequent steps in the judicial selection process. At the very least, the use of these legally mandated elections would require that the judicial selection process be subjected to a vote-dilution analysis under *Reynolds*. For the reasons given earlier in this paper, *Wells v. Edwards* does not control that analysis, notwithstanding the Ninth Circuit’s mistaken statement to the contrary.<sup>54</sup>

In any event, even assuming that the Ninth Circuit might have correctly decided the case before it, the Kansas case is different in a decisive respect. In Kansas, the attorneys on the nominating commission are directly elected by members of the state bar, so a case relying on the distinction between elections and appointments is inapposite.<sup>55</sup>

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<sup>53</sup> Alaska Stat. §§ 08.08.04(b); 08.08.50(a).

<sup>54</sup> [slip op. at 16658-16659]

<sup>55</sup> In addition, the Alaska nominating commission has a minority of members chosen by the state bar, whereas the bar elects a majority of

## B. District Court Decisions

Two federal district courts outside Kansas have upheld Missouri Plan judicial nominating commissions against equal protection challenges. District court decisions lack precedential authority, and both of the opinions rely on unpersuasive reasoning.

*Bradley v. Work* considered a commission charged with nominating a slate of candidates from which the governor was required to choose in making judicial appointments.<sup>56</sup> The district court held that the commission was a narrow, special-purpose governmental unit within the meaning of *Salyer* and *Ball v. James*:

[T]he attorney members of the Commission are elected to a special group that serves no traditional governmental functions at all. The Commission's sole purpose and reason for existence is to screen candidates as part of the judicial appointment process. Consequently, the Commission satisfies the "special unit with narrow

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the Kansas nominating commission. This difference is probably not significant under the Supreme Court's jurisprudence, but it provides another reason to regard the Ninth Circuit's decision as distinguishable from the Kansas case.

<sup>56</sup> 916 F. Supp. 1446 (1996). The district court's statutory holdings under the Voting Rights Act were affirmed by the Seventh Circuit, but the appellants waived their independent constitutional claims on appeal, and the Seventh Circuit did not consider those claims. *Bradley v. Work*, 154 F.3d 704, 711 (1998). Accordingly, the district court's constitutional rulings are without precedential authority.

functions” prong of the exception to the one-man, one-vote rule.<sup>57</sup>

This analysis is untenable. The nominating commission performed the traditional governmental function of compiling a short list of candidates for appointment to a public office. Ordinarily, this is done by the appointing official himself, or by others acting at his direction.<sup>58</sup> The court seems to assume that a “screening” process of this kind is analogous to the operation of the nominally public business enterprises in *Salyer* and *Ball v. James*. If that assumption were correct, it would follow that a narrow slice of the population could be authorized to elect those who “screen” the candidates for *any* public office. Thus, for example, a state’s public employees could be authorized to elect “screeners” charged with selecting two gubernatorial candidates, and the general population could be given a choice of electing one or the other of these two candidates. That would make a mockery of the general election, and it is impossible to imagine that the Supreme Court would permit so blatant an evasion of *Reynolds* and *Kramer*.

*African-American Voting Rights Legal Defense Fund v. Missouri*<sup>59</sup> involved a wide-ranging challenge to Missouri’s

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<sup>57</sup> *Id.* at 1456-57 (footnotes and citation omitted).

<sup>58</sup> Although this is the ordinary procedure, the task of screening candidates and compiling a short list of finalists could be given to some other official or body of officials, so long as he or they had themselves been validly elected or appointed.

<sup>59</sup> 994 F. Supp. 1105 (E.D. Mo. 1997). The decision was affirmed by the Eighth Circuit in an unpublished summary disposition. 133 F. 3d

complex system for staffing the judiciary. Most of the issues in the case arose under the Voting Rights Act, or depended on allegations of racial discrimination. But the plaintiffs also challenged the state’s use of a judicial selection commission that included members elected by the bar.<sup>60</sup> The district court rejected the applicability of *Reynolds* and *Kramer* on the ground that “no fundamental right has been abridged, and the election of lawyers to commissions is not an election of general interest.”<sup>61</sup> In light of the broad public interest in judicial selection, and the pivotal role of Missouri’s nominating commission, this *ipse dixit* is patently unpersuasive.

### C. The Tenth Circuit

The Tenth Circuit has not decided a case involving judicial selection procedures. In an analogous case, however, that court correctly applied the relevant Supreme Court

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921 (1998). Such dispositions have no authority as precedent. *See, e.g., United States v. Marston*, 517 F.3d 996, 1004 n.5 (2008) (“[U]npublished opinions carry no precedential value in our circuit.” (citation omitted)).

<sup>60</sup> “Judicial selection commissions for appellate positions consist of one judge from the Missouri Supreme Court, three attorneys elected by their peers, one from each appellate district, and three lay members of the public appointed by the governor.” 994 F. Supp. at 1117.

<sup>61</sup> *Id.* at 1128. In a footnote to this statement, the court suggested that the judicial selection commission fell within the “special unit with narrow functions” exception recognized in *Ball v. James. Id.* at n.49. For the reasons set out earlier in this paper, this conclusion is unfounded.

precedents. In *Hellebust v. Brownback*,<sup>62</sup> the court struck down the method of selecting the members of the Kansas State Board of Agriculture. Under the challenged statute, a variety of agricultural interest groups sent delegates to an annual meeting at which the delegates elected the members of the Board. The Board in turn, regulated a variety of activities within the state, some of which were not closely tied to the business of agriculture.<sup>63</sup>

The court held that this arrangement did not fall with the *Salyer/Ball* exception to the strict scrutiny regime of *Reynolds* and *Kramer* because the public character of the Board was more than nominal. “Once the line is crossed into the governmental powers arena, one person, one vote applies.”<sup>64</sup> To the extent that the Kansas judicial nominating commission is understood to be choosing judges, it has clearly “crossed into the governmental powers arena,” and *Reynolds/Kramer* applies.

Significantly, the Tenth Circuit also held that “[t]he [Agriculture] Board’s partial dependence on the actions of other state entities does not restrict the range of govern-

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<sup>62</sup> 42 F.3d 1331 (10th Cir. 1994).

<sup>63</sup> The Board was charged with enforcing approximately eighty state laws, including commercial pumps and scales at ordinary filling stations. It regulated the use of pesticides, not only on farms but also on residential lawns, and it controlled water rights held by cities, utilities, and individuals not directly connected with agriculture. *Id.* at 1332-33.

<sup>64</sup> *Id.* at 1334.

mental powers it wields.”<sup>65</sup> Logically, this implies that the Kansas governor’s small role in judicial selection — choosing from among the three candidates presented to him by the bar-controlled judicial nominating commission — cannot serve to distinguish the judicial selection case from *Hellebust*. Tenth Circuit precedent thus strongly supports the constitutional challenge to the Kansas judicial selection mechanism.

**D. The Kansas District Court Decision in *Dool v. Burke***

In a decision that will presumably be appealed, the federal district court in Kansas recently dismissed an equal protection challenge to the state’s supreme court nominating commission.<sup>66</sup> Judge Monti L. Belot’s short opinion falls well short of providing an adequate analysis of the issues.

The main argument on which the decision rests is that this case is indistinguishable from the Alaska case in which the Ninth Circuit upheld that state’s judicial nominating commission. The judge’s discussion consists almost entirely of lengthy excerpts from the Ninth Circuit opinion and the district court opinion that was affirmed by the Ninth Circuit. As far as I can guess from reading those excerpts, Judge Belot believes that the crucial fact in both cases is that the governor, rather than the nominating

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<sup>65</sup> *Id.*

<sup>66</sup> *Dool v. Burke*, Civ. No. 10-1286-MLB (D. Kan. Nov. 3, 2010).

commission, has “the ultimate power to appoint judges.”<sup>67</sup>

For the reasons presented earlier in this paper, it cannot possibly be true that strict scrutiny under *Reynolds* and *Kramer* can be avoided simply by allowing an official elected in accordance with one person, one vote to have some small share in a decision that is effectively controlled by officials elected in violation of one person, one vote.<sup>68</sup>

In any event, Ninth Circuit decisions are obviously not binding in Kansas. The Tenth Circuit’s decision in *Hellebust* just as obviously *is* binding. Judge Belot purported to distinguish *Hellebust* on the ground that the judicial nominating commission performs only one narrow function, whereas the agricultural board performed myriad duties that directly affected the general population. The judicial nominating commission “has but one function: to screen applicants to fill vacancies on the Kansas Supreme Court . . . [and] has no duties, functions and powers ‘which

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<sup>67</sup> Slip op. at 11 (quoting *Kirk v. Carpeneti*, slip. op. at 16662). Oddly, Judge Belot criticized the plaintiffs’ counsel for “try[ing] to make it sound as if the governor *must* appoint one of the three applicants [chosen by the judicial nominating commission].” Slip op. at 5. It is true that if the Kansas governor fails to exercise his power of appointment, the appointment is made by the supreme court’s chief justice. But the chief justice *must* appoint one of the three nominees chosen by the nominating commission. Kan. Const. art. 3, § 5(b). With respect to the equal protection claim at issue in the case, this fall-back provision is patently irrelevant.

<sup>68</sup> As noted above, the Tenth Circuit appears already to have rejected that argument by saying that “partial dependence on the actions of other state entities does not restrict the range of governmental powers [the agricultural board] wields.” *Hellebust*, 42 F.3d at 1334.

affect all residents of Kansas daily’ such as those of the Board [of Agriculture at issue in *Hellebust*].”<sup>69</sup>

Once again, for reasons presented earlier in this paper, that argument cannot be right. If it were, *Reynolds* and *Kramer* would not apply to presidential elections, which they certainly do. One might also wonder why — if judicial nominating commissions perform only a trivial function of little interest to the general public — there has been such a concerted and controversial effort, extending over many decades, to replace other modes of judicial selection with this one.

As if recognizing that his analysis may not be satisfactory, Judge Belot concludes by saying: “Plaintiffs are free to disagree, of course, and realistically, the Tenth Circuit is best suited to decide whether *Hellebust* applies.”<sup>70</sup> It would certainly be difficult to dispute *that* proposition.

Judge Belot also declined to discuss *any* Supreme Court opinions, for the following reason:

This court does not understand plaintiffs’ argument any better than, apparently, did the Ninth Circuit. This court is not *required* to follow decisions of the Ninth Circuit and would not hesitate to disregard *Kirk* if it is clear that the decision is contrary to Supreme Court precedent. No such clarity appears from plain-

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<sup>69</sup> Slip op. at 4-5.

<sup>70</sup> Slip op. at 6.

tiffs arguments.”<sup>71</sup>

Whoever may be to blame for Judge Belot’s refusal to look at what the Supreme Court has had to say, the Tenth Circuit will presumably feel obliged to read those opinions, and take them seriously.

#### IV. Conclusion

Kansas law is unique in granting lawyers the sole authority to elect a controlling majority of the members of

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<sup>71</sup> Slip op. at 11-12 (footnote quoting the Ninth Circuit omitted). Judge Belot, did achieve clarity about one thing. In the final sentence of his opinion, he “point[ed] out that Kansas voters approved the present system and the *absence of evidence* that Kansas’ system has not worked and will not continue to work to ensure that qualified individuals are appointed to the Kansas Supreme Court and the Kansas Court of Appeals.” Slip op. at 12 (footnote omitted). What is not clear is why this would have any legal relevance.

In a footnote appended to this final sentence of the opinion, Judge Belot also pointed out that “Yesterday, by margins of 60% or better, Kansas voters retained all four justices of the Supreme Court who were up for retention.” As in many other states, members of this court must periodically stand for so-called retention elections, in which they run unopposed. Kan. Const. art. 3, § 5(c). Unsurprisingly, incumbents who face retention elections in jurisdictions that use this device are almost always retained. *See, e.g.*, Rachel Paine Caulfield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 Mo. L. Rev. 573, 577 (2009); G. Alan Tarr, *Do Retention Elections Work?*, 74 Mo. L. Rev. 605, 627-28 (2009). In the rare case where a Kansas incumbent loses his seat, of course, he will be replaced by someone selected in the same manner that he was originally selected. A state’s use of retention elections cannot somehow cure an unconstitutional selection system.

a body charged with creating a short list of candidates from which judges must be appointed.<sup>72</sup> This provision of the state's constitution was adopted in response to an abusive use of the gubernatorial appointment power. In 1956, the state's chief justice, who was seriously ill, resigned. The governor, who was a lame duck, then immediately resigned his own office, and was replaced by his lieutenant governor. The new governor then performed the only official act of his brief tenure in office: appointing the former governor to the chief justiceship.<sup>73</sup> After this sleazy stunt, the state bar's "intensive lobbying efforts" persuaded the voters to adopt the current selection system by constitutional amendment in 1958.<sup>74</sup>

The outrage displayed by the Kansas electorate is certainly understandable. And there is a lot to be said for a general principle that would allow the people of Kansas to live with their decision, for good or ill, until they see fit to amend their own constitution. The United States Supreme Court, however, has decided that the federal Constitution

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<sup>72</sup> See, e.g., 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). Other Missouri Plan states give their bars a somewhat reduced role in selecting the judiciary. This paper's focus on the uniquely powerful role given to lawyers in Kansas should not be taken to suggest that Missouri Plan arrangements in other states are constitutionally permissible.

<sup>73</sup> Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 Kan. B. Ass'n 32, 34 (2000).

<sup>74</sup> *Id.*

does not give free rein to the states in structuring their electoral processes. As this paper has shown, the Court's precedents require that the Kansas system be subjected to strict scrutiny. It may not be upheld — certainly not by the Tenth Circuit, and not by the Supreme Court itself if it follows its own precedents — unless it is both necessary to promote a compelling state interest and sufficiently tailored to serve that interest.

Kansas certainly has a compelling interest in seeking the most qualified candidates for judicial office. And it is easy to agree that the state has a compelling interest in ensuring that the state's lawyers have a full opportunity to contribute their knowledge and expertise during the process through which judges are selected. But it is almost impossible to imagine how the Kansas procedure could be regarded as narrowly or sufficiently tailored to serve those interests.

The scandal that triggered the adoption of the current system, for example, could easily have been avoided by a simple rule under which a lame duck governor is precluded from making judicial appointments near the end of his term, or a rule under which he can make only interim appointments that expire with his own term in office.

More generally, there are countless other mechanisms through which gubernatorial abuses can be checked. The most obvious is a requirement, on the federal model, that gubernatorial nominees be confirmed by one or both houses of the legislature, but others could easily be imagined. And there are also many other ways in which a state's lawyers could be given a significant advisory role in judicial selection. The governor, for example, might be required to

give the bar an opportunity, before he made an appointment, to comment on candidates he was considering. If a stronger control were desired, the governor might be required to provide a written explanation for any decision to appoint a supreme court justice who had not been recommended by the bar.<sup>75</sup>

What Kansas may not do is delegate to a private interest group the authority to hold elections that virtually determine who will exercise the significant and wide-ranging power of its supreme court. Such a delegation sits very uneasily with basic principles of republican government and with common sense principles of political economy. Individual lawyers have many virtues and many uses, but when gathered into a guild they also have the usual exploitive tendencies of other such interest groups. And they are no exception to Madison's famous analysis:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the gov-

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<sup>75</sup> These examples are not meant as an exhaustive list. For some additional suggestions, see Joshua Ney, *Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?*, 49 Washburn L.J. 143, 170-72 (2009).

ernment; but experience has taught mankind the necessity of auxiliary precautions.<sup>76</sup>

In responding as they did in 1958 to lobbying by their state’s lawyers, and to the disgraceful behavior of a couple of lame duck politicians, the people of Kansas may not have adequately considered how best to arrange these auxiliary precautions. In any event, modern constitutional law requires the federal courts to reject the decision they made.

It is very unlikely that this federal intrusion will harm what Madison called “the permanent and aggregate interests”<sup>77</sup> of the people of Kansas, or of other states that have adopted Missouri Plan devices. Indeed, even the nation’s most prominent and respected advocate of merit selection has said:

There is nothing in the goals of a non-partisan court plan that requires it to be dominated by attorneys. It certainly helps to have people with legal expertise on the commission, but I have no doubt members of the public who are duly engaged and attentive can quite ably select judges. And this move helps curb the accusation that attorney or bar politics dominate the selection process.<sup>78</sup>

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<sup>76</sup> *Federalist No. 51.*

<sup>77</sup> *Federalist No. 10.*

<sup>78</sup> Sandra Day O’Connor, *The Essentials and Expendables of the Missouri Plan*, 74 Mo. L. Rev. 479, 492 (2009). Justice O’Connor is

Justice O'Connor's formulation here is exactly correct, and it reinforces the conclusion that the result dictated by the Supreme Court's case law will have salutary effects.

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referring here to Arizona's nominating commission, which comprises the state's chief justice, five members nominated by the state bar's board of governors and confirmed by the senate, and ten members appointed by the governor and confirmed by the senate. Ariz. Const. art. VI, § 36. Arizona's requirement of senate confirmation reduces, though it may not adequately avoid, the kind of constitutional difficulties raised by the Alaska mechanism discussed earlier in this paper.