

## THE JUSTICES OF THE KANSAS SUPREME COURT 1861-1975: A COLLECTIVE PORTRAIT

*Francis H. Heller\**

"In contrast to Governors and state legislators, virtually no attention has been paid in any aggregate sense to the attributes and career patterns of men who become state supreme court justices."<sup>1</sup> Some obvious generalizations recur in the literature,<sup>2</sup> and one political scientist has published a survey of data on educational background, age and tenure, demographic background, religion, party affiliation, and career background for the years 1961-68.<sup>3</sup> A few individual courts have been the subject of study<sup>4</sup> but, in general, far less is known about state judges than about state legislators and state governors.

An example of what could be done was set by Schmidhauser, whose "collective portrait" of the justices of the Supreme Court of the United States appeared in 1959.<sup>5</sup> Schmidhauser assembled data on paternal occupations, place of birth, ethnic origin, religious affiliation, educational background, non-political occupation, political party identification, and prior judicial experience for each of the 91 men who served on the Supreme Court of the United States from its establishment through the October 1957 term. He concluded:

The typical Supreme Court justice has invariably been white, generally Protestant with a penchant for a high social status denomination, usually of ethnic stock originating in the British Isles, and born in comfortable circumstances in an urban or small town environment. In the earlier history of the Court, he very likely was born in the aristocratic gentry class, while later he tended to come from the professionalized upper middle-class.<sup>6</sup>

Heiberg sought to follow Schmidhauser and draw a "collective portrait" of the justices of the Minnesota Supreme Court.<sup>7</sup> Schmidhauser had divided the United States Supreme Court's history into six periods: 1789 to 1828,

\* Roy A. Roberts, Professor of Law and Political Science, University of Kansas. M.A. 1941, J.D. 1941, Ph.D. 1948, Virginia. Thomas Brill, J.D. 1975, University of Kansas, assisted in the collection of data and prepared an early draft of portions of this paper.

<sup>1</sup> Canon, *Characteristics and Career Patterns of State Supreme Court Justices*, 45 STATE GOV'T 34 (1972).

<sup>2</sup> E.g., "The bench was lily-white and mostly Protestant. . . . [T]hey were middle-of-the-road conservatives . . . successful or ambitious lawyers." L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 334-35 (1973).

<sup>3</sup> Canon, *Characteristics and Career Patterns of State Supreme Court Justices*, 45 STATE GOV'T 34, 36-39 (1972).

<sup>4</sup> E. BASHFUL, *THE FLORIDA SUPREME COURT: A STUDY IN JUDICIAL SELECTION* (1958); R. FRYE, *THE ALABAMA SUPREME COURT: AN INSTITUTIONAL VIEW* (1969); T. MORRIS, *THE VIRGINIA SUPREME COURT: AN INSTITUTIONAL AND POLITICAL ANALYSIS* (1975) [hereinafter cited as MORRIS]; Heiberg, *Social Backgrounds of the Minnesota Supreme Court Justices: 1858-1968*, 53 MINN. L. REV. 901 (1969) [hereinafter cited as Heiberg]; Roberts, *A Political History of the New Mexico Supreme Court 1912-1972*, 1975 N.M.L. REV. 1 (special issue); Vines, *The Selection of Judges in Louisiana*, in *STUDIES IN JUDICIAL POLITICS* (K. Vines and H. Jacob eds. 1963).

<sup>5</sup> Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait*, 3 MIDWEST J. POL. SCI. 1 (1959) [hereinafter cited as Schmidhauser]. Much of the same material, but without the charts and figures, is found in chapter three of the same author's *THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES* (1960).

<sup>6</sup> Schmidhauser, *supra* note 5, at 45.

<sup>7</sup> Heiberg, *supra* note 4.

1829 to 1861, 1862 to 1888, 1889 to 1919, 1920 to 1932, and 1933 to 1957. Heiberg identified three distinct periods in the history of the Minnesota court: 1858 to 1890, 1891 to 1930, and 1931 to 1968. Thus Schmidhauser's third and Heiberg's first period were comparable, as were their last periods. Heiberg's second period covers the years of two of Schmidhauser's periods, the fourth and the fifth. In Heiberg's first period, he found that the Minnesota justices conformed rather closely to the model Schmidhauser had derived from his data on United States Supreme Court justices: white, high status Protestant, upper class in background, ethnic origin in the British Isles, high status in educational background.<sup>8</sup> In the second period, however, the characteristics began to shift: though British Isles ancestry was still the norm, the typical Minnesota justice of the middle period was born in Minnesota, of a farm family, and had received his education in the state or at least the Midwest.<sup>9</sup> In the final period, the Minnesota court begins to parallel the population composition of the state. Scandinavians, Germans, and Irish Catholics now predominate. The judges are Lutherans and Catholics and predominantly Minnesota-educated.<sup>10</sup>

Heiberg encountered some difficulty because the data on state court justices are considerably less plentiful than on justices who served on the nation's highest court. Schmidhauser was able to draw on "[t]he sustained intellectual interest in judicial biography . . . in the past three decades,"<sup>11</sup> but this interest has not extended much beyond the Supreme Court.<sup>12</sup> Considerable work still needs to be done<sup>13</sup> before a "collective portrait" of a state supreme court can be fully comparable to what Schmidhauser was able to do for the Supreme Court of the United States.

Anyone attempting a "collective portrait" of the Kansas Supreme Court is faced with the same problem of relative scarcity and incompleteness of information. The number of justices who have been the subject of special study is negligible.<sup>14</sup> The best available source of information proves to be the memorials and encomia published upon the death or retirement of a justice in the *Kansas Reports*.<sup>15</sup> For sitting or recently deceased or retired justices, recourse must be had to such reference books as *Who's Who in*

<sup>8</sup> *Id.* at 930.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 931-32.

<sup>11</sup> Schmidhauser, *supra* note 5, at 2. Schmidhauser provided an appendix of his biographic sources that lists 56 books, 18 articles, 4 theses, and 51 entries from the *DICTIONARY OF AMERICAN BIOGRAPHY*, plus assorted references to newspaper articles. Since the publication of Schmidhauser's article, biographical essays on all justices of the Supreme Court of the United States have been assembled in a four-volume work, *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS* (Friedman & Israel eds. 1969).

<sup>12</sup> Among the exceptions: L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957); J. REID, *CHIEF JUSTICE: THE JUDICIAL WORLD OF CHARLES DOE* (1967).

<sup>13</sup> See Heller, *Lawyers and Judges in Early Kansas: A Prospectus for Research*, 22 *KAN. L. REV.* 217 (1974).

<sup>14</sup> Two such studies are T. Alexander, *Johnston of the Kansas Supreme Court*, January 1964 (unpublished thesis in University of Kansas Law Library); D. Taylor, *The Business and Political Career of Thomas Ewing, Jr.: A Study of Frustrated Ambition*, 1970 (unpublished doctoral dissertation in University of Kansas Library).

<sup>15</sup> The most recent index of such memorials is in 215 *Kan. xiv* (1974).

*America* and *Who's Who in the Midwest*. In one or two instances, the only information that could be located was in newspaper stories. Obviously, not all of the categories used in Schmidhauser's survey of the justices of the Supreme Court of the United States are covered by either the memorials or the data submitted by the biographees to *Who's Who*. Such items as religion and ethnic origin may or may not be represented. Even more elusive is the matter of parental occupation, generally considered the best indicator for the establishment of social status.<sup>16</sup>

Thus this "collective portrait" is not as refined as one might hope. It is, however, reasonably comparable to what Heiberg<sup>17</sup> was able to do for Minnesota and, in some of its aspects, comparability can also be established with Morris' study of the Virginia court.<sup>18</sup>

### I. INSTITUTIONAL HISTORY

The Wyandotte Constitution of 1859, which became the Constitution for the State of Kansas upon admission into the Union in 1861, provided for the Judiciary in Article III.<sup>19</sup> The Supreme Court was to consist of one Chief Justice and two Associate Justices, elected at large by the voters of the State. The terms of office were to be six years, but only after the State's first election. At the initial election, voters would select a Chief Justice for a six year term, one Associate Justice for a four year term, and one for a two year term. In February of 1861, Thomas Ewing, Jr., was elected as the court's first Chief Justice, and Samuel A. Kingman and Lawrence D. Bailey were chosen to serve as Associate Justices.<sup>20</sup>

In 1900, the three-man court was expanded and its procedures reformed.<sup>21</sup> A constitutional amendment expanding the court to seven members and allowing the justices to sit separately in two divisions of three justices each was approved by Kansas voters. Only the cases deemed necessary to be reviewed by the entire court would be heard before the entire bench. The position of Chief Justice would go to the justice senior in terms of continuous service, with age determining the position when terms of service were equal. The term of office remained at six years, with staggered terms to provide continuity. The incumbent Governor, William E. Stanley, was allowed to select the four new justices who would serve from January 1901 to January 1903.<sup>22</sup> The general election of 1902 began the transition period for the staggered terms of the new justices. This transition ended with the 1908 election; thereafter, every six years three justices were voted into office, while at each of the two intervening general elections two justices were elected.

<sup>16</sup> D. MATTHEWS, *THE SOCIAL BACKGROUND OF POLITICAL DECISION-MAKERS* 23-29 (1954), cited in Schmidhauser, *supra* note 5, at 6.

<sup>17</sup> Heiberg, *supra* note 4.

<sup>18</sup> MORRIS, *supra* note 4.

<sup>19</sup> KAN. CONST. art. III (1861).

<sup>20</sup> Lilliard, *Beginnings of the Kansas Judiciary*, 28 KAN. JUD. COUNCIL BULL. 3, 4-8 (1954).

<sup>21</sup> KAN. CONST. art. III (1900).

<sup>22</sup> 62 Kan. iii (1901).

This system prevailed until 1957, when the legislature decided to submit a revised Article III, Section 2 to the voters of the state.<sup>23</sup> The most significant change resulting from the approval of the new section was a nonpartisan nominating commission to give the Governor three names from which he would select one for appointment to a court vacancy. The intent was to minimize the role of political considerations in judicial appointments and to assure that the best qualified persons would be appointed to the high court. A second major procedural change was to place the names of sitting justices on a separate judicial ballot without party designation, with the voters to determine whether they should be retained or removed.

These changes in the number and the mode of selection of the justices of the Supreme Court of Kansas provide a plausible basis for a division of the "collective portrait" into three periods. The first, 1861-1900, corresponds with Heiberg's first division of the Minnesota Court from 1858 to 1890, and to Schmidhauser's 1862-1888 period for the national Supreme Court. The second historical period for this study is from 1901-1957, with the last period being 1958-1975. Heiberg's two other historical periods are 1891-1930 and 1931-1968, thus again providing reasonably analogous parameters.<sup>24</sup>

## II. POLITICAL PARTY AND MEANS OF REACHING THE COURT

The two means of reaching the Kansas Supreme Court during the first two historical periods were either by gubernatorial appointment or by election. As previously discussed, during the third historical period of 1958-1975, all justices were appointed by the Governor from the three candidates offered by the nonpartisan nominating commission. As Table I reveals, during the 1861-1900 period, 73.3 percent of the justices were elected to their positions, while 26.7 percent of the justices were appointed. This pattern changed in the 1901-1957 period, with 57.6 percent initially appointed to the court and 42.4 percent elected.<sup>25</sup>

These results are at variance with Heiberg's findings for the Minnesota court. His data reveal that from 1858 to 1890, 53 percent of the justices were initially appointed and 47 percent elected. In his second historical period (1891-1930), 52 percent of the justices were elected to the court. This pattern changed, however, during his last period (1931-1968). During this time span, 77 percent of the Minnesota court members obtained their positions initially through gubernatorial appointments.<sup>26</sup>

It appears from this data that Kansas voters initially had more opportunity to select their supreme court justices than did Minnesota voters. The differences might be explained by variances in the number of vacancies on the

<sup>23</sup> KAN. CONST. art. III, § 2 (1958). This change was submitted by the legislature in 1957, but was not approved by the voters until 1958.

<sup>24</sup> See text at note 7 *supra*.

<sup>25</sup> See Table I *infra*.

<sup>26</sup> Heiberg, *supra* note 4, at 904.

courts for these periods, *i.e.* the incidence of deaths and the element of longevity. Another explanation might be the turbulent political scene in Kansas during the 1861-1900 period, with voter sentiment shifting more often than it would in more recent years.

Political party endorsement was important to each justice when he presented himself for election or reelection to Kansas voters during the first two historical periods. The data show that the Republican Party has enjoyed an 88.4 percent share of the high court's political affiliation, while Democrats and Populists captured the remaining 11.6 percent of the seats. This comports, of course, with the fact that the Republican Party has dominated Kansas politics over the years. It is noteworthy that the two Democratic appointees of the 1861-1900 period, Chief Justice Nelson Cobb and Justice Theodore A. Hurd, were not elected to a full six year term. During the 1901-1957 period, the single Democratic appointee, Edward R. Sloan, also was not elected to a full term. Since 1958, all supreme court candidates have run on a separate non-partisan ballot.

### III. PATERNAL OCCUPATION

Social scientists believe that paternal occupation can offer the most trustworthy clue to determining one's social origin. It has also been noted that, if occupational heredity exists, then those falling within the higher social status occupations enjoy a better chance to attain fame and prominence in their own right.<sup>27</sup>

This study followed Heiberg's classification model for the various occupations.<sup>28</sup> It should be emphasized that small farmers were often not on a lower social status level in Kansas. Rather the pioneer families who homesteaded small farms and expanded them slowly over the years were often the backbone of small, rural communities in the state.

Information on parental occupations was very difficult to obtain, with the result that, for all the historical periods, 67.2 percent of the parental occupations have to be listed as "unknown." Until more comprehensive statistics are available, however, these fragmentary results are the best available figures.<sup>29</sup>

For the 1861-1900 period, one finds that the most common paternal occupation was a profession. Lawyers, physicians, teachers, and clergy all shared this category. Justice Daniel M. Valentine's father was a prosperous farmer and is the sole figure in this category. For the second historical period of 1901-1957, 21.6 percent of the paternal occupations were given as small farmers. The second highest division was the professional category, with physicians and lawyers predominating. For the most recent period, 1958-1975, so little

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<sup>27</sup> D. MATTHEWS, *THE SOCIAL BACKGROUND OF POLITICAL DECISION-MAKERS* 23-29 (1954), *cited in* Schmidhauser, *supra* note 5, at 6; Schneider, *Fame and Social Origin*, 14 *SOCIAL FORCES* 358 (1936), *cited in* Heiberg, *supra* note 4, at 909.

<sup>28</sup> Heiberg, *supra* note 4, at 909-11.

<sup>29</sup> See Table II *infra*.

information was available that no summary can be given. For all the historical periods taken together, the categories of professional positions and lower social status occupations shared equally at 14.8 percent each.

Heiberg's study was also plagued with a large number of "unknowns" but, despite this difficulty, his data show rather clearly that the majority of fathers of Minnesota Supreme Court justices were engaged in high social status occupations.<sup>80</sup> This concurs with Schmidhauser's results on the United States Supreme Court.<sup>81</sup> If one assumes—as Heiberg does<sup>82</sup>—that being a small farmer in the Midwest was not a low status occupation but equal to the professional status level, then, despite the great absence of data, this study also shows that the majority of justices on the Kansas bench came from high social status paternal occupational environments.

#### IV. SETTING OF BIRTH

Another variable closely related to social origin and attitudinal background is the type of community environment in which a person is born and lives through his or her formative years. The present study followed Heiberg's and Schmidhauser's assumption that the settings of a person's birth and formative years usually correspond to each other.<sup>83</sup> Thus, Table III is constructed around the birth setting for each justice.<sup>84</sup>

In the first historical period, the majority of Kansas justices were born and reared in a small town or rural environment. Only two of fifteen justices grew up in an urban setting. Eight of the ten justices in this period were born in the United States.<sup>85</sup> During the 1901-1957 period, the small town and rural environments again predominated as the birth setting of the justices. All of the court members in this period were born in the United States, with the sole exception of Chief Justice John Shaw Dawson, who was born in Grantown-on-Spey, Scotland.<sup>86</sup> For the last period, the small town community setting once again is in the majority. All justices for this period were also native-born Americans.

Heiberg had very similar results with regard to the location of the Minnesota justices' birth.<sup>87</sup> In Minnesota, as in Kansas, small towns and rural areas have been the source for the majority of justices during all the historical periods. The urban areas have not been completely absent as settings for a justice's early

<sup>80</sup> Heiberg, *supra* note 4, at 910-11.

<sup>81</sup> Schmidhauser, *supra* note 5, at 6-13.

<sup>82</sup> Heiberg, *supra* note 4, at 911.

<sup>83</sup> Heiberg, *supra* note 4, at 913; Schmidhauser, *supra* note 5, at 16.

<sup>84</sup> See Table III *infra*.

<sup>85</sup> Justice William A. Johnston was born near Oxford Mills, Ontario, Canada. 146 Kan. v (1937); T. Alexander, Johnston of the Kansas Supreme Court, at 3, January 1964 (unpublished thesis in University of Kansas Law Library). Justice David J. Brewer was born in Smyrna, Asia Minor, where his father, a Congregational minister, served as a missionary to the Greeks in Turkey. The family returned to the United States a year later and Brewer grew up in Wethersfield, Connecticut. 83 Kan. vi (1911); Paul, *David J. Brewer*, in *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 1515* (Friedman & Israel eds. 1969).

<sup>86</sup> 187 Kan. xv (1960-61). Dawson emigrated to America at the age of fifteen.

<sup>87</sup> Heiberg, *supra* note 4, at 911-14.

environment, but the domination by the rural and small town areas for this category is strong, reflecting both states' primarily agricultural orientation.

#### V. ETHNIC ORIGIN

The ethnic environment of a justice may also be an important variable of social background. Certain foreign groups have traditionally been considered to be of lower social status, while other groups, especially the English, have enjoyed a significantly higher social status in American culture.<sup>38</sup> The data on ethnic origin of Kansas Supreme Court justices, however, were so sparse (nine out of ten had to be listed as "unknown") that a valid generalization is not appropriate.<sup>39</sup> Reliance on family names was rejected, partly because of the frequency of name changes by non-English-speaking immigrants<sup>40</sup> and partly because an Irish surname, for instance, may be carried by a person whose major ethnic inheritance is predominantly non-Irish.

#### VI. RELIGIOUS ASSOCIATION

The importance of one's religious affiliation in relation to one's social class has been well documented.<sup>41</sup> Schmidhauser and Heiberg divided denominations into three social status levels, the highest level including (in alphabetical order) Congregationalists, Episcopalians, French Calvinists, Presbyterians, and Unitarians. Catholics, Jews, and Quakers comprise an intermediate group in this classification, while Baptists, Disciples of Christ, Dutch Reformed, Lutherans, and Methodists were placed in the group labeled "low social status."<sup>42</sup>

For the majority of the Kansas justices, information on their religious affiliation was not available. Thus, for the first period (1861-1900), such information could be found on only three of the 15 justices. In the middle period, data were available on slightly more than half of the group (19), 14 of whom were identified with high social status denominations, three were listed only as "Protestant," one (William Wertz) as Lutheran, and one (William D. Jochims) as Roman Catholic. In the third period, information is again available on slightly less than half of the group, all of whom were in high social status denominations.<sup>43</sup>

Heiberg notes that in Minnesota, Catholics and Lutherans, although still underrepresented, have appeared in that state's supreme court's membership in increasing numbers in the most recent period, thus tending to reflect the dominant strength (38 and 41 percent, respectively) of these churches in

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<sup>38</sup> Schmidhauser, *supra* note 5, at 18.

<sup>39</sup> See Table IV *infra*.

<sup>40</sup> Thus Schmidhauser notes that Justice William Johnson of the U.S. Supreme Court was descended from a Dutch family by the name of Jansen. Schmidhauser, *supra* note 5, at 18.

<sup>41</sup> H. NIEBUHR, *THE SOCIAL SOURCES OF DENOMINATIONALISM* (2d ed. 1957), *cited in* Schmidhauser, *supra* note 5, at 21, and Heiberg, *supra* note 4, at 917.

<sup>42</sup> Heiberg, *supra* note 4, at 918; Schmidhauser, *supra* note 5, at 22.

<sup>43</sup> See Table V *infra*.

Minnesota.<sup>44</sup> Similar results reflecting Florida's particular religious composition were reported by Bashful.<sup>45</sup>

In Kansas, no religious group predominates as do Lutherans and Catholics in present-day Minnesota. The so-called high-status denominations, however, account for less than 20 percent of the state's population<sup>46</sup> and therefore comprise a disproportionately large share of the membership of the highest court.

## VII. EDUCATIONAL BACKGROUND

The pre-law education of Kansas Supreme Court justices has been very diverse, with 54.1 percent having attended a university or college. Another 3.3 percent attended private academies, while 18 percent of the justices had only a public school education. The universities and colleges attended are widely scattered, with only the University of Kansas, Kansas State (Normal) College of Emporia, Washburn University, and the University of Wisconsin having more than one graduate on the court.<sup>47</sup>

In the 1861-1900 period, one-third of the court members attended universities or colleges while 40.0 percent had only a public school education. During the second period, the college attendance figure increased to 56.7 percent. For the final historical period, all the justices had attended a college or university.

Heiberg's results differ somewhat from the Kansas figures. In the first Minnesota historical period, 73.3 percent of the justices attended some college or university. During the 1891-1900 period, 47.8 percent of the court members attended colleges or universities, with 77.3 percent going to institutions of higher learning during the final period. For all the historical periods, some 13.3 percent of the justices attended private academies, which contrasts with the lower Kansas figure of 3.5 percent for all periods of the study. Perhaps the lower availability of private academies in this area accounts for the lower percentage. Public school systems accounted for 21.7 percent of the Minnesota justices' educational training, and the Kansas figure is comparable.<sup>48</sup>

For their legal education, 55.7 percent of the Kansas court members attended law schools during all the historical periods of the study.<sup>49</sup> This majority figure was not true during the 1861-1900 period, when private law offices accounted for 26.6 percent of the justices' legal training. This figure dropped significantly during the middle period and fell to zero during the 1958-1975 period, when law school education completely dominated as the means of legal training. During the last two historical periods, the two law

<sup>44</sup> Heiberg, *supra* note 4, at 919.

<sup>45</sup> E. BASHFUL, *THE FLORIDA SUPREME COURT: A STUDY IN JUDICIAL SELECTION* (1958), *cited in* Heiberg, *supra* note 4, at 919.

<sup>46</sup> D. JOHNSON, P. PICARD & B. QUINN, *CHURCHES AND CHURCH MEMBERSHIP IN THE UNITED STATES* 1971, at 6 (1974).

<sup>47</sup> See Table VI *infra*.

<sup>48</sup> Heiberg, *supra* note 4, at 922.

<sup>49</sup> See Table VII *infra*.



schools in the state, the University of Kansas and Washburn University, have provided the high court with the bulk (43.5 percent) of its justices.

These findings correspond to Heiberg's results. Private law office study predominated in the 1858-1890 historical period in Minnesota, but this practice diminished greatly in popularity during the second two periods. Law schools filled this gap, and again the state law schools enjoyed the greatest popularity. A wide range of law schools are represented in the Minnesota Supreme Court,<sup>50</sup> as in the Kansas Supreme Court. The figures for Virginia reflect the fact that the state was stably settled by the time its judiciary was established. Forty-two (55.3 percent) of the 76 judges covered by Morris' study attended law schools, all but two of them within the state. Twenty-six judges came to the Virginia court before 1850, and of these, 15 had read law in a law office or with a judge (often a close relative). Thus, for the period comparable to the coverage of this study and of Heiberg's research, the percentage of Virginia judges who attended law school is 80.0—considerably higher than in the two midwestern states.<sup>51</sup> Although only 11.5 percent of the Kansas justices studied in private law offices, it is noteworthy that the legal training they received was with some rather prominent lawyers of their day.<sup>52</sup>

#### VIII. GOVERNMENTAL AND JUDICIAL EXPERIENCE

To be appointed or elected to the Kansas Supreme Court, one must be well known throughout the state. It is not surprising then that, over the three historical periods of the study, 50.8 percent of the justices have held state governmental positions.<sup>53</sup> The judiciary has been the source of 15 court members, the executive branch has provided nine justices, and four justices have come from the ranks of the legislature. A small number of justices had served only as county attorneys before being elevated to the high court, principally in the 1901-1957 period.

In the earliest historical period, three court members served in the state's Constitutional Convention of 1859, and two served as territorial district judges. In the middle period, two justices served as United States Assistant District Attorneys, and one was a United States Senator before being named to the court. In the modern period, the justices came mostly from district court benches, with one having been a former county attorney.<sup>54</sup>

This is not the place to examine the contention that judicial experience at the trial court level should be a prerequisite for any position on an appellate court.<sup>55</sup> While this experience may provide new justices with knowledge of the high court's procedures and perspectives, such a requirement could also

<sup>50</sup> Heiberg, *supra* note 4, at 921-23.

<sup>51</sup> MORRIS, *supra* note 4, at 173-77.

<sup>52</sup> See Table VIII *infra*.

<sup>53</sup> See Tables IX and X *infra*.

<sup>54</sup> Justice Alex M. Fromme served as county attorney of Sheridan County from 1941 to 1948. WHO'S WHO IN THE MIDWEST 228 (4th ed. 1974-75).

<sup>55</sup> The arguments are reviewed by H. ABRAHAM, THE JUDICIAL PROCESS 50-60 (3d ed. 1975).

create a professional judiciary that might be disinclined to innovation or reforms. What seems preferable is a balance between candidates with prior judicial experience and "outsiders" with relatively little experience. If one closely examines the figures for the Kansas court, one sees that a balance has in fact occurred. For example, on the state level, for all periods fifteen court members have served as district judges, nine have served as Attorney General or in the Attorney General's office, and four have been experienced members of the legislature. In addition, Table X shows that 49.3 percent of the court's members have come to the court with no prior judicial experience.

Heiberg found a virtually identical balance of judicial experience with inexperience on the Minnesota court, with 51.7 percent of the Minnesota Supreme Court justices having had some prior judicial experience.<sup>56</sup> This is also very nearly the same percentage that Schmidhauser found for the United States Supreme Court.<sup>57</sup> Heiberg noted that in Minnesota a significant decline in prior judicial experience occurred in the third period.<sup>58</sup> The Kansas experience, on the other hand, has reflected an increase. More data are needed to establish any trend.

#### IX. PRIMARY OCCUPATIONS

What has been the range and type of experiences that the Kansas justices have had as attorneys before coming to the court? Table XI shows that 24.4 percent of the justices were primarily judges, 26.3 percent were general practitioners, 18.3 percent had served as government attorneys, and 16.3 percent had been primarily politicians before being appointed or elected to the state's high bench.<sup>59</sup>

Heiberg's results from the Minnesota bench correlate fairly closely to the above findings. He found that 43.3 percent of the Minnesota court members had been judges, 18.3 percent had been general practitioners, 16.7 percent had been politicians, and 10.0 percent had once served as corporation lawyers. Experience as government attorneys ranked fourth with 8.3 percent.<sup>60</sup> Heiberg noted that only two academicians had ever reached the Minnesota court, and the same applies to Kansas: Harry K. Allen was elected to the court in 1936, having served as Dean of the Washburn Law School since 1922, and Schuyler W. Jackson came to the court in 1958 from the same deanship. In conclusion, one may generalize that in Kansas, lower court judges, general practitioners, and government attorneys (in that order) are the most likely to be called to service on the state's highest court.

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<sup>56</sup> Heiberg, *supra* note 4, at 926.

<sup>57</sup> Schmidhauser, *supra* note 5, at 42.

<sup>58</sup> Heiberg, *supra* note 4, at 928.

<sup>59</sup> See Table XI *infra*.

<sup>60</sup> Heiberg, *supra* note 4, at 929.

## X. CONCLUSION

Interesting differences appear among the social backgrounds of the Kansas Supreme Court justices over the three historical periods. The members of the court during the 1861-1900 period originated from small towns and rural areas of the old Northwest region of Ohio, Indiana, or from the Northwestern region of the United States. They received their legal training in private law offices, and frequently their mentors were prominent attorneys of their day. Their ethnic origin was from the British Isles, and their religious affiliation was high-status Protestant. Many had come to Kansas in the 1850's and had served with the Territorial Government.

This common profile changes slightly during the second period (1901-1957). More justices then came from small town or rural environments in Kansas or other Midwestern states. They were more frequently trained at Kansas colleges or universities; again the majority were high-status Protestant. Service in state government was common, and most often the service was as a district court judge. The sparse data that are available for the most recent period confirms this same profile.

Professor Friedman's suggestion<sup>61</sup> that the early state benches represented "old America" rather than a cross-section of the country appears to be confirmed by the data for the Kansas Supreme Court. The findings for the Kansas court also correlate closely with Heiberg's results for the Minnesota court.<sup>62</sup> Thus, for the Kansas and Minnesota Supreme Courts, the majority of justices have come to their positions with good legal training, experience in government, and from high social status family backgrounds. As better data become available, some of the figures of the present study may be subject to correction, but in all probability the overall "collective portrait" will not change much from that presented here.

## APPENDIX

TABLE I  
Political Party and Means of Reaching the Court\*

	1861-1900	1900-1957	Total
Total .....	15 (100%)	37 (100%)	52 (100%)
Republicans .....	11 (73.3%)	35 (94.5%)	46 (88.4%)
Appointed .....	1 (6.7%)	7 (18.9%)	8 (15.4%)
Appointed-elected .....	1 (6.7%)	14 (37.8%)	15 (29.9%)
Elected .....	9 (60.0%)	14 (37.8%)	23 (44.2%)
Democrats .....	2 (13.3%)	2 (5.5%)	4 (7.7%)
Appointed .....	2 (13.3%)	1 (2.7%)	3 (5.8%)
Elected .....	0	1 (2.7%)	1 (1.9%)
Populists .....	2 (13.3%)	0	2 (3.9%)
Elected .....	2 (13.3%)		2 (3.9%)
Total Appointed .....	3 (20.0%)	8 (19.8%)	11 (21%)
Total Appointed-elected .....	1 (6.7%)	14 (37.8%)	15 (29%)
Total Elected .....	11 (73.3%)	15 (42.4%)	26 (50%)

\* Because all justices since 1957 have been appointed upon nomination by a non-partisan commission, data for the 1957-75 period have not been included in this table. On all tables, due to rounding, percentages may not add up to 100%.

<sup>61</sup> L. FRIEDMAN, A HISTORY OF AMERICAN LAW 334 (1973).

<sup>62</sup> Heiberg, *supra* note 4, at 930-32.

TABLE II  
Major Non-Political Occupations of the Fathers of the Kansas Supreme Court Justices

	1861-1900	1901-1957	1958-1975	Total
Higher Social Status .....	0	1 ( 2.7%)	0	1 ( 1.6%)
Merchants .....	0	0	0	
Manufacturers .....	0	0	0	
Bankers .....	0	0	0	
Miscellaneous .....	0	1	0	
Wealthy, Prosperous Farmer .....	1 ( 6.7%)	0	0	1 ( 1.6%)
Professional Men .....	4 (26.7%)	5 (13.5%)	0	9 (14.8%)
Lawyers .....	1	2	0	
Clergymen .....	1	0	0	
Physicians .....	1	3	0	
Dentists .....	0	0	0	
Teachers .....	1	0	0	
Lower Social Status .....	0	8 (21.6%)	1 (11.2%)	9 (14.8%)
Smaller Farmers .....	0	8	1	
Mechanics, Laborers .....	0	0	0	
Unknown .....	10 (66.7%)	23 (62.2%)	8 (88.8%)	41 (67.2%)
Total .....	15 ( 100%)	37 ( 100%)	9 ( 100%)	61 ( 100%)*

\* In this and all following tables Lloyd H. Kagey who served for only five weeks in December 1950-January 1951, has not been included.

TABLE III  
Birth Setting of the Kansas Supreme Court Justices

	1861-1900	1901-1957	1958-1975	Total
United States .....	12 (80%)	36 (97.3%)	9 (100%)	57 (93.4%)
Urban .....	1	2	2	5
Small Town .....	5	17	5	27
Rural .....	3	10	0	13
Unknown .....	3	7	2	12
Canada .....	1 (6.7%)	0	0	1 ( 1.7%)
Rural .....	1	0	0	1
Europe .....	1 (6.7%)	1 (2.7%)	0	2 ( 3.3%)
Urban .....	1	0	0	1
Small Town .....	0	1	0	1
Unknown .....	1 (6.6%)	0	0	1 ( 1.7%)
Total .....	15 (100%)	37 (100%)	9 (100%)	61 ( 100%)
Urban .....				6 ( 9.8%)
Small Town .....				28 (45.9%)
Rural .....				14 (22.9%)
Unknown .....				13 (21.3%)

TABLE IV  
Ethnic Origins of the Kansas Supreme Court Justices

	1861-1900	1901-1957	1958-1975	Total
British Isles .....	4 (26.7%)	2 (5.4%)	0	6 (9.8%)
English .....	2	0	0	
Irish .....	0	0	0	
Scottish/Irish .....	1	0	0	
English/Irish .....	1	0	0	
French .....	0	0	0	0
Dutch .....	0	0	0	0
Scandinavian .....	0	0	0	0
Central Europe .....	0	0	0	0
German .....	0	0	0	0
Unknown .....	11 (73.3%)	35 (94.6%)	9 (100%)	55 (90.2%)
Total .....	15 ( 100%)	37 ( 100%)	9 (100%)	61 ( 100%)

TABLE V  
Religious Association of Kansas Supreme Court Justices

	1861-1900	1901-1957	1958-1975	Total
<b>High Social Status</b>				
Denominations .....	2 (13.3%)	14 (37.8%)	4 (45.5%)	20 (32.8%)
Presbyterian .....	1	3	2	
Congregational .....	1	3	0	
Episcopal .....	0	3	1	
Methodist .....	0	5	1	
<b>Intermediate Social</b>				
Status Denominations .....	0	2 ( 5.4%)	0	2 ( 3.3%)
Lutheran .....	0	1	0	
Roman Catholic .....	0	1	0	
Protestant .....	1 ( 6.7%)	3 ( 8.1%)	0	4 ( 6.6%)
Unknown .....	12 (80.0%)	18 (48.7%)	5 (55.5%)	35 (57.3%)
<b>Total</b> .....	<b>15 (100%)</b>	<b>37 (100%)</b>	<b>9 (100%)</b>	<b>61 (100%)</b>

TABLE VI  
Pre-Legal Education of Kansas Supreme Court Justices

	1861-1900	1901-1957	1958-1975	Total
<b>Colleges and Universities</b> .....	<b>5 (33.3%)</b>	<b>21 (56.7%)</b>	<b>6 (100%)</b>	<b>32 (54.1%)</b>
(Attended by more than one Justice)				
University of Kansas .....	0	3	3	6
Kansas State Normal College (Emporia) .....	0	3	0	3
Washburn University .....	0	1	2	3
University of Wisconsin .....	0	2	0	2
(Attended by only one Justice)				
Baker University .....	0	1	0	
Brown University .....	1	0	0	
Campbell College .....	0	1	0	
Fort Scott College .....	0	1	0	
Franklin College .....	0	1	0	
Hillsday College .....	0	1	0	
Iowa State College .....	0	1	0	
Indiana University .....	0	1	0	
Kansas State College-Pittsburg .....	0	0	1	
Kansas State University .....	0	1	0	
Kenyon College, Ohio .....	1	0	0	
Lafayette College .....	0	1	0	
University of Michigan .....	1	0	0	
Monmouth College .....	0	1	0	
Ottawa University .....	0	1	0	
University of Southern California ....	0	1	0	
State Normal College, Salina .....	1	0	0	
Yale University .....	1	0	0	
Academies .....	2 (13.3%)	0	0	2 ( 3.3%)
Casena Academy .....	1	0	0	
Illinois Academy .....	1	0	0	
Public Schools .....	6 (40.0%)	5 (12.7%)	0	11 (18.0%)
Unknown .....	2 (13.4%)	11 (30.6%)	3 (33.3%)	16 (24.6%)
<b>Total</b> .....	<b>15 (100%)</b>	<b>37 (100%)</b>	<b>9 (100%)</b>	<b>61 (100%)</b>

TABLE VII  
Legal Education of Kansas Supreme Court Justices

	1861-1900	1901-1957	1958-1975	Total
Private Law Office Only .....	4 (26.6%)	3 ( 8.1%)	0	7 (11.5%)
Law Schools .....	3 (20.0%)	24 (64.9%)	7 (77.7%)	34 (55.7%)
Albany Law School .....	1	0	0	1
University of Cincinnati .....	1	0	0	1
College of Emporia .....	0	1	0	1
Harvard University .....	0	1	1	2
University of Kansas .....	0	8	4	12
University of Kansas City .....	0	2	0	2
University of Michigan .....	1	2	0	3
Northwestern University .....	0	1	0	1
University of Southern California .....	0	1	0	1
Washington University (St. Louis) .....	0	1	0	1
Washburn University .....	0	6	2	8
University of Wisconsin .....	0	1	0	1
Other .....	3 (20.0%)	4 (10.8%)	0	7 (11.5%)
Studied law while teaching .....	2	2	0	
Studied law while Justice of Peace .....	1	0	0	
Studied law while farming .....	0	1	0	
Studied law while newspaper reporter ..	0	1	0	
Unknown .....	5 (33.4%)	6 (16.2%)	2 (22.3%)	13 (21.3%)
Total .....	15 ( 100%)	37 ( 100%)	9 ( 100%)	61 ( 100%)

TABLE VIII  
Prominent Law Teachers of Kansas Supreme Court Justices

<i>Court Justices</i>	<i>Dates</i>	<i>Law Teachers</i>
Thomas Ewing .....	1861-1862	Philemon Beecher, prominent attorney in Lancaster, Ohio
David Martin .....	1895-1897	J. Warren Keifer, Springfield, Ohio
David J. Brewer .....	1871-1884	David Dudley Field (uncle), plus Albany Law School
Theodore Hurd .....	April 1884 to December 1884	B. Davis Martin, Utica, New York
Stephen H. Allen .....	1893-1899	Brother's law office, Buffalo, New York
William A. Johnston .....	1884-1903	E. F. Clark, Appleton City, Missouri
Silas Wright Porter .....	1905-1923	John Porter (father), prominent lawyer of Warren Co., Illinois
Charles B. Graves .....	1905-1911	Judge H. H. Bent, Burlington, Kansas
William West Harvey .....	1923-1945	Ira Lloyd, Ellsworth, Kansas

TABLE IX  
Highest Governmental Posts Held by Kansas Supreme Court Justices Prior to Their Appointment or Election

	1861-1900	1901-1957	1958-1975	Total
Federal Government .....	3 (20.0%)	0	0	3 ( 4.9%)
Executive .....	2	0	0	
Legislative .....	1	0	0	
Judicial .....	0	0	0	
Territorial Government .....	2 (13.3%)	0	0	2 ( 3.3%)
Executive .....	0	0	0	
Legislative .....	0	0	0	
Judicial .....	2	0	0	
State Government .....	8 (53.3%)	17 (45.9%)	6 (66.7%)	31 (50.8%)
Executive .....	1	8	0	
Legislative .....	1	3	0	
Judicial .....	6	6	6	
Local Government .....	1 ( 6.7%)	7 (19.2%)	1 (11.1%)	9 (14.8%)
Executive .....	1	6	1	
Judicial .....	0	1	0	
Independent Boards .....	0	2 ( 5.4%)	0	2 ( 3.3%)
None .....	1 ( 6.7%)	5 (13.2%)	0	6 ( 9.8%)
Unknown .....	0	6 (16.2%)	2 (22.2%)	8 (13.1%)
Total .....	15 ( 100%)	37 ( 100%)	9 ( 100%)	61 ( 100%)

TABLE X  
Highest Judicial Posts Held by Kansas Supreme Court Justices  
Prior to their Appointment or Election to the Kansas Supreme Court

	1861-1900	1901-1957	1958-1975	Total
Territorial Supreme Court .....	0	0	0	0
District Court .....	9 (60%)	10 (27.0%)	5 (55.5%)	24 (39.4%)
Local Court .....	0	1 ( 2.7%)	0	1 ( 1.6%)
Supreme Court Reporter .....	0	0	1 (11.1%)	1 ( 1.6%)
None .....	6 (40%)	23 (62.2%)	1 (11.1%)	30 (49.3%)
Unknown .....	0	3 ( 8.1%)	2 (22.2%)	5 ( 8.1%)
Total .....	15 (100%)	37 (100%)	9 (100%)	61 (100%)

TABLE XI  
Primary Occupations of the Kansas Supreme Court Justices

	1861-1900	1901-1957	1958-1975	Total
Lawyers who were Primarily:				
Politicians .....	5 (33.3%)	5 (13.5%)	0	10 (16.4%)
Judges .....	6 (40.0%)	5 (13.5%)	4 (44.4%)	15 (24.6%)
Corporation Lawyers .....	1 ( 6.7%)	1 ( 2.7%)	0	2 ( 3.3%)
General Practitioners .....	2 (13.3%)	12 (32.4%)	2 (22.2%)	16 (26.2%)
Government Attorneys .....	1 ( 6.7%)	10 (27.0%)	0	11 (18.0%)
Academicians .....	0	1 ( 2.7%)	1 (11.1%)	2 ( 3.3%)
Unknown .....	0	3 ( 8.1%)	2 (22.2%)	5 ( 8.2%)
Total .....	15 (100%)	37 (100%)	9 (100%)	61 (100%)

