

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

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

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

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

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

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

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

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

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

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

### A. Democratic Selection Methods

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

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

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

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

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

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

Senate confirmation is a less populist method of judicial selection than contestable elections because senate confirmation is less directly dependent on the “wisdom . . . of the common people.”<sup>12</sup> While contestable judicial elections “embody the passion for direct democracy prevalent in the Jacksonian era . . . senate confirmation exemplifies the republicanism of our Nation’s Founders.”<sup>13</sup> Senate confirmation is part of the Founders’ “system of

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

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

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

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

10. U.S. CONST. art. II, §2.

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

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

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

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

indirect democracy in which the structure of government mediates and cools the momentary passions of popular majorities.”<sup>14</sup>

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

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

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

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

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

16. U.S. CONST. art. 2, §1.

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

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

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

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

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

20. See *infra* note 33.

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

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

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

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

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

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

24. N.Y. CONST. art. VI, § 2.

25. N.Y. CONST. art. VI, § 2(e).

26. N.Y. CONST. art. VI, § 2(d)(1).

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

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

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

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

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

28. N.Y. CONST. art. VI, § 2.

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

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

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

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

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

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

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merely from an executive order which the governor may rescind. See Del. Exec. Order No. 4 (Mar. 27, 2009), available at [http://governor.delaware.gov/orders/exec\\_order\\_4.shtml](http://governor.delaware.gov/orders/exec_order_4.shtml) (commission consists of nine members: eight appointed by governor—four lawyers and four nonlawyers—and one appointed by president of bar association, with consent of governor); Me. Exec. Order No. 9 FY 94/95 (Feb. 10, 1995) (five members, all appointed by the governor); Mass. Exec. Order 500 (March 13, 2008), available at [http://www.mass.gov/?pageID=gov3terminal&L=3&L0=Home&L1=Legislation+%26+Executive+Orders&L2=Executive+Orders&sid=Agov3&b=terminalcontent&f=Executive+Orders\\_executive\\_order\\_500&csid=Agov3](http://www.mass.gov/?pageID=gov3terminal&L=3&L0=Home&L1=Legislation+%26+Executive+Orders&L2=Executive+Orders&sid=Agov3&b=terminalcontent&f=Executive+Orders_executive_order_500&csid=Agov3) (twenty-one members, all appointed by Governor); Md. Exec. Order No. 01.01.2007.08 (Apr. 27, 2007) available at <http://www.gov.state.md.us/executiveorders/01.07.08JudicialNominatingCommissions.pdf> (seventeen members, twelve appointed by governor, five by president of bar association); N.H. Exec. Order, 2005-2, available at [http://www.nh.gov/governor/orders/documents/Exec\\_Order\\_Judicial\\_Selection\\_Comm2.pdf](http://www.nh.gov/governor/orders/documents/Exec_Order_Judicial_Selection_Comm2.pdf) (eleven members, all appointed by governor consisting of six lawyers and five nonlawyers,); N.J. Exec. Order No. 36 (Sept. 22, 2006), available at <http://www.state.nj.us/infobank/circular/eojsc36.htm>. (seven members, all appointed by governor: five retired judges). Also, California probably belongs in this category of states that do not require their governors to nominate someone recommended by the commission. See Ware, *supra* note 1, at 388-89 nn.10 & 12.

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

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

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

After the Kansas statute was declared unconstitutional,

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

### C. *The Most Elitism: The Missouri Plan*

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

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

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

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

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

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

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

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

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

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

39. The leader in this regard seems to be the American Judicature Society (AJS). Under the heading “Judicial Selection in the States . . . ‘Initial Selection: Courts of Last Resort,’” AJS claims that at the supreme court level, three states select judges by gubernatorial appointment, two by legislative appointment, eight by partisan election, thirteen by non-partisan election, and twenty-five (including the District of Columbia) by merit selection.

AMERICAN JUDICATURE SOCIETY, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (American Judicature Society) (2007), <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>. Among the 24 states, AJS claims for “merit selection” are ten states with confirmation by the senate or similar popularly-elected body: Connecticut, Delaware, Hawaii, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Utah, Vermont. *Id.*

While today AJS conducts a wide variety of programs, the advocacy of and education about the merit selection of judges as an alternative to the elective system has, since its formation, been the cornerstone of its activities. AJS was formed in 1913 with the general progressive mission of improving the ‘efficiency’ of the administration of justice.

The founders of AJS shared the commonplace Progressive belief that the solution to most of the country’s problems lay in more efficient public administration. The Society’s negative attitude toward the election of judges, for example, was part of a widespread denigration of partisan politics. Progressives tended to view partisanship as productive of inefficiency in governance and to believe that government should be run like a business corporation.

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

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

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

Then, in 1937, the [American Bar Association] adopted the merit plan. It proposed:

(a) The filling of vacancies by appointment by the executive or other elective official or officials, but from a list named by another agency, composed in part of high judicial officers and in part of other citizens, selected for the purpose, who hold no other public office.

(b) *If further check upon appointment be desired, such check may be supplied by the requirement of confirmation by the State Senate or other legislative body of appointments made through the dual agency suggested.*

(c) The appointee shall after a period of service be eligible for reappointment periodically thereafter or go before the people upon his record with no opposing candidate, the people voting upon the question, Shall Judge Blank be retained in office?

*Id.* at 9-10 (emphasis added).

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

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

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

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

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

Professor Jeffrey Jackson explains:

A commission system [of judicial selection] carries an even greater burden to demonstrate legitimacy than other systems, such as elections or appointments. Judicial elections, for all of their problems, fit well within the democratic system, in that judges are selected through a direct vote of the public. Even appointments, such as those in the federal system, have a basis in the democratic process, in that the appointments are made by a popularly-elected official holding a national or state-wide office, with the choice then confirmed by a popularly-elected representative body.

Commission systems, on the other hand, do not fit so neatly within this democratic framework. While judges in a commission

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

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

44. *Id.*

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

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

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

Professor Jackson continues:

The idea of mandating lawyer participation in the selection of judges is unique to the commission system and also unique in the democratic system. As a result, it requires special justification if it is to be considered legitimate.<sup>49</sup> . . . .

Most of the commission systems in the United States use the state bar, either through its board of governors or through direct election of its members, to select the lawyer members. From a legitimacy standpoint, this is a questionable system. Membership in the state bar does not have a connection to the democratic function, and judges selected through the use of this system are open to charges that they are simply tools of the lawyers running the state bar.<sup>50</sup>

Moreover, this problem is not entirely solved by placing the final selection in the hands of the governor, an elected official, or by juxtaposing the non-lawyer members with lay members who are appointed through some other process. Rather, because the governor's choices are generally limited to the slate given to her

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46. Jackson, *supra* note 17, at 146 (footnotes omitted).

47. *Id.*

48. *See supra* notes 35-39 and accompanying text.

49. Jackson, *supra* note 17, at 148.

50. *Id.* at 153 (footnote omitted).

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

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

Professor Jackson rightly concludes that democratic legitimacy

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

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

#### ***D. Kansas Alone At the Extreme***

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

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51. *Id.* at 153-54 (footnote omitted).

52. *Id.* at 154.

53. KAN. CONST. art. 3 § 5(e).

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

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

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

### A. Introduction

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

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

55. *Id.* at 391.

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

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

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

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

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

### ***B. Kansas is Not Colorado (or Even Missouri)***

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

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

59. See generally Casad, *supra* note 2, at 424 n.1 (biographical information of author).

60. See generally Riley, *supra* note 2, at 429 n.1 (biographical information of author).

61. See generally Russell, *supra* note 2, at 437 n.1 (biographical information of author).

62. Parks, *supra* note 22, at 4 n.1 (biographical information of author); Linda Parks, *Judicial Selection Counterpoint*, 77 J. KAN. B.A. 7 (Apr. 2008); Linda Parks, *Keep Selecting Justices on Merit, Not Politics*, THE WICHITA EAGLE, Dec. 6, 2007, at 7A.

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

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

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

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

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

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

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

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

67. KAN. CONST. art. 3, § 5(e).

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

69. COLO. CONST. art. VI, § 24.

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

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

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

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

(1) Each judicial nominating commission shall be composed of the following members:

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

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

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

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

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*of three different recommended nominees for that position who have not been previously recommended by the Board of Governors.*

(b) Five members appointed by the Governor, each of whom is a resident of the territorial jurisdiction served by the commission to which the member is appointed, of which at least two are members of The Florida Bar engaged in the practice of law.

*Id.* (emphasis added).

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

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

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

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

78. *Id.*

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

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

### C. *Judges Are Lawmakers, Not Just Technicians*

#### 1. Judges' Political Views Matter

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

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

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

82. *See supra* Part I.D.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## 2. Supreme Court Justices Have the Most Lawmaking Discretion

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

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

Similarly, Professor Michael Dimino concludes:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

105. ELSBERND, *supra* note 100.

106. *Id.*

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

108. See *supra* note 99.

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

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

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

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

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

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

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

112. ELSBERND, *supra* note 100.

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

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

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

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

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

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

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

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

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

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inferential undertaking." Specifically, preconceptions and expectations can influence how information is labeled and understood, how ambiguous information is interpreted, and the degree to which information is scrutinized.

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

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

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

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

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

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

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

political, but that their politics—rather than being the politics of the citizenry as a whole—are “a somewhat subterranean politics of bar and bench involving little popular control.”<sup>118</sup>

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

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

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

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

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

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

121. *Id.*

122. *Id.*

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

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

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

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

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

That is from Malia Reddick, of the American Judicature Society, which is perhaps the leading organization in favor of the Missouri Plan.<sup>125</sup>

#### 4. Summary

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

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

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

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

125. See *supra* note 39.

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

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

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

#### ***D. Retention Elections and Democratic Legitimacy***

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

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

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

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

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

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

130. *See id.*

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

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

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

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

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

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

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

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

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

136. *Id.*

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

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

139. *Id.* at 811.

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

vener of democracy at the judicial retention stage that the bar can use to distract the populace from the elitism of bar power at the initial selection stage, which is where the real action is.<sup>141</sup>

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

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

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

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

142. *See supra* note 4.

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

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

145. *Id.* at 457.

146. *Id.* at 459-60.

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

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

### III. CONCLUSION

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

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

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

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

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

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

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

TABLE 1  
 BAR CONTROL OF SUPREME COURT SELECTION

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

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