

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

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INTRODUCTION

Imagine that Congress enacted a law under which the nation’s bank presidents elect three people to serve as candidates for Secretary of the Treasury, and the President is required to appoint one of these candidates. Or suppose that a state required its governor to choose the chief of the state police from a slate of three candidates elected by the state troopers.

Most people would have an immediate gut reaction to these hypotheticals: “That cannot be right.” This response has a sound basis in self-evident principles of political economy. The Secretary of the Treasury has a great deal of discretionary authority over the regulation of banks. Allowing the presidents of these institutions to elect the candidates for Secretary would create a blatant conflict of interest. Similarly, the head of the police force is the supervisor of the troopers, so they would have a conflict of interest in deciding who could be their boss.¹

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

Supporters of merit selection might point out that bank presidents and state troopers have a lot of information, unavailable to the general public, about the qualifications of applicants to serve as Secretary of the Treasury and head of the police force, respectively. This is certainly true, but it is equally certain that these groups would have overwhelming incentives to use that information to serve their own private interests. The general public and their elected representatives may have less information about the qualifications of candidates for these public offices, but they are also less prone to undervalue the public interest.

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

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

It is *essential* to [a republican] government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified [i.e., during pleasure, for a limited period, or during good behavior]; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.²

The U.S. Constitution scrupulously respects the principle that Madison articulated, and my hypothetical constraint on the President's discretion to choose the Secretary of the Treasury

flict with the public interest to a greater degree than the private interests of larger banks and higher ranking troopers.

2. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

would violate the Appointments Clause.³ But what about the state police hypothetical? Here the law is not quite as clear, and the example is not quite so hypothetical.

Many states choose judges under a "merit selection" system, often referred to as the Missouri Plan, that gives a preferred role to lawyers.⁴ Under the Kansas constitution, for example, the governor fills vacancies on the state's supreme court.⁵ The governor, however, is required to appoint one of three nominees presented to him by a "Supreme Court Nominating Commission."⁶ The commission comprises nine members, chosen as follows. The chairman is elected at large by the members of the state bar.⁷ The bar members in each of the state's four congressional districts elect one commissioner.⁸ The governor appoints a non-lawyer from each congressional district.⁹ Thus, the state's lawyers elect a majority of the com-

3. U.S. CONST. art. II, § 2, cl. 2. The President is free to seek the advice of bank presidents, or anyone else who he thinks may have useful information, before choosing his nominee. He may also be subjected to various political pressures in making his choice. But the only legal constraint on his power of appointment is the requirement of Senate confirmation.

In a less extreme case than my hypothetical, the Supreme Court struck down a statutory provision that assigned executive powers to the Comptroller General, an official nominated by the President from a list of three candidates provided by congressional leaders, confirmed by the Senate, and removable only at the initiative of Congress. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (invalidating the statutory provision at issue because of the removal procedure); *see also* *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 482–89 (1989) (Kennedy, J., concurring in the judgment) (arguing that the Federal Advisory Committee Act's intrusion on the President's access to information and advice in exercising his exclusive responsibility to nominate federal judges violates the Appointments Clause); *Buckley v. Valeo*, 424 U.S. 1, 127 (1976) (per curiam) (holding that the FEC's members must be appointed in accordance with the Appointments Clause).

4. The term "Missouri Plan" is used to describe a variety of legal devices that give lawyers a preferred role in judicial selection. For a useful review and classification of the various arrangements, see Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009). The extent to which Missouri Plan selection devices actually succeed in substituting considerations of "merit" for those of "politics" has been hotly debated. The actual evidence of this effect might charitably be described as inconclusive. *See, e.g.*, Henry R. Glick, *The Promise and the Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 539 (1978); Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 732–34 (2002).

5. KAN. CONST. art. III, § 5(a).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

mission. The constitution, in turn, requires the governor to appoint one of the three nominees that this bar-controlled commission has selected.¹⁰

Although this system may not satisfy Madison's criteria for republican institutions, there is little doubt that the procedure would be upheld under the Guarantee Clause.¹¹ The Supreme Court has stressed its extreme reluctance to invoke this clause as authority for adjudicating political disputes in the states.¹² Perhaps that reluctance reflects an appropriate respect for the principles of federalism and a prudent recognition of the Court's very limited capacity for converting the finer points of political theory into law.

Until recent times, that would probably have been that. The Kansas nominating commission, like my hypothetical involving the election of candidates for chief of the state police, may be a bad idea, but it is one that the federal courts would have left the people of Kansas free to adopt. During the past half century, however, the Supreme Court has grown more willing to constrain state choices regarding the structure of government. Rather than invoke the Guarantee Clause, the Court has turned to the Equal Protection Clause. Whether or not the resulting decisions have been consistent with the original meaning of the Fourteenth Amendment,¹³ there is now a large and well-

10. *Id.*

11. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government.")

12. See, e.g., *Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) ("Under [the Guarantee Clause] it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not."); *Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912) ("Whether it is the duty of the courts or the province of Congress to determine when a state has ceased to be republican in form, and to enforce the guaranty of the Constitution on that subject. . . . has long since been determined by this court conformably to the practice of the government from the beginning to be political in character, and therefore not cognizable by the judicial power, but solely committed by the Constitution to the judgment of Congress."); see also *New York v. United States*, 505 U.S. 144, 183–85 (1992) (suggesting that a Guarantee Clause claim of some kind might someday be found justiciable).

13. For a detailed argument (unrebutted by the majority opinion) that the seminal decisions are inconsistent with the original meaning of the Equal Protection Clause, see *Reynolds v. Sims*, 377 U.S. 533, 589–632 (1964) (Harlan, J., dissenting).

settled body of case law strongly indicating that the Kansas nominating commission is unconstitutional.

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

I. SUPREME COURT PRECEDENT

A. *The Governing Principle*

The Supreme Court decision most relevant to the Kansas litigation is *Kramer v. Union Free School District No. 15*.¹⁴ This case involved a state law under which local school boards were elected solely by voters who either (a) owned or leased taxable property within the school district or (b) had children who were enrolled in the local schools.¹⁵ The law gave school boards significant control over the schools and their budgets, and village governments were required to levy taxes on real property for the support of the schools in their villages.¹⁶

Invoking the "one person, one vote" equal protection decision in *Reynolds v. Sims*,¹⁷ the *Kramer* Court applied strict scrutiny.¹⁸ Noting that this case involved a complete denial of the franchise to certain otherwise qualified voters, and distinguish-

14. 395 U.S. 621 (1969).

15. *Id.* at 622.

16. *Id.* at 623–24.

17. 377 U.S. 533 (1964).

18. "[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Kramer*, 395 U.S. at 626 (quoting *Reynolds*, 377 U.S. at 562) (internal quotation marks omitted). The one person, one vote principle had been announced the previous year in *Gray v. Sanders*, 372 U.S. 368, 381 (1963), but *Reynolds* is more commonly cited.

ing it from cases involving vote dilution (like *Reynolds* itself),¹⁹ the Court held that the challenged statute could not be upheld unless it was both “necessary to promote a compelling state interest” and “sufficiently tailored” to serve that interest.²⁰ In holding that strict scrutiny applied, the Court specifically observed that the limited jurisdiction of the school boards was irrelevant:

Our exacting examination is not necessitated by the subject of the election; rather, it is required because some resident citizens are permitted to participate and some are not. For example, a city charter might well provide that the elected city council appoint a mayor who would have broad administrative powers. . . . [But] if the city charter made the office of mayor subject to an election in which only some resident citizens were entitled to vote, there would be presented a situation calling for our close review.²¹

The State defended its statute by arguing that it had a strong interest in limiting the franchise to those “primarily interested” in school affairs—namely, the taxpayers who financed the schools and the parents whose children attended the schools—because other residents are less likely to be fully informed about local school affairs.²² The Court declined to decide whether such considerations could ever constitute a compelling government interest.²³ Even assuming that it might, the statute at issue in *Kramer* was insufficiently tailored to serve such an interest.²⁴ It denied the franchise to interested and affected persons like the plaintiff in the case (a childless adult who was living with his parents), while granting the franchise to an unin-

19. *Kramer*, 395 U.S. at 626, 626–27 n.6. “Vote dilution” involves giving some votes more weight than others, as when a legislature is elected from districts that are not equipopulous. “Vote denial” cases typically involve the disenfranchisement of persons otherwise qualified to vote on the basis of age, citizenship, and residence. See, e.g., *Hill v. Stone*, 421 U.S. 289, 300–01 (1975) (invalidating denial of vote in city bond elections to persons not paying property tax); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–67 (1966) (invalidating denial of vote to persons unable to pay a poll tax); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (invalidating denial of vote to military personnel temporarily stationed within a jurisdiction).

20. *Kramer*, 395 U.S. at 627, 633.

21. *Id.* at 629–30.

22. *Id.* at 630–31.

23. *Id.* at 632.

24. *Id.*

terested and childless adult who rented an apartment in the district.²⁵

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

The Kansas case may at first seem distinguishable from *Kramer* because the Kansas supreme court justices do not fill their offices as a direct result of elections that violate the one person, one vote principle. This superficial difference between direct and indirect elections, however, is not itself significant. Presidential elections, for example, are subject to scrutiny under *Reynolds*, notwithstanding the intermediating role of the electoral college.²⁶

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

25. *Id.* at 632, 632 n.15. Similar statutes were invalidated in *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 208–09 (1970) (restricting franchise in municipal general obligation bond elections to property taxpayers) and *Cipriano v. City of Houma*, 395 U.S. 701, 704–06 (1969) (restricting franchise in municipal revenue bond elections to property taxpayers).

The *Kramer* strict scrutiny regime does not always apply when the franchise is denied to affected persons living outside the geographic boundaries of the governmental entity concerned. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–70 (1978). That exception is not applicable in the Kansas case. The Supreme Court also upheld a statute under which changes in the form of local governments having overlapping jurisdictions require approval of a majority of voters in each of the affected jurisdictions. *Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc.*, 430 U.S. 259, 271–73 (1977). This decision has no bearing on the Kansas case, which involves elections to a nominating commission whose activities have statewide effects.

26. *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam).

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

Because the Kansas nominating commission exercises overwhelming power to determine who fills these judicial offices, and because the bar-controlled commission is chosen in elections that do not comply with the one person, one vote principle, the Kansas scheme must be subject to strict scrutiny unless it fits within an exception to *Kramer* recognized in other cases. In fact, a variety of post-*Kramer* decisions have been invoked to defend the Kansas scheme and similar Missouri Plan judicial selection procedures in other states. Upon examination, all of these cases appear to be inapposite.

B. *Exceptions to the Kramer Principle*

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

1. Salyer and Ball v. James

In *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,²⁷ the Supreme Court upheld an election in which the franchise was limited to those "primarily interested" in the result of the election.²⁸ The case involved a governmental unit whose primary responsibility was to acquire, store, and distribute water for farming in a limited geographic area.²⁹ The unit covered all of its expenses by levying assessments against landowners in the special-interest district.³⁰ The governing board of this unit was elected by those who owned land in the district (including nonresident owners), and their votes were proportionate to the assessed value of the land that they owned.³¹

The *Salyer* Court found that the costs and benefits of the activities performed by this special-purpose district fell overwhelmingly on the landowners, and did so in proportion to the value of their lands.³² The Court distinguished *Kramer* on the grounds that this water district, "although vested with some typical governmental powers, ha[d] relatively limited authority,"³³ and that "its actions disproportionately affect[ed] landowners."³⁴ Because of these differences, the Court held that *Kramer's* strict scrutiny analysis was inapplicable.³⁵

Salyer resolved an issue left open in *Kramer*, holding that there can indeed be "functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* might not be required."³⁶ In

27. 410 U.S. 719 (1973).

28. *Id.* at 726–30.

29. *Id.* at 728.

30. *Id.* at 724.

31. *Id.* at 724–25.

32. *Id.* at 729.

33. *Id.* at 728 (footnote omitted).

34. *Id.* at 729.

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

36. *Salyer*, 410 U.S. at 727–28 (quoting *Hadley v. Junior Coll. Dist.*, 397 U.S. 50, 56 (1970)) (citation and internal quotation marks omitted).

Salyer, the effects on different groups were extremely disproportionate, and the effects on the disenfranchised residents were extremely remote or speculative.³⁷ The election of this type of body is hardly comparable to an election involving a State's supreme court, a tribunal that has enormous effects on every citizen. The significance of these effects is not in any way diminished by the fact that the court has additional effects on the lawyers who practice in the State.³⁸

Nor does the multistep process leading to the judicial appointments in Kansas render *Salyer* applicable. The Kansas Supreme Court Nominating Commission, like the electoral college and unlike the water district in *Salyer*, performs a governmental function with broad, if indirect, effects on the general population. Elections of presidential electors are subject to the one person, one vote rule of *Reynolds*,³⁹ even though the presidential electors themselves exercise only "relatively limited authority."⁴⁰

Three facts decisively distinguish *Salyer* from the Kansas case. First, the Kansas lawyers, unlike the landowners in *Salyer*, are not solely responsible for financing the operations of the state judiciary. Second, the Kansas nominating commission virtually controls the selection of officials who have broad and powerful effects on the general public. Finally, Kansas lawyers have a strong incentive to externalize the costs of an excessively lawyer-friendly judiciary onto the public at large.⁴¹

37. See, e.g., *id.* at 728–29 & nn.8–9.

38. In addition to all of the obvious ways in which judges affect lawyers, the Kansas Supreme Court controls admissions to the bar and discipline of bar members. See, e.g., KAN. SUP. CT. R. 201–27, 701–23.

39. See *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (per curiam).

40. *Salyer*, 410 U.S. at 728.

41. The most obvious way for this externalizing effect to take place is for the commission to select supreme court candidates who can be expected to enforce the bar's cartel by maintaining inefficient barriers to entry into the profession, along with lax discipline of those already admitted. But this is only the beginning of the potential externalities. Elections by lawyers can also be expected to lead to a bias in favor of supreme court candidates who are likely to create legal rules that generate more business for lawyers, and perhaps to make decisions that favor the economic interests of the most numerous segments of the legal profession. See, e.g., Michael E. DeBow, *The Bench, the Bar, and Everyone Else: Some Questions About State Judicial Selection*, 74 MO. L. REV. 777, 779 & n.10 (2009). If, moreover, the bar has ideological preferences that differ substantially from the public at large, elections by lawyers should be expected to result in an ideologically skewed set of candidates, especially but not only when there is a reasonably close correlation between the ideological and economic interests of the

*Ball v. James*⁴² involved special-purpose water districts similar to the one at issue in *Salyer*.⁴³ In *Ball*, however, the water districts also generated electricity that was sold to a large swath of the state's population,⁴⁴ so they had a much greater effect on persons ineligible to vote in its elections. The Court nonetheless upheld the *Ball* scheme because the districts were not performing traditional governmental functions:

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

....

[N]o matter how great the number of nonvoting residents buying electricity from the District, the relationship between them and the District's power operations is essentially that between consumers and a business enterprise from which they buy. Nothing in the *Avery*, *Hadley*, or *Salyer* cases suggests that the volume of business or the breadth of economic effect of a venture undertaken by a government entity as an incident of its narrow and primary governmental public function can, of its own weight, subject the entity to the one-person, one-vote requirements of the *Reynolds* case.⁴⁵

The Kansas procedure for selecting supreme court justices does not fit within the *Ball* exception to *Reynolds* and *Kramer*. The state's supreme court obviously performs quintessentially governmental functions, and it bears no resemblance at all to the nominally public business enterprises at issue in *Ball*. The Kansas nominating commission, for its part, also performs a critical governmental function, namely that of choosing the three candidates from among whom a gubernatorial appointment must be made. This nominating power has to be regarded as a governmental function, and subjected to strict scrutiny, for

dominant elements of the legal profession. For empirical evidence tending to confirm this hypothesis, see Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009) and Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL'Y 392, 413–21 (2009).

42. 451 U.S. 355 (1981).

43. See *id.* at 357.

44. *Id.*

45. *Id.* at 368, 370 (citations and footnotes omitted).

the same reason that the Supreme Court applies strict scrutiny to primary elections conducted by political parties⁴⁶ and elections to the electoral college.⁴⁷

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

2. Sailors

In *Sailors v. Board of Education*,⁴⁸ the Court considered a challenge to a state law under which county school boards were chosen by local school boards.⁴⁹ Local residents elected the local school boards,⁵⁰ consistent with *Reynolds* and *Kramer*. Because the county school boards were appointed through an "election" in which the popularly elected local school boards were the "voters," the Court held the appointments valid: "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election."⁵¹

46. See *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963). *Gray* was a vote-dilution case involving primary elections for statewide offices. The Court specifically held that "the action of [the state's Democratic] party in the conduct of its primary constitutes state action within the meaning of the Fourteenth Amendment." *Id.* at 374.

47. See *Bush v. Gore*, 531 U.S. 98, 109 (2000) (per curiam). Like the U.S. Senate, the electoral college itself is malapportioned, contrary to *Reynolds*'s anti-vote-dilution rule, but this is legitimated by specific constitutional provisions. The States, moreover, need not hold elections at all in selecting presidential electors. But once a state chooses to hold elections for presidential electors, *Reynolds* applies, as *Bush v. Gore* confirms. See *id.* at 104–05.

48. 387 U.S. 105 (1967).

49. *Id.* at 106.

50. *Id.*

51. *Id.* at 108. As the Court correctly recognized, an appointment is not an "election" in the constitutionally relevant sense just because it results from voting by a multi-member body. See *id.* at 109. Conversely, *Reynolds* and *Kramer* cannot become inapplicable to a genuine election just because those who are elected subsequently exercise a power of appointment, as *Bush v. Gore* illustrates.

Thus, not surprisingly, the Court has recognized that many offices, presumably including judicial offices, can be filled either by gubernatorial appointments or by "elections" in which the state's legislators are the "voters." Governors and state legislators are themselves elected in conformance with *Reynolds* and *Kramer*, just like the members of the local school boards in *Sailors*. The Kansas selection process, however, differs from these two noncontroversial appointment mechanisms in a crucial respect. Although the Kansas governor technically appoints the members of the supreme court, his choice is extremely constrained because he must appoint one of three candidates selected by a body whose controlling majority is elected by members of the state bar.⁵² This controlling majority is neither appointed by validly elected officials nor elected in accordance with *Reynolds* and *Kramer*.

The *Sailors* Court was careful to note that a "State cannot of course manipulate its political subdivisions so as to defeat a federally protected right Nor can the restraints imposed by the Constitution on the States be circumvented by local bodies to whom the State delegates authority."⁵³ That is exactly what Kansas appears to have done. By delegating to the state's lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices. The State's choice of a complex procedure that obscures that effect cannot alter the reality of the effect.⁵⁴

Because the local school boards in *Sailors* were elected in accordance with the principle of *Reynolds* and *Kramer*, whereas the Supreme Court Nominating Commission in Kansas is not, the *Sailors* precedent is inapposite to the Kansas case.

52. The nominating commission acts by a concurrence of a majority of its members. KAN. CONST. art. 3, § 5(g).

53. *Sailors*, 387 U.S. at 108 & n.5 (emphasis added).

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

3. Rodriguez

Sailors rests on the intuitively plausible premise that appointments to nonlegislative offices are presumptively valid when made by persons or bodies that have themselves been elected in accordance with the *Reynolds-Kramer* principle. But what about the converse? Are appointments always invalid unless made by a person or body elected in accordance with that principle? *Rodriguez v. Popular Democratic Party*⁵⁵ rejects this proposition.

Under the Puerto Rican law at issue in *Rodriguez*, vacancies in the legislature were filled on an interim basis (that is, until an election could be held) by the political party to which the departed legislator had belonged.⁵⁶ The *Rodriguez* Court observed that the right to vote is not itself a constitutionally protected right, and that the Constitution does not specify a fixed method of choosing state and local legislators.⁵⁷ The question in an equal protection case is whether, once elections have been provided for, the right to participate has been granted on an equal basis.⁵⁸ The Court then upheld Puerto Rico's procedure.⁵⁹ Filling vacancies on an interim basis by appointment, rather than by election, was approved on the ground that its effect on the right of voters to elect their legislators was minimal and did not disproportionately disadvantage "any discrete group of voters, candidates, or political parties."⁶⁰ The harder question was whether appointment by a political party, rather than by a person or group that had been directly or indirectly elected in compliance with *Reynolds* and *Kramer*, was constitutionally permissible.

The Court resolved this question through a fact-intensive analysis. The principle underlying the challenge to the Puerto Rico procedure was that "legitimacy [requires] derivative voter approval and control."⁶¹ The Court believed that this principle

55. 457 U.S. 1 (1982).

56. *Id.* at 4.

57. *Id.* at 8–9.

58. *See id.* at 10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). In *Sailors*, the Court reserved the more general question whether legislatures must be elected rather than appointed. 387 U.S. at 109–10.

59. *Rodriguez*, 457 U.S. at 14.

60. *Id.* at 12.

61. *Id.* at 12 (quoting Reply Brief of Appellants, *Rodriguez*, 457 U.S. 1 (No. 81-328)).

was too broad because the presumed control would sometimes be illusory.⁶² In this case, for example, Puerto Rico's governor belonged to a different political party from the departed legislator, and the departed incumbent's political party would be expected to make a choice more fairly reflecting the will of the voters.⁶³ As this example illustrates, party control over the appointment was more likely than a gubernatorial appointment to reflect the mandate of the previous election and preserve the existing balance in the legislature. Puerto Rico, moreover, had a peculiarly strong interest in protecting the role of minority political parties "in order to provide a democratic forum and an outlet for the radically different views of the various political parties as to the ultimate status of Puerto Rico."⁶⁴

Rodriguez certainly does reject the general proposition that every appointment must be made by officials chosen (directly or indirectly) through an election that conforms with the requirements set forth in *Reynolds* and *Kramer*. The case, however, does not stand for the equally general proposition that appointments to public office can be delegated to any group that seems reasonably (or even exceptionally) well qualified to make good appointments. If it did, *Rodriguez* would effectively have overruled *Kramer*. Instead, the *Rodriguez* Court cited *Kramer* with approval.⁶⁵ Furthermore, *Rodriguez* also approvingly cited *Gray v. Sanders*,⁶⁶ which applied the one person, one vote rule to primary elections. In *Rodriguez* itself, the Popular Democratic Party chose the interim legislator through a primary election in which only party members were permitted to participate.⁶⁷ If such a procedure were generally permissible, *Rodriguez* would have to be interpreted as overruling *Gray*, which it obviously did not do.

Thus, *Rodriguez* can only be understood as a narrow, fact-specific decision that creates an exception to the *Reynolds-Kramer* principle for certain interim appointments designed to reflect the will of the voters in a previous election for the particular office to which the appointment is made. For three rea-

62. *Id.*

63. *Id.*

64. *Id.* at 13 n.13 (quoting Brief of Appellees, *Rodriguez*, 457 U.S. 1 (No. 81-328)).

65. *See id.* at 10.

66. 372 U.S. 368 (1963).

67. 457 U.S. at 5 n.3.

sons, the Kansas method of selecting supreme court justices is not remotely analogous. First, Kansas's judicial appointments are not interim in nature. Second, these appointments do not fill an office to which the departed incumbent had been elected in a one person, one vote election. Finally, and perhaps most importantly, the Kansas scheme entrenches the power of a discrete special interest group, namely the state's lawyers. More specifically, the disenfranchising effect of the Kansas law, unlike that of the Puerto Rico law, is not "minimal" and its effects *do* "fall disproportionately on [a] discrete group of voters, candidates, or political parties."⁶⁸ The discrete group of voters in question, of course, comprises the numerous Kansas voters who are not lawyers.

4. Wells v. Edwards

A different kind of exception to the *Reynolds* principle was recognized in a vote-dilution case involving judicial elections. In *Wells v. Edwards*,⁶⁹ the Supreme Court summarily affirmed a district court decision holding that the vote-dilution principle of *Reynolds* was inapplicable to elections to judicial office.⁷⁰ Although that decision is binding on the lower courts, its precedential effect is extremely limited. Summary affirmances merely "prevent lower courts from coming to opposite conclusions on the *precise issues* presented and *necessarily* decided by those actions. . . . The precedential significance of the summary action . . . is to be assessed in the light of all of the facts in that case."⁷¹

The "precise issue" decided in *Wells* was whether direct elections to multi-member courts must comply with the vote-dilution rulings in the *Reynolds* line of cases.⁷² In *Wells*, Louisiana's supreme court justices were elected from districts that were not equipopulous.⁷³ The district court rejected the appli-

68. *Id.* at 12.

69. 409 U.S. 1095 (1973), *aff'g* 347 F. Supp. 453 (M.D. La. 1972).

70. 347 F. Supp. at 455-56.

71. *Mandel v. Bradley*, 432 U.S. 173, 176-77 (1977) (per curiam) (emphasis added). See also *Fusari v. Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring) ("An unexplicated summary affirmance settles the issues for the parties, and is not to be read as a renunciation by this Court of doctrines previously announced in our opinions after full argument." (quoted with approval in *Mandel*, 432 U.S. at 176)).

72. 347 F. Supp. at 454.

73. *Id.*

cability of *Reynolds* on the ground that judges are not "representatives" in the sense that legislative and executive officials are.⁷⁴ Judges, according to that court, do not represent the interests of constituents, or exercise the kind of discretion involved in such representation, but simply administer the law.⁷⁵

In *Chisom v. Roemer*, a case interpreting the Voting Rights Act, the Supreme Court declined to follow the reasoning of the *Wells* district court.⁷⁶ Because there were no constitutional claims at issue in *Chisom*, the Court had no occasion to reconsider its own decision in *Wells*, which "held the one-person, one-vote rule inapplicable to judicial elections."⁷⁷ The Supreme Court's subsequent rejection of the reasoning in the *Wells* district court opinion, however, reinforces the importance of respecting the limited scope of summary affirmances. Such decisions have precedential effect only with respect to the precise issues necessarily decided on all of the facts presented in the case.

The laws at issue in *Wells* and in the Kansas case are substantially dissimilar. The Kansas case does not involve an election to judicial office. Instead, it virtually displaces an executive official's appointing discretion as a result of elections from which part of the population (and a very large part at that) is excluded. Even if one accepts the proposition that judges do not perform representative functions because they do not exercise the kind of discretion typically associated with such functions, the Kansas nominating commission does exercise such discretion. Furthermore, the Kansas case involves a denial of the vote, not dilution of votes, two categories that were expressly distinguished in *Kramer*.⁷⁸ Unlike the judicial elections at issue in *Wells*, the Kansas elections for the nominating commission entail a complete exclusion of many otherwise qualified voters.

For these reasons, the summary affirmance in *Wells* cannot be read to imply that *Kramer's* mandate of strict scrutiny re-

74. *Id.* at 454–55.

75. *Id.* at 455.

76. *Chisom v. Roemer*, 501 U.S. 380, 395–96, 402–03 (1991).

77. *Id.* at 402. Language in the *Wells* district court opinion that might suggest a wider holding is without precedential effect. See *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) ("Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.").

78. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626–27 & n.6 (1969).

view is inapplicable to a nominating commission like the one used in Kansas.

II. LOWER COURT DECISIONS

A. *The Ninth Circuit*

Although Missouri Plan judicial selection procedures resembling the Kansas process are quite common, only the Ninth Circuit has issued a precedential decision on the constitutionality of such a mechanism. In Alaska, the governor appoints judges from a list of nominees chosen by a commission.⁷⁹ The commission comprises the state's chief justice along with three lay members appointed by the governor and three attorneys appointed by the Alaska bar's board of governors.⁸⁰

In *Kirk v. Carpeneti*,⁸¹ the Ninth Circuit upheld this method of selection.⁸² The court concluded that the case fell within the exceptions recognized in *Rodriguez* and *Sailors*, rather than under the principle of *Reynolds* and *Kramer*, because the attorneys were appointed to the commission, rather than elected.⁸³ Although its opinion is lengthy, the court simply cited *Rodriguez* and *Sailors* for this crucial point, without further explanation.⁸⁴ Thus, the court appears to have assumed that *Rodriguez* and *Sailors* permit virtually any mode of selection that can be formally characterized as an appointment rather than an election. As explained earlier in this Essay, that is an untenably broad reading of these cases.

At the very least, the Ninth Circuit's decision could not be justified without a much more detailed analysis. Under Alaska law, for example, nine of the twelve members of the board of governors of the Alaska bar are elected by active members of the state's organized bar.⁸⁵ This board selects a near majority of the nominating commission, which in turn selects the judicial

79. ALASKA CONST. art. IV, § 5; ALASKA STAT. §§ 22.05.080, .07.070, .10.100, .15.170 (2010).

80. ALASKA CONST. art. IV, § 8.

81. 623 F.3d 889 (9th Cir. 2010).

82. *Id.* at 896.

83. *Id.* at 898.

84. *See id.*

85. ALASKA STAT. §§ 08.08.040(b), .050(a) (2010).

nominees from among whom the governor must choose. It is therefore not at all obvious that this process is correctly characterized as one involving only appointments. Such a characterization assumes that the elections to the board of governors are somehow made irrelevant by the subsequent steps in the judicial selection process. At a minimum, the use of these legally mandated elections would require that the judicial selection process be subjected to a vote-dilution analysis under *Reynolds*. For the reasons given earlier in this Essay, *Wells v. Edwards* does not control that analysis, notwithstanding the Ninth Circuit's mistaken statement to the contrary.⁸⁶

In any event, even assuming that the Ninth Circuit might have correctly decided the case before it, the Kansas case is different in a decisive respect. In Kansas, the attorneys on the nominating commission are directly elected by members of the state bar,⁸⁷ so a case relying on the distinction between elections and appointments is inapposite.⁸⁸

B. District Court Decisions

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

*Bradley v. Work*⁸⁹ considered a commission charged with nominating a slate of candidates from which the governor was required to choose in making judicial appointments.⁹⁰ The district court held that the commission was a narrow, special-purpose governmental unit within the meaning of *Salyer* and *Ball v. James*:

86. See *Kirk*, 623 F.3d at 897.

87. KAN. CONST. art. III, § 5(e).

88. In addition, the Alaska nominating commission has a minority of members chosen by the state bar, whereas the bar elects a majority of the Kansas nominating commission. This difference is probably not significant under the Supreme Court's jurisprudence, but it provides another reason to regard the Ninth Circuit's decision as distinguishable from the Kansas case.

89. 916 F. Supp. 1446 (S.D. Ind. 1996).

90. *Id.* at 1450. The district court's statutory holdings under the Voting Rights Act were affirmed by the Seventh Circuit, but the appellants waived their independent constitutional claims on appeal, and the Seventh Circuit did not consider those claims. *Bradley v. Work*, 154 F.3d 704, 711 (7th Cir. 1998). Accordingly, the district court's constitutional rulings lack precedential authority.

[T]he attorney members of the Commission are elected to a special group that serves no traditional governmental functions at all. The Commission's sole purpose and reason for existence is to screen candidates as part of the judicial appointment process. Consequently, the Commission satisfies the "special unit with narrow functions" prong of the exception to the one-man, one-vote rule.⁹¹

This analysis is untenable. The nominating commission performed the traditional governmental function of compiling a short list of candidates for appointment to a public office. Ordinarily, this is done by the appointing official himself, or by others acting at his direction.⁹² The *Bradley* court seems to assume that a "screening" process of this kind is analogous to the operation of the nominally public business enterprises in *Salyer* and *Ball*. If that assumption were correct, it would follow that a narrow slice of the population could be authorized to elect those who "screen" the candidates for any public office. Thus, for example, a state's public employees could be authorized to elect "screeners" charged with selecting two gubernatorial candidates, and the general population could be given a choice of electing one or the other of these two candidates. Such a result would make a mockery of the general election, and it is unthinkable that the Supreme Court would permit so blatant an evasion of *Reynolds* and *Kramer*.

*African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*⁹³ involved a wide-ranging challenge to Missouri's complex system for staffing the judiciary. Most of the issues in the case arose under the Voting Rights Act or depended on allegations of racial discrimination.⁹⁴ In addition, however, the plaintiffs raised a constitutional challenge to the State's use of a judicial selection

91. *Bradley*, 916 F. Supp. at 1456 (footnotes and citation omitted).

92. Although this is the ordinary procedure, the task of screening candidates and compiling a short list of finalists could be given to some other official or body of officials, so long as that official or body had been validly elected or appointed.

93. 994 F. Supp. 1105 (E.D. Mo. 1997). The decision was affirmed by the Eighth Circuit in an unpublished summary disposition. *African-American Voting Rights Legal Def. Fund, Inc. v. Missouri*, No. 97-1885 (8th Cir. Feb. 4, 1998). Such dispositions have no authority as precedent. See, e.g., *United States v. Marston*, 517 F.3d 996, 1004 n.5 (8th Cir. 2008) ("[U]npublished opinions carry no precedential value in our circuit . . .").

94. See *African-American Voting Rights*, 994 F. Supp. at 1110.

commission that included members elected by the bar.⁹⁵ The district court rejected the applicability of *Reynolds* and *Kramer* on the ground that "no fundamental right has been abridged, and the election of lawyers to commissions is not an election of general interest."⁹⁶ In light of the broad public interest in judicial selection and the pivotal role of Missouri's nominating commission, this *ipse dixit* is patently unpersuasive.

In *Carlson v. Wiggins*,⁹⁷ an Iowa district court upheld a system in which the governor must appoint one of three nominees selected by a commission that comprises seven members elected by the state bar, seven members appointed by the governor, and the senior judge on the state's supreme court.⁹⁸ The court relied primarily on the district court decision in *Wells* for the proposition that *Kramer* applies only to "representatives," not to judges, and on *Ball v. James* for the proposition that the nominating commission does not perform a "traditional government function."⁹⁹ The court dismissed as irrelevant "the sometimes broad statements" by the Supreme Court in *Kramer* and its progeny.¹⁰⁰ For the reasons set out earlier in this Essay, this analysis is unpersuasive even if one believes that broad statements by the Supreme Court need not be taken seriously by the inferior courts.

C. The Tenth Circuit

The Tenth Circuit has not decided a case involving judicial selection procedures. In an analogous case, however, that court correctly applied the relevant Supreme Court precedents. In *Hellebust v. Brownback*,¹⁰¹ the court struck down the State's

95. See *id.* at 1126–27. The court described the challenged process as follows: "Judicial selection commissions for appellate positions consist of one judge from the Missouri Supreme Court, three attorneys elected by their peers, one from each appellate district, and three lay members of the public appointed by the governor . . ." *Id.* at 1117.

96. *Id.* at 1128. In a footnote to this statement, the court suggested that the judicial selection commission fell within the "special unit with narrow functions" exception recognized in *Ball v. James*. See *id.* at 1128 n.49. For the reasons set out earlier in this Essay, *Ball v. James* does not support this conclusion.

97. No. 4:10-cv-00587, 2011 WL 166492 (S.D. Iowa Jan. 19, 2011).

98. *Id.* at *4–5, *17.

99. *Id.* at *9, *14–15.

100. *Id.* at *13.

101. 42 F.3d 1331 (10th Cir. 1994).

method of selecting the members of the Kansas State Board of Agriculture.¹⁰² Under the challenged statute, a variety of agricultural interest groups sent delegates to an annual meeting at which the delegates elected the members of the Board.¹⁰³ The Board, in turn, regulated a variety of activities within the state, some of which were not closely tied to the business of agriculture.¹⁰⁴ The court held that this arrangement did not fall within the *Salyer-Ball* exception to the strict scrutiny regime of *Reynolds* and *Kramer* because the public character of the Board was more than nominal: “once the line is crossed into the governmental powers arena, one person, one vote applies.”¹⁰⁵

To the extent that the Kansas judicial nominating commission is understood to be effectively choosing judges (by severely limiting the governor’s discretion), it has clearly “crossed into the governmental powers arena,” and under *Hellebust* strict scrutiny applies. Significantly, the Tenth Circuit also held that “[t]he [Agriculture] Board’s partial dependence on the actions of other state entities does not restrict the range of governmental powers it wields.”¹⁰⁶ This holding logically implies that the Kansas governor’s small role in judicial selection—choosing from among the three candidates presented to him by the bar-controlled judicial nominating commission—cannot serve to distinguish the judicial selection case from *Hellebust*. Thus, Tenth Circuit precedent strongly supports the constitutional challenge to the Kansas judicial selection mechanism.

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

In a decision that presumably will be appealed, the federal district court in Kansas recently dismissed an equal protection challenge to the state’s Supreme Court Nominating Commis-

102. *Id.* at 1332.

103. *Id.*

104. The Board was charged with enforcing approximately eighty state laws, including commercial pumps and scales at ordinary filling stations. It regulated the use of pesticides, not only on farms but also on residential lawns, and it controlled “water rights held by cities, utilities[,] and individuals not connected with agriculture.” *Id.* at 1332–33 (citations and internal quotation marks omitted).

105. *Id.* at 1334.

106. *Id.*

sion.¹⁰⁷ Judge Monti L. Belot's short opinion in *Dool v. Burke* falls far short of providing an adequate analysis of the issues.

The decision rests mainly on the proposition that *Dool* is indistinguishable from the Alaska case in which the Ninth Circuit upheld that state's judicial nominating commission. The judge's discussion consists almost entirely of lengthy excerpts from the Ninth Circuit opinion and from the district court opinion affirmed by the Ninth Circuit.¹⁰⁸ Judge Belot appears to believe that the crucial fact in both cases is that the governor, rather than the nominating commission, has "the ultimate power to appoint judges."¹⁰⁹

For the reasons presented earlier in this Essay, it cannot be true that a state can avoid strict scrutiny under *Reynolds* and *Kramer* simply by allowing an official elected in accordance with one person, one vote to have some small share in a decision that is effectively controlled by officials elected in violation of one person, one vote.¹¹⁰

In any event, Ninth Circuit decisions are not binding in Kansas, and the Tenth Circuit's decision in *Hellebust* is binding. Judge Belot purported to distinguish *Hellebust* on the ground that the judicial nominating commission performs only one narrow function, whereas the agricultural board performed myriad duties that directly affected the general population: the judicial nominating commission "has but one function: to screen applicants to fill vacancies on the Kansas Supreme Court . . . [and] has no duties, functions, and powers which 'affect all residents of Kansas daily' such as those of the Board [of Agriculture at issue in *Hellebust*]." ¹¹¹

107. *Dool v. Burke*, No. 10-1286-MLB, 2010 U.S. Dist. LEXIS 117294, at *19–20 (D. Kan. Nov. 3, 2010).

108. *See id.* at *4–8, *11–19.

109. *See id.* at *18 (quoting *Kirk v. Carpeneti*, 623 F.3d 889, 900 (9th Cir. 2010)). Oddly, Judge Belot criticized the plaintiffs' counsel for "try[ing] to make it sound as if the governor must appoint one of the three applicants [that the nominating commission chose]." *Id.* at *8. It is true that if the Kansas governor fails to exercise his power of appointment, the appointment is made by the supreme court's chief justice. But the chief justice must appoint one of the three nominees chosen by the nominating commission. KAN. CONST. art. III, § 5(b). With respect to the equal protection claim at issue in the case, this fall-back provision is patently irrelevant.

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

111. *Dool*, 2010 U.S. Dist. LEXIS 117294, at *7–8.

Once again, for reasons presented earlier in this Essay, that argument cannot be right. If it were, *Reynolds* would not apply to presidential elections because the electoral college performs only one narrow function. *Bush v. Gore* confirms that Judge Belot's reasoning is fallacious. Furthermore, if judicial nominating commissions perform only a trivial function of little interest to the general public, one might wonder why there has been such a concerted and controversial effort over many decades to replace other modes of judicial selection with this one.

As if recognizing that his analysis may not be satisfactory, Judge Belot concludes by saying: "Plaintiffs are free to disagree, of course, and realistically, the Tenth Circuit is best suited to decide whether *Hellebust* controls."¹¹² It would certainly be difficult to dispute that proposition. Judge Belot also declined to discuss any Supreme Court opinions, for the following reason:

This court does not understand plaintiffs' argument any better than, apparently, did the Ninth Circuit. This court is not required to follow decisions of the Ninth Circuit and would not hesitate to disregard *Kirk* if it is clear that the decision is contrary to Supreme Court precedent. No such clarity appears from plaintiffs' arguments.¹¹³

112. *Id.* at *9.

113. *Id.* at *19. Judge Belot did achieve clarity about one thing. In the final sentence of his opinion, he pointed out "[the fact] that Kansas voters approved the present system and the absence of evidence that Kansas' system has not worked and will not continue to work to ensure that qualified individuals are appointed to the Kansas Supreme Court and the Kansas Court of Appeals." *Id.* at *20. What is not clear is why this would have any legal relevance.

In a footnote appended to this final sentence of the opinion, Judge Belot also noted that "[y]esterday, by margins of 60% or better, Kansas voters retained all four justices of the Kansas Supreme Court who were up for retention." *Id.* at *20 n.8. As in many other states, members of this court must periodically stand for so-called retention elections, in which they run unopposed. KAN. CONST. art. III, § 5(c). Unsurprisingly, incumbents who face retention elections in jurisdictions that use this device are almost always retained. See, e.g., Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573, 577 (2009); G. Alan Tarr, *Do Retention Elections Work?*, 74 MO. L. REV. 605, 627-28 (2009). In the rare case where a Kansas incumbent loses his seat, of course, he will be replaced by someone selected in the same manner by which he was originally selected. A state's use of retention elections cannot somehow cure an unconstitutional selection system, so the legal relevance of Judge Belot's observation is inapparent.

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

CONCLUSION

Kansas law is unique in granting lawyers the sole authority to elect a controlling majority of a body charged with creating a short list of candidates from which judges must be appointed.¹¹⁴ This provision of the state's constitution was adopted in response to an abusive use of the gubernatorial appointment power. In 1956, the state's chief justice resigned.¹¹⁵ The governor, who was a lame duck, then immediately resigned his own office, and was replaced by his lieutenant governor.¹¹⁶ The new governor then performed the only official act of his brief tenure in office: appointing the former governor as the new chief justice.¹¹⁷ After this sleazy stunt, the state bar's "intensive lobbying efforts" persuaded the voters to adopt the current selection system by constitutional amendment in 1958.¹¹⁸

The outrage displayed by the Kansas electorate is certainly understandable. And there is a lot to be said for a general principle that would allow the people of Kansas to live with their decision, for good or ill, until they see fit to amend their own constitution. The United States Supreme Court, however, has decided that the federal Constitution does not give free rein to the States in structuring their electoral processes. As this Essay has shown, the Court's precedents require that the Kansas process be subjected to strict scrutiny. It may not be upheld—certainly not by the Tenth Circuit and not by the Supreme Court itself if the Court follows its precedents—unless the system's violation of one person, one vote is both necessary to

114. See, e.g., Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 KAN. J.L. & PUB. POL'Y 386, 386 (2008); Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL'Y 392, 392 (2009). Other Missouri Plan states give their bars a somewhat reduced role in selecting judges; this Essay's focus on the uniquely powerful role given to lawyers in Kansas should not be taken to suggest that Missouri Plan arrangements in other states are constitutionally permissible.

115. See Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASS'N 32, 34 (2000).

116. *Id.*

117. *Id.*

118. *Id.*

promote a compelling state interest and narrowly tailored to serve that interest.

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

The scandal that triggered the adoption of the current system, for example, could have been avoided by a simple rule under which a lame-duck governor is precluded from making judicial appointments near the end of his term, or by a rule under which he can make only interim appointments that expire with his own term in office. More generally, there are countless other mechanisms through which gubernatorial abuses can be checked. The most obvious is a requirement based on the federal model, whereby judicial candidates nominated by the governor are confirmed by one or both houses of the legislature, but other systems could easily be imagined. And there are also many other ways in which a state's lawyers could be given a significant advisory role in judicial selection. The governor, for example, might be required to give the bar an opportunity to comment on candidates he was considering before making an appointment. If a stronger role for the bar were desired, the governor might be required to provide a written explanation for any decision to appoint a supreme court justice whom the bar had not recommended.¹¹⁹

What Kansas may not do, however, is delegate to a private interest group the authority to hold elections that give that group effective control over the selection of those who will exercise the significant and wide-ranging power of its supreme court. Such a delegation sits very uneasily with basic principles of republican government and with common-sense principles of political economy. Individual lawyers have many virtues and many uses, but when gathered into a guild they have the

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

usual exploitive tendencies of other such interest groups. Lawyers are no exception to Madison's famous analysis:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹²⁰

In responding as they did in 1958 to lobbying by their state's lawyers and to the disgraceful behavior of a couple of lame-duck politicians, the people of Kansas may not have given adequate consideration to the arrangement of these auxiliary precautions. In any event, modern constitutional law requires the federal courts to reject the decision they made.

It is very unlikely that this federal intrusion will harm what Madison called "the permanent and aggregate interests"¹²¹ of the people of Kansas or of other states that have adopted Missouri Plan devices. Indeed, even Sandra Day O'Connor, the nation's most prominent and respected advocate of merit selection, has said:

There is nothing in the goals of a non-partisan court plan that requires it to be dominated by attorneys. It certainly helps to have people with legal expertise on the commissions, but I have no doubt members of the public who are duly engaged and attentive can quite ably select judges. And this move helps curb the accusations that attorney or bar politics dominate the selection process.¹²²

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

120. THE FEDERALIST NO. 51, (James Madison), *supra* note 2, at 322.

121. THE FEDERALIST NO. 10, (James Madison), *supra* note 2, at 78.

122. Sandra Day O'Connor, *The Essentials and Expendables of the Missouri Plan*, 74 MO. L. REV. 479, 492 (2009).