

TO: SENATE COMMITTEE ON JUDICIARY

FROM: F. JAMES ROBINSON, JR.
KANSAS BAR ASSOCIATION

DATE: MARCH 4, 2022

RE: JUDICIAL SELECTION IN KANSAS

Chairperson Warren, members of the committee, we thank you for the opportunity to appear today and comment on your review of judicial selection in Kansas. I am here today for the Kansas Bar Association.

If those who select judges for our highest courts are knowledgeable and insulated from partisan politics, focus on professional qualifications, and are guided by proper rules and procedures, they will choose good judges.

History of Direct Elections

Before charting a course for the future, we must have a clear understanding of the past. Several times since the state's founding, Kansans have had to rethink how to select Kansas Supreme Court justices. For the first 97 years, Kansas elected its justices. That changed in 1958 when Kansas voters overwhelmingly rejected direct elections in favor of the merit plan. The clear intent was to create a system where justices would be insulated from political pressure or influence.

Early in this nation's history, governors and legislators chose state court judges. Concerns that some judges received their judicial appointments as a reward for their previous work for political elites, party machines, and special interests led reformers around the time of Kansas' statehood to propose judicial elections.¹ The first Kansans preferred non-partisan judicial elections, while allowing the governor to appoint judges to fill vacancies. Early in the 20th century, Kansans switched to partisan elections, but a few years later switched back to non-partisan elections. However, critics were not convinced that non-partisan elections cured the problems plaguing partisan elections. Political parties continued to play a role in selecting and supporting candidates.²

During the mid-part of the 20th century, political scandals prompted some states to move from direct elections to the merit plan. Missouri was the first such state. By 1940 Missouri courts fell victim to the control of machine politics by notorious

¹ Jeffrey D. Jackson, "The Selection of Judges in Kansas: A Comparison of Systems," *Journal of the Kansas Bar Association* 32, 33-34 (January 2000).

² *Id.*

Democratic Party boss Tom Pendergast. Missouri designed a merit selection system to ensure that judges are selected based on professional qualifications, experience, legal expertise, impartiality, and judicial temperament. The “Missouri Plan” enjoyed widespread public support. Missouri voters approved the initiative in 1940. Two years later the voters again approved the initiative. In 1945, Missouri voters adopted a new Constitution, which included the Nonpartisan Court Plan, using an independent commission to select judges.³

Kansas was the second state to adopt the Missouri Plan. The Kansas Republican Party was deeply divided in 1956. Republican Governor Fred Hall lost the party nomination to Warren Shaw. Democratic candidate George Docking defeated Shaw in the general election. Kansas Supreme Court Chief Justice Bill Smith was Hall’s political ally. Smith was ill and wanted to retire. But Smith could not stand the prospect of having a Democratic governor fill his seat. Hall negotiated a scheme to retire Smith. Smith retired on December 31. Hall resigned on January 3. Lieutenant Governor John McCuish held office for eleven days before Docking’s inauguration. McCuish’s only official act was to appoint Hall as Chief Justice of the Kansas Supreme Court.⁴

That scandal and the experience with direct elections prompted super-majorities in the House and the Senate to approve a constitutional amendment which eliminated direct elections and limited the Governor’s influence over appointments by instituting merit selection for the Kansas Supreme Court based on the “Missouri Plan.”⁵ Kansas voters in 1958 overwhelmingly approved the amendment.⁶ Kansas statutes implemented the amendment, and eventually applied it to the Kansas Court of Appeals.⁷

Drake University’s Rachel Paine Caufield, Ph.D. after studying Kansas’ move to the Missouri Plan found the historical context was a “concern with the ability of political and party elites to control judicial selection and, in doing so, to manipulate judicial decision-making based on overtly political goals.”⁸ The important lesson, according to Dr. Caufield, is that “the origins of merit selection rest on public dissatisfaction with politics in the judicial process and overt politicization of judicial

³ Rachel Paine Caufield, “Article and Response: What Makes Merit Selection Different?” *Roger William University Law Review* 765, 766-69 (Fall 2010).

⁴ *Id.* at 770.

⁵ Patricia E. Riley, “Merit Selection: The Workings of the Kansas Supreme Court Nominating Commission,” 17 *Kansas Journal of Law & Public Policy* 429, 436 (2008); Jackson, note 1, at 34.

⁶ Jackson, note 1, at 34.

⁷ K.S.A. 20-119 *et seq.* (legislation implementing amendment); K.S.A. 20-3004(a) (applying amendment to appellate courts).

⁸ Caufield, note 3, at 771 (discussing the history with elections in Kansas and Missouri).

selection processes.”⁹ The clear intent in adopting the Missouri Plan “was to create a system where judges would be free from political pressure or influence.”¹⁰

The weaknesses of direct elections of judges for our highest courts¹¹ are well known. Judicial elections are difficult for voters. They are low information contests. Most voters have little interaction with appellate judges. Voters have limited familiarity with the Constitution and judicial reasoning. They have little understanding of how to assess a judge’s performance. All this contributes to a high ballot roll-off, where at the voting booth voters complete a ballot but skip over the judge races.¹²

Judges are reluctant candidates. In their judicial role, they are supposed to be indifferent to popularity. They are limited by ethics rules from public comment on pending cases, engaging in politics, and fundraising. Currently, in the states that elect their high court justices opaque special interest groups dominate the elections, and often the campaigns spend six to seven figures.

Judges do not have effective tools to respond to criticism about unpopular decisions. Judges speak in court or in written decisions. Those who lob political attacks at judges exploit this. By responding to the criticism, the judge becomes an active participant in a political debate, which reinforces the suggestion that the judge is politician in a black robe. If judges are indistinguishable from other politicians, it creates the appearance they will not be able to avoid political biases when they sit on the bench. If a judge’s response to a political attack is silence, the lack of a vigorous defense may reinforce the appearance that the attack is valid.

The politics, campaigning, and fundraising discourage many well-qualified people from seeking election. The solution to preserving fair and impartial courts cannot be that we train judges to be more accomplished politicians.

Some opponents of merit selection argue the State adheres to a representative form of government and that merit selection denies the people the right to elect Supreme Court justices. But that argument for a representative process is based on

⁹ *Id.*

¹⁰ *Id.* at 772.

¹¹ Electing trial court judges involves different considerations. Most Kansans interact with the judiciary through the thousands of cases at the trial court level. Once an appellate court has decided a legal point it is to be followed by a trial court in which the same legal point is raised. Various mechanisms restrain trial court judges, more so than appellate judges, especially for the Supreme Court, which is the court of last resort and has the final say on matters of Kansas law. By design, Kansans have taken greater care to insulate appellate judges from political and other controls, so they are better able to enforce the Constitution, uphold the rule of law, preserve the separation of powers, and promote due process of law.

¹² Rachel Paine Caufield, “Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections,” 74 *Mo. L. Rev.* 573, 574, 586 (2009).

a mistaken premise. Judges do not represent people or constituencies, as legislators or elected officials do. They represent the law. We select judges for our highest courts by focusing on the ability to properly interpret and apply the law and not the public's policy preferences.

The Judiciary's role is unique amongst the three branches of government. The political branches are expected to abide by public opinion. But the Framers insulated courts from the shifting winds of public opinion. They constructed a system of justice based on the rule of law, which is the foundation of freedom. They equipped courts to administer the law impartially and in a neutral manner. They believed basic rights and privileges to be so important they removed them from the reach of voters and elected officials. They fixed such rights and privileges in the Constitution as legal principles to be applied by courts, free from the effects of politics and public sentiments. So that these rights are not hollow promises, they made sure the Judiciary as an institution was not under the thumb of the other branches. Judges, who must apply the laws created by the other two branches—laws that affect opposing constituencies—are expected to remain detached so they can weigh the opposing arguments and not find themselves personally on either side of the scale.

Direct elections of high court judges are fundamentally flawed. Throughout history, special interest groups and political figures have found the value proposition of using unpopular decisions to reshape courts to their liking simply too good to pass up. They accuse the judge of being out-of-step with the march of the voters. They ask voters to evaluate a judge as a politician. But in all respects, judges are responsible to the law rather than public opinion. Generations of Kansans have resolutely agreed the best way to uphold the law is to insulate judges from popular will and political intimidation. As Professor Caufield puts it, “to allege that judges should be assessed based on whether they adhere to political agendas and public opinion is anathema to the unique role that we ask judges to play.”¹³

Asking judges to be more responsive to political interests and public opinion has a host of negative consequences. Should a judge be accountable to the “majority”?¹⁴ If so, what happens to minority rights? And how does a judge square the public sentiment with his or her responsibility to uphold the law and the Constitution? It would be wrong for justices to consult a poll before deciding a case. So why should voters be allowed to unseat a justice for a legally correct, but controversial, decision? If our high courts are to remain fair and impartial, judges and justices must be able to issue decisions in high-profile cases without considering public opinion or political pressure.

¹³ Caufield, note 12, at 584.

¹⁴ In judicial elections, given their typical low-profile nature and low voter turnout, it is possible for a vocal minority to mobilize against and depose a judge.

A Kansas Chamber of Commerce brochure¹⁵ from the 1958 campaign for merit selection well summed up the concern with direct election of judges:

What's Wrong with Electing Judges? First, the partisan elective process puts the judiciary into politics. Candidates for legislative or executive offices may run on the basis of advocacy of certain policies; a judge should have no policy other than to administer the law honestly and competently. Judges should not be influenced by political alliances or political debts.

When methods of selection become more political and ideological, it becomes more likely that political or ideological high court judges will be selected. But voters agree that judges should not be influenced by personal ideology or politics. A February 2022 Pew Research Center national poll about the U.S. Supreme Court finds that 84% of the public say justices should not bring their political views into decisions.¹⁶ We suspect Kansans hold similar views.

Election of our highest state court judges risks that the public will perceive those judges as politicians in black robes who are influenced by politics and campaign contributions. The judiciary relies heavily on public support to perform its role. Public trust and confidence are precious commodities. At a time when faith in government institutions is at risk, the legislature should not disrupt a system designed by Kansas in response to specific concerns about direct elections and gubernatorial appointments. Returning to direct elections would be an unfortunate backward step.

The Kansas Supreme Court Nominating Commission and Retention Elections

Article 3, Section 5 of the Kansas Constitution, as amended in 1958, provides for the non-partisan Kansas Supreme Court Nominating Commission. The Commission has nine members. Licensed Kansas lawyers, in a state-wide election, select an attorney as the Chair. Licensed Kansas lawyers in each congressional district elect one attorney to serve as a commissioner. The governor appoints one non-attorney member from each congressional district.

The Commission's composition ensures a balance between professional assessment of an applicant's legal ability and the voice of citizens. Lawyer members understand the work of courts, can critique the applicant's written materials, and are aware of the specialized knowledge and experience needed to serve as a judge. Citizen

¹⁵ Caufield, note 3, at 772 (quoting brochure).

¹⁶ Pew Research Center, *Public's Views of Supreme Court Turned More Negative Before News of Breyer's Appointment* (February 2, 2022), <https://www.pewresearch.org/politics/2022/02/02/publics-views-of-supreme-court-turned-more-negative-before-news-of-breyers-retirement/>.

members appointed by the Governor provide public input, ensure accountability, and lend credibility and legitimacy to the process.

The rule governing the Commission's makeup denies the Governor the right to select most of the commissioners. This is to reduce political influence on the Commission. A May 2019 study of nominating commissions by the Brennan Center for Justice at the New York University School of Law finds that governors are likely to appoint commissioners "whose judgment they trust and with whom they share values or political preferences."¹⁷

Recently, in Iowa and Florida, where the governor in each state appoints all the commissioners, the governors have "come under fire for appointing political allies and donors to their states' nominating commissions."¹⁸ In Florida, the governor has been accused of interfering with the commission by insisting that one of the applicants be presented to him for consideration.¹⁹ Also, editorials have criticized the Florida governor for elitism and playing politics with the commission.²⁰ In Iowa, the governor appointed her father to the commission.²¹

According to the Brennan Center's findings, "power concentrated in the hands of one official makes it more likely that the commission will merely ratify that official's preferences. Conversely, a mix of appointing authorities reduces the chance that a single political agenda will drive the commission's work."²²

Political scientist Greg Goelzhauser studies nominating commissions. His recent book, *Choosing State Supreme Court Justices: Merit Selection and the Consequences of Institutional Reform*, notes, "[a]n analysis of the backgrounds of supreme court

¹⁷ Douglas Keith, *Judicial Nominating Commissions: An analysis finds that despite varying methods of selecting them, state commissioners are almost uniformly professionally homogeneous* (Brennan Center May 29, 2019), <https://www.brennancenter.org/publication/judicial-nominating-commissions>, at p. 4.

¹⁸ *Id.*

¹⁹ Gary Fineout, "DeSantis admin strong-arms judicial pick — South Florida congresswoman wants impeachment inquiry — Florida timber owners rethink their future," *Politico* (June 24, 2019) <https://www.politico.com/newsletters/florida-playbook/2019/06/24/desantis-admin-strong-arms-judicial-pick-south-florida-congresswoman-wants-impeachment-inquiry-florida-timber-owners-rethink-their-future-449855>.

²⁰ Editorial, "Florida's sham: Governors are rigging courts through 'partisan litmus tests,'" *Orlando Sentinel* (July 3, 2019), <https://www.orlandosentinel.com/opinion/guest-commentary/os-op-florida-governors-rigging-courts-desantis-20190703-ewczebk4zzeexgxielijcvxyqgq-story.html>; Editorial, "Gov. Ron DeSantis stiffs Florida Bar to stack courts with hard-right judges," *South Florida Sun-Sentinel* (August 14, 2019), <https://www.sun-sentinel.com/opinion/editorials/fl-op-edit-desantis-judges-20190814-tfpq5h5cbfextaragehnlcpji4-story.html> ("The news is not good for people who believe Florida's courts need to be something more than extensions of the governor's office.").

²¹ Todd Magel, "Critics denounce Reynolds' decision to appoint father to panel that vets judges," *KCCI Des Moines*, May 2, 2018, <http://www.kcci.com/article/critics-denounce-reynolds-decision-to-appoint-father-to-panel-thatvets-judges/20128272>.

²² Keith, note 17, at p. 4

justices found that states using nominating commissions are less likely to have justices with ties to major political offices (such as former aides to the governor or state legislators) than states using an appointment system without nominating commissions, suggesting that nominating commissions do constrain the governor in appointing political allies.”²³

As for the Nominating Commission’s work, its members screen and vet prospective justices based on qualifications, not party affiliation or connection. The commission presents a slate of three nominees to the governor, who must choose one.

Retention elections are an important part of merit selection. Unlike the federal process, Kansas does not grant lifetime judgeships. A Kansas Supreme Court justice serves a 6-year term. As the justice’s term is nearing the end, the justice is on the ballot in an unopposed “yes-or-no” retention election.

Retention elections give the people a voice in whether a state court judge deserves another term without the bruising characteristics of political attacks, partisan tactics, and competitive contests.²⁴ These elections seek to evaluate a judge based on his or her judicial performance—has the judge committed a serious ethical indiscretion, or is the judge incompetent?—not the popularity of a single decision or whether the judge is too “conservative” or too “liberal.”²⁵ These elections seek to remove partisan politics and special interests from the election process.²⁶ Most importantly, they insulate judges from shifts in public opinion that can undermine the consistency and fairness in the law. Judicial retention elections are not meant to serve as a tool for judicial intimidation or payback for an unpopular, but legally sound, decision.

Kansas’ merit selection process cannot ensure the total elimination of politics. Even so, having an independent non-partisan commission select nominees for the governor’s consideration removes a threat to the fairness and impartiality of the judiciary. A justice, after all, should not owe his or her position to a governor who made the appointment as a reward for political accomplishments. And justices should not make promises the way politicians do. Their job is to remain impartial: to decide cases based on the law and the facts. Also, they must be free enough to make unpopular rulings while applying the law, doing justice, and respecting an individual’s rights.

²³ Greg Goelzhauser, *Choosing State Supreme Court Justices: Merit Selection and the Consequences of Institutional Reform*, pp. 57-58 (Temple University Press, 2016).

²⁴ Todd E. Pettys, “Judicial Retention Elections, The Rule of Law, and the Rhetorical Weaknesses of Consequentialism,” 60 *Buffalo Law Review* 69, 74 (2012).

²⁵ *Id.*

²⁶ Traci V. Reid, “The Politicization of Retention Elections: Lessons Learned from the Defeat of Justices Lamphier and White,” 83 *Judicature* 68, 69 (1999).

The greatest political vulnerability in the merit selection system is the retention election. Even so, those elections subject justices to less political pressure than either contested partisan elections or political appointments. If a justice is ousted in a retention election, the Nominating Commission starts the process of taking applications and vetting applicants.

Merit selection was originally championed by business interests and the legal profession. The U.S. Chamber of Commerce's Institute for Legal Reform issued a report in 2009, and a second edition in 2016, *Promoting Merit in Merit Selection: A Best Practices Guide to Commission-Based Judicial Selection*, advocating for merit selection systems with meaningful public participation.

A strong scholarly view supports merit selection.²⁷

Today, 34 states and the District of Columbia use a commission as part of the selection process for at least some of their high court judges.²⁸

The Brennan Center's 2019 study finds that while "the work of commissioners varies only slightly from state to state," the composition and selection of commission members vary among the states.²⁹ Governors appoint a majority of commissioners in 15 of the 35 commission jurisdictions. In 16 commission states no single authority appoints a majority of commissioners. In 26 jurisdictions, lawyers comprise a majority of commissioners, even though only 15 states require lawyer majorities. Nonlawyer commissioners comprise a majority of commissioners in just 6 states, and half of the seats in 3 states. Nearly two-thirds of the nonlawyer commissioners come from either private industry or the legislative or executive branches of government.³⁰

To date, no state that has adopted a merit plan has opted to replace it with direct elections of judges. Indeed, in 2012, voters in Arizona, Florida, and Missouri, by wide

²⁷ See for example, Nuono Garoupa and Tom Ginsburg, "Guarding the Guardians: Judicial Councils and Judicial Independence," 57 *American Journal of Comparative Law* 103, 104 (Winter 2009) (noting a "growing scholarly consensus in favor of 'merit selection'"); Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature," 106 *Dickerson Law Review* 729 (2002) (providing summary of empirical evidence); Malia Reddick, "Judging the Quality of Judicial Selection Methods: Merit Selection, Elections, and Judicial Discipline," (American Judicature Society 2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2731018; Joseph A. Colquitt, "Rethinking Judicial Nominating Commissions: Independence, Accountability and Public Support," 34 *Fordham Urban Law Journal* 78 (2007); Rachel Caufield, "Inside Merit Selection: A National Survey of Judicial Nominating Commissioners," *American Judicature Society* 17 (2012)

²⁸ Caufield, note 27.

²⁹ Keith, note 17.

³⁰ *Id.*

margins, rejected efforts to move away from merit selection.³¹ This fact alone, is the best evidence that the merit plan is the superior method of judicial selection.

As for Kansas voters, in a 2015 poll of likely Kansas voters, 46% of whom voted for Sam Brownback and 44% of whom voted for Paul Davis in the 2014 general election, 53% favored merit selection, 27% opposed merit selection, and 20% were undecided. 76% opposed changing the Constitution to allow selection by the governor and confirmation by the Senate, 14% favored the change, and 10% were undecided.³²

Answering the Critics

Some critics argue Kansas' merit process is undemocratic. But they fail to recognize that merit selection was approved by super-majorities in the legislature and an overwhelming popular vote in response to the politicization of judicial elections and a major political scandal. Having a process for the Kansas Supreme Court that focuses on an applicant's fairness and impartiality, rather than politics or popularity, is an important consideration in selecting justices.

Some critics of the Kansas process prefer a federal-style model, where the governor appoints the justice (without the benefit of a nominating commission) and the Senate confirms the appointment. Few states follow the federal model.³³

The federal model has its own set of problems. The federal model has been too political and ideological. It is more likely to select federal judges who are ideologically oriented. That opens the door to the circus-like atmosphere of recent notable U.S. Supreme Court confirmation hearings. For those who think the states are immune from such antics, they need look no further than the recent 6 years-long battle in New Jersey to confirm former Governor Chris Christie's appointments to the Democrat-controlled New Jersey Senate.³⁴ Connecticut, using a model similar to the federal one,

³¹[https://ballotpedia.org/Arizona_Judicial_Selection_Amendment,_Proposition_115_\(2012\);](https://ballotpedia.org/Arizona_Judicial_Selection_Amendment,_Proposition_115_(2012);)
[https://ballotpedia.org/Florida_Supreme_Court,_Amendment_5_\(2012\);](https://ballotpedia.org/Florida_Supreme_Court,_Amendment_5_(2012);)
[https://ballotpedia.org/Missouri_Judicial_Appointment_Amendment,_Amendment_3_\(2012\).](https://ballotpedia.org/Missouri_Judicial_Appointment_Amendment,_Amendment_3_(2012).)

³² *20/20 Insight LLC, Kansas Likely Voters*, Feb 26-Mar 1, 2015,
<https://www.brennancenter.org/sites/default/files/2015%202020%20Insight%20Kansas%20Poll.pdf>

³³ Examples include Maine and New Jersey. Me. Const., Art. V, Pt. 1, § 8; N.J. Const., Art. VI, § VI, ¶ 1.

³⁴ Editorial, "The Politicization of a Respected Court," *The New York Times* (December 16, 2010) <https://www.nytimes.com/2010/12/16/opinion/16thurs3.html?ref=opinion>; "N.J. lawmakers strike deal to advance state Supreme Court nomination," *The Star-Ledger* (May 2, 2011), https://www.nj.com/news/2011/05/nj_lawmakers_strike_deal_to_ad.html; Gibson, "N.J. Senate approves nomination of Anne Patterson to state Supreme Court," *The Star-Ledger* (June 27, 2011), https://www.nj.com/news/2011/06/nj_senate_approves_nomination.html; Spotto, "Anne Patterson sworn in to N.J. Supreme Court," *The Star-Ledger* (September 9, 2011), https://www.nj.com/news/2011/09/anne_patterson_sworn_in_as_new.html; Baxter, "In rejecting Supreme Court nominee Phillip Kwon, Dems send Gov. Christie a message," *The Star-Ledger* (March 25, 2012), https://www.nj.com/news/2012/03/in_rejecting_supreme_court_nom.html; Celock, "Chris

has encountered a similar problem.³⁵ In Rhode Island, legislative confirmation has been used to extract concession on unrelated issues.³⁶ Political wrangling over nominees leading to long vacant judicial seats can result in excessive caseloads for those who are on the bench, causing excessive delays in deciding cases.

Under the Kansas process the nominating commission, not the governor creates the short list. That limits a governor's discretion to appoint judges based on personal loyalty or the influence of partisan or special interests. Legal historian, Jed Shugerman, notes, because "the governor and the parties do not get the first crack at selecting judges," a nominating commission adds "a thicker layer of insulation from the political parties with a new set of veto points."³⁷ A study of states using nominating commissions and states using an appointment system without nominating commissions, found that nominating commissions do constrain the governor in appointing political allies.³⁸

The federal model is not as transparent as the *current* Nominating Commission's processes. Per K.S.A. 20-123(b)(1), the Commission is subject to the open meetings act, K.S.A. 75-4317 *et seq.* The Commission's application form is available to the public. When a vacancy occurs, the Commission advertises the application process. The Commission publishes the names of each applicant and it publicly releases portions of the person's application. The Commission conducts public interviews. It publishes guidelines for the interviews and uses a statutorily mandated yardstick by which to measure applicants. Its deliberations are public, except when it goes into executive session. Its votes are public. The Commission then publishes the names of the three nominees when it sends those names to the governor.

Christie, Stung By New Jersey Supreme Court Nominee Defeat, Attacks Democratic Lawmakers," *The Huffington Post* (May 31, 2012), https://www.huffpost.com/entry/chris-christie-new-jersey-supreme-court-nominee_n_1560938; Maygar, "Christie's Judicial Shuffle Escalates Supreme Court Battle," *N.J. Spotlight*, August 13, 2013, <https://www.njspotlightnews.org/2013/08/13-08-13-christie-s-judicial-shuffle-escalates-supreme-court-battle/>; Aron, "Supreme Court Still On Standoff Over Appointments," *NJTV News* (December 26, 2013) <https://www.njtvonline.org/news/video/supreme-court/>; Rizzo, "Reacting to Christie, NJ lawyers call for constitutional amendment to protect judges," *The Star-Ledger* (April 11, 2014), https://www.nj.com/politics/2014/04/reacting_to_christie_nj_lawyers_call_for_constitutional_a_mendment_to_protect_judges.html#incart_flyout_politics; Johnson, "Sweeney slaps down Christie over N.J. Supreme Court nominee," *The Star-Ledger*, https://www.nj.com/politics/2016/03/sweeney_slaps_christie_over_nj_supreme_court_nomin.html#incart_most-commented_opinion_article.

³⁵ Joseph De Avila, "Connecticut Supreme Court Nominee Is Blocked by State Republicans," *The Wall Street Journal*, March 27, 2018, <https://www.wsj.com/articles/connecticut-supreme-court-nominee-is-blocked-by-state-republicans-1522186710>.

³⁶ Scott Mackay, "Despite Reforms, Connections Can Still Lead to Judgeships," *Rhode Island Public Radio*, May 27, 2013.

³⁷ Jed Handelsman Shugerman, *The People's Courts*, 259 (Cambridge: Harvard University Press, 2012).

³⁸ Goelzhauser, note 23, 57-58.

By contrast, under the federal-style process which the legislature in 2013 imposed on the Kansas Court of Appeals, K.S.A. 20-3020(a)(3) requires the governor to tell the public who applied for the position, and who the governor appointed. However, the governor need not tell the public who else was considered for the seat, what the appointee or the governor discussed during the interview, or what yardstick the governor used to measure the appointee. On this score, the Commission's process is more transparent than the Court of Appeals' process.

The federal model appoints judges for life. That model does not provide the same accountability measures as Kansas' merit plan, which uses retention elections to remove justices who do not meet fixed standards for job performance or ethics and assure keeping justices who properly perform their duties.

Some who oppose Kansas' merit selection process argue the Commission is an elite group controlled by lawyers favoring liberal appointees. But that charge is not based on any study assessing the structure, function, and operation of the current Kansas Supreme Court Nominating Commission.

Empirical evidence is hard to come by. The most comprehensive study is the *Inside Merit Selection* national survey that was published in 2012 by the American Judicature Society.³⁹ Professor Caufield led a team who surveyed 487 nominating commission members in 30 states, including Kansas. The study notes the non-lawyer members are "overwhelmingly" appointed by the governor while the lawyers are selected by some process involving other lawyers. The study shows that lawyer and non-lawyer commission members reject political considerations as part of their deliberations. More than 73% say that party affiliation is not considered. Most commissioners report they are not aware of candidates' party affiliations. The survey finds, "[a]cross the board, we see consensus among survey participants that lawyer and non-lawyer members work well together and respect each other's contributions." The survey notes, "[l]awyers and non-lawyers tend to agree on the criteria for evaluation, the role of political influences, and the relationship between the governor and the Commission." The survey concludes, "[a]rguments that merit selection systems are dominated by members of the bar appear to be unfounded, based upon the evidence offered by the Commissioners themselves."⁴⁰

On balance, Kansas' merit selection process is more likely than either elections or the federal model to select judges who are accountable to the rule of law and not to the electorate, a political party, or the ideological preferences of most people.

A Fair and Impartial Judiciary is a Cherished Democratic Principle

³⁹ Caufield, note 27.

⁴⁰ *Id.*

The Framers of the American Constitution intended the judicial branch to be free from political influence. Alexander Hamilton noted in Federalist No. 78 that great care should be taken to ensure that only the best qualified candidates be appointed.⁴¹ He emphasized that judges should be independent from politics, insulated from partisanship and the public mood, and free from political retribution.⁴²

The Framers equipped courts to act impartially. Thomas Jefferson wrote, “[w]hen one undertakes to administer justice, it must be with an even hand, and by rule; what is done for one must be done for everyone in equal degree.”⁴³ Retired U.S. Supreme Court Justice Sandra Day O’Connor observes the Framers founded the judiciary on the premise that “there has to be someplace where being right is more important than being popular or powerful, where fairness trumps strength. And in our country, that place is supposed to be the courtroom.”⁴⁴

Ensuring that democracy, liberty, and the rule of law were not hollow promises, the Framers created a form of government aimed at avoiding the concentration of power in a single authority. They designed a democracy in which the legislative branch creates the law, which the executive branch enforces. The judicial branch’s role is to interpret and apply the legislature’s statutes, declare the common law, and preserve and protect the Constitution.

They made the judiciary an institution “not under the thumb of the other branches of Government.”⁴⁵ James Madison, while introducing in Congress the amendments that became the Bill of Rights, eloquently noted that the judiciary “will be an impenetrable bulwark against every assumption of power in the Legislative and the Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”⁴⁶

Alexander Hamilton described the judiciary as the only institution that can ensure the legislature and the executive do not violate the Constitution. Hamilton argued that “there is no liberty, if the power of judging be not separated from the legislative and executive powers . . . The complete independence of the courts of justice is . . . essential . . .”⁴⁷ As Hamilton explained, if the legislature judged the validity of its own laws, then its members would substitute their will for the will of the people, noting “the courts were designed to be an intermediate body between the people and

⁴¹ The Federalist No. 78 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁴² *Id.*

⁴³ W. Cleon Skousen, *The Making of America*, 241 (Verity Publ.)

⁴⁴ NPR’s All Things Considered, “Justice O’Connor Criticizes Campaign Finance Ruling,” (January 26, 2010), <https://www.npr.org/templates/story/story.php?storyId=122993740>.

⁴⁵ Ruth Bader Ginsburg, “Judicial independence: The Situation of the U.S. Federal Judiciary,” 85 *Nebraska Law Review* 1, 1 (2006).

⁴⁶ James Madison, Speech to the House of Representatives (June 8, 1789), *in the Mind of the Founder*, 210, 224 (Marvin Meyers ed., 1973).

⁴⁷ The Federalist No. 78.

legislature, in or order, among other things, to keep the latter within the limits assigned to their authority.”⁴⁸ Without judicial independence, Hamilton argued, “all the reservation of particular rights and privileges [as legal principles to the applied by courts] would amount to nothing.”⁴⁹ Hamilton argued that citizens “of every description” should value judicial independence because “no man can be sure that he may not be tomorrow the victim of a spirit of injustice.”⁵⁰

Thus, the Framers called on the judiciary to patrol the Constitution’s legal boundaries and preserve the rule of law not because they believed judges to be wiser or smarter than those in the government’s other branches; rather, the Framers believed that allowing the other branches to police themselves was too dangerous.⁵¹

Jurists, performing their basic role in American democracy, have throughout this country’s history required the other branches to take unpopular actions such as desegregating schools or mandating certain minimum standards for prisons. Often politicians have enough respect for courts to be circumspect in their statements about unpopular decisions. They understand the value to the democracy of accepting decisions from the highest courts, even those they think are wrong. Former U.S. Supreme Court Justice John Paul Stevens warns that, “[d]isciplining judges for making an unpopular decision can only undermine their duty to apply the law impartially.”⁵² Preserving a high level of confidence in courts should be, as Justice Anthony Kennedy has noted, “a state interest of the highest order.”⁵³

The Framers thus plainly intended for judges to be free from political influence. As Hamilton noted, every care should be taken to ensure that the best qualified persons will be appointed, and that once seated the judge is expected to decide cases free from the effects of politics and the changing winds and passions of the public.⁵⁴

Conclusion

Retired United States Supreme Court Justice Sandra Day O’Connor observes, “[l]ike democracy itself, merit selection relies on a wide-angle view of our nation’s goals for its people and produces a systemic superiority that safeguards our most precious baseline values.”⁵⁵

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Stephen Breyer, *Making Our Democracy Work*, 6-8, 215 (Alfred A. Knopf 2010).

⁵² John Paul Stevens, “Should We Have a New Constitutional Convention?” *New York Review of Books* (October 11, 2012), <https://www.nybooks.com/articles/2012/10/11/should-we-have-new-constitutional-convention/?pagination=false>.

⁵³ *Republican Party of Minnesota v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring).

⁵⁴ The Federalist No. 78.

⁵⁵ Sandra Day O’Connor, “Reflections on Arizona’s Judicial Selection Process,” 50 *Arizona Law Review* 15, 24 (Spring 2008).

No selection method is perfect. Even so, the Commission uses a balanced, rigorous, and transparent process, in which the qualifications of the applicants are the determinative factor. That process continues to select highly qualified, non-partisan, fair and impartial Supreme Court justices. There is no compelling reason for Kansans to rethink their constitutionally based merit selection process or take a backward step.