

# Does the Kansas Supreme Court Selection Process Violate the One Person, One Vote Doctrine?

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*“I don’t care who does the electing so long as I do the nominating.”<sup>1</sup>*

## I. INTRODUCTION

Is the Kansas Supreme Court selection process unconstitutional? In Kansas, when a vacancy occurs on the state supreme court, the Kansas Supreme Court Nominating Commission (Nominating Commission) selects three nominees from a pool of qualified applicants, and the governor must appoint one of the nominees to fill the vacancy.<sup>2</sup> This process, mandated under Article III of the Kansas Constitution, is a version of the method popularly known as “merit selection” or the “Missouri Plan.”<sup>3</sup> While Kansas is not the only state in the United States that has adopted some version of the Missouri Plan,<sup>4</sup> Kansas is unique as to the role that the state bar plays in the process.<sup>5</sup> The Nominating Commission is comprised of nine members: five bar-elected lawyers and four governor-appointed non-lawyers.<sup>6</sup> As the Kansas Constitution provides, the Nominating Commission includes:

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1. J. JACKSON BARLOW ET AL., THE NEW FEDERALIST PAPERS 338 (1988) (quoting William “Boss” Tweed, political boss of Tammany Hall).

2. See KAN. CONST. art. III, § 5(a).

Any vacancy occurring in the office of any justice of the supreme court and any position to be open thereon as a result of enlargement of the court, or the retirement or failure of an incumbent to file his declaration of candidacy to succeed himself . . . shall be filled by appointment by the governor of one of three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted to the governor by the supreme court nominating commission established as hereinafter provided.

*Id.*

3. See *id.*, Jeffrey D. Jackson, *The Selection of Judges in Kansas: A Comparison of Systems*, 69 J. KAN. B. ASS’N 32, 34 (2000) (describing Kansas’s current judicial selection method as a version of the “Missouri Plan”).

4. See *infra* note 37 and accompanying text.

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

6. See KAN. CONST. art III at § 5(e).

One member, who shall be chairman, chosen from among their number by the members of the bar who are residents of and licensed in Kansas; one member from each congressional district chosen from among their number by the resident members of the bar in each such district; and one member, who is not a lawyer, from each congressional district, appointed by the governor from among the residents of each such district.<sup>7</sup>

Unlike any other state, the Kansas version of the Missouri Plan gives the bar—the collective body of lawyers in the state—the power to elect a *majority* of the Nominating Commission.<sup>8</sup>

Some scholars have criticized this system as “elitist”<sup>9</sup> and democratically illegitimate because it gives a lawyer more voting power than a non-lawyer.<sup>10</sup> Little attention, however, has been given to the question of whether it is also unconstitutional. And while two scholars have briefly noted a possible violation of the United States Constitution’s

7. *Id.*

8. See Ware, *supra* note 5, at 386.

9. See Stephen J. Ware, *The Bar’s Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 KAN. J.L. & PUB. POL’Y 392, 396 (2009) [hereinafter *The Bar’s Extraordinarily Powerful Role*]. Professor Ware notes that the charge of “elitism” against excessive bar influence in the Missouri Plan states is not unique to his work. Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751, 751-52 (2009) (citing, for example, Seth Andersen, *Examining the Decline in Support for Merit Selection in the States*, 67 ALB. L. REV. 793, 796-97 (2004) (noting that Missouri Plan states have been subject to “charges of elitism”)); see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 LAW & CONTEMP. PROBS. 78, 106 (1998) (“‘Merit selection’ is seen by many as a masquerade to put political power in the hands of the organized bar and other members of the elite.”); Harry O. Lawson, *Methods of Judicial Selection*, 75 MICH. B.J. 20, 24 (1996) (suggesting that “[m]erit selection does not take politics out of the judicial selection process . . . [but merely] substitutes bar and elitist politics for those of the electorate as a whole”).

10. See Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 FORDHAM URB. L.J. 125, 145-46, 54 (2007).

Legitimacy . . . refers to the confidence of the public that the initial selection system itself comports with democratic principles.

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

Commission systems, on the other hand, do not fit so neatly within this democratic framework. While judges in a commission system are appointed by a popularly-elected official, the official’s choice is not unfettered. Rather, the choice is made from a pool selected by an unelected commission. Further, although some members of the commission are generally appointed by an elected official, others are not. In particular, many commissions have lawyer members that gain their seats, either through election by a minority of the persons, i.e. lawyers in their area, or through nomination by special interest groups. The composition of nominating commissions thus raises some serious concerns with regard to legitimacy.

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

*Id.* Noting that the “serious concerns” raised by bar-elected nominating commission members are “real and should be addressed,” Professor Jackson concluded that commission systems required “special justification” to be considered legitimate. *Id.* at 146-48.

Equal Protection Clause, this Note is the first extensive analysis of whether that clause's "one person, one vote" doctrine is violated by the Kansas Supreme Court selection process.<sup>11</sup> Accordingly, this Note discusses the potential success of an equal protection challenge to the Kansas Supreme Court selection process.

Part II discusses the evolution of the Kansas Supreme Court selection process within the broader historical context of several judicial selection trends that have at different times swept through the states. Part III discusses the United States Supreme Court cases that established and expanded the scope of the one person, one vote doctrine, as well as the cases that limited the application of the doctrine in certain, narrow circumstances.<sup>12</sup> Part IV discusses the Kansas Supreme Court selection process in light of the broad scope of the one person, one vote doctrine, while considering whether the narrow exceptions to the doctrine apply. This Note concludes by suggesting that the state constitutional scheme enabling the Kansas bar to elect a majority of the members of the Nominating Commission is a *non-judicial election* and, thus, is not protected by these narrow exceptions. Therefore, a strong argument exists that the Kansas system violates the one person, one vote doctrine by undermining the doctrine's purpose of ensuring that every qualified voter both be allowed to vote and be afforded equal voting power in elections of general public concern.

## II. JUDICIAL SELECTION METHODS

### A. *The Evolution of State Judicial Selection Methods*

The federal model of judicial appointment—presidential nomination followed by senate confirmation<sup>13</sup>—was part of the Framers' effort to ensure a republican system of government based on the separation of powers between the legislative, executive, and judicial branches of gov-

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11. See Richard E. Levy, *Written Testimony of Richard E. Levy Before the House Committee, State of Kansas*, 42 U. KAN. L. REV. 265, 283 (1994) (analyzing the implications of the one person, one vote doctrine as applied in *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994) for the Kansas Supreme Court selection process); *The Bar's Extraordinarily Powerful Role*, *supra* note 9, at 398 & n.34 (associating the exclusive role of the bar in some Missouri Plan selection systems with the "sort of favoritism" that had been found unconstitutional in *Hellebust*). In *Hellebust*, the Tenth Circuit Court of Appeals upheld a district court ruling that the election of the Kansas Board of Agriculture by delegates from agricultural organizations violated the one person, one vote doctrine. 42 F.3d at 1332.

12. Namely, Part III discusses those cases holding that the one person, one vote doctrine does not apply to judicial elections, non-legislative appointment methods for selecting governmental officials, or elections for governmental bodies "having a narrow and limited focus which disproportionately affects the few who are entitled to vote." See *Hellebust*, 42 F.3d at 1333.

13. See U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate . . . by and with the Advice and Consent of the Senate . . . Judges of the supreme court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by law . . .").

ernment.<sup>14</sup> An essential part of the Framers' attempt to establish the proper separation of powers framework within a republican form of government was the "check" that Senate confirmation provided on the President's power to appoint judges.<sup>15</sup> Due to the widespread media coverage of the Senate confirmation process for United States Supreme Court Justices in recent years, the federal model of judicial selection is perhaps the most well-known system for selecting judges in the United States.<sup>16</sup> This is not to say that the federal model currently is, or has been throughout American history, the most popular judicial selection method.<sup>17</sup> Although many states have adopted methods that reflect parts of the federal model, no state currently has a judicial selection method that is identical to the federal model.<sup>18</sup>

The fact that the method for selecting judges in the federal government has not changed since the ratification of the Constitution stands in stark contrast to the tumultuous evolution of judicial selection method trends in the states from the eighteenth century to the present.<sup>19</sup> In the wake of the ratification of the United States Constitution in 1789,

14. Luke Bierman, *Help Wanted: Is There a Better Way to Select Judges?*, 34 *FORDHAM URB. L.J.* 511, 516 (2007). Bierman notes that language in the Declaration of Independence accusing King George III of exercising complete control over the selection of colonial judges greatly influenced the Framers' desire that the federal model reflect the republican ideal of separation of powers. *Id.* at 511 (citing *THE DECLARATION OF INDEPENDENCE* para. 11 (U.S. 1776)).

15. See Ware, *supra* note 5, at 396-97 & n.35 (contrasting the "check" on the executive appointment power in the federal model that is provided by Senate confirmation with the "check" on the executive appointment power in the "merit selection" model that is provided by the Nominating Commission).

16. See KERMIT L. HALL & KEVIN T. MCGUIRE, *THE JUDICIAL BRANCH* 156 (2006) (describing the Senate confirmation hearings on the nomination of Robert Bork as "prime-time media events"); Michael DeBow et al., *The Case for Partisan Judicial Elections*, *THE FEDERALIST SOCIETY*, Jan. 1, 2003, [http://www.fed-soc.org/publications/PubID.90/pub\\_detail.asp](http://www.fed-soc.org/publications/PubID.90/pub_detail.asp) (suggesting that the intense and highly visible "public relations campaigns, smear tactics, and character assassination familiar to observers of some recent Federal judicial confirmation hearings," including, but "not limited to the Bork and Thomas hearings" have put the federal model in the public, but negative, spotlight among the states).

17. As this Section will demonstrate, the popularity of various selection methods has waxed and waned in a manner parallel to various socio-political movements in American history. See Bierman, *supra* note 14, at 511 (outlining the shifts in popularity of appointment-style selection methods during the Framers' period to election-style selection methods during the Jacksonian Era and back to modified appointment-style selection methods during the Progressive Era); Thomas R. Phillips, *The Merits of Merit Selection*, 32 *HARV. J.L. & PUB. POL'Y* 67, 71-79 (2009) (discussing the various socio-political movements that undergirded the evolution of judicial selection methods from appointment to merit selection).

18. Michael DeBow et al., *supra* note 16; see AMERICAN JUDICATURE SOCIETY, *JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS* 6 (2007), <http://ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf>. The essential feature of the federal model is that judges are nominated by the executive and then confirmed by the senate or other popularly-elected body. In twelve states, the governor nominates state supreme court justices, but the governor's nominee does not join the court unless confirmed by the state senate or similar popularly-elected body. *The Bar's Extraordinarily Powerful Role*, *supra* note 9, at 394. Many of these "senate confirmation" states use a nominating commission. See *id.* at 396-98.

19. See Phillips, *supra* note 17, at 71-79. Professor Phillips's article provides an excellent overview of the socio-economic factors that influenced the historically evolving popularity of the major judicial selection methods. See also Bierman, *supra* note 14, at 511 (linking the Framers' republicanism to a preference for appointment methods, the Jacksonian Era's democratic populism to a preference for judicial election methods, and the Progressive Era's critique of cronyism to a preference for modified appointment methods).

states either revised previous constitutions or adopted new constitutions, giving the power to select judges to the legislature or to the executive and subjecting that power to confirmation by the legislature or other popularly-elected body.<sup>20</sup>

This remained the case until the Jacksonian Era ushered in a wave of populist enthusiasm for the direct election of judges.<sup>21</sup> From 1846 to 1861, more than two-thirds of the states adopted judicial elections as the method for selecting judges for all levels of their courts.<sup>22</sup> Scholars have suggested that perhaps the most significant reason for this wave of popularity for judicial elections was the prevailing belief by influential attorneys at the time that both governors and legislators used their appointment power to appoint political cronies to the bench.<sup>23</sup> During the Jacksonian Era, the states placed more trust in the “check” of direct democratic control through popular elections than in the “check” of indirect democratic control through executive nomination and senate confirmation.<sup>24</sup>

Soon, however, many began to criticize the partisan judicial elections of the Jacksonian Era as fostering the prevalence of deeply partisan judges.<sup>25</sup> Thus, the Progressive Era, which extended into the 1920s and 1930s, saw the replacement of partisan elections with non-partisan elections as a means of attempting to ensure that “judges would be both independent and accountable.”<sup>26</sup> Today, twenty-two states have retained either partisan or non-partisan elections as their method for selecting judges for their respective high courts.<sup>27</sup>

The final significant judicial selection method that several states adopted was first promoted in 1914 by Albert Kales, then Director of Research for the American Judicature Society.<sup>28</sup> Kales’s method, later referred to as the “Missouri Plan,” or “merit selection,”<sup>29</sup> was a hybrid

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20. See Phillips, *supra* note 17, at 71.

21. See *id.* at 71-72.

22. See *id.* at 71. Professor Phillips pins the beginning of this wave of judicial elections to 1846 because that was the year of the New York Constitutional Convention, which provided for election of the judges of the New York high court. See *id.* at 71-73.

23. *Id.* at 73.

24. See Ware, *supra* note 5, at 406 (“[J]udicial elections . . . embody the passion for direct democracy prevalent in the Jacksonian era. [S]enate confirmation exemplifies the republicanism of our Nation’s Founders.”).

25. See Phillips, *supra* note 17, at 74.

26. See *id.* at 75.

27. *The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 396-405 (discussing the various levels of bar influence in both senate confirmation and Missouri Plan states); see AMERICAN JUDICATURE SOCIETY, *supra* note 18, at 6; Phillips, *supra* note 17, at 75 (stating that many states have continued to use non-partisan elections because the elections are “the least ambitious item on the Progressive judicial agenda”).

28. See Phillips, *supra* note 17, at 75-76.

29. See *id.* at 76; Jackson, *supra* note 3, at 34; The American Judicature Society, *Working to Improve the Administration of Justice Since 1913*, 87 JUDICATURE 108, 110 (2003) [hereinafter *Working to Improve*].

of the elective and appointive aspects of the previous systems.<sup>30</sup> The plan centered on a “select but diverse [nominating] committee” which was tasked with screening qualified applicants and nominating several names for consideration by the appointing official.<sup>31</sup>

Kales’s original plan did not provide for the organized bar to form a part of the nominating commission.<sup>32</sup> Rather, Herbert Harley proposed bar involvement in 1928 so that the lawyer-members of the commission might “winnow out the deserving from the merely self-seeking” by creating “a goodly list of lawyers willing to become judges and bearing the approval of their colleagues.”<sup>33</sup> Furthermore, Kales’s plan originally designated the chief justice of the state supreme court as the appointing official, but the version of the plan endorsed by the American Bar Association in 1937 substituted the governor as the appointing official.<sup>34</sup> The elective aspect of the system called for judges to stand for a popular retention election after a period of years on the bench.<sup>35</sup> In 1940, Missouri became the first state to adopt the modified version of Kales’s method.<sup>36</sup> Today, thirteen states select their supreme court judges with some version of the Missouri Plan, and several other states combine aspects of both the Missouri Plan and the federal method by providing for a nominating commission process that is subject to confirmation by the senate or other popularly-elected body.<sup>37</sup>

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30. Phillips, *supra* note 17, at 76; *Working to Improve*, *supra* note 29, at 110.

31. Phillips, *supra* note 17, at 76; see Jackson, *supra* note 3, at 34; *Working to Improve*, *supra* note 29, at 110.

32. See Jackson, *supra* note 10, at 149.

33. *Id.* (quoting Herbert Harley, Editorial, *The Eligible List of Judicial Candidates*, 11 J. AM. JUDICATURE SOC’Y 131, 132 (1928)).

34. See *Working to Improve*, *supra* note 29, at 110.

The system that Kales devised essentially combined appointments with election and added an important third element—a nominating body later to become known as the judicial nominating commission. Under the Kales plan, an elected chief justice would fill vacancies from a list submitted by this commission that was expected to seek out the best available judicial talent. Once on the bench, these judges would thereafter go before the voters on the sole question of whether they should be retained in office.

In 1926, a British political scientist, Harold Lasky, proposed a variation of the Kales plan that substituted the governor of the state for the chief justice as the appointing official, and this Kales/Lasky proposal became essentially the merit plan as we know it. The plan was talked about for years until in 1937 the American Bar Association essentially endorsed the Kales/Lasky proposal and . . . three years later the state of Missouri voted into its constitution the so-called Missouri Plan, or merit plan.

*Id.* It is notable that Kansas, with regard to the appointing official, has retained aspects of both Kales’s original plan (chief justice as appointing official) and the Kales/Lasky proposal (governor as appointing official); should the governor fail to make an appointment from the three nominees put forth by the commission within sixty days, the chief justice of the supreme court is required to appoint one of the three nominees. See KAN. CONST. art. III, § 5(b); KAN. STAT. ANN. §§ 20-135, 20-3005 (2008); Patricia E. Riley, *Merit Selection: The Workings of the Kansas Supreme Court Nominating Commission*, 17 KAN. J.L. & PUB. POL’Y 429, 429 n.2 (2008).

35. *Working to Improve*, *supra* note 29, at 110.

36. See Jackson, *supra* note 3, at 34; Phillips, *supra* note 17, at 76; *Working to Improve*, *supra* note 29, at 110.

37. *The Bar’s Extraordinarily Powerful Role*, *supra* note 9, 397-99, 399.

*B. The History of the Kansas Supreme Court Selection Process*

In 1958, the people of Kansas passed a state constitutional amendment adopting a version of the Missouri Plan as the state's method of selecting supreme court judges.<sup>38</sup> Prior to the 1958 amendment and dating back to its admission to the Union in 1861, Kansas had selected its judges by popular election.<sup>39</sup> During that time, the State held judicial elections every four years, while the governor appointed individuals to fill vacancies on the bench occurring in the interim between elections.<sup>40</sup> By the early 1950s, the Missouri Plan was gaining in popularity among the states.<sup>41</sup> In 1953, the Kansas Legislature considered a constitutional amendment that sought to replace judicial elections with a commission-selection, gubernatorial-appointment system based on the Missouri Plan.<sup>42</sup> While this amendment failed to pass the Legislature in 1953 and 1955, a combination of "intensive lobbying efforts [by] the Kansas Bar Association" and the public outcry over the notorious "'Triple Play' of 1956"<sup>43</sup> created enough public support for the amendment that it passed easily in 1958.<sup>44</sup>

Kansas has not altered its current system of selecting its supreme court judges since the system's adoption in 1958.<sup>45</sup> When the Kansas Legislature created the Court of Appeals in 1976, the Legislature granted the Nominating Commission power to nominate candidates to the Court of Appeals.<sup>46</sup> In 1972, another amendment to the state constitution gave state judicial districts the option to either implement a commission-selection method for the selection of district court judges or to maintain their current system based on judicial elections.<sup>47</sup>

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38. Jackson, *supra* note 3, at 34.

39. *Id.* During the Progressive Era of the early 1900s, Kansas tracked the general movement among the states in adopting non-partisan elections as "a means to alleviate some of the [politicization] problems associated with partisan elections." *Id.* at 33.

40. See KAN. CONST. art. III, § 11 (1859); Jackson, *supra* note 3, at 34 n.8.

41. See Phillips, *supra* note 17, at 77.

42. Jackson, *supra* note 3, at 34.

43. *Id.* The "'Triple Play' of 1956" involved the lame duck Governor Fred Hall basically appointing himself to the state supreme court in the few days before his term was set to expire. *Id.* In December of 1956, just a month after losing in the primaries for his re-election bid for governor, Governor Hall solicited the resignation of the seriously-ill Chief Justice of the Kansas Supreme Court. *Id.* Upon receipt of the resignation, Governor Hall immediately resigned as Governor. *Id.* The Lieutenant Governor, John McCuish, who was also ill at the time, prematurely ended his stay at the hospital to be sworn in as Governor and appoint Hall to the Kansas Supreme Court. *Id.* McCuish's appointment of Hall to the state's high court was "his first and only official act of his 11 day tenure as Governor." *Id.*

44. Jackson, *supra* note 3, at 34.

45. See *id.*

46. Janice D. Russell, *The Merits of Merit Selection: A Kansas Judge's Response to Professor Ware's Article*, 17 KAN. J.L. & PUB. POL'Y 437, 439 (2008) (citing KAN. STAT. ANN. §§ 20-3004 to 20-3005 (2008)); see Jackson, *supra* note 3, at 34.

47. Jackson, *supra* note 3, at 34-35. Jackson notes that as of January 2000, "17 judicial districts ha[d] opted to implement the plan, while 14 districts still continue the partisan election of their district judges." *Id.* at 35.

### C. The Role of the Bar in State Supreme Court Selection Processes

Kansas is the only state that allows the members of its state bar to elect a majority of its supreme court Nominating Commission.<sup>48</sup> Eight states—Alaska, Indiana, Iowa, Missouri, Nebraska, Oklahoma, South Dakota, and Wyoming—allow their bars to select a slim minority (only one member short of a majority) of the commission.<sup>49</sup> In three other states—Arizona, Florida, and Tennessee—the bar’s role in selecting members of the commission is limited to “merely suggesting names for . . . the commission and those suggested do not become commissioners unless approved by the governor and/or legislature.”<sup>50</sup> In addition, two states—Hawaii and Vermont—allow their bars to select some members of the commission, but offset the bar’s influence by requiring senate confirmation of the judicial nominee.<sup>51</sup>

Other states, while not allowing the bar to *select* any commission members, still require that attorneys *occupy* a given number of commission seats.<sup>52</sup> In these states, attorney members of the nominating commission are appointed by a democratically-elected official (for example, governor or legislative leader) or by judges nominated and confirmed by such an official.<sup>53</sup> In summary, states vary in the extent to which they

48. Ware, *supra* note 5, at 387.

49. *Id.* at 387 n.5 (citing ALASKA CONST. art. IV, §§ 5, 8 (three lawyers appointed by the governing body of the state bar to serve on seven-member nominating commission); IND. CONST. art. VII, § 9 (three lawyers, one from each court of appeals district, elected by the members of the bar in each district to serve on seven-member nominating commission); IOWA CONST. art. V, § 16; IOWA CODE §§ 46.1-2, .15 (2006) (seven lawyers elected by members of the bar association to serve on a fifteen-member nominating commission); MO. CONST. art. V, § 25(a), (d) (three lawyers elected by members of the bar to serve on seven-member nominating commission); NEB. CONST. art. V, § 21 (four lawyers elected by members of the bar to serve on nine-member commission); OKLA. CONST. art. VII-B, § 3 (six lawyers elected by members of the bar to serve on thirteen-member nominating commission); WYO. CONST. art. V, § 4 (three lawyers elected by members of the bar to serve on seven-member nominating commission); S.D. CODIFIED LAWS § 16-1A-2 (2007) (three lawyers appointed by president of bar to serve on seven-member nominating commission)).

50. *Id.* at 388, n.8 (citing ARIZ. CONST. art. VI, § 36; FLA. CONST. art. V, § 11; TENN. CODE ANN. §§ 17-4-102, 17-4-106, 17-4-112 (2007)).

51. See *The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 397 & n.32.

52. See Jackson, *supra* note 10, at 149 (“Today, the vast majority of the states using a commission system require the presence of lawyer members.”). Professor Jackson notes that the rationale of advocates for mandating the presence of lawyers on the nominating commission is two-fold: “First, lawyers were thought to have better knowledge of the judicial skills of the candidates than would ordinary citizens. Second, lawyers, and especially judges, would be more concerned with the administration of justice and would thus seek to put only the most deserving on the bench.” *Id.* at 150. Professor Jackson suggests, however, that such reasoning may not reflect reality as he questions whether lawyers “actually have a far greater base of knowledge about the quality of individual attorneys than the general public.” *Id.* Nevertheless, Professor Jackson states his belief that “there are good reasons . . . for mandated inclusion of lawyers and judges on the committee,” because lawyers generally have an appreciation for the importance of unbiased judges, have better access to information about individual candidates (for example, through law school or professional networking) than do lay persons, and have a “frame of reference” within the real world of lawyering for the qualifications that make a good judge. *Id.* at 152. As a result, Professor Jackson sees the presence of lawyers as possibly advantageous if a commission system addresses the legitimacy concerns by ensuring the presence of non-lawyers on the commission as well. *Id.*; see also Ware, *supra* note 5, at 388-89 n.10 (listing the various states that allow the bar to *occupy* a certain number of seats without giving the bar the power to *elect* those members).

53. See *The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 396-98 (citing principally

give their bars a formal role in judicial selection, and no state gives its bar greater power than Kansas.

While the policy issues regarding the appropriate role for the bar in judicial selection continue to arouse significant debate in Kansas and in the nation, this Note addresses a different question: whether a state system that gives the bar the power to elect a majority of the Nominating Commission violates the one person, one vote doctrine stemming from the Equal Protection Clause of the Fourteenth Amendment.<sup>54</sup> As stated above, at least two scholars have noted the possible violation of the one person, one vote doctrine by the Kansas system.<sup>55</sup> Professor Richard E. Levy discussed this possibility in his testimony before the Kansas House of Representatives in 1995 during the debates regarding the restructuring of the Kansas Board of Agriculture in the fallout from *Hellebust v. Brownback*.<sup>56</sup> Professor Stephen Ware also recognized a potential problem when he considered in his article whether the “favoritism for an occupational group [like the bar is] unconstitutional.”<sup>57</sup> Otherwise, the question of whether the Kansas Supreme Court selection process violates the one person, one vote doctrine has gone largely unexplored. The remainder of this Note discusses the United States Supreme Court’s jurisprudence regarding the applicability of the one person, one vote doctrine to the elections of various governmental officials before turning to the question of whether Kansas’s method of allowing the bar to elect a majority of the Nominating Commission violates the doctrine.

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N.Y. CONST. art. VI, § 2). Professor Ware argues that in states that mandate that a certain number of commission seats be occupied by attorneys the senate confirmation aspect of the system provides a democratic check on the “elite” nature of the “lawyers quota” even though “[t]he ‘lawyers quota’ guarantees that lawyers, compared to their percentage of the state’s population, will be over-represented on the commission.” *See id.* at 396-99.

54. For a sampling of the policy debate in Kansas, see H. JUDICIARY COMM. MINUTES, Feb. 12, 2009, p. 1-4 (2009) (recording debate between sixteen prominent scholars, judges, and advocates regarding whether senate confirmation should be added to the Kansas Supreme Court selection system); Robert C. Casad, *A Comment on “Selection to the Kansas Supreme Court,”* 17 KAN. J.L. & PUB. POL’Y 424 (2008); Jackson, *Selection of Judges in Kansas*, *supra* note 3; Riley, *supra* note 34; Russell, *supra* note 46; *The Bar’s Extraordinarily Powerful Role*, *supra* note 9; Ware, *Selection to the Kansas Supreme Court*, *supra* note 5. Although the academic materials comprising the national debate regarding the merits of the “Missouri Plan” or “merit selection” are legion, for a sampling see James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683 (2002); Symposium, *Mulling over the Missouri Plan: A Review of State Judicial Selection and Retention Systems*, 74 MO. L. REV. 473 (2009); Phillips, *supra* note 17; Symposium, *Symposium on Rethinking Judicial Selection: A Critical Appraisal of Appointive Selection for State Court Judges*, 34 FORDHAM URB. L.J. 1 (2007) (symposium comprising the work of twenty scholars); Clifford W. Taylor, *Merit Selection: Choosing Judges Based on Their Politics Under the Veil of a Disarming Name*, 32 HARV. J.L. & PUB. POL’Y 97 (2009).

55. *See supra* note 11 and accompanying text.

56. 42 F.3d 1331 (10th Cir. 1994); Levy, *supra* note 11, at 283.

57. *See The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 398 n.34.

### III. ONE PERSON, ONE VOTE

#### A. Hadley: *The Broad Scope of the One Person, One Vote Doctrine*

The 1963 landmark case of *Gray v. Sanders*,<sup>58</sup> established the one person, one vote doctrine.<sup>59</sup> In this case, a qualified voter sought to prevent the Georgia State Democratic Executive Committee from using the state's "county unit" system as the method for counting votes in the Democratic primary election for the party's United States Senate nominee.<sup>60</sup> The system provided that:

(1) Candidates for nominations who received the highest number of popular votes in a county were considered to have carried the county and to be entitled to two votes for each representative to which the county [was] entitled in the lower House of the General Assembly; (2) the majority of the county unit vote nominated a United States Senator and Governor; the plurality of the county unit vote nominated the others.<sup>61</sup>

Because each county was not similarly populated, the system gave significantly more voting power to voters in less populated counties.<sup>62</sup> The U.S. Supreme Court struck down the county unit system as a violation of the newly announced one person, one vote doctrine of the Equal Protection Clause:

Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment.

....

The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.<sup>63</sup>

One year after *Gray*, the Supreme Court applied the one person, one vote doctrine in *Reynolds v. Sims*.<sup>64</sup> This 1964 decision held that when a district apportionment plan for a legislative election is not based on an equal population basis, the plan is invalid under the Equal Protection Clause and requires redistricting on an equal population basis.<sup>65</sup>

58. 372 U.S. 368 (1963).

59. *Id.* at 381.

60. *Gray v. Sanders*, 372 U.S. at 370. The "county unit" system in Georgia was used for state-wide primaries. *Id.* at 370-71. State law gave each county "a specified number of representatives in the lower House of the General Assembly." *Id.* at 370. The Supreme Court struck down Georgia's system because it violated the one person, one vote doctrine announced in the case. *Id.* at 381.

61. *Id.* at 371.

62. *See id.*

63. *Id.* at 379, 381.

64. 377 U.S. 533 (1964).

65. *Id.* at 533.

The apportionment plan that *Reynolds* ultimately held unconstitutional had not been redistricted in sixty years.<sup>66</sup> The court stated that, as a general rule, the one person, one vote doctrine:

require[d] that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.<sup>67</sup>

The apportionment plan at issue in *Reynolds* did not apportion either of the houses of the state legislature on a population basis and, thus, resulted in grossly disproportionate voting districts.<sup>68</sup> The Court struck down the plan as a violation of the one person, one vote doctrine.<sup>69</sup>

A few years after *Reynolds*, the Court in *Kramer v. Union Free School District No. 15*,<sup>70</sup> established that prima facie violations of the one person, one vote doctrine were subject to strict scrutiny review because the doctrine protected the fundamental right to vote.<sup>71</sup> Under strict scrutiny review, any general election plan that gives disproportionate voting power to a portion of the qualified electorate is unconstitutional unless it is *narrowly tailored to promote a compelling state interest*.<sup>72</sup> The voting system struck down in *Kramer* granted the right to vote in certain school district elections only to those persons who (1) owned, leased, or were the spouse of a person who owned or leased "taxable real property located in the district" or (2) had children enrolled in local public schools.<sup>73</sup> Applying strict scrutiny, the Court found that such a system was not narrowly tailored to the state purpose claimed by the defendants.<sup>74</sup>

66. *Id.* at 539-40. The failure to redistrict was in spite of the fact that the state constitution required redistricting every ten years. *Id.* (citing ALA. CONST. art. IX, § 200 (1963)). In addition to Alabama's then-current apportionment plan, the Court also held unconstitutional two of the State's proposed apportionment plans as a violation of the one person, one vote doctrine. *See id.* at 543-44, 568. Furthermore, the *Reynolds* Court struck down the apportionment plans in six other states. *Id.* at 589 (Harlan, J., dissenting) ("In [the majority holding,] the Court holds that seats in the legislatures of six States are apportioned in ways that violate the Federal Constitution."). The six states were Alabama, Colorado, Delaware, Maryland, New York, and Virginia. *See id.* at 589 n.1.

67. *Id.* at 568.

68. *Id.*

69. *Id.*

70. 395 U.S. 621 (1969).

71. *See id.* at 626 ("[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." (quoting *Reynolds*, 377 U.S. at 562)).

72. *Id.* at 627.

73. *Id.* at 623.

74. *Id.* at 633. The defendant school district argued that it was necessary [for the system] to limit the franchise to those "primarily interested" in school affairs because "the ever increasing complexity of the many interacting phases of the school system and structure make it extremely difficult for the electorate fully to understand the whys and wherefores of the detailed operations of the school system."

*Id.* at 631. The Court purposely did not reach the issue of whether limiting the voting franchise to those "primarily interested" in the election was a valid state interest. *Id.* at 632. Nevertheless, the

The Court later emphasized the sweeping breadth of the one person, one vote doctrine in *Hadley v. Junior College District of Metropolitan Kansas City, Missouri*.<sup>75</sup> In *Hadley*, the state law at issue provided that the election of all six trustees of the local junior college district “be apportioned among the separate school districts on the basis of ‘school enumeration,’ defined as the number of persons between the ages of six and [twenty] years, who reside in each district.”<sup>76</sup> Under the apportionment plan, the Kansas City School District was allowed to elect three trustees, amounting to fifty percent of the total number of trustees.<sup>77</sup> Because the District “contain[ed] approximately sixty percent of the total school enumeration” among the entire voting populace, the Court struck down the apportionment plan as a violation of the one person, one vote doctrine.<sup>78</sup> In *Hadley*, the Court established that the one person, one vote doctrine does not distinguish between “the purpose of the election or the function—legislative or administrative—of the elected official.”<sup>79</sup> Rather, as the *Hadley* Court expressed, “as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election . . . .”<sup>80</sup>

*B. One Person, One Vote Does Not Apply to Governmental Bodies with a Narrow and Limited Focus That Disproportionately Affects a Minority of Citizens*

Although the *Hadley* Court clearly established that the one person, one vote doctrine generally applies to the election of any governmental body that exercises governmental functions, the Supreme Court has created several narrow exceptions to the doctrine. The Supreme Court held in *Salyer Land Co. v. Tulare Lake Basin Water Storage District*<sup>81</sup> and *Ball v. James*<sup>82</sup> that the one person, one vote doctrine does not apply to elections of governmental units having “a narrow and limited focus which disproportionately affects the few who are entitled to vote.”<sup>83</sup>

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Court found that the voter classification was not “tailored so that the exclusion of the appellant, [a bachelor who owned no real property,] and members of his class [was] necessary to achieve the articulated state goal.” *Id.* at 632.

75. 397 U.S. 50 (1970). *See id.* at 54-56.

76. *Id.* at 51.

77. *Id.*

78. *Id.* at 51-52.

79. *See Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994) (summarizing *Hadley*, 397 U.S. at 54-56).

80. *Hadley*, 397 U.S. at 56.

81. 410 U.S. 719 (1973).

82. 451 U.S. 355 (1981).

83. *See Hellebust*, 42 F.3d at 1333 (paraphrasing the rule created in *Salyer*, 410 U.S. at 719).

Both *Salyer* and *Ball* involved local water districts whose authority disproportionately affected citizens entitled to vote.<sup>84</sup> *Salyer* involved a water storage district whose sole purpose “[was] to provide for the acquisition, storage, and distribution of water for farming” in the regional lake basin.<sup>85</sup> Even though only landowners were entitled to vote in the election for the district’s board of directors, the Court held that such an election did not violate the one person, one vote doctrine “by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group.”<sup>86</sup>

In contrast to the water district in *Salyer*, the water district in *Ball* exercised additional governmental functions, including the generation and sale of electricity to neighboring urban areas.<sup>87</sup> Nevertheless, the Court in *Ball* held that even though the water district in the case provided additional services, which were “more diverse and affect[ed] far more people” than the local water district in *Salyer*, these added services were not so distinguishable as to “amount to a constitutional difference” between the outcomes of the two cases.<sup>88</sup>

### C. *Wells and Chisom: One Person, One Vote Does Not Apply to Judicial Elections*

In *Wells v. Edwards*,<sup>89</sup> the United States Supreme Court established that the one person, one vote doctrine does not apply to judicial elections.<sup>90</sup> On appeal, the Supreme Court affirmed without opinion a district court decision rejecting a challenge to the Louisiana Supreme Court selection system.<sup>91</sup> The system provided for the election of the state supreme court judges among districts configured without concern for the equal distribution of the population among the districts.<sup>92</sup> The district court acknowledged that it “was not unaware of the broad language of *Hadley*” which greatly expanded the types of elections to which the one person, one vote doctrine applied.<sup>93</sup> Nevertheless, the district court created a new exception to the general rule—“that the concept of one-man, one-vote apportionment does not apply to the judicial branch of the government”—which the district court said “was contemplated by the [Supreme] Court in *Hadley*.”<sup>94</sup> The specific language

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84. See *Salyer*, 410 U.S. at 721-22; *Ball*, 451 U.S. at 357-59.

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

86. *Id.*

87. *Ball*, 451 U.S. at 365.

88. *Id.* at 365-66.

89. 409 U.S. 1095 (1973), *aff’d* 347 F. Supp. 453 (M.D. La. 1972).

90. See *id.* at 1095.

91. *Id.*

92. *Id.* (White, J., dissenting).

93. *Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972).

94. *Id.*

from *Hadley* that the Court said contemplated its new exception read: “It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities . . . that a popular election in compliance with [the one person, one vote doctrine] . . . might not be required . . . .”<sup>95</sup> From this language, the district court in *Wells* reasoned that the governmental functions<sup>96</sup> at issue in *Hadley* were not analogous to the functions that the judiciary provided.<sup>97</sup>

[I]n *Hadley*, as in every other case that we can find dealing with the question of apportionment, the “governmental functions” involved related to such things as making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people. In other words, apportionment cases have always dealt with elected officials who performed legislative or executive type duties, and in no case has the [one person, one vote] principle been extended to the judiciary. On the contrary, several cases have specifically held that that principle does not apply to the judiciary.<sup>98</sup>

The *Wells* Court quoted one of those cases as making the crucial distinction between the governmental functions of legislative and executive officials and the governmental function of judges: “Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.”<sup>99</sup> Moreover, the chief purpose of the one person, one vote doctrine was to ensure “that each official member of an elected body speaks for approximately the same number of constituents.”<sup>100</sup> The *Wells* court reasoned that the one person, one vote doctrine’s chief purpose to ensure equal representation simply did not apply to the election of judges because the court did not consider judges to be *representatives* of the people, but rather *servants* of the people.<sup>101</sup>

As mentioned above, the Supreme Court affirmed the district court’s ruling in *Wells* without issuing a written opinion.<sup>102</sup> Justice

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95. *Id.* at 454-55 (quoting *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970)).

96. *See id.* at 455 (listing the various important “governmental functions” in *Hadley* “related to such things as making laws, levying and collecting taxes, . . . collecting fees, operating schools, and generally managing and governing people”).

97. *Id.*

98. *Id.* The *Wells* court drew on several predecessor cases which held that the one person, one vote doctrine did not apply to the state judiciary. *See Holshouser v. Scott*, 335 F. Supp. 928, 932 (M.D.N.C. 1971) (“We hold that the [one person, one vote] rule does not apply to the state judiciary, and therefore a mere showing of a disparity among the voters or in the population figures of the district would not be sufficient to strike down this election procedure and these statutes.”); *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964).

99. *Stokes*, 234 F. Supp. at 577.

100. *Wells*, 347 F. Supp. at 455.

101. *Id.* (quoting *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1960)).

102. *See Wells v. Edwards*, 409 U.S. 1095 (1973), *aff’d* 347 F. Supp. 453 (M.D. La. 1972).

White, however, joined by Justices Douglas and Marshall, filed a lengthy dissent challenging the establishment of a bright-line rule rendering the one person, one vote doctrine inapplicable to judicial elections.<sup>103</sup> Justice White argued that the *Hadley* rule should apply to elected judges as “they are state officials, vested with state powers and elected . . . to carry out the state government’s judicial functions. As such, they most certainly ‘perform governmental functions,’” and, thus, the one person, one vote doctrine, as expressed in the *Hadley* rule, should apply.<sup>104</sup>

Since *Wells*, the Supreme Court has not revisited the *constitutional* issue of whether the one person, one vote doctrine applies to judicial elections. Nevertheless, in its 1991 decision in *Chisom v. Roemer*,<sup>105</sup> the Supreme Court struck down on *statutory* grounds the very same Louisiana judicial election system that had been upheld in *Wells*.<sup>106</sup> In *Chisom*, citizens had again challenged Louisiana’s system for electing state supreme court judges, but this time, they based their challenge on Section 2 of the Voting Rights Act of 1965 instead of on the one person, one vote doctrine as in *Wells*.<sup>107</sup> The Court held that, for purposes of the Act and in distinct contrast to the reasoning in *Wells*, the statute’s use of the word “representatives” included elected judges, and as a result, the petitioner’s succeeded in their claim.<sup>108</sup> However, the Court made clear that its interpretation of the language from the Voting Rights Act did not suggest that the one person, one vote doctrine applied.<sup>109</sup> In order to make this distinction, the *Chisom* Court issued

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103. *Id.* (White, J., dissenting).

104. *Id.* at 1096.

105. 501 U.S. 380 (1991).

106. *Id.* at 401-02.

107. *Id.*

108. *See id.* at 381. Section 2 of the Voting Rights Act prohibits “certain practices and procedures that result in the denial or abridgment of the right to vote . . . even though the absence of proof of discriminatory intent protects them from constitutional challenge.” *Id.* at 383-84. Under the Act, a violation is established

if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect *representatives* of their choice.

*Id.* at 384 n.2 (emphasis added). In 1982, when Congress amended the Act, the statutory language was patterned after the language used in a previous Supreme Court case involving voting rights. *Id.* at 397 (citing *White v. Regester*, 412 U.S. 755, 766 (1973) (“The plaintiffs’ burden is to produce evidence . . . that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.”)). The 1982 amendment, however, slightly modified the Court’s language by substituting the word “representatives” for “legislators.” *Id.* at 398-99. In *Chisom*, the Court held that Congress’s use of the word “representatives” demonstrated that Congress intended the Act to apply to more than legislative elections, and, namely, to judicial elections. *Id.* at 399.

109. *Id.* at 390, 402-03.

Our decision today is limited in character. . . . No constitutional claims are before us. Unlike *Wells v. Edwards*, . . . this case presents us solely with a question of statutory construction. The question involves only the scope of coverage of [section 2] of the Voting Rights Act as amended in 1982.

dicta regarding the *Wells* decision which stated that the Court has “held the one person, one vote rule inapplicable to judicial elections.”<sup>110</sup>

*D. Sailors: One Person, One Vote Does Not Apply to Appointments*

The final exception to the one person, one vote doctrine is its inapplicability to governmental officials selected by appointment.<sup>111</sup> In *Sailors v. Board of Education of Kent County*,<sup>112</sup> the Supreme Court held that no constitutional issue was raised with regard to the one person, one vote doctrine when a state decided to select officers of a non-legislative character by means of appointment “by the governor, by the legislature, or by some other appointive means rather than by an election.”<sup>113</sup> Applying this exception, the Court upheld a system that allowed delegates selected by local school boards to appoint the county boards of education.<sup>114</sup> Under the system, the delegates were not required to choose county board members in accordance with the express preferences of the local school boards.<sup>115</sup> The Court ruled that the system was generally appointive rather than elective and, thus, did not violate the one person, one vote doctrine.<sup>116</sup>

While *Sailors* partially based its rationale on the fact that the governmental functions exercised by the appointed county board members were administrative in nature,<sup>117</sup> the Court subsequently dismissed this rationale, holding in *Hadley* that the one person, one vote doctrine does not distinguish between “the function[s]—legislative or administrative—of the elected official.”<sup>118</sup> The combination of the *Hadley* rule with the *Sailors* exception makes clear that a state need not provide for the election of non-legislative governmental officers who nevertheless exercise broad governmental functions, but if it does, it must ensure that every qualified voter “be given an equal opportunity to participate in that election.”<sup>119</sup>

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*Id.* at 390.

110. *Id.* at 402 (citing *Wells v. Edwards*, 409 U.S. 1095 (1973), *aff'g* 347 F. Supp. 453 (M.D. La. 1972)).

111. *See Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967).

112. 387 U.S. 105 (1967).

113. *Id.* at 108.

114. *Id.* at 106.

115. *Id.* at 106-07.

116. *Id.* at 108.

117. *Id.* at 110 (distinguishing governmental bodies that exercise legislative functions from governmental bodies exercising administrative functions).

118. *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994) (summarizing *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970)).

119. *See Hadley*, 397 U.S. at 56.

*E. Hellebust: The Tenth Circuit's Application of the One Person, One Vote Doctrine Against Special Interest Group Control of General Interest Elections*

In its 1994 ruling in *Hellebust v. Brownback*, the United States Court of Appeals for the Tenth Circuit held that the Kansas statutory scheme for selecting the State Board of Agriculture violated the one person, one vote doctrine.<sup>120</sup> The statutory procedure for selecting the members of the Board of Agriculture—who in turn selected the Secretary of Agriculture—provided that delegates from Kansas agricultural organizations were to elect the twelve-member State Board of Agriculture.<sup>121</sup> In addition to the delegates sent by the agricultural organizations named in the statute, a catchall provision provided that “if 100 residents of a single county who are not members of [any agricultural organization] sign a petition, they may send a delegate to the annual meeting.”<sup>122</sup>

The Tenth Circuit conducted a thorough inquiry as to the history and scope of the one person, one vote doctrine, as well as to the relevant exceptions, before ruling that the Board of Agriculture election procedure violated the one person, one vote doctrine.<sup>123</sup> The court distinguished *Salyer* and *Ball* by holding that “once a state agency has the authority to affect every resident in matters arising in their daily lives, its powers are not disproportionate to those who vote for its officials.”<sup>124</sup> In contrast to the local water districts in *Salyer* and *Ball* which both had a “narrow and limited focus,”<sup>125</sup> the court in *Hellebust* held that the State Board of Agriculture exercised very broad powers to “regulate for the benefit of the health, safety, and welfare of the general public.”<sup>126</sup> Such broad powers included oversight on “matters [which] unremitt-

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120. See *Hellebust*, 42 F.3d at 1332. The district court noted examples of the state agricultural organizations that sent delegates. The list included “county agricultural societies, each state fair, each county farmer’s institute, each livestock association having a statewide character, and each of the following with at least 100 members: county farm bureau associations, county granges, county national farmer’s organizations, and agricultural trade associations having a statewide character.” *Id.* at 1332 n.1 (citing KAN. STAT. ANN. § 74-502(a) (1992)).

121. *Id.* at 1332 & n.1.

122. *Id.* at 1332 n.1 (citing KAN. STAT. ANN. § 74-502(b)).

123. See *id.* at 1333-35. The *Hellebust* court did not address the *Wells* or *Sailors* exceptions because the nature of the selection system and governmental body at issue in *Hellebust* did not implicate either exception.

124. *Id.* at 1335.

125. *Id.* at 1333. The water district in *Ball* had a narrow and limited focus because it “simply did not exercise the sort of governmental powers that invoke the strict demands of *Reynolds*.” See *Ball v. James*, 451 U.S. 355, 366 (1981) (noting that the district could not impose taxes, “enact any laws governing the conduct of citizens,” nor administer governmental functions like street maintenance, school operation, or health and welfare services).

126. See *Hellebust*, 42 F.3d at 1334. While some of the Board’s powers uniquely affected the agricultural industry and not the general public, the court held that the Board exercised enough broad powers like regulating the quality standards of meat and dairy products, regulating the accuracy standards of weights and measures, and the right to use and divert water, among others, rendering the narrow and limited focus exception to the one person, one vote doctrine inapplicable in the Board’s case. *Id.* at 1333-34.

tingly influence every person within the State of Kansas.”<sup>127</sup> As a result, the court held that the one person, one vote doctrine is violated when a state allows a special interest group—for example, an agricultural association—to elect governmental officials whose authority significantly affects the general public.<sup>128</sup> Indeed, one commentator characterized such an election as a prime example of “the fox guarding the chicken coop.”<sup>129</sup>

#### IV. ANALYSIS: THE KANSAS BAR’S POWER TO ELECT A MAJORITY OF MEMBERS OF THE SUPREME COURT NOMINATING COMMISSION VIOLATES THE ONE PERSON, ONE VOTE DOCTRINE

Unless an exception to the one person, one vote doctrine applies to Kansas’s method of selecting Nominating Commission members, the *Hadley* Court’s general rule will apply by default.<sup>130</sup> Furthermore, the *Salyer-Ball* exception does not apply because the Nominating Commission is not a governmental body with “a narrow and limited focus which disproportionately affects the few who are entitled to vote.”<sup>131</sup> Rather, the Nominating Commission is a governmental body exercising a power that affects every citizen of the state: the broad power to screen and limit the governor’s supreme court appointment.<sup>132</sup>

However, the *Wells* rule “that the concept of [one person, one vote] apportionment does not apply to the judicial branch of the government” might seemingly serve to dismiss the claim that the Kansas Supreme Court selection process violates the one person, one vote doctrine because the selection system involves the election of those responsible for nominating judges.<sup>133</sup> Likewise, the *Sailors* rule that the one person, one vote doctrine does not apply when a state provides for the selection of a non-legislative governmental official by “appointive means rather than by an election” might seemingly apply because Kansas Supreme Court Justices are initially appointed, rather than elected, to the court.<sup>134</sup>

A closer look at *Wells*, *Sailors*, and their progeny, however, suggests that these exceptions to the one person, one vote doctrine do not protect the Kansas Supreme Court selection process from constitutional

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127. *Id.* at 1335. The broad powers exercised by the Board of Agriculture included, among others: the power to inspect gasoline stations; the power to regulate and inspect meat and dairy facilities; the power to regulate the use of pesticides; and the power to control agricultural, municipal, and residential water use. *Id.* at 1332-33.

128. *See id.* at 1332.

129. *See Levy, supra* note 11, at 283.

130. *See Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970).

131. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 719 (1973).

132. *Id.*; *Hellebust*, 42 F.3d at 1333. One might call this broad power a “governor” on the Governor.

133. *See Wells v. Edwards*, 347 F. Supp. 453, 454 (M.D. La. 1972).

134. *See KAN. CONST.* art. III, § 5(a); *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967).

challenge. As discussed below, the *Wells* exception applies only to the election of judges but not to the election of a judicial nominating commission.<sup>135</sup> Furthermore, *Sailors* does not protect the election of a judicial nominating commission from constitutional challenge because the lawyer-members of the commission are selected by an election instead of a democratically legitimate appointment process.<sup>136</sup>

As a result of the inapplicability of these exceptions, the *Hadley* Court's general rule, which states that equal voting power for all qualified voters is required in all elections for officials performing governmental functions, applies by default.<sup>137</sup> Moreover, the holding in *Hellebust* is significantly analogous to the Kansas judicial selection process because both systems involve an occupational group electing a majority of the Nominating Commission members. In summary, the inapplicability of the *Salyer-Ball*, *Wells*, and *Sailors* exceptions; the broad scope of the *Hadley* rule; and the analogous nature of the *Hellebust* decision suggest that an Equal Protection claim against the Kansas Supreme Court selection process should succeed. The remainder of this Note addresses these assertions in order and concludes by evaluating the broad spectrum of the constitutional alternatives to Kansas's current method of selecting Nominating Commission members.

*A. The Ball and Salyer Exceptions Do Not Protect Bar-Elected Members of the Nominating Commission from the One Person, One Vote Requirements*

Does the Nominating Commission have, like the local water districts in *Ball* and *Salyer*, "a narrow and limited focus which disproportionately affects the few who are entitled to vote,"<sup>138</sup> or does the Nominating Commission, like the Board of Agriculture in *Hellebust*, exercise more general governmental powers?<sup>139</sup> The nature of the Nominating Commission's power is more analogous to the latter. The power to exclusively screen and nominate candidates for selection to every vacancy on the Kansas Court of Appeals and the Supreme Court affects all Kansas citizens equally and does not disproportionately affect the lawyers in the state.<sup>140</sup>

The power to limit the candidates for appointment to the highest court in the state is a broad power due to its relationship to the uniquely powerful and independent role of state supreme court justices. State supreme court justices may be even more powerful than state legislators

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135. See discussion *infra* Part IV.B.

136. See discussion *infra* Part IV.C.

137. See *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 56 (1970).

138. See *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994).

139. See *id.* at 1332-35.

140. See *id.* at 1333.

because the justices have the final word on their state constitutions and common law.<sup>141</sup> The state supreme court creates state law based on its interpretation of the constitution and extension of the common law, “matters [which] unremittingly influence every person within the State of Kansas.”<sup>142</sup> The broad scope of this powerful governmental function establishes that the election of the Nominating Commission is of general public concern, and, thus, implicates the one person, one vote doctrine.<sup>143</sup> As a result, the election of the Nominating Commission, much like the election of the Board of Agriculture in *Hellebust*, does not fall within the *Salyer-Ball* exception.<sup>144</sup>

*B. The Wells Exception Does Not Protect Bar Election of Nominating Commission Members from the One Person, One Vote Requirements*

As noted above, in *Wells*, the Supreme Court summarily affirmed a district court opinion holding that the one person, one vote doctrine did not apply to the apportionment of voting districts in judicial elections.<sup>145</sup> The district court in *Wells* reasoned that because judges were not representatives like legislators and executive officers, judicial elections did not offend the purpose for which the one person, one vote doctrine was created—to ensure equal representation in elections of representative governmental officials.<sup>146</sup>

According to the district court in *Wells*, the governmental function of judges is “to administer the law, not to espouse the cause of a particular constituency.”<sup>147</sup> This function is fundamentally different than the “legislative or executive type duties” of governmental officials to which the one person, one vote doctrine applies.<sup>148</sup> These duties include “making laws, levying and collecting taxes, issuing bonds, hiring and firing personnel, making contracts, collecting fees, operating schools, and generally managing and governing people.”<sup>149</sup> Eighteen years later in *Chisom*, the Supreme Court noted the *Wells* rule when contrasting the inapplicability of the one person, one vote doctrine to judicial elections with the respective applicability of the Voting Rights Act to the facts of the case.<sup>150</sup>

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

142. *Hellebust*, 42 F.3d at 1335.

143. See *id.* at 1333 (stating that the one person, one vote rule applies to “election[s] of general interest” (quoting *Hill v. Stone*, 421 U.S. 289, 295 (1975))).

144. See *id.* at 1335.

145. *Wells v. Edwards*, 409 U.S. 1095, 1095 (1973) *aff’g* 347 F. Supp. 453 (M.D. La. 1972).

146. See *Wells v. Edwards*, 347 F. Supp. 453, 454-55 (M.D. La. 1972) (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)).

147. *Id.* at 455 (quoting *Stokes*, 234 F. Supp. at 577).

148. *Id.*

149. *Id.*

150. *Chisom v. Roemer*, 501 U.S. 380, 402 (1991).

As a result of *Chisom*, the scope of the *Wells* exception is currently unclear for two reasons. First, when paraphrasing the rule from *Wells*, the *Chisom* Court used narrower language than that used in *Wells*. The district court in *Wells* had stated “that the concept of [one person, one vote] apportionment does not apply to the judicial branch of the government.”<sup>151</sup> This *language* left open the possibility that the exception applies to the election of non-judge governmental officials who are part of the judicial branch. The *facts* of the *Wells* case, however, involved only the election of judges.<sup>152</sup> Indeed, every case that has applied the *Wells* exception has only involved the election of judges.<sup>153</sup> To state it in the negative, none of these cases involved the election of a governmental official *other than* a judge, and in particular, no case has involved the election of a judicial nominating commission.

In *Chisom*, the Court said, “[*Wells*] held the one-person, one-vote rule inapplicable to judicial elections.”<sup>154</sup> *Chisom* suggested that the *Wells* exception to the one person, one vote doctrine applied to the election of judges alone, not the election of others within “the judicial branch.”<sup>155</sup> Whether the exception applies only to judges or to anyone in the judicial branch may be dispositive of a one person, one vote challenge to bar election to the Kansas Nominating Commission if that Commission is considered part of the judicial branch.<sup>156</sup> The unsettled nature of the scope of the *Wells* exception, then, would likely be one of the most significant issues to be decided in an Equal Protection challenge to the Kansas Supreme Court selection process.

Second, and perhaps more significantly, the rationale the Supreme Court used in *Chisom*—that judges are considered “representatives” for the purposes of the Voting Rights Act—directly contradicts the rationale the district court used in *Wells* when it held that judges were not “representatives” for purposes of the Equal Protection Clause.<sup>157</sup> As

151. *Wells*, 347 F. Supp. at 454.

152. *Id.*

153. *See, e.g., Chisom*, 501 U.S. 380; *Republican Party of N.C. v. Martin*, 980 F.2d 943 (4th Cir. 1992); *Sagan v. Commonwealth of Pennsylvania*, 542 F. Supp. 880 (W.D. Pa. 1982); *Concerned Citizens of S. Ohio, Inc. v. Pine Creek Conservancy Dist.*, 473 F. Supp. 334 (D. Ohio 1977); *Holshouser v. Scott*, 335 F. Supp. 928, 933 (D. N.C. 1971); *N.Y. St. Ass’n of Trial Law v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967); *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964); *Buchanan v. Rhodes*, 249 F. Supp. 860 (D. Ohio 1960).

154. *Chisom*, 501 U.S. at 402.

155. *See Wells*, 347 F. Supp. at 454.

156. Email from Jeffery D. Jackson, Associate Professor of Law, Washburn University School of Law, to Joshua A. Ney (May 6, 2009, 15:26 CST) (on file with author) (suggesting that the Kansas Supreme Court Nominating Commission might be considered to be part of the state’s judicial branch due to the fact that the Nominating Commission is established under Art. III—the section establishing the state judicial branch—of the Kansas Constitution); *see KAN. CONST.* art. III, § 5.

157. *See supra* notes 105-110 and accompanying text; *see also* Wendy R. Weiser, *Regulating Judges’ Political Activity After White*, 68 ALB. L. REV. 651, 697 n.226 (2005) (“The reasoning underlying the *Wells* decision has been significantly undermined by *Chisom v. Roemer* . . .”); Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767, 793 n.117 (2007) (“The majority in *Chisom v. Roemer* found that

some scholars have suggested, the distinction between the *Wells* decision and the *Chisom* Court's holding that judges in many ways "represent" the interests of the people may have to do with the more active, "policymaking" role that courts now play in the legal process.<sup>158</sup> Others have characterized *Chisom* as a clear departure, if not a rejection, of the *Wells* Court's rationale, leaving the *Wells* exception ripe for direct reconsideration by the United States Supreme Court.<sup>159</sup> Despite scholarly speculation, however, the *Wells* decision is still the authority on the direct issue of the one person, one vote doctrine's inapplicability to judicial elections.

Nevertheless, the *Wells* ruling that the one person, one vote doctrine does not apply to judicial elections is not directly relevant to the selection of the Kansas Nominating Commission. As a result, the *Wells* decision, especially given the contradictory rationale used in *Chisom* with regard to the Voting Rights Act, does little to shield the Kansas judicial selection process from constitutional challenge. Other than the language of *Wells*, little support exists for the contention that the *Wells* exception applies to elections of non-judge members of the judicial branch.

Cases addressing the scope of the one person, one vote doctrine—including *Wells*—have tended to focus on the nature of the *function* that the elected official serves, rather than the *branch of government* to which the governmental official belongs.<sup>160</sup> The rationale that the *Wells* court used to support its rule—that the one person, one vote doctrine does not apply to the judicial branch—was that the governmental function provided by judges was not representative in nature. Rather, "[a judge's] function is to administer the law, not to espouse the cause of a particular constituency."<sup>161</sup> Similarly, even though the representative nature of the specific governmental function analyzed in *Hadley*, *Ball*, and *Salyer* was not at issue, all three of those cases analyzed in-depth whether the respective governmental official's *function* was broad or narrow in scope.<sup>162</sup>

Is the function of a member of the Kansas Nominating Commission representative like legislators or not representative like judges? That

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*Wells* was a reapportionment, not a [Voting Rights Act] case, and was not controlling.").

158. See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 192 (2004) ("*Chisom*'s recognition that courts 'engage in policymaking at some level' . . . is plainly in tension with the reasoning that animated *Wells*.").

159. See Captain Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823, 845 (1994) ("Given the *Chisom* Court's rejection of the *Wells* majority analysis, the applicability of the one-person, one-vote principle to judicial elections is ripe for plenary review.").

160. See, e.g., *Hellebust v. Brownback*, 42 F.3d 1331, 1332-35 (10th Cir. 1994).

161. *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972).

162. See *Ball v. James*, 451 U.S. 355, 357 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 727-28 (1973); *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 54-56 (1970).

the members are representative is suggested by the fact that they are selected by congressional district, which indicates equal-population apportionment for the purpose of equal representation.<sup>163</sup> The fact that each congressional district in Kansas gets a minimum of two commissioners—one non-attorney appointed from each district by the governor and one attorney from each district selected by the bar in that district—suggests that those commissioners *represent* the views and interests of their constituencies.<sup>164</sup>

Furthermore, the nature of the Nominating Commission’s governmental function is to serve as the gate-keeping body to the gubernatorial appointment of judges by nominating three qualified judicial candidates.<sup>165</sup> The Nominating Commission members elected by the bar serve as representatives of a special interest group charged with the governmental function of screening and nominating judicial candidates for consideration by the governor. The representative function that the Nominating Commission serves—to nominate governmental officers for appointment—stands in contrast to the non-representative law administering function of judges emphasized by the *Wells* Court.<sup>166</sup> While the function of judges in administering and adjudicating the law is unique to the robed members of the judicial branch, the function of the Nominating Commission is not unique to that branch. The extensive discussion of the nature of a judge’s function, therefore, suggests that the district court had only judges—and not non-judge members of the judicial branch—in mind when it issued its narrow exception to the one person, one vote doctrine. As a result, the *Wells* exception only applies to those members of the judicial branch who “administer the law” (i.e., judges) and not to judicial nominating commissions.

### *C. The Sailors Exception Does Not Protect Bar Election of Nominating Commission from the One Person, One Vote Requirements*

As noted above, in *Sailors* the Supreme Court held that there was no constitutional issue raised with regard to the one person, one vote doctrine when a state decided to select non-legislative governmental officers by means of appointment “by the governor, by the legislature, or

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163. See KAN. CONST. art. III, § 5(e).

164. The representative function of Nominating Committee members is further demonstrated by the fact that candidates for membership on the Commission campaign on their ability to represent those who select them. See, e.g., *The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 418 n.117 (quoting campaign support letter for Nominating Commission chairwoman Anne Burke promising that, as chairwoman, she would “serve the interests of all lawyers in the state of Kansas”).

165. See Greg Grisham, Grisham: Federal Hybrid is Better Way to Pick State Judges (May 2, 2009), <http://www.knoxnews.com/news/2009/may/02/federal-hybrid-is-better-way-to-pick-state> (describing “lawyer-dominated [nominating] commission” as providing a “gate-keeping” function).

166. See *Wells*, 347 F. Supp. at 455.

by some other appointive means rather than by an election.”<sup>167</sup> Does the fact that Kansas Supreme Court Justices are appointed by the governor, rather than elected, bring the Kansas Supreme Court selection process within the *Sailors* exception to the one person, one vote rule?

No. The constitutionally-suspect part of the Kansas Supreme Court selection process is not the manner in which supreme court justices are selected, but rather the manner in which lawyer-members of the Nominating Commission are selected. These lawyer-members are elected (by the bar) rather than appointed. The possible violation of the one person, one vote doctrine is not the governor’s *appointment* of a justice, but rather the bar’s *election* of five members of the Nominating Commission. Thus, *Sailors* is not applicable.

#### *D. The Broad Array of Constitutional Alternatives to the Kansas Method*

The possibly unconstitutional aspect of the current Kansas system is the power given to a select group of citizens (the members of the state bar) to *elect* members to a governmental body (the Nominating Commission) that exercises broad and significant governmental powers. This conclusion also implies that the supreme court selection processes of other states that allow their state bars to elect or appoint members of their state judicial nominating commission are likely unconstitutional as well.<sup>168</sup> Therefore, it is necessary to consider three unconstitutional methods that are currently used in other states before discussing the many constitutional alternatives to Kansas’s current system.

##### 1. Merely Reducing the Number of Bar-Elected Commission Members Will Not Solve the Problem

Kansas is the only state that allows the state bar to elect a *majority* of the Nominating Commission members. Thus, it is worth considering whether a reduction of the number of bar-selected members to a minority, perhaps to only one member short of a majority like the other eight states with bar-selected members, would cure the Kansas system’s unconstitutionality.<sup>169</sup> After all, the unconstitutional situation in *Hellebust* involved the ability of the delegates of the respective state agricultural organizations to elect *all* of the members of the State Board of Agriculture, which left open the possibility that something less than a majority might have passed constitutional muster.<sup>170</sup> Is the one person, one vote

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167. *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967).

168. See *supra* note 49-51 and accompanying text.

169. See *supra* note 49 and accompanying text.

170. See *Hellebust v. Brownback*, 42 F.3d 1331, 1332 (10th Cir. 1994) (“By statute . . . delegates from Kansas agricultural organizations attend[ed] the Board’s annual meeting where they elect[ed]

doctrine satisfied if a special interest group selects even a slim minority, to the respective governmental body?

The equal-population basis of the one person, one vote doctrine suggests the answer is no. The *Hadley* Court held that even when every qualified voter in the jurisdiction is entitled to vote in an election for members of a governmental body, the members of that body must “be apportioned in a manner that does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the [jurisdiction].”<sup>171</sup> This equitable districting result is impossible when a subset of citizens has significantly more voting strength than any other equally-populated subset of citizens.

When the *Hadley* standard is applied to the Kansas system, it becomes clear that even reducing the current number of bar-elected members down to one would not cure the constitutional infirmity:

Kansas has about [two million] adults, about [nine thousand] of whom are licensed to practice law in Kansas. Yet in selecting the Nominating Commission, [under the current system] those [nine thousand] people have more power than everyone else in the state combined. In other words, a member of the Kansas bar [currently] has more than two hundred times as much power as his or her neighbor.<sup>172</sup>

Even if the bar was allowed to elect only one of the nine members on the Nominating Commission, with the remainder of the Commission members elected by equally divided districts comprised of every other qualified voter in the state, the bar would still have over *twenty-seven times* as much voting power.<sup>173</sup> When the *Hadley* court mandated that each voter be ascertained “his right to have his own vote given as much weight . . . as that of any other voter,” surely, it did not imagine giving a small minority of citizens twenty-seven times as much voting power, let alone two hundred times as much power, as under the current system, merely because those citizens decided to go to law school.<sup>174</sup> As a result, any supreme court selection process that gives the members of its bar

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either all twelve Board members, or fewer, depending upon when terms expire[d].”).

171. *Hadley v. Junior Coll. Dist. of Metro. Kansas City, Mo.*, 397 U.S. 50, 52 (1970).

172. *The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 405 (emphasis added) (citing U.S. Census Bureau, State & County Quickfacts: Kansas, <http://quickfacts.census.gov/qfd/states/20000.html> (last visited Oct. 10, 2009); *Casad*, *supra* note 54 at 425).

173. If the amount of governor-appointed (or popularly elected, for a pure comparison) Nominating Commission members were increased from the current number (four) to eight, each of those eight members would represent approximately 249,000 non-lawyer citizens. This would give each non-lawyer citizen 1/249,000th voting power. If the amount of bar-elected Nominating Commission members were correspondingly reduced from the current number (five) down to one member, that one member would represent approximately 9,000 lawyers in the state. This would give each lawyer 1/9000th voting power in the Nominating Commission election, which is 27.65 times as much voting power as a non-lawyer. Then again, these calculations would only work if the eight non-bar-elected members were selected by popular election and not by gubernatorial appointment. This is because lawyers are not segregated from, but in fact vote in, the statewide gubernatorial election, so their voting power under a dual-bar election (like the present system) is actually greater than the pure “voting power” comparison shown above.

174. *See Hadley*, 397 U.S. at 52.

the power to elect even one member of the nominating commission stands in violation of the one person, one vote doctrine.<sup>175</sup>

## 2. Merely Changing from Bar Election to Bar Appointment Will Not Solve the Problem

While Kansas allows the members of its bar to *elect* five members of the Nominating Commission, South Dakota instead allows the state bar association president to *appoint* members of the nominating commission.<sup>176</sup> *Sailors* held that there was no constitutional issue raised with regard to the one person, one vote doctrine when a state decided to select officers of nonlegislative character by means of appointment “by the governor, by the legislature, or by some other appointive means rather than by an election.”<sup>177</sup> Suppose an individual, such as the Kansas Bar Association (KBA) President, appointed members of the Nominating Commission. Would Kansas fall within the *Sailors* exception if it moved from bar election to bar appointment?

Unlikely. As Professor Richard E. Levy has noted, “[a]lthough the ‘one person, one vote’ principle does not apply to appointments, this seems to be because the power of appointment is vested in politically accountable officials who ultimately trace their power to elections that do comply with that principle.”<sup>178</sup> The president of the KBA is not such an official. Indeed, the president of the KBA is elected by Kansas lawyers, not other Kansas citizens, so allowing that individual to appoint members of the Nominating Commission is no better from a one person, one vote perspective than allowing the Kansas bar to elect those members. In both cases, a lawyer’s vote has vastly more weight than the vote

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175. This alternative would be unconstitutional unless, of course, the state decided to provide for the popular election of every member of the commission and expand the total number of Nominating Commission members so that a member of the bar retained the same amount of voting strength as every other qualified voter in the state. In Kansas’s case, using the demographic statistics stated above, should the bar be allowed to elect at least one of the members of the Nominating Commission, the Commission would have to be comprised of 222 members in order for the demands of one person, one vote to be satisfied. In such case, one person, one vote would not apply as members of the bar would retain the same amount of voting power as every other qualified voter in the state. However, if instead of providing for the popular election of the Nominating Commission, the state gave the bar the power to elect *one* member of the Commission and gave the governor the power to appoint the *remaining 221 members*, the system would still likely violate the one person, one vote doctrine. This is because members of the bar would retain more voting power than every other qualified citizen; the members of the bar would have both the power to vote for the bar-selected members of the commission *and* vote for the governor while the non-lawyer qualified voters would only have the power to vote for the governor.

176. S.D. CODIFIED LAWS § 16-1A-2 (2007) (providing for the president of the bar to appoint three lawyers to serve on the seven-member nominating commission).

177. *Sailors v. Bd. of Educ.*, 387 U.S. 105, 108 (1967).

178. Levy, *supra* note 11, at 279 (citing Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. REV. 62, 72-74 (1990)). “Many cases suggest that the ‘one person, one vote’ principle does not apply to appointments, but these cases involve appointments by elected officials who *themselves* are chosen in compliance with that principle.” *Id.* at 282 n.118 (emphasis added) (referencing *Sailors*, 387 U.S. at 111).

of a non-lawyer.

As Professor Levy noted in the analogous context of *Hellebust*:

Since the “one person, one vote” requirement was crafted in the context of “elections,” supporters of the previous [unconstitutional selection] system [of the Board of Agriculture] might wish to avoid the *Hellebust* decision by *cosmetic changes* designed to recast the process as the “appointment” of government officials.<sup>179</sup>

Nevertheless, Professor Levy aptly concluded, “[t]his expedient is unlikely to be successful.”<sup>180</sup>

### 3. Merely Giving the Bar Power to Limit Nominees for Appointment Will Not Solve the Problem

Rather than allowing the bar to *select* members to the Nominating Commission, Kansas might only give its bar the reduced power to provide the governor with a list of individuals from which the governor would be required to appoint members of the Commission.<sup>181</sup> Would this overcome the “*Sailors* problem” that the one person, one vote doctrine is avoided only when appointment is made by “politically accountable officials who ultimately trace their power to elections that do comply with [the one person, one vote] principle?”<sup>182</sup>

Probably not. As Professor Levy suggests, the crucial distinction is whether the governor is legally required to pick from among the bar’s suggestions.<sup>183</sup> If so, then some of the appointment power remains with

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179. Levy, *supra* note 11, at 278-81 (emphasis added). In his comments before the Kansas House Agriculture Committee, Professor Levy considered three different possibilities for an appointment-type selection system for the new Board of Agriculture:

Whether the appointment of the Board of Agriculture would be constitutional depends on who does the appointing. It seems there are three basic possibilities: (1) the Governor might appoint the Board or Secretary or both; (2) the legislature might appoint the Board or Secretary or both; or (3) the appointment of the Board or Secretary or both might be vested in some private group or groups.

*Id.* at 278.

180. *Id.* at 279. In addition, allowing the president of the Kansas Bar Association (KBA), a private organization, to appoint members of the Nominating Commission might run afoul of the non-delegation doctrine. *See id.*

181. *See, e.g.*, TENN. CODE ANN. §§ 17-4-102, 17-4-106, 17-4-112 (2007).

182. Levy, *supra* note 11, at 279.

183. The important distinction for Professor Levy was whether the governor was required to *appoint* from the list of nominees or whether the governor was merely required to *consider* the list of nominees before making the appointment. *See id.* at 282 n.115. He noted that the statutes governing the appointment system for members of several governmental bodies provided that the governor *must* choose from a list of nominees put forth by the respective professional organization in the state. *See id.* at 280 n.100 (citing KAN. STAT. ANN. § 44-709(f) (2008) (Employment Security Review Board); KAN. STAT. ANN. § 74-4001 (2008) (Kansas Animal Health Board); KAN. STAT. ANN. § 74-9001(a) (2008) (Travel and Tourism Board); KAN. STAT. ANN. § 74-9402(a) (1992) (Commission on the Future of Health Care)). Professor Levy distinguished the statutes governing those bodies from other statutes regulating bodies wherein the governor was merely required to *consider* the nominees of the respective professional organizations and had the ability to select a person whom the respective professional organization had not nominated. *See id.* (citing KAN. STAT. ANN. § 65-2812 (2008) (Board of Healing Arts); KAN. STAT. ANN. § 74-1106(a) (2008) (Board of Nursing); KAN. STAT. ANN. § 74-1404 (2008) (Kansas Dental Board); KAN. STAT. ANN. §§ 74-1603 through 1605 (Board of Pharmacy); KAN. STAT. ANN. § 74-1501 (State Board of Examiners in Optometry)). Professor Levy argued that the one person, one vote doctrine may apply to statutes providing that the governor *must*

the bar and, to that extent, does not rest with “politically accountable officials who ultimately trace their power to elections that do comply with [the one person, one vote] principle.”<sup>184</sup> If, however, the bar’s suggestions for the Nominating Commission are merely suggestions, then the governor may reject them and appointment power rests with the governor. This latter scenario falls within the *Sailors* exception, and there is no violation of the one person, one vote doctrine.

#### 4. A Vast Array of Constitutional Alternatives

In summary, any system which grants the bar exclusive or disproportionate power to elect, appoint, or nominate the members of the Nominating Commission likely stands in violation of the one person, one vote doctrine. For supporters of the current system, this conclusion might seem to present a broad restriction on the availability of various constitutional alternatives that retain the commission-selection, gubernatorial-appointment structure of the Missouri Plan. However, the unconstitutional aspect of the current system is limited to *exclusive bar control* of the selection or nomination of any number of the Commission members. In other words, any system which does *not* grant the bar, an-

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appoint from the list of nominees provided by the respective professional organization. *See id.* at 282 n.115. However, the nature of the problem regarding the Nominating Commission is unique among all the governmental bodies surveyed by Professor Levy. The case is unique because the Nominating Commission is a governmental body, whereas all of the other nominating entities surveyed by Professor Levy were the collective body of a profession or professional organization. There lies a critical distinction between a *private entity* like a professional organization that provides nominations to the governor and a *governmental body* like the Nominating Commission that provides nominations to the governor. *Compare* KAN. STAT. ANN. § 74-1404 (nominating body for Kansas Dental Board candidates is a professional organization), *with* KAN. CONST., art. III, § 5(a) (providing that the nominating body for supreme court candidates is a governmental body). Regarding the applicability of the one person, one vote doctrine, in the case of the Nominating Commission, members of the law profession are empowered to *directly elect* a majority of the members of the governmental body, rather than to merely *limit* the governor’s pick to three nominees. In the case of the Nominating Commission selection process, it is important to realize that the electing entity for the bar-elected members is the collective body of lawyers in the state and not the Kansas Bar Association, a voluntary professional organization for attorneys.

In other statutes, the nominating entity is in fact a voluntary professional organization that serves the profession rather than the collective body of all licensed professionals in the state. *See, e.g.*, KAN. STAT. ANN. § 74-1404 (stating that the Kansas Dental Association, a voluntary non-profit professional organization serving the dentistry profession, is empowered to nominate candidates for the Kansas Dental Board). This distinction demonstrates that the bar’s power to directly elect five Nominating Commission members is even more patently a violation of one person, one vote than is the scenario wherein the governor *must* pick from one of three nominees put forth by a professional organization, as in the nomination process for the travel and tourism commission. *See* Levy, *supra* note 11, at 282 n.115 (suggesting that the one person, one vote doctrine might be violated when “the Governor’s appointment is . . . legally constrained by private nominations”); *see, e.g.*, KAN. STAT. ANN. § 74-9001(a) (“Of the [eleven] members [of the Travel and Tourism Commission] appointed by the governor, one *shall be* appointed from a list of three nominations made by the travel industry association of Kansas . . .” (emphasis added)). At least in the case of the Travel and Tourism Commission, the professional organization does not get to directly elect members to the governmental body, but rather is empowered to limit the governor’s appointment to one of three nominees. In the case of the Kansas Supreme Court Nominating Commission, the professional organization directly elects members to the governmental body at issue.

184. *See* Levy, *supra* note 11, at 279.

other special interest group, or any other minority group of voters disproportionate power in electing, appointing, or nominating members of the Nominating Commission *does not* stand in violation of the one person, one vote doctrine.

Obviously, a system allowing the bar *no role* in the selection process would cure the current constitutional problem. Providing for the currently bar-elected members of the Nominating Commission to be selected by popular vote<sup>185</sup> or appointment “by popularly-elected officials or by judges”<sup>186</sup> would satisfy the demands of the one person, one vote doctrine.<sup>187</sup>

If Kansans, from a policy standpoint, appreciate or desire the expertise that lawyers allegedly bring to the commission-selection process, there are other alternatives that keep this feature. For example, a system like Connecticut’s or Utah’s that allows for gubernatorial appointment of *all* members of the commission while still requiring a certain number of those appointees to be lawyers would likely still satisfy the demands of one person, one vote.<sup>188</sup> Other means of retaining bar-participation in the current system might be to shift the bar’s role from an elective or appointive role to an advisory role. As mentioned above, the one person, one vote doctrine would likely not tolerate a system wherein the bar provided a list of nominees to serve on the Nominating Commission from which the governor was *required* to appoint. However, the doctrine would tolerate a system in which the bar merely provided a list of nominees to the governor in an effort to aid the governor’s selection, assuming that the governor remained free to appoint a person not on that list.<sup>189</sup>

Other possibly constitutional alternatives might focus on increasing the role and discretion of democratically-elected officials. For example, the current system might be left largely intact should the governor be allowed to appoint a person to fill a judicial vacancy who is not on the list of nominees provided by the Nominating Commission. Should the constitution be changed to incorporate this gubernatorial discretion, the

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185. Currently, no state selects its nominating commission members by popular vote. *See generally* Ware, *Selection to the Kansas Supreme Court*, *supra* note 5, at 387-90 nn.4-12. The only states where some nominating commission members are selected by any type of an election are those states limiting the persons qualified to vote in those elections to attorneys only. *See supra* notes 49-50 and accompanying text.

186. *See The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 397.

187. There is nothing in the United States Supreme Court’s current jurisprudence suggesting that limiting candidates for certain governmental bodies to persons with specified qualifications (i.e., persons licensed by the bar) violates the one person, one vote doctrine.

188. *See The Bar’s Extraordinarily Powerful Role*, *supra* note 9, at 396-98 & nn.24-33. Currently, four states “with [legislative] confirmation of supreme court justices also (1) require their governors to nominate only someone recommended by a nominating commission, and (2) give lawyers a quota on that commission.” *Id.* (referring to New York, Connecticut, Rhode Island, and Utah); *see* CONN. CONST. art. V, § 2; R.I. CONST. art. X, § 4; UTAH CONST. art. VIII, § 8.

189. *See supra* note 50 and accompanying text; ARIZ. CONST. art. VI, § 36; FLA. CONST. art. V, § 11; TENN. CODE ANN. §§ 17-4-102, 17-4-106, 17-4-112 (2007).

role of the Nominating Commission would largely change to a purely advisory one. Moreover, such an advisory role would not entail the exercise of a “governmental power,” and as such, the one person, one vote doctrine would likely not apply.<sup>190</sup>

Less clear is whether merely adding senate confirmation of judicial appointees to the current system would satisfy the demands of one person, one vote. In this scenario, the power currently exercised by the Nominating Commission, a body dominated by bar-elected members, would significantly decrease because the legislature could reject the judicial nominee and begin the entire process anew. Such a change might qualify the Nominating Commission as having such “a narrow and limited focus which disproportionately affects the few who are entitled to vote” that the *Salyer-Ball* exception would apply.<sup>191</sup> Nevertheless, the change would not fundamentally alter the bar’s power to exclusively elect members to a governmental body that has the power to *screen and limit* the candidates considered by the governor and senate.<sup>192</sup> Given the potentially burdensome nature of having to start the entire political process—application, screening, nomination, appointment, confirmation—afew, the Nominating Commission, and thus the bar, would still retain a great deal of power in the process, threatening the possibility that the *Salyer-Ball* exception would not apply. Such alternatives should be considered, however, given the unconstitutional nature of the current system. This list of possibly constitutional alternatives to the current system is not exhaustive, but the broad spectrum of alternatives demonstrates that the one person, one vote doctrine does not necessarily limit the people of Kansas to one policy stance on the role of the bar in the state’s supreme court selection process.

## V. CONCLUSION

The 1958 Amendment to the Kansas Constitution granting the state bar the power to elect a majority of the Nominating Commission has since come into conflict with the requirements of the one person, one vote doctrine. The notable exceptions to the one person, one vote doctrine do not apply to the bar election of Nominating Commission members. Kansas’s use of a nominating commission does not *per se* create a constitutional conflict. Rather, the conflict lies in electing its Nominating Commission in a manner that gives one citizen’s vote substantially more weight than another citizen’s vote. Because Kansas cur-

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190. See *Educ./Instruccion, Inc. v. Moore*, 503 F.2d 1187, 1189 (2d Cir. 1974) (holding that one person, one vote doctrine did not apply to election for governmental body serving merely advisory role and exercising no governmental powers).

191. See *Hellebust v. Brownback*, 42 F.3d 1331, 1333 (10th Cir. 1994).

192. See *generally id.* (citing *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 355 (1981); *Ball v. James*, 451 U.S. 355 (1981)).

rently grants the state bar over two-hundred times more voting power than non-lawyer citizens in the election of members to the Nominating Commission, the state's system stands in violation of the one person, one vote doctrine. Moreover, any state that currently gives its bar the power to elect or appoint members of the state judicial nominating commission is vulnerable to having its supreme court selection process struck down as a violation of the one person, one vote doctrine. Kansas should immediately adopt one of the many constitutional alternatives to the current system or risk a potentially successful challenge to the system in court.

