▶ LEAD

Protecting Fair Courts From Political Criticism and Budget Cuts

By F. James Robinson, Jr.

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Political criticism of courts is not new. The political attacks "notable for both their frequency and their stridency" are.[1] These attacks undermine the Judiciary and the public's confidence in it.[2]

Within our democracy the Judiciary applies the statutes, declares the Kansas common law, and upholds the Kansas Constitution. To do this important work, courts must be independent of the legislative and executive branches. And they must be fair and impartial, deciding the cases before them uninhibited by partisan politics and "undisturbed by the clamor of the multitude."[3]

The legislative and executive branches should respect the Judiciary's role and practice restraint when critiquing courts. This principle has enjoyed at least grudging acceptance in the past. But recently, politicians have threatened to ignore Kansas Supreme Court decisions they do not like, or use their role to influence judicial decisions or weaken courts.

Fair criticism plays an important role in improving courts. Irresponsible political criticism can undermine confidence in the Judiciary. Protecting fair courts in the current climate needs immediate action by members of the Bar and others.

The Role of Courts in Our Democracy

Our federal founders removed basic rights from the "vicissitudes of political controversy," placing them "beyond the reach of majorities and officials" and establishing them "as legal principles to be applied by the courts."[4] "One's right to life, liberty, and property, to free speech, free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."[5]

These founders fashioned separate institutions — the legislature, the executive, and the judiciary — to create a form of government to ensure that democracy, liberty, and the rule of law were not hollow promises. They relied on the mutual restraint of the competing branches to manage inter-branch tensions and preserve the balance of powers.

They understood that the rule of law depends on courts "not under the thumb of other branches of Government, and therefore equipped to administer the law impartially."[6] James Madison, when introducing in Congress the amendments that became the Bill of Rights, eloquently said:

> Independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.[7]

Alexander Hamilton, urging New York to adopt the Constitution, explained "there is no liberty, if the power of judging be not separated from the legislative and executive powers … The complete independence of the courts of justice is … essential …"[8]

A century and a half later, Justice Hugo Black wrote that courts "stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement."[9]

Our founders called on the Judiciary to patrol the legal boundaries set through the Constitution. They did this not because judges are always wiser or smarter, but because allowing the other institutions to police themselves was too dangerous. The executive, with sole power to decide whether executive orders complied with the Constitution, could become too powerful. The legislature, carrying out the will of the voters, would seldom turn down popular statutes that cross the Constitution's legal boundaries.[10] Alexander Hamilton put it this way when he asked, can it "be expected that men who had infringed the Constitution in the character of legislators, would be disposed to repair the breach in the character of judges?"[11]

This doctrine, also known as judicial review, is carefully woven into the fabric of democracy. In *Marbury v. Madison*,[12] the United States Supreme Court reasoned that the United States is a "government of law, and not of men."[13] The Court declared, "It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it … It is emphatically the province and duty of the judicial department to say what the law is."[14]

The Court noted exceptions to this rule: political acts based on constitutional or legal discretion are not "examinable by the courts."[15]

If a specific duty were assigned by law to the executive or legislature and the law directs the performance of the duty, Alexander Hamilton argued that a person who considers himself injured must be able to "resort to the laws of his country for a remedy."[16]

Strong courts provide balance in our government. They police the limits of power. They make good on the constitutional guarantees, even to the least popular people among us. They stand up for individual rights against the popular will. The Judiciary, as an institution, is the "great leveler" in which all people are "created equal."[17]

But our founders also made the Judiciary the "least dangerous" branch because it has "no influence over either the sword or the purse … it may truly be said to have neither FORCE nor WILL, but merely judgment."[18] They understood that judicial independence depends on the deference of political branches to uphold court judgments. Thus, the traditional balance of powers between the federal judiciary and the other branches is primarily based on informal norms and customs of restraint. Courts have long forced politicians to take unpopular actions, such as desegregating schools or bringing prisons up to certain minimal standards, "but many of those politicians had enough respect for the courts that they were careful not to take their criticism too far."[19]

The importance of this cannot be overstated. In the wake of the Supreme Court's decision in *Brown v. Board of Education of Topeka, Kansas*,[20] state resistance to federal judicial orders put judicial independence to the test.[21] President Dwight D. Eisenhower sent troops into Little Rock, Arkansas to enforce a federal court's order. Historian David A. Nichols wrote, "While Eisenhower was a disappointing rhetorical advocate for racial equality, we must balance that assessment with his uncompromising defense of the courts. Eisenhower revered the federal judiciary and spoke eloquently about it … [Eisenhower said], 'These courts are not here merely to enforce integration. These courts are our bulwarks, our shield against autocratic government.'"[22]

The separation of powers doctrine is not stated in the Kansas Constitution. It is, nevertheless, "'an inherent and integral element'" of the three-branch system of government.[23] Kansas's doctrine is "almost identical" to that in the United States Constitution.[24] Kansas Constitution article 3, section 1 "makes clear that judicial power is exclusively vested in the unified court system."[25]

Years ago, two U.S. legal scholars, each at different ends of the political spectrum, joined in an essay on the value of judicial independence, concluding:

> Judicial independence in the United States strengthens ordered liberty, domestic tranquility, the rule of law, and democratic ideals. At least in our political culture, it has proved superior to any alternative form of discharging the judicial function that has ever been tried or conceived. It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans.[26]

Irresponsible Political Criticism of Courts Undermines the Integrity and Independence of the Judiciary

Reading or hearing what some legislators have recently said about Kansas' appellate courts, one might lose sight of what experience largely bears out: Kansas judges, whether appointed by Republican or Democrat governors, strive to decide cases impartially and to interpret laws reasonably, guided and restrained by precedent.

A judge's role is like that of a referee in a basketball game. At times, the referee "is obliged to call a foul against a member of the home team at a critical moment in the game," knowing he will be "soundly booed."[27] But the referee calls it "as he saw it, not as the home crowd wants him to call it."[28]

Yet, for some lawmakers it is fashionable to criticize judges who disregard what the home crowd wants. Professor Stephen Burbank notes that many of these criticisms:

> [H]ave been part of strategies calculated to create and sustain an impression of judges that makes courts fodder for electoral politics. The strategies reflect a theory of judicial agency, the idea that judges are a means to an end, and that it is appropriate to pursue chosen ends through the selection of judges who are committed or will commit to them in advance. The architects of these strategies seek to create the impression not only that courts are part of the political system, but also that they and the judges who sit upon them are part of ordinary politics.[29]

Courts do not choose the cases they hear. Sometimes those cases require courts to decide difficult controversial issues: that is their job in our democracy. Politicians can shy away from tough issues. But when an issue is justiciable, our courts cannot shy away.

Courts will not always be either popular or right. No judge is immune from error, and there will always be court decisions with which some people disagree. Decisions in difficult cases can put courts in tension with politicians. Our founders expected this. We do not want a basketball referee to reverse his call when the crowd boos, for fear it was the booing that influenced the referee.[30] And we do not want courts to bend to political criticism and pressure. Funding K-12 public education in Kansas has created opportunities to criticize courts and judges. This is because litigation about the sufficiency of school funding poses unique separation-of-powers issues. The Kansas Constitution requires the legislature to "make suitable provision for finance."[31] Recent experience shows that school funding litigation has the potential to put courts on a collision course with the Legislature.

After the 2013 legislative session, Senate President Susan Wagle (R-Wichita) predicted that in 2014 "we will most likely be in a constitutional crisis" over school funding.[32] She explained, "We're going to be caught between the court telling us to do one thing and the people of Kansas maybe asking for something else. And then the question is, who has the authority to spend your money? Ultimately, I think it should be your elected legislators."[33]

During a November 7, 2013 presentation, Senator Wagle returned to the same point. She said, "If we do get that ruling down, what we're going to do is focus on what is the role of the Supreme Court. Should they be interpreting law, should they be appropriating money? They aren't elected."[34]

House Speaker Ray Merrick (R-Stilwell) echoed this message when he told the *Kansas City Star*, "I don't see the Legislature right now, with this makeup, going along with what the courts say. But I could be surprised."[35]

Representative Gene Sullentrop (R-Wichita), Vice-Chair of House Appropriations, has said that "if we are ordered to cough up $400 to $500 million, we've got a significant dilemma. If there is a strong feeling that the court doesn't have jurisdiction to appropriate money, and if there is a strong feeling that they are not looking at all sides fairly, then we are not apt to go along with them."[36]

The *Lawrence Journal-World* recently reported that during a discussion with Kansas University's chancellor about the impact of budget cuts on higher education, Representative Jerry Lunn (R-Overland Park) warned that a decision against the state in the current school finance litigation would result in significant funding decreases for higher education.[37] The legislator urged the chancellor to "talk to your friendly Supreme Court justice," as if the Court's decision could be shaped by political influence or lobbying efforts.[38]

Responsible criticism plays an important role in improving courts. The difficult legal questions that courts decide do not always have a single correct answer. In the words of Judge Learned Hand: "Let [judges] be severely brought to book, when they go wrong, but by those who will take the trouble to understand."[39] Every motion to reconsider, appeal, petition for review, and motion for rehearing is a criticism of judicial action. Decisions like *Scott v. Sandford*[40] and *Plessy v. Ferguson*[41] should be criticized.

In response to any decision, ordinary citizens and politicians should ask: Is the decision correct? Should the Constitution be amended? Should the legislature make new laws to produce a different outcome? And there is nothing wrong with caring about who becomes a judge or criticizing a judge's behavior. The First Amendment protects this activity.

However, when lawmakers threaten to ignore Supreme Court decisions with which they disagree, or use their role to influence judicial decisions or weaken courts, it exacts a high price.

Judicial independence is secured by law and public opinion. An enduring judiciary depends on the enduring support of ordinary citizens. The public respects the rule of the law and is willing to live with judicial decisions, even those they think are wrong, because they believe courts operate fairly and impartially. But the public has limited familiarity of the Constitution and judicial reasoning. Their perception of court decisions is easily influenced by criticism from other branches.

When court decisions are criticized, courts are nearly unable to mount a defense. If a judge publicly responds to criticism, he or she becomes an active participant in the political process. This undermines the appearance of impartiality that is essential to the public's willingness to accept the judge's authority. But if courts do not respond, some may view the criticism as unanswerable or valid. Judicial independence and the equilibrium of the three branches depend on restraint by the legislative and executive branches when critiquing courts.

"Judges can take criticism, I am very confident," noted Judge Joseph Bellacosa of the New York Court of Appeals, "but whether the public interest can stand and absorb malinformed, drumbeaten, and heated attacks on the judicial process is worth pause and reflection."[42]

Justice Stephen Breyer has written, "A public that does not understand the judiciary, its role in protecting the Constitution, and the related need for judicial independence may act in ways to weaken the institution."[43] This is the greatest threat to the rule of law.

Courts are accountable to the Constitution and the law, not to politicians thinking about the next election.

Efforts to Weaken Courts

Some elected leaders would weaken courts. They assert the appellate courts are part of the political system, and that the judges who sit on them act like legislators in black robes. They suggest the courts are out of step with the march of Kansans. They argue that court decisions should bend to popular will or political fervor. And they introduce legislation to allow politicians to pick and confirm judges for our highest courts.

During the 2013 legislative session, on a 28-to-12 vote the Senate passed SCR 1601, a constitutional amendment revising article 3, on the judiciary.[44] The resolution allows the Governor to appoint Supreme Court justices and Court of Appeals judges, subject to senate confirmation.[45] It abolishes the non-partisan Supreme Court Nominating Commission — the central feature of a "Missouri Plan" or "Merit Plan."[46] The Senate also passed SB 8, which creates a new commission that reviews the Governor's selection and recommends the nominee to the Senate.[47]

The House of Representatives referred SCR 1601 to its Judiciary Committee and did not hold a vote, presumably because it lacked support of two-thirds of the representatives as required for a constitutional amendment.[48] SCR 1601 will carry over to the 2014 session.

When it was clear that SCR 1601 would not pass in the House, representatives passed HB 2019 on a vote of 73-50.[49] The bill amended the procedure for the appointment of judges to the Kansas Court of Appeals.[50] Unlike the Supreme Court, the Court of Appeals is a creature of statute,[51] which means it can be changed without a constitutional amendment. The bill allowed the Governor, with the consent of the Senate, to appoint a qualified person to fill any vacancy on the Kansas Court of Appeals.[52] The bill passed the Senate on a vote of 28-to-12[53] and became law on July 1, 2013.[54]

Proponents of SCR 1601 and HB 2019 have argued the federal model of judicial selection, on which their legislation is loosely based, is the democratic way. But they ignore that the current merit selection system, using the nonpartisan Supreme Court Nominating Commission, was adopted by Kansans in a democratic way after considerable experience with other systems.

When the state entered the Union in 1861, the Kansas Constitution allowed voters to elect all judges.[55] Concerns about the role of political parties in the selection process led Kansas in 1913 to approve nonpartisan judicial elections, but this was repealed in 1915.[56] In the 1950s, renewed criticism about the role of partisan politics in the election of judges led to proposals in 1953 and 1955 for the merit selection of justices, but those proposals were defeated in legislative committees.[57]

The infamous "Triple Play" of 1956 cast a "dark shadow" on the "judicial selection horizon."[58] Governor Fred Hall, after serving one term, was defeated in the 1956 Republican primary. Just before Hall's term expired, Chief Justice William A. Smith retired. Governor Hall then resigned, and Lieutenant Governor John McCuish appointed Hall to the Supreme Court.[59] "Kansans were so outraged" that in 1958 the voters approved a constitutional amendment creating the Supreme Court Nominating Commission and establishing merit selection for Supreme Court justices.[60] And so, for the past 55 years, Kansans have been selecting appellate judges using a system forged by Kansans in a democratic process.

There is no consensus among the states on the best manner to select appellate judges to ensure fair and impartial courts. We know of no empirical study that demonstrates improvements in fairness and impartiality after adopting a Merit Plan.[61] However, several reviews of the social science literature about the ideological underpinnings of the various selection methods conclude that there is "today a strong consensus that, of all the procedures, the merit plan best insulates the state judiciary from partisan political pressure."[62]

A recent American Judicature Society[63] (AJS) study concluded that judicial nominating commissions in Merit Plan states "are highly functional decision-making bodies that operate in a way that is consistent with the goals that guided their creation."[64] AJS conducted anonymous surveys of 487 nominating commissioners from 30 states including Kansas, and the District of Columbia. [65] The study found wide agreement among the commissioners that "merit selection process is fair, that it works to promote highly qualified individuals for service on the bench, that it appropriately constrains the power of the governor, and that it helps to minimize the role of partisan politics."[66]

The proponents of change in Kansas urge a constitutional amendment. But they fail to heed the admonition of James Madison that a Constitution should be amended only on "great and extraordinary occasions."[67] The public outcry over the "triple play" of 1956 was such an occasion.

Today there is no such public scandal. Controversy over the complicated roles of the legislature and the judiciary in school funding is not a "great and extraordinary occasion." Besides, since the January 3, 2005 *Montoy v. State*[68] school funding decision, the Kansas Court of Appeals has filed more than 10,700 opinions concerning more than 11,300 appeals and the Kansas Supreme Court has filed more than 2,750 opinions concerning more than 2,900 appeals. Most of these opinions attracted very little public attention. Courts should be judged on the body of their work, rather than on a single decision.

The proponents of change also argue the federal model is a more transparent process than those used by the Supreme Court Nominating Commission. But they ignore that the Commission in recent years has opened to the public its interviews of applicants. And they fail to acknowledge that the Commission's process is more transparent than the one recently used by the Governor to select a nominee for the Kansas Court of Appeals under the new federal-style model.[69]

The proponents of change assert that attorneys dominate the current merit process. But the 2012 AJS survey results show that, almost across the board, commissioners reported working well together with no significant friction between lawyer and non-lawyer members.[70] The respondents reported mutual respect and neither group dominating the process or the final selection of nominees.[71]

The proponents of change argue the current merit process is unconstitutional on equal protection grounds because of the composition of the nominating commission. But the U.S. Court of Appeals for the Tenth Circuit rejected this challenge to Kansas' nominating commission and the United States Supreme Court denied a *writ of certiorari*.[72]

The proponents of change urge Kansas to follow New Jersey's federal-style model.[73] But New Jersey's experience shows that injecting politics prominently into the nomination and confirmation process can lead to long delays in filling judicial vacancies.

While running for office in 2009, New Jersey Governor Chris Christie led an attack on the New Jersey Supreme Court. He was not hesitant to say that if he were elected he would remove those judges with whom he disagreed and intimidate those who remained on the bench. He promised, "I will remake the court and I will remake it in this one simple principle. If you [want to] legislate [then] run for the Legislature, don't put on a black robe and go to the Supreme Court and there won't be any justices that I either reappoint or put on that court that do that."[74]

Until Governor Christie's administration, no New Jersey governor had failed to reappoint a sitting justice in the 63 years since the federal-style model was adopted.[75] But in 2010, Governor Christie refused to reappoint Justice John E. Wallace Jr., the court's only African-American justice.[76] The Governor made general comments about the liberalism of the Supreme Court in explaining his decision.[77]

Since then, a political stalemate between the Governor and the Democrat-controlled Senate has left positions on New Jersey's highest court vacant for years.[78] Until recently, the seven-member court had four justices—only two with tenure—and three fill-in appointees from the Appellate Division "whose decisions are now scrutinized as much for their partisanship as for their judicial intent."[79] In November 2013, the Senate confirmed a Republican to replace a Republican justice Governor Christie did not reappoint. But there are still two vacancies on the court and no action on those nominees (the first two nominees were rejected).[80]

Robert F. Williams, associate director of the Center for State Constitutional Studies at Rutgers University Camden, told the *New Jersey Spotlight*, "Ever since the Justice Wallace decision, it has been one bad surprise after another."[81] Williams argues it is the New Jersey Supreme Court's "independence that is being damaged."[82]

The proponents of change in Kansas say nothing about the economic impact of merit-selected courts. Every two years the U.S. Chamber's Institute for Legal Reform ranks all states' litigation environments.[83] In the 2012 report, four of the five states with the highest overall rankings are states that use a commission-based appointment process for choosing appellate judges. Kansas is ranked fifth overall, eighth for judicial impartiality and ninth for judicial competence.[84]

This is an important vote of confidence. A vibrant business climate that can create jobs depends upon Kansas' commitment to the rule of law, especially to fair and impartial courts that bring stability and consistency to economic decision-making. By the Chamber's measure, the current Kansas process is choosing good judges.

Other measures proposed at the end of the 2013 Kansas legislative session that would weaken courts will carry into 2014. HB 2415 would reduce the mandatory retirement age from 75 to 65 for the Court of Appeals and Supreme Court. This would force a rapid turnover of judges.[85]

HB 2416 would abolish the court of appeals, establish the court of criminal appeals and the court of civil appeals, and change appellate court jurisdiction, which would strip the Supreme Court of the power to hear criminal appeals, as well as most civil cases.[86]

Further complicating the political landscape is 2014 is an election year. All 125 state representatives will be up for election. There have been rumblings of a coordinated effort to defeat a number of Republican House members who have not fully supported the proposed constitutional amendment. Other political races in 2014 include Senator Pat Roberts, Governor Sam Brownback, Attorney General Derek Schmidt, and Secretary of State Kris Kobach.

Appellate retention elections will also be held for Supreme Court Justices Eric Rosen and Lee Johnson; and Court of Appeals Judges Thomas E. Malone; Henry W. Green, Jr.; Patrick D. McAnany; Melissa Taylor Standridge; Anthony J. Powell; and Kim R. Schroeder.

Underfunding of Courts Threatens Judicial Independence

The legislature's control over the treasury is a powerful political weapon that can be used to reward or punish the executive and judicial branches, depending on how they conduct their affairs.

When disagreements erupt between the legislature and the judiciary, the

power of the purse can threaten judicial independence. To limit this threat, our founders wrote into the Kansas Constitution the guarantee that justices of the Supreme Court and judges of the district courts "shall receive for their services such compensation as may be provided by law, which shall not be diminished during their terms of office, unless by general law applicable to all salaried officers of the state."[87]

In the wake of the June 2005 decision in *Montoy v. State*,[88] the 2006 legislature gave all judges in the state a salary increase, except Supreme Court justices.[89] Alexander Hamilton succinctly identified the problem when he wrote, "In the general course of human nature, a power over a man's subsistence amounts to power over his will."[90]

No constitutional guarantees protect the judiciary's budget. For years courts have been underfunded. The impact of the recession placed additional stress on an already compromised budget. "A judiciary free from control by the Executive and legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government."[91] The fiscal control the legislature exercises over courts can create tension with the need for judicial independence.

Judge Learned Hand once said, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice."[92] But the rationing of justice has already occurred because of budget constraints and cost-cutting measures, including hiring and pay freezes, reduction of court hours, delaying of needed technology upgrades, and court closures.

Funding issues will plague courts in fiscal year 2014. A proposed two percent under-market pay increase for non-judicial employees failed to pass in 2013. Approximately the same amount of revenue that was available in fiscal year 2013 will be available in 2014. However, due to mandatory payroll increases for longevity, KPERS, etc., budget shortfalls are likely. Added stress will come from docket fees and surcharges, which have proven to be unreliable funding sources as court filings continue to decrease.

The budget approved for fiscal year 2015 is much worse. According to Kansas Supreme Court Chief Justice Lawton Nuss, the judiciary will be short $8.25 million. Since 96 percent of its budget goes to salaries, Chief Justice Nuss has warned that courts could close for seven weeks.[93]

We Need Leaders Who Will Protect Fair and Impartial Courts

Black clouds forming on the Kansas horizon portend the perfect storm for the state's judiciary. There is no quick fix. There is simply too much campaign value in the cynical sound bite, uttered by a politician on the courthouse steps, that courts have forced government to take unacceptable and unpopular actions.

2014 may test the quality of civics education in Kansas. Popular culture and entertainment toss around legal verbiage and highlights some of the trappings of the legal profession. But our society has done a poor job of educating the present generation about the real workings of the law and the court's role in our democracy. Perhaps we can better educate the next generation.

For the current generation, our courts need advocates. There is little courts can do when they are unfairly criticized. It is urgent that attorneys step forward and stand up for courts. "It would be folly to squander this priceless constitutional gift to placate the clamors of benighted political partisans."[94]

"Where is the Bar with all of its committees upon committees? Why is there not a strike force, a rapid response team, to deal with attacks …"[95] We must build a coalition of private citizens, corporate leaders, elected leaders, attorneys, and retired judges. They can put single decisions by courts in the broader perspective of the rule of law. When critics focus on a single decision and argue that only results matter, court advocates can point to the legal principles and facts underlying the decision. And most importantly, court advocates can point out that the role of judges is different from legislators or the Governor — making decisions based on the law and not what is politically popular.

Preserving fair and impartial courts is advanced citizenship. We need many hands. When asked by a woman in Philadelphia what form of government the Constitutional Convention had created, Benjamin Franklin famously replied, "A republic, Madam, if you can keep it." This is our challenge. ▲

Endnotes

1 Stephen B. Burbank, "*Fair and Independent Courts: A Conference on the State of the Judiciary: Judicial Independence, Judicial Accountability, and Interbranch Relations*," 95 Geo. L. J. 909 (2007).
2 Stephen B. Bright, "*Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*," 72 N.Y.U. L. Rev. 310 (May 1997).
3 1 Charles Warren, The Supreme Court in United States History 303 (1923).
4 *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).
5 *Id.*
6 Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 Neb. L. Rev. 1 (2006).
7 James Madison, Address to the House of Representatives (June 8, 1789), in The Mind of the Founder 224 (Marvin Meyers ed., 1973).
8 The Federalist No. 78, at 502 (Alexander Hamilton) (Edward Mead Earle ed.). Without judicial independence, Hamilton argued, "all the reservations of particular rights or privileges would amount to nothing." *Id.*
9 Chambers v. Florida, 309 U.S. 227,241 (1940).
10 Stephen Breyer, Making Our Democracy Work: A Judge's View 6-11, 215 (2010).
11 The Federalist No. 81 (Alexander Hamilton).
12 5 U.S. 137 (1803).
13 *Id.* at 163.
14 *Id.* at 177.
15 *Id.* at 166.
16 *The Federalist* No. 78 (Alexander Hamilton).
17 In the words of Atticus Finch: Thomas Jefferson once said that all men are created equal … We know all men are not created equal in the sense some people would have us believe — some people are smarter

than others, some people have more opportunity because they're born with it, some men make more money than others … But there is one way in this country in which all men are created equal — there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution, gentlemen, is a court … Our courts have their faults, as does any institution, but in this country our courts are the great levelers, and in our courts all men are created equal.
Harper Lee, To Kill a Mockingbird 217–18 (1960).

18 The Federalist No. 78 (Alexander Hamilton).

19 Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. Rev. 310 (May 1997).

20 347 U.S. 483 (1954).

21 *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. Rev. 333, 432 (1998).

22 David A. Nichols, A Matter of Justice: Eisenhower and the Beginning of the Civil Rights Revolution 278-79 (2007).

23 *Hays v. Ruther*, 2013 Kan. LEXIS 1259, at *14 (Nov. 22, 2013) (quoting *State ex rel. Morrison v. Sebelius*, 285 Kan. 875, 882, 179 P.3d 366 (2008)); *see also Miller v. Johnson*, 295 Kan. 636, 670, 289 P.3d 1098 (2012).

24 *State ex rel. v. State Office Bldg. Comm'n*, 185 Kan. 563, 569-70, 345 P.2d 674 (1959).

25 *Miller*, 295 Kan. at 672.

26 Bruce Fein & Burt Neuborne, *Why Should We Care About Independent and Accountable Judges?*, 84 Judicature 58, 63 (2000).

27 William H. Rehnquist, *Act Well Your Part: Therein All Honor Lies*, 7 Pepp. L. Rev. 227, 230 (1980).

28 *Id.* at 229-30.

29 Burbank, *supra* note 2, at 909.

30 John Goshko and Nancy Reckler, *Controversial Ruling is Reversed: N.Y. Judge Now Finds Evidence Admissible*, Wash. Post, Apr. 2, 1996.

31 Kan. Const. art. VI, § 6(b).

32 Dion Lefler, *Senate President Susan Wagle: 2014 Legislative Session Could be Even Worse*, The Wichita Eagle, June 5, 2013, *available at* http://www.kansas.com/2013/06/05/v-print/2834156/wagle-2014-session-could-be-even.html#storylink=cpy.

33 *Id.*

34 John Stearns, *Brownback: K-12 Court Ruling Will Color Next Legislative Session*, Wichita Bus. J., Nov 7, 2013, *available at* http://www.bizjournals.com/wichita/blog/2013/11/brownback-k-12-court-ruling-will.html?s=print; *see also* Dion Lefler, *Brownback, Wagle: School Finance Ruling Could Trigger Public Fight over Judge Selection*, The Wichita Eagle, Nov. 07, 2013, *available at* http://www.kansas.com/2013/11/07/v-print/3102607/brownback-wagle-school-finance.html#storylink=cpy.

35 Brad Cooper, *Constitutional Stalemate Brewing over Kansas School Funding*, The Kansas City Star, Oct. 6, 2013, *available at* http://www.kansascity.com/2013/10/06/4536554/constitutional-stalemate-brewing.html#storylink=cpy.

36 Roy Wenzl, *Top Kansas Legislators Weigh in on K-12 Financing*, The Wichita Eagle, Nov. 9, 2013, *available at* http://www.kansas.com/2013/11/09/v-print/3106367/top-kansas-legislators-weigh-in.html#storylink=cpy.

37 Scott Rothschild, *Legislators Say Big Budget Cuts to Higher Ed., Other Areas Would Occur If Public Schools Win Finance Lawsuit,* The Lawrence Journal-World, Nov. 4, 2013, *available at* http://www2.ljworld.com/news/2013/nov/04/republicans-say-big-budget-cuts-higher-ed-other-ar/.

38 *Id.; Court Influence. A Horse Race May be an Apt Metaphor for a Political Campaign, but it Shouldn't Apply to a Court Proceeding,* The Lawrence Journal-World, Nov. 7, 2013, *available at* http://www2.ljworld.com/news/2013/nov/07/editorial-court-influence/.

39 Learned Hand, *How Far Is a Judge Free in Rendering a Decision?* (1935), *reprinted in* The Spirit of Liberty: Papers and Addresses of Learned Hand 103, 110 (Irving Dilliard 3d ed. 1960).

40 60 U.S. 393, 407 (1857) (stating that African-Americans were "altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that African-Americans had no rights which the white man was bound to respect").

41 163 U.S. 537, 552 (1896) ("If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.").

42 Joseph W. Bellacosa, *Judging Cases v. Public Opinion*, 65 Fordham L. Rev. 2381, 2388 (1997).

43 Breyer, *supra* note 11, at 218.

44 J. of the Senate, Jan. 30, 2013, at 96-97, *available at* http://www.kslegislature.org/li/b2013_14/chamber/documents/daily_journal_senate_20130130182223.pdf.

45 S. Con. Res. 1601, 2013 Sess. (Kan. 2013), *available at* http://www.kslegislature.org/li/b2013_14/measures/documents/scr1601_02_0000.pdf.

46 The linchpin of the current merit selection system is the nine-member nonpartisan nominating commission. Four of the commission's members are non-attorneys appointed by the Governor. Four of the members are attorneys selected by attorneys in each of the four Congressional Districts. The chairperson of the commission is an attorney elected by attorneys in a state-wide vote. Each member's term is four years, and terms are staggered so the terms of only two members — one a lawyer and one a non-lawyer — expire each year. The commission's work is familiar to anyone who has made an important hiring decision. It initially reviews résumés and an extensive application that must be completed by all applicants for the Supreme Court. It then screens candidates and interviews the most qualified and investigates their references. After the applicants have been thoroughly vetted, the commission submits to the Governor the names of the three who in its consensus are the most technically able and experienced, and the Governor must select an applicant from the list. Judges are selected for retention by the voters statewide in an uncontested election every six years for the Supreme Court.

47 S. 8, 2013 Sess. (Kan. 2013), *available at* http://www.kslegislature.org/li/b2013_14/measures/documents/sb8_02_0000.pdf.

48 J. of the House, Feb. 1, 2013, at 135-36, Feb. 1, 2013, *available at* http://www.kslegislature.org/li/b2013_14/chamber/documents/daily_journal_house_20130201111947.pdf.

49 J. of the House, Mar. 1, 2013, at 322, *available at* http://www.kslegislature.org/li/b2013_14/chamber/documents/daily_journal_house_20130301125831.pdf.

50 H.R. 2019, 2013 Sess. (Kan. 2013), *available at* http://www.kslegislature.org/li/b2013_14/measures/documents/hb2019_00_0000.pdf.

51 K.S.A. 20-3001 *et seq*.

52 H.R. 2019, 2013 Sess. (Kan. 2013), *available at* http://www.kslegislature.org/li/b2013_14/measures/documents/hb2019_00_0000.pdf.

53 J. of the Senate, Mar. 13, 2013, at 268, *available at* http://www.kslegislature.org/li/b2013_14/chamber/documents/daily_journal_senate_20130313210843.pdf.

54 2013 Kan. Sess. Laws 1.

55 Kan. Const. art. III, §11; John F. Fontron, Jr., *The KBA Story*, in Requisite Learning and Good Moral Character: A History of the Kansas Bench and Bar, 16 (Kan. Bar Assoc. ed. 1982) (noting that direct election of judges was then in vogue, as 22 of the 34 states chose appellate judges by popular vote).

56 Fontron, *supra* note 56, at 16; Jeffrey D. Jackson, *The Selection of Judges in Kansas: A*

Comparison of Systems, 69 J. Kan. Bar Assoc. 32, 33-34 (Jan. 2000).

57 *Id.*

58 Fred N. Six, *The Threat to Merit Selection: An Ominous Political Cloud Hovers over the Capitol, Casting a Dark Shadow on the Judiciary*, 81 J. Kan. Bar Assoc. 24 (Nov./Dec. 2012).

59 Arthur J. Stanley, Jr., Requisite Learning and Good Moral Character: A History of the Kansas Bench and Bar, at 86.

60 Six, *supra* note 59, at 24.

61 Richard B. Saphire & Paul Moke, *The Ideologies of Judicial Selection: Empiricism and the Transformation of the Judicial Selection Debate*, 39 U. Tol. L. Rev. 551, 586 (2008) ("Ultimately, we conclude that the extant empirical evidence simply does not provide convincing support for the reformers' contentions, at least not on a level that is sufficient to remove the judicial independence debate from its traditional ideological moorings.").

62 F. Andrew Hannsen, *Learning About Judicial Independence: Institutional Change in State Courts,* 33 J. Legal Stud., 431, 452 (2004); *see also* Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 Am. J. Comp. L. 103, 104 n. 3 (2009).

63 The American Judicature Society is an independent, non-partisan organization working nationally to promote the administration of justice through research, publications, and education.

64 Rachel Paine Caufield, *Inside Merit Selection: A National Survey of Judicial Nominating Commissions*, Am. Judicature Soc'y 3 (2012), http://www.judicialselection.us/uploads/documents/Selection_Retention_Term_116092850316.pdf.

65 *Id.*

66 *Id.* at 4.

67 The Federalist No. 49 (James Madison).

68 *278 Kan. 765 (2005).*

69 *Brownback Won't Divulge Applicants for Court of Appeals Governor's Policy Abandons 32-year-old Tradition of Transparency*, The Topeka Capital-Journal, June 27, 2013, http://cjonline.com/news/state/2013-06-27/brownback-wont-divulge-court-appeals-applicants.

70 *Caufield, supra* note 65, at 50.

71 *Id.* at 50-51.

72 *Dool v. Burke*, 497 Fed. Appx. 782 (10th Cir. 2012), *cert. denied* 133 S. Ct. 992 (Jan. 22, 2013).

73 The last two years Professor Alan Tarr of Rutgers University has given testimony to the Kansas legislature as a proponent for change. *See* http://www.kslegislature.org/li/b2013_14/committees/ctte_s_jud_1/documents/minutes/20130116.pdf; http://rutgerscamden.files.wordpress.com/2011/02/tarr-testimony.pdf.

74 Press Release, Gov. Chris Christie, Governor Christie on the New Jersey Supreme Court (May 3, 2010), *available at* http://www.state.nj.us/governor/news/news/552010/approved/20100503c.html.

75 In New Jersey, after serving for seven years, Supreme Court justices may be reappointed by the Governor with Senate confirmation.

76 Richard Pérez-Peña, *Christie, Shunning Precedent, Drops Justice from Court*, N.Y. Times, May 4, 2010, at A22.

77 *Id.*

78 Jenna Portnoy, *Christie Introduces Two New Nominees For New Jersey Supreme Court*, Star-Leader, Dec. 2, 2012, *available at* http://www.nj.com/politics/index.ssf/2012/12/christie_press_conference.html; Kate Zernike, *Governor Nominates 2 for New Jersey's Top Court*, N.Y. Times, Dec. 10, 2012, *available at* http://www.nytimes.com/2012/12/11/nyregion/christie-nominates-2-justices-for-new-jersey-supreme-court.html?_r=0; David Voreacos & Terrence Dopp, *N.J. Supreme Court Weighs School Cuts Amid Impasse*, Bloomberg Bus. Week, Jan. 5, 2011, *available at* http://www.businessweek.com/news/2011-01-05/n-j-supreme-court-weighs-school-cuts-amid-impasse.html; Richard Pérez-Peña, *New Tangle in Battle Over Court in Trenton*, N.Y. Times, Jan. 3, 2011, *available at* http://www.nytimes.com/2011/01/04/nyregion/04judge.html?ref=johnewallacejr; Editorial, *The Politicization of a Respected Court*, N.Y. Times, Dec. 15, 2010, *available at* http://www.nytimes.com/2010/12/16/opinion/16thurs3.html?ref=opinion&_r=1&; Lisa Fleisher & Chris Herring, *Justice Stymies New Jersey High Court*, Wall St. J., Dec. 11, 2010, *available at* http://online.wsj.com/article/SB10001424052748704457604576011962304920054.html?mod=googlenews_wsj.; Bob Braun, *N.J. Supreme Court's Refusal to Hear Gay Marriage Case Raises Question of Christie's Influence*, Star Ledger, Aug. 16, 2010, *available at* http://blog.nj.com/njv_bob_braun/2010/08/nj_supreme_court_justices_who.html.

79 Mark Maygar, *Christie's Judicial Shuffle Escalates Supreme Court Battle*, N.J. Spotlight (Aug. 13, 2013), http://www.njspotlight.com/stories/13/08/13/christie-s-judicial-shuffle-escalates-supreme-court-battle/?p=all.

80 Michael Phillis, *Christie Supreme Court Nominee Approved, but Democrats Warn They Won't Budge on Others*, The Record (Nov. 18, 2013), http://www.northjersey.com/news/NJ_Senate_confirms_Supreme_Court_nominee_.html?c=y&page=1.

81 Maygar, *supra* note 80.

82 *Id.*

83 U.S. Chamber Institute for Legal Reform, *2012 State Liability Systems Ranking Study*, http://www.instituteforlegalreform.com/states.

84 *Id.*

85 Passage of such a law in 2014 would likely force the immediate retirement of Supreme Court Justice Lee A. Johnson and Court of Appeals Judges G. Joseph Pierron, Jr., Henry W. Green, Jr. and Patrick McAnany. In the following four years, it would require the retirement of at least two more Supreme Court Justices and two Court of Appeals Judges. http://www.kscourts.org/kansas-courts/general-information/justice-listing.asp (Kansas Supreme Court Justices); http://www.kscourts.org/kansas-courts/general-information/judge-listing.asp (Kansas Court of Appeals Judges).

86 John Hanna, *Bigger Push on Kansas Judiciary Selection Coming*, The Kansas City Star, May 19, 2013, *available at* http://www.kansascity.com/2013/05/19/4244053/bigger-push-on-kansas-judiciary.html.

87 Kan. Const. art. III, § 14.

88 279 Kan. 817 (2005).

89 See Kay McFarland, State of the Judiciary: Annual Report of the Chief Justice of the Kansas Supreme Court (2007), available at http://www.kscourts.org/court-administration/State-of-Judiciary-2007.pdf

90 The Federalist No. 79 (Alexander Hamilton).

91 *U.S. v. Will*, 449 U.S. 200, 217-18 (1980).

92 Learned Hand, Address to New York Legal Aid Society (Feb. 16, 1951).

93 Scott Rothschild, *Kansas Supreme Court Justice Nuss Says Court Closings Possible Because of State Budget*, The Lawrence Journal-World, Sept. 19, 2013, *available at* http://www2.ljworld.com/news/2013/sep/19/kansas-supreme-court-justice-nuss-says-court-closi/.

94 Bruce Fein & Burt Neuborne, *supra* note 27, at 58.

95 Stephen B. Bright, *supra* note 3, at 308.