

AVOIDING THE APPEARANCE OF IMPROPRIETY: MISSOURI  
AND KANSAS SUPREME COURT DECISIONS ON THE  
CONSTITUTIONALITY OF CAPS ON NONECONOMIC  
DAMAGES DEMONSTRATE THE NEED FOR OBJECTIVE  
PROCEDURES IN THE SELECTION OF SPECIAL JUDGES

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In 2012, the supreme courts of Missouri and Kansas staked out opposing positions on the constitutionality of statutory caps on noneconomic damages in personal injury cases. Analysis of the two cases demonstrates the need for objective procedures for selecting temporary, or “special,” judges when a member of a court of last resort is absent. This article first reviews the cases and then examines the implications of the fact that special judges cast crucial votes in both cases. The article calls for the institution of objective procedures for temporary judicial appointments.

In July 2012, the Supreme Court of Missouri overruled a twenty-year-old precedent when it held in *Watts ex rel. Watts v. Lester E. Cox Medical Centers*<sup>1</sup>—a four-to-three decision—that a statutory cap on noneconomic damages in medical malpractice cases violated article I, section 22(a) of the Missouri Constitution’s right to trial by jury.<sup>2</sup> A few months later, in *Miller v. Johnson*,<sup>3</sup> the Kansas Supreme Court upheld Kansas’s statutory cap on noneconomic damages in personal injury cases, including medical malpractice cases, as constitutional.<sup>4</sup> Specifically, the Kansas Supreme Court held that the cap does not violate sections 5 and 18 of the Kansas Constitution’s Bill of Rights providing a right to a jury trial and a right to damages, respectively.<sup>5</sup>

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<sup>1</sup> *Watts ex rel. Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (en banc).

<sup>2</sup> *See id.* at 640.

<sup>3</sup> *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012).

<sup>4</sup> *See id.* at 1121.

<sup>5</sup> *See id.* at 1108, 1113, 1118.

I. MISSOURI: *WATTS* EX REL. *WATTS* V. *LESTER E. COX MEDICAL CENTERS*

A. *Facts*

The plaintiff in *Watts* ex rel. *Watts v. Lester E. Cox Medical Centers* alleged that the defendants' medical malpractice caused disabling brain injuries to a newborn.<sup>6</sup> The jury returned a verdict in favor of the plaintiff and awarded \$1,450,000.00 in noneconomic damages and \$3,371,000.00 in future medical damages.<sup>7</sup> The trial court entered judgment reducing the noneconomic damages award to Missouri Revised Statute section 538.210's \$350,000.00 cap.<sup>8</sup> Lodging several state constitutional challenges to section 538.210's cap, including that it violated the Missouri Constitution's right of trial by jury, the plaintiff appealed.<sup>9</sup> The respondents argued that the Supreme Court of Missouri's 1992 decision in *Adams v. Children's Mercy Hospital*, holding that section 538.210's statutory cap on noneconomic damages did not violate the state constitutional right to a trial by jury, controlled.<sup>10</sup>

B. *Constitutional Right to Jury Trial*

Article I, section 22(a) of the Missouri Constitution provides "[t]hat the right of trial by jury as heretofore enjoyed shall remain inviolate[.]"<sup>11</sup> The *Watts* court explained that this provision "requires analysis of two propositions to determine if the cap imposed by section 538.210 violates the state constitutional right to trial by jury."<sup>12</sup> First, the court had to determine "whether [the] medical negligence action and claim for non-economic damages is included within 'the right of trial by jury as heretofore enjoyed.'"<sup>13</sup> "[H]eretofore enjoyed' means that '[c]itizens of Missouri are entitled to a jury trial in all actions to which they would have been entitled

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<sup>6</sup> *Watts*, 376 S.W.3d at 635.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 635 & n.2.

<sup>10</sup> *Id.* at 637 (citing *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (en banc)). *Adams* was decided by a six-to-one majority, with no dissenting opinion. *Adams*, 832 S.W.2d at 908.

<sup>11</sup> MO. CONST. art. I, § 22(a).

<sup>12</sup> *Watts*, 376 S.W.3d at 637.

<sup>13</sup> *Id.* at 637–38 (quoting MO. CONST. art. I, § 22(a)).

to a jury when the Missouri Constitution was adopted' in 1820."<sup>14</sup> Expounding, the court stated, "[i]n the context of this case, the scope of that right also is defined by common law limitations on the amount of a jury's damage award."<sup>15</sup> Thus, "if Missouri common law [in 1820] entitled a plaintiff to a jury trial on the issue of non-economic damages in a medical negligence action . . . , [the plaintiff] has a state constitutional right to a jury trial on her claim for damages for medical malpractice."<sup>16</sup> Second, the court had to determine whether application of section 538.210's cap on noneconomic damages left the right to a jury trial "inviolable."<sup>17</sup>

Analyzing the first proposition—whether the plaintiff had a right to a jury trial—the *Watts* court assessed the state of Missouri common law (and the English common law upon which it was based) at the time of the adoption of the Missouri Constitution in 1820.<sup>18</sup> Under applicable law, courts provided redress for medical negligence and permitted recovery of noneconomic damages.<sup>19</sup> Reviewing applicable history, the *Watts* court concluded: "civil actions for damages resulting from personal wrongs have been tried by juries since 1820," and "[the plaintiff's] action for medical negligence, including her claim for non-economic damages, 'falls into that category' and is the same type of case that was recognized at common law when the constitution was adopted in 1820."<sup>20</sup> Put simply, the right to a jury trial attaches to the plaintiff's "claim for non-economic damages caused by medical negligence."<sup>21</sup>

The court also determined that Missouri and English common law as of 1820 defined the "scope of [the plaintiff's] right to a jury trial, like the existence of th[at] right[.]"<sup>22</sup> Evaluating select precedent, the Supreme Court of Missouri concluded,

history demonstrates that statutory caps on damage awards simply did not exist and were not contemplated by the common law when the people of Missouri adopted their constitution in 1820 guaranteeing that the right to trial by

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<sup>14</sup> *Watts*, 376 S.W.3d at 638 (quoting *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. 2003) (en banc)).

<sup>15</sup> *Watts*, 376 S.W.3d at 638.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 638–39.

<sup>19</sup> *Id.* at 638.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

jury as heretofore enjoyed shall remain inviolate[,] [and therefore] [t]he right to trial by jury “heretofore enjoyed” was not subject to legislative limits on damages.<sup>23</sup>

Considering the second proposition—whether the right to a jury trial “remain[s] inviolate’ when a statutory cap requires courts to reduce the jury’s verdict”—the *Watts* court explained: “if the statutory cap changes the common law right to a jury determination of damages, the right to trial by jury does not ‘remain inviolate’ and the cap is unconstitutional.”<sup>24</sup> One of a “jury’s primary functions is to determine the plaintiff’s damages” so “the amount of non-economic damages is a fact that must be determined by the jury and is subject to the protections of the article I, section 22(a) right to trial by jury.”<sup>25</sup>

The *Watts* court also explained: “Once the right to a trial by jury attaches . . . the plaintiff has the full benefit of that right free from the reach of hostile legislation.”<sup>26</sup> Because section 538.210’s cap on a jury’s award of non-economic damages “operates wholly independent of the facts of the case,” it “directly curtails the jury’s determination of damages and, as a result, necessarily infringes on the right to trial by jury when applied to a cause of action to which the right to jury trial attaches at common law.”<sup>27</sup> Since Missouri’s common law in 1820 “did not provide for legislative limits on the jury’s assessment of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on the evidence in the case.”<sup>28</sup>

The court’s determination of section 538.210’s constitutional invalidity resulted in its conclusion that *Adams* violates article I, section 22(a)’s right to a jury determination of damages.<sup>29</sup> The *Watts* court rejected the *Adams* court’s reasoning that section 538.210’s cap is substantive law, not a fact issue, and that it “does not limit the jury’s constitutional role in determining damages because the jury remains free to award damages consistent with the evidence in the case” and the trial court applies the cap after the jury fulfills its constitutional duty of determining damages.<sup>30</sup>

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<sup>23</sup> *Id.* at 639.

<sup>24</sup> *Id.* at 638.

<sup>25</sup> *Id.* at 639–40.

<sup>26</sup> *Id.* at 640.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 641.

<sup>30</sup> *Id.* at 641. See also *id.* at 649–50 (Russell, J., concurring in part and dissenting in part)

### C. *Dissent—Majority Leaps into a New Era of Law*

In a strong dissent, the Honorable Mary R. Russell, joined by Judges Breckenridge and Price, argued that *Adams* controls the decision and that “the majority opinion overrules this Court’s well-reasoned, longstanding precedent in *Adams* without persuasive justification.”<sup>31</sup> Judge Russell noted that *Adams* has been the law in Missouri for twenty years, and it is “squarely in line with other jurisdictions that have addressed the constitutional validity of statutory caps on noneconomic damages.”<sup>32</sup> Thus, she wrote, “[t]he majority opinion reflects a wholesale departure from the unequivocal law of this state and leaps into a new era of law.”<sup>33</sup>

### D. *Implications of Watts*

With the *Watts* decision, Missouri switched to the opposing side of a split among states on the issue of whether statutory caps on noneconomic damages violate an individual’s constitutional right to a jury trial.<sup>34</sup> The decision gutted a major component of the comprehensive tort reform passed by the Missouri legislature in 2005,<sup>35</sup> and made Missouri a much more hospitable venue for medical malpractice claims, particularly when compared to the decision of the Kansas Supreme Court a few months later in *Miller v. Johnson*.

## II. KANSAS: *MILLER V. JOHNSON*

### A. *Facts*

The plaintiff in *Miller v. Johnson* sued her physician for medical malpractice after the physician erroneously removed her left ovary

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(discussing the majority’s rationale).

<sup>31</sup> *Id.* at 649.

<sup>32</sup> *Id.* at 650, 652.

<sup>33</sup> *Id.* at 649.

<sup>34</sup> *See id.* at 640–41 (majority opinion) (noting the majority’s accord with decisions of the supreme courts of Washington, Oregon, Alabama, and Florida); *id.* at 650–52 (Russell, J., concurring in part and dissenting in part) (noting the majority’s discord with decisions of the supreme courts of Nebraska, Idaho, Ohio, Maryland, Virginia, and other jurisdictions that mirror the rationale underlying the *Adams* decision); *see also* Learmonth v. Sears, Roebuck & Co., 710 F.3d 249, 259–64 (5th Cir. 2013) (rejecting an argument based on *Watts* and upholding a Mississippi cap on non-economic damages, in part on the basis of the *Adams* rationale).

<sup>35</sup> *See* Tort Reform, H.B. 393, sec. 538.210, 2005 Mo. Laws 641, 651–52.

instead of her right ovary.<sup>36</sup> After trial, the jury found the physician completely at fault and awarded the plaintiff \$759,679.74 in total monetary damages, including \$575,000.00 in noneconomic damages.<sup>37</sup> The district court reduced the noneconomic damages award to \$250,000.00 as required by the limitations in Kansas Statute Annotated section 60-19a02.<sup>38</sup> Both sides appealed, and the Kansas Supreme Court transferred the case from the court of appeals.<sup>39</sup> On appeal, the plaintiff raised four state constitutional challenges to the validity of section 60-19a02.<sup>40</sup>

### *B. Constitutional Challenges and Analysis*

First, the plaintiff argued that section 60-19a02 violates section 5 of the Kansas Constitution's Bill of Rights, which provides: "The right of trial by jury shall be inviolate."<sup>41</sup> The *Miller* court acknowledged that: (a) "[s]ection 5 preserves the jury trial right as it historically existed at common law when our state's constitution came into existence[;]" (b) medical malpractice claims were historically triable to a jury; and (c) damages, including noneconomic damages, were historically a question of fact for Kansas juries in common-law tort actions.<sup>42</sup>

Without much discussion of the historical nature of jury trials in medical malpractice cases or noneconomic damages cases, the Kansas Supreme Court determined that section 60-19a02 does indeed "encroach[ ] upon the rights preserved by Section 5," but such encroachment "does not necessarily render K.S.A. 60-19a02 unconstitutional under Section 5."<sup>43</sup> Section 5 of the Kansas Constitution's Bill of Rights mirrors article 1, section 22(a) of the Missouri Constitution, under which the Supreme Court of Missouri saw fit to declare a statutory cap on noneconomic damages as an unconstitutional infringement on the right to a jury trial.<sup>44</sup> In a strong dissent, Justice Beier took issue with the *Miller* court majority's failure to discuss the meaning of the term "inviolate" as

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<sup>36</sup> *Miller v. Johnson*, 289 P.3d 1098, 1105 (Kan. 2012).

<sup>37</sup> *Id.* at 1106.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 1108; KAN. CONST. BILL OF RIGHTS § 5.

<sup>42</sup> *Miller*, 289 P.3d at 1108–09.

<sup>43</sup> *Id.* at 1109.

<sup>44</sup> *See Watts ex rel. Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 637–41 (Mo. 2012) (en banc).

used in the Kansas Constitution.<sup>45</sup> The majority, however, went on to further analyze the plaintiff's section 5 challenge in conjunction with her next argument.

Second, the plaintiff argued section 60-19a02 violates section 18 of the Kansas Constitution's Bill of Rights, which provides: "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay."<sup>46</sup> Specifically, she argued that by placing a \$250,000.00 ceiling on noneconomic damages, the cap denies her a remedy guaranteed by Section 18.<sup>47</sup> Kansas courts interpret section 18 to provide "an injured party . . . a constitutional right to be made whole and a right to damages for economic and noneconomic losses suffered."<sup>48</sup>

Acknowledging that the "legislature may modify the common law in limited circumstances without violating Section 5," the Kansas Supreme Court held that a quid pro quo analysis applies to both Section 5 and Section 18 claims.<sup>49</sup> A quid pro quo analysis is a two-step examination.<sup>50</sup> First, a court must "determine whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare."<sup>51</sup> Second, the court must "determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue."<sup>52</sup> In her dissent, Justice Beier strenuously objected to the use of a quid pro quo analysis to the plaintiff's section 5 claim, noting that none of the nineteen states that have considered whether a statutory damages cap violates the right to a jury trial has applied a quid pro quo analysis to the determination.<sup>53</sup>

Employing the first step of the quid pro quo analysis, the *Miller* court held section 60-19a02's noneconomic damages cap is reasonably necessary in the public interest to promote the public

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<sup>45</sup> *Miller*, 289 P.3d at 1137–38 (Beier, J., dissenting).

<sup>46</sup> *Id.* at 1113 (majority opinion) (quoting KAN. CONST. BILL OF RIGHTS § 18) (internal quotation marks omitted).

<sup>47</sup> *Miller*, 289 P.3d at 1113.

<sup>48</sup> *Id.* (quoting *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541, 553 (1990)) (internal quotation marks omitted).

<sup>49</sup> *Miller*, 289 P.3d at 1109, 1112–14.

<sup>50</sup> *Id.* at 1114.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1138 (Beier, J., dissenting).

welfare because “[t]he potential [for the cap to lower insurance premiums] is enough.”<sup>54</sup> Applying the second step and noting that section 60-19a02 “unquestionably functions to deprive [the plaintiff]

of a portion of her noneconomic damages,” the *Miller* court pointed out that the plaintiff did receive compensation for her loss, finding it noteworthy that section 60-19a02 does not impose a cap on total damages.<sup>55</sup> The Kansas Supreme Court found “the deprivation caused by K.S.A. 60-19a02, although very real, [to be] limited in its scope.”<sup>56</sup> Further, the court found that the Kansas Health Care Provider Insurance Availability Act, which mandates that all health care providers maintain professional liability insurance in certain amounts, in addition to the Kansas Health Care Stabilization Fund’s excess insurance coverage requirement, “make the prospects for recovery of at least the statutory minimums directly available as a benefit to medical malpractice plaintiffs when there is a finding of liability,” which is “something many other tort victims do not have.”<sup>57</sup>

Based on precedent finding Kansas’s statutory mandatory insurance and excess coverage requirements to provide an adequate statutory remedy for the legislature’s modification of common-law remedies, the *Miller* court then determined that although the legislature has not increased the cap to adjust for inflation, such failure has not “sufficiently diluted the substitute remedy to render the present cap clearly unconstitutional when viewed in light of the other provisions” benefiting medical malpractice plaintiffs.<sup>58</sup> Accordingly, the *Miller* court held that the legislature has substituted an adequate remedy for the modification of section 5 and section 18’s constitutional protections, thereby rendering section 60-19a02 non-violative of those sections.<sup>59</sup>

For her third constitutional challenge to section 60-19a02, the plaintiff argued the cap violates the equal protection provision of section 1 of the Kansas Constitution Bill of Rights, which provides: “All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.”<sup>60</sup>

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<sup>54</sup> *Id.* at 1115 (majority opinion).

<sup>55</sup> *Id.* at 1116.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 1116–17.

<sup>58</sup> *Id.* at 1118.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (quoting KAN. CONST. BILL OF RIGHTS § 1) (internal quotation marks omitted).

Section 1 is only an issue if there is different treatment among similarly situated individuals.<sup>61</sup> The plaintiff argued section 60-19a02's cap treats women and the elderly differently.<sup>62</sup> Noting that an equal protection challenge to a facially neutral statute requires a disparate impact traced to a discriminatory purpose—and finding no such discriminatory purpose—the *Miller* court rejected the plaintiff's disparate impact challenge.<sup>63</sup>

The plaintiff also asserted an equal protection violation claiming the statutory cap treats personal injury plaintiffs differently based on whether their noneconomic damages are greater or less than \$250,000.<sup>64</sup> Finding this assertion true, the Kansas Supreme Court had to determine the appropriate level of scrutiny to apply to the classification.<sup>65</sup> While noting that Kansas courts have never held the right to a jury trial under section 5 and the right to a remedy under section 18 to be fundamental rights for equal protection purposes (therefore precluding application of a strict scrutiny standard), the *Miller* court determined that because section 60-19a02 is “economic legislation,” the rational basis test applies.<sup>66</sup> Thus, section 60-19a02's statutory classification must bear some rational relationship to a valid legislative purpose.<sup>67</sup> After applying a rational basis analysis, the Kansas Supreme Court concluded: “We hold that it is ‘reasonably conceivable’ under the rational basis standard that imposing a limit on noneconomic damages furthers the objective of reducing and stabilizing insurance premiums by providing predictability and eliminating the possibility of large noneconomic damages awards.”<sup>68</sup>

For her final constitutional attack on section 60-19a02, the plaintiff argued the statutory cap violates the doctrine of separation of powers because the cap “abolishes the judiciary's authority to order new trials and robs judges of their judicial discretion by functioning as a statutory remittitur effectively usurping the court's power to grant remittiturs.”<sup>69</sup> The Kansas Supreme Court rejected

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<sup>61</sup> *Miller*, 289 P.3d at 1119.

<sup>62</sup> Brief of Plaintiffs/Appellants at 33–35, *Miller*, 289 P.3d 1098 (Kan. 2012) (No. 08-99818-A), 2008 WL 5240461, at \*14–15.

<sup>63</sup> *Miller*, 289 P.3d at 1119 (citing *Montoy v. State*, 120 P.3d 306, 308 (Kan. 2005)).

<sup>64</sup> *Miller*, 289 P.3d at 1119.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 1120.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 1121.

<sup>69</sup> *Id.*

this challenge, explaining in part that while the cap prevents a trial court from awarding more than \$250,000.00, it does not prevent the trial court from granting a new trial under the rules of civil procedure.<sup>70</sup>

### C. Implications of *Miller*

The *Miller* decision brings Kansas in line with the numerous other states that have upheld caps on noneconomic damages as constitutional,<sup>71</sup> but into direct conflict with its neighbor, Missouri.<sup>72</sup> In this new environment, observers will be watching for plaintiffs' lawyers to concoct new and creative arguments to bring Kansas medical malpractice defendants into court in Missouri. The now-stark difference between the two states will provide an interesting laboratory for studying the effects of noneconomic damages caps in medical malpractice cases on plaintiffs, defendants, medical professionals, insurance providers, and the judiciary.

### III. THE DISPOSITIVE INFLUENCE OF SPECIAL JUDGES AND IMPLICATIONS FOR THEIR SELECTION

Despite their divergent outcomes, *Watts* and *Miller* also share a dubious distinction: they both illustrate the need for reform in the selection of special or temporary judges. In each of the two cases, one member of the seven-member court recused himself, and a special judge was appointed to replace him for that single case.<sup>73</sup> In *Miller*, the special judge became the fourth judge in a four-to-two majority upholding the constitutionality of a cap on noneconomic damages.<sup>74</sup> In *Watts*, the special judge became the fourth judge—the deciding vote—in a four-to-three majority invalidating such a

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<sup>70</sup> *Id.* at 1123.

<sup>71</sup> See *Watts ex rel. Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 650–52 (Mo. 2012) (en banc) (Russell, J., concurring in part and dissenting in part) (listing courts that have upheld caps on noneconomic damages).

<sup>72</sup> See *id.* at 646, 648 (majority opinion).

<sup>73</sup> Order, *Watts ex rel. Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633 (Mo. 2012) (No. SC91867) (order assigning the Honorable Sandra C. Midkiff as a Special Judge of the Supreme Court of Missouri to hear *Watts v. Lester E. Cox Medical Centers*, signed by Chief Justice Richard B. Teitelman) [hereinafter *Watts Order*]; Order, *Miller v. Johnson*, 289 P.3d 1098 (Kan. 2012) (No. 99818) (order assigning the Honorable David S. Knudson to serve temporarily on the Kansas Supreme Court to hear *Miller v. Johnson*, signed by Chief Justice Lawton R. Nuss) [hereinafter *Miller Order*].

<sup>74</sup> *Miller*, 289 P.3d at 1104.

cap and overruling a twenty-year-old precedent.<sup>75</sup> Considering the influence these special judges exercised in landmark cases on a divisive issue,<sup>76</sup> one might expect that they were selected by a transparent, impartial procedure, assuring litigants, the legal community, and the general public of the fairness of the judicial process. To the contrary, both courts selected the special judges by unexplained, unreviewable and discretionary processes, creating at least an appearance of impropriety for both courts.

In both *Watts* and *Miller*, the special judge replaced a recused judge who had been appointed by a governor of the *opposite* political party,<sup>77</sup> thereby altering the political composition of the court.<sup>78</sup> In both cases, the chief justice who signed the order appointing the special judge was appointed by a governor of the *same* political party—in fact, by the same governor—as the special judge.<sup>79</sup> In both cases, the chief justice (and whoever else might have been involved in the selection decision) knew which case the special judge would hear.<sup>80</sup> In both cases, both the appointing chief justice and the appointee special judge joined the majority opinion (in fact, in *Watts*, the Chief Justice authored the majority opinion), which enshrined a political position traditionally associated with the party of the governor who appointed them. And in *Watts*, the Chief Justice appointed a trial court judge rather than selecting one of the thirty-two state appellate judges.<sup>81</sup>

<sup>75</sup> *Watts*, 376 S.W.3d at 634.

<sup>76</sup> A judge appointed temporarily typically exercises the same degree of authority as a regularly-appointed judge. See MO. SUP. CT. R. 11.02 (2014) (“A judge or commissioner so transferred, during the period designated, shall have the same powers and responsibilities as a judge of the court or district to which he is transferred.”); *Medlock v. Leathers*, 842 S.W.2d 428, 432 (Ark. 1992) (“[A]ny opinion of this court involving one or more Special Justices shall bear the same precedential value as any other.”).

<sup>77</sup> In *Watts*, Judge Sandra C. Midkiff, a Democratic appointee, replaced recused Judge Zel M. Fischer, a Republican appointee. In *Miller*, Judge David S. Knudson, a Republican appointee, replaced recused Justice Eric S. Rosen, a Democratic appointee.

<sup>78</sup> This conclusion assumes a correlation between the political party of the appointing governor and the political persuasion of the judge. While it is certainly not a 100% reliable correlation, ample evidence shows that governors tend to choose judges who share their political convictions. See, e.g., Laura Denvir Stith & Jeremy Root, *The Missouri Nonpartisan Court Plan: The Least Political Method of Selecting High Quality Judges*, 74 MO. L. REV. 711, 736 (2009) (“Governors, of course, can and typically do choose judges whom they believe to be of their own party . . .”).

<sup>79</sup> Missouri Chief Justice Richard B. Teitelman and Judge Sandra C. Midkiff were both appointed by Democratic Governor Robert L. Holden. Kansas Chief Justice Lawton R. Nuss and Judge David S. Knudson were both appointed by Republican Governor William P. Graves.

<sup>80</sup> See *Watts Order*, *supra* note 73; *Miller Order*, *supra* note 73.

<sup>81</sup> See *Meet Your Missouri Judges*, MO. COURTS, [www.courts.mo.gov/page.jsp?id=630](http://www.courts.mo.gov/page.jsp?id=630) (last

These remarkable factual scenarios cast a pall of partisanship on the *Watts* and *Miller* decisions, but they still would not have any significant constitutional implications but for one final fact: in both cases, the appointing court had unfettered discretion to select the special judge and no obligation to explain its process or criteria, either before- or after-the-fact. No written procedure governs the appointment of special judges to either the Supreme Court of Missouri or the Kansas Supreme Court beyond blanket authorizations for each court to appoint a temporary judge when one is needed.<sup>82</sup> The two supreme courts exercise unconstrained discretion to fill—or not—any vacant spot, without offering any rationale for their decisions.<sup>83</sup> No prescribed decision procedure exists for choosing special judges; no rules constrain either court's discretion; and no protocol requires that either court provide an explanation of its decisions.

Of course, the absence of transparency or accountability does not conclusively demonstrate impartiality or political maneuvering in the appointment of special judges. Nevertheless, the opacity of the selection process coupled with the arguably partisan outcomes in *Watts* and *Miller* present a serious credibility problem for the Supreme Court of Missouri and the Kansas Supreme Court. At the very least, the outcomes coupled with the opaque and discretionary processes used to select temporary judges give critics of the decisions fodder for accusations of political maneuvering. But more than that, the circumstances of *Watts* and *Miller* bring into stark relief the substantial risk of abuse associated with special judge

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visited Oct. 11, 2014). This is the number of judges sitting on the Missouri Court of Appeals at the time of publication, not at the time that *Watts* was heard, but it is a reasonable approximation of the number of appellate judges at that time.

<sup>82</sup> See, e.g., MO. CONST. art. V, § 6 (“The supreme court may make temporary transfers of judicial personnel from one court or district to another as the administration of justice requires, and may establish rules with respect thereto.”); KAN. CONST. art. 3, § 6(f) (“The supreme court may assign a district judge to serve temporarily on the supreme court.”); KAN. STAT. ANN. § 20-2616 (2013) (“Designation and assignment of a retired justice or judge in connection with any matter pending in the supreme court shall be made by the supreme court.”); KAN. STAT. ANN. § 20-3002(c) (2012) (“The supreme court may assign a judge of the court of appeals to serve temporarily on the supreme court.”); MO. SUP. CT. R. 11.07 (2014) (“This Court may call for temporary duty any eligible retired judges or commissioners to serve in any appellate or circuit court when this Court finds the administration of justice so requires.”).

<sup>83</sup> See, e.g., *Watts Order*, *supra* note 73 (offering no explanation of the court's rationale for appointing Judge Midkiff); *Miller Order*, *supra* note 73 (offering no explanation of the court's rationale for appointing Judge Knudson); *State v. Qualls*, 298 P.3d 311, 313 (Kan. 2013) (decided by six judges); *Mo. Roundtable for Life v. State*, 396 S.W.3d 348, 350 (Mo. 2013) (en banc) (decided by six judges).

selection processes. Any process that gives judges unconstrained discretion to make unreviewable decisions that could have a direct impact on case outcomes offends the principles of impartiality and accountability underlying our judiciary system.<sup>84</sup> Missouri and Kansas's selection processes for special judges allow the members of each state's supreme court to exercise virtually unfettered discretion.<sup>85</sup> Moreover, they call for the exercise of such broad discretion in a context where the potential for influencing the outcome of a case is substantial: where the selecting judges are familiar with both the nature of the case to be considered and relevant personal characteristics of the candidates.<sup>86</sup> Giving judges such unchecked discretion contravenes their ethical obligation to "act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and [to] avoid impropriety and the appearance of impropriety."<sup>87</sup>

In light of the flaws of the current selection process, the Supreme Court of Missouri and the Kansas Supreme Court, and indeed all state courts of last resort,<sup>88</sup> should adopt a transparent and non-discretionary procedure for appointing special judges that eliminates the risk of abuse and the appearance of impropriety. Given their broad discretion under their governing statutes and rules, the courts themselves could eliminate the risk of strategic appointments altogether by devising a non-discretionary, self-executing procedure for appointing special judges. For example, in Missouri, where the intermediate appellate court is divided into

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<sup>84</sup> Cf. Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 361 (2004) (arguing that an analogous power exercised by the Chief Justice of the United States is in tension with fundamental principles enshrined in the United States Constitution).

<sup>85</sup> See *id.* at 376 ("[J]udges' discretion is arguably constrained—both by the bounds of precedent and logic and also by a requirement of consistency with their own previously expressed statements.")

<sup>86</sup> See *id.* at 379–80 (arguing that the risk of strategic use of the judicial appointment power is greatest where the Chief Justice is able to observe relevant differences among candidate judges and match those characteristics to the kind of case that the appointed judge will be considering).

<sup>87</sup> MO. SUP. CT. R. 2-1.2 (2014); accord KAN. SUP. CT. R. 601B, Canon 1, Rule 1.2 (2013).

<sup>88</sup> Missouri and Kansas are not the only states in which members of the court of last resort enjoy broad and opaque discretion in the selection of special judges to sit alongside them. See, e.g., W. VA. CONST. art. VIII, § 8 (granting the Chief Justice of the Supreme Court of Appeals of West Virginia the power to recall retired judges for temporary assignment to the Supreme Court of Appeals "with the approval of the supreme court of appeals"); MISS. CODE ANN. § 9-1-105(1) (2013) (granting the Chief Justice of the Mississippi Supreme Court the power to appoint special judges with "the advice and consent of a majority of the justices").

three districts,<sup>89</sup> the chief judges of those districts could take turns sitting as special judges in the Supreme Court of Missouri, in a rotation determined by seniority or some other objective criterion. For that matter, in any state, the full roster of appellate court judges could participate in a special judge rotation, whether in order of seniority or by a random selection procedure.<sup>90</sup> Such a system should not be unduly complex or difficult to administer,<sup>91</sup> particularly when weighed against the value of having a transparent, impartial procedure for selecting judges to hear cases that—like *Watts* and *Miller*—have a profound and lasting impact on a state’s future.

Whatever alternative method may be devised, removing discretionary appointment power from a small number of judges—judges who themselves are members of the reviewing court and who have foreknowledge of both the case and the special judge candidates—would enhance the perceived legitimacy of decisions in which special judges are involved and reduce the exposure of the courts to accusations of politicization. Moreover, by eliminating even the appearance of impropriety, it would enhance public confidence in the integrity and impartiality of the courts.

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<sup>89</sup> MO. CONST. art. V, § 13.

<sup>90</sup> See Ruger, *supra* note 84, at 389 (“[R]andom selection . . . creates a veil in the assignment mechanism that avoids the strategic dangers of [allowing the Chief Justice of the United States to unilaterally appoint federal judges to specialized courts] . . .”).

<sup>91</sup> In fact, automatic appointment procedures are common throughout federal and state court systems. See, e.g., 28 U.S.C. § 45(a) (2012) (establishing a seniority system for the designation of chief judges in the federal circuit courts); KAN. CONST. art. 3, § 2 (“The justice who is senior in continuous term of service shall be chief justice, and in case two or more have continuously served during the same period the senior in age of these shall be chief justice.”); MO. CT. OPERATING R. 24.01(a) (2014) (“The [election] panel in each district shall be composed of the chief judge and the two active judges of the district who have served the longest continuous time as a judge on the court and are available to consider the petition immediately.”).