THE ONLY VOTES THAT COUNT: THE KANSAS SUPREME COURT APPLIES COMMON LAW, NOT COMMON SENSE, TO INVALIDATE BOARD OF EDUCATION ELECTIONS

[*UNIFIED SCHOOL DISTRICT NUMBER 501 V. BAKER*, 269 KAN. 239, 6 P.3D 848 (2000)]

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> *"Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."*[1]

I. INTRODUCTION

Voters across the country learned during the 2000 presidential election that American courts stand ready to intervene when the outcome of an election is in doubt.[2] The Kansas Supreme Court has gone a step further, showing itself willing to intervene even when the vote tally is not disputed. In 1999, the voters of Unified School District Number 501, Shawnee County, Kansas elected Linda Baker, a teacher employed by the district, to a position on the board of education.[3] In *Unified School District Number 501 v. Baker*,[4] the Kansas Supreme Court invalidated the will of the voters, holding that where the legislature has not enacted specific legislation with respect to the holding of dual offices, teachers are excluded from board service by "the common-law doctrine of incompatibility of office."[5]

Although the specific question of the case as framed to the court was whether a person "may hold both positions, teacher and board

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 280 (A. A. Knopf 1985) (1835).
2. *See generally* Bush v. Gore, 531 U.S. 98 (2000).
3. *See* Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 240, 6 P.3d 848, 849 (2000).
4. 269 Kan. 239, 6 P.3d 848 (2000).
5. *Id.* at 252, 6 P.3d at 856.

member,"[6] in actuality the analysis centered on two very specific questions: whether any provision of the Kansas Statutes and/or local board policy precludes a teacher from serving on the Board of the district which employs her and, if not, whether the common-law doctrine of incompatibility of office precludes such service.[7] Certainly a third, more sweeping issue underlies the decision of this case. May a court impose provisions upon a statute that the legislature has repeatedly refused to enact?[8] The Kansas Supreme Court presently answers this question in the affirmative.[9]

The decision in this case transcends the concerns of the parties, the patrons of U.S.D. 501, and the educational system of the state of Kansas in general. By refusing to find legislative intent in the construction of the statutes in question and in the legislature's repeated decision not to amend them,[10] the court has unfairly overruled Kansas voters in the political arena and has assumed a role properly reserved to the legislature by the Kansas Constitution.[11]

II. CASE DESCRIPTION

Linda Baker began full-time employment as a teacher for Unified School District Number 501, Shawnee County, Kansas in 1984.[12] In 1999, she campaigned for and won an at-large seat on the district's board of education.[13] While still under contract to the district as a certified teacher, she took her position on the school board on July 1, 1999, and served for nearly a year, pending the outcome of the board's declaratory judgment action challenging her right to hold both positions simultaneously.[14] In addition to claiming that state law prohibited a teacher from holding a position on the board of education in the district in which she was employed, the board questioned "whether either Kansas law or Board policy permit[ted] payment of Baker's teaching salary while she serve[d] on the board."[15]

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6. *Id.* at 240, 6 P.3d at 849.
7. *See id.* at 241, 6 P.3d at 850.
8. *See id.* at 242, 6 P.3d at 850-51 (listing by bill number the various failed attempts to enact legislation prohibiting teachers from service on the school boards of their employing districts).
9. *See id.* at 242, 6 P.3d at 850-51.
10. *See id.* at 246, 6 P.3d at 853.
11. *See* KAN. CONST. art. II, § 18 (stating "The legislature may provide for the election or appointment of all officers and the filling of all vacancies not otherwise provided for in this constitution.").
12. *See U.S.D. 501*, 269 Kan. at 240-41, 6 P.3d at 850.
13. *See id.* at 240, 6 P.3d at 849. The Appellee's brief points out that "[t]he public had knowledge through newspaper advertisements that Baker was a district employee and either determined to vote for her, at least in part, because of or in spite of her status as an employee." Brief of Appellee at 14, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d at 848 (2000) (No. 99-83805-A) (internal citations to the record omitted).
14. *See U.S.D. 501*, 269 Kan. at 240, 6 P.3d at 850.
15. *Id.* at 240, 6 P.3d at 849.

Baker won summary judgment from the district court, which held that she could retain both positions and still receive her teaching salary.[16] The district court noted that although certain persons were specifically prohibited from holding positions on school boards, no statute barred teachers from holding such positions.[17] While superintendents, principals, board treasurers, and clerks of the board were excluded by legislative enactment,[18] no legislative provision expressly excluded teachers from service.

The court also held that the common-law incompatibility of office doctrine had been "supplanted by legislative enactment."[19] In reaching this conclusion, Judge Luckert applied the maxim, "*expressio unius est exclusio alterius*,"[20] a doctrine which suggests that "the inclusion of one thing implies the exclusion of another."[21] In other words, by expressly prohibiting superintendents, principals, clerks and treasurers from board service, but not enacting such a prohibition for teachers, the legislature had spoken upon the issue, demanding deference from the court.

The district court's final holding was that local board policy placing restrictions on board service was "*ultra vires* and void as an impermissible attempt to delineate who is qualified to serve as a member of the Board."[22] This holding was grounded in a provision of the Kansas Constitution, which reserves decisions regarding qualifications for public office to the legislature.[23]

U.S.D. 501 appealed the summary judgment verdict.[24] Before the court of appeals could hear the case, the Kansas Supreme Court moved to transfer it for consideration by the highest court.[25]

III. BACKGROUND

A. The Role of the Legislature

Dual office holding presents, if not a clear existence of impropriety, at least an appearance of it.[26] Prohibitions against the holding of dual

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16. *See id.*
17. *See id.* at 241, 6 P.3d at 850.
18. *See id.* at 243, 6 P.3d at 851 (citing KAN. STAT. ANN. §§ 72-8202b, 72-8202c, and 72-8202d).
19. *Id.* at 241, 6 P.3d at 850.
20. *Id.* at 243, 6 P.3d at 851.
21. Brief of Appellee at 5, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A).
22. *U.S.D. 501*, 269 Kan. at 241, 6 P.3d at 850.
23. *See id.* at 243, 6 P.3d at 851 (citing KAN. CONST. art. II, § 18).
24. *See U.S.D. 501*, 269 Kan. at 240, 6 P.3d at 849.
25. *See id.* Transfer by the court's motion grants jurisdiction under Kansas Statutes Annotated § 20-318(c). Although the court apparently saw an immediate need for a definitive resolution of the issues presented in this case, analysis and decision by the court of appeals would have lent another valuable layer of insight to the discussion.
26. *See* Patricia E. Salkin, *Municipal Ethics Remain a Hot Topic in Litigation: A 1999 Survey of Issues in Ethics for Municipal Lawyers*, 14 BYU J. PUB. L. 209, 219 (2000).

offices are intended to promote certain governmental interests, such as "(1) preventing public servants from accumulating many positions, resulting in a 'pyramid of power'; (2) avoiding direct or indirect pecuniary conflicts; (3) preventing employees from asserting control over their supervisors through their elected positions; and (4) assuring that public servants exercise their duties with undivided loyalty."[27]

Where such conflicts pose the greatest threat to the public welfare, specific constitutional or legislative provisions prohibit the holding of dual offices.[28] Perhaps the most demonstrative example of such a prohibition in Kansas is a constitutional limitation upon supreme court and district court judges, who may not "hold any other office of profit or trust under the authority of the state."[29] Some states, in order to prevent the potential for conflicts, have enacted statutes codifying the common law doctrine of incompatibility of office.[30] Many of these statutes also provide tests to apply to the facts of a dispute in order to determine whether multiple office holding in the particular circumstances is acceptable.[31] Kansas has codified the incompatibility of office doctrine, though its statute provides no test of applicability.[32]

Because setting qualifications for public office holders is within the express province of the legislature,[33] it is generally left to the legislature to declare incompatibility between offices where it recognizes the potential for serious conflicts.[34] The Kansas legislature has done this by expressly precluding certain officials from holding secondary offices that

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27. Acevedo v. City of N. Pole, 672 P.2d 130, 135 (Alaska 1983).

28. *See* Abry v. Gray, 58 Kan. 148, 149, 48 P. 577, 578 (Kan. 1897) (stating "[I]t is apparent that both the framers of the Constitution and the Legislature have had under consideration the question of incompatible offices and have provided against one person holding two offices in those cases where it has seemed to them most detrimental to the public welfare.").

29. KAN. CONST. art. III, § 13.

30. *See*, *e.g.*, MICH. COMP. LAWS ANN. § 15.181(b) (West 2000).

31. *See* Salkin, *supra* note 26, at 221 (2000) (referring to Michigan's Incompatible Public Offices Act). The act limits its definition of incompatible office to "public offices held by a public official which . . . results in any of the following with respect to those offices held: (i) The subordination of 1 public office to another; (ii) The supervision of 1 public office by another; (iii) A breach of duty of public office." MICH. COMP. LAWS ANN. § 15.181(b) (West 2000).

32. *See* KAN. STAT. ANN. § 25-123 (West 1999).

> When a person is simultaneously elected to more than one office, such person may accept any such offices that are not incompatible with any other office accepted by such person. If a person accepts election to incompatible offices, the person shall be deemed to have accepted the office last accepted and to have declined any previously accepted incompatible office.

Id.

A test of the statute's applicability is crucial to promote the policy concerns for which it is enacted. While conflict may be found to exist in many complimentary positions, it may be difficult to discern when those conflicts are such that they may be overcome by careful remedial steps, and when they are so insurmountable that the only logical way to prevent harm to public interests is to prohibit an individual from holding both offices.

33. *See* KAN. CONST. art. II, § 18.

34. *See* Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 252, 6 P.3d 848, 856 (2000) (stating "[t]he legislature holds the trump card to resolve the question before us today [of teachers holding positions on school boards], either by specific authorization or prohibition.").

may conflict with their primary positions.[35] In the context of school administration, for example, the legislature saw sufficient potential for conflict to expressly exclude superintendents, deputy superintendents, supervisors, and principals from holding positions on the board of education.[36] It also excluded clerks of the board[37] and board treasurers[38] from holding such positions. No comparable prohibition expressly prevents teachers from holding office as school board members.

b. The Role of the Courts

Where ambiguity in the law exists, it is the province of the court to resolve the conflict.[39] A related provision of Kansas Statutes Annotated section 72-8202, the act which allows a school board to "appoint other officers and employees to serve at the pleasure of the board,"[40] states that "[n]o member of a board of education shall receive compensation from the school district for any work or duties performed by him."[41] Under a plain-meaning analysis, it may appear that the language of this section precludes teachers, as well as anyone else holding a paid position in the district, from holding a seat on the board.[42] However, it is fundamental that "the intent of the legislature governs, if that intent can be ascertained."[43] Even when the language of a statute appears unambiguous, it is necessary to discern the intent underlying the law not by focusing on a single statutory clause, but through consideration of the clause in the context of the entire act.[44] The court is bound to pursue this course of analysis in order to "reconcile the different provisions so as to make them consistent, harmonious, and sensible."[45]

Examining the statute regarding school board service with these rules in mind, the court has held Kansas Statutes Annotated section 72-8202e inapplicable to teachers[46] in spite of its "any work" provision

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35. *See*, *e.g.*, KAN. STAT. ANN. § 72-8202b(a) (West 1999) (precluding a school superintendent from serving on the board of education for the district which employs him).

36. *See* KAN. STAT. ANN. § 72-8202b (West 1999).

37. *See* KAN. STAT. ANN. § 72-8202c (West 1999).

38. *See* KAN. STAT. ANN. § 72-8202d (West 1999).

39. *See* Kansas Power & Light Co. v. Kansas Corp. Comm'n, 237 Kan. 394, Syl. Par. 2 (1985) (stating "[i]f the statute is ambiguous, the court shall determine the legislative intent of the statute and give it effect, absent a constitutional impediment.").

40. KAN. STAT. ANN. § 72-8202e (West 1999).

41. *Id.*

42. *See* Dir. of Taxation, Dep't of Revenue v. Kansas Krude Oil Reclaiming Co., 236 Ka n. 450, 455, 691 P.2d 1303, 1307 (1984) (defining the strict construction rule: "ordinary words are to be given their ordinary meaning . . . . [A] statute should not be so read as to add that which is not readily found therein or to read out what as a matter of ordinary English language is in it.").

43. Hamilton v. State Farm Fire & Cas. Co., 263 Kan. 875, 879, 953 P.2d 1027, 1031 (1998) (paraphrasing Davey v. Hedden, 260 Kan. 413, 419, 920 P.2d 420, 425 (1996)).

44. *See* Bd. of County Comm'rs v. McGraw Fertilizer Serv., Inc., 261 Kan. 901, 919, 933 P.2d 698, 711 (1997).

45. *Id.*

46. *See* Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 244, 6 P.3d 848, 851 (2000) (agreeing that Kansas Statutes Annotated section 78-8202e only prohibits board members from being

because teachers with tenure do not serve "at the pleasure of the board."[47] Where intent to legislate the issue is not established, the common-law doctrine of incompatibility of office applies.[48] In the absence of a legislative declaration, the court must determine whether the two offices are incompatible under the doctrine.

C. State of the Law Regarding Teachers Serving on Boards of Education

No constitutional or statutory provision specifically prohibits Kansas teachers from serving on the boards of education for the districts in which they teach.[49] An explanation for the lack of directives on this issue may derive from the fact that some states find an incompatibility of office only when a person holds two *offices*, and not in cases where a newly acquired office may conflict with the officeholder's *employment*.[50]

Before the *U.S.D. 501* decision, the issue of teachers' eligibility for board of education service had never been settled in Kansas.[51] Four separate Attorneys General opinions and two opinions of the Governmental Ethics Commission stated differing conclusions as to the propriety of teachers serving on the board under existing Kansas law.[52] Only one of these opinions, Kansas Attorney General Opinion number 75-52, declared teachers ineligible for board service.[53]

Interestingly, the opinion that evoked the greatest response from those opposed to allowing teachers to serve as board members dealt not with the eligibility of teachers to serve on boards of education, but with the eligibility of a bus driver employed by the district to hold a board position.[54] Subsequent to this opinion, the Kansas Association of School

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compensated for serving their functions as members of the board).

47. *Id.* at 244, 6 P.3d at 851.

48. *See U.S.D. 501*, 269 Kan. at 247, 6 P.3d at 853. Where the court finds that the legislature has not exercised its power to enact legislation, the court must resolve conflicts according to common-law principles. For this reason, Baker's initial argument was that the legislature had spoken upon the issue by choosing not to enact a specific prohibition, and that the common law, therefore, should not be applied to determine the outcome of the case. *See id.* at 246, 6 P.3d at 853.

49. *See id.* at 246, 6 P.3d at 852.

50. *See*, *e.g.*, Eldridge v. Sierra View Local Hosp. Dist., 224 Cal. App. 3d 311, 319 (1990) (stating that the incompatibility of office doctrine "has no application when one of the positions is an employment rather than a public office."); Corsall v. Gover, 174 N.Y.S.2d 62, 67 (1958) (stating "[W}here a position is created not by force of law, but by a contract of employment, the employment does not rise to the dignity of an office.") (quoting 140 A.L.R. 1081). *But see* Otradovec v. City of Green Bay, 347 N.W.2d 614, 616 (Wis. 1984) (stating that the doctrine "extends to pos itions of public employment as well as public offices.").

51. *See U.S.D. 501*, 269 Kan. at 241, 6 P.3d at 850.

52. *See* Kan. Att'y Gen. Op. No. 75-52 (1975); *see also* Kan. Att'y Gen. Op. No. 79 -108 (1979); Kan. Att'y Gen. Op. No. 79-301 (1979); Kan. Att'y Gen. Op. No. 91-15 (1991); Gov. Ethics Comm. Op. Nos. 79-12, 79-59.

53. *See U.S.D. 501*, 269 Kan. at 241, 6 P.3d at 850. It is notable that the only other Attorney General's Opinion to directly address the eligibility of teachers to serve on school boards was written subsequently to Kansas Attorney General Opinion Number 75-52, and stated that under then-existing state law, nothing prohibited teachers seeking and holding school board positions. *See* Kan. Att'y Gen. Op. No. 91-15 (1991).

54. *See* Kan. Att'y Gen. Op. No. 79-108 (1979) (stating that the incompatibility of office

Boards began an immediate and persistent effort in the legislature to enact a statute expressly prohibiting teachers from serving on the school boards of their employing districts.[55] Although the issue has been urged eleven times since 1979, the legislature has never adopted the proposed amendment.[56] The most telling of these rejections occurred in 1984, when the House of Representatives rejected Senate Bill 79, which proposed a mandate that "[n]o . . . person appointed under the authority of [section 72-8202e] shall be a member of the board of education. . . ."[57]

Notwithstanding the argument that teachers are not employed under the authority of Kansas Statutes Annotated section 72-8202e,[58] the House's rejection of the proposed amendment suggests an expression of its intent to continue allowing employees paid by the district to serve in the capacity of board member.[59] In the absence of a direct prohibition against teachers serving on boards of education, it is reasonable to conclude that the legislature did not intend to exclude their service.[60] The Kansas Supreme Court has voiced an inclination toward deference to the legislature on this issue by stating, "[w]here the legislature has not expressly precluded a group of persons from holding office, this court does not imply such a prohibition."[61] Having found that the legislature had not spoken upon the issue, however, the court sought guidance in the common law.[62]

D. Incompatibility of Office

The common-law doctrine of incompatibility of office applies where the legislature has not spoken on the holding of dual offices.[63]

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doctrine does not exclude a bus driver from board eligibility). The Attorney General reasoned that the incompatibility of office doctrine applied only to persons holding "two incompatible public offices," and did not "extend to a position which is mere agency or employment." *Id.*

55. *See U.S.D. 501*, 269 Kan. at 242, 6 P.3d at 850.

56. *See id. at 242*, 6 P.3d at 851.

57. Brief of Appellee at 12, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A).

58. *See U.S.D. 501*, 269 Kan. at 246, 6 P.3d at 852 (stating that the revision to Kansas Statutes Annotated section 72-8202e to remove prohibitions against employees serving on the board did not apply to teachers since the 1963 version and the 1973 amendments applied only to employees who serve "at the pleasure of the board," and teachers are not such employees because they have tenure and can only be dismissed for cause).

59. *See* Brief of Appellee at 12, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A).

60. This conclusion seems especially likely when viewed in light of the fact that specific prohibitions have been imposed on other school officials through the statutory scheme of Kansas Statutes Annotated section 72-8202 *et seq.*, and upon considering the legislature's refusal to amend the statute to expressly prohibit teachers from holding office on the board of education.

61. *U.S.D. 501*, 269 Kan. at 246, 6 P.3d at 853 (citing Congdon v. Knapp, 106 Kan. 206, 207, 187 P. 660, 661 (1920); Dyche v. Davis, 92 Kan. 971, 977, 142 P. 264, 267 (1914)).

62. *See U.S.D. 501*, 269 Kan. at 247, 6 P.3d at 853.

63. *See id.* Since Kansas courts had not confronted the issue of board service by teachers employed by the same board, the court sought guidance from other jurisdictions which had considered and resolved the conflict. *See id.* at 250, 6 P.3d at 855. Applying the common law promotes uniformity and, presumably, allows courts to adopt resolutions that have been effective

Kansas courts have applied it to cases in which a city clerk was elected clerk of the district court,[64] and in which an assistant chief food and drug inspector was elected hotel commissioner.[65] The focus of the doctrine is not upon the physical impossibility of performing the tasks associated with both offices, but upon the inconsistency between the unique functions of the two offices.[66]

In *Gilbert v. Craddock*,[67] the Kansas Supreme Court further expanded the doctrine, holding that when a determination was made that a person held two incompatible offices, the acceptance of the second office resulted in the automatic forfeiture of the first.[68] The court has refused to follow the lead of other states, however, in ruling that the doctrine applies only to the holding of dual offices, and not to the holding of an office that may conflict with a person's employment.[69]

The determination of whether two positions are incompatible is to be based on public policy grounds.[70] The supreme court has said the doctrine is to be applied "where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one person to retain both."[71]

IV. ANALYSIS

The issue before the Kansas Supreme Court in *U.S.D. 501* was whether a teacher may serve on the board of education for the district that employs them.[72]

A. The Parties' Arguments

The central dispute between the parties turns on two questions: whether the legislature had spoken to the issue of teachers serving on school boards for the districts in which they are employed,[73] and if it had not, whether the common-law doctrine of incompatibility of office precluded such service.[74]

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elsewhere. In this case, for example, the court found substantial uniformity on the issue in the few jurisdictions that had resolved the issue judicially. *See infra* notes 136-37.

64. *See generally* Abry v. Gray, 58 Kan. 148, 48 P. 577 (1897).

65. *See* Congdon v. Knapp, 106 Kan. 206, 208, 187 P. 660, 661 (1920) (finding no incompatibility of office).

66. *See Abry*, 58 Kan. at 149, 48 P. at 578.

67. 67 Kan. 346, 72 P. 869 (1903).

68. *See id.*, at 362-63, 72 P. at 874 (holding that councilman vacated his seat on the council by accepting the position of mayor).

69. *See* Dyche v. Davis, 92 Kan. 971, 977, 142 P. 264, 266 (1914).

70. *See* Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 248, 6 P.3d 848, 854.

71. *Abry*, 58 Kan. at 149, 48 P. at 578.

72. *See U.S.D. 501*, 269 Kan. at 240, 6 P.3d at 849.

73. *See id.* at 243, 6 P.3d at 851 (stating "[t]he legislature decides who may qualify for public office.").

74. *See id.* at 240, 6 P.3d at 850.

1. U.S.D. 501 Board of Education

The U.S.D. 501 Board of Education contended that concurrently holding positions of teacher and board member was a violation of both Kansas statutory law and the common-law incompatibility of office doctrine.[75] Alternatively, the board contended that if the law permitted Baker to hold both positions, Board policy prevented her from being paid her salary as a teacher.[76] Kansas Statutes Annotated section 72-8202e provides:

> In addition to the officers provided for in this act, the board of education of any school district may appoint other officers and employees to serve at the pleasure of the board. Such officers and employees shall receive compensation fixed by the board. No member of a board of education shall receive compensation from the school district for any work or duties performed by him.[77]

The board argued that by a plain meaning interpretation, the "any work" language of this provision excluded teachers from board service.[78] Following the rule of construction that requires viewing specific provisions of a statute within the context of the entire act, the supreme court disagreed with the board, stating that tenured teachers such as Baker, do "not serve 'at the pleasure of the board.'"[79] In addition, the court stated that the language of the statute addressed only the issue of compensation, not that of eligibility to serve.[80] Having failed to establish that teachers were precluded from board service by statute, the board urged the court to apply the doctrine of incompatibility of office to disqualify Ms. Baker.[81]

As a final argument, the board contended that the doctrine of incompatibility of office required that Baker, having assumed a post on the board, must abandon her conflicting position as a teacher in the district.[82] In seeking declaratory judgment, the board did not allege any

75. *See id.*

76. *See id.* at 241, 6 P.3d at 850 (referring to Board Policy 1050, which says: "[B]oard members of Unified School District No. 501 shall not receive compensation for services rendered as an employee of the school district.") The district court held that this provision was "*ultra vires* and void as an impermissible attempt to delineate who is qualified to serve as a member of the Board." *Id.* The court noted that "[t]he legislature decides who may qualify for public office." *Id.* at 241, 6 P.3d at 851.

77. KAN. STAT. ANN. § 72-8202e (West 1999).

78. Brief of Appellant at 7, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A).

79. *U.S.D. 501*, 269 Kan. at 244, 6 P.3d at 851.

80. *See id.*

81. *See id.* at 241, 6 P.3d at 850. Although the complaint and the Appellant's brief lack a substantial discussion of the "injuries" potential in allowing Baker to serve, the argument seems to center almost solely upon personnel concerns, where a teacher's status as employee may interfere with the board's function as the district's principal employer. *See id.* at 251-52, 6 P.3d at 855-56. The court focused principally upon issues of compensation, hiring and firing, as discussed in cases from other jurisdictions. *See id.* at 251, 6 P.3d at 855.

82. *See id.* at 252, 6 P.3d at 856. Recall that Kansas law supports this assertion. *See* Gilbert v. Craddock, 67 Kan. 346, 350, 72 P. 869, 874 (1903) (holding that a councilman vacates his councilman's

immediate harm, but sought the court's interpretation of the law on the issue in order to disqualify Baker from her position on the board.[83]

2. Baker

Baker's defense of her right to hold a school board office began with an analysis of the statutory provisions describing the composition of a school district's administrative body.[84] She contended that if Kansas Statutes Annotated section 72-8202e were read applying the doctrine of "*expressio unius est exclusio alterius*,"[85] the court should infer that the legislature intended to allow teachers to sit on the school boards of their districts.[86]

She also argued that legislative history indicated the legislature had made a policy choice to allow teachers to hold office as school board members.[87] Baker pointed out that from 1963 to 1973, Kansas Statutes Annotated section 72-1713 stated, "[t]he board shall appoint a clerk and treasurer, and other personnel as needed. Such clerk, treasurer, and other personnel shall not be board members and shall serve at the pleasure of the board."[88]

The "other personnel" language of this provision, which the board claimed barred teachers from board service,[89] was not included when the legislature amended the statute in 1973.[90] Baker viewed this as a clear statement of the legislature's intent to permit district employees to be members of the school board.[91]

Baker's most vehement argument was that the legislature had, in fact, decided whether teachers should be prohibited from serving on the school boards of the districts that employ them, and that the legislature

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position on assumption of the office of mayor).

83. *See U.S.D. 501*, 269 Kan. at 240, 6 P.3d at 849.

84. Brief of Appellee at 4, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P. 3d 848 (2000) (No. 99-83805-A).

85. *Id.* at 5. Literally, "[t]he expression of one thing is the exclusion of the other." BARRON'S LAW DICTIONARY 186 (4th ed. 1996). The doctrine applies to situations where one matter is stated clearly in a statute, while other, related matters that one would expect to be so stated are conspicuously absent. In this case, Baker's argument was that since the statutory language had expressly excluded treasurers, clerks, and school administrators from holding board positions, but had not expressly prohibited teachers from doing so, it logically followed that the legislature intended no such restriction. *See* In re Marriage of Killman, 264 Kan. 33, 37, 955 P.2d 1228, 1231 (1998) (discussing application of the *expressio unius* doctrine in Kansas).

86. *See* Brief of Appellee at 6, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A).

87. *See id.* at 7.

88. *U.S.D. 501*, 269 Kan. at 245, 6 P.3d at 852.

89. *See* Brief of Appellee at 8, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A).

90. *See U.S.D. 501*, 269 Kan. at 245, 6 P.3d at 852.

91. *See* Brief of Appellee at 10, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A) (stating "other personnel" language does not apply to teachers and, therefore, Kansas Statutes Annotated section 72-8202e does not preclude teachers from serving on employing school boards).

had decided against any such restrictions.[92] Since the legislature had considered amendments posing a direct restriction *eleven times*, but had rejected them all, Baker contended that the legislature had expressed its intent, thereby preempting application of the common-law doctrine of incompatibility of office as a bar to her service on the board.[93]

B. Majority Decision

The Kansas Supreme Court concluded that the legislature had not spoken on the issue of whether teachers may serve on the school boards of their employing districts.[94] Although the court agreed with Baker that Kansas Statutes Annotated section 72-8202e did not apply to teachers because teachers served subject to the Tenure Act, and not "at the pleasure of the board,"[95] it disagreed that authorization could be inferred from the lack of a specific prohibition.[96]

Writing for the majority, Justice Six stated, "[w]e should observe legislative inaction with a gimlet eye. Legislative inaction is not necessarily indicative of legislative intent."[97] After determining that no legislation governed the issue, the court applied the common-law doctrine of incompatibility of office.[98] The court cited *Dyche v. Davis*[99] as support for the proposition that Kansas law prohibits the holding of an office incompatible with a position in the employment of the state as well.[100] In *Dyche*, a professor of zoology and taxidermy and curator of birds, mammals and fishes at the University of Kansas was appointed to serve as warden of fish and game,[101] a post that came with a salary.[102] Although the court did not ultimately hold the two positions incompatible,[103] the court did hold that the incompatibility doctrine applied, even though the professor did not hold two public offices.[104] The *U.S.D. 501* court stressed that the *Dyche* holding was not limited to

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92. *See U.S.D. 501*, 269 Kan. at 246, 6 P.3d at 853.

93. *See id. See also*, Bd. of County Comm'rs v. Cent. Air Conditioning Co., 235 Kan. 977, 981, 683 P.2d 1282, 1285 (1984); Abry v. Gray, 58 Kan. 148, 149, 48 P. 577, 578 (1897).

94. *See U.S.D. 501*, 269 Kan. at 247, 6 P.3d at 853 (holding "[b]ecause the legislature has neither specifically authorized nor prohibited teachers from serving as members on an employing board, we must analyze the issue under the common-law doctrine of incompatibility of office").

95. *Id.* at 246, 6 P.3d at 852.

96. *See id.* at 247, 6 P.3d at 853.

97. *Id.* at 246, 6 P.3d at 853 (citing Bd. of County Comm'rs v. McGraw Fertilizer Serv., Inc., 261 Kan. 901, 916, 933 P.2d 698, 710-11 (1997); Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 25, 360 P.2d 456, 466 (1961), *cert denied*, 368 U.S. 829, 82 S. Ct. 51 (1961)).

98. *See U.S.D. 501*, 269 Kan. at 247, 6 P.3d at 853.

99. 92 Kan. 971, 142 P. 264 (1914).

100. *See U.S.D. 501*, 269 Kan. at 248, 6 P.3d at 854.

101. *See* Dyche v. Davis, 92 Kan. 971, 971, 142 P. 264, 265 (1914).

102. *See id.*

103. *See id.* at 974, 142 P. at 267.

104. *See U.S.D. 501*, 269 Kan. at 249-50, 6 P.3d at 854 (paraphrasing *Dyche*, 92 Kan. at 973, 142 P. at 266). *See also* Otradovec v. City of Green Bay, 347 N.W.2d 614 (Wis. Ct. App. 1984) (stating that "the public detriment in having one person hold incompatible public offices can also exist when one person holds a public office and a position of public employment with duties that might conflict.").

situations in which the dual office holder received a salary from both positions, but was to be applied in the interest of public policy wherever a factual inquiry revealed a conflict between two public positions.[105]

To explain these policy concerns, the court relied on *Haskins v. State ex rel. Harrington*,[106] a Wyoming case which held that subordination was the central impetus for preventing teachers from holding positions on the board of the districts that employ them.[107] *Haskins* involved a teacher with fifteen years of service who was elected to a position on his district's board of trustees.[108] The Wyoming court, citing concerns about conflicts in salary negotiations and fears of the board's inability to function if it were ever comprised of a majority of teacher members,[109] held the two positions incompatible under the common law.[110]

In the case of *U.S.D. 501 v. Baker*, the Kansas Supreme Court, following the lead of the Wyoming Court, focused squarely upon the subordination issue in stating its opinion:

> By assuming the role of teacher and Board member, Baker occupies one position that is subordinate to the other. As Board member she is the employer and as teacher, the employee. In her capacity as Board member she sits on a policy-making body that negotiates with the teachers' collective bargaining representative, who is also her representative as a teacher. This is a clear conflict of interest. Similarly, Baker is subject to discipline by the Board. She may, under certain circumstances, be fired by it. The principal who must evaluate Baker's performance as a teacher indirectly answers to Baker as a board member. As Baker discharges her Board duties, her actions, no matter how well-intentioned, will be colored by the conflict inherent in her two positions.[111]

Although Baker informed the court that she had recused herself from negotiation issues during her service on the board, the court deemed this remedy inadequate.[112] The court based its reasoning on the argument presented in *Haskins*, that this abstention would render the

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105. *See U.S.D. 501*, 269 Kan. at 248, 6 P.3d at 854.
106. 516 P.2d 1171 (Wyo. 1973).
107. *See* Haskins v. State ex rel. Harrington, 516 P.2d 1171, 1174 (Wyo 1973).
108. *See id.* at 1171-72. Recall that Baker had been employed as a teacher in U.S.D. 501 for fourteen years prior to gaining office on the board of education. *See U.S.D. 501*, 269 Kan. at 240-41, 6 P.3d at 850.
109. *See Haskins*, 516 P.2d at 1181 (McEwan, J., concurring).
110. *See id.* at 1180.
111. *U.S.D. 501*, 269 Kan. at 251, 6 P.3d at 855.
112. *See id.*

board powerless if it were ever comprised of a majority of teachers.[113] Reiterating that in the absence of a constitutional or statutory provision addressing the issue it was compelled to apply the common-law doctrine of incompatibility of office, the court disqualified Baker from board service.[114]

C. Dissenting Opinions

The dissents by Justices Allegrucci and Lockett viewed the case upon different theories, both of which would have reversed the outcome. Justice Allegrucci focused upon the eleven opportunities the legislature had to enact a statutory prohibition of board service by teacher-employees[115] and criticized the majority for its refusal "to draw any inference from the legislature's inability to pass such legislation."[116] Citing *Ling v. Jan's Liquors*,[117] Justice Allegrucci contended that the court had an established precedent requiring it to make inferences based on the legislature's decision not to enact a proposed amendment to a statute.[118] The majority argued that the case was distinguishable on grounds that in *Ling*, the legislature had repealed and subsequently refused reenactment of a law.[119] Allegrucci characterized this as a "distinction . . . without a difference,"[120] and argued "it was the legislature's considering and refusing to enact [the proposed legislation] which was indicative of legislative intent."[121] The intent of the legislature thus revealed, Allegrucci stated he would affirm the district court's verdict, allowing Baker to serve on the board of education.[122]

Justice Lockett's dissent argued that the legislature's intent was clear on the face of the statutes cited by the parties.[123] Lockett criticized the majority's decision by stating, "the statute was not to be read to add that which is not readily found in the statute or to be read to take out what as a matter of ordinary English language is in the statute."[124] His sharpest criticism was of the court's interpretation of Kansas Statutes Annotated section 72-8202e, which in his view effectively added a provision disallowing board service to a statute that would naturally

113. *See id.*
114. *See id.* at 253, 6 P.3d at 856.
115. *See id.* (Allegrucci, J., dissenting).
116. *Id.*
117. 237 Kan. 629, 703 P.2d 731 (1985).
118. *See U.S.D. 501*, 269 Kan. at 253, 6 P.3d at 856 (Allegrucci, J., dissenting).
119. *See id.* at 247, 6 P.3d at 853.
120. *Id.* at 253, 6 P.3d at 857 (Allegrucci, J., dissenting).
121. *Id.*
122. *See id.* at 254, 6 P.3d at 857.
123. *See id.* (Lockett, J., dissenting)
124. *Id.* (citing Dir. of Taxation v. Kansas Krude Oil Reclaiming Co., 236 Kan. 450, 455, 691 P.2d 1303, 1307 (1984).

have included such a restriction if the legislature had so intended.[125] He further stated, "the majority's interpretation of the statute prohibits a member of the board of education from contracting to perform any work or service for or to sell any goods to the school district."[126]

D. Commentary

Linda Baker's right to hold a duly-elected office as a school board member essentially turned upon a single question: had the Kansas Legislature expressed its intent upon the issue of teachers serving on the school boards of districts that employ them?[127] The court stated unequivocally that a statement of legislative intent on the point would abrogate application of the common-law incompatibility of office doctrine.[128]

As Justice Allegrucci pointed out in his dissent, the Kansas Supreme Court had previously found legislative intent in lawmakers' decision not to enact proposed legislation when it decided *Ling v. Jan's Liquors*.[129] The majority's attempt to distinguish this decision on grounds that the legislative inaction at issue in *Ling* involved a statute that the legislature refused to reenact after it had repealed it[130] is baffling. The sequence of statutory enactments governing the situation in *U.S.D. 501* is nearly identical. From 1963 until 1973, Kansas General Statutes section 72-1713 stated, "[t]he board shall appoint a clerk and treasurer, and other personnel as needed. Such clerk and treasurer, and other personnel shall not be board members and shall serve at the pleasure of the board."[131] The court noted that this provision prohibited employees from holding positions on the board.[132] In 1973, the language pertaining to "other personnel" was removed from the statute by a legislative revision.[133] Thus, the situation in this case is the same as the situation the court confronted in *Ling*: the legislature repealed a statutory provision and has subsequently refused to reinstate it.[134] Neither the majority nor the dissenting justices recognized the inconsistency of the majority's grounds for distinguishing *Ling*, and the result is a clear break in court precedent.

After losing the battle over whether the legislature had spoken to

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125. *See U.S.D. 501*, 269 Kan. at 255, 6 P.3d at 857.
126. *Id.*
127. *See id.* at 241, 6 P.3d at 850 (noting the Board's contention that Baker's service violated Kansas statutes).
128. *See id.* at 243, 6 P.3d at 851 (stating "[i]f the legislature has spoken, the statement supersedes common law, and the doctrine of incompatibility of office does not apply.").
129. 237 Kan. 629, 703 P.2d 731 (1985).
130. *See* Ling v. Jan's Liquors, 237 Kan. 629, 640, 703 P.2d 731, 739 (1985).
131. *U.S.D. 501*, 269 Kan. at 245, 6 P.3d at 852.
132. *See id.*
133. *See id.*
134. *See id.* at 242, 6 P.3d at 850-51.

the issue of teachers serving on school boards, Ms. Baker was faced with the formidable task of convincing the court that the common-law doctrine of incompatibility of office should not operate to prevent her from holding both positions.[135] The court noted that research revealed no case expressly holding that teacher and board member are compatible positions.[136] It failed to note, however, that only a few courts have considered the issue.[137] The reasons for this lack of precedent likely range from clear statutory control of the issue in some states to indifference to the practice of allowing teachers to serve on school boards in others.[138]

When the Kansas Supreme Court elected to follow the lead of *Haskins*, Ms. Baker's fate was sealed. The court so thoroughly adopted the reasoning of the *Haskins* court, in fact, that it did not add any meaningful discussion of its own upon the issue.[139] Particularly troubling in this nonchalant acceptance of the Wyoming court's analysis is the manner in which the court failed to balance factors that may countervail the perceived conflicts between the two positions Ms. Baker sought to hold simultaneously. The majority, which looked at legislative inaction with such a "gimlet eye,"[140] refused to afford an equally careful look at both sides of the policy concerns that purportedly underpin its holding. Is there no benefit that may countervail the potential conflicts in allowing a teacher to serve on a board of education?

After her election, Ms. Baker stated that she offered "an important perspective about what works and what doesn't work."[141] A supporter who was instrumental in convincing Baker to seek the office said, "[t]he whole idea is to prevent the 'we' and 'they' mentality and build bridges [between teachers and the administration]."[142] The supreme court considered none of these benefits. Instead, the court in a very

135. *See id.* at 247, 6 P.3d at 853.

136. *See id.* at 252, 6 P.3d at 856. *But see* Amador v. New Mexico State Bd. of Educ., 455 P.2d 840 (N.M. 1969) (stating that a teacher on the state Board of Education who confronted a potential conflict of interest "would simply refrain from acting as a member of the Board in his case just as would a member for any other trade or profession who appealed to the board of which he was a member.").

137. *See* Allan E. Korpela, Annotation, *Right of Schoolteacher to Serve as Member of School Board in School District Where Employed*, 70 A.L.R.3d 1188 (2000) (listing only nine state courts that have taken up the issue and stating that "few [courts] have discussed the bases for such holding").

138. The relatively small number of courts that have taken up the issue suggests that there may be other states which, like Kansas before the decision in this case, allow teachers to seek and hold school board offices in part because no one has challenged their ability to do so in court.

139. *See*, *e.g.*, *U.S.D. 501*, 269 Kan. at 251-52, 6 P.3d at 855-56 (reciting a long passage from the *Haskins* opinion, then stating merely, "[w]e agree.").

140. *Id.* at 246, 6 P.3d at 853.

141. Heather Hollingsworth, *Teacher Defeats Incumbent: Stapleton Falls; Browning Prevails*, TOPEKA CAPITAL-JOURNAL, April 8, 1999, *available at* http://www.cjonline.com/stories/040899/com_usd501.shtml

142. Heather Hollingsworth, *Board Member Faces Legal Challenge*, TOPEKA CAPTIAL-JOURNAL, July 1, 1999, *available at* http://www.cjonline.com/stories/070199/com_boemember.shtml.

peremptory manner presumed on the weight of possible conflicts of interest in personnel matters[143] that the two positions were incompatible under the doctrine, and removed Baker from her elected office.[144] In short, by adopting the reasoning of *Haskins* so completely, the court neglected to balance the *U.S.D. 501* parties' competing interests.[145]

Baker contended that by excluding herself from issues of conflict, she could avoid compromising her duties to either post.[146] She had served on the board for nearly a year before the supreme court issued its opinion,[147] suggesting that any fear that her presence would impair the ability of the board to function was unfounded. The court, again following the lead of *Haskins*, reasoned that a board comprised of a majority of teachers could not carry out its duties.[148]

The court's adopted argument that a board comprised of a majority of teachers could not perform its function seems particularly misplaced. The question before the court was not whether the board could function with a majority of teacher-employees comprising its membership, but whether it could carry out its functions adequately with a single member who was employed by the district.[149] Most importantly, proactive policy measures are more properly to be instituted by the legislature than by the court.[150] If the legislature predicts that this eventuality may pose a future harm, it has the power to enact legislation to prevent it.[151] The legislature, by refusing on eleven separate occasions to preempt this problem before it could arise,[152] implicitly stated that it was not a serious concern. The court, however, wrongly failed to credit the legislature's refusal.[153]

The dissenting justices in *U.S.D. 501* levied legitimate criticisms of the majority's holding. It is important to remember this was a

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143. *See U.S.D. 501*, 269 Kan. at 251, 6 P.3d 855 (stating, "[i]n her capacity as Board member [Baker] sits on a policy-making body that negotiates with the teachers' collective bargaining representative, who is also her representative as a teacher. This is a clear conflict of interest.").

144. *See id.* at 253, 6 P.3d at 856.

145. *See* Mark S. Kende, *Deconstructing Constructive Discharge: The Misapplication of Constructive Discharge Standards in Employment Discrimination Remedies*, 71 NOTRE DAME L. REV. 39, 71 (1995) (discussing the need for courts to balance the parties' interests in order to resolve conflicts).

146. *See U.S.D. 501*, 269 Kan. at 251, 6 P.3d at 855.

147. *See id.* at 240, 6 P.3d at 850.

148. *See id.* at 251, 6 P.3d at 855.

149. *See id.* at 240, 6 P.3d at 849.

150. *See* Robert L. Glicksman, *A Retreat from Judicial Activism: The Seventh Circuit and the Environment*, 63 CHI.-KENT L. REV. 209-10 (1987) (stating "[w]hereas the federal courts in the 1960's and early 1970's stressed their obligation to prevent executive branch subversion of the legislative will, more recent decisions reflect the belief that an unrestrained judiciary actively seeking to implement its own notions of public policy infringes improperly upon executive and legislative authority.").

151. *See* KAN. CONST. art. II, § 18.

152. *See U.S.D. 501*, 269 Kan. at 242, 6 P.3d at 850-51.

153. *See id.* at 247, 6 P.3d at 853.

declaratory judgment action.[154] The board of education was asking the court merely to make a ruling, based on existing law, whether it was legal for Baker to hold a board of education post while teaching for the district she represented.[155] Yet the opinion handed down by the supreme court was more legislative in nature than judicial.[156] The court found no statutory prohibition,[157] then imposed its own.[158] Fully aware that it was making policy from the bench, the court stated, "[t]he legislature holds the trump card to resolve the question before us today, either by specific authorization or prohibition."[159] This statement, of course, assumes the correctness of the court's own conclusion that the legislature has not spoken on the issue.[160] The statement also overlooks a key point: while the legislature has enacted a host of statutes *restricting* access to positions on school boards,[161] no statute specifically *authorizes* anyone of a certain title or profession to serve.[162] Under the court's analysis, then, in order to enable teachers to serve on the school boards of their employing districts, the legislat ure would have to make a special provision that it has not made for any other group.

Although such an express statute is unlikely, it is apparent that the court would welcome guidance from the statehouse upon the issue.[163] The court, in fact, betrayed some misgivings about the very doctrine it employed to disqualify Ms. Baker from the board. Kansas Statutes Annotated section 25-123 states:

> When a person is simultaneously elected to more than one office, such person may accept any such offices that are not incompatible with any other office accepted by such person. If a person accepts election to incompatible offices, the person shall be deemed to have accepted the office last accepted and to have declined any previously accepted incompatible office.[164]

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154. *See id.* at 240, 6 P.3d at 849.
155. *See id.*
156. *See id.* at 255, 6 P.3d at 857 (Lockett, J., dissenting) (stating "[t]he majority disregards the rules of statutory interpretation and the action of the legislature to amend the statute, and then, under the guise of common law, the majority rewrites the statute.").
157. *See id.* at 245, 6 P.3d at 852 (stating "[n]othing in the language of K.S.A. 72-8202 et. seq. indicates a legislative prohibition of teachers serving on school boards.").
158. *See id.* at 253, 6 P.3d at 856.
159. *Id.* at 252, 6 P.3d at 856.
160. *See id.* at 246, 6 P.3d at 853 (stating "[l]egislative inaction is not necessarily indicative of legislative intent.").
161. *See* KAN. STAT. ANN. §§ 72-8202a-d (West 1999) (prohibiting the holding of board positions by superintendents , school administrators, district clerks, and the treasurers).
162. *See* KAN. STAT. ANN. § 72-8202 *et seq.* (West 1999).
163. The court recognized that decisions regarding qualification for public office reside with the legislature. *See U.S.D. 501*, 269 Kan. at 243, 6 P.3d at 851 (citing KAN. CONST. art. II, § 18).
164. KAN. STAT. ANN. § 25-123 (West 1999). The caption of the statute is "[e]lection to more than one office; incompatible offices." *Id.* There is no apparent reason why this statute would not apply to the case at hand.

Inexplicably, the supreme court did not cite or even acknowledge the existence of this statute in resolving *U.S.D. 501*.[165] Furthermore, after finding the offices of teacher and board member incompatible under the equivalent common-law doctrine, the court allowed Baker to retain her teaching position, an action that appears to conflict with the provision contained in the statute's final clause.[166] Thus, in applying its version of common-law incompatibility of office, the court unwittingly violated the statutory enactment of the doctrine.[167]

Perhaps the court is also aware that decisions which, in effect, legislate policy from the bench are becoming increasingly unpopular.[168] Yet, as appears to be the current trend,[169] the court could not bring itself to defer to the legislature.

Another cause for concern is the manner in which the court supplanted its judgment for that of the voters[170] and usurped the legislature's constitutional authority to decide who may hold public office.[171] Baker spent considerable effort in her appellate brief arguing that the court would violate the separation of powers doctrine if it intervened and invalidated her election to the board.[172] She contended that the doctrine should operate as a bar to the "judicial legislation" the school district sought,[173] and she argued that the policy questions presented by the case were better resolved by the legislature.[174] In delivering its decision, the court did not address the issues raised in this portion of Baker's brief.

In light of the Kansas Association of School Boards' ongoing

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165. *See generally* U.S.D. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000).

166. *See id.* at 252-53, 6 P.3d at 856. Recall that under the statute, a person found to be holding incompatible offices is deemed to have abandoned the first in favor of the second. Thus, under Kansas law, once the court declared Baker's positions as board member and teacher incompatible, it enjoyed no discretion to decide that she must abandon her post on the board and revert to her single position as teacher. By the strict letter of the law, Baker should have been required to abandon her teaching position at the moment she accepted office on the board of education.

167. If Baker occupied two incompatible offices, as the court held she did, the statute mandates forfeiture of the first office. Perhaps drawing a distinction it had earlier dismissed as irrelevant between an office and a contractual position, the court deemed it "inequitable" to deprive Baker of her teaching position in favor of the school board office. *See id.* at 252, 6 P.3d at 856. The court's modification of the doctrine to suit equitable concerns suggests that it was not intended for the situation presented in this case.

168. *See*, *e.g.*, Sambhav N. Sankar, Comment, *Disciplining the Professional Judge*, 88 CAL. L. REV. 1233 n. 236 (2000) (stating: "[t]he late California Chief Justice Rose Bird's persistent dissenting opinions opposing the death penalty earned her an early retirement at the hands of California's voters, both because of substantive disagreement with her stance . . . and because the voters found it inappropriate that a judge should, in effect, legislate from the bench.").

169. *See* Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 430 (1997) (concluding "[d]isguised or not, the habit of legislating policy from the bench, once acquired, is addictive.").

170. *See U.S.D. 501*, 269 Kan. at 253, 6 P.3d at 856 (disqualifying Baker from board service).

171. *See* KAN. CONST. art. II, § 18.

172. *See* Brief of Appellee at 13, Unified Sch. Dist. No. 501 v. Baker, 269 Kan. 239, 6 P.3d 848 (2000) (No. 99-83805-A).

173. *Id.*.

174. *See id.* at 14.

efforts to enact legislation regarding teachers serving on school boards,[175] the court could also have utilized the political question doctrine and avoided deciding the issue at all.[176] The court chose instead not to exercise judicial restraint. In affirming the district court's holding that the board could not place restrictions upon who could serve on the school board,[177] the court stated, "[t]he legislature decides who may qualify for public office."[178] A few pages later, the court took this decision into its own hands and ruled Baker and all Kansas teachers ineligible for board service.[179]

Conflicts of interest exist everywhere in a representative system. Members of the judiciary itself, in fact, occasionally must abstain from deciding certain matters.[180] Yet in *U.S.D. 501*, this same court that entrusts itself with the duty to diagnose areas of potential conflict and to act ethically to avoid them, held that in the school board setting, recusal from matters of conflict is not a sufficient remedy.[181] Despite the obvious safeguards inherent in the boardroom setting,[182] the court, in effect, placed its discretion above that of officials elected to oversee the administration of schools.

The court also overlooked the myriad of other school policy matters to which a teacher-employee's opinions and expertise would be invaluable, including issues of facilities, budget, and curriculum. Teachers work with the students, whom the board ultimately serves, and are uniquely situated to assess, in the words of Baker, "what works and what doesn't work."[183] The immediate effect of the court's holding in *U.S.D. 501* was to remove many active and well-informed school board members from office.[184] Justice Lockett suggested that the majority's holding may be more far-reaching that merely excluding teachers as potential board members.[185] If the holding truly prohibits board

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175. *See U.S.D. 501*, 269 Kan. at 242, 6 P.3d at 850.

176. *See* Van Sickle v. Shanahan, 212 Kan. 426, 438, 511 P.2d 223, 234 (1973) (quoting Baker v. Carr, 369 U.S. 186 (1962)) (stating "[p]rominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department."). Here, by the court's own admission, the election issues had been committed to the legislature by the Kansas Constitution. *See U.S.D. 501*, 269 Kan. at 243, 6 P.3d at 851.

177. *See U.S.D. 501*, 269 Kan. at 241, 6 P.3d at 850.

178. *U.S.D. 501*, 269 Kan. at 243, 6 P.3d at 851 (citing KAN. CONST. art. II, § 18).

179. *See id.* at 253, 6 P.3d at 856.

180. *See* KAN. SUP. CT. R. 107 (b); KAN. SUP. CT. R. 606 (a).

181. *See U.S.D. 501*, 269 Kan. at 252, 6 P.3d at 855.

182. Safeguards limiting the potential for a member participating, despite apparent conflicts of interest, may include the following: oversight by school administrators; the presence of six other board members to assist in diagnosing areas of conflict; open nature of board proceedings; and publication of board minutes.

183. Hollingsworth, *supra* note 141.

184. *See* Heather Hollingsworth, *Ruling Impacts Dozens of Educators*, TOPEKA CAPITAL-JOURNAL, May 30, 2000, *available at* http://www.cjonline.com/stories/53100/com_aftermath.shtml (stating that approximately thirty school employees in Kansas served on their local school boards prior to the decision of *U.S.D. 501.*).

185. *See U.S.D. 501*, 269 Kan. at 255, 6 P.3d at 857 (Lockett, J., dissenting).

members from receiving compensation for any services provided to the school district, as Justice Lockett suggested,[186] the effect of the court's holding will be not only to exclude teachers, who clearly bring relevant insight to the process of school policy-making, but also a host of others who contract to provide various services to schools. Indeed, in the aftermath of the ruling, the Kansas State Board of Education and Kansas Association of School Boards interpreted the decision to exclude all employees of the school from board service.[187] As a result, board members who served their districts in various employment capacities were forced to choose between their board positions and their jobs.[188]

The ultimate result of the court's decision will be to exclude anyone who invests time directly with the student population, and to convene a board of outsiders to govern the school. In a state such as Kansas, this result simply makes no sense. Unified School District No. 501 could be described as the exception to the rule in Kansas. It is a large district, comprised of several high schools, middle schools and elementary schools, and it derives its patrons from one of the largest cities in the state.[189] A significant number of school districts in Kansas are much smaller, some existing in communities of no more than a few hundred residents and maintaining schools staffed by only a handful of teachers.[190] In many of these cities, the very people excluded by the court are those most suited to school board service and those most drawn to seek office on the board. The court's holding will certainly limit the ability of the state's smallest districts to seat their communities' most qualified people on the board of education.

Beyond the arena of education in Kansas, the opinion announced in *U.S.D. 501*, may have a more substantial impact upon the Kansas Supreme Court itself. Not only has the court created new law through the holding of this case, it has also struck down decisions made by the voting public of Shawnee County and other voting districts across the state.[191] The primary basis for its holding came from the courts of other states, yet the court did not weigh the sensibility of these outside

186. *See id.*

187 *See* Heather Hollingsworth, *Officials: School Board Decision Causing Large Ripple Effect*, TOPEKA CAPITAL-JOURNAL, August 7, 2000, *available at* http://www.cjonline.com/stories/080800/com_officials.shtml.

188. *See id.*

189. *See* Kansas State Department of Education, *Organization Information: Topeka Public Schools U.S.D. 501*, *at available*, http://www.ksde.org/cgi-bin/dist org no=D0501 (last visited March 8, 2001) (listing more than thirty separate school buildings in U.S.D. No. 501).

190. *See* Kansas State Department of Education, *Selected School Statistics*, *available at* http://www.ksde.org/leaf/sss00b.txt (last visited March 8, 2001) (revealing that in the 1999-2000 school year, U.S.D. No. 501 served a total enrollment of over 13,000 students, while approximately 100 districts in Kansas had enrollments of 400 or fewer).

191. *See* Hollingsworth, *supra* note 187.

authorities to Kansas school districts,[192] or balance the board's concerns against the potential benefits of allowing Baker and others like her to continue to occupy board positions. Finally, the court invited the state legislature to overrule its decision,[193] an action which, if taken, might be seen as an indictment of the court's reasoning in the case and of its interpretation of the law. As occurred in the aftermath of the United States Supreme Court's decision in *Bush v. Gore*,[194] angry voters may complain that the court wrongly interfered with the result of an election. The end result must necessarily be a decline in the credibility of the court.

V. CONCLUSION

The court should have logically inferred from the natural progression of the statutes precluding certain officials from serving on boards of education,[195] and from the legislature's repeated refusal to enact a statutory provision forbidding such service,[196] that Baker's service was not in any way contrary to state law. The court instead followed the lead of other states,[197] and overturned the outcome of a valid election. As a result, Kansas teachers who wish to affect educational policy will necessarily be subordinate to board members who are not trained in education and who are not personally familiar with the daily operations of today's schools.

Even more troubling is the manner in which the Kansas Supreme Court ignored the potential benefits of permitting teachers to be members of boards of education and established law where the legislature had repeatedly refused to do so.[198] The court wielded its considerable power in this case, and in the process trampled upon duties that are the express domain of the legislative branch.[199] In the interest of Kansas schools, we can only hope that the legislature takes up the gauntlet thrown down by the majority,[200] and by express legislative action, overrules the restriction imposed by the court.

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192. *See* Hollingsworth, *supra* note 184 (quoting Rod Bieker, who authored two attorney general's opinions in favor of allowing teachers to serve on their employing boards, as stating, "these folks are locally elected, and most are [in] small districts. These voters knew exactly who they [were] voting for, and the Supreme Court said, 'we don't care, they're out.'").

193. *See U.S.D. 501*, 269 Kan. at 252, 6 P.3d at 856.

194. 531 U.S. 98 (2000).

195. *See* KAN. STAT. ANN. §§ 72-8202a-e (West 1999).

196. *See U.S.D. 501*, 269 Kan. at 242, 6 P.3d at 851-52.

197. *See id.* at 250, 6 P.3d at 855. Most notably, the court followed the precedent set in *Haskins v. State ex rel. Harrington*, 516 P.2d 1171 (Wyo. 1973), and *Visotcky v. City of Garfield*, 273 A.2d 597 (N.J. Super. 1971).

198. *See U.S.D. 501*, 269 Kan. at 242, 6 P.3d at 850-51.

199. *See* KAN. CONST. art. II, § 18.

200. *See U.S.D. 501*, 269 Kan. at 252, 6 P.3d at 856 (stating "[t]he legislature holds the trump card to resolve the question before us today, either by specific authorization or prohibition.").