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Off the Mark: The Nebraska Supreme Court and Judicial Nominating Commissions

Steven L. Willborn
University of Nebraska College of Law, willborn@unl.edu

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I. INTRODUCTION

Syas: [W]ill [the roll call vote of judicial nominating commissions] be available to the general public [or] will it be shielded from the general public? I want [the] roll call vote available to the general public which is the press.

Carstens: Well . . . [t]here wouldn't be any purpose in taking . . . a roll call vote, oral or written, in secret.

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* Cline Williams-Flavel A. Wright and Warren C. (Bud) Johnson Professor of Law, University of Nebraska. The author filed an amicus brief on behalf of the Nebraska Civil Liberties Union in Marks v. Judicial Nominating Comm’n, 236 Neb. 429, 461 N.W.2d 551 (1990).
When the Nebraska Legislature enacted the current statutes regulating judicial nominating commissions, it was 100 percent certain that the statutes required commissions to select or reject candidates for judicial office through a public roll call vote. Last October, 100 percent of the Nebraska Supreme Court was certain that those same statutes permit, and indeed may require, judicial nominating commissions to conduct their voting in secret.

This Article will explore this strange state of affairs. The Article will first analyze *Marks v. Judicial Nominating Commission,* the case in which the supreme court decided that the voting of judicial nominating commissions could be conducted in secret. The analysis will demonstrate that the supreme court’s result could not be reached by any fair-minded reading of the Nebraska statutes. In *Marks,* the supreme court decided to implement its own notion of how judicial nominating commissions should operate, even though the Legislature had clearly indicated that its opinion was different. The Article will then discuss why the *Marks* case is important: why it is important to the process of nominating judges in this state and why it is important as an interpretation of Nebraska’s public meetings law. Finally, the Article will discuss options for limiting the damage caused by the supreme court through the *Marks* decision.

II. THE DECISION

The judicial nominating process in the *Marks* case was not unusual in any way. In early 1987, the Nebraska Supreme Court declared a
judicial vacancy for the County Court in the Twentieth Judicial Dist-
trict. Nominations for the vacancy were solicited and the names of
four candidates were forwarded for consideration. The judicial nomi-
nating commission, composed of Supreme Court Judge D. Nick
Caporale and eight other members, met on March 27, 1987, to con-
sider the nominees. The first part of the meeting was the public hear-
ing at which the commission accepted comments from the public on
the qualifications of the nominees. After the public hearing, the com-
mission went into a private session. During the private session, the
commission first interviewed each of the nominees individually. Then
the commission, with only commission members present, deliberated
and voted on each of the nominees. For each nominee, Judge
Caporale orally called the name of each member of the commission
and recorded the vote of that member on that nominee. Two of the
four nominees received the votes of at least five commission members
and the commission forwarded the names of those two nominees to
the Governor for her consideration.

The plaintiff, James Marks, was a member of the public who challenged the secret voting procedure under the public meetings law.

Judge Boslaugh wrote the *Marks* decision for a unanimous supreme court, with retired District Judge Colwell sitting in for Judge
Caporale. Judge Boslaugh first considered the provisions of the Ne-
braska statutes on judicial nominating commissions. He began by
noting that section 24-809 of the statutes, as required by article V,
section 21(5) of the Nebraska Constitution, obliges judicial nominating

6. Judge Caporale was a non-voting member of the commission and its chair. NEB. REV. STAT. § 24-809 (Reissue 1989).

7. This judicial nominating commission, and judicial nominating commissions generally, are composed of the chair who is a judge from the Nebraska Supreme Court; four lawyer members, with not more than two from the same political party; and four citizen members, also with not more than two from the same political party. NEB. REV. STAT. § 24-803(2) & (3)(Reissue 1989).

8. Private sessions are specifically authorized by the statutes regulating judicial nominating commissions. NEB. REV. STAT. § 24-810(3)(Reissue 1989).

9. The precise voting procedure used in this case was disclosed in an affidavit filed in the case by Judge Caporale. The judge who eventually was appointed to this vacancy by the Governor later received the lowest evaluation of any judge in the state on the state bar's judicial evaluation process, "Results: 1990 Judicial Performance Evaluation," NSBA News 17, 28 (July 1990) (lowest rating was on ultimate question of whether judge should be retained), and was not retained by the voters in his first retention election. Omaha World-Herald, Nov. 8, 1990, at 25, col. 6.

10. Because Judge Caporale was a member of the judicial nominating commission whose actions were challenged in the case, he recused himself from the case.

commissions to make their decisions to select or reject judicial nominees through a roll call vote. Judge Boslaugh noted that neither the statute nor the constitution explicitly required that the roll call vote be taken in public and that a later section of the statutes provided that communications between members of judicial nominating commissions are to be confidential. Although he never completes the argument, Judge Boslaugh hints that the failure of the statutes explicitly to require a public roll call vote coupled with their protection of the confidentiality of member communications authorizes, if indeed it does not require, that the roll call vote be taken in secret. Judge Boslaugh went on to cite section 24-810 which requires judicial nominating commissions to hold a public hearing and which authorizes them to hold "such additional private or confidential meetings as [they] determine to be necessary." He concluded by finding that the statutes are "plain, direct and unambiguous" on the procedures to be followed by judicial nominating commissions. The commissions "may select or reject judicial nominees, after the public hearing, in a private or confidential meeting, provided the vote is taken by an oral rollcall [sic]."

Judge Boslaugh then proceeded to discuss the public meetings law which provided the legal base for Marks' claim. The public meetings law, on its face, quite clearly applies to judicial nominating commissions and seems to require a public roll call vote. Nevertheless, the court held that the public meeting law did not require judicial nominating commissions to vote in public for two reasons. First, the court relied on the maxim that statutes relating to a particular subject take precedence over general statutes. Thus, the court held that the provisions of the statutes relating particularly to judicial nominating commissions took precedence over the general procedural requirements of the public meetings law. The authorization of the former statutes to conduct a roll call vote in secret overrode the requirement of the latter statutes that the roll call be conducted in public. Second, the court held that the public meetings law did not apply to the type of decisions that are made by judicial nominating commissions. The court held that the requirements of the public meetings law only apply when

15. NEB. REV. STAT. §§ 84-1408 to 84-1414 (Reissue 1987).
16. The public meetings law applies to "public bodies" and public bodies are defined by the law to include "all independent . . . commissions . . . now or hereafter created by the Constitution of Nebraska, statute, or otherwise pursuant to law." NEB. REV. STAT. § 84-1409(1)(Cum. Supp. 1990).
17. "Any action taken [by a public body] shall be by roll call vote of the public body in open session, and the record shall state how each member voted, or if the member was absent or not voting." NEB. REV. STAT. § 84-1413(2)(Reissue 1981).
"public policy" decisions are being made and that selecting nominees for judicial vacancies does not involve the formation of "public policy." Thus, the public meetings law simply did not apply to the decisions of judicial nominating commissions, or at least not to their decisions to select or reject judicial nominees.

The Nebraska Supreme Court held, then, that the public meetings law had not been violated when the judicial nominating commission in the Marks case made its decisions on nominees in secret.

III. ANALYSIS

The Nebraska public meetings law provided the legal base for the claim in Marks that judicial nominating commissions were required to conduct their voting in public. Thus, the Nebraska Supreme Court could have decided the case solely within the terms of that law without raising issues under the statutory and constitutional provisions regulating judicial nominating commissions. But the court did not do that. Instead, it based its holding that the public meetings law did not require public votes, in part, on an interpretation of the laws regulating judicial nominating commissions. Thus, analysis of the Marks decision must consider both the public meetings law and the constitutional and statutory provisions regulating judicial nominating commissions.

In Marks, the Nebraska Supreme Court decided (1) that the Nebraska Constitution and statutes permitted (and perhaps required) the votes of judicial nominating commissions to be taken in secret and (2) that the plain language of the public meetings law requiring public votes was overridden by the more specific laws regulating judicial

18. For example, the court could have based its decision that the public meetings law did not apply solely on the rationale that that law only applied to "public policy" decisions and judicial nominating commissions were not engaged in making that type of decision.

19. The Nebraska Supreme Court held that the open voting required by the public meetings law was overridden by the statutes regulating judicial nominating commissions. There are only three possibilities for the effect of the latter statutes on the voting procedures of judicial nominating commissions. First, the statutes could be interpreted to require open voting, which would mean that there was no conflict between the two sets of statutes and no reason for one to override the other. Second, the statutes could be silent on the issue of whether judicial nominating commissions are required to vote in public, which once again would mean that there was no conflict between the two sets of statutes and no reason for one to override the other. Third, the statutes could require judicial nominating commissions to vote in secret, which would mean that there is a conflict between the two sets of statutes necessitating a decision about which should control. Thus, although the supreme court never states this directly, its decision could be interpreted to mean that the statutory and constitutional provisions regulating judicial nominating commissions require judicial nominating commissions to vote in secret. See infra notes 63-94 and accompanying text.
nominating commissions and by language in the intent section of the public meetings law.

The supreme court was wrong on both counts. The Nebraska Constitution and statutes do not permit secret votes by judicial nominating commissions. Indeed, Nebraska law requires exactly the opposite; Nebraska law requires judicial nominating commissions to select or reject nominees through a public roll call vote. The plain language of the public meetings law also requires a public vote. That language should not be overridden by the laws which regulate judicial nominating commissions since the need to override arises only when there is a conflict between two laws and here both laws require a public vote. The argument that the plain language of the public meetings law should be overridden by language in the intent section of the law is novel and unprecedented and causes concern because it poses a serious threat to the continued viability of the public meetings law.

Many cases are wrongly decided. This case, however, is more troubling than most, not because of the result reached (although that is unfortunate), but because the supreme court refused to deal meaningfully with the arguments that were presented to it.

A. What Does It Mean to Require a Roll Call Vote?

The Nebraska Constitution and state statute both require judicial nominating commissions to select or reject nominees through a roll call vote. Thus, a natural first question to ask is what does it mean to require a roll call vote? Why is it that the roll call vote requirement was redundantly placed in Nebraska law?

The overriding reason for requiring roll call votes is to ensure that the votes of individual voters are made public. Every manual on procedure that discusses how to choose between various voting methods indicates that the purpose of a roll call vote is to ensure that votes are made public. The statement on roll call votes in Keesey's *Modern Parliamentary Procedure* provides an example of the kind of statement that is made in procedural manuals: "Most people have witnessed dull and time-consuming roll call votes at televised national political conventions. It is a slow method of voting . . . and is justified only when it is desirable to make public the members' votes."21

This rationale for requiring roll call votes is reinforced by several Nebraska statutes, including the public meetings law. Roll call votes

20. *NEB. CONST.* art. V, § 21(5); *NEB. REV. STAT.* § 24-809 (Reissue 1989).
are required by the public meetings law \(^{22}\) and by other Nebraska statutes,\(^{23}\) but the Legislature has added the following qualifying language to the roll call vote requirements contained in the statutes: "The requirements of a roll call . . . vote shall be satisfied by a [voting body] which utilizes an electronic voting device which allows the yeas and nays of each [voter] to be readily seen by the public."\(^{24}\) This qualifying language indicates, as do the procedural manuals, that the purpose of a roll call vote is to ensure that votes are made public. Through this qualifying language, the Nebraska Legislature has indicated that when it requires a roll call vote, its concern is not with whether names are called before votes are cast—the Legislature requires a roll call vote to enable the public to know how individual voters voted.\(^{25}\)

This concern with the publicness of votes—and pursuing that concern through a roll call vote requirement—rests on a firm policy basis. Public votes are intended to ensure that the required number of voters vote for a measure, to make voters feel the responsibility of their action when important issues are voted upon, and to compel each voter to bear her portion of the responsibility for the action taken.\(^{26}\) All of these purposes are undermined if, as in the present case, the roll call vote is taken in secret and active steps are taken to ensure that the particulars of the vote are never known by the public. First, the public cannot rely on the roll call vote itself to ensure that the majority required by the constitution for forwarding a name to the Governor was or was not met by a candidate; instead, the public must rely on the assurances of the commission itself which, of course, could be in error inadvertently. Second, the heightened sense of responsibility the roll call vote is designed to create in commissions is undermined if commissions can hide their votes from the public; the self-perceived need of commissions to consider and justify their actions carefully is reduced if the determinative votes can be cast in secret and forever hid-

\(^{22}\) NEB. REV. STAT. § 84-1413(2)(Reissue 1987).


\(^{24}\) Id.

\(^{25}\) The qualifying language quoted in the text is not included as part of the language of the constitution or the statutes requiring judicial nominating commissions to use a roll call vote. As will be well documented below, however, that does not mean that the Legislature's intent with the roll call vote requirement as applied to judicial nominating commissions was different than its intent when it requires a roll call vote by other bodies. See infra notes 27-56 and accompanying text. The qualifying language was not added to the roll call vote requirement that applies to judicial nominating commissions simply because the commissions are so small and meet so infrequently that the use of electronic voting devices was very improbable.

den from public scrutiny. And third, the individual sense of
responsibility a roll call vote is designed to create is subverted if the
individual votes of commission members are never disclosed to the
public; the public only knows the collective decisions of commissions
and, without knowing how they voted, can never hold individual com-
mission members responsible for their share of the collective
decisions.

In the *Marks* opinion, the court did not explore the question of why
judicial nominating commissions are required to use the roll call
method of voting. It did not discuss the reason the procedural manu-
als give for such a requirement—to ensure that votes are made public;
it did not discuss the Legislature's acceptance of that reason; it did not
discuss the policies supporting a roll call vote requirement. Nor did
the court tell us what purposes are served by a secret roll call vote; the
court did not tell us why the constitution and statutes would require
such a counterintuitive procedure or what public policies are served by
such a procedure. Instead, the court merely quoted the language of
the statutes and then stated, without analysis, that they plainly, di-
rectly, and unambiguously permit a secret roll call vote. So the next
obvious question is, do they?

B. Do the Nebraska Constitution and Statutes Permit a Secret Roll Call
Vote?

Both the Nebraska Constitution and the statutes require judicial
nominating commissions to vote by roll call.\(^{27}\) In *Marks*, the court rec-
ognized this, as it must, but held that the roll call vote can be taken in
secret because later sections of the statutes authorize private or confi-
dential meetings\(^{28}\) and provide that communications between mem-
bers of judicial nominating commissions shall be confidential.\(^{29}\)

The Nebraska Supreme Court was wrong here for two reasons.
First, the court relied on *statutory provisions* to hold that the roll call
votes can be taken in secret. The constitution does not include lan-
guage similar to that found in the statutes and, obviously, cannot be
 overridden by statutory language. Hence, if the constitution requires
a public vote, and it clearly does, the court's reliance on the statutory
language is misplaced. Second, even within the statutory framework
itself, the court is wrong. The court's holding is premised on the belief
that it is necessary to hold the roll call vote in secret to ensure that the
policies of the other statutory provisions can be met. But that belief is
in error. The policies of the other statutes can be met even if a public
roll call vote is held, and the Legislature made it abundantly clear

\(^{27}\) *NEB. CONST.* art. 5, § 21(5); *NEB. REV. STAT.* § 24-809 (Reissue 1989).

\(^{28}\) *NEB. REV. STAT.* § 24-810(3)(Reissue 1989).

\(^{29}\) *NEB. REV. STAT.* § 24-812 (Reissue 1989).
when it enacted the provisions in issue that it intended the roll call vote to be public.

1. Does the Nebraska Constitution Require a Public Roll Call Vote?

The Nebraska Constitution requires that members of judicial nominating commissions "vote for the nominee of their choice by roll call." As indicated in the previous section, in the absence of any other information about what was meant by the roll call vote requirement, the bald requirement in the constitution should be interpreted to require a vote in public. The reason roll call votes are required is to ensure that votes are public. There is no reason to think that the purpose here was different. Nevertheless, if there is lingering doubt about what the roll call vote requirement means, reference to the enactment history of the constitutional provision is appropriate. That history makes it very clear that the provision was intended to require a public vote.

The framers of this section of the constitution intended that the roll call vote be taken in public. Article V, section 21(5) was one of the amendments made to the merit plan for the selection of state judges in 1972. The amendments were proposed by the Legislature through LB 1199. The language of LB 1199 as originally introduced in the Legislature, however, did not include the language requiring judicial nominating commissions to hold a roll call vote. On February 10, 1972, at the public hearing on LB 1199 before the Committee on Constitutional Revision, the following interchange occurred between Mr. Arlan Beam, who was speaking in favor of the bill on behalf of the Nebraska State Bar Association and Senator George Syas, Chair of the Committee:

Bean: I think that Senator Carstens did lay out the bill; and if . . . there are some ideas from within the Legislature or outside in the people who think that they could come up with some ideas that would improve the situation . . . .

Syas: I tell you what I would like to have in here: why don't you put in here by amendment that when the committee votes, they do it by roll call vote that is public, instead of this secret ballot? And, I wish to emphasize that the Legislature and all subdivisions have to go through roll call vote, I don't see why they can't.

Bean: Okay, I will make a note of that, Senator Syas.

In response to this interchange, the Committee on Constitutional

31. See supra notes 20-26 and accompanying text.
33. LB 1199, 82d Leg., 2d Sess., 1972 Nebraska Laws.
34. February 10, 1972, Committee on Constitutional Revision hearing on LB 1199, p. 4.
Revision amended LB 1199 to add the current language requiring a roll call vote.\textsuperscript{35} On March 9, 1972, the Legislature adopted the amendment.\textsuperscript{36} In the debate on that day, Senator Syas once again indicated, albeit more indirectly, that the roll call vote was to be taken in public:

\textbf{Syas:} The roll call vote, everybody else in this state government has to have a roll call vote and the Legislature and all subdivisions of government. We didn't think these people should be any different, the judiciary or the judicial nominating committee should be any different than other people that hold state, county or local government, whether it's paid or not.\textsuperscript{37}

Although Senator Syas did not indicate explicitly on this day that the roll call vote should be taken in public, he did say that the voting of judicial nominating commissions should be treated the same as the voting of the Legislature and political subdivisions. Then, as well as now, voting in the Legislature and in political subdivisions had to be conducted in public.\textsuperscript{38} The framers of article V, section 21(5) of the Nebraska Constitution intended the voting of judicial nominating commissions to be treated the same as the voting of other public bodies in Nebraska—to be public.

The history of article V, section 21(5), then, clearly indicates that its framers intended the roll call vote required by that section to be conducted in public. I have been unable to find any evidence in the language or history of the amendment that indicates any intention to permit the roll call vote to be taken in secret.

The Nebraska Constitution, then, is clear. It requires judicial nominating commissions to vote for or against nominees for judicial office in public. The court's argument in \textit{Marks} that statutory provisions permit a secret vote must fall to this constitutional requirement.

So what did the Nebraska Supreme Court say in \textit{Marks} about this constitutional argument? Nothing. The supreme court did not say anything about what the words "roll call" mean in the constitution. It said not one word about the enactment history which so clearly indicates that the Constitution requires public votes. It did not explain how statutory provisions can override constitutional commands.

2. \textit{Do the Statutes Regulating Judicial Nominating Commissions Require a Public Vote?}

The \textit{Marks} decision would be wrong even if the constitution did not

\textsuperscript{35} 1972 NEB. LEGIS. J. 747.  
\textsuperscript{36} 1972 NEB. LEGIS. J. 1156.  
\textsuperscript{37} March 9, 1972, Floor Debate on Amendments to LB 1199 (no pagination).  
\textsuperscript{38} See, e.g., NEB. CONST. art. III, § 11 (voting in Unicameral must be public); NEB. REV. STAT. § 84-1405 (Reissue 1971)(repealed 1975) (voting in all political subdivisions must be public); NEB. REV. STAT. § 84-1413 (Reissue 1987) (voting in all political subdivisions must be public).
so clearly require a public vote. Nebraska statutes also require a public vote.

In Marks, the Nebraska Supreme Court began by recognizing that the Nebraska statutes require a roll call vote. But then it noted one thing that the statutes do not say explicitly and two things that the statutes do say. The court first noted that the statutes do not explicitly provide that the roll call vote shall be public or taken at the public hearing that is required by the statutes. Then the court noted two statutory provisions that permit judicial nominating commissions to operate with some degree of secrecy. First, section 24-812 provides that communications between members of commissions are to be confidential and, second, section 24-810(3) permits commissions to hold private or confidential meetings. The court then stated, without analysis, that the statutes read "as a whole" permit judicial nominating commissions to conduct their vote in secret.

Since the court did not provide any analysis, the first thing we must do to analyze the case is to try to determine why the court thinks the secrecy-protection statutes permit a secret roll call vote. The court's burden is heavy here because, as indicated above, a secret roll call vote is a self-contradiction, analogous to an optimistic Eeyore. The court's probable analysis was that the secrecy-protection statutes are intended to encourage full and honest interchange about nominees by shielding from public view the statements made by members of judicial nominating commissions. If members could not be assured that their statements were shielded from public view, they would be reluctant to criticize nominees bluntly and candidly. This policy, the court must be asserting, extends beyond discussion about candidates to the voting itself.

The court's probable analysis is in error for two reasons, and the

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41. Although the court at this point phrases its result in permissive terms, the court's later analysis requires that the court find that judicial nominating commissions must vote in secret. See supra note 19. Thus, everything I state in this section to undermine the court's holding that commissions may vote in secret is valid a fortiori to the court's implicit holding that commissions must vote in secret.
43. See supra notes 20-26 and accompanying text.
44. A. Milne, Winnie-the-Pooh (1926); A. Milne, The House at Pooh Corner (1928). These citations reflect the current reading of a father with three preschool children.
45. Once again, the court did not provide any analysis in the case; it just stated the result. As a result, to analyze the decision we must speculate about what the court's analysis was. I have done my best in this second-best world to state what the court's probable analysis was. If I am inaccurate, that is unfortunate, but this type of error can be easily avoided by the court if it simply fulfills its institutional obligations, i.e., if it explains the rationale of its decisions.
error is confirmed by legislative history. First, the statutes require a 
roll call vote, but they merely authorize commissions to act with a 
degree of secrecy. Commissions are not required to hold private or 
confidential meetings; they need only hold them if the particular com-
mission "determines [them] to be necessary." If no private or confi-
dential meetings are held, there are no confidential communications 
between members of the commission protected by section 24-812; that 
section protects communications "except those at the public hear-
ing" and if there is no private or confidential meeting, all of the 
communications occur at the public hearing, so none of the communi-
cations are shielded. It is anomalous to read a requirement out of the 
statutory framework (the public roll call vote requirement) because of 
an arguably inconsistent policy that the Legislature did not value 
highly enough to require in every case.

The court's probable analysis is also flawed because the policy of 
the secrecy-protection statutes can be fully implemented without in-
fringing at all on the policy of the roll call vote requirement. The pol-
icy of the secrecy-protection statutes is to encourage full and frank delibera-
tions about candidates. That policy would not be infringed at 
all by requiring a public vote after the deliberations. Indeed, that is 
precisely the balance struck by the public meetings law where private 
meetings are permitted, but where voting must be in public. Thus, 
there is no need to create the oxymoron of a private roll call vote be-
cause the policies of the roll call vote requirement are not at all in 
conflict with the policies of the secrecy-protection statutes.

As with the constitutional analysis, if there is lingering doubt about 
how the roll call vote requirement and the secrecy authorized by the 
secretty-protection statutes should be reconciled, resort to the Legisla-
ture's intent as expressed in the legislative history is appropriate. The 
legislative history is absolutely clear that the Legislature intended the 
votes of judicial nominating commissions to be taken in public.

The current statutory language on roll call votes was enacted into 
law in 1973 when the Legislature acted to conform the judicial nomin-
ating process to the constitutional amendment which was enacted in 
1972. The relevant statutory language prior to that time read: "In se-
lecting judicial nominees, [the judicial nominating] commission shall 
vote in executive session by secret ballot." As originally introduced, 
the amendatory bill, LB 110, merely proposed to delete that sen-

47. NEB. REV. STAT. § 24-812 (Reissue 1989).
48. See infra notes 49-50 and accompanying text.
49. NEB. REV. STAT. § 84-1410 (Reissue 1987).
51. NEB. REV. STAT. § 24-809 (Reissue 1964).
In response to comments at the hearing on the bill before the Committee on Judiciary, amendments were proposed (and later adopted) to change the language to its current form: “In selecting or rejecting judicial nominees [the judicial nominating] commission shall vote in executive session by secret ballot by oral roll call vote. Each candidate must receive a majority vote of the members of the nominating commission to have his name submitted to the Governor.”

This amendment by itself clearly indicates that the Legislature intended the roll call vote to be conducted in public. If the Legislature had merely intended to change the form of the voting from secret ballot to roll call, the Legislature would have stricken only the words “by secret ballot.” But the Legislature intended the amendment to do more than merely change the form of the voting. By striking the words “in executive session,” the Legislature clearly evidenced its intent that the roll call vote be conducted in public.

The clear message of the amendment that roll call votes by judicial nominating commissions must be public is affirmed by the statements of the bill’s sponsor and others on the floor of the Legislature. Shortly before the amendment above was adopted, the interchange that is cited at the beginning of this Article between Senator Fred Carstens, the bill’s sponsor, and Senator George Syas occurred. The bill’s sponsor agreed “100%” that the intent of the bill was to require a public roll call vote.

Read in light of its legislative history, then, section 24-809 is absolutely clear: The roll call votes of judicial nominating commissions must be conducted in public. As with the constitutional amendment, I have been unable to find any evidence in the legislative history that indicates the Legislature intended to permit the roll call vote of judicial nominating commissions to be held in secret.

Once again, what did the Nebraska Supreme Court say on these issues in the Marks case? Sadly, the answer once again is nothing.

53. 1973 NEB. LEGIS. J. 679 (Italics indicate language added by the amendment. Strikeover indicates language omitted by the amendment.).
55. NEB. REV. STAT. § 24-809 (Reissue 1989).
56. In 1980, a bill was introduced in the Legislature which would have amended the statutes regulating judicial nominating commissions to require even more explicitly that the individual votes of commission members be made public. LB 730, 86th Leg., 2d Sess. 1980 Nebraska Laws § 5(3). Although the bill eventually passed, 1980 NEB. LEGIS. J. 1380-81, the provision providing for public roll call votes had been eliminated earlier. 1980 NEB. LEGIS. J. 596-97, 952. It would, of course, be improper to make any inference about the intent of the 1973 Legislature based on this failure to act by the 1980 Legislature. R. DICKERSON, THE INTERPRETATION AND APPLICATION OF STATUTES 179-83 (1975). See also LB 878, 91st Leg., 2d Sess., 1989 Nebraska Laws (requiring that votes of judicial nominating commissions be public).
The supreme court did not say why a required legislative policy (public votes) should be overridden by a permissive legislative policy (protection of commission deliberations). It did not say why it thought the secrecy-protection statutes were in conflict with the roll call requirement. It did not attempt at all to reconcile its decision with the clear and contrary legislative history.

C. Does the Public Meetings Law Permit a Secret Vote?

Marks' direct claim was under the public meetings law. By its terms, that law seems to have been violated by the procedure used by the judicial nominating commission in Marks. The statute applies to "all independent ... commissions ... now or hereafter created by constitution, statute, or otherwise pursuant to law." Judicial nominating commissions are independent commissions created by constitution and statute and, hence, seem to be covered by the statute. The law requires public roll call votes: "Any action taken ... shall be by roll call vote of the public body in open session." The secret voting of the judicial nominating commission in this case seems to violate that provision.

The Nebraska Supreme Court, as indicated above, rejected Marks' claim under the public meetings law for two reasons. First, the supreme court said that the more specific statutes regulating judicial nominating commissions took precedence over the public voting

57. Presumably, Marks' direct claim was under the public meetings law because he had standing under that law. Neb. Rev. Stat. § 84-1414(3)(Reissue 1987). See State ex rel. Schuler v. Dunbar, 208 Neb. 69, 302 N.W.2d 674 (1981). Marks, an interested private citizen, may not have had standing to raise claims based on the statutes regulating judicial nominating commissions.


59. Neb. Rev. Stat. § 84-1413(2)(Reissue 1987). The Nebraska Supreme Court could have used this statutory language to argue that since the constitutional and statutory language relating to judicial nominating commissions requires only a "roll call vote," and not a "roll call vote of the public body in open session," an inference is created that the Legislature intended to permit the roll call votes of judicial nominating commissions to be taken in secret. The argument is swamped, however, by the purpose for requiring roll call votes in the first place, by other statutory language that indicates that the Legislature's intent when it uses "roll call" language is to require a public vote, and by the legislative history which unequivocally expresses the legislative intention that the votes of judicial nominating commissions should be conducted in public. In any event, the supreme court did not rely on this argument in reaching its decision.

60. The public meetings law also imposes other requirements which were not met in the Marks case. Neb. Rev. Stat. § 84-1410(2)(Reissue 1987) (vote must be taken in open session to go into closed session and body must reconvene in open session before any formal action is taken); Neb. Rev. Stat. § 84-1413(1)(Reissue 1987) (minutes must disclose members present and absent and substance of all matters discussed).

61. See supra note 15 and accompanying text.
requirement of the public meetings law and, second, the court said that the public meetings law simply did not apply to decisions of judicial nominating commissions. The court was quite wrong on these two points also.

1. Is the Public Voting Requirement of the Public Meetings Law Overridden by the Statutes Regulating Judicial Nominating Commissions?

On this issue, the Nebraska Supreme Court determined the relationship between two sets of statutes—the public meetings law and the statutes which regulate judicial nominating commissions. The court held that because the statutes regulating judicial nominating commissions apply specifically to the procedures used by commissions, the provisions of those statutes should take precedence over the provisions of the public meetings law, which apply to meetings of governmental bodies generally.

The supreme court incorrectly stated the canon of statutory interpretation that applies in the case. The supreme court said that the canon is that "specific statutory provisions relating to a particular subject control over general provisions." The canon actually is that where there is a conflict, specific statutory provisions control over general provisions. Nebraska law is clear that the latter canon is the correct one—the supreme court has explicitly held that where there is not a conflict, the canon that a specific law takes precedence over a general law is inapplicable. Where there is not a conflict, the court should apply the well-accepted canon, in Nebraska and elsewhere, that statutes in pari materia should be construed together.

The two cases the supreme court cites in support of the rule—Lentz v. Saunders and Reed v. Parratt—do not include the conflict language in their statements of the rule. The cases, however, do not hold that no conflict is required for specific statutes to control general statutes; they simply do not contain the conflict language in their

64. Id.
68. 207 Neb. 796, 301 N.W.2d 343 (1981).
statements of the canon. The supreme court failed to cite or mention in *Marks* the many cases that correctly state the canon, including cases that the court rediscovered only a couple of weeks after the *Marks* decision when it stated the canon correctly.

The court's result was wrong, however, even under the canon as incorrectly stated by the court. According to the court's statement of the canon, the issue of whether judicial nominating commissions are required to vote in public must be decided by reference only to the statutes regulating judicial nominating commissions. Since those stat-

69. In *Lentz*, there was a conflict between the two statutes being considered. One statute applied only to Class I school districts and required that instruction be contracted out for a two-year period before dissolution of the district, while the other applied to all districts and required a five-year period of contracting out before dissolution. The court held that the more specific statute applied to dissolution of Class I districts. *Lentz* v. *Saunders*, 199 Neb. 3, 5-6, 255 N.W.2d 853, 855 (1977). Thus, although the court in *Lentz* did not include the conflict language in its statement of the canon, it applied the canon in a situation where there was a conflict.

In *Reed*, the Nebraska Supreme Court reconciled statutes regulating the procedures to be used for prison disciplinary proceedings and the procedures of the Nebraska Administrative Procedure Act. The two procedures were inconsistent in some respects, but on the precise issue in *Reed*—the availability of judicial review—arguably there was no conflict. The majority held that the more specific statute should apply without discussing the issue of whether there was a conflict; a dissent was filed in which two justices argued that the statutes were not in conflict and, hence, that the canon should not apply. Thus, application of the canon in *Reed* is unclear. Either the court thought there was a conflict between the two statutes (disagreeing with the dissent) and properly applied the canon, or the court applied the canon even in the absence of a conflict. The former is the better interpretation because the latter would mean that *Reed* overruled *sub silentio* a number of prior cases. See cases cited in note 65 supra and note 70 infra. For a critical discussion of *Reed*, see Potuto, *Prison Disciplinary Procedures and Judicial Review Under the Nebraska Administrative Procedure Act*, 61 NEB. L. REV. 1 (1982).


71. Holdrege Coop. Ass'n v. *Wilson*, 236 Neb. 541, 548, 463 N.W.2d 312 (1990) (citing *Glockel* v. *State Farm Mut. Auto Ins. Co.*, 219 Neb. 222, 361 N.W.2d 559 (1985) ("special provisions of a statute in regard to a particular subject will prevail over general provisions in the same or other statutes so far as there is a conflict")).
utes require a public vote, the court was wrong to permit a secret vote.

The court was also wrong, even accepting its canon of statutory construction, because of the constitution. In this section of its opinion, the court conveniently forgot the constitutional provisions that apply to judicial nominating commissions. The constitutional provisions are specific to judicial nominating commissions, but even if they were not, they would control over either set of statutes. As a result, if the constitution requires a public vote, and it does, it would take precedence over the specific statutes regulating judicial nominating commissions. Thus, either those statutes should be interpreted to require a public vote to ensure their constitutionality, or the constitution should be applied directly to require a public vote. Yet the supreme court, in its opinion, never discusses the meaning of the roll call vote requirement in the constitution.

But if the court's result was wrong, even accepting its peculiar canon of statutory construction, why did the court bother to misstate the canon? To answer this question, we need to examine more closely the court's analysis of the relationship between the two sets of statutes. The court's discussion was very brief, but the court decided:

1) That specific statutory provisions relating to a particular subject control over general provisions;
2) That the statutes which regulate judicial nominating commissions are specific provisions relating to a particular subject and therefore control over the public meetings law which is a general statute; and
3) That the statutes regulating judicial nominating commissions permit either public or secret voting.

72. See supra notes 39-56 and accompanying text.
73. The court could have used its misstatement of the canon to mount a procedural argument. According to the court's canon, the public meetings law is inapplicable; the issue is controlled by the more specific statutes which regulate judicial nominating commissions. Marks, however, had standing only under the public meetings law. Neb. Rev. Stat. § 84-1414(3)(Reissue 1987). Even if the statutes relating to judicial nominating commissions require a public vote, Marks would not have standing to assert those claims and, therefore, it was appropriate to dismiss his case. This argument is available only because the canon of statutory interpretation is misstated and, in any event, the court did not make it.
74. Marks v. Judicial Nominating Comm'n, 236 Neb. 429, 432, 461 N.W.2d 51, 553-54 (1990). This is in contrast to earlier in the opinion when the court cites the Nebraska Constitution, but fails to grant it any weight. Id. at 431, 461 N.W.2d at 553.
75. See supra notes 30-38 and accompanying text.
77. Id. at 432, 461 N.W.2d at 554.
78. The court is not as explicit on this as one might hope, but it does use a permissive rather than a mandatory term in its holding:

[The statutes regulating judicial nominating commissions provide] that a judicial nominating commission may select or reject nominees . . . in a private or confidential meeting, provided the vote is taken by an oral rollcall [sic].
The court's principal error in the case was on the third point, but accepting that as a correct interpretation for the moment, the court's misstatement of the canon of statutory construction permitted it to avoid the troublesome issue of whether there was a conflict between that interpretation and the requirements of the public meetings law. According to the court's canon, its interpretation governed the case whether there was a conflict or not. According to the correctly-stated canon, the court's interpretation controlled only if there was a conflict; in the absence of a conflict, the two statutes would be harmonized rather than prioritized.79

Still accepting the court's interpretation of the statutes regulating judicial nominating commissions as stated in three above, the issue of whether there is a conflict between that interpretation and the public meetings law is troublesome. Under the court's interpretation, judicial nominating commissions have the discretion to hold their votes in public or private. The public meetings law requires the votes to be in public.80 Thus, there is no conflict in the sense that one law requires A and the other requires not-A. Rather, one law permits A or B and the other requires A. For two reasons, that is probably not a conflict in this context.81

First, the burden to demonstrate a conflict should be quite heavy in this case. The burden should be heavy because finding a conflict would preserve the option of holding votes in secret and the public policy of this state is to construe the public meetings law liberally and to construe narrowly and strictly claims that public meetings can be closed to the public.82 The burden should also be heavy because finding a conflict means that a section of the public meetings law—the section which requires a public vote—is impliedly repealed by the court and implied repeals are disfavored. And the burden should be heavy because any conflict arises in the face of a statute that clearly requires open voting,83 that by its terms covers judicial nominating commissions,84 and that does not recognize any conflict within its own

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79. With apologies to Jesse Jackson. See supra note 66.
80. NEB. REV. STAT. § 84-1410(2)(Reissue 1987).
81. Clearly, there could be a conflict in other contexts. Specifically, if the legislature clearly intended one law to preserve a choice between A and B and the other law required A, there would be a conflict. In this context, there is no evidence that the legislature clearly intended to preserve a choice between public and secret voting. Indeed, to the extent there is ambiguity on this point in the legislation itself, the legislative history of both the constitution and the statutes clearly indicates that the legislature not only did not intend to preserve choice, it intended to require public voting. See supra notes 27-56 and accompanying text.
83. NEB. REV. STAT. § 84-1410(2)(Reissue 1987).
84. The public meetings law applies to "all independent... commissions... now or hereafter created by the Constitution of Nebraska, statute, or otherwise pursuant
terms\textsuperscript{85} even though it was enacted close in time to the statutes regulating judicial nominating commissions\textsuperscript{86} so the Legislature should have been constructively\textsuperscript{87} and actually\textsuperscript{88} aware of any conflict between the two statutes.

Second, this burden of demonstrating a conflict cannot be met because the two sets of statutes can be harmonized so easily and so well. The statutes which regulate judicial nominating commissions authorize commissions to hold private or confidential meetings to consider candidates.\textsuperscript{89} The public meetings law also permits private or confidential meetings.\textsuperscript{90} Neither set of statutes requires private meetings.\textsuperscript{91} The statutes regulating judicial nominating commissions do not discuss the procedural mechanisms for entering into or exiting to law." \textsuperscript{92} 

\textsuperscript{85} The Legislature demonstrated that it knew how to deal with potential conflicts—it exempted some bodies from coverage. \textsuperscript{86} Judicial nominating commissions are independent commissions created by the constitution and by statute and, hence, are unquestionably covered by the statute.

\textsuperscript{86} The public meetings law was enacted in 1975; the relevant portions of the statutes regulating judicial nominating commissions were enacted in 1973.

\textsuperscript{87} Thirty-seven of the 49 state legislators were the same in 1973 when the relevant laws regulating judicial nominating commissions were enacted and in 1975 when the current public meetings law was enacted. \textsuperscript{88} The court hints in its opinion that perhaps the statutes regulating judicial nominating commissions require a private vote. \textsuperscript{89} The court notes that the statutes do not explicitly require a public vote and that they provide that all communications between members of judicial nominating commissions shall be confidential. Marks v. Judicial Nominating Comm'n, 236 Neb. 429, 431, 461 N.W.2d 551, 553 (1990). The statutes, however, do not require a private vote. The statute reads: "[The Commission] shall hold such additional private or confidential meetings as it determines to be necessary." Thus, private meetings are not required. Commissions might complete their business at the required public meeting and, as a result, determine that no additional meetings at all are required. Or they might decide to hold additional meetings, but determine that private or confidential meetings are not necessary. Both options are clearly permitted by the statutory language. On the confidentiality issue, the court neglected to mention that the confidentiality protections extend to communications "except those at the public hearing." \textsuperscript{90} The statutes do not require a secret meeting because they do not extend to communications at the public hearing. Since the statutes do not require a secret meeting, they do not require a secret vote \textit{a fortiori}. To the extent the statutes are ambiguous, the legislative history clearly indicates that the Legislature did not intend to require a secret vote; it intended the exact opposite. \textsuperscript{91} See supra notes 39-56 and accompanying text.
from closed sessions; the public meetings law does. The both sets of statutes require roll call votes. There are no apparent conflicts between the statutes and no difficulties in reconciling them.

For multiple reasons, then, the court was wrong in deciding that the public voting requirement of the public meetings law was overridden by the more specific requirements of the statutes regulating judicial nominating commissions.

2. Does the Public Meetings Law Apply to Decisions of Judicial Nominating Commissions?

The Nebraska Supreme Court also provided another reason for its holding that the public meetings law did not apply to decisions of judicial nominating commissions. The court said that the intent section of the public meetings law indicated that the “main purpose” of the law was to ensure that public policy is formulated at open meetings. The court then asserted that the selection of nominees for judicial vacancies “with certainty” does not involve the formation of public policy. Thus, the court concluded that the act of selecting nominees fell outside the purview of the public meetings law.

94. There are hypothetical possibilities for conflict between the two statutes. The statutes regulating judicial nominating commissions, although not clear on the issue, appear to permit commissions to hold private meetings to deliberate on candidates. Neb. Rev. Stat. §§ 24-810(3), 24-812 (Reissue 1989). The public meetings law, on the other hand, may require open meetings even for deliberations. Section 84-1410(1) requires open meetings for deliberations 1) on “the appointment or election of a new member to any public body” and 2) if an applicant requests an open meeting. Neb. Rev. Stat. § 84-1410(1) (Reissue 1987). This conflict is hypothetical because of uncertainties in how both sets of statutes should be interpreted. First, the statutes which regulate judicial nominating commissions do not require private meetings for deliberations, so an interpretation of those statutes which recognized that private meetings were merely permissive would avoid a conflict. Second, the cited provisions of the public meetings do not clearly require open deliberations. Judicial nominating commissions, arguably, do not appoint or elect new members to a public body; instead they nominate persons who might later be appointed to a public body by the Governor. And an applicant has a right to a public meeting upon request only if the closed meeting was contemplated to prevent injury to that person’s reputation. In this context, arguably, the closed meeting is contemplated to protect the integrity of the commissioners’ discussions about the candidate, not to protect the requesting candidate’s reputation. These interpretations of the public meetings law would also avoid a conflict. In any event, these hypothetical conflicts were irrelevant to the issue addressed in Marks. These conflicts, even if they were found to exist, would not justify use of the maxim where there was no conflict. Specifically, it would not justify use of the maxim to permit a roll call vote in closed session, an issue on which there is no conflict whatsoever between the two sets of statutes.
The first premise in this argument is that the requirements of the public meetings law only apply to the formation of "public policy." If public policy is not being formed, the law simply does not apply. For this holding, the court relies solely on language in the intent section of the public meetings law.\(^{96}\) So one might be tempted to ask, although the Nebraska Supreme Court apparently was not, what role should the intent sections of statutes play in the interpretation of those statutes? Sound principles of statutory interpretation indicate that intent sections can be relied on to clarify ambiguous provisions of statutes, but should not be used independently to assign meaning to statutes or to create ambiguities.\(^{97}\) Some courts have gone further and argued that intent sections are not an operative section of a statute at all, that an intent section is "no part of the [statute]."\(^{98}\)

The court's use of the intent section of the public meetings law, then, violates normal interpretative principles. The supreme court's "public policy" standard does not clarify any ambiguity presented in \textit{Marks} by the coverage provisions of the statute; instead, it introduces ambiguity. Application of the statute's principal coverage sections seemed clear in the \textit{Marks} case. The statute covers public bodies and judicial nominating commissions unambiguously fell within the definition of public body.\(^99\) The statute requires all "meetings" of public bodies to be open and defines meetings as "all regular, special, or called meetings, formal or informal, of any public body for the purposes of briefing, discussion of public business, formation of tentative policy, or the taking of any action of the public body."\(^{100}\) Prior to the

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97. \textit{1A SUTHERLAND STATUTORY CONSTRUCTION} §§ 20.12 (4th ed. 1984 & Cum. Supp. 1990). It should be noted that there is no inconsistency between arguing that expressions of legislative intent should be disregarded here, while at the same time arguing, as I have earlier, that expressions of legislative intent in the enactment of the constitutional and statutory provisions relating to judicial nominating commissions should be regarded seriously. The basic principle of statutory interpretation that is being applied consistently is that reference to legislative intent is permissible only to resolve ambiguities. \textit{Sun Ins. Co. v. Aetna Ins. Co.}, 169 \textit{Neb.} 94, 112, 98 \textit{N.W.2d} 692, 702 (1959). With respect to the public meetings law, the statute was not ambiguous on the issues the court was addressing so resort to legislative intent was improper. With respect to the roll call vote requirements of the constitution and statutes, there was ambiguity on the issues the court was addressing so resort to legislative intent would have been proper.


99. \textit{See supra} note 58 and accompanying text.

100. \textit{NEB. REV. STAT.} § 84-1409(2)(Cum. Supp. 1990)(emphasis added). The public meetings law permits closed sessions for \textit{discussion} of certain issues, \textit{NEB. REV. STAT.} § 84-1410(1)(Reissue 1987), but requires the meeting to be reconvened in open session before any formal action is taken. \textit{NEB. REV. STAT.} § 84-1410(1)(Reissue 1987). Thus, the public meetings law, on its face, permits judicial nominat-
court's decision, the statute clearly seemed to apply to meetings of judicial nominating commissions. 101

The court's decision amends the coverage provisions of the public meetings law. The law says it applies when public bodies are taking any action; 102 the court says the law applies only when public bodies are taking action that involves the formation of public policy. At the very least, the court introduces ambiguity into the coverage of the public meetings law. Judicial nominating commissions, and indeed all public bodies, are now covered by the law only to the extent they are forming "public policy," but the court provides us with only very limited guidance on what that phrase means. 103

The court's reliance on the intent section of the public meetings law in Marks encourages claims based on the intent sections of other laws. The intent section of the Nebraska equal pay act, for example, says that the act is intended to implement comparable worth, 104 even though the body of the act requires only equal pay for equal work. 105 Thus, if the court treats this intent section as it did the one in Marks, the language on comparable worth would override the otherwise unambiguous language on equal pay. Marks encourages attorneys to forward this type of argument based on the language in intent sections of statutes, even though such arguments would have been considered frivolous before Marks and even though the Legislature did not anticipate that intent sections would have such a powerful effect. 106

The second premise of the court's decision on this issue is that the selection of nominees for judicial vacancies "with certainty" does not

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101. Remember, the court was not arguing here that the public meetings law did not apply because of some inconsistency with the statutes regulating judicial nominating commissions. In this part of its decision, the court was asserting that the public meetings law on its own terms did not apply to judicial nominating commissions.


103. See infra note 112 and accompanying text.

104. "The practice of discriminating on the basis of sex by paying wages to employees of one sex at a lesser rate than the rate paid to employees of the opposite sex for comparable work on jobs which have comparable requirements [leads to all kinds of dire and evil results]." NEB. REV. Stat. § 48-1219(1)(Reissue 1988)(emphasis added).

105. "No employer shall discriminate . . . on the basis of sex [by paying unequal wages] for equal work on jobs which require equal skill, effort and responsibility under similar working conditions." NEB. REV. Stat. § 48-1221 (Reissue 1988)(emphasis added).

106. Such arguments would have been considered frivolous before Marks and the Legislature did not anticipate that intent sections would have such an effect for the same reason—because it was so well-accepted before Marks that language in the intent section of a statute could not override unambiguous language in the body of the statute. See supra notes 97-98 and accompanying text.
involve the formation of public policy. The premise is ironic given its source, and the irony is enhanced by the "with certainty" language. The claim is made in a case in which the court ignores the public policy established by the Legislature which requires open voting and instead implements its own view of how judicial nominating commissions should operate. It is made in the face of a statute which explicitly states that open meetings are required for "the appointment or election of a new member to any public body." It is made by a court which establishes public policy even to the extent of regularly citing its own opinions as support for the existence of a particular public policy, by a court which has discussed public policy in 157 of its cases since 1980. On the hierarchy of bodies in this state which establish public policy, the court has now held that judicial nominating commissions rank somewhere below county agricultural societies.

But the court has held that the selection of nominees for judicial vacancies does not involve the formation of public policy, and hence is not subject to the public meetings law. So what does that mean for the scope of application of the public meetings law in the future? The court is not very informative, but presumably it means that public bodies are subject to the public meetings law only when they are actually engaged in the formation of public policy. So the appointment of people to public bodies would never be subject to the public meetings law because that is not actually forming public policy, it is only deciding who will form public policy. Public bodies engaged in adjudicatory functions would never be subject to the law because those bodies are applying public policy, not forming it. Public bodies engaged in executive functions would never be subject to the law because those bodies are enforcing public policy. Even public bodies engaged in legislative functions would be subject to the law only if the particular decision at issue rose to some unspecified level of public importance.

110. A Lexis search of Nebraska Supreme Court cases since 1980 indicates that the phrase "public policy" was used in 157 cases. In a number of the cases, of course, the phrase was used in contexts in which the court itself was not forming public policy. But see supra note 109.
112. This result is in some conflict with a specific provision of the public meetings law which requires open meetings for the appointment or election of new members to public bodies, NEB. REV. STAT. § 84-1410(1)(Reissue 1987), but the Marks case presented that same conflict and the court was unconcerned with it.
The ability of government to act in secrecy is dramatically expanded by the *Marks* decision. The decision severely weakens the scope and effect of the public meetings law.

The court then was wrong on both premises of its argument that the public meetings law on its own terms did not apply to judicial nominating commissions. The language in the intent section of the law should not have been used to override language in the principal sections of the law. And the argument that judicial nominating commissions are not involved with the formation of public policy is not credible and poses a serious threat to the continued viability of the public meetings law.

IV. CONCLUSION

In *Marks*, the Nebraska Supreme Court was dramatically off the mark. To accept the supreme court's decision as correct, one has to be convinced that the Nebraska Constitution does not require public votes by judicial nominating commissions, that the statutes which regulate commissions do not require public votes, and that the public meetings law does not require public votes. If this Article has been convincing on any one of those points, the *Marks* decision was wrongly decided. But the supreme court was also off the mark in another, more fundamental sense. The supreme court simply refused to discuss the issues in the case. Squarely confronting issues is perhaps the most important institutional obligation of the court, and the court in *Marks* failed to fulfill that obligation.

In this Part, I will discuss the effects of *Marks* in three distinct areas: On the procedures to be used by judicial nominating commissions, on the viability of the public meetings law, and on the stature of the Nebraska Supreme Court as an institution. I will also present responses to the decision which would tend to minimize those effects.

*Marks* confirms the secret voting procedures currently used by judicial nominating commissions. One question to ask, then, is whether those procedures are working well. If they are, *Marks* does not present an especially serious problem on the policy issue (although it may on the issue of institutional deference). On the other hand, if the procedures are not working well, one needs to ask an additional question: Would the change from secret to public voting make any difference?

The current procedures used by judicial nominating commissions have generated a considerable amount of criticism. The principal concern is that the process produces too few female judges. There is considerable anecdotal evidence that the process, which now allows the commission to operate behind the veil of secrecy sanctioned by *Marks*,

113. See infra pp. 303-04.
has been manipulated to favor friends, law partners, and even relatives, almost always to the disadvantage of female candidates. The Nebraska Supreme Court itself has implicitly recognized the existence of these types of problems by promulgating disqualification rules intended to eliminate the most blatant of these abuses.

An empirical analysis of the Nebraska judiciary confirms that the current system produces too few female judges. If female judges had been selected in proportion to their numbers in the pool of potential judges with the necessary experience, Nebraska would have nearly twice as many female judges—Nebraska would have seven or eight female supreme court, district court and county court judges, instead of its current four. And this analysis understates the shortage of


115. “Rules for Nebraska Judicial Nominating Commissions,” 236 Neb. iii-iv (adopted September 6, 1990). The rules require commissioners to recuse themselves if they are related to any applicant or if they practice law or have any other profitmaking venture with an applicant.

116. The proportion of women in the overall pool of potential judges considered by judicial nominating commissions was estimated by determining the year of graduation for each current judge, assigning as the pool for that judge the number of men and women in the graduating class at the University of Nebraska College of Law for that year, totaling the pools for all the judges, and calculating the proportion of women in the overall pool. The proportion of women in the pool overall was 6.9%, which would have meant that 7.59 of the 110 judges in the sample would have been women if the proportion of women selected as judges had been the same as the proportion of women in the hypothetical pool. (I said “seven or eight” female judges in the text to avoid the difficult task of discussing the nature of a judge who is 59% female.)

This analysis was based on the 110 supreme court, district court and county court judges listed in the 1990 Bar Directory. NEBRASKA STATE BAR ASSOCIATION, THE BAR DIRECTORY: ANNUAL REPORT AND DIRECTORY, 1990 279-87 (1990). There have been some changes in the judiciary since publication of the Directory (for example, Judge Janice Gradwohl has been replaced by Judge Mary Doyle), but no significant changes for purposes of this analysis. Including judges on other bodies subject to the judicial nominating commission process would not have significantly affected the results.

The hypothetical pool developed by this analysis, although not precise, is a reasonably accurate, low-cost estimate of the actual overall pool faced by judicial nominating commissions over time. Use of the proportion of women in graduating classes at the University of Nebraska in the analysis poses two potential biases. First, use of that measure means that the estimate of women in the hypothetical pool is lower than it would be if the proportion of women graduates nationally had been used instead because the increase in the proportion of women graduates occurred slightly earlier nationally than it did in Nebraska. See infra note 117. Nevertheless, use of Nebraska graduates as the proxy is probably preferable 1) because Nebraska supplies a significant proportion of the potential judge candidates and 2) because the proportion of female graduates at Creighton, the other major supplier of candidates in Nebraska, probably closer reflects the proportion at the University of Nebraska than the proportion nationally. Use of Nebraska graduates as a proxy also poses a potential bias because its use means
female judges because it assumes that judicial nominating commissions have no duty affirmatively to seek out female candidates in an

that the pools for individual judges are not very accurate. Judges who graduated in the same year but who were appointed in different districts would have the same proxy pool under the analysis even though the proportion of women candidates may well vary from district to district. Moreover, the pools for individual judges depend importantly on the particular year in which the judges graduated. For example, a judge graduating in 1958 had a proxy pool with zero percent women, while a judge graduating a year later in 1959 had a proxy pool with 9% women; judges graduating in 1974 and 1975 had proxy pools containing 7 and 18% women, respectively. This bias for individual judges, however, is not very significant for purposes of this study where the object was to develop a proxy pool for potential judges overall.

In essence, this analysis controls for two factors—the number of female lawyers in the pool and years of experience required to be a judge. The analysis uses 1) graduation statistics at the University of Nebraska College of Law as a proxy for the number of female lawyers in the pool and 2) the number of years of experience actually required by judicial nominating commissions and governors to estimate the years of experience required to be qualified to be a judge.

On all other factors, the analysis assumes that male and female candidates for judicial office were equal. The analysis is biased to the extent that that assumption is not true, but the direction of the bias is uncertain in most circumstances and acquiring the information to determine the direction and extent of any bias would be costly. Consider, as an example, the argument that the analysis is biased because it only considers differences between men and women in years of experience, but not in the quality of experience. One version of the argument is that private law firm experience provides a higher quality experience than an equivalent number of years of experience in the public sector, that men are disproportionately employed by private firms and women in the public sector, and therefore that failure of the analysis to take account of this difference in the quality of experience results in an overestimation of the number of female judges. This type of argument raises several issues which, until they are resolved, make the direction and extent of any bias uncertain. For instance, there is the issue of whether private law firm experience is actually preferred by judicial nominating commissions. A significant number of judges, including many male judges, came to the bench from the public sector. If public sector experience is actually preferred and women are overrepresented there, then this analysis's estimate of the number of women judges to expect is too low, rather than too high. Second, the direction and extent of any bias is uncertain because there may be a less than proportional number of applicants for judicial vacancies from the private sector because, among other things, the pay is generally higher there than it is in the public sector. Thus, even if judicial nominating commissions do prefer private sector experience and even if men are overrepresented in that sector, the estimate of female judges made by this analysis may not be too high because those advantages of private sector experience may be overridden by the disproportionately low number of applicants for judicial vacancies received from persons with experience in the private sector. These types of issues could certainly be addressed by a more ambitious empirical study, but acquiring the necessary information would be costly.

In sum, this empirical analysis indicates that the judicial nominating commission process as it currently operates in Nebraska produces too few female judges. The analysis is not definitive, but it is sufficient to shift the burden to those who would claim that there is not an underrepresentation of women to produce empirical evidence, rather than mere argumentation, to support that viewpoint.
attempt to reduce their historic underrepresentation as judges. Other states, and even the federal government (which, under the Reagan administration, was not especially sensitive to this issue), have produced significantly higher proportions of female judges even though the proportion of women in the pool of potential judges is roughly the same as in Nebraska. Nationwide, 8.7 percent of state court judges, 9.9 percent of state supreme court judges and 11.1 percent of federal court judges are women. In Nebraska, 3.6 percent of state court judges overall and zero percent of state supreme court judges are women.

Frankly, I am doubtful that the single change proposed through the *Marks* case which would have required judicial nominating commissions to vote in public would adequately address this problem with the current system. The problem has too many causes and is too complex to be solved by such a simple procedural expedient. On the other hand, we do know that discrimination is more likely to occur in the dark than in the light, so requiring judicial nominating commissions to operate in the light may reduce the problem, even if only marginally.

Even if one concludes that the proportion of female judges in Nebraska is not a problem or that making the change proposed in *Marks* would not address the problem, the Legislature has reason to be concerned about the *Marks* holding on judicial nominating commissions. The Legislature clearly expressed its preference for public voting both in the legislative history of the constitutional amendment and in the legislative history of the statutes regulating judicial nominating commissions. In *Marks*, the supreme court paid no deference to the Legislature's policy choice. Independently of how it feels on the issue of female judges, the Legislature might decide to respond to the *Marks*...
decision to protect its institutional integrity from judicial encroachment.

Whether the Legislature decides to respond because of the women's judges issue or to protect its own institutional integrity, the narrow legislative response to *Marks* would be to amend the statutes regulating judicial nominating commissions to require a public vote. That would reaffirm the prior expressions of legislative intent on the issue and signal the supreme court that when it disregards legislative intent in making a decision, the Legislature will respond to protect its integrity. Broader responses would, of course, also be appropriate if the Legislature were concerned about the women's judges issue.\(^1\)

The *Marks* decision also places in jeopardy the continued viability of the public meetings law. As is detailed above,\(^2\) the "public policy" exception to the public meetings law threatens to curtail severely the scope of application of the law. The appropriate legislative response to this aspect of *Marks* would be either to amend or repeal the intent section of the public meetings law.\(^3\) The section could be amended to expand the openness policy of the act beyond "the formation of public policy," as is evident in the principal sections of the act, or the section could be repealed, which would leave only the more expansive openness policies of the principal sections of the act.

Finally, the *Marks* decision damages the stature of the Nebraska Supreme Court as an institution. The court was damaged not because it decided the *Marks* case incorrectly, but because it failed to discuss the issues in the case. The refusal was not because the court was unaware of the issues in the case. The court knew the legislative history of the constitutional amendment, and chose to ignore it. The court knew of the Legislature's intention when it enacted the statutes which regulate judicial nominating commissions, and chose to ignore it. The court knew that its statement of the canon of statutory interpretation to reconcile statutes was incorrect, and stated it that way anyway.\(^4\)

Reason is the currency courts use to maintain and enhance their institutional authority. They cannot rely on democratic notions, as the other branches of government do, as an alternative currency. When the courts reject reason and rely on raw assertion, as the supreme court did in *Marks*, they undermine their own legitimacy\(^5\) and reduce, at least marginally, the willingness of others to obey the law voluntarily.\(^6\) The Nebraska Supreme Court is the only body that can

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2. See supra note 112 and accompanying text.
3. The "intent" section is the first paragraph of NEB. REV. STAT. § 84-1408 (Reissue 1987).
4. All of these issues were discussed fully in the amicus brief filed in the *Marks* case.
address this damage from the *Marks* decision but, unfortunately, there are no short-term remedies. The supreme court can limit this damage only by squarely addressing issues in future cases and attempting to resolve them in a fair-minded manner so that eventually the *Marks* decision is viewed as an aberration in Nebraska Supreme Court decisionmaking, rather than standard practice.