

February 20, 2025
SCR 1611
Proponent
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Chairman Thompson and Members of the Committee,

On behalf of Americans for Prosperity and the tens of thousands of American citizens and families it represents across the state of Kansas, I write today to support SCR 1611.

This resolution would give the people the opportunity to eliminate the Kansas Supreme Court Nominating Commission and return the selection of Kansas judges to where it belongs, the voters of Kansas.

Currently, Kansas is the only state in the country where the Bar Association, a collection of practicing attorneys, have the majority voice in the selection of judges. That is, only in Kansas do attorneys get to fully pick their own judges, who then decide the cases of those same attorneys.

It is a system that flies in the face of basic common sense; and it has led to a crisis of confidence in the state's judiciary. The current system is untenable.

1. The People of Kansas should have a say in the selection of their judges.

The judicial power is one of the three powers of government exercised on behalf of Kansans. Kansas citizens should, therefore, have a role in deciding who will exercise the judicial power on their behalf. This should not be a radical proposition. It is fundamental to the idea of the American experiment that citizens should be able to act as an effective check on the power of the state.

Unfortunately, Kansas has departed from the desire of the founding fathers. Instead, it now lets an unelected, unrepresentative and unaccountable group of special interest lawyers choose the judges who wield power over the lives and liberties of every Kansan.

Imagine if Kansas used this system for state legislators or the Governor. Surely "expertise" and "merit" are also important in those roles too. If one were to try and abolish Kansas elections and have legislators be appointed by an unelected board of experts, Kansans would, to put it mildly, not be satisfied. It would undermine legitimacy of the system and for good reason. The fundamental principal of democracy is that the people choose who will exercise power over them.

Why are courts different? They are not. The Kansas Supreme Court Nominating Commission has effectively undermined the legitimacy of the Kansas Supreme Court. It is time for the people to have a say at removing it and returning the political power over the courts to where it belongs. With the citizens.

Some have argued that retention elections are a sufficient check on judicial power, this has proven not to be the case. 99% of judges are retained. But more important than the results, these elections fail to give voters a real choice. If a judge is not retained the process of unrepresentative and unaccountable selection just repeats. At no point do Kansas voters have an opportunity to actually have a say in who the judge is. A vote to not retain is a vote into the void, so it is no surprise that

despite an unpopular and unaligned judiciary, Kansas voters don't bother to simply reset the status quo with no hope for change.

This measure is a vote to break that chain of unaccountable disappointment and give the voters an actual say in this crucial branch of government.

2. The Kansas system intentionally and methodically skews judges to the political left.

State bars tend to skew left, as Vanderbilt law professor Brian Fitzpatrick highlights.¹ This produces judiciaries, in “almost all states,” that skew left of their population. But that ideological skew is greatest in states with Bar Association dominated selection boards, like Kansas. Kansas is the only state in the country that gives its Bar Association effective complete control over its judicial nominees.

In Kansas, the difference between the relative liberalness of the Supreme Court and the relative conservativeness of the average Kansan is about 17 points. To put that in electoral terms, if the Kansas judiciary were a state, its vote would look roughly like that of California.² Kansas is not California.

Given how the system is set up, this is not surprising. Lawyers make up the majority of the judicial nominating commission. Lawyers as a profession skew to the left of the general population, and lawyers active in the bar association skew further left still.

The academic literature widely agrees on this. A 2016 study by Harvard and Stanford political scientists matched Martindale Hubbell names w/ political contributions. And the result was that the legal profession skewed well left of the population. The same political scientists also compared state judges to other state officials and found state judges to be to the left of other state elected officials in terms of their political contributions.³

We are not alleging a devious plot, to trick Kansans into picking unrepresentative judges; we're simply describing human nature – people choose leaders who represent themselves. Everyone in this system believes they are choosing the “best” people – the problem is who gets to decide what best is. Currently, liberal lawyers decide what is best for Kansas. The system has been set up to produce judges that represent the average lawyer, not the average Kansan.

3. The current system does not produce more competent judges.

Some have argued that judging is different. Here you need special expertise that only a special selector can understand. It's true that a good judge is different from a good legislator or a good governor. But in states that elect judges, *voters* are selecting for “merit.” The difference is it's the people who make the judgments about what judicial merit is. And it has worked elsewhere.

“there is no evidence that any method of selection produces more competent judges than any other. This surprises people—it surprises me—but scholars have looked at it every way we know how— years of experience, ranking of law school, productivity, citation of opinions in other jurisdictions, clarity of opinions—and there is no good evidence one system produces better judges than any other.”⁴

So what to do with this? If a judicial commission is just as likely to produce a competent judge as a judicial election (or other selection methods), we must look to other metrics to evaluate them. Judicial philosophy, political legitimacy and independence.

Kansas's system fails on all three scores. Its ideology and judicial philosophy are not in line with the citizens of this state. This in turn has led to a loss of legitimacy; the court has lost the trust of the citizens of Kansas by stretching legal interpretations to strike down popular laws and programs passed by the elect branches and has made decisions at odds with the text and history of the Kansas constitution. And while it claims independence, this system is only independent in that it is unaccountable to either the legislature or the voters. It is not independent from its true master, the state bar association.

4. Kansas is an outlier.

It is true that Kansas is not alone in voters feeling a sense of unease with the courts, but unlike Kansas, voters in other states have avenues to voice those concerns and produce change.

Currently twenty-one states, from Texas to Pennsylvania, from Oregon to Alabama, hold judicial elections. Another eighteen states have judicial nominations, similar to the federal model, where elected officials control the nomination of supreme court judges and voters, in turn, can hold those elected officials accountable for their choices. The final eleven states, including Kansas, use some version of the Missouri system, where an unaccountable board of experts chooses the judiciary.⁵

But even among the Missouri system states, other states attempt through various rules and restrictions to keep the lawyer-dominated boards in equipoise with other interest groups.

Kansas, and Kansas alone, has a majority of members of its selection board directly controlled by the state bar association.

More than fifty years ago, Kansas began this experiment where lawyers chose their own judges. It has not worked. It is long past time to reform judicial selection in Kansas. I urge you to pass this measure and return the power to select judges to its rightful owners, the Kansas voters.

Thank you
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