

Testimony of Stephen Ware

Before the Senate Judiciary Committee

Re: SCR 1621

March 2, 2022

My name is Stephen Ware. I am the Frank Edwards Tyler Professor of Law at the University of Kansas. I submit this testimony, not on behalf of KU, but on my own as a concerned citizen.

I have been a law professor since 1993. I began my scholarly research and writing on judicial selection and retention in the 1990's. I have been invited to speak on the topic by a variety of organizations, from universities to chambers of commerce to bar associations to citizen's groups. I have spoken on the topic throughout Kansas and in states ranging from Missouri, Iowa, and Indiana to Florida and Texas. I consider myself one of a handful of law professors in the country with significant expertise on the various methods of judicial selection and retention used around the United States.

I published articles that researched how all 50 states select their supreme court justices and have devoted special attention to Kansas.¹ This research shows that the Kansas Supreme Court selection process is undemocratic and, from a national perspective, extreme.

Both problems would be fixed by SCR 1621. That is, both problems would be fixed by selecting Kansas Supreme Court justices in much the same way our elected representatives select judges for the Kansas Court of Appeals, which is based on the way our elected representatives have selected federal judges for over two centuries. So, I support SCR 1621.

I. The Kansas Supreme Court Selection Process is Undemocratic

Currently, no one can become a justice on the Kansas Supreme Court without being one of the three finalists chosen by the Kansas Supreme Court Nominating Commission. The Commission is the gatekeeper to the Kansas Supreme Court. However, the Commission is selected in a shockingly undemocratic way.

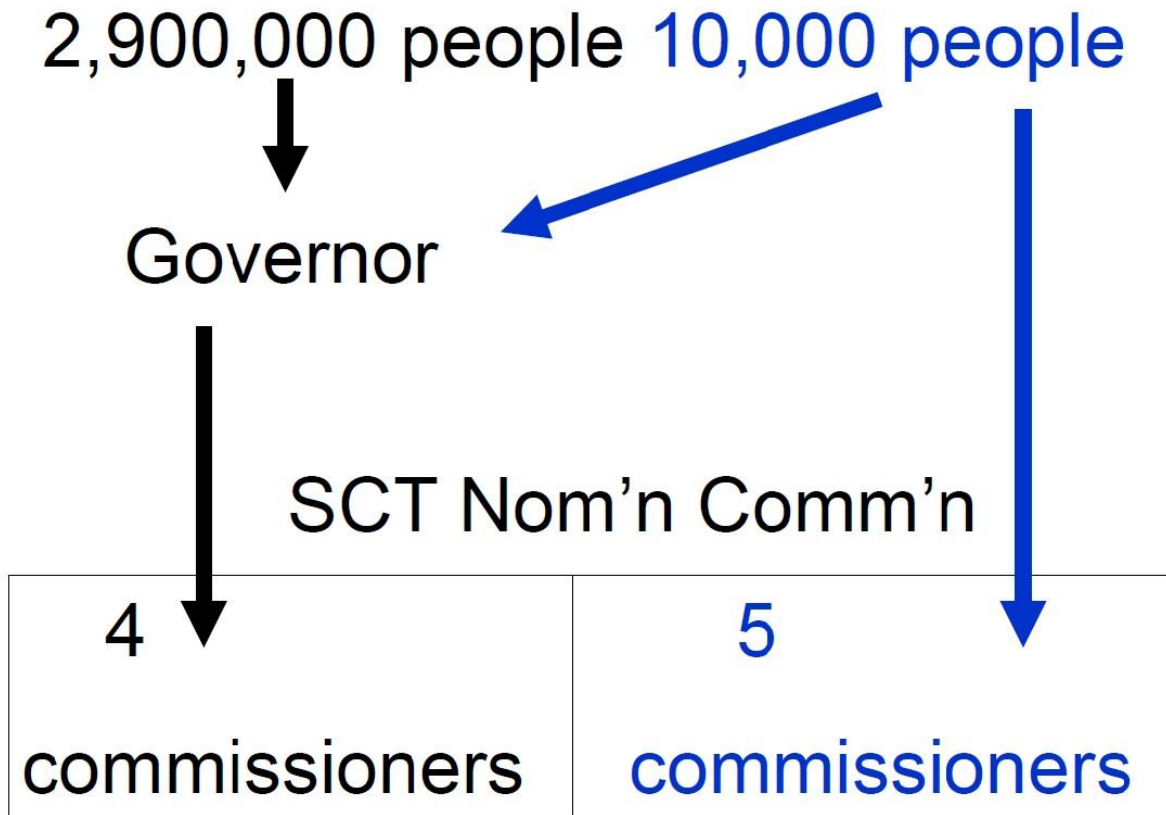
Most of the members of the Commission are picked in elections open to only about 10,000 people, the members of the state bar. The remaining 2.9 million people in Kansas have no vote in these elections.

This violates basic equality among citizens, the principle of one-person, one-vote. The current system concentrates tremendous power in one small group and treats everyone else like second-class citizens. In a democracy, a lawyer's vote should not be worth more than any other citizen's vote. As Washburn University School of Law professor Jeffrey Jackson wrote, democratic

¹ Stephen J. Ware, *Selection to the Kansas Supreme Court*, 17 Kan. J. L. & Pub. Pol'y 386 (2008); Stephen J. Ware, *The Bar's Extraordinarily Powerful Role in Selecting the Kansas Supreme Court*, 18 Kan. J. L. & Pub. Pol'y 392 (2009); Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 Mo. L. Rev. 751 (2009); Stephen J. Ware, *Originalism, Balanced Legal Realism and Judicial Selection: A Case Study*, 22 Kan. J. L. & Pub. Pol'y 165 (2013).

legitimacy "would appear to favor a reduction in the influence of the state bar and its members over the nominating commission, because they do not fit within the democratic process."²

The following diagram shows the undemocratic way the Kansas Supreme Court Nominating Commission is selected.



II. Kansas Supreme Court Justices Make Law, Instead of Just Applying It

Why should Kansas Supreme Court justices be selected democratically? Isn't it true that "Justices must follow the law and not be influenced by politics, special interest groups, public opinion, or their own personal beliefs"³? No. This statement is misleading. This statement is in the Kansas Courts Office of Judicial Administration news release a few years ago announcing that on "the Supreme Court Nominating Commission will interview applicants to fill the vacancy on the Kansas Supreme Court created by the September 8 retirement of Justice Lee Johnson."

² Jeffrey D. Jackson, *Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System*, 34 *Fordham Urb. L.J.* 125, 154 (2007).

³ See <http://kscourts.org/Kansas-Courts/General-Information/2019-News-Releases/091819.pdf>

Contrary to this statement of the Kansas Courts Office of Judicial Administration, judges in fact make law. Judges have for centuries going back to England made the common law, and some important areas of the common law are predictably political. Judges also make law in the gaps left by broad or ambiguous language in constitutions and statutes. Judges with enough cases will inevitably be occasional lawmakers, and supreme court justices inevitably are important lawmakers. This is true of Kansas, as it is true elsewhere. I have published detailed examples of it in Kansas.⁴

For instance, a clear case of lawmaking by the Kansas Supreme Court is a workers compensation case, *Coleman v. Armour Swift-Eckrich*.⁵ As the court's opinion by Justice Beier explained,

The pertinent facts are simple and undisputed. While waiting for the start of a meeting required by her employer, Armour Swift-Eckrich, Coleman sat on a chair with rollers, with her feet propped up on another chair. A coworker came up behind Coleman, took hold of the back of her chair, and dumped her out of it and onto the floor. The fall injured her back. There was no ill will between Coleman and her coworker, nor had Coleman done anything to provoke or encourage him. There was no evidence that such horseplay was common at Armour Swift-Eckrich or that the company had in some way condoned the coworker's actions.⁶

Was Coleman entitled to Workers' Compensation? Not under Kansas law as it stood at the time of this 2006 case. As Justice Beier's opinion for the court candidly acknowledged, "Armour Swift-Eckrich is correct that our precedent dealing with situations similar to Coleman's is clear and, if adhered to, would deny her relief."⁷

So, Coleman would clearly lose this case if judges always merely "follow the law." Under this unrealistically narrow description of judging, the *Coleman* case would end in a simple ruling for the defendant. If judges do not engage in lawmaking, then Coleman would clearly lose this case. As Justice Beier said, "The rule is clear, . . . : An injury from horseplay does not arise out of employment and is not compensable unless the employer was aware of the activity or it had become a habit at the workplace."⁸

However, Justice Beier and her colleagues on the Kansas Supreme Court engaged in lawmaking. Justice Beier's lawmaking opinion started by criticizing the old rule, while acknowledging that it was, in fact, the rule prior to her opinion by which the Supreme Court made new law. Here again is the above quote from *Coleman*, but now with the formerly omitted words restored and italicized: "The rule is clear, *if a bit decrepit and unpopular*: An injury from horseplay does not arise out of employment and is not compensable unless the employer was aware of the activity or it had become a habit at the workplace."⁹

⁴ Stephen J. Ware, *Originalism, Balanced Legal Realism and Judicial Selection: A Case Study*, 22 Kan. J. L. & Pub. Pol'y 165 (2013).

⁵ 130 P.3d 111 (Kan. 2006).

⁶ *Id.* at 112.

⁷ *Id.* at 114.

⁸ *Id.*

⁹ *Coleman*, 130 P.3d at 114.

Who decided that this rule is “decrepit and unpopular” and so should be changed? Was it the Kansas Legislature? No, it was the Kansas Supreme Court. It was judges, not legislators, who decided that this legal rule was bad policy, and who changed the law to bring it in line with what the lawmaking judges thought was good policy? As Justice Beier candidly stated:

Coleman cannot prevail on this appeal unless we are willing to do now what this court was unwilling to do ... in 1946: Reevaluate the wisdom of the horseplay rule. Sixty years later, we think it is time to do so.

Coleman is correct that the climate has changed since [an earlier case] was decided. The Kansas rule, once in the clear majority [around the country], is now an anachronism.

Courts of last resort, such as this one, are not inexorably bound by their own precedents. They follow the rule of law established in earlier cases unless clearly convinced that the rule was originally erroneous *or is no longer sound*. *State v. Marsh*, 278 Kan. 520, Syl. ¶ 23, 102 P.3d 445 (2004). We are clearly convinced here that our old rule should be abandoned. *Although appropriate for the time in which it arose, we are persuaded by the overwhelming weight of contrary authority in our sister states and current legal commentary.*¹⁰

Justice Beier forthrightly acknowledges that nothing tells “courts of last resort”¹¹ what they “must”¹² do in deciding cases. Rather than being compelled to “follow the law,” Justice Beier rightly says the Kansas Supreme Court may change the state’s common law if the judges on this court believe some aspect of that law “is no longer sound.”¹³ Those sitting on the Kansas Supreme Court, like judges sitting on other states’ high courts, make common law based on what they are “persuaded” is “appropriate for the time.”¹⁴

Those are the words of a unanimous opinion of the Kansas Supreme Court, and they are not earth-shattering. They are merely describing something virtually every lawyer has seen since the first year of law school. State supreme courts make common law based on what they are persuaded is appropriate for the time. Changing the law is what state supreme courts do with common law rules they believe to be “decrepit and unpopular.” They overturn the decrepit and unpopular old law and make new law, which they believe will be more in keeping with contemporary society. This lawmaking by state supreme courts is not always done as openly as it was by the Kansas Supreme Court in *Coleman*, but it is done from time to time. It is part of the job of being on a supreme court.

Judicial lawmaking is not confined to the common law. Statutory language is sometimes vague or ambiguous. Such statutes do not compel a single result in each case that might arise, as reasonable people can disagree about the best interpretation of the statute and therefore the best

¹⁰ *Id.* at 115 (emphasis added).

¹¹ *Id.* at 116.

¹² *Id.* at 115.

¹³ *Id.*

¹⁴ *Id.* at 116.

result of the particular case. For example, the Kansas Supreme Court divided 4 justices to 3 in a case interpreting the Kansas Uniform Commercial Code.¹⁵

A century ago, “The legal realists saw the interpretation of statutory ambiguities as necessarily involving judgments of policy and principle. They insisted that when courts understand statutes to mean one thing rather than another, they use judgments of their own, at least in genuinely hard cases.”¹⁶ This realist view that statutory interpretation often involves “substantial judicial discretion” and therefore constitutes “judicial lawmaking, not lawfinding,” had by the 1950s, “become deeply rooted.”¹⁷ “Although there was a time in the late nineteenth and early twentieth centuries when many American lawyers and some citizens deluded themselves with the belief that judges could be trained to be professional technicians interpreting statutes and constitutions without regard to their political consequences, there is virtually no one who thinks that today.”¹⁸

These realist points about judicial lawmaking in *statutory* interpretation apply as well to judicial lawmaking in *constitutional* interpretation. Constitutional provisions are sometimes vague or ambiguous. So constitutional interpretation necessarily involves some degree of judicial discretion and judgment.

In sum, and to reiterate, judges with enough cases will inevitably be occasional lawmakers, and supreme court justices inevitably are important and powerful lawmakers. We all realize that governors and legislators are lawmakers so each of the fifty United States selects governors and legislatures democratically, in direct elections. We also generally use a form of democracy—the indirect democracy of appointment by governors and legislatures — to select leaders of the various government departments, boards, and commissions that administer a modern state because we understand that these officials also make law. In contrast, we do not select our doctors, plumbers, and hairdressers democratically because we understand that these jobs do not entail making law.

In general, lawmakers in our society are selected democratically and non-lawmakers are not selected democratically. However, judges selected by a system like that used to select the Kansas Supreme Court are incongruous; they are lawmakers, but they are not selected democratically. They are not selected in accord with the basic democratic principle of one-person, one-vote. Quite simply, the processes for the selecting the supreme courts of Kansas and a few other states are aberrant violations of our society’s practice of selecting lawmakers democratically.

¹⁵ *Wachter Management Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747 (Kan. 2006).

¹⁶ Cass R. Sunstein, *Beyond Marbury: The Executive’s Power to Say What the Law Is*, 115 Yale L.J. 2580, 2591 (2006).

¹⁷ Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241, 248 (1992) (“Because neither statutory text nor legislative intent was universally determinate and confining, the legal realists insisted that statutory interpretation often involved substantial judicial discretion and constituted judicial lawmaking, not lawfinding. . . . By the 1950s, the legal realists’ critique of interpretive formalism had become deeply rooted.”)

¹⁸ Paul D. Carrington & Adam R. Long, *The Independence and Democratic Accountability of the Supreme Court of Ohio*, 30 Cap. U. L. Rev. 455, 469 (2002).

III. Kansas is Extreme; No Other State is as Undemocratic as Kansas

Kansas is the only state that allows its bar to select most of its supreme court nominating commission. None of the other 49 states gives its bar so much power. Kansas stands alone.

The following provides details:

Bar Control of Supreme Court Selection

High Bar Control						Low Bar Control
MO Plan Comm'n majority selected by bar	MO Plan Comm'n near majority selected by bar	Nom'n Comm'n w/ no or little role for bar	Legislative Appointment	Governor's Nominee Confirmed	Non-Partisan Elections	Partisan Elections
Kansas	Alaska Indiana Iowa Missouri Oklahoma Nebraska South Dakota Wyoming	Arizona Colorado Florida	South Carolina Virginia	California Connecticut Delaware Hawaii Maine Maryland Massachusetts New Hampshire New Jersey New York Rhode Island Tennessee Utah Vermont	Arkansas Georgia Idaho Kentucky Michigan Minnesota Mississippi Montana Nevada North Carolina North Dakota Ohio Oregon Washington Wisconsin	Alabama Illinois Louisiana New Mexico Pennsylvania Texas West Virginia

Kansas lawyers defending their extremely high level of power often try to distract from this fact by pointing out that some other states also have nominating commissions with some seats reserved for lawyers. But the important question for democratic legitimacy is not whether a member of the commission is a lawyer; the important question is *who selects* that member of the commission. No other state allows its bar to select most of its supreme court nominating commission. No other state's commission is as undemocratic as Kansas's.

Examining judicial selection elsewhere in the country reveals two main approaches. Nearly half the states elect their supreme courts. Elections are direct democracy. They put power directly in the hands of the people, the voters, and give each voter equal power. A lawyer's vote is worth no more than any other citizen's vote.

The second common method of selecting state supreme court justices is the one used to select federal judges: executive nomination followed by senate confirmation. In fourteen states, the governor nominates state supreme court justices, but the governor's nominee does not join the court unless confirmed by the state senate or by a similar democratically elected body. A senate confirmation system is a form of indirect democracy. It has democratic legitimacy because the governor and state senate are elected democratically, according to the principle of one person, one vote.

The indirect democracy of a senate confirmation system is, I believe, better suited to judicial selection than is the direct democracy of judicial elections. At both the state and federal levels, we generally use indirect democracy—appointment by elected officials—to select the leaders of the various government departments and boards. The practical reasons for doing so also counsel for using that indirectly democratic system to select judges.

Our Nation’s Founders adopted this wise approach in the United States Constitution, and we Americans have used it at the federal level for well over 200 years. That our federal courts are widely respected in the U.S. and around the world is surely due in part to the caliber of judges selected in the process the Founders adopted and the incentives that process creates. Similarly, about a dozen states also select their supreme courts with confirmation by the senate or similar body. Experience in these states suggests that senate confirmation of judicial nominees works well at the state, as well as the federal, level. Senate confirmation of Kansas Court of Appeals nominees has shown its value as well.

No process of judicial selection is perfect, but my research and reflection has convinced me that the senate confirmation is the least imperfect process. That is the best we can achieve so long as—to use James Madison’s words—men are not angels. Members of the Kansas bar tend to be good people, but they are not angels. Every person is flawed and limited, and so democratic openness has proven better than concentrating power in a small group not accountable to the broader citizenry.

In short, senate confirmation of Kansas Supreme Court justices is a prudent reform that would move Kansas judicial selection from an extreme to position to the mainstream of the country. As a lawyer who cares deeply about our court system, I commend the legislators who are pursuing such a measured and thoughtful approach to an issue on which Kansas has for too long been so extreme.

IV. Possible Counterarguments

I expect defenders of the status quo to make the same arguments they have made in the past.

A. “If it ain’t broke, don’t fix it”

Some members of the Kansas bar defend the current Kansas Supreme Court selection process with the assertion that it is not “broken.” However, the previous paragraphs show that it is broken because it is undemocratic and extreme. Each of these problems can and should be fixed.

B. The Empty Claim of “Merit”

Defenders of Kansas’s current lawyer-favoring system often claim that it selects judges based on merit, rather than politics. But this claim of “merit” is just an empty assertion. They provide no facts showing that Kansas does better than senate-confirmation states at selecting meritorious judges.

It is misleading to suggest that the bar must select members of the Nominating Commission to ensure that lawyers' expertise is brought to bear on judicial selection. In states with senate confirmation, the governor and senate avail themselves of lawyers' expertise with respect to potential judges. Calling the current Kansas system "merit selection" is propagandistic rhetoric, rather than an accurate statement with factual support. Senate confirmation is as much "merit selection" as is a bar-dominated commission system.

C. Politics Comes in Different Forms

Defenders of Kansas's current lawyer-favoring system say it avoids politics. But compared to a senate confirmation system, there is no evidence that Kansas's current system involves less politics rather than just a different kind of politics: the politics of the bar, as opposed to the politics of the citizenry.

In both the current system and a senate-confirmation system, the governor has significant power. The difference between the two systems is who serves as the check on the governor's power. Kansas's current system makes the bar the check on the governor's power. Replacing the commission with senate confirmation would make the Senate the check on the governor's power.

D. Senate Confirmation Works Well in the Many States that Use It, and for the Kansas Court of Appeals

Some claim that senate confirmation in Kansas would be a "circus" or present large practical challenges. Rather than speculating about this, one can examine the experience of the twelve states with judicial selection systems that have senate confirmation or confirmation by a similar popularly elected body. One of my articles researched what were then the last two votes for initial supreme court confirmation in each of these twelve states.¹⁹ In all twenty-four of these cases, the governor's nominee was confirmed. In nearly eighty percent of these cases, the vote in favor of confirmation was unanimous. In only two of these twenty-four cases was there more than a single dissenting vote. These facts provide little support for the view that senate confirmation of state supreme court justices tends to produce a circus. Nor do these facts suggest that senators always do what governors want. Rather, these facts suggest that governors know that senate confirmation of controversial nominees may be difficult, so governors consider, in advance, the wishes of the senate in deciding whom to nominate.

For many years, Kansas governors have cooperated with the Kansas Senate to secure confirmation of a wide variety of gubernatorial nominees. More recently, Kansas has seen the value of senate confirmation with respect to nominees for the Court of Appeals. Appointments to the Kansas Supreme Court similarly deserve the consent of the executive and legislative branches of government.

E. The Irrelevant "Triple Play"

Some members of the Kansas bar like to recall the story of how Kansas got its current Supreme Court selection process, the story of the "triple play" in which a governor essentially got himself

¹⁹ Stephen J. Ware, Selection to the Kansas Supreme Court, 17 Kan. J. L. & Pub. Pol'y 386, App. B (2008).

appointed to the Court in the mid-1950's. The moral of this story is that governors should not have unchecked power over the selection of supreme court justices. But neither Kansas's current system nor a senate-confirmation system would give the governor such power, so the "triple play" story is irrelevant to the issue now before your Committee.

F. Judicial Independence Would Not Be Affected by Replacing the Commission with Senate Confirmation

In defending Kansas's current system for selecting justices, some members of the bar suggest that senate confirmation would reduce the independence of the Kansas Supreme Court. By contrast, bar groups have not charged that senate confirmation of federal judges reduces the independence of federal courts. All seem to agree that federal judges enjoy a tremendous degree of independence because they have life tenure. By contrast, judges who are subject to reelection or reappointment have less independence because they are accountable to those with the power to reelect or reappoint them. Judicial independence is primarily determined, not by the system of judicial *selection*, but by the system of judicial *retention*, including the length of a justice's term. Replacing the nominating commission with senate confirmation would make no change to Kansas's system of judicial retention and thus would not affect judicial independence.

VI. Conclusion

The Kansas Supreme Court selection process is broken because it is undemocratic and extreme. Both problems can and should be fixed. Replacing the nominating commission with senate confirmation would do so and thus SCR 1621 deserves your support.

Thank you very much for your time and attention. I would be happy to respond to any questions or comments you have today or in the future.

Stephen J. Ware
1535 West 15th Street
Lawrence, KS 66045
785-864-9209
ware@ku.edu