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## Stephen J. Ware: Process for selecting judges is undemocratic

By Stephen J. Ware

Lawyers have much more power than their fellow citizens in selecting the Kansas Supreme Court, and Wichita lawyer Richard Hite argued for keeping it that way ("Don't change process for selecting justices," Aug. 15 Opinion). But he is simply wrong in claiming "no viable reason has been shown" to reform this system.

The reason for reform begins with the fact that judges make law. This has been true throughout our country's history and even earlier, going back to England. Judge-made law, called the "common law," continues today to govern thousands of cases including those involving contracts, property rights and bodily injuries.

State supreme court judges play an especially large lawmaking role because they are the final word on their state's common law. Also, state supreme court judges have enormous lawmaking power because of their role in interpreting their state's constitution.

The power to interpret constitutions enables the Kansas Supreme Court to hold unconstitutional, and thus nullify, laws approved by the Legislature and governor on a variety of topics. The Kansas Supreme Court has done this to laws on public school funding and the death penalty.

In short, judges on the Kansas Supreme Court are, like judges on other state supreme courts, tremendously important lawmakers. What is unusual about the lawmaking judges of Kansas is how they are selected. None of the other 49 states uses the system Kansas uses to pick its Supreme Court. And for good reason, because the Kansas system is a shockingly undemocratic way to select lawmakers.

At the center of the Kansas system is the Supreme Court Nominating Commission; most of the members of this commission are picked in elections open to only 9,000 people, the members of the state bar. The remaining 2.7 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 elevates one small group into a powerful elite and treats everyone else like second-class citizens.

Kansas lawyers tend to be fine people, but they're not superheroes. They don't deserve more power than lawyers have in any of the other 49 states. In a democracy, a lawyer's vote should not be worth more than any other citizen's vote.

So the problem is not so much that Kansas has a nominating commission but how that commission is selected. As Washburn University School of Law professor Jeffrey Jackson wrote, democratic 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. Rather, the more desirable system from a legitimacy standpoint would have a greater number of the commission's members selected through means more consistent with the concept of representative government."

Kansas should break the grip its bar holds on the selection of the judges who have more lawmaking power than any other in the state. To defend the status quo is either to deny the fact that supreme court judges make law or to argue that these powerful lawmakers should be selected in a deeply undemocratic way.

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