

## THE MERITS OF MERIT SELECTION

### A Kansas Judge's Response to Professor Ware's Article

*Janice D. Russell\**

The underlying assumption of Professor Ware's article is that Senate confirmation of Supreme Court appointees is essential to fulfill the Founding Fathers' visionary plan for establishing and maintaining a fair and impartial judicial branch. Professor Ware seems to imply that the Framers are rolling over in their graves at the use of the merit selection process for judges. But is it not just as likely that the Framers are sitting around in heaven, slapping their foreheads and saying, "Merit selection with a nominating commission—now, why didn't we think of that?"

The people of Kansas did think of it in 1958, when they voted to approve a constitutional amendment that effected a bold change in the way Supreme Court justices were selected: the amendment changed selection of the Supreme Court from partisan elections (with interim appointments made by the governor) to merit selection. The change was made in response to public revulsion over a nakedly political gambit, referred to as the "triple play" of 1956, which moved the lame-duck governor onto a seat on the Kansas Supreme Court.

It was exactly the sort of slick move that earns politicians the distrust of the public. In 1956, Governor Fred Hall had lost the Republican primary, so he was going to find himself unemployed when Governor-elect George Docking was sworn in. In coordinated moves, Hall's friend and political cohort, Chief Justice Bill Smith, resigned his seat on the Supreme Court while Hall resigned from his own office of Governor. Lieutenant Governor John McCuish was immediately sworn in, if only for a few days. In his single official act as Governor, McCuish appointed Hall to the seat on the Supreme Court just vacated by Smith. This dirty backroom deal gave Kansas citizens the impetus to adopt merit selection as their method for choosing justices of the

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Kansas Supreme Court.

The purpose of this article is to demonstrate that Professor Ware's criticism of the merit selection plan adopted by the citizens of Kansas in 1958 is unfounded. Furthermore, the article will show that the Kansas merit selection plan satisfies all of the aims that led the Founding Fathers to adopt the plan of presidential appointment with Senate confirmation.

### **THE KANSAS METHOD OF SELECTING APPELLATE JUDGES AND SUPREME COURT JUSTICES**

In 1958, Kansas citizens incorporated into their Constitution the current method of selecting Supreme Court justices:

Any vacancy occurring in the office of any justice of the supreme court . . . shall be filled by appointment by the governor of one of the three persons possessing the qualifications of office who shall be nominated and whose names shall be submitted to the governor by the supreme court nominating commission established as hereinafter provided.<sup>1</sup>

The same Constitutional amendment also established the composition of the nominating commission: the chairman is to be a lawyer, elected in a statewide election by lawyers who are licensed in and reside in Kansas. Additionally, lawyers are to elect a lawyer member from each of the congressional districts of Kansas, and the governor is to appoint a non-lawyer member from each congressional district.<sup>2</sup> Because Kansas has four congressional districts, there are five lawyer members, including the chairman, and four non-lawyer members.

The implementing legislation for Article 3, Section 5 of the Kansas Constitution is found at Chapter 20, Section 119 et seq. of the Kansas Statutes Annotated. The statutes provide the mechanism for lawyers to vote for the lawyer members of the nominating commission.<sup>3</sup> Significantly, the voting for lawyer members of the commission has no connection whatsoever with partisan political concerns. Voting is carried out without partisan political considerations.

The statute also sets out how the governor is to appoint the non-lawyer members of the commission, and it provides the length of the term of each commission member: the number of years equal to the number of congressional districts in the state.<sup>4</sup> Finally, it provides that both the lawyer and non-lawyer members serve on staggered terms.<sup>5</sup> The latter provision is of great importance, because it means that until near the end of a governor's second term, the commission comprises non-lawyer members appointed by

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1. KAN. CONST. art. 3, § 5(a).

2. *See id.* § 5(e).

3. *See* KAN. STAT. ANN. §§ 20-119 to -123 (2007).

4. *See id.* §§ 20-124 to -125.

5. *See id.* § 20-129.

both the current governor and that governor's predecessor.

The Constitutional and statutory provisions effectively guarantee that the commission will always be a mix of lawyers and non-lawyers, that it will be geographically diverse, and that it will most of the time be a mix of appointees by two different governors.

The Kansas Court of Appeals was created by the Legislature in 1976. Because it was created by legislative enactment, no Constitutional provisions govern how its judges are selected. However, the 1976 Legislature, believing that the method of selecting Supreme Court justices had worked quite well, chose to have Court of Appeals judges selected in exactly the same method: the supreme court nominating commission was charged with the additional task of nominating panels of three suitable nominees for Court of Appeals positions, with the appointment to be made by the governor.<sup>6</sup>

#### DOES THE KANSAS METHOD OF SELECTING APPELLATE JUDGES AND JUSTICES MEET THE GOALS OF THE FOUNDING FATHERS?

Professor Ware asks, "So the question is, when taking the long view, did the Framers of the United States Constitution get it right?"<sup>7</sup> The answer to that question is "Yes." The federal system of selecting judges and justices, i.e., appointment by the president, with senate confirmation, works adequately most of the time, though one might note a disturbing trend toward partisan battles during the confirmation process in the last few decades, with senators from both sides of the aisle trying to extract commitments from the nominees on hot-button issues.

Professor Ware simply assumes that because the Founding Fathers got it right when they settled on appointment by the president with confirmation by the senate, then of necessity, all other methods are wrong, including the method chosen by the people of Kansas in their vote on the Constitutional amendment in 1958.

Is this assumption correct? The only way to determine whether Professor Ware is correct is to examine the Framers' goals in choosing this selection method of federal judges and then determine whether the Kansas method also satisfies these goals. The qualities that the Founding Fathers valued for the judiciary are set out clearly in the Federalist Papers.

**Independence.** In Federalist No. 78, Alexander Hamilton explained that an independent judiciary is necessary to the preservation of a constitutional form of government that limits the powers of the legislative and executive branches:

Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it

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6. *See id.* §§ 20-3004 to -3005.

7. STEPHEN J. WARE, *Selection to the Kansas Supreme Court* 14 (Nov. 26, 2007), available at [http://www.fed-soc.org/doclib/20071126\\_KansasPaper.pdf](http://www.fed-soc.org/doclib/20071126_KansasPaper.pdf).

must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.<sup>8</sup>

Hamilton also noted that an independent judicial branch was essential for safeguarding the rights of individuals against quickly changing political winds: “[N]o man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today.”<sup>9</sup> In short, the Founding Fathers saw an independent judicial branch as essential to preserving each branch of government within its proper constitutional sphere as well as essential to the protection of individual rights.

**Professional Competence.** The Founding Fathers also recognized that a high degree of professional competence is necessary if a judge is to follow the rule of law, rather than deciding cases according to his discretion or whims:

To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them. . . . The records of those precedents must unavoidably swell to a very considerable bulk, and must demand long and laborious study to acquire a competent knowledge of them.<sup>10</sup>

**Integrity.** “And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge.”<sup>11</sup>

**Judicial members not beholden to one party, faction, or branch of government.** Federalist No. 76 explains why the concurrence of two branches of government is necessary to guarantee the independent, competent and honest bench that the Founding Fathers believed was essential. Hamilton wrote that requiring Senate confirmation of the President’s appointees

would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from State prejudice, from family connection, from personal attachment, or from a view to popularity. . . . He would be both ashamed and afraid to bring forward, for the most distinguished or lucrative stations, candidates who had no other merit than that of coming from the same State to which he particularly belonged, or being in some way or other personally allied to him, or of possessing the necessary insignificance and pliancy to render them the obsequious instruments of his pleasure.<sup>12</sup>

Does the Kansas system of selecting appellate judges and justices satisfy

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8. THE FEDERALIST Nos. 76, 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 2003) (1961).

9. *Id.* at 469.

10. *Id.* at 471.

11. *Id.*

12. *Id.* at 457-58.

these goals? Yes, in every respect. Even Professor Ware admits that lawyers, “because of their professional expertise and interest in the judiciary, are well suited to recognizing which candidates for a judgeship are especially knowledgeable and skilled lawyers.”<sup>13</sup> Because of their daily interactions with courts and their practical experience working with every aspect of litigation, lawyers understand the absolute necessity of a judiciary that possesses the qualities the Founding Fathers wanted. Lawyers know that courts are fair and impartial only when they unflinchingly apply the rule of law to their cases. Application of the rule of law requires knowledge of the law; this requires the willingness and ability to research caselaw and statutes, which reveal what the law is. These abilities are essential for every level of the legal system from the lawyers to the judges. Lawyers therefore are in a better position than any other group of people to determine which applicants possess the proper combination of professional knowledge, skill, integrity, and work ethic to carry out the duties of a judge.

Judges from municipal courts right up through the Supreme Court must follow the rule of law in deciding cases. Judicial independence means that judges must be free from political and other pressures so that they may be unwavering in their adherence to and application of the rule of law. A system under which nominees for the most important courts in our state are screened by a commission that owes no allegiance to either political party, but rather an allegiance to the establishment of an independent, fair and impartial judiciary fulfills the Founding Fathers’ goals and is the best way to protect the right of the people of Kansas to have an independent court system: a court system that is free to do the difficult job of deciding each case according to the rule of law, not shifting political sands—whether the case involves a speeding ticket, the death penalty, or school finances.

The Founding Fathers clearly intended the senate confirmation process to provide a high level of scrutiny into the qualifications of the president’s appointees, to make sure that they were not the sort of person who would be the “obsequious instruments of his pleasure,” in the colorful words of Hamilton. In Kansas, this high level of scrutiny takes place at the nominating commission level. While the Kansas system does not require confirmation by one of the legislative bodies, each nominee who goes before the governor has already been thoroughly vetted as to his or her qualifications. The people of Kansas are thus assured that whomever the governor appoints possesses the necessary intelligence, learning, skill and integrity to serve the people of Kansas by following the rule of law in deciding the cases that come before that judge.

Senate confirmation would not add anything to the examination of the appointees’ legal qualifications that is not provided by the nominating commission. What it would add instead is an outlet for partisan politics to taint, skew, and corrode the current selection process. Lawyers have opposed

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13. Ware, *supra* note 8, at 9.

attempts to change the way appellate judges and justices are chosen not because they are trying to protect their turf, as Professor Ware suggests, but to protect our system of choosing judges from being corrupted by more partisan politics.

Professor Ware makes much of the fact that governors have historically chosen to appoint nominees who belong to the same political party as the governor.<sup>14</sup> Thus, he argues, partisan politics *does* play a part in the selection process. It would be impossible to say whether a governor making a judicial appointment consciously chooses his or her appointee based on party affiliation or because that person's world view most closely lines up with the governor's own. It hardly matters. Few people, including lawyers, would argue that politics plays *no* part in the judicial selection process.

However, the Kansas process has gone as far as possible to erase partisan politics from judicial selection. It makes no sense to argue that because some political considerations may creep into the appointment process, we need to inject another big dose of partisan politics by adding Senate confirmation into the process to bring about a cure.

#### ARE LAWYERS A UNIFIED "FACTION" AT ODDS WITH THE CITIZENS OF KANSAS?

Professor Ware does not seriously argue that the nominating commission under the Kansas system does not provide the same checking function on the chief executive as does Senate confirmation in the federal system. His quarrel with the Kansas system instead seems to be twofold:

- 1) Five out of nine commission members are lawyers, elected by lawyers, giving lawyers a slim majority on the commission.
- 2) The nominating commission is not "accountable to the people." And thus judicial selection is not "accountable to the people."<sup>15</sup>

As noted earlier in this article, Professor Ware admits that lawyers are particularly well qualified to recognize which candidates are well-suited to positions on the state's high courts. Why, then, does he argue that a system that is built on the expertise of lawyers is flawed?

Running throughout his article is the suspicion that lawyers are a "faction," bent on "mischief."<sup>16</sup> Are lawyers a unified faction? As anybody who has actually spent time with lawyers can tell you—NO! Lawyers have a wide divergence of personal and professional interests: prosecutors have

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14. *See id.* at 7.

15. Ware, *supra* note 8, at 15-16

16. *See id.* at 10-11. One might wonder why a person who earns a living teaching people to become lawyers harbors such sad, deep suspicions of lawyers, but that is a side issue best left to another day.

different interests from criminal defense attorneys; plaintiffs' lawyers have different interests from the defense bar; lawyers who practice probate law have different interests from those who practice family law, or juvenile law, or administrative law, or tax law. Lawyers occupy the entire spectrum of political positions and beliefs, from ultraconservative to moderate to liberal. Some lawyers are wealthy because of their profession; others struggle to pay their overhead. Some lawyers are Evangelical Christians; some adhere to a much more liberal dogma; and some practice no particular faith. Anyone who has ever tried to get a group of lawyers to agree on something can say, without a doubt, that lawyers are not a unified faction.

It is simply not true that lawyers are a unified faction, marching in lockstep to accomplish a shared goal. The one exception to this is that lawyers do have a common goal of ensuring that we have courts that are fair and impartial, accountable for their decisions, independent from politics, and free to uphold the Constitution.

Not surprisingly, these are exactly the same values that Americans believe are most important for courts. In a 2005 survey commissioned by Justice at Stake, a non-partisan group formed to keep politics and special interests out of our courts, it was revealed that 33% of those surveyed believed that the most important quality for the court system was to serve as the guardian of our Constitutional rights; 31% believed that being fair and impartial was the most important quality; and 13% believed that being independent from politics was the most important quality.<sup>17</sup>

Lawyers want courts that are accessible to their clients, where their clients can have their cases decided by judges who are fair and impartial and not beholden to any financial or political group. Lawyers also want courts that will protect their clients' constitutional rights. In those desires, their interests are exactly congruent with those of the public. Far from being a unified cabal that promotes its own interests over those of other citizens, lawyers' one shared interest promotes the values that citizens believe are most important for the courts.

#### **DOES IT MATTER THAT THE NOMINATING COMMISSION IS NOT DIRECTLY “ACCOUNTABLE TO THE PEOPLE?”**

Part of Professor Ware's argument is that the nominating commission, as it is presently constituted, is chosen in a way that it is not “accountable to the people.” He assumes from this that the entire judicial selection process is not “accountable to the people.” He posits two possible practical fixes: increase the number of non-lawyer members on the commission by giving the Kansas Legislature the right to make some appointments to the commission, or, in the

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17. See JUSTICE AT STAKE CAMPAIGN, SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS 14, Justice at Stake Campaign (2006), available at [http://www.justiceteaching.org/resource\\_material/JAS-SpeaktoAmValues.pdf](http://www.justiceteaching.org/resource_material/JAS-SpeaktoAmValues.pdf).

alternative, institute Senate confirmation of the governor's appointees.<sup>18</sup>

Before examining the question of whether it matters that the nominating commission is not "accountable to the people," it first should be noted that four out of nine members are appointed by elected governors, who are fully accountable to the people for their actions, including whom they appoint to the nominating commission. Thus, to a significant degree, the nominating commission is actually "accountable to the people."

Implicit in his argument is also that if the nominating commission is not directly "accountable to the people," then neither are the judges and justices it nominates. As has been pointed out earlier in this article, a judge's duty is to be accountable to the rule of law, not the political whims that prevail among any group of people. Under the system created by the Founding Fathers and those who crafted the Constitutional amendments in Kansas that brought merit selection to Kansas, judges are appointed in such a way as to maximize their opportunities to be accountable to the rule of law and decide cases based upon facts and existing legal precedent.

The fact that judges are appointed in such a way as to curtail their need to sway with the prevailing political winds does not in any sense mean that they are a free-wheeling, unfettered part of the government. Courts, including the Kansas Supreme Court and the Kansas Court of Appeals, are held accountable in many ways:

- Their first and foremost accountability is to the rule of law. Judges and justices are sworn to make their decisions according to existing law, not their personal political preferences.
- If they fail to follow existing law, their decisions are subject to review and reversal by higher courts. The Kansas Supreme Court routinely reviews decisions of the Kansas Court of Appeals to determine whether the Court of Appeals correctly applied the law. If it did not, the Supreme Court reverses. Even the Kansas Supreme Court's decisions are potentially subject to review—by the United States Supreme Court. Though review happens rarely, it is certainly possible, and the United States Supreme Court can reverse a Kansas Supreme Court decision, as it did in *State v. Marsh*.<sup>19</sup>
- Supreme Court justices stand in retention elections every six years<sup>20</sup> and Court of Appeals judges stand for retention

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18. Ware, *supra* note 8, at 11-14. Ware also posits a third possible reform: direct popular election of judges. Though he notes that popular elections would reduce bar control, he rejects this possible solution because of the many drawbacks of a purely elective system.

19. *State v. Marsh*, 102 P.3d 445 (2004), *rev'd*, 548 U.S. 163 (2006).

20. See KAN. CONST. art. 3, § 5.

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every four years.<sup>21</sup> Voters who are dissatisfied with their performance have the opportunity to vote them out of office.

- In 2006, the Legislature approved and funded a state-wide system of judicial evaluations, which will assess each judge's or justice's "ability, integrity, impartiality, communication skills, professionalism, temperament and administrative capacity."<sup>22</sup> The results of those evaluations will be disseminated to voters in retention elections, and will include public recommendations on whether to retain or not to retain district court judges chosen under the merit selection method, as well as Supreme Court justices and Court of Appeals judges.<sup>23</sup> It is generally believed by the Kansas judiciary and the Legislature that the evaluations will make the retention votes a more meaningful tool for accountability.
- Judges and justices in Kansas, as in the federal system, can be impeached.<sup>24</sup>

The mechanisms and tools for accountability described above mean that the appellate courts of Kansas are accountable in meaningful ways, while still protecting courts from political influence that would interfere with their ability to be fair and impartial forums for the cases that come before them. Both of the possible solutions that Professor Ware advocates (Senate confirmation and shifting the choice of commission members from licensed lawyers in the state to the Legislature) would have one effect and one effect only: making appellate judges and justices more accountable to the politics of the legislative branch, not to the citizens of Kansas.

#### DOES MERIT SELECTION PRODUCE BETTER JUDGES?

Professor Ware quotes with approval from Harry P. Stumpf and Kevin C. Paul in *American Judicial Politics*, where they state that "[n]ot only is there little evidence of the superiority of judges selected by the "merit" system (although there is some evidence to the contrary), but also *there is little to show that judicial selection mechanisms make any difference at all.*"<sup>25</sup>

Retired Justice Sandra Day O'Connor does not agree with this sentiment at all. In a recent article, she argued in support of merit selection as the process that best produces fair and impartial judges:

When so much money goes into influencing the outcome of a judicial election, it is hard to have faith that we are selecting

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21. See KAN. STAT. ANN. § 20-3006(b) (2007).

22. KAN. STAT. ANN. § 20-3204(a) (2006).

23. *Id.*

24. See KAN. CONST. art. 3, §15; See also KAN. CONST. art. 2, §§ 28-29.

25. Ware, *supra* note 8, at 10 nn.35, 37 (emphasis added).

judges who are fair and impartial. If I could do one thing to solve this problem, it would be to convince the states that select judges through partisan elections—that is, when a Democrat and a Republican run against one another—to switch to merit selection instead.<sup>26</sup>

The Committee for Economic Development agrees with Justice O'Connor's position. The CED is not precisely a liberal think tank: its ranks are filled by presidents, chairmen, and CEOs of such major corporations as BankOne, Quaker Chemical Corporation, General Electric, The Brookings Institution, Pfizer, Caterpillar, Shell Oil, and Honeywell International. Its stated purpose is to “propose policies that bring about steady economic growth at high employment and reasonably stable prices, increased productivity and living standards, greater and more equal opportunity for every citizen, and an improved quality of life for all.”<sup>27</sup>

In its 2002 national policy statement, the CED highlights the spiraling costs of partisan judicial elections across the country, as well as the effects of negative campaigning on the quality of justice (and just as importantly, on people's perception of the quality of justice). The CED's unequivocal recommendation is that the best solution is an appointive system based upon three stages: First, an independent nominating commission would recruit and review judicial candidates and develop a list of nominees. Second, the vacancies would be filled by appointment, normally by the governor. Third, an independent judicial commission would conduct a comprehensive, objective performance review and make recommendations as to reappointment. Reappointment would be by the original appointing authority.<sup>28</sup> The Kansas system lines up exactly with these recommendations, except in Kansas, judges stand for retention rather than reappointment.

A second source of support for Justice O'Connor's position comes from a rather interesting result that emerged from a series of studies done by the U.S. Chamber Institute for Legal Reform, which is the national association of chambers of commerce. In 2005, 2006, and 2007, the Institute for Legal Reform conducted surveys to determine the level of satisfaction that business leaders had for their state court systems. Each respondent was asked to rate his or her state's court system in a variety of areas, including meaningful venue requirements, overall treatment of tort and contract litigation, treatment of class action suits, punitive damages, non-economic damages, scientific and technical evidence, and judges' impartiality and competence. The overall question was whether the state was “creating a fair and reasonable litigation

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26. Justice Sandra Day O'Connor, *How to Save Our Courts*, PARADE, Feb. 24, 2008, at 5, available at [http://www.parade.com/articles/editions/2008/edition\\_02-24-2008/Courts\\_O\\_Connor](http://www.parade.com/articles/editions/2008/edition_02-24-2008/Courts_O_Connor).

27. *Justice for Hire: Improving Judicial Selection*, COMMITTEE FOR ECONOMIC DEVELOPMENT (New York, NY) 2002, at iv, available at [http://www.ced.org/docs/report/report\\_judicial.pdf](http://www.ced.org/docs/report/report_judicial.pdf).

28. See *id.* at 4-5.

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environment.”<sup>29</sup>

The results were surprisingly consistent from year to year: states that ranked well in 2005 also ranked well in 2006 and 2007. The Institute collated all their results into overall rankings for each of the 50 states. The number 1 ranking represents the best score and the number 50 the worst. The 2007 table is set out below. The states that select their appellate courts and supreme courts by merit selection are shaded. The shaded table makes it apparent, at a glance, that there is a high degree of correlation between merit selection and the level of satisfaction that business leaders feel with the court systems in their states.

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29. HARRIS INTERACTIVE, INC., LAWSUIT CLIMATE 2007: RATING THE STATES, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 2 (2007), [http://www.instituteforlegalreform.com/lawsuiteclimate2007/pdf/Climate\\_Report.pdf](http://www.instituteforlegalreform.com/lawsuiteclimate2007/pdf/Climate_Report.pdf).

STATE	RANK
Delaware	1
Minnesota	2
Nebraska	3
Iowa	4
Maine	5
New Hampshire	6
Tennessee	7
Indiana	8
Utah	9
Wisconsin	10
South Dakota	11
Virginia	12
Kansas	13
Connecticut	14
Arizona	15
North Carolina	16
Oregon	17
Massachusetts	18
New York	19
North Dakota	20
Colorado	21
Wyoming	22
Michigan	23
Ohio	24
Washington	25

STATE	RANK
New Jersey	26
Vermont	27
Nevada	28
Maryland	29
Idaho	30
Georgia	31
Pennsylvania	32
Kentucky	33
Missouri	34
Rhode Island	35
Florida	36
South Carolina	37
Oklahoma	38
New Mexico	39
Montana	40
Arkansas	41
Hawaii	42
Alaska	43
Texas	44
California	45
Illinois	46
Alabama	47
Louisiana	48
Mississippi	49
West Virginia	50

### HOW MUCH WEIGHT SHOULD WE GIVE TO PROFESSOR WARE'S OPINION?

Certainly every citizen has a First Amendment right to express his or her opinion on matters relating to how we are governed, including matters relating to courts. But to phrase it in terms that every lawyer who has ever tried a case will understand, how much weight should we give Professor Ware's opinion?

Judges and lawyers who actually work in courts are familiar with the holdings of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, and *Kumho Tire Co., Ltd. v. Carmichael*. In *Daubert*, the United States Supreme Court established the trial court's duty to act as a gatekeeper in matters of expert scientific testimony to assure that the expert's testimony rests on a reliable foundation and is relevant to the matter being tried.<sup>30</sup> In *Kumho Tire*, the

30. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

Supreme Court extended the holding of *Daubert* to all experts claiming technical or other specialized knowledge. Trial courts now have a duty to assure that experts offering their opinions in trial have a reliable basis in the knowledge and experience of their discipline.<sup>31</sup>

Does Professor Ware have sufficient experience to qualify him as an expert on courts? His curriculum vitae is singularly lacking in the kind of extensive experience in the courtroom that would entitle him to be considered an expert on courts. He graduated from law school in 1990 and clerked briefly for a judge on the United States Court of Appeals. From 1991 to 1993, his resume reflects that he worked for a law firm in New York. In 1993, he moved into the academic realm, and since then, has spent all of his professional life as a law professor. Nothing in his resume indicates that he has had any direct experience with courts since, at the latest, 1993.<sup>32</sup> Nothing in his resume indicates that he has had any experience whatsoever with the courts of Kansas. In fact, the attorney registration division of the office of the clerk of the Supreme Court indicates he is not licensed to practice law in Kansas.<sup>33</sup>

Further, his extensive list of writings is almost entirely about arbitration. Arbitration and other alternate dispute resolution methods are embraced by most courts in this day and age, but arbitrators are not bound by the rules that govern court proceedings. Understanding the arbitration process does not give him an understanding of how courts operate. Further, the selection process of arbitrators and mediators is in no way comparable to the selection of judges.

Without a full understanding based upon actual experience of what courts do, how can Professor Ware hold himself out as an expert on how they should be chosen? At the very least, if he were to be permitted to testify at a trial regarding these matters, his testimony would be entitled to very little weight, as his experience in courts seems to be lacking.

### CONCLUSION

The citizens of Kansas voted fifty years ago to adopt this method of choosing Supreme Court justices. Thirty years ago, the Legislature believed that the method had worked well enough that it decided to use the same method for choosing judges for the new Kansas Court of Appeals. This method has worked well for fifty years now. There is simply no good reason to tinker with a system that has worked well for a half-century.

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31. See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 148 (1999).

32. See Stephen J. Ware, Curriculum Vitae, [http://www.law.ku.edu/faculty/pdfs/Ware\\_CV\\_2007.pdf](http://www.law.ku.edu/faculty/pdfs/Ware_CV_2007.pdf).

33. Telephone interview with Sally Brown, Clerk of the Kansas Supreme Court, Attorney Registration Office (Mar. 4, 2008).