FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Tenth Circuit Rejects Challenge to the Judicial Merit Selection Process in Kansas

*by Clayton Callen and Justin Whitworth**

The U.S. Court of Appeals for the Tenth Circuit has become the latest federal appellate court to weigh in on the constitutionality of the so-called "merit selection" method for selecting state court judges.[1] Like the Eighth Circuit and Ninth Circuit courts before it, the Tenth Circuit upheld the key provision of the "merit selection" process against an Equal Protection Clause challenge.[2] The Tenth Circuit's decision was not unanimous, however. Further, the two judges in the majority disagreed on the appropriate analysis and application of relevant Supreme Court precedent. The divergent reasoning applied by the Tenth Circuit demonstrates the need for clarity from the Supreme Court. Only time will tell if such clarity will be provided.

The Kansas Judicial Nominating Commission

Kansas, like a host of other states, utilizes the "merit selection" process for nominating and appointing state appellate court judges.[3] Commonly referred to as the "Missouri Plan," the process features judicial nominating commissions that are charged with selecting nominees for state appellate courts. Until the middle of the twentieth century, state court judges in Kansas were popularly elected. However, in part as a result of the infamous "Kansas triple play,"[4] Kansas voters approved a constitutional amendment establishing the Kansas Supreme Court Nomination Commission (Commission) in 1958.[5] Shortly thereafter, Kansas enacted legislation implementing the amendment and eventually made it applicable to the Kansas Court of Appeals.[6]

The Commission is composed of nine members: a chairperson who is a licensed attorney, and one attorney and one non-attorney member from each of the four U.S. congressional districts in Kansas.[7] Importantly, the chairperson is elected at large by licensed Kansas attorneys,[8] and the four attorney members are elected by the licensed attorneys residing in their respective congressional districts.[9] The non-attorney members are appointed by the governor.[10] Thus, a controlling majority of the Commission is made up of attorneys elected exclusively by other attorneys.

The Commission meets when there is a judicial vacancy and submits a list of three nominees to the governor.[11] The governor must make the appointment from among the list of nominees selected by the Commission.[12] If the governor fails to do so, the Commission makes the appointment itself.[13] Thus, the Commission presents the governor with exclusive options from which to make the appointment. Additionally, in practice, the Commission's power can be manipulated to exercise even greater control over the appointment process. For example, the Commission may nominate two unqualified or politically radioactive nominees, leaving the governor with little choice but to nominate the Commission's preferred candidate.[14]

In *Dool v. Burke*, four non-attorneys and registered

Kansas voters filed suit in the U.S. District Court for the District of Kansas alleging that they were unconstitutionally denied the right to vote in the election for the attorney members of the Commission.[15] Specifically, the plaintiffs argued that limiting the election of these Commission members to licensed attorneys violates the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment by denying non-attorneys the right to vote. The plaintiffs' request for a preliminary injunction was denied by the district court and the State's motion to dismiss was ultimately granted.[16] The plaintiffs promptly appealed to the Tenth Circuit.

In a *per curiam* ruling, the Tenth Circuit affirmed the district court by a vote of 2-1.[17] Although both judges in the majority applied rational basis scrutiny in upholding the attorney-only elections, they did so for different reasons. Generally, laws denying the franchise to a class of otherwise qualified voters are subject to strict scrutiny review under the Equal Protection Clause of the Fourteenth Amendment.[18] The Supreme Court has carved out an exception to this rule, however, for "limited purpose" elections that have a disparate impact on the specific class of citizens permitted to vote.[19] Laws limiting the franchise in such "limited purpose" elections receive only rational basis scrutiny.[20]

In *Dool*, the non-attorney challengers argued that strict scrutiny was applicable because the election of Commission members is an election of "general interest" affecting all Kansas voters.[21] In separate concurring opinions, the majority disagreed. Judge Matheson opined that the Commission "performs a limited purpose" and "has a disproportionate effect on the voting population of attorneys."[22] Specifically, Judge Matheson noted that the Commission has a "limited role" and "does not make, administer, or enforce laws" or have "taxing or borrowing authority."[23] Accordingly, he found that the election of Commission members qualified as a "limited purpose" election warranting deferential rational basis scrutiny.[24]

Conversely, Judge O'Brien found that the Commission did not fit within the exception for "limited purpose" elections set out in *Ball* and *Salyer*, but he nonetheless applied rational basis scrutiny to uphold the law. To reach this conclusion, Judge O'Brien relied upon a hodgepodge

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Declining to Follow its Neighbor Missouri, the Kansas Supreme Court Holds Noneconomic Damages Cap in Medical Malpractice Cases Constitutional

*by Stephen R. Clark and Kristin E. Weinberg**

The Kansas Supreme Court, in *Miller v. Johnson*,[1] recently upheld Kansas' statutory cap on non-economic damages in personal injury cases, including medical malpractice cases, as constitutional. Specifically, the Kansas Supreme Court held the cap, set forth in K.S.A. 60-19a02, does not violate Sections 5 and 18 of the Kansas Constitution Bill of Rights providing a right to a jury trial and a right to damages, respectively. This decision is in contrast to its neighboring state's supreme court, which recently declared a statutory cap on non-economic damages in medical malpractice cases unconstitutional for violation of the right to a jury trial.[2]

I. Facts

In *Miller*, the appellant-patient sued the appellee-doctor for medical malpractice stemming from a surgery in which the doctor erroneously removed the patient's left ovary instead of the right ovary.[3] After trial, the jury found the doctor completely at fault and awarded the patient $759,679.74 in total monetary damages, including $575,000.00 in non-economic damages.[4] The district court reduced the non-economic damages award to $250,000.00 as required by the limitations in K.S.A. 60-19a02.[5] Both sides appealed, and the Kansas Supreme Court transferred the case from the Court of Appeals.[6] On appeal, the patient raised four state constitutional challenges to the validity of K.S.A. 60-19a02.

II. Constitutional Challenges and Analysis

First, the patient argued K.S.A. 60-19a02 violates Section 5 of the Kansas Constitution's Bill of Rights, which provides: "The right of trial by jury shall be inviolate."[7] The *Miller* Court acknowledged that: (a) Section 5 "preserves the jury trial right as it historically

Kivalina alleged that AES and others had emitted millions of tons of carbon dioxide "intentionally," and that AES "knew or should have known of the impacts"[11] of carbon dioxide emissions on coastal Alaskan villages like Kivalina because of the "clear scientific consensus that global warming is caused by emissions of greenhouse gases . . . ."[12]

AES argued that the *Kivalina* complaint described an "accident" because it also alleged negligent action by AES, which it knew or should have known would result in environmental damage.[13] The court stated, however, that "negligence" and "accident" are not synonymous terms.[14] Because the Kivalina plaintiffs did not allege that

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of Supreme Court and Court of Appeals precedent to create a new "threshold inquiry" for Equal Protection analysis. According to Judge O'Brien, strict scrutiny "cannot reasonably apply to every election unable to be wedged into the fact-bound and exceedingly narrow exception established in *Salyer* and *Ball*."[25] Instead, he determined that strict scrutiny analysis should only apply to the elections of officials performing "general governmental functions."[26] As a result, though Judge O'Brien concluded that the election of Commission members was not a "limited purpose" election, he found that the "Commission does not exercise the type of governmental functions necessary to trigger strict scrutiny."[27] Like Judge Matheson, Judge O'Brien determined that the Commission is "removed from the day-to-day decisions affecting the lives of the electorate" and "has no say in matters of safety or welfare."[28] And, like Judge Matheson, Judge O'Brien concluded that limiting the franchise to attorneys furthered a rational state interest of "limit[ing] the influence of politics on the nomination process and ensur[ing] the quality of its judicial nominees."[29]

In dissent, Judge McKay exposed this inherent insufficiency in the majority's reasoning, noting that "[t]he selection of judicial candidates is quintessentially governmental in nature . . . ."[30] Quoting an article authored by Professor Nelson Lund, the dissent noted that the election in question warranted strict scrutiny '"for the same reason that the Supreme Court applies strict scrutiny to primary elections conducted by political parties and elections to the electoral college."'[31] In other words, it is of no matter that the election of Commissioners is a preliminary step in the selection of judges, because the Commission serves a powerful role in "determining who will exercise one of the three most critical governmental functions," *i.e.* the judicial function.[32] As Judge McKay concluded: '"[b]y delegating to the state's lawyers the authority to elect a controlling majority of a body that exercises almost all of the discretion involved in appointing supreme court justices, Kansas has virtually given the state bar the authority to elect those who choose the justices. The State's choice of a complex procedure that obscures that effect cannot alter the reality of the effect."'[33] Accordingly, Judge McKay found that strict scrutiny was appropriate, and would have struck down the attorney-only elections as unconstitutional.

In sum, *Dool* represents another setback to those hoping to reduce the control of state bar associations over the selection of state appellate judges. However, Judge McKay is the first to author a dissent in this series of cases, and it warrants watching to see if his arguments prove persuasive to future courts considering such challenges.

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Endnotes

1 *See* Dool v. Burke, No. 10–3320, 2012 WL 4017118 (10th Cir. Sept. 13, 2012) [hereinafter Dool].

2 *See* Carlson v. Wiggins, 675 F.3d 1134 (8th Cir. 2012); Kirk v. Carpeneti, 623 F.3d 889 (9th Cir. 2010).

3 Currently, 35 states use some method of the "Missouri Plan" to select their judicial nominees. Each with varying forms of how the commission is composed. Commissions are composed of as little as six members (*e.g.*, North Dakota) or as many as 49 members (*e.g.*, Minnesota).

4 Jeffrey D. Jackson, *The Selection of Judges in Kansas: Comparison of Systems*, 69 J. Kan. B. Ass'n (Jan. 2000), at 33-34 (Governor Fred Hall had been defeated in his party's primary so he decided to go after the next best thing, that being Chief Justice of the Kansas Supreme Court. He convinced a loyal supporter, then Chief Justice, Bill Smith, to resign. Next, he ceded the governorship to his Lieutenant Governor, John McCuish, who then appointed Hall to the vacant Chief Justice position. Alas, the Kansas triple play.).

5 Kan. Const. art. III, § 5.

6 Kan. Stat. Ann. §§ 20-119 *et seq*. (legislation implementing the amendment); Kan. Stat. Ann. § 20-3004(a) (applying amendment to appellate courts).

7 Kan. Stat. Ann. §§ 20-119, 20-120.
8 *Id.*
9 *Id.*
10 Kan. Const. art. III, § 5.
11 Kan. Stat. Ann. §§ 20-132, 20-3007.
12 Kan. Const. art. III, § (a), (e).
13 Kan. Const. art. III, § 5(b).
14 Nelson Lund, *May Lawyers be Given the Power To Elect Those who Choose Our Judges? "Merit Selection" and Constitutional Law*, 34 Harv. J.L. & Pub. Pol'y 1043, 1050 (2011).
15 *Dool*, 2012 WL 4017118 at *1.
16 Dool v. Burke, No. 10-1286-MLB, 2010 WL 4568993 (D. Kan. Nov. 3, 2010).
17 Judge Terrence L. O'Brien and Judge Scott M. Matheson, Jr., concurring, Senior Judge Monroe G. McKay, in dissent.
18 *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969).
19 Ball v. James, 451 U.S. 355, 371 (1981); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 729 (1973).
20 *Id.*
21 *Dool*, 2012 WL 4017118 at *5.
22 *Id.* at *10–11.
23 *Id.*
24 *Id.*
25 *Id.* at *5.
26 *Id.* at *5–7 (interpreting Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny).
27 *Id.* at *7.
28 *Id.*
29 *Id.* at *9.
30 *Id.* at *12.
31 *Id.* (quoting Lund, *supra* note 14, at 1053).
32 *Id.*
33 *Id.* (quoting Lund, *supra* note 14, at 1055).

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cap denies her a remedy guaranteed by Section 18.[13] Kansas courts interpret Section 18 to provide "an injured party . . . a constitutional right to be made whole and a right to damages for economic and noneconomic losses suffered."[14]

Acknowledging that the "legislature may modify the common law in limited circumstances without violating Section 5," the Kansas Supreme Court held that a *quid pro quo* analysis applies to both Section 5 and Section 18 claims.[15] A *quid pro quo* analysis is a two-step examination.[16] First, a court must determine "whether the modification to the common-law remedy or the right to jury trial is reasonably necessary in the public interest to promote the public welfare."[17] Second, the court must "determine whether the legislature substituted an adequate statutory remedy for the modification to the individual right at issue."[18] In her dissent, Justice Beier strenuously objected to the use of a *quid pro quo* analysis to the patient's Section 5 claim, noting that none of the

Pennsylvania High Court Hears Challenge to Voter ID

by Anita Y. Woudenberg

Voter ID laws, defined as laws requiring photo evidence of identification at the polls, are a growing trend across the country. The first states to adopt such laws were Georgia, Indiana, Kansas, and Tennessee. Proponents claim that the impetus behind these laws is to minimize voter fraud by ensuring that those voting are, in fact, the person they claim to be. Opponents view them as an effort to disenfranchise the poor, the infirmed, and the elderly, analogizing the law to the unconstitutional poll taxes historically used to prevent black Americans from voting.

Of these laws, Indiana's was the first to be challenged in court on grounds that it was voter discrimination and a violation of federal due process. In 2008, Indiana's law withstood constitutional scrutiny when the United States Supreme Court held that Indiana's law did not impose an undue burden on voters.[1] In 2010, the Indiana Supreme Court upheld the law on the grounds that no evidence of an injury resulting from the law was presented.[2]

Since these rulings, numerous states have adopted substantially similar laws, including Mississippi, Pennsylvania, South Carolina, Texas, and Wisconsin. This article focuses on the state court challenge to Pennsylvania's voter ID law.

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