Judicial Remedies for fraudulent or poorly executed elections

1. Enjoining a Particular Practice

Stewart v. Blackwell

Post Bush v. Gore- Calf Tech/MIT project 4-6 million votes lost nation wide

N.J. case with Torricelli getting off the ballot, Supreme Court did not take the case which allowed a kind of change not allowed in Bush v. Palm Beach County.

Facts:

Use of punch card equipment in some Ohio Counties but not others violated the 14th – prot.

I. Background on Voting Technology

1. Ohio counties-81 of 88 no notice to voter-11 op/scan, 69 punch card, 2 lever, 6 electronic.

2. Statistical evidence;

a. Residual vote of 2.4% in punch card and ,23 to .73% nationally

b. High error rate from punch cards

II

A. Right to Vote

1. Bush v. Gore emphasizes stats may not by later arbitrary and disparate treatment value one person’s vote over that of another.

IV

B. Analysis

1. Supreme Court precedent instructs that if Ohio statue permitting localities to use deficient voting technology infringes on the right to vote then SS applies

If statute does not infringe on the right to vote, and merely regulates some tangential aspect of the franchise, then rational basis review applies

2. Begs question what right to vote encompasses. We conclude right to have vote counted on equal terms.

3. SS requires us to determine whether ss practice of of using two challenged technologies in some jurisdictions is narrowly tailored to further compelling governmental interests.

a, Justification of cost and training are insufficient

b. Mere fact some cost is involved is not compelling

4. Non notice tech users have two drawbacks

a. non notice

b. more likely to have misvotes-be disenfranchised

5. Use of technology fails under rational basis test

a. State says that its interests In failing to decertify nonnotice and substantd technology is based on the cost of replacement and training workers on the new machines.

b. We fail to see how the interest is justified or rational at the expense of tens of 1000’s of votes

5. Dissent question precedential value of Bush v. Gore

a. Limiting language of opinion

b. Lack of seriousness with which the Court undertook its own analysis

c. Inconsistency with other jurisprudence

d. Even if Court playing fast and loose with the law we as a lower court cannot disregard it.

e. Claim about failure to refute Hasen’s claim of overruling Bush v. Gore.

f. Dissent criticism of failure of majority to articulate mathematical formula when voting tech is constitutional

1. Judicially imposed mathematical formula would be arbitrary

2. Once apply SS, state has to show compelling interest

3. Look at real world justifications and implications

4. Reject dissents .1% error vs .01% error hypo

IF switching to new technology expensive or in development stage or potential for fraud high, then then claim against old may fail.

VII

A. Violations of =prot are not less deserving of protection because they are accomplished with a modern machine than with outdated prejudices. Basic ingredient of judicial decision is principle.

Dissent

Take a more cautious approach, per curiam in Bush v. Gore, vacated 9th circuit and two district court decisions not enough to redo national voting laws.

I. Constitutional Standard of Review

1. Court taking quote sout of context and standard of review in voting rights cases is far form settled

A. V/R Precedents

1. No issue of votger qual or impermissible weighting

2. Risk that votes won’t be counted differs across the state

3. Properly marked ballots counted the same everywhere, just some methods do not catch voters own inadvertent mistakes

4. Challenge to nuts and bolts of election admin not discriminatory voter quals, equality of voting power laws

B. Rational basis is proper standard of review

Flexibile framework of Burdick, not all cases are SS

Weber v.Shelly-challenge to electronic voting system over paper ballots because increased chance of fraud. 9th circuit applied Burdick appropriate standard of review

All illustrated dammed if you and dammed if you don’t.

II =prot and Bush v.Gore

A. Majority cautioned analysis limited to present circumstance for problem of =prot in election processes generally presents many complexities

1. Far cry from lack of uniform rules for discerning the meaning of votes already case.

2. In 5 years in other voting cases, B v. G not even cited once suggesting its limitation

3. B v. G was a shield to present the status quo of an electoral process beset by extraordinary temporal and political pressures.

III. Equality and Voting Procedures

. A. Majority requiring absolute equality in voting methods and procedures across Ohio counties

B. What is standard. Here 4 to 1, but which is.1% and .2%. Is that constitutionally significant. Which is the significant number the 2.29% for punch cards of .94% for electronic machines

C. Do the voters have anything to do with it?

D. What is the limiting principle?

E. If require equality, then the use of punch card ballots everywhere is permissible?

F. Hypo about testing internet voting and the permissible problems with it might cause it not to be tried in some parts of the state

However, unpleasant the prospect, human error remains a part of the democratic process and no constitutional rule is going to change that.

Notes:

1. Two views of Bush v. Gore substantive-individual right to an equally weighted vote Procedural-right to election systems that limit the risk of a partisan manipulation of election outcomes.

Pildens-individual level-equally weighted voted-elements of the voting process, such as technology of voting machines, the standards and methods of voting recounts and perhaps the design of ballots must ensure individually and cumulative that the same weight be given statewide to each cote cast or validly attempted to be cast. Considerable breadth nd administrative expense

Fla’s recount process created an unconstitutional risk of partisan manipulation of the recount and hence the election itself. Risk related to elements seven of the justices singled out as procedurally problematic-lacks of sufficiently precise standard of counting in advance,each county free to post own ad hoc standards, Structural concern for partisan capture.

Get different amounts of judicial oversight.

3. Wexler v Anderson, 11 circ denied claim that = prot denied because voters in touch screen counties would be denied opportunities that voters in optical scan counties had to have their residual votes captured.

Issues Is whether voters in touch screen counties are less likely to cast an effective vote than voters in optical scan counties? Not a question of whether uniform procedures have been followed across a state regardless of differences in voting technology,

P’s didn’t argue voters in touch screen counties less likely to cast effective ballots because of recount procedures than voters in optical scan counties. No ss. Use Burdick and review Fla’s manual recount procedures to determine if they are justified by the state’s important regulatory interests.

Optical scan registers under vote but there might be a mark on ballot that tells of intention. Touch screen either marked it or not.

1a. Enjoining a practice or election activity  
Bush v. Gore

2. Enjoining An Election

Chisom v. Roemer(853 F.2d 1186, 5th Cir 1988)

Facts: Black P's want to stop the election of a Supreme Court of La. justice who are elected by district with 2 justices per district. Claims it violated VRA Sec 2

Procedural History: Lower Court issues what is called a preliminary injunction, stopping the election on the that plaintiff’s t satisfied tetrad test

1. Likelihood will prevail at trial

2. Irreparable injury if not granted

3. Harm to P’s outweighs hardship to D’s if injunction granted

4. Grant of injunction will not disserve public interest

Issue: Is the correct remedy here enjoining the election?

Holding: No, there can be other corrective relief at a later date

Judgment: Lower Court granting of a preliminary injunction vacated

Judge Politz

A. Likelihood prong- Not sure if VRA applies to judicial elections

B. Irreparable injury prong-don't agree that if an electoral std, practice or procedure abridges section 2 of VRA it automatically does irreparable injury to all or a portion of body politicc including these plaintiffs and citizens of La.

C. Assuming items 1-3 listed above in procedural history are met, not sure about public interest requiring injunction

1. Cites Reynolds about use of velvet glove of federal equity jurisdiction and not enjoining pending elections

2. Chavis case- stayed District Court so that election was held under old plan which was deemed unconstitutional

3. Need for stability in judicial system-what would be status of Court if no election. If election is enjoined and Justice Calogero continues to serve, will there be any question about the validity of his actions as justice or the validity of what the entire Court does?

a. What if he is one of 4 in a 4-3. Is there now uncertainty?

b. Does he hold office until a successor is "inducted into office"? No La law on this point

c. After Dec 31 would there be a vacancy subject to filling by the other justices?

d. What about years of service. If election enjoined and his office deemed vacant if re-elected would he forfeit previous years of service counted toward being Chief Justice?

4. Court can't appoint successor since denies electorate right to vote

D. Must give state authorities time to remedy defect in standard, practice etc.

E. La Governor and legislature will fix problem if Court says to

F."in the interim, we are convinced that the system in place for the election of the subject judicial officer should be left undisturbed. There are a number of variables and several contingencies. But notwithstanding their final alignment, at the appropriate time, should it become necessary, the federal courts may fashion whatever remedy the law, equity and justice system require."

3. Adjusting Vote totals

In Re Matter of the Protest of Election Returns

Facts: Lower court found a "pattern of fraudulent, intentional and criminal conduct that resulted in such an extensive abuse of absentee ballot laws that it can fairly be said that the intent of these laws was totally frustrated"

New election ordered.

Issue: Did trial court err in ordering a new trial

Holding: Yes. Florida law does not warrant a new election since it can be decided solely on the machine votes.

Judgment: Reversed

Per Curiam

A. Reviews evidence of fraud in Miami Mayoral election

1. Expert statisticians who says the chance that amount of fraud in absentte ballots affected outcome of election about 5000 to 1 in favor.

2. Variety of stolen votes, falsely witnessed votes, false voter addresses

3. 480 ballots procured by 29 ballot brokers

B. Values: Will of electorate versus sanctity of ballot

C. Fla Sup Ct. "The general rule is that where the number of invalid absentee ballots is more than enough to change the result of an election, then the election shall be determined solely upon the basis of machine vote."

D. Absentee voting is a privilege not a right

4. Voiding An Election

Bell v. Southwell(376 F.2d 659, 5th Cir 1967)

Facts; Ga. election conducted under discriminatory voting procedures. Separate voting booths by race and some intimidation of Negroes(This is a 1967 case and this is the term the Court uses) and segregated voting lists

Procedural History:

District Court said it could not set it aside but did enjoin all of the activities.

Issue: Can a federal court set aside an election

Held: Yes

Judgment: Reversed

Judge Brown

A. Lower Court said while it could fix the future but the implications of rectifying past discriminatin would be staggering

B. No way to tell if this crude discrimination made a difference. Negroes cast 403 out of total vote for Jsutice of the Peace of 2,781. 5 candidates in the race including a Nego woman.

C. Negroes and body politic injured and cannot assume whites voted only for whites and Negroes voted only for Negroes

D. Analogy to discrimination in jury selection-set aside the verdict

E. Law must extinguish judgment wrought by such discrimination

F. Answers claim that injunction sought after election

1. Have refused relief where denial of right to vote through not registering Negroes happened.

2. Here no effective relief before the election. Negroes could assume these racial techniques would not be used in this present day and age.

H Not usual case of post election relief where affirmative proof of things like fraud, or ineligible voters made a difference not needed. Here want an election free of racial discrimination

I. Court has equitable power to do what is right here.

5. Civil Damages

Wayne v. Venable

Facts:

Suit for 5k and 10k in punitive damages for preventing plaintiffs from voting for Presidential Electors , Senator and Congressmen in 1916. Defendants did not let P's in to vote, chose specific people in line to vote, slowed voting for everyone and so on.

Did not keep polls open as they should have or open on time.

Note how widespread this could be.

Lower Court: Judgment for 2K

Issue: Can you recover damages from someone who keeps you from voting in a federal election?

Holding: Yes, action of damages is appropriate

Judgment: Affirmed

Judge Sanborn

1. “An action for damages in the proper federal court lies by a qualified elector for his wrongful deprivation of this right by a defendant or by an effective conspiracy of several defendants who dperive him thereof.”

2. Federal Court has jurisdiction because plaintiffs pleading said they wanted to vote for federal offices, Senator and Congressman, and were not allowed to. Proved this claim to the satisfaction of the jury.

6. Criminal Penalties

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, Delegate from the District of Columbia, or Resident Commissioner, at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, [62 Stat. 720](http://uscode.house.gov/statviewer.htm?volume=62&page=720); [Pub. L. 91–405, title II](http://www.gpo.gov/fdsys/browse/collection.action?collectionCode=PLAW), § 204(d)(5), Sept. 22, 1970, [84 Stat. 853](http://uscode.house.gov/statviewer.htm?volume=84&page=853); [Pub. L. 103–322, title XXXIII](http://thomas.loc.gov/cgi-bin/bdquery/L?d103:./list/bd/d103pl.lst:322%28Public_Laws%29), § 330016(1)(H), Sept. 13, 1994, [108 Stat. 2147](http://uscode.house.gov/statviewer.htm?volume=108&page=2147).)