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Opinion No. 01-012

Election Laws - Equal Protection - Punch Card Machines - Uniformity - *Bush v. Gore*

QUESTIONS

1. What obligation, if any, does *Bush v. Gore*, ___ U.S. ___, 121 S.Ct. 525, ___ L.Ed.2d __ (2000), place on the General Assembly to revise its election laws in order to insure that Tennessee's election laws do not violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

2. Would the equal protection analysis in *Bush v. Gore* require Tennessee to have a uniform voting system, including the same type of voting machines in all counties of the State for: (a) all state and local elections, (b) all federal elections, (c) only the Presidential elections?

3. Since different types of machines have a different margin of error in recording or counting votes, and with the punch card machine (presently used in 21 counties) apparently having the highest margin of error, does the continued use of these machines violate the Equal Protection Clause in a state-wide or federal election?

4. Since 21 counties in Tennessee use the punch card machine, must the State develop a uniform standard for hand counting the votes from these machines or must Congress establish a uniform national standard?

5. Does the continued use of the mechanical lever machines in some counties in Tennessee constitute a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

6. What provisions of Tennessee's election laws violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution because local officials have discretion to interpret voting results?

OPINIONS

1. Of course, as a general proposition, each state is obligated to insure that its election laws

comply with the Equal Protection Clause of the Fourteenth Amendment. But, the holding in *Bush v. Gore* (the failure of the Florida Supreme Court to impose any statewide objective standards for the hand-recounting of punch card ballots violated the Equal Protection Clause) is essentially limited to the peculiar facts of that case and provides no real guidance concerning what, if any, revisions to Tennessee's election statutes might be required to insure compliance with equal protection.

2. The majority opinion in *Bush v. Gore* expressly declines to decide whether a uniform voting system in a state is required by equal protection.

3. The majority opinion in *Bush v. Gore* expressly declines to decide whether the continued use of the punch card voting system in a state complies with the Equal Protection Clause.

4. For Presidential elections, the responsibility to remedy any potential equal protection violation lies exclusively with each state legislature. The responsibility to remedy any equal protection problems with statutes governing the election of members of Congress would be initially vested with each state legislature; however, Congress does have the power to alter such laws. For election of state and local officials, the responsibility to enact laws that insure equal protection lies with the General Assembly.

5. Without evidence that mechanical lever machines in Tennessee are less accurate than any other type of voting machines used in this state, the use of mechanical lever machines could not be successfully attacked under the Equal Protection Clause.

6. County election officials in Tennessee do not have any statutory discretion to interpret voting results.

ANALYSIS

A. Tennessee's Election Process

This opinion request concerns the effect of *Bush v. Gore* upon Tennessee's election process. The starting point of an analysis for the questions is a description of the process itself. Tennessee uses a variety of election machines and devices on election day including the following:

(1) **Mechanical lever voting machines** are voting devices that use a mechanical tabulation system and have no separate tangible recording of individual votes in the form of a ballot. At the end of election day, election officials unseal a door in the rear of these machines, canvass the machine and publicly proclaim the vote tallies in accordance with Tenn. Code Ann. § 2-7-130. These devices are used in 18 counties in this State. Mechanical lever voting machines are no longer manufactured.

(2) **Electronic button machines** are voting devices that use an electronic tabulation system and

have no separate tangible recording of individual votes in the form of a ballot. At the end of election day, election officials unseal a door in the rear of these machines, canvass the machine and publicly proclaim the vote tallies in accordance with Tenn. Code Ann. § 2-7-130. These devices, which include the Electronic Danaher, Microvote and other direct recording electronic voting systems, are used in 38 counties in this State.

(3) **Punch card voting machines** are voting devices that record votes on a computer punch card through which the voter punches a hole with a stylus. The punch card ballots are then deposited in a ballot box. At the end of election day, election officials transport the unread and untabulated punch card ballots to the county election commission. The punch card ballots are then processed in a machine that reads the punch cards and tabulates the vote. Election officials then print a report from the machine and publicly proclaim the vote tallies in accordance with Tenn. Code Ann. § 2-7-130. These devices, which include C.E.S., Votomatic and other comparable punch card voting systems, are used in 21 counties in this State.

(4) **Optical scan voting machines** are voting devices that record votes on an optical scan card upon which the voter marks a designated space with pen or pencil. The optical scan ballots are then deposited in a ballot box. At the end of election day, election officials transport the unread and untabulated optical scan ballots to the county election commission. The optical scan ballots are then processed in a machine that reads the optical scan cards and tabulates the vote. Election officials then print a report from the machine and publicly proclaim the vote tallies in accordance with Tenn. Code Ann. § 2-7-130. These devices, which include the Opti-Scan Global and Opti-Scan ESS voting systems, are used in 12 counties in this State.

(5) Touch Screen Voting Machines work in a manner similar to mechanical lever machines and electronic button machines. The ballot appears on a computer screen in the voting booth, and the voter simply touches the designated portion of the screen for the preferred candidate. Like the mechanical lever machines and electronic button machines, the touch screen machine does not have a separate tangible recording of individual votes in the form of a ballot. The touch screen machine is only being used in 1 county on election day.

The following counties use a combination of two different methods of voting on election day: (1) Sumner County - electronic button and optical scan; (2) Van Buren County - mechanical lever and paper ballot; and (3) Fentress, Franklin and Perry Counties - mechanical lever and electronic button. As for voting absentee-by-mail, most counties use paper ballots; some use the optical scan method. Finally, early voting is done by all of the above-mentioned methods including paper ballot.

Thus, registered voters may vote in one of six different ways depending upon where and when they vote. After all of the votes are cast at the closing of the polls on election day, election officials are then responsible for the canvassing, tabulation and proclamation of votes. As previously noted, Tenn. Code Ann. § 2-7-130 provides for the canvassing and proclamation of votes on all types of voting machines with no differentiation between the different types of machines. Clearly, the provisions of Tenn. Code Ann. § 2-7-130 apply to the mechanical lever machines, the electronic button machines, and touch screen

machines. However, that statute does not exactly fit the way in which punch card machines and optical scan machines operate. Strictly speaking, there is no counter compartment on these devices that are used at the polling place. Rather, the "ballot" is deposited in a ballot box and later processed through a machine that tabulates the votes at the county election commission offices.

Tenn. Code Ann. § 2-7-136 provides that "[w]hen the certification of the tally sheets is complete, the officer of elections shall publicly announce the results and shall, on demand of any candidate or watcher present, furnish such person a certified copy of the results." As soon as possible after the election, the county election commission must "open each voting machine and compare the votes shown with the tally sheets prepared at the polling place." Tenn. Code Ann. § 2-8-104(a). The county election commission must "revise any figures in the tally sheets prepared at the polling place to conform to the figures on the machines without writing on or otherwise making the original figures on the tally sheets illegible." Tenn. Code Ann. § 2-8-104(c).

The county election commission must then meet on the first Monday after an election or upon completion of the duties in Tenn. Code Ann. § 2-8-104, but no later than the second Monday after the election, "to compare the returns on the tally sheets, to certify the results as shown by the returns in writing signed by at least the majority of them. . . ." For certain state and federal elections, the Governor, Secretary of State and Attorney General and Reporter must then "publicly calculate and compare the votes received by each person" for such offices and "declare the person receiving the highest number of votes elected." There is no specific deadline for this certification.

Unlike the Florida election code, Tennessee law does not provide for the automatic recount of votes in close elections. In fact, Tennessee courts have held that election officials may not automatically recount votes once the returns have been certified. *State ex rel. Robinson v. Hutcheson*, 180 Tenn. 46, 171 S.W.2d 282, 283-84 (1943)("[t]he judges of the election, having certified the returns and sealed the same as required by law, have no authority thereafter to add to, change or alter them, or make a new return"). Furthermore, Tenn. Code Ann. § 2-8-101(b) provides that the county election "commission may not recount any paper ballots, including absentee ballots."

The only authority for a recount of an election in Tennessee is pursuant to an election contest filed by "[t]he incumbent office holder and any candidate for the office. . . ." Tenn. Code Ann. § 2-17-101(b). Although there is no specific provision regarding a recount, Tenn. Code Ann. § 2-17-107 gives the trial court broad discretion to fashion an appropriate remedy ("the court may make all necessary orders with respect to any matter required in the contest.") Furthermore, Tenn. Code Ann. § 2-17-110 provides:

> (a) If voting machines were used in the election, any party to the contest who challenges either the accuracy of the voting machines or the accuracy of the election officials recording of the vote on the machines may have the machine or machines brought into court to be examined by the parties or as evidence.

> (b) The total votes shown on the machine shall be conclusive unless the court finds reason to believe that the vote shown on the machine is not accurate.

Since no separate recorded individual ballots are generated with mechanical lever, electronic button and touch screen machines, there can be no recount of individual votes recorded on such machines. Rather, the vote counter mechanisms in each of these machines can be rechecked. Furthermore, the parties to the election contest would have the opportunity to establish that certain machines were not properly working and that the vote tallies were inaccurate. If it were established that the machines inaccurately recorded the votes, the trial court would not be able to declare a winner because an accurate tally of the number of votes for each candidate would not be possible. The court does have the authority to declare the election void, however. Tenn. Code Ann. § 2-17-112(2). As for those counties which use the punch card or optical scan methods, there are no statutory provisions which set forth any standards by which punch cards or optical scan ballots are to be hand recounted in an election contest in the event the court ordered a recount.

B. Equal Protection Law Before *Bush v. Gore*

It has long been established that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right." *See Massachusetts Board of Retirement v. Murgia*, 407 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). Although the right to vote, per se, is not a "constitutionally protected right," the Supreme Court has found, "implicit in our constitutional system, [a right] to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 n. 78, 93 S.Ct. 1278, 1298 n. 78, 36 L.Ed 2d 16 (1973); *see also Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 1000, 31 L.Ed.2d 274 (1972)("[T]his Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction."). However, the Supreme Court has also held that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock v. Carter*, 405 U.S. 134, 142, 92 S.Ct. 849, 855, 31 L.Ed.2d 92 (1972).

As for the applicability of the Equal Protection Clause to the tabulation process on election day, the Supreme Court made the following general statement in *Gray v. Sanders*, 372 U.S. 368, 379, 83 S.Ct. 801, 808, 9 L.Ed.2d 821 (1963):

> The Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted at Congressional elections.' *United States v. Classic*, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368 [citations omitted] Every voter's vote is entitled to be counted once. It must be correctly counted

> and reported. As stated in *United States v. Mosley*, 238 U.S. 383, 386, 35 S.Ct. 904, 905, 59 L.Ed. 1355, 'the right to have one's vote counted' has the same dignity as 'the right to put a ballot in a box.' It can be protected from the diluting effect of illegal ballots.

Until *Bush v. Gore*, the Supreme Court had never addressed whether the use of different voting methods within different jurisdictions of a state for the same election implicated the Equal Protection Clause. In *Mooney v. Phillips*, 173 Tenn. 398, 118 S.W.2d 224 (1938), the Tennessee Supreme Court specifically addressed the question of whether the General Assembly could authorize the use of "voting machines" in lieu of paper ballots in light of Article IV, Section 4 of the Tennessee Constitution which provides that all elections save those made by the General Assembly "shall be by ballot." In holding that such legislation was constitutional, the court noted that "the word 'ballot' is not used in a literal sense but merely by way of designating a method of conducting elections that will guarantee the secrecy and integrity of the ballot." *Id.* at 226. However, the court did not address the question of whether the use of "voting machines" in some counties versus "paper ballots" in other counties implicated the equal protection guarantees of either the state or federal constitutions.

C. Analysis of *Bush v. Gore*

The per curiam opinion in *Bush v. Gore* sets forth the following questions as the issues before the Court:

> [W]hether the Florida Supreme Court established new standards for resolving Presidential election contests, thereby violating Art. II, § 1, cl. 2 of the United States Constitution and failing to comply with 3 U.S.C. § 5, and whether the use of standardless manual recounts violates the Equal Protection and Due Process Clauses.

Bush v. Gore, 125 S.Ct. at 529.

Basically, the per curiam opinion held that the Florida Supreme Court's order for a statewide hand recount of the punch card ballots violated the Equal Protection Clause because there were no standards for determining how to count the punch card ballots. Specifically, the per curiam opinion rejected the Florida Supreme Court's standard of considering the "intent of the voter" when recounting punch card ballots. The per curiam opinion stated that although "[t]his is unobjectionable as an abstract proposition and starting principle, [t]he problem inheres in the absence of specific standards to ensure its equal application." *Id.* at 530. The per curiam opinion further found that this lack of standards led in the Florida case to unequal and disparate treatment of votes. Specifically, the Court found that the Florida Supreme Court had "ratified this uneven treatment" between different counties during the recount process when it "mandated that the recount totals from two counties, Miami-Dade and Palm Beach, be included in the certified total. . . [because] each of the counties used varying standards to determine what was a legal

vote." *Id.* at 531.

In addition, the per curiam opinion found that extending the recount in Miami-Dade, Palm Beach and Broward Counties from the so-called undervotes to all ballots to include the overvotes would discriminate against as many as 110,000 overvotes in the rest of the state. In particular, the Court gave the following illustration to support its conclusion:

> [T]he citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernable by the machine will not have the same opportunity to have his vote count, even if the manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernable by the machine, will have his vote counted even though it should have been read as an invalid ballot. The State Supreme Court's inclusion of vote counts based on these variant standards exemplifies concerns with he remedial processes that are underway.

Id.

As for the use of different voting systems in different counties and potential equal protection problems, the per curiam opinion expressly declined to address that issue stating that it was not considering the issue of "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 532. Justice Stevens in dissent, with whom Justices Breyer and Ginsberg joined, suggested the use of different voting systems in different counties "might" raise equal protection concerns:

> Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated -- if not eliminated -- by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. . . . . **If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ -- despite enormous differences in accuracy[1] — might run afoul of equal protection. So, too might the**

[1]According to Justice Stevens, the percentage of nonvotes in this election in counties using a punch-card system was 3.92%, whereas the rate of error for counties using the optical scan system was only 1.43%. In other words, for every 10,000 votes cast, the punch-card system resulted in 250 more nonvotes than the optical scan system. *Id.* 541, fn. 4.

> **similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design**.

Bush v. Gore, 125 S.Ct. at 541 (Stevens, J., dissenting). On the other hand, Justice Souter, also dissenting, expressed the view that " the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about the cost, the potential value of innovation, and so on." *Bush v. Gore*, 125 S.Ct. at 544 (Souter, J. dissenting in part and concurring in part)

D. Effect of *Bush v. Gore* on Tennessee's Election Laws

1. In *Bush v. Gore*, the majority opinion held that the absence of any standards for the hand-recount of punch card ballots violated equal protection. Tennessee has no separate statutory standards during an election contest for hand recounting votes for counties using the punch card and optical scan voting systems. However, Tenn. Code Ann. § 2-17-107 gives the trial court in an election contest broad powers to "make all necessary orders with respect to any matter required in the contest." The majority opinion's objection in *Bush v. Gore* to the Florida Supreme Court's decision was the lack of any objective judicially imposed standards for hand recounting votes in those counties using the punch card system. Without such standards, the majority found that unequal treatment of hand-recounting the punch card ballots occurred, resulting in a violation of equal protection.

Tennessee's situation is similar to Florida's, in that there are no statutory standards for the hand recounting of punch card ballots. Therefore, if an election contest arose in this state in which a trial court ordered the hand recounting of punch card ballots, the trial court would be required to impose a single uniform standard for the hand recounting of those ballots. Otherwise, there would be an equal protection violation. *Bush v. Gore*, however, does not require state legislatures to enact such standards by statute.[2]

2. If the equal protection clause requires uniformity in the voting system, the second question is: to which elections does the equal protection clause apply -- all state and local elections, all federal elections or only Presidential elections. *Bush v. Gore* expressly declined to address this issue stating that "[t]he question before the Court is not whether local entities, in the exercise of their expertise may develop different systems for implementing elections." *Bush v. Gore*, 125 S.Ct. at 532.

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[2]Some states have enacted objective standards for the hand recounting of punch card ballots. For example, the Michigan legislature has enacted the following standard: "[i]f the electronic voting system requires that the elector cast a vote by punching a hole in a ballot, the vote shall not be considered valid unless the portion of the ballot designated as a voting position is completely removed or is hanging by 1 or 2 corners or the equivalent." Mich. Comp. Law Ann. 168.799a(2).

As a general matter, the Equal Protection Clause "announces a fundamental principle: the State must govern impartially," *New York City Transit Authority v. Beazer*, 440 U.S. 568, 587, 99 S.Ct. 1355, 1367, 59 L.Ed.2d 587 (1979), and "directs that 'all persons similarly circumstanced shall be treated alike.'" *Plyler v. Doe*, 457 U.S. 202, 216, 102 S.Ct. 2382, 2394, 72 L.Ed.2d 786 (1982) (*quoting F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S.Ct. 560, 561-62, 64 L.Ed. 989 (1920)). Therefore, "[g]eneral rules that apply evenhandedly to all persons within the jurisdiction unquestionably comply" with the Equal Protection Clause. *Beazer*, 440 U.S. at 587, 99 S.Ct. at 1366-67. Only when a state "adopts a rule that has a special impact on less than all persons subject to its jurisdiction" does a question arise as to whether the equal protection clause is violated. *Id.* at 587-88, 99 S.Ct. at 1367.

The General Assembly has legislative authority to establish the method of election in all elections in Tennessee -- local, state and federal. *See* U.S.Const. art. II, § 1, cl. 2 (selection of Presidential electors delegated to states); U.S. Const. art. I, § 4, cl. 1 (the times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature); Tenn. Const. art. IV, § 1 (the General Assembly has the power to enact laws regulating state and local elections). Thus, if uniformity in voting systems is required, it would apply to all elections in Tennessee, and the responsibility to enact legislation establishing such uniformity would lie with the General Assembly.

3. The third question assumes a greater margin of error in tabulating votes in those counties still using punch card voting. Again, the majority in *Bush v. Gore* expressly declined to decide whether such disparity raised equal protection concerns. Data[3] from the State Election Coordinator's Office reveals a pattern of "undervotes" in Tennessee during the recent Presidential election similar to that experienced in Florida. *See Bush v. Gore*, 125 S.Ct. at 541, fn. 4 (Stevens, J., dissenting). For example, a total of 1,167,320 persons voted using electronic button machines in the November 2000 election. Of that total 1,155,923 voted for President. Thus, the rate of Presidential "undervote" for electronic button machines was only .97%. By contrast, a total of 255,140 persons voted using the punch card voting system in the 2000 November election. Of that total, only 245,868 recorded a vote for President, representing an "undervote" of 3.6%. The following chart compares all the various voting systems from the November 2000 election based on data provided by the State Election Coordinator's Office:

Type of Machine	**Total Vote**	**Presidential Vote**	**Difference**	**Percentage**
Mechanical Lever	192,339	190,514	1,825	0.94%
Electronic Button	1,167,320	1,155,923	11,397	0.97%
Punch Card	255,140	245,868	9,272	3.63%
Opti-Scan	94,947	92,657	2,290	2.41%
Touch Screen	2,335	2,301	34	1.45%

[3]Davidson and Marshall Counties are not included in this data as they have yet to provide the State Election Coordinator's Office with the final tally of the total vote in those counties.

This disparity raises at least a question of whether the continued use of punch card machines in Tennessee "might" violate the Equal Protection Clause. However, the majority in *Bush v. Gore* expressly declined to decide whether such disparities, assuming they are attributable to differences in the accuracy of the various voting systems employed, raise an equal protection problem, and the answer to this question is therefore unclear under present case law.

4. The fourth question asks whether the responsibility to remedy any equal protection problem lies with the General Assembly or Congress. The selection of Presidential Electors is expressly delegated to the states not Congress under Article II, Section 1, Clause 2 of the United States Constitution. Furthermore, the Supreme Court in *McPherson v. Blacker*, 146 U.S. 1, 35, 13 S.Ct.3, 36 L.Ed. 869 (1892) held that such a power is plenary. Likewise, Article I, Section 4, Clause 1 of the United States Constitution provides that "[t]he times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the congress may at any time by law make or alter such regulations, except as to the places of choosing senators." Thus, for Presidential elections, the responsibility to remedy any potential equal protection violation lies exclusively with each state legislature. On the other hand, the responsibility to remedy any equal protection problems with the election of members of Congress would be initially vested with each state legislature. Of course, under Article I, Section 4, Clause 1, Congress, has the power "make or alter such regulations." As previously stated, the responsibility for enacting legislation concerning state and local elections is vested by the Tennessee Constitution in the General Assembly.

5. There is no evidence that mechanical lever machines in Tennessee are less accurate than any other type of voting machines used in this state. Without evidence that mechanical lever machines in Tennessee are less accurate than any other type of voting machines used in this state, the use of mechanical lever machines could not be successfully attacked under the Equal Protection Clause.

6. The final question presumes that county election officials have some type of statutory discretion to interpret election results. That is not the case. County election officials in Tennessee do not have any statutory discretion to interpret voting results. *See State ex rel. Robinson v. Hutcheson*. The initial tabulation of results from the various types of voting machines involves the ministerial function of simply canvassing the machine counters and publicly declaring the results. As for punch card machines and the optical scan machines, county election officials again perform no discretionary function -- they insert the punch card ballots or optical scan ballots in the machine to tabulate the results. Any recount of such ballots can only be authorized during an election contest by a trial court.

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