Comments

Punch-Card Ballots, Residual Votes and the Systematic Disenfranchisement of Minority Voters: A Look at the Decision to Allow the California Recall Election to Proceed

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IN THE SUMMER OF 2004 a dozen Democratic Members of the House of Representatives asked the United Nations to monitor the 2004 Presidential election.[1] After these efforts stalled in the House, Secretary of State Colin Powell invited the Organization for Security and Cooperation in Europe to observe the Presidential election—for the first time in history.[2] These efforts to seek outside monitors for a United States Presidential election underscored the deep concerns regarding the U.S. voting system in the wake of the 2000 Presidential election.[3] Nevertheless, despite predictions that the 2004 Presidential election would be the most litigious election in history,[4] causing the election to be decided by lawyers not voters, on November 3, 2004, the day after the election, Democratic nominee John Kerry conceded that he had lost the election to President George W. Bush.

Despite the apparent resolution that Bush had defeated Kerry, questions regarding the 2004 election remained. For the second time in U.S. history since 1877, there was a formal challenge to the certifi-

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1. *See* Eliza Newlin Carney, *Ballot-Box Blues*, 36 NAT'L J. 2720, 2720 (2004).
2. *See id.*
3. *See id.*
4. *See id.*

cation of the electoral votes from one key state—Ohio.[5] This formal challenge caused a two-hour debate in both houses of Congress.[6] The debate, led by Senator Barbara Boxer from California focused on the "fight for electoral justice."[7] Issues debated included, *inter alia*, why poor and predominantly African-American communities had to wait a disproportionate amount of time in line to vote[8] and why voting machines in one predominantly African-American district in Franklin County used 2,798 voting machines when election officials stated that they needed 5,000.[9] By challenging electoral vote certification, Senator Boxer and Congresswoman Stephanie Tubbs Jones were attempting to cast light on the truth of a flawed system riddled with voting irregularities.[10] Although the challenge did not change the outcome of the Presidential election—indeed, it was never in doubt—the objection was nevertheless made because, as Congresswoman Tubbs Jones stated on the House floor, it was "the only immediate avenue to bring these causes to light."[11]

The formal challenge led by Senator Boxer and Congresswoman Tubbs Jones brought to Congress the issue of an imperfect voting system in the United States. The battle over improving the system to ensure compliance with the constitutional mandate that "all qualified voters have a protected right 'to cast their ballots and have them counted,'"[12] however, had been waged well before it reached Congress in 2004. One year earlier, issues similar to those discussed in the congressional challenge to the 2004 certification of Ohio's electoral votes were raised in the context of the California's gubernatorial recall election. Specifically, opponents of the recall election charged that California's voting system was flawed due to the use of pre-scored punch-card balloting machines, which resulted in the undercounting of minority votes. Thus, the question arose in California regarding whether to let a gubernatorial recall election proceed in the face of constitutional and statutory challenges.

5. *See* Sheryl Gay Stolberg & James Dao, *Congress Ratifies Bush Victory After a Rare Challenge*, N.Y. TIMES, Jan. 6, 2005, at A16.

6. *See id.*

7. Press Release, Sen. Barbara Boxer, Statement on Her Objection to the Certification of Ohio's Electoral Votes (Jan. 5, 2005), *available at* http://boxer.senate.gov/news/record.cfm?id=230450 (last accessed Feb. 21, 2005).

8. *See id.*

9. *See id.*

10. *See id.*

11. Charles Babington & Brian Faler, *Congress Makes Re-election Official; Two Lawmakers Raise Objection to Ohio Balloting*, WASH. POST, Jan. 7, 2005, at A4.

12. Gray v. Sanders, 372 U.S. 368, 380 (1963) (citation omitted).

The legal challenge to the California recall election was waged in the case of *Southwest Voter Registration Educ. Project v. Shelley*.[13] On August 7, 2003, plaintiffs filed suit to delay the recall election until it could be conducted without pre-scored punch-card balloting machines.[14] The plaintiffs argued that the use of pre-scored punch-card ballots violated both the Fourteenth Amendment to the Constitution[15] and the Voting Rights Act of 1965.[16] They contended that the use of pre-scored punch-card ballots disproportionately disenfranchised minority voters because the results of the machines are less reliable and are used in counties with higher populations of minority voters.[17] Finding that the possibility of success on the merits of the Voting Rights Act violation did not outweigh the hardship of postponing the election, the Ninth Circuit allowed the recall election to proceed on October 7, 2003.[18]

This Comment argues that the Ninth Circuit's decision to allow the California recall election to proceed was wrong; when future courts grapple with issuing injunctions to prevent constitutional and statutory violations, they must take into consideration the type of election at issue and exactly what is at stake. In balancing the likelihood of success on the merits with the hardships of issuing an injunction, the courts must recognize that the balance weighs in favor of *not* issuing an injunction only when the hardships that follow from postponing an election are greater than merely having to re-send absentee ballots and require candidates to campaign longer.

Part I of this Comment provides the necessary background on the Voting Rights Act of 1965 and the Supreme Court's decision in *Bush v. Gore*.[19] Part II introduces and discusses the Ninth Circuit case of *Southwest Voter Registration Educ. Project v. Shelley*. Part III comments on the Ninth Circuit's refusal to acknowledge the systematic disenfranchisement of minority voters caused by the use of punch-card voting machines. Part III also critiques how the court applied judicial precedent regarding the use of injunctions in elections. Finally, Part III argues that the court improperly allowed practical concerns regarding the

13. 344 F.3d 914 (9th Cir. 2003).

14. *See id.* at 917.

15. U.S. CONST. amend. XIV.

16. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

17. Appellants' Opening Brief at 2, Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (No. 03-56498).

18. *See Southwest Voter Registration Educ. Project*, 344 F. 3d at 919.

19. 531 U.S. 98 (2000).

expense and work that went into the election to outweigh the constitutional and statutory violations at bar.

I. Background: The Voting Rights Act of 1965 and *Bush v. Gore*

A. The Voting Rights Act of 1965

The Voting Rights Act of 1965[20] was designed to effectuate the guarantee under the Constitution's Fifteenth Amendment that no citizen's right to vote shall be denied or abridged on the basis of race, color, or previous servitude.[21] The Voting Rights Act has been described as "the most successful piece of federal civil rights legislation ever enacted."[22] It is "a broad remedial statute,"[23] which the Supreme Court has emphasized "should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination."[24] Specifically, Section 2 of the Voting Rights Act prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters.[25]

The Voting Rights Act was amended in 1982 to impose a "results" test as the standard for determining state compliance with the Act, thereby supplanting the "intent" standard previously articulated by the Supreme Court.[26] In *City of Mobile v. Bolden*,[27] Justice Stewart, writing for a plurality, stated that the language of Section 2 of the Act as originally written incorporated the discriminatory intent standard that was prescribed by the Fourteenth Amendment. In 1982, however, Congress amended Section 2 to no longer require a showing of intent to discriminate to prove a violation of the Voting Rights Act.[28] This

20. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000).

21. *See* 25 AM. JUR. 2D *Elections* § 38 (2004).

22. Drew S. Days III, *Section 5 and the Role of the Justice Department, in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 52 (Bernard Grofman & Chandler Davidson eds., 1992).

23. *See* Black v. McGuffage, 209 F. Supp. 2d 889, 896 (N.D. Ill. 2002).

24. *See* Chisom v. Roemer, 501 U.S. 380, 403 (1980) (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 567 (1969)).

25. 25 AM. JUR. 2D *Elections* § 38; *see also* 42 U.S.C. § 1973(a) (2000) (establishing the definition of a protected class by prohibiting "denial or abridgement of the right of any citizen of the United States to vote on account of race or color"); *id.* § 1973b(f)(2) (adding "language minority group" to the class of protected citizens).

26. *See* Wesley v. Collins, 605 F. Supp. 802, 809 (M.D. Tenn. 1985).

27. 446 U.S. 55 (1980).

28. *See* Virginia E. Hench, *The Death of Voting Rights: The Legal Disenfranchisement of Minority Voters*, 48 CASE W. RES. L. REV. 727, 747 (1998).

amendment, known as the "results test," barred all voting qualifications, standards, practices, or procedures that result in a minority group having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[29]

Generally, violations of the Voting Rights Act hinge on concerns regarding reapportionment of legislative districts.[30] The Supreme Court, however, explained in *Thornburg v. Gingles*[31] that Section 2 prohibits "any . . . practices or procedures which result in the denial or abridgement of the right to vote of any citizen who is a member of a protected class of racial and language minorities."[32] The Ninth Circuit further elaborated, "Section 2 plainly provides that a voting practice or procedure violates the [Voting Rights Act] when a plaintiff is able to show, based on the *totality of the circumstances*, that the challenged voting practice results in discrimination on account of race."[33] Therefore, a violation of Section 2 is established by a showing that "in the totality of the circumstances" a particular state statute, policy, practice, or standard *results* in the denial of equal opportunity to participate in the process for selecting persons for public office or deciding public issues.[34]

B. Punch-Card Balloting Machines: The Legacy of *Bush v. Gore*

On November 7, 2000, an NBC television announcement declared that Presidential candidate Vice President Albert Gore had won the crucial Florida electoral votes and thus the Presidential election.[35] In the pre-dawn hours of the following morning, however, the media then announced that it was actually Presidential candidate Texas Governor George W. Bush who had won Florida's twenty-five electoral votes and thus the Presidential election.[36] Subsequent embarrassed explanations revealed that the election in Florida, and therefore the

29. 42 U.S.C. § 1973(b).

30. *See* 25 AM. JUR. 2D *Elections* § 38.

31. 478 U.S. 30 (1986). The protected class in *Thornburg* was a group of black citizens of North Carolina who alleged that a redistricting scheme impaired their "ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution and of § 2 of the Voting Rights Act." *Id.* at 35.

32. *Id.* at 43.

33. Farrakhan v. Washington, 338 F.3d 1009, 1016 (9th Cir. 2003).

34. *See* 42 U.S.C. § 1973(b).

35. *See* LAURENCE H. TRIBE, *eroG v. hsuB*: Through the Looking Glass 41–42 (Bruce Ackerman ed., Yale Univ. Press 2002).

36. *See id.*

nation, was too close to call.[37] This spawned a barrage of litigation which led to the United States Supreme Court decisions in *Bush I*[38] and *Bush v. Gore.*

1. *Bush I*

On November 8, 2000, the Florida Division of Elections reported that Governor Bush had received 2,909,135 votes and that Vice President Gore had received 2,907,351 votes, creating a margin of 1,784 votes in favor of Governor Bush.[39] The margin of victory for Governor Bush was less than half of a percent of the votes cast; therefore, an automatic machine recount was conducted pursuant to the Florida election code.[40] The automatic recount resulted in a reduction in the margin between the two candidates, but still showed Governor Bush winning the race.[41] Given the closeness of the election, the Florida Democratic Executive Committee requested that manual recounts be conducted in Broward, Palm Beach, and Volusia Counties pursuant to Florida law.[42] The Florida Division of Elections, at the request of the Palm Beach Canvassing Board, then issued an advisory opinion stating that the results of the manual recounts had to be received by 5:00 p.m. on November 14, 2000 in order to be included in the certification of the statewide results.[43] The Volusia County Canvassing Board then filed suit in the Circuit Court of the Second Judicial District in Leon County, Florida seeking a declaratory judgment that it was not bound by the November 14th deadline.[44] The trial court subsequently ruled that under Florida law the deadline was mandatory, but that the Volusia Board would be able to amend its returns and the Florida Secretary of State could exercise her discretion in deciding to accept the amended returns.[45] The Volusia Board appealed this ruling to the First District Court of Appeal. The Florida Secretary of State, meanwhile, announced that she would not accept the returns from the four counties that requested the ability to file amended returns; instead she would rely on the earlier certified totals.[46] Vice President Gore

37. *See id.*
38. Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000) [hereinafter *Bush I*].
39. Bush v. Gore, 531 U.S. 98, 101 (2000).
40. *See id.*
41. *See id.*
42. Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1220, 1225 (Fla. 2000).
43. *Id.* at 1225–26.
44. *Id.*
45. *Id.*
46. *Id.* at 1226–27.

and the Florida Democratic Party then filed a motion in the Circuit Court of the Second Judicial District in Leon County seeking to compel the Secretary to accept the amended returns. Following the Circuit Court's denial of the motion, Gore and the Democratic Party appealed to the First District Court of Appeal which consolidated that appeal with Volusia Board's appeal and certified both to the Florida Supreme Court.[47] On November 21, 2000 that court, in turn, set November 26, 2000 as the deadline for all recounts.[48]

The United States Supreme Court granted certiorari, in what came to be known as *Bush I*,[49] and on December 4, 2000 issued an opinion vacating the Florida Supreme Court's decision, "finding considerable uncertainty as to the grounds on which it was based."[50] Despite this finding by the United States Supreme Court, on December 11, 2000 the Florida Supreme Court issued a decision on remand reinstating the deadline as November 26, 2000.[51]

2. *Bush v. Gore*

The United States Supreme Court had its final say on the 2000 election in *Bush v. Gore*,[52] which arose from an action Gore filed separately from his participation in the dispute regarding the deadline for submission of electoral returns that ultimately led to *Bush I*. Following the Florida Supreme Court's original decision setting the November 26, 2000 submission deadline, the Florida Elections Canvassing Commission certified the results of the election on that date and declared Governor Bush to be the winner.[53] The next day, Vice President Gore filed another complaint contesting the November 26, 2000 certification, this time because "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election"[54] constitutes grounds for contest. Gore based his challenge on, *inter alia*, approximately 10,750 ballots in Miami-Dade county and 3,300 ballots in Palm Beach county that the punch-card counting machines failed to register as having cast a vote for president.[55] The circuit court denied relief stating that Vice Presi-

47. *Id.* at 1227.
48. *Id.* at 1240.
49. *Bush I*, 531 U.S. 70 (2000).
50. *Id.*
51. Palm Beach Canvassing Bd. v. Harris, 772 So. 2d 1273, 1290 (Fla. 2000).
52. 531 U.S. 98 (2000).
53. *Id.*
54. *Id.*
55. Gore v. Harris, 772 So. 2d 1243, 1258–59 (Fla. 2000).

dent Gore failed to meet his burden of proof.[56] Gore then appealed to the First District Court of Appeal, which certified the issue to the Florida Supreme Court.[57]

The Florida Supreme Court affirmed in part and reversed in part.[58] The court held that the circuit court was correct in rejecting the challenge to the results in Nassau and Palm Beach Counties because those votes were not, in the statutory sense, "legal votes."[59] The court also held, however, that Vice President Gore had satisfied his burden with respect to his challenge to Miami-Dade County's failure to tabulate, by manual count, 9,000 ballots on which the machines had failed to detect a vote for President ("undervotes").[60] The court thereby ordered a hand recount of the 9,000 ballots in Miami-Dade County. The court also determined that both Palm Beach and Miami-Dade Counties, in their earlier manual recounts, had identified a net gain of 215 and 168 legal votes for Vice President Gore.[61] The Florida Supreme Court then directed the circuit court to include the totals in the certified results.[62]

Governor Bush challenged the decision of the Florida Supreme Court and the Supreme Court again granted certiorari in *Bush v. Gore.* The Court addressed the issue of whether the Florida Supreme Court violated Article II of the Constitution by establishing new standards for resolving Presidential election contests.[63] More importantly, the Court considered whether the use of manual recounts conducted in the absence of clear standards violates the Equal Protection and Due Process Clauses of the Constitution.[64]

In its decision in *Bush v. Gore,* the Court noted that the closeness of the 2000 Presidential election "brought into sharp focus a common, if heretofore unnoticed, phenomenon. Nationwide statistics esti-

56. *See* Bush v. Gore, 531 U.S. 98.

57. *Id.*

58. *See* Gore v. Harris, 772 So. 2d at 1247.

59. Bush v. Gore, 531 U.S. at 101.

60. *See* Gore v. Harris, 772 So. 2d at 1258–59. On November 19, 2000 the Palm Beach Canvassing Board began a manual recount of the 10,750 ballots on which no vote was registered by the punch-card counting machine. When the Florida Supreme Court issued its decision in *Palm Beach County Canvassing Board v. Harris,* 531 U.S. 70, setting the certification deadline at November 26, 2000, the manual recount was suspended. At the time the recount was stopped, approximately 9,000 of the 10,750 "undervote" ballots had not yet been manually recounted. Gore v. Harris, 772 So. 2d at 1258–59.

61. *See id.*

62. *See id.*

63. *See* Bush v. Gore, 531 U.S. 98.

64. *Id.* at 102.

mate that . . . 2% of ballots cast do not register a vote for President."[65] The Court focused on the importance of the right to vote and the requirement that the State not "accord[ ] arbitrary and disparate treatment to voters in different counties."[66] Noting the high failure rate of punch card balloting machines, the Court predicted, "After the current counting, it is likely legislative bodies nationwide will examine ways to improve mechanisms and machinery for voting."[67]

The Court ultimately held that the recount process approved by the Florida Supreme Court was "inconsistent with the minimum procedures necessary to protect the fundamental right of each voter" and halted the manual recall. This decision led to the certification of Governor George Bush as the official winner of Florida's twenty-five electoral votes, and Governor Bush was subsequently inaugurated as the Forty-third President of the United States.[68] The decision brought into focus the weaknesses of our voting machine system and its effect on nationwide elections:

> *Bush v. Gore* highlighted this soft underbelly of American elections, just as it threw into high relief the peculiar operations of our electoral college. It showed that different types of voting machines had patterns of different sorts of failure rates. It elicited from the Supreme Court a decision in which seven justices at least decided that the differential levels of participation were sufficient (with vastly different consequences) to sustain equal protection challenges to practices that heretofore had passed well underneath the constitutional radar.[69]

Bush v. Gore is widely believed to be the most controversial judicial decision heard by the Supreme Court in several decades.[70] In fact, eight months after the election a Fox News Poll showed that nearly sixty percent of Americans had not "gotten over" how Bush won the presidency and that people were still "angry."[71]

Some scholars assert that the Supreme Court should not have granted certiorari in *Bush I* or *Bush v. Gore* because the questions were not justiciable and should have been left to the Florida Legislature

65. *Id.* at 103.

66. *Id.* at 107.

67. *Id.* at 104.

68. *See id.* at 101.

69. CASS R. SUNSTEIN & RICHARD A. EPSTEIN, THE VOTE, BUSH, GORE AND THE SUPREME COURT (Univ. of Chicago Press 2002).

70. *See* MICHAEL MOORE, STUPID WHITE MEN . . . AND OTHER SORRY EXCUSES FOR THE STATE OF THE NATION xviii (Regan Books 2001).

71. *Id.*

and ultimately to Congress.[72] Those who defend the Supreme Court's decision to grant certiorari have countered by arguing that the uncertainty following the Presidential election threatened political chaos and the nation needed closure.[73] Most critics, however, contend that such defenses of *Bush v. Gore* encourage us to "[t]hrow the law out the window and think about the 'good of the country.'"[74] The most prevalent critique of *Bush v. Gore*, however, is that it was the result not of a principled legal analysis, but rather a political preference. As one critic has stated, "[I]nstead of deciding the case in accordance with pre-existing legal principles, fairly interpreted or even stretched if need be, five Republican members of the Court decided the case in a way that is recognizably nothing more than a naked expression of these justices' preference for the Republican party."[75]

The overwhelming criticism that followed in the wake of the *Bush v. Gore* decision has left an open question regarding the legitimacy of the decision and what effect it would have on future election questions. In turn, the 2000 Presidential election has forced the nation to reconsider the full range of practices that surround elections.[76] Specifically, what types of voting machines are acceptable? Do all voting machines need to be overhauled before we can move forward with elections and guarantee with any degree of certainty that every vote will count? If not, what amount of undercounting and overcounting can exist and have an election be ruled legitimate?

The next major case to challenge the use of certain voting machines was *Southwest Voter Registration Education Project v. Shelley*,[77] a challenge to California's recall election held on October 7, 2003. Plaintiffs in this case alleged both a violation of equal protection under the Constitution and a violation of the Voting Rights Act due to the use of the same problematic punch-card voting machines.[78]

72. *See* CHARLES FRIED, AN UNREASONABLE REACTION TO A REASONABLE DECISION 9 (Bruce Ackerman ed., Yale Univ. Press 2002).

73. *See* JED RUBENFELD, NOT AS BAD AS *PLESSY*, WORSE 21 (Bruce Ackerman ed., Yale Univ. Press 2002).

74. *Id.*

75. MARGARET JANE RADIN, CAN THE RULE OF LAW SURVIVE *BUSH V. GORE* 111 (Bruce Ackerman ed., Yale Univ. Press 2002).

76. *See* RICHARD EPSTEIN, WHITHER ELECTORAL REFORMS IN THE WAKE OF *BUSH V. GORE* 241 (Cass R. Sunstein & Richard A. Epstein eds., Univ. of Chicago Press 2002).

77. 344 F.3d 914 (9th Cir. 2003).

78. *Id.* at 916.

II. The Case: *Southwest Voter Registration Education Project v. Shelley*

A. The Parties

In *Southwest Voter Registration Educ. Project v. Shelley*[79] the plaintiffs included a number of individual organizations that joined together to bring suit. The plaintiffs included Southwest Voter Registration Education Project, the Southern Christian Leadership Conference of Greater Los Angeles, the National Association for the Advancement of Colored People, and the California State Conference of Branches.[80]

The Southwest Voter Registration Education Project is an organization committed to educating Latino communities across the Southwest about the democratic process, the importance of voter registration, and voter participation.[81] Its self-stated mission is "to politically empower Latinos by increasing civic engagement in the American electoral system."[82] The Southern Christian Leadership Conference of Greater Los Angeles is an organization committed "[i]n the spirit of Martin Luther King, Jr. . . . to bring about the promise of 'one nation, under God, INDIVISIBLE together with the commitment to activate the 'strength to love' within the community of humankind."[83] The organization targets their efforts toward issues such as quality, integrated education, and full political participation.[84] The National Association for the Advancement of Colored People, the oldest civil rights organization in the United States,[85] sponsors a variety of programs to "make real the promise of America."[86] The aim of their programs is to ensure, among other things, "civil rights compliance, equitable treatment of all Americans under law . . . and fully participatory democracy."[87] Additionally, the California State Confer-

79. *Id.*

80. *See id.*

81. *See* SOUTHWEST VOTER REGISTRATION EDUC. PROJECT, INFORMATION SHEET AND MISSION STATEMENT (2004), *at* http://www.svrep.org/about_svrep.html (last accessed Apr. 6, 2004).

82. *Id.*

83. S. CHRISTIAN LEADERSHIP CONFERENCE, MISSION STATEMENT AND OBJECTIVES *at* http://www.sclcnational.org/net/content/item.aspx?mode=P&cs=4682.0.12.2607 (last accessed May 25, 2005).

84. *See id.*

85. *See* NAACP, TIMELINE, *at* http://www.naacp.org/about/about_history.html (last accessed May 25, 2005).

86. NAACP, NAACP PROGRAMS, *at* http://www.naacp.org/programs/programs_index.html (last accessed May 25, 2005).

87. *Id.*

ence of Branches is the California affiliate of the NAACP working specifically on the status of civil rights in California.[88]

These plaintiffs moved for a temporary restraining order and a preliminary injunction against the use of punch-card voting machines in the recall election.[89] Plaintiffs sought the injunctive relief against Kevin Shelley, in his official capacity of California Secretary of State.[90]

B. History of the Case

On August 7, 2003, the plaintiffs filed a lawsuit in federal court to enjoin the use of pre-scored punch-card balloting machines in the upcoming recall election.[91] The basis for their claim was that the planned use of punch-card balloting machines violates the Equal Protection Clause of the United States Constitution and Section 2 of the Voting Rights Act.[92] The United States District Court for the Central District of California issued an order and opinion denying the request for a preliminary injunction.[93]

In its opinion, the district court first assessed the validity of any defenses to the claims asserted by the plaintiffs.[94] While the district court did not ultimately rule on any defense, it did note that there was "ample reason"[95] to believe that the suit would be barred under the doctrine of res judicata as a result of the earlier case of *Common Cause v. Bill Jones*.[96] In that case a number of the same plaintiffs as in *Southwest Voter Registration Educ. Project* made similar constitutional allegations against the use of punch-card balloting machines in general and, ultimately, obtained a Consent Decree banning the use of punch-card balloting in California by March 2004.[97] In addition to finding that that the suit was barred under res judicata, the district court in *South-*

88. *See* CAL. STATE CONFERENCE OF THE NAACP, CENTURY 21 WEBPAGE, *at* http://www.ca-naacp.org/cgi-bin/public_canaacp/default.asp (last accessed May 25, 2005).

89. Appellants' Opening Brief at 10, Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (No. 03-56498).

90. Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003).

91. *See id.* at 917.

92. *See id.* at 916.

93. Southwest Voter Registration Educ. Project v. Shelley, 278 F. Supp. 2d 1131 (C.D. Cal. 2003).

94. *See id.* at 1135–38.

95. *Southwest Voter Registration Educ. Project*, 278 F. Supp. 2d at 1137.

96. Common Cause v. Jones, No. 01-03470 SVW(RZX), 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002).

97. *Southwest Voter Registration Educ. Project*, 278 F. Supp. 2d at 1135–37.

west Voter Registration Educ. Project also found that the action was likely barred by laches.[98]

With regard to the merits of the plaintiff's claims, the district court found that "[w]hile the Court assumes that Plaintiffs can show a likelihood that the punch-card machines will suffer a higher error rate than other technologies, the Court concludes that Plaintiffs are not likely to prevail on the merits of their claims."[99] As to the equal protection claim, the district court first looked to *Bush v. Gore* as standing for the proposition that a rational basis review should be used when analyzing the justifications for the use of punch-card balloting machines.[100] In the end the district court did not come to a conclusion about the proper standard of review and held that "whatever the appropriate standard of review, Plaintiffs are unlikely to succeed on the merits of their constitutional claim."[101] The district court found that even if the plaintiffs could prove disparate treatment of voters through the use of punch-card balloting machines, the State had a compelling interest in holding the recall election on its originally-scheduled date and that the use of punch-card balloting machines was narrowly tailored to achieve this goal.[102]

The district court similarly found that the plaintiffs had a "slim chance" of prevailing on their Voting Rights Act claim.[103] The court listed the factors relevant to an analysis of an alleged violation of Section 2 of the Voting Rights Act, which include "a history of official discrimination in the jurisdiction; racially polarized voting; the lingering effects of prior discrimination; a lack of electoral success among minority candidates; the comparative unresponsiveness of elected officials to the needs of minorities; and, whether the policy justification for the challenged practice is 'tenuous.'"[104] The court found that the plaintiffs allegations were not "of the type contemplated by Section 2 of the Voting Rights Act," noting that of the above relevant factors, the plaintiffs had cited only one.[105] Ultimately, the district court held that while the plaintiffs' allegations might be able to support a claim under the federal pleading rules, they were not able to show either a probability of success on the merits nor substantial questions as to the

98. *Id.* at 1138.
99. *Id.*
100. *Id.* at 1139–40.
101. *Id.* at 1141.
102. *Id.*
103. *Id.* at 1143.
104. *Id.* at 1142.
105. *Id.*

merits and, therefore, were not entitled to the injunctive relief that they sought.[106] Furthermore, the district court determined that although the plaintiffs would suffer irreparable injury, the balance of hardships and consideration of the public interest weighed in favor of allowing the recall election to proceed.[107]

On September 11, 2003, the plaintiffs appealed to the Ninth Circuit and the case was argued on an expedited basis to a three-judge motions panel.[108] On September 15, 2003, the panel granted an injunction that postponed the election.[109] The panel first looked at the precedent set by the United States Supreme Court in *Bush v. Gore*. "Plaintiffs' claim presents almost precisely the same issue as the Court considered in *Bush*, that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause."[110] The Ninth Circuit panel noted that "[i]n *Bush*, the Supreme Court held that using different standards for counting votes in different counties across Florida violated the Equal Protection Clause" and therefore using voting apparatus of different degrees of reliability could lead to a similar outcome (i.e., a violation of the Equal Protection Clause) in the instant case.[111] The Ninth Circuit panel analyzed the evidence put forth by the plaintiffs that demonstrated the unreliability of punch-card balloting machines when compared to other methods of vote counting and determined that the plaintiffs had "tendered more than sufficient proof to satisfy [the] preliminary burden" of showing "that the likelihood is such that, when considered with the demonstrated hardship, a preliminary injunction should issue to preserve the respective rights of the parties."[112] The panel, like the district court, refrained from articulating what standard of constitutional review should be applied, but ultimately held that "plaintiffs have demonstrated a sufficient likelihood of success on the merits regardless of the standard of review."[113] Finally, the Ninth Circuit panel determined that neither res judicata nor laches would bar the plaintiffs'

106. *Id.* at 1143.

107. *Id.* at 1143–45.

108. *See* Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882 (9th Cir. 2003).

109. *See id.* at 913.

110. *Id.* at 895.

111. *Id.*

112. *Id.* at 899.

113. *Id.* at 900.

suit and that the district court had applied incorrect legal analyses to these defenses.[114]

Given these findings, the Ninth Circuit panel granted the injunction and postponed the recall election. On rehearing, the Ninth Circuit affirmed the district court and allowed the recall election to proceed on October 7, 2003.[115]

C. The Plaintiffs' Contentions

In their appeal to the Ninth Circuit, plaintiffs argued that the district court erred in denying plaintiffs request for preliminary injunction based on two main legal arguments: first, that their right to equal protection was violated because voters in counties that use punch-card machines would have a "comparatively lesser chance of having their votes counted than voters in counties that use other technologies."[116] Second, that the counties that use the punch-card machines have greater minority populations, thus the use of the punch-card machines "denies the right to vote on the basis of race, in violation of Section 2 of the Voting Rights Act."[117] Plaintiffs contended that they demonstrated a substantial likelihood of succeeding on the merits based on their showing that, *inter alia*, the use of obsolete equipment would disproportionately disenfranchise minority voters at a much higher rate than those of white citizens.[118] The plaintiffs requested that the election be postponed until March 2004 when the counties that used punch-card machines were scheduled to switch to more reliable systems.[119]

Specifically, the plaintiffs pointed to statistics showing that punch-card machines were used in six major counties—Los Angeles, Sacramento, San Diego, Santa Clara, Solano, and Mendocino.[120] In these six counties, people of color constitute forty-six percent of the population, whereas they constitute only thirty-two percent of counties that use more reliable voting machines.[121] Further, African-Americans,

114. *See id.* at 901–07.

115. *See* Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 919 (9th Cir. 2003).

116. *See id.* at 917.

117. *See id.*

118. *See* Appellants' Opening Brief at 40, Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (No. 03-56498).

119. *See* Alex Roth, *Punch-card Cited in Voter Omissions; Recall Question Skipped More Often, Study Finds*, S. D. UNION-TRIB., Oct. 11, 2003, at A1.

120. Appellants' Opening Brief at 2, *Southwest Voter Registration Educ. Project* (No. 03-56498).

121. *See id.* at 44.

Asian-Americans, and Latinos are all more likely to reside in punch-card counties than are white voters.[122]

The plaintiffs claimed that the use of punch-card machines would result in an average combined residual vote rate of 2.23%.[123] Residual votes consist of over-votes, ballots disqualified because they are read by the machine as containing more than one vote on a single candidate or issue, and under-votes, ballots disqualified because the machine reads them as not containing a vote.[124] Due to these statistics, the plaintiffs argued that they had put forth a likelihood of success on the merits that the voting machines resulted in systematic disenfranchisement of minority voters, in violation of both the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965.[125]

D. The Decision

"The basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies."[126] Every request for injunctive relief is different, however, and "a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[127] In *Southwest Voter Registration Educ. Project*,[128] the Ninth Circuit, on an en banc reconsideration, analyzed the various standards they could use to determine whether the plaintiffs had demonstrated the need for an injunction.

The court first considered their standard analysis that the plaintiffs demonstrate "either: (1) *a likelihood of success* on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [their] favor."[129] When using this test, the court must also consider

122. *See id.* at 44, n.18. The six punch-card counties collectively have 9% African-Americans, 11% Asian-Americans, and 27% Latinos. Comparatively, the counties with more reliable voting systems have only 5% African-Americans, 8% Asian-Americans, and 19% Latinos. *Id.*

123. *See id* at 44 n.19.

124. *Southwest Voter Registration Educ. Project*, 344 F.3d at 917.

125. Appellants' Opening Brief at 52, *Southwest Voter Registration Educ. Project* (No. 03-56498).

126. Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

127. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531(1987).

128. 344 F.3d at 917–18.

129. Clear Channel Outdoor, Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003) (quoting Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999)) (emphasis added).

whether the public interest favors issuance of the injunction.[130] The court also contemplated an alternative analysis previously employed by the Ninth Circuit that requires the plaintiff to establish: "(1) *a strong likelihood of success* on the merits, (2) the possibility of irreparable injury to plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the public interest (in certain cases)."[131] Ultimately, the court concluded that these forms of analysis created a continuum, meaning that the less certain the district court is of the likelihood of success on the merits, the more the plaintiffs must convince the district court that the public interest and balance of hardships tip in the plaintiff's favor.[132]

The Ninth Circuit, on an en banc reconsideration, held that the plaintiffs failed to show a strong likelihood of success on the merits of their violation of the Voting Rights Act claim and equal protection claim, and therefore the district court did not abuse its discretion in refusing to issue the injunction.[133] The Ninth Circuit concluded that the district court was correct in ruling that plaintiffs would suffer no hardship outweighing the stake of the State of California and its citizens in having this election go forward as planned and as required by the California Constitution.[134]

The panel quoted *Bush v. Gore* as the leading case on disputed elections: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."[135] Rather, the Ninth Circuit en banc panel focused on their finding that the possibility of success on the merits of the Voting Rights Act violation did not outweigh the hardship of postponing the election, affirmed the district court, and allowed the recall to occur on October 7, 2003.[136]

In applying the standard injunction analysis, the court missed the unique elements of this case. Not only was this case different because the injunction was desired to enjoin an election, but it was especially unique because it involved a special recall election. The distinction is significant because it goes to whether or not the hardships of granting

130. *See* Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992).

131. Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (citations omitted) (emphasis added).

132. *See Southwest Voter Registration Educ. Project*, 344 F.3d at 918.

133. *Id.* at 920.

134. *Id.* at 919–20.

135. *Id.* at 918 (quoting Bush v. Gore, 531 U.S. 98, 109 (2000)).

136. *See id.* at 919.

the injunction were more significant than the likelihood of success on the merits. Without a clear understanding of the unique elements of a special election, such as the flexibility with regard to scheduling the election and the lack of a constitutional crisis should the election be postponed, the court is likely to overvalue the hardships of postponing an election and undervalue the high investment the voters have in making certain that their vote will count.

In the future, when courts are grappling with issuing injunctions to prevent constitutional and statutory violations, the court must factor in what type of election is involved and what exactly is at stake. In balancing the likelihood of success on the merits with the hardships of issuing the injunction, the courts must recognize that the right to vote is so fundamental that the hardships that would follow from issuing an injunction should be more significant than merely having to re-send absentee ballots and require candidates to campaign longer.

III. Practical Consideration Trumps Sound Legal Analysis

A number of factors contributed to the Ninth Circuit's flawed decision in *Southwest Voter Registration Educ. Project v. Shelley*. The decision resulted from a combination of two main factors: (1) the confusion that followed in the wake of *Bush v. Gore* regarding how problematic voting machines impact fundamental voting rights and notions of equal protection and (2) the unique nature of this first-ever recall election and how that allowed greater flexibility to schedule the election. These factors came together, like a perfect storm, in a decision that failed to acknowledge the systematic disenfranchisement of minority voters, incorrectly applied judicial precedent regarding enjoining elections in progress, and ultimately allowed practical considerations to trump a principled legal argument.

A. The Court Refused to Acknowledge Systematic Disenfranchisement of Minority Voters

On the violation of the Voting Rights Act, the en banc court first had to consider whether there was a strong probability of success on the merits.[137] Given the fear and concern the en banc court expressed at enjoining an election in progress, however, this claim was not given proper consideration.

In the first appeal, the three-judge panel properly recognized that forty-four percent of the electorate would be using a voting sys-

137. *See id.*

tem so flawed that California Secretary of State Kevin Shelley had officially deemed it "unacceptable" and banned its use in all future elections.[138] This panel recognized the inherent defect in a system where approximately 40,000 voters cast ballots that would never be counted because of unreliable voting machines.[139]

In addition, the three-judge panel found that the plaintiffs had demonstrated that those most affected by this disparity were minority voters.[140] The panel was persuaded by the plaintiff's overwhelming statistics that proved that people of color were more likely to reside in the counties that have not yet replaced their punch-card voting machines. The fact that people of color constitute forty-six percent of punch-card counties but only thirty-two percent of counties using other more reliable voting systems caused the three-judge panel to pause and recognize the need to enjoin the October 7 election.[141] The judges recognized that this systematic disenfranchisement of minority voters is specifically precluded by Section 2 of the Voting Rights Act. For this reason, the panel held that the plaintiffs properly demonstrated the likeliness of success on the merits.[142]

Despite the facts and overwhelming statistics regarding how proceeding with the recall would disenfranchise minority voters, the en banc court reversed the panel's decision and chose to only recognize that there was a possibility of success and not a *strong* possibility of success on the merits. This analytical mistake led the en banc court to find that the district court did not abuse its discretion in weighing the hardships and considering the public interest.[143]

In a subsequent analysis of the election, a study demonstrated that in San Diego County, one of the seven counties that still used punch-card ballots, an estimated 176,000 votes were "lost" in the recall election because of the punch-card ballot's flawed design.[144] In addition, another study that conducted an independent review of the recall election results found that "of the 8,359,168 votes cast statewide, some 384,427 were not recorded for the recall question. Almost half

138. *See id.* at 888.

139. *See id.*

140. *See* Appellants' Opening Brief at 43, Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (No. 03-56498).

141. *See id.*

142. *Southwest Voter Registration Educ. Project*, 344 F.3d at 888.

143. *See Southwest Voter Registration Educ. Project*, 344 F.3d at 919.

144. Roth, *supra* note 119, at A1. The study cited was conducted by University of California Berkeley Professor Henry Brady. *Id.*

of these residual votes—more than 175,000—were in Los Angeles County."[145]

It is vital to recall that the plaintiffs provided the en banc panel with overwhelming statistics that proved that people of color were more likely to reside in the counties that had not yet replaced their punch-card voting machines. This fact was dismissed. In the end, the results demonstrated that sweeping violations of the Voting Rights Act occurred, and while the eleven-judge panel on the Ninth Circuit did not have the benefit of hindsight, they did have adequate statistics and forecasts that these violations would occur. But instead of merely postponing the election until March of the next year when new voting machines would be available, the court allowed the violations to go forward, thus refusing to acknowledge the systematic disenfranchisement of minority voters in California.

B. The Court Misapplied Judicial Precedent Regarding Injunctions in Elections

To determine whether the district court had abused its discretion in denying the preliminary injunction to halt the recall, the Ninth Circuit en banc followed precedent in *Sports Form, Inc. v. United Press International, Inc.*[146] that held that an order "will be reversed only if the district court relied on an erroneous legal premise or abused its discretion."[147] The Ninth Circuit en banc court began its analysis by recognizing that there is no doubt that the right to vote is fundamental, but also recognized that the courts cannot lightly interfere with or enjoin a state election.[148] This notion was drawn from the Supreme Court's decision in *Reynolds v. Sims.*[149] In *Reynolds*, the Supreme Court held that the Alabama Legislature's decision to not re-apportion the legislative districts between 1901 and 1960, despite well-documented changes in demographics, was a violation of the Equal Protection Clause.[150] When crafting a remedy for this violation, however, the Court noted, "where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effec-

145. *Id.*

146. 686 F.2d 750 (9th Cir. 1982).

147. *Id.* at 752.

148. *See Southwest Voter Registration Educ. Project*, 344 F.3d at 918 (citing Reynolds v. Sims, 377 U.S. 533, 555, 585 (1964)).

149. *Id.*

150. *See Reynolds*, 377 U.S. at 568.

tive relief *in a legislative apportionment case.*"[151] The Court specifically limited itself by adopting the words "might justify" and by narrowly tailoring the statement to situations where "legislative apportionment" constitutes the constitutional violation. Despite the limits of the holding in *Reynolds*, the Ninth Circuit utilized the case as standing for the proposition that "a federal court cannot lightly interfere with or enjoin a state election."[152]

Against this improper backdrop of fear that the en banc court expressed at enjoining an election in progress, the court incorrectly followed the judicial trend towards allowing elections in progress to proceed. Citing a string of cases in which the Supreme Court overlooked undisputed constitutional violations,[153] the court reasoned that the decision to enjoin an impending election has often been treated as more serious than remedying a known constitutional violation.[154] This flawed analysis set the stage for a wrongly reasoned decision.

The en banc Ninth Circuit court cited *Ely v. Klahr*,[155] where the United States Supreme Court affirmed a three-judge United States District Court decision to allow legislative elections to go forth despite a finding that the apportionment plan used for that election was invalid.[156] The concern regarding the apportionment plan in *Ely* was that it "creates legislative districts that are grossly unequal" due to a misconception regarding the then-current population distribution in Arizona.[157] Relying on the fact that the results of the 1970 census would allow the legislature to adopt a valid apportionment statute in the next elections in 1972, the Supreme Court affirmed the district court's decision to allow the election to proceed.[158]

The *Southwest Voter Registration Educ. Project* court also looked to *Whitcomb v. Chavis*[159] where the Supreme Court stayed the decision of a three-judge panel of the District Court that held that the legislative apportionment statutes of Indiana were unconstitutional and void.[160] The district court in that case held that the statutes operated to mini-

151. *Id.* at 585 (emphasis added).
152. *Southwest Voter Registration Educ. Project*, 344 F.3d at 917.
153. *See, e.g.*, Ely v. Klahr, 403 U.S. 108 (1971); Whitcomb v. Chavis, 396 U.S. 1055 (1970); Kilgarlin v. Hill, 386 U.S. 120 (1967).
154. *See Southwest Voter Registration Educ. Project*, 344 F.3d at 918.
155. 403 U.S. at 113.
156. *See Southwest Voter Registration Educ. Project*, 344 F.3d at 918.
157. *Ely*, 403 U.S. at 111.
158. *Id.* at 115.
159. 396 U.S. 1055 (1970).
160. *See* Chavis v. Whitcomb, 307 F. Supp. 1362 (S.D. Ind. 1969).

mize the voting strength of a cognizable racial minority group and therefore ordered a redistricting of the entire state by October 1, 1969.[161] On February 2, 1970, the Supreme Court granted the State of Indiana a stay, allowing the election to proceed despite the alleged constitutional violations.[162] Finally, the court considered *Kilgarlin v. Texas*,[163] a case where the district court allowed a 1966 election to proceed despite a finding that Fourteenth Amendment rights were violated in some districts due to unacceptable variations in the population per representative.[164]

These cases stand for the proposition that there are certain cases—those involving constitutional violations of legislative apportionment schemes—in which the courts will favor allowing an election to proceed in the face of constitutional violations. These cases, however, all involve legislative re-districting, a complex and involved proposition, whereas the appellants in *Southwest Voter Registration Educ. Project v. Shelley* were merely requesting a short postponement of a recall election for five months until the voting machines could be brought up to the requirements imposed by the Secretary of State.

The difference is significant. The cases the court relied upon to deny the injunction involve complex schemes to properly divide a legislative district based upon constantly changing populations. Nevertheless, the case at bar did not involve judicial intervention to re-draw district lines, it merely requested a five month time delay in a special election.

In *Southwest Voter Registration Educ. Project*, the court misapplied the Supreme Court's reasoning with regard to legislative apportionment cases despite the plaintiffs' argument that "there is a world of difference between briefly postponing a recall and Proposition election that might (but might not) result in a governor's early exit from office, and postponing a regularly scheduled election to fill offices that otherwise would not be filled."[165] The plaintiffs' contention was that the judicial proclivity to avoid enjoining impending elections was borne from a concern that without timely elections there would be a constitutional crisis, either by leaving vacancies in government offices or by extending the amount of time elected officials served.[166] This

161. 396 U.S. at 1055.
162. *See id.*
163. 386 U.S. 120 (1967).
164. *Id.*
165. *See* Appellants' Opening Brief at 5, Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (No. 03-56498).
166. *See id.*

was never a possibility with this election. In fact, if the election was enjoined, the constitutional crisis the en banc panel appeared to fear would never have occurred. Governor Davis would have remained in his position until the voting machines could be replaced and the Propositions would have appeared on the March 2004 ballot for which they were originally intended.

By ignoring the unique element of this first-ever recall election in California, the court placed too much weight on the judicial precedent that favored allowing elections in progress to proceed. In so doing, the court allowed an election to proceed that could have easily been postponed until the constitutional and statutory violations were resolved by replacement of the unreliable voting machines.

C. The Court Heavily Relied on Practical Considerations and Ignored Legal Principles

The balancing test invoked by the en banc panel, strangely reminiscent of *Bush v. Gore*, focused significantly on the resources that the state of California and its citizens had invested in the recall election.[167] Specifically, the court expressed concern that time and money had already been spent to prepare voter pamphlets and sample ballots, to mail absentee ballots, and to train poll workers.[168] The court noted that public officials had been forced to divert their attention from official duties to campaign and recognized that candidates had crafted a message to voters in light of a schedule and calibrated that message to the political and social environment of the time.[169] Further, the court noted that the candidates had raised funds under contribution laws and expanded them in reliance on the election occurring on October 7, 2003.[170] Next, the court looked at the hundreds of thousands of absentee voters who already cast their ballots, used their time and money to exercise their citizenship rights.[171] The court was compelled by the notion that "[t]hese investments of time, money, and the exercise of citizenship rights cannot be returned."[172] The court reasoned that if the election were to be postponed, the citizens who already made an investment of the election would essentially be told that their votes do not count and they must vote again.[173]

167. *See Southwest Voter Registration Educ. Project*, 344 F.3d 914, 918 (9th Cir. 2003).
168. *See id.*
169. *See id.* at 919.
170. *See id.*
171. *See id.*
172. *Id.*
173. *See id.*

On the other side of the balancing equation, the en banc court merely held that the plaintiffs claims that the punch-card system would deny the right to vote to some voters were "merely a speculative possibility . . . that any such denial will influence the result of the election."[174] The court never considered the reality that the 40,000 voters whose votes would not be counted were being told that their votes do not count at all. This is a very different proposition than telling an absentee voter that they would have the opportunity to vote again. Thus, the en banc panel, by refusing to postpone the election for five months, essentially told the minority voters in the seven major counties that the reality that 40,000 of them would never be given an opportunity to have their vote count was inconsequential. This flies in the face of the Supreme Court's assertion in *Reynolds v. Sims*: "We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of constitutionally protected rights demands judicial protection."[175]

This attempt to balance the harms was not a true balance at all. The court merely enumerated the practical difficulties in halting the recall as significant and considered the inevitable disenfranchisement of minority voters on the other side merely speculative. Rather than dealing with the concrete reality that 40,000 votes of primarily minority voters would not be counted, the panel chose to predict the future and determine that since the votes might not affect the outcome, the practical problems of halting the election outweighed the disenfranchisement. This en banc panel improperly held that despite their finding that there was a possibility of success on the merits of the Voting Rights Act violation,[176] the material hardship that the State of California would suffer from postponing the recall outweighed the possibility of systematic discrimination.

This poor balancing act resulted in an election that utterly disregarded the Supreme Court's declaration in *Gray v. Sanders*, which was cited by the *Bush v. Gore* Court: "The Court has consistently recognized that all qualified voters have a constitutionally protected right 'to cast their ballots and have them counted' . . . . Every voter's vote is entitled to be counted once. It must be correctly counted and reported."[177] Maybe, according to the Ninth Circuit, every voter's vote is entitled to be counted—except for when it's not.

174. *Id.* at 919–20.
175. Reynolds v. Sims, 377 U.S. 533, 566 (1964).
176. *See Southwest Voter Registration Educ. Project*, 344 F.3d at 917.
177. Gray v. Sanders, 372 U.S. 368, 380 (1963) (citation omitted).

Conclusion

A multitude of questions remain following the decision of *Southwest Voter Registration Educ. Project v. Shelley*. If *Bush v. Gore* stood for the proposition that every vote deserved to be counted equally, then how could it be equitable to allow an election to proceed in the face of massive voting machine failures? How important is the nature of the particular election to the application of judicial precedent discouraging enjoining impending elections? And, most importantly, when it comes to elections, are we truly concerned with protecting the integrity of the process or merely allowing practical reasons to rule the day? The reasoning of *Southwest Voter Registration Educ. Project* would instruct us that every vote counts, except when it doesn't; the uniqueness of the recall election was irrelevant; and it is totally acceptable to craft an argument relying on whether the application of the law to this situation would result in too great a practical hardship rather than relying on sound legal principles. If the court had applied this type of weak reasoning to some of the most important decisions of our time, our children might still be going to segregated schools simply because it would be more convenient. The role of the judiciary, as stated by the Supreme Court, is to protect constitutionally protected rights—the decision in *Southwest Voter Registration Educ. Project* falls short of that mandate.

In the future, when courts are grappling with elections and issuing injunctions to prevent constitutional and statutory violations, the courts must factor in what type of election is involved and what exactly is at stake. In balancing the likelihood of success on the merits with the hardships of issuing the injunction, the courts must recognize that the right to vote is so fundamental that the hardships that would follow from issuing an injunction should be more significant than merely having to re-send absentee ballots and require candidates to campaign longer.