

Rule of Law/ *By Einer Elhaug*

Rewire This Circuit

The Ninth Circuit federal court's decision delaying the California recall elevates a straw-man argument against *Bush v. Gore* into constitutional principle, and then employs that bogus principle to deny the California electorate its constitutional right to oust its governor.

The straw man is the claim that the Supreme Court decision in *Bush v. Gore* made it an equal protection violation for different counties to use different ballot-counting methods. Back when it was electorally convenient to them, Democrats lampooned this equal protection theory because it would lead to the absurd conclusion that it was unconstitutional to use punch cards in some counties and not others, which would invalidate just about every election conducted in the last century.

Now, the Ninth Circuit federal court claims that this absurdity is binding constitutional law, and thus requires enjoining the recall because some California counties use punch card technologies and others do not.

But *Bush v. Gore* never rested on such an equal protection theory. It couldn't have, because that decision sustained a machine recount despite the fact that some Florida counties used punch cards and others used optical scanners. As the Supreme Court stated, "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." Instead, *Bush v. Gore* expressly stated that the issue there was "whether the use of *standardless* manual recounts violates the Equal Protection and Due Process Clauses." It stressed that, there, the standards about whether to count a dimpled or partially perforated ballot varied not only between counties but within counties over time and between different counters.

If allowed to exercise such standardless discretion in ballot-counting, counters could engage in political discrimination by manipulating the standard to disfavor the ballots and candidates whose political viewpoints the counters disliked. But such discrimination would be hard to detect or prove precisely because there would be no standard against which to judge the counting. As *Bush v. Gore* stated, "The problem inheres in the absence of specific standards to ensure its equal application."

If, in advance of an election, a county adopts a counting technology that undercounts votes in a uniform way, that choice is far less likely to

affect the election outcome because its predicted effects apply to both candidates equally. Nor would any county have an incentive to adopt a technology that undercounts its own vote compared to the vote in other counties, for that would simply lessen its own political clout.

Precisely the same distinction is recognized for the conventional constitutional doctrine that bans counties from exercising standardless discretion about whether to grant parade permits because of the fear that it might be exercised against disfavored political viewpoints. No one had ever thought this makes it unconstitutional for one county to allow parades from 1 p.m. to 5 p.m. on Saturday, while other counties allow them from 9 a.m. to 5 p.m.

Nor, apparently, did anyone think similar county variations in election machinery raised a constitutional problem for all the other elections conducted since 2000, until this recall created a strategic reason for so claiming.

* * *

The Ninth Circuit's decision was as precipitous as it was unsound. It took an incredibly close election result for the relatively small number of incompletely perforated punch cards to arguably matter in Florida, and the media recount suggests it turned out not to matter even there. Nor has the problem been replicated before or since in other elections. But because of the concern that some similar problem *might* affect the recall election, the Ninth Circuit is with *certainty* depriving the entire California electorate of its right to vote on whether it wants a different governor for the next six months.

The Ninth Circuit appears not to have noticed the irony that, in so holding, it is keeping in office a governor who himself was elected under a system that used punch cards in some counties and not others, and thus must, under its theory, be holding office unconstitutionally. Does this mean Gray Davis cannot be removed from office by a recall election but can by judicial injunction? Or does the court really think that the best way to vindicate a purported right to vote using equal vote-counting technology is to require voters to keep in office a governor elected with unequal vote-counting technology?

Mr. Elhaug is a professor of law at Harvard.

**The court's 'recall' decision
was precipitous and unsound.**