

Judges Interfere with Elections

FOR THE FIRST 174 YEARS after our Constitution was adopted, the reapportionment of state legislatures was considered a “political question” to be resolved by the legislative branch. “Courts ought not to enter this political thicket,” the Supreme Court ruled in *Colegrove v. Green* (1946).

Then suddenly, in *Baker v. Carr* (1962), Justice William J. Brennan led the judicial supremacists into the thicket. Asserting the “responsibility of this Court as ultimate interpreter of the Constitution,” he ruled that courts could redraw the boundaries of legislative districts. Justice Frankfurter, in dissent, joined by Justice Harlan, wrote that the *Baker v. Carr* decision was “. . . a massive repudiation of the experience of our whole past in asserting destructively novel judicial power. . . .”

Reapportionment was another new area where the judicial supremacists of the Warren Court seized legislative

powers. The next step after *Baker* was Chief Justice Earl Warren's majority opinion in *Reynolds v. Sims* (1964). The Supreme Court ruled that population (one-man-one-vote) must be the primary consideration in apportionment plans for both houses of state legislatures. This forbade state legislatures from imitating the pattern of Congress, where one house is apportioned by population and the other by geography.

Further enunciating notions of judicial exclusiveness, Chief Justice Warren wrote in *Powell v. McCormack* (1969), "It is the responsibility of this court to act as the ultimate interpreter of the Constitution."

On the contrary, the U.S. Constitution does not make the Supreme Court "the ultimate interpreter of the Constitution." Such language originated with the judicial supremacists. Justices Warren and Brennan were leaders in the revolution that was taking place, case by case, to dismantle the separation of powers and replace it with judicial supremacy.

The Supreme Court's disdain for the right of the people to govern ourselves was pointed out by Justice Clarence Thomas in his brilliant dissent in *U.S. Term Limits v. Thornton* (1995):

It is ironic that the Court bases today's decision on the right of the people to "choose whom they please to govern them." Under our Constitution, there is only one State whose people have the right to "choose whom they please" to represent Arkansas in Congress. The Court holds, however, that neither the

elected legislature of that State nor the people themselves (acting by ballot initiative) may prescribe any qualifications for those representatives. The majority therefore defends the right of the people of Arkansas to “choose whom they please to govern them” by invalidating a provision that won nearly 60% of the votes cast in a direct election and that carried every congressional district in the State.

BUSH V. GORE

The Bush-Gore election in 2000 is a case in which *state* court judicial supremacists caused unprecedented problems. The Florida ballots had been counted and recounted according to pre-election procedures. All ballot procedures had been approved by both major parties before the election, and Florida was about to certify the election in an orderly way. Al Gore was free to present evidence of fraud or other misconduct, but he had no such evidence and lost his challenge in the trial court.

Then the judicial supremacists on the Florida supreme court threw the election into chaos. They seized on Gore’s argument that a different recount method might have yielded a different outcome and ordered a peculiar recount invented by the judges in order to maximize Al Gore’s chances.

The Florida supreme court supremacists, in their extraordinary conceit, operated on the premise that because they were high-ranking judges, they could devise and require a recount scheme superior to the one prescribed

by pre-election rules. That premise is nonsensical and undemocratic. It is absolutely essential to democratic elections to count the votes according to the rules agreed to *before* the election begins. Any deviation from the procedure agreed upon in advance makes the election less fair.

During the Supreme Court oral argument on *Bush v. Gore*, Justice Sandra Day O'Connor enunciated the best rule about what standard to apply in ballot recounts: "Why isn't the standard the one that voters are instructed to follow, for goodness' sakes? I mean, it couldn't be clearer."

Yes, the ballots should be counted in accord with the instructions provided to the voters before they vote.

The wild activism of the Florida court cried out to be stopped by someone. Fortunately, the U.S. Supreme Court put an end to the crazy post-election recount scheme invented by the Florida judicial supremacists.

Unfortunately, the Supreme Court failed to identify *state* court judicial supremacy as the cause of the post-election turmoil in Florida. Probably because too many Supreme Court justices are *federal* judicial supremacists, they didn't want to criticize *state* judicial supremacists. The majority opinion held only that a *judicially ordered recount* must satisfy minimal equal protection standards.

The Supreme Court decision in *Bush v. Gore* was widely criticized on federalism grounds by those who thought that the Supreme Court should have deferred to the Florida state judicial supremacists. But the Supreme Court effectively and properly deferred to Florida's legislative and executive branches, while halting the Florida judiciary's interference in the election. Justices Souter and Breyer agreed that the

Florida supreme court was interfering with the election in an unconstitutional manner, but they still wanted to use federal judicial supremacy to order their own peculiar recount schemes.

The Supreme Court annoyed many commentators who believe in judicial supremacy by saying that the *Bush v. Gore* ruling applies only to the “present circumstances.” But of course *all* rulings should apply only to the case before the court. Courts are not supposed to concoct laws or rules to apply to people who are not parties to the case. As the Kennedy-Rehnquist-O’Connor-Scalia opinion stated in *Missouri v. Jenkins*, it would be “a blatant denial of due process” to apply its decision to “persons who have had no presence or representation in the suit.”

But the judicial supremacists have become so accustomed to believing that Supreme Court decisions are the law of the land—instead of merely a decision on the controversy before the court—that it caused much comment when the justices restricted *Bush v. Gore* to that particular case.

THE CALIFORNIA RECALL

The California constitution has a provision for recalling a governor so he can be replaced without waiting for the next election. A populist movement in 2003 gathered the necessary petitions to recall Governor Gray Davis, and a recall election was scheduled.

With the election already underway and absentee ballots being collected, the Ninth Circuit U.S. Court of Appeals ruled 3 to 0 that the election must be postponed.

Many concluded that the judges were trying to help the Democrats, but the announced reason was that there was a likelihood that the ACLU could prove in a trial that new touch-screen computerized ballots would be more accurate than the system California had used for decades.

This decision was in the face of overwhelming evidence from academics and voter registrars that an abrupt switch to new voting technology would create its own problems and errors among voters and poll personnel. If the punch-card ballot were really illegal as the court maintained, then how could Governor Davis's original election be valid, since punch cards were used then?

The relative merits of punch-card and touch-screen ballots are not the issue. Such controversies are routinely resolved in our political system without any help from judges. The threat to self-government comes from judges who interfere with an ongoing election. The California judicial supremacists said they had to suspend the election in order for the United States to set a good example for other countries. The court said in *Southwest Voter Registration Education Project. v. Shelley* (2003): "... this is a critical time in our nation's history when we are attempting to persuade the people of other nations of the value of free and open elections. Thus, we are especially mindful of the need to demonstrate our commitment to elections held fairly, free of chaos"

Did those judges really think that the California recall election would be so chaotic that it would set a bad example for Iraq and Afghanistan? If anything, the Ninth Circuit showed us that judicial supremacists could derail

an election at the last minute and create real chaos. No democratic country should ever permit judges to postpone or cancel an election. It is essential that elections proceed as scheduled.

The trial judge had found nothing objectionable about the California recall election. The only evidence cited by the three Ninth Circuit judges was that the ACLU wanted to cancel the election; that the Secretary of State had agreed to phase out punch cards; and that a study showed that touch-screens were superior to punch cards. But the study was funded by a major provider of touch-screen voting machines.

To try to justify an order to switch to a new system, the judges used some meaningless buzzwords to suggest that a perfectly good election procedure needed a high-tech replacement: “. . . the fundamental right to have votes counted in the special recall election is infringed because the pre-scored punch-card voting systems used in some California counties are intractably afflicted with technologic dyscalculia.” (Judicial supremacists, elitists that they are, love to lace their opinions with words the voters don’t understand.)

As it turned out, the Ninth Circuit judicial supremacists lost their nerve, and the full court let the election proceed as scheduled. The voters elected Arnold Schwarzenegger in a fair election with ordinary ballots. California counties then spent millions of dollars on computerized touch-screen election equipment, but controversies remain. On April 30, 2004, the California secretary of state banned the use of fourteen thousand touch-screen machines because of

security and reliability concerns, and “decertified” an additional twenty-eight thousand until their security could be upgraded.

The court’s analysis of voting systems was naive and technically flawed, as well as legally and politically abominable. It is scary to think how close we came to letting judges sabotage the most important California election in years, and there is no indication that the judges have retreated from their supremacist attitudes.

SHENANIGANS IN NEW JERSEY

The liberals in politics, media, and the judiciary have popularized the notion that an election loser can use the courts to change the rules that were in place before the election. This is a very bad idea; not even banana republics let judges interfere with elections.

In the 2002 New Jersey Democratic primary for the U.S. Senate, the incumbent Senator Robert Torricelli easily won renomination. He then dropped dramatically in the polls following corruption charges and announced his intention to withdraw. But the general election had already begun; ballots had been printed, overseas military ballots had been mailed, some servicemen had already voted, and the legal deadline for substituting another candidate had passed.

New Jersey law clearly states that a name can be substituted on the ballot “in the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the fifty-first day before the general election.” When Torricelli announced his in-

tention to withdraw, it was only thirty-six days before the election.

So the Democrats asked the New Jersey supreme court to rewrite the law, and the New Jersey judicial supremacists changed the rules.

The problem with the court's decision is that no change in the rules during or after an election can ever be fair. The only way to hold an honest election is to have an agreed-on procedure in advance and follow pre-election rules, whether or not one side later objects, and even if hindsight can invent a better system. If judges are allowed to manipulate elections by changing the rules in the middle of or after the election, then we can expect crooked elections.

GIVING THE FRANCHISE TO FELONS

The nation's four million convicted felons could be enough to swing future elections. Surveys show that the big majority would vote Democratic if they could, so felons are a voting bloc the Democrats are itching to acquire.

In the 2000 election, George W. Bush carried Florida by 537 votes. The Associated Press reported afterwards that as many as five thousand felons may have voted illegally, nearly 75 percent of whom were registered Democrats. In the 2004 gubernatorial election in Washington State, the Democrat was elected by a margin of 129 votes, but the Democrats later admitted that at least seven hundred felons voted illegally.

The laws of forty-eight states place restrictions on the ability of convicted felons to vote. State laws vary widely

in these restrictions. State laws may distinguish between those who are now behind bars and those who have been released, or whether they are repeat offenders, or whether they are violent or nonviolent offenders, or whether they are parolees or probationers.

Allowing felons to vote is highly unpopular with the American people, but the laws are amended from time to time. Since 1996, nine states have repealed a few of their voting barriers for convicted felons, while three states made their laws tougher. These changes don't appear to have anything to do with partisanship or geography. The states easing their bans were Alabama, Maryland, Virginia, Connecticut, Delaware, Nevada, New Mexico, Texas, and Wyoming, while the states that toughened their policies were Massachusetts (by constitutional amendment), Utah and Kansas.

The Democrats haven't a chance for wholesale repeal of these laws. So the Democrats are doing what liberals always do: line up the American Civil Liberties Union and other left-wing lawyers and then seek out activist judges to issue decisions which elected legislators will not make. A massive campaign is now underway to overturn state laws that bar or restrict felons from voting. The Democrats are also trying to get the courts to rewrite the Voting Rights Act to make it applicable to felons.

To try to give convicted felons the franchise, the Democrats are playing the race card, asserting that state laws have a "disparate impact" on blacks and Hispanics and therefore violate equal-protection guarantees. The laws, of course, are color-blind, and, furthermore, it is no more

discriminatory to deny felons their franchise than to deny them certain categories of employment, child custody, or gun ownership.

In *Johnson v. [Jeb] Bush*, a panel of the Eleventh Circuit U.S. Court of Appeals by 2 to 1 in 2003 reversed a district court ruling and ordered a trial on the race allegations in Florida even though the plaintiffs presented no evidence of any racial animus. The decision was written by one of Clinton's most controversial nominees, Judge Rosemary Barkett. The dissenting opinion pointed out that the Fourteenth Amendment, Section 2, "explicitly allows states to disenfranchise convicted felons." Furthermore, the dissent explained, in the time period when Florida adopted the rule against voting by felons, no "disparate impact" on minorities existed, so there could not have been any bias in the adoption of the rule. In April 2005, the Eleventh Circuit *en banc* reversed, and the U.S. Supreme Court, on November 14, 2005, refused to hear the case.

In *Farrakhan v. Locke* (2003), a U.S. District Court in Spokane dismissed a case brought by prison inmates, but the liberal Ninth Circuit sent the case back for a trial. In *Munatqim v. Coombe*, the Second Circuit expressed uncertainty and confusion about the felons issue and is now reconsidering this case *en banc*. The plaintiff, Jalil Munatqim, was convicted of the ambush murder of two New York police officers.

New Jersey allows felons to vote after they complete their incarceration, parole, or probation, but that's not enough to please the Democrats. Ten ex-convicts (including a convicted killer) are suing to void the state law, backed

by the Constitutional Litigation Clinic at Rutgers Law School, the ACLU, the New Jersey State NAACP, and the Latino Leadership Alliance of New Jersey.

Activist judges who like to cite foreign law and create new “human rights” based on “emerging awareness” may soon be invoking Britain’s October 2005 decision to grant the franchise to its 77,000 prisoners. Britain kowtowed to the European Court of Human Rights in Strasbourg, which ruled that the “right to free elections” applies to prisoners. The case was won by a prisoner who killed his landlady with an axe.

The U.S. Constitution reserves the matter of voting regulations to state legislatures and specifically authorizes the disenfranchisement of felons. We should not permit supremacist judges to rewrite these laws.

10 *Judges Interfere with Elections*

- The Supreme Court is on the verge of reentering the political thicket of reapportionment in a major way. In *Vieth v. Jubelirer* (2004), the Supreme Court reviewed reapportionment in Pennsylvania, where it had been alleged that the majority party redrew the district boundaries in order to favor themselves. Four justices agreed that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist. Justice Kennedy seemed to agree, as he said: “Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights.”

But that doesn't make it hopeless for a supremacist such as Kennedy, as he went on to say: “It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied. Nor is it alien to the Judiciary to draw or approve election district lines. . . . Our willingness to enter the political thicket of the apportionment process with respect to one-person, one-vote claims makes it particularly difficult to justify a categorical refusal to entertain claims against this other type of gerrymandering.”

Kennedy and the other supremacist justices seem to invite future cases that would give the Court the opportunity to invent new standards for reviewing and redoing apportionment decisions. Justices Stevens, Souter, and Breyer each have their own ideas for what those standards might be. For example, Breyer

wants to review and reverse “the unjustified use of political factors to entrench a minority in power.”

Political reapportionment is often hotly contentious and subject to political deal-making, but it won't be improved by turning it over to judges who cannot even identify the criteria that they would use for drawing district lines.

- How a court-ordered recount of the Florida ballots in 2000 might have turned out has been a matter of some speculation, as it is difficult to predict what standards the courts would have used once they abandoned the pre-election standards. One group of newspaper reporters led by *USA Today* concluded (May 11, 2001): “Who would have won if Al Gore had gotten the manual counts he requested in four counties? Answer: George W. Bush. Who would have won if the U.S. Supreme Court had not stopped the hand recount of undervotes, which are ballots that registered no machine-readable vote for president? Answer: Bush, under three of four standards. Who would have won if all disputed ballots—including those rejected by machines because they had more than one vote for president—had been recounted by hand? Answer: Bush, under the two most widely used standards; Gore, under the two least used.” Thus, Bush probably would have won a court-ordered recount, but Florida judges could have manipulated the outcome to make it appear that Gore won.
- Regarding the sales pitch for touch-screen voting machines: The core logic behind the Ninth Circuit ruling was based on the Berkeley study. The study was funded by Sequoia Voting Systems, a major provider of touch-screen voting machines, which is actively seeking additional contracts to install its equipment in California counties.
- As the ballots were being counted after a statewide election in Alabama in 1994, it appeared that the first Republican would be elected to the state supreme court since Reconstruction days. With a few thousand absentee ballots still uncounted and Republican Perry Hooper appearing to be ahead, the Demo-

crats rushed into court to ask a judge to change the rules. The Alabama statute was very clear that the absentee ballots had to be notarized by the voter in order to be counted, and that procedure had been followed for years. The Democrats demanded that the court rewrite the law and eliminate that requirement. The Democrats kept the case in court for a year, trying to get judicial supremacists to order the counting of illegal ballots. Finally, the Eleventh Circuit U.S. Court of Appeals upheld the law in *Roe v. State of Alabama* and allowed Perry Hooper to take his seat as chief justice of the state supreme court.

LESSON TEN

JUDGES INTERFERE WITH ELECTIONS

QUESTIONS FOR DISCUSSION:

- ★ To which body of government did the U.S. Constitution assign the conduct of elections? How did the Supreme Court take over this power?
- ★ Who were the supremacist judges in the litigation about the 2000 Bush v. Gore presidential election - U.S. Supreme Court justices or Florida state supreme court judges?
- ★ Should judges ever change election rules after the election is over - or after voting has begun?
- ★ How did supremacist judges rewrite New Jersey election law to help elect a Democratic U.S. Senator?
- ★ Should federal judges ever issue injunctions to halt or delay state elections?
- ★ Should judges be permitted to override state law and allow convicted felons to vote?
- ★ Do we need to watch out for supremacist judges using foreign law to override the U.S. Constitution and allow felons to vote?