

## Continuing the Use of Punch-Card Ballots for a Special Election

*Southwest Voter Registration Education Project v. Shelley*  
(*Stephen V. Wilson, C.D. Cal. 2:03-cv-5715*)

Two months before a gubernatorial recall election, a federal complaint challenged the use in some jurisdictions of punch-card ballots. The district judge denied immediate relief because the election would be held before a previous consent decree's decertification of punch-card ballots would go into effect. A three-judge panel of the court of appeals reversed the district court's ruling, but an eleven-judge en banc panel subsequently affirmed the district court's decision. The governor was recalled.

*Subject:* Voting procedures. *Topics:* Voting technology; intervention; laches.

Two months before California's October 7, 2003, gubernatorial recall election, two interest groups filed a federal complaint in the Central District of California to enjoin the election because some California jurisdictions were going to use punch-card ballots, which the plaintiffs regarded as insufficiently reliable.<sup>1</sup> With their complaint, the plaintiffs filed a notice that the case was related to a case before Judge Stephen V. Wilson that was filed in 2001 and resolved by a consent decree on May 8, 2002.<sup>2</sup>

The two original plaintiffs in the 2003 action were among the thirteen plaintiffs in the 2001 action.<sup>3</sup> According to the consent decree, punch-card ballots would be decertified for use in California as of March 1, 2004.<sup>4</sup> Five days after the 2003 complaint was filed, the plaintiffs filed an amended complaint adding an interest group that had not before been a plaintiff in either action.<sup>5</sup> Judge Wilson also permitted another party to intervene.<sup>6</sup>

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1. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 916–17 (9th Cir. 2003); *Sw. Voter Registration Educ. Project v. Shelley*, 278 F. Supp. 2d 1131, 1133–34, 1137 (C.D. Cal. 2003); Docket Sheet, *Sw. Voter Registration Educ. Project v. Shelley*, No. 2:03-cv-5715 (C.D. Cal. Aug. 12, 2003) [hereinafter *Sw. Voter Registration Educ. Project* Docket Sheet] (complaint filed on August 7, 2003, D.E. 1). See generally Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio St. L.J. 1065, 1073–78 (2007) [hereinafter *Lower Courts*]; Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 Fordham L. Rev. 1711, 1729–30 (2005) [hereinafter *Paperless Chase*].

2. *Sw. Voter Registration Educ. Project* Docket Sheet, *supra* note 1 (D.E. 3); Docket Sheet, *Common Cause S. Cal. Christian Leadership Conference v. Jones*, No. 2:01-cv-3470 (C.D. Cal. Apr. 17, 2001) [hereinafter *Common Cause S. Cal. Christian Leadership Conference* Docket Sheet]; Consent Decree, *id.* (May 9, 2002), D.E. 77.

3. *Common Cause S. Cal. Christian Leadership Conference* Docket Sheet, *supra* note 2 (amended complaint filed on April 24, 2001, D.E. 4); *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1134.

4. Consent Decree, *supra* note 2; *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1135.

5. *Sw. Voter Registration Educ. Project* Docket Sheet, *supra* note 1 (amended complaint

On August 20, 2003, not quite two weeks after the 2003 complaint was filed, Judge Wilson denied the plaintiffs injunctive relief.<sup>7</sup> He concluded that the plaintiffs had not made a sufficient showing that it would be improper to use punch-card ballots in some jurisdictions before the 2004 consent-decree proscription: “Alternative technologies will not be available in several of the affected counties in time for the October election.”<sup>8</sup>

With respect to consent-decree parties seeking relief in advance of the agreed deadline, “while the Court need not decide the *res judicata* issue at this juncture, there is ample reason to believe that Plaintiffs will have a difficult time overcoming it.”<sup>9</sup>

Also: “As with the question of *res judicata*, while the Court need not decide the defense of laches at this point in the litigation, it clearly poses a significant impediment to the prosecution of this suit.”<sup>10</sup>

Here, Plaintiffs waited almost two years to reassert their claims with full knowledge that, until replacement of the punch-card machines in March of 2004, other elections would take place. . . . Most significantly, the 2002 primary and general elections came and went without Plaintiffs at any time asserting these claims or calling for injunctive relief.<sup>11</sup>

On September 15, however, a panel of the court of appeals disagreed with Judge Wilson’s conclusions.<sup>12</sup>

[T]he effect of using punchcard voting systems in some, but not all, counties, is to discriminate on the basis of geographic residence.

This is a classic voting rights equal protection claim. . . .

. . .

It is virtually undisputed that pre-scored punchcard voting systems are significantly more prone to errors that result in a voter’s ballot not being counted than the other voting systems used in California. . . .

. . .

. . . Plaintiffs have tendered sufficient evidence to demonstrate a likelihood of success in establishing that there is no rational basis for using vot-

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filed on August 12, 2002, D.E. 22); *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1137.

6. Minutes, *Sw. Voter Registration Educ. Project*, No. 2:03-cv-5715 (C.D. Cal. Aug. 18, 2003), D.E. 27.

7. *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1146; see Allison Hoffman, Joel Rubin & Jean Guccione, *Court Ruling Keeps Recall on Track for Oct. 7 Ballot*, L.A. Times, Aug. 21, 2003, at 24.

8. *Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1141.

9. *Id.* at 1137.

10. *Id.* at 1138.

11. *Id.*

12. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882 (9th Cir. 2003); see Tokaji, *Lower Courts*, *supra* note 1, at 1074–75; Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 Ind. L. Rev. 113, 115–16 & n.16 (2010); Henry Weinstein, *The Recall Campaign*, L.A. Times, Sept. 16, 2003, at 1.

ing systems that have been decertified as “unacceptable” in some counties and not others.<sup>13</sup>

Animating the panel’s decision was its observation that “forty-four percent of the electorate will be forced to use a voting system so flawed that the Secretary of State has officially deemed it ‘unacceptable’ and banned its use in all future elections.”<sup>14</sup>

According to the panel, *res judicata* was not a bar to the plaintiffs’ 2003 action because of the new plaintiff in the later case and because the unusual recall election was not foreseen in 2002.<sup>15</sup> Nor did the panel find laches to be a bar, because the complaint was filed only two weeks after the recall election date was set.<sup>16</sup>

The court of appeals voted to have the case reheard *en banc*.<sup>17</sup> On September 23, the *en banc* panel affirmed Judge Wilson’s decision.<sup>18</sup> “If the recall election scheduled for October 7, 2003, is enjoined, it is certain that the state of California and its citizens will suffer material hardship by virtue of the enormous resources already invested in reliance on the election’s proceeding on the announced date.”<sup>19</sup> The *en banc* panel determined that the plaintiffs’ legitimate concern “that use of the punch-card system will deny the right to vote to some voters who must use that system” was too speculative.<sup>20</sup>

On October 7, Governor Gray Davis was recalled and Arnold Schwarzenegger won the first of his two gubernatorial elections.<sup>21</sup>

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13. *Sw. Voter Registration Educ. Project*, 344 F.3d at 895, 896, 900.

14. *Id.* at 888.

15. *Id.* at 901–05.

16. *Id.* at 905–07; *see Sw. Voter Registration Educ. Project*, 278 F. Supp. 2d at 1134.

17. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 913 (9th Cir. 2003).

18. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (*en banc*); *see* Michael Finnegan, *The Recall Campaign*, L.A. Times, Sept. 24, 2003, at 1; Tokaji, *Lower Courts*, *supra* note 1, at 1075; Tokaji, *supra* note 12, at 116 & n.16; Henry Weinstein, *Court Sees Delay as Too Disruptive*, L.A. Times, Sept. 24, 2003, at 22.

19. *Sw. Voter Registration Educ. Project*, 344 F.3d at 919; *see* Tokaji, *Paperless Chase*, *supra* note 1, at 1730 (“In effect the court punted, leaving for another day the applicability of the Equal Protection Clause and Voting Rights Act in cases where inaccurate voting equipment is employed.”).

20. *Sw. Voter Registration Educ. Project*, 344 F.3d at 919–20; *see* Tokaji, *Lower Courts*, *supra* note 1, at 1075 (“If the Ninth Circuit opinion did not clarify the law, it did not muddy it either.”).

21. *See* John M. Broder, *Davis Is Out, Schwarzenegger Is In by Big Margins in California Recall*, N.Y. Times, Oct. 8, 2003, at A1; Michael Finnegan, *Gov. Davis Is Recalled; Schwarzenegger Wins*, L.A. Times, Oct. 8, 2003, at 1; *see also* Peter Nicholas, *A Second Term for Schwarzenegger*, L.A. Times, Nov. 8, 2006, at 1.