TO RECALL OR NOT TO RECALL?

I. INTRODUCTION

Less than one year after voters reelected Gray Davis as governor, some citizens of California decided that he was no longer up to the job. California faced a "$38 billion deficit" during 2003,[1] making some voters[2] angry with Governor Davis. To put the "recall" of Governor Davis on the ballot, voters had to collect a certain number of registered voters' signatures.[3] Collecting those signatures was time-consuming, but the support of Congressman Darrell Issa, a California Republican and a "chief financier of the recall effort," made it possible.[4] Legal challenges in state court failed to stop the recall,[5] so opponents of the recall focused their

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[1] John Mercurio, *California Recall Bid Succeeds: Governor Slams Recall Financier Darrell Issa*, CABLE NEWS NETWORK, *at* http://www.cnn.com/2003/ALLPOLITICS/07/23/davis.recall/index.html (July 29, 2003) [hereinafter *California Recall Bid Succeeds*].

[2] Ted Costa, an intervenor in the subsequent federal election-related litigation, was so opposed to Governor Davis that he filed legal briefs in support of the election's validity; *see infra* notes 7 and 8. Costa is a "Sacramento-based anti-tax activist." Henri Brickey, *Recall Proponent Comes to Town*, NORTH COUNTY TIMES, *at* http://www.nctimes.com/articles/2003/06/18/export12965.txt (June 18, 2003). Costa initiated the recall by "gathering the requisite 100 signatures to file a recall petition." Max Blumenthal, *California Confidential: Who Are the Mystery Men Behind the Recall Push?*, AMERICAN PROSPECT ONLINE, *at* http://www.prospect.org/webfeatures/2003/08/blumenthal-m-08-13.html (Aug. 13, 2003). Costa is the chief executive officer of People's Advocate. *See* http://www.peoplesadvocate.org/directors.html (last updated June 25, 2003).

[3] "The Secretary of State certified the recall petition for circulation on March 25, 2003." California Secretary of State, *FAQs About Recalls*, *at* http://www.ss.ca.gov/elections/elections_recall_faqs.htm (last visited Jan. 26, 2005). Its proponents only had "160 days, or until September 2, 2003, to circulate the petition" and collect signatures. *Id.* To get on the ballot, the proponents had to collect a minimum of 897,158 valid signatures – a number equal to 12% of the votes cast for the office of governor in 2002. *Id.*

[4] *California Recall Bid Succeeds*, *supra* note 1.

[5] On July 25, 2003, the California Supreme Court refused to "halt preparations for [the] recall election." *California Supreme Court Refuses to Stop Recall: Election Set for October 7*, CABLE NEWS NETWORK, *at* http://www.cnn.com/2003/ALLPOLITICS/07/25/davis.recall (July 25, 2003).

attention on federal courts. Their primary claim was that punchcard voting systems were "less reliable than the other voting systems" used in California elections.[6]

Much can be learned from studying the 2003 California recall election litigation. Part II describes the problems associated with punchcard voting systems, the litigation in federal court that preceded the recall litigation, and the relevant state statutory and constitutional provisions. Part III describes how the district court and a three-judge appellate court[7] applied the test for granting a preliminary injunction. Part IV explains how an *en banc* panel of the United States Court of Appeals for the Ninth Circuit[8] reviewed the lower courts' rulings. Part V concludes with a discussion of the lessons learned since the legal proceedings related to the 2000 presidential election results. The most important lesson is that when considerable amounts of effort and money are spent preparing for a time-sensitive, statewide election, it is difficult for any group to postpone its administration, even when a constitutional violation is alleged.

II. BACKGROUND

A. Sources of Error Associated with Punchcard Voting Systems

Following the 2000 presidential election debacle, California public interest groups have lobbied and litigated to force the state to get rid of its punchcard voting systems. They were particularly interested in the poor performance of the VotoMatic[9] punchcard voting system. There are many ways in which errors can occur with the VotoMatic system. First, since the punchcard itself does not list the candidates' names and the ballot initiatives, voters must "cross-referenc[e] the rectangles [on the punchcard] with the election booklet listing the candidates and other ballot measures that are the subject of the election."[10] Once a voter removes

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[6] Common Cause v. Jones, 213 F. Supp. 2d 1106, 1107 (C.D. Cal. 2001). If Florida and California use similar punchcard voting machines, there may be some truth to this allegation. Justice Stevens stated that, in Florida during the 2000 election, "the percentage of nonvotes . . . in counties using a punchcard system was 3.92%; in contrast, the rate of error under the more modern optical-scan systems was only 1.43%." Bush v. Gore, 531 U.S. 98, 126 n.4 (2000) (Stevens, J., dissenting) (citations omitted).

[7] To read the brief Ted Costa filed with the district court, see http://news.findlaw.com/hdocs/docs/elections/svrepvshlly81503ami.pdf (Aug. 15, 2003). To read the brief he filed with the three-judge appellate court, see http://news.findlaw.com/hdocs/docs/elections/svrepvshlly90403intab.pdf (Sept. 4, 2003).

[8] To read the brief Ted Costa filed with the en banc panel of the Ninth Circuit, see http://news.findlaw.com/hdocs/docs/elections/svrepvshlly91703int.ebr.pdf (Sept. 17, 2003). To read some of the other related briefs, see http://news.findlaw.com/legalnews/lit/recall/ (last visited Jan. 26, 2005).

[9] The VotoMatic is one type of punchcard voting machine. To read about where it was first used, see Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 888 (9th Cir. 2003) (per curiam). For a brief discussion about its competitor, the Datavote punchcard system, see *id.* at 889.

[10] *Id.* at 888.

the punchcard from the machine, he does not have a meaningful chance to check to see whether he has punched the proper boxes; all that he can see is that "holes [have been] punched through certain numbers."[11] As was the case in the November 2000 presidential election, voters may occasionally fail to apply enough pressure when using the stylus.[12] Other voters forget to remove the chad[13] from their ballots before turning them in.[14] Due to chad, vote "tabulation machine[s] may not count the vote."[15] Furthermore, "unlike mechanical lever machines, the VotoMatic system does not have any built-in protection preventing the voter from casting more than one vote for a candidate or ballot measure."[16]

In addition to its susceptibility to these "voter-caused" errors, the VotoMatic system also has inherent, mechanical sources of error. Many of these machines are old.[17] The punchcards must be "pre-scored properly" in order for the tabulator to read a "vote" properly; the data reader and software "must also be functioning properly."[18] The tabulation machine can jam or "grab two cards" simultaneously.[19] In a slight improvement on the VotoMatic system, the Datavote punchcard lists the candidates' names "so that voters may examine the card to make sure their vote has been correctly recorded."[20] Due to the problems associated with punchcard systems, public interest groups pressed state officials to change voting systems. The following section introduces some of the litigation in which the public interest groups engaged to achieve their goal.

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[11] *Id.* at 889.

[12] This failure to use enough pressure can result in a pregnant (or dimpled) chad, one that is "only indented slightly and is still fully attached to the [punchcard]." *What Is a Chad?*, *at* http://www.miamisouth.com/chads.html (last visited Jan. 26, 2005) [hereinafter *What Is a Chad?*].

[13] Chad are the "tiny bits of paper left over from punching" the punchcards. *Id.* The plural of chad is "chad," not chads. *Id.* A punched chad is one that "has been punched all the way out," a hanging chad is one in which "[o]nly one corner remains attached to the card," a swinging chad is one in which "[t]wo corners remain attached to the card," and a tri-chad is one in which "[t]hree corners remain attached to the card." *Id.*

[14] On the news, the author of this note saw signs at the polling place where Arnold Schwarzenegger voted on October 7, 2003. Those signs reminded voters to check their punchcards for chad.

[15] "The [punchcard] machines only count votes when the [c]had is pushed cleanly all the way through. . . . [I]n most cases[,] ballots with [hanging, swinging, or tri-chad] would not have been counted by the machine method because the attached [c]had would likely block the hole when the [punch]card was fed through." *What Is a Chad?*, *supra* note 12.

[16] *Shelley*, 344 F.3d at 889.

[17] Florida bought its punchcard machines "about 20 years ago to replace the lever machines [it was] using at the time." Lorrie Faith Cranor, *Voting After Florida: No Easy Answers*, *at* http://lorrie.cranor.org/voting/essay.html (last revised Mar. 19, 2001) [hereinafter *Voting After Florida*].

[18] *Shelley*, 344 F.3d at 889.

[19] *Id.*

[20] *Id.*

B. Common Cause and Relevant State Statutory and Constitutional Provisions

To understand California's 2003 recall election litigation, one must first look at the earlier case of *Common Cause v. Jones*.[21] In this case, Common Cause, along with individuals and other organizations, sued the California Secretary of State – who, at that time, was William Jones. The *Common Cause* plaintiffs challenged both Secretary Jones' certification of punchcard machines for use in future state and federal elections, as well as the "adequacy of [California's] recount procedures."[22]

Under California law, the Secretary of State must review voting systems and may "decertify" those that are "defective, obsolete, or otherwise unacceptable."[23] Recognizing the flaws in the punchcard voting system,[24] on September 18, 2001, Jones "decertified" that system for use in any California election after January 1, 2006.[25] On December 17, 2001, Jones accelerated the decertification to July 1, 2005.[26] The *Common Cause* plaintiffs, however, pushed for an even earlier date. After the court ruled that the counties still using punchcard machines could logistically "replace those machines with other certified voting systems in advance of the elections in March of 2004," the parties entered into a consent decree, which was followed by entry of a final judgment on May 8, 2002.[27]

The entry of this final judgment in *Common Cause* apparently left some parties dissatisfied. Two of the plaintiffs, the Southwest Voter Registration Education Project ("Southwest Project") and the Southern Christian Leadership Conference of Greater Los Angeles ("SCLC"), were so unhappy that they filed a new federal lawsuit.[28] The defendant, the Secretary Jones, was not satisfied, because he wanted the nine counties that still used punchcard voting systems to switch directly to the touch screen voting system.[29] Under the state statutory scheme, however, the

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[21] No. 01-03470 SVW (RZX), 2002 WL 1766436 (C.D. Cal. Feb. 19, 2002). The plaintiffs filed this suit on April 17, 2001. *Id.*, at *1.

[22] Southwest Voter Registration Education Project v. Shelley, 278 F. Supp. 2d 1131, 1134 (C.D. Cal. 2003) (explaining Common Cause v. Jones).

[23] CAL. ELEC. CODE § 19222 (West 2003).

[24] Kevin Shelley, Jones' successor, also recognized the flaws in the system. In his brief to the United States Court of Appeals for the Ninth Circuit, Shelley stated that:

> Punch-card [*sic*] voting systems are old technology more prone to voter error than are newer voting systems. Both the present and the prior Secretar[ies] of State have been acutely aware of this reality, and have taken aggressive steps to eliminate the use of punch-card [*sic*] machines statewide.

Shelley, 344 F.3d at 896.

[25] *Common Cause*, 2002 WL 1766436, at *1.

[26] *Id.*

[27] *Shelley*, 278 F. Supp. 2d at 1135. The entry of final judgment for the plaintiffs in Common Cause v. Jones can be found at 2002 WL 1766410 (C.D. Cal. May 9, 2002).

[28] *See infra* text accompanying notes 36-38.

[29] Jones probably wanted all counties to convert to the use of a touch screen voting system, which he must have thought was less error-prone than other non-punchcard voting systems. *See* Common Cause v. Jones, 213 F. Supp. 2d 1110 (C.D. Cal. 2002) (denying

Secretary of State could only certify and decertify voting systems for use within California; county officials could choose which kind to use from the "list" of certified voting systems.[30] Therefore, unless the secretary decertified all voting systems "other than the touch screen system," different counties could use different voting systems.[31] This lack of statewide uniformity was central to the plaintiffs' case in both *Common Cause* and the later litigation.

In the later litigation, the courts cited several state constitutional provisions. Article II of the California Constitution provides, in pertinent part, that the lieutenant governor must set the date of a gubernatorial recall election, which must be held between 60 and 80 days after the "date of certification."[32] In addition, if a regular election was scheduled to be held "within 180 days of the date of certification" (which was July 23, 2003 in this case[33]), the recall would have been conducted on the date of the regularly scheduled election: March 2, 2004.[34] Furthermore, had the date of certification been about one and a half months after July 23, the recall election would have been held on that date in March.[35] Had the special election been held on March 2, 2004, the state would have had to either (a) use non-punchcard voting systems (as it had agreed to do in the consent decree upon which the court entered a final judgment on May 8, 2002), which presumably would have made filing the complaint in the later case unnecessary, or (b) risk being held in contempt.

III. THE RECALL LITIGATION

Two of the *Common Cause* plaintiffs, the Southwest Project and the SCLC, were so unhappy with the prospect of using punchcard voting machines in the October 7, 2003 special election that they sued the state again in *Southwest Voter Registration*

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secretary's motion for reconsideration). However, he neglected to ask Judge Wilson to order the use of *touch screen* voting systems until it was too late. *Id.* In his order, Judge Wilson noted that the court "was never asked to decide which system was most optimal out of all of the certified systems, only whether a change [from the use of the punchcard system] to another certified system was feasible." *Id.* The nine counties that still used punchcard voting systems in November 2000 were "Los Angeles, San Diego, San Bernadino, Sacramento, Alameda, Mendocino, Santa Clara, Shasta and Solano." *Common Cause*, 2002 WL 1766436, at *2. More than 8 million registered voters, including some of the individual plaintiffs in this case, live in these counties. *Id.*

[30] CAL. ELEC. CODE § 19210 (West 2003).

[31] *Common Cause*, 213 F. Supp. 2d. at 113.

[32] CAL. CONST. art. 2, §§ 15(a), 17. Arguably the most important issue on the ballot on October 7, 2003, was whether to recall Gray Davis, a Democrat, from the office of governor of California. The voters recalled Davis and chose Arnold Schwarzenegger to replace him.

[33] On July 23, 2003, Secretary Shelley announced (i.e., certified) that those who wanted to recall Governor Davis had collected the requisite number of registered voters' signatures to force him to, in effect, run again for governor before his term expired. *See Shelley*, 278 F. Supp. 2d at 1133-34.

[34] *Id.* at 1134.

[35] *Shelley*, 344 F.3d at 892, 900.

Education Project v. Shelley. The *Shelley* plaintiffs alleged that "voters using punch-card (*sic*) machines to cast their votes in the October 7 election will have a comparatively lesser chance of having their votes counted, in violation of the Equal Protection Clause[.]"[36] The plaintiffs also raised a Voting Rights Act claim by alleging that the nine counties[37] have "greater minority populations than counties using other voting systems, thereby disproportionately disenfranchising and/or diluting . . . votes . . . on the basis of race."[38]

Several courts issued opinions in *Shelley*. First, District Judge Stephen V. Wilson ("Judge Wilson"),[39] who sits on the United States District Court for the Central District of California, issued an order denying the plaintiffs' *ex parte* application for a temporary restraining order and their motion for a preliminary injunction.[40] Second, a three-judge panel of the United States Court of Appeals for the Ninth Circuit ("Paez panel") reversed Judge Wilson's order, agreeing with the plaintiffs that a preliminary injunction was warranted.[41] The rulings by Judge Wilson and the Paez panel will be discussed simultaneously, rather than separately, in this Part. Finally, as discussed in Part IV, an *en banc* panel of the United States Court of Appeals for the Ninth Circuit ("Schroeder panel") affirmed Judge Wilson's order.[42] Since neither party sought review in the Supreme Court of the United States, the election occurred as scheduled on October 7, 2003.[43]

The party that moves for a preliminary injunction (in this case, the plaintiffs) must prove the following: "'(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to the plaintiff[s] if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff[s], and (4) advancement of the

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[36] *Shelley*, 278 F. Supp. 2d at 1134. (citation omitted) The plaintiffs alleged that punchcard machines cause an "average combined 'residual vote rate' of 2.23%." *Id.* Overvotes are ballots that the punchcard machine reads as containing more than one vote on a single contest" or for a single ballot initiative. *Id.* Undervotes are ballots that the machine reads "as not containing a vote." *Id.* The machine does not record overvotes or undervotes as being votes; "residual votes" consist in part of overvotes and undervotes. *Id.*

[37] *See supra* note 29 for a list of the nine counties.

[38] *Shelley*, 278 F. Supp. 2d at 1134 (citation omitted).

[39] Judge Wilson had previously dealt with some of the parties, since he issued the final judgment in Common Cause v. Jones. *See Common Cause*, 2002 WL 1766410.

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

[41] *Shelley*, 344 F.3d at 888. The Paez panel consisted of Circuit Judges Pregerson, Thomas, and Paez. *See id.*

[42] Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914 (9th Cir. 2003) (en banc) (per curiam). The Schroeder panel consisted of Chief Judge Schroeder and Circuit Judges Kozinski, O'Scannlain, Kleinfeld, Tashima, Silverman, Graber, McKeown, Gould, Tallman, and Rawlinson. *Id.* at 915.

[43] *See* John Mercurio, *Schwarzenegger Nation*, CABLE NEWS NETWORK, *at* http://www.cnn.com/2003/ALLPOLITICS/10/08/mgrind.day.schwarzenegger/index.html (Oct. 8, 2003).

public interest (in certain cases).'"[44] Alternatively, injunctive relief can be granted if the moving party shows "'*either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in [its] favor.'"[45] Though Judge Wilson and the Paez panel both used this test, they reached different conclusions.

A. Strong Likelihood of Success on the Merits?

To assess the likelihood of success on the merits, the judges addressed whether res judicata or laches might bar the plaintiffs' claims. In addition, the courts debated (largely without deciding) the proper level of scrutiny to apply under the Equal Protection Clause. Judge Wilson also considered the plaintiffs' allegations under the Voting Rights Act at length.

1. Res Judicata

To determine whether there was a strong likelihood of success on the merits, Judge Wilson first considered the defenses the defendant[46] could or did raise, starting with res judicata. The consent decree, to which the parties in *Common Cause* had agreed, presented a problem for the plaintiffs in *Shelley*, since its existence arguably prevented them from reopening that same dispute.[47] Judge Wilson concluded that the two 'claims' were "the same" for res judicata purposes.[48] The Paez panel agreed that the two suits involved "infringement" of "the fundamental right to vote."[49] The panel disagreed with Judge Wilson, however, over (1) whether the "prosecution" of the second action would "destroy[ ]or impair[ ]" the rights established in the prior judgment, (2) whether "substantially the same" evidence was presented in the two actions, and (3) whether the two suits arose "out of the same transactional nucleus of facts."[50] Specifically, the Paez panel stated

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[44] *Shelley*, 344 F.3d at 893 (quoting Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995) (internal quotation marks omitted)) (brackets in original).

[45] *Id.* (emphasis in original).

[46] The Secretary of State was not the only individual or organization interested in having the special election held on October 7, 2003. *See supra* note 2.

[47] *Shelley*, 278 F. Supp. 2d at 1135.

[48] *Id.* at 1136 (citing Nordhorn v. Ladish Co., 9 F.3d 1402, 1405 (9th Cir. 1993)).

[49] *Shelley*, 344 F.3d at 902.

[50] *Shelley*, 344 F.3d at 901-03. Judge Wilson focused on the state's interest in an "orderly replacement of punch-card [*sic*] balloting," *Shelley*, 278 F. Supp. 2d at 1136, while the Paez panel noted the plaintiffs' interest in having as few elections conducted using punchcard ballots as possible. *Shelley*, 344 F.3d at 901-02. Judge Wilson and the Paez panel disagreed on the foreseeability of the occurrence of a recall election before March 2004. Judge Wilson stated that the plaintiffs "knew one was *possible*," *Shelley*, 278 F. Supp. 2d at 1136 (emphasis in original), while the Paez panel seemed to emphasize its hypothetical nature. *See Shelley*, 344 F.3d at 906 ("[N]o gubernatorial recall has previously been certified for election in the history of California.").

that Judge Wilson "accounted for neither the election-specific nature of the evidence in a claim to enjoin the election, nor the hypothetical nature of this particular election at the time of the *Common Cause I* litigation."[51]

Judge Wilson and the Paez panel also disagreed over the "identity" or privity of the parties.[52] Both Southwest Project and SCLC, two of the three plaintiffs in *Shelley*, had been plaintiffs in *Common Cause*. Thus, Judge Wilson focused on the only remaining plaintiff in *Shelley*, the California National Association for the Advancement of Colored People ("NAACP").[53] He found that the NAACP was "closely aligned with the interests of the plaintiffs" in *Common Cause*.[54] The fact that the same lead counsel represented both the NAACP and the *Common Cause* plaintiffs, however, did not sway the Paez panel.[55]

The Paez panel noted that the Due Process Clause imposes limits on the extent to which a defendant can bind a new plaintiff to a "final judgment" issued in a prior case, absent "privity or some other special relationship between the [old and new] plaintiffs."[56] In *Common Cause*, the plaintiffs "did not even purport to represent all people of color in California."[57] Members of the NAACP are not necessarily members of the SCLC, and vice versa.[58] Moreover, the NAACP never had its "day in court" on this matter before now.[59] As a result, the Paez panel did not find that

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[51] *Shelley*, 344 F.3d at 903. The Paez panel mentioned Common Cause I (as opposed to Common Cause) in different sections of its opinion. *See, e.g., id.* at 901-03. The Common Cause litigation began in 2001, but lasted well into 2002. If there are any differences between Common Cause and Common Cause I, they are unimportant and not pertinent to the discussion here.

[52] A finding of "identity" of the parties would strengthen the Secretary of State's res judicata claim and, therefore, increase the chance that the plaintiffs' claims might be dismissed. *See Shelley*, 278 F. Supp. 2d at 1137.

[53] *Id.* The NAACP was not a plaintiff when this case was filed; it joined the suit as the third plaintiff on the "First Amended Complaint." *Id.* It was not a plaintiff in Common Cause v. Jones. *See id.*

[54] *Id.* Judge Wilson noted similarities between the plaintiffs' mission statements to support this finding. *See id.*

[55] *Shelley*, 344 F.3d at 903. "'[E]arlier litigation brought by parties with similar interests [cannot] preclude subsequent plaintiffs from bringing their own lawsuit even though they were aware of the prior litigation and shared a lawyer with the earlier plaintiffs.'" *Id.* (quoting Green v. City of Tucson, 255 F.3d 1086, 1101 (9th Cir. 2001) (citing S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-68 (1999))) (brackets in original). That the NAACP and the Common Cause plaintiffs share the same counsel is, therefore, not determinative here.

[56] *Shelley*, 344 F.3d at 903.

[57] *Id.* at 904. The *Common Cause* plaintiffs "only purported to represent their members." *Id.*

[58] "There is no showing that all members of the NAACP who are voters in California are also members of other *Common Cause* [p]laintiff groups." *Id.*

[59] "The fact that the *Common Cause I* [p]laintiffs were willing to give up rights in exchange for a promise to replace punchcard systems by March 2004 does not indicate that the NAACP or its members were willing to do the same." *Id.*

privity (i.e., identity) of the parties existed. Accordingly, since the defendant was "unlikely to meet [his] burden of showing an identity of claims,"[60] the panel thought that his res judicata claim was much weaker than Judge Wilson had thought.

2. Laches

Judge Wilson and the Paez panel also reached opposite conclusions regarding the application of the doctrine of laches.[61] To successfully assert laches as a defense, the secretary would have to prove the plaintiffs' "lack of diligence" and "prejudice" to himself (i.e., the state).[62] Wilson noted that the plaintiffs had not complained when the punchcard system was used during the 2002 election, which occurred after the entry of final judgment in *Common Cause* on May 8, 2002.[63] Although the Paez panel discussed when the plaintiffs' claims became ripe,[64] Judge Wilson arguably had the better reasoning here. Judge Wilson noted that after the entry of the consent decree in *Common Cause*, the state made a timetable for the replacement of all of its punchcard equipment by the March 2004 "deadline."[65]

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[60] *Shelley*, 344 F.3d at 903.

[61] The Secretary of State failed to raise this "as an affirmative defense." *Id.* at 905. Thus, in light of FED. R. CIV. P. 8(c), arguably Judge Wilson should not have considered this claim. *Id.*

[62] *Id.* at 905 (citing In re Beaty, 306 F.3d 914, 926 (9th Cir. 2002)).

[63] *Shelley*, 278 F. Supp. 2d at 1138. The plaintiffs' claim that there was a greater "public interest in holding" the 2002 elections than in holding the recall election in 2003 (given the larger number of state and federal offices up for grabs) did not impress Judge Wilson. *Id.* His opinion implied that the plaintiffs were willing to tolerate the errors associated with the punchcard machines in 2002, because Democrats are successful in many California races. Many statewide officeholders, including the lieutenant governor, the attorney general, and the secretary of state, were Democrats at the time he issued his opinion. Therefore, the plaintiffs' desire to avoid having a Republican replace Gray Davis as governor might have motivated them to seek injunctive relief.

> Plaintiffs waited almost two years to reassert their claims with full knowledge that, until replacement of the punch-card [sic] machines in March of 2004, other elections would take place. On the eve of this election, [p]laintiffs have suddenly rediscovered 'the malfunctioning machine of our democracy' that will render this election 'a sham.' . . . Yet [p]laintiffs were apparently content with the malfunctioning machine when they faced, and presumably participated in, recent elections. . . . [T]he 2002 primary and general elections came and went without [p]laintiffs at any time asserting these claims or calling for injunctive relief.

Id. (internal citation omitted).

[64] The panel argued that the plaintiffs' cause of action "was not ripe until the Lieutenant Governor scheduled the special [i.e., recall] election." *Shelley*, 344 F.3d at 906.

[65] *Shelley*, 278 F. Supp. 2d at 1138.

More importantly, the state had an "interest in complying with" its constitutionally required election deadlines.[66]

Despite all of this, the Paez panel noted that the ballot initiatives, Propositions 53 and 54,[67] were "originally scheduled" to appear on the March 2004 ballot.[68] Thus, even if the state had a strong interest in conducting the gubernatorial recall election on October 7, it arguably had much less of an interest in conducting a vote on Propositions 53 and 54 on that date. The panel concluded that the "public interest is best served by holding the vote on the initiatives [i.e., Propositions 53 and 54] at its originally scheduled date [i.e., March 2, 2004], rather than on the accelerated schedule established by the Secretary of State less than two months ago."[69] The plaintiffs' claims, therefore, were "not likely to be barred by" either res judicata or laches.[70]

3. Different Perceptions of Strength of Plaintiffs' Case

Despite their disagreements on the issues of res judicata and laches, Judge Wilson and the Paez panel both "assumed that the [p]laintiffs would suffer irreparable harm" if the election were held during October 2003.[71] Both noted that punchcard machines apparently produced a "disproportionately high residual vote rate in the 2002 California elections."[72] They both agreed that voting is a fundamental right,[73] but the Paez panel also noted that the "Constitution does not demand the use of the best available technology."[74] Wilson and the Paez panel, however, had different views regarding the likelihood of the plaintiffs' success on

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[66] *Shelley*, 278 F. Supp. 2d at 1138. Under article 2 of the California Constitution, a gubernatorial recall election must be held between 60 and 80 days after the "date of certification." CAL. CONST. art. 2, §15(a); *See also* discussion *supra* Part II.B.

[67] Proposition 53 asked voters to decide whether to set up an [i]nfrastructure [i]nvestment [f]und," while Proposition 54 dealt with the government's use of racial or ethnic information. *Shelley*, 344 F.3d at 911. Proposition 54, which did not pass on October 7, 2003, was informally called the Racial Privacy Initiative. *See* California Secretary of State, *Official Declaration of the Result of the Statewide Special Election Held on Tuesday, October 7, 2003. Throughout the State of California on Statewide Measures Submitted to a Vote of Electors, at* http://www.ss.ca.gov/elections/sov/2003_special/sum.pdf (last visited Apr. 5, 2004) [hereinafter *Official Declaration*]. *See infra* notes 115-118 and accompanying text.

[68] *Shelley*, 344 F.3d at 911.

[69] *Id.* at 912.

[70] *Id.* at 907.

[71] *Id.* "'Abridgement or dilution of . . . the right to vote constitutes irreparable injury.'" *Id.* (quoting Cardona v. Oakland Unified Sch. Dist., 785 F. Supp. 837, 840 (N.D. Cal. 1992)).

[72] *Shelley*, 278 F. Supp. 2d at 1139; *Shelley*, 344 F.3d at 898.

[73] *See Shelley*, 278 F. Supp. 2d at 1139 ("It is . . . 'beyond cavil that voting is of the most fundamental significance under our constitutional structure.'" (quoting Burdick v. Takushi, 504 U.S. 428, 433 (1992))); *Shelley*, 344 F.3d at 894.

[74] *Shelley*, 344 F.3d at 895 ("No voting system is foolproof, of course.").

the underlying, substantive claims – in part due to their different interpretations of case law under the Equal Protection Clause of the Fourteenth Amendment.

First, the Paez panel conducted a more thorough review of the plaintiffs' evidence. It noted that the plaintiffs had an affidavit from an expert in the field that listed several errors associated with the use of punchcard machines.[75] Another expert concluded that the "use of pre-scored punchcard voting systems discriminated against minorities."[76]

None of this mattered, according to Judge Wilson, since it would not violate the Equal Protection Clause even if it was proved.[77] Judge Wilson wrote that the Supreme Court's voting rights cases set forth a "two-tiered analysis."[78] Under *Burdick v. Takushi*,[79] "'severe' restrictions" on the right to vote trigger "strict scrutiny," while more reasonable restrictions receive less scrutiny – more akin to rational basis scrutiny.[80] Judge Wilson emphasized the Supreme Court's use of words like "reasonable" and "legitimate" to support its interpretation.[81]

On the other hand, the Paez panel hinted, but did not decide, that a more searching level of review than rational basis scrutiny was appropriate in this case.[82] The panel was unsure of the extent to which Judge Wilson had "relied on *Burdick*,"[83] so it emphasized that "*Burdick* did not mandate rational basis scrutiny; rather, it merely described the continuum of review appropriate in a particular circumstance."[84] In the end, however, Judge Wilson and the Paez panel agreed that they would not decide what standard of review would apply to the present case.[85]

However, Judge Wilson and the Paez panel reached opposite conclusions with respect to the likelihood that the planned use of punchcard machines would pass muster under Equal Protection Clause. Whereas Judge Wilson asserted that the use

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[75] *See* discussion *supra* Part II.A.

[76] *Shelley*, 344 F.3d at 897. This expert also found that the error rate for punchcard systems was at least 2.5 times greater than those of other voting systems. In addition, "minority voters had significantly higher residual vote rates [i.e., uncounted votes] than non-minorities." *Id.* An MIT-Caltech study also "found that punchcards lose significantly more votes than optically scanned paper ballots." *Id.* at 897-98. The Paez panel succinctly summarized similar, longstanding research as follows: "[V]oters in counties using pre-scored punchcard balloting will have a statistically more probable chance that their vote will not be counted than voters in other counties." *Id.* at 898.

[77] *Shelley*, 278 F. Supp. 2d at 1139.

[78] *Id.*

[79] 504 U.S. 428 (1992).

[80] *Shelley*, 278 F. Supp. 2d at 1139; *see Burdick*, 504 U.S. at 434.

[81] *Shelley*, 278 F. Supp. 2d, at 1139-40; *see, e.g.*, Reynolds v. Sims, 377 U.S. 533, 579 (1964); *Burdick*, 504 U.S. at 434.

[82] *Shelley*, 344 F.3d at 900 ("[W]e need not reach the question of whether strict scrutiny should be applied in this context[.]").

[83] *Id.* at 899 ("To the extent that [Judge Wilson] intended to employ *Burdick* as a template for a rational basis review of this race, we respectfully disagree with [his] legal analysis.").

[84] *Id.*

[85] *Id.* at 900; *Shelley*, 278 F. Supp. 2d at 1141.

of the punchcard machines in the recall election would likely pass strict scrutiny,[86] the Paez panel held that such use might fail the rational basis test.[87] Judge Wilson drew a distinction between the use of punchcard machines in general and their use in this particular recall election.[88] He noted that the state faced two unpalatable options under the California Constitution: (1) use punchcard machines in the nine counties previously mentioned or (2) use no voting machines at all in those counties.[89] In this situation, the use of the punchcard machines was the lesser of two evils.

4. Allegations under the Voting Rights Act

Judge Wilson and the Paez panel treated the plaintiffs' claims under Section 2 of the Voting Rights Act differently. A Senate report accompanying the 1982 amendments to the Voting Rights Act noted factors related to Section 2 analysis, including: "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.'"[90] The first five factors address discrimination, its effects, and others' response to it. The sixth factor deals with the government's justification for its policy.

Where the Paez panel did not even analyze the plaintiffs' Voting Rights Act claims, Judge Wilson considered them at length before rejecting them.[91] The plaintiffs asserted that the use of arguably substandard equipment (i.e., the punchcard machines) in the nine counties with large minority populations would result in higher error rates, thus discriminating on the basis of race.[92] After

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[86] *Shelley*, 278 F. Supp. 2d at 1141.

[87] *Shelley*, 344 F.3d at 900.

[88] *Shelley*, 278 F. Supp. 2d at 1141. Whether or not this is a meaningful distinction is debatable. At any rate, Wilson and the Paez panel focused to a great extent on the specific applicable constitutional provisions and various interests in this case.

[89] *Id.* One wonders whether handwritten paper balloting would even be permissible under the California Elections Code in an emergency.

[90] *Id.* at 1142 (citing Thornburg v. Gingles, 478 U.S. 30, 37 (1986) (citing SEN. JUDICIARY COMM. MAJORITY REP., at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206-07)).

[91] The Paez panel noted that the plaintiffs' equal protection claims were sufficient to grant a preliminary injunction. *Shelley*, 344 F.3d at 901. It, therefore, declined to analyze their Voting Rights Act claims. *Id.*

[92] *Shelley*, 278 F. Supp. 2d at 1141. The counties mentioned supposedly have "average minority populations that are 15% larger than counties using other voting technologies." *Id.* at 1142. Section 2 of the Voting Rights Act is codified at 42 U.S.C. § 1973 (2000). It reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on

reviewing the legislative history and case law pertaining to the Voting Rights Act, Judge Wilson found "little about the violation alleged here that would suggest it [was] of the type contemplated by Section 2 of the Voting Rights Act."[93] That the error rate was not high enough "to consistently disable minority voters from electing their candidates of choice"[94] hurt the plaintiffs' case. The plaintiffs cited the sixth factor (i.e., that the state's justification for using the punchcard voting system was tenuous) in support of their position, but this was not enough to show a likelihood of success on the merits.[95] The plaintiffs thus did not prevail with respect to their claims under the Voting Rights Act. In sum, while the Paez panel concluded that the plaintiffs were likely to succeed on the merits,[96] Judge Wilson disagreed.[97]

B. Balancing of Hardships

The two courts' different perceptions of the strength of the plaintiffs' case influenced the remainder of their analysis regarding the balancing of hardships and the consideration of the public interest. Since Judge Wilson failed to perform an in-depth balancing of the hardships, the Paez panel concluded that he had erred as a matter of law.[98] While Wilson collapsed the two analyses – the balancing of hardships and the analysis of the public interest – into one, the Paez panel examined both much more extensively.[99]

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account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

[93] *Shelley*, 278 F. Supp. 2d at 1142. The plaintiffs would likely have an uphill battle if they wanted to use more than a couple of these factors.

[94] *Id.*

[95] *Id.* at 1142-43. Judge Wilson correctly noted that "many, if not most," votes that the punchcard tabulating machines would ignore or miscount would be votes of non-minorities "cast by non-minority voters[.]" *Id.* at 1143.

[96] *Shelley*, 344 F.3d at 907.

[97] *Shelley*, 278 F. Supp. 2d at 1141, 1143.

[98] *Shelley*, 344 F.3d at 907. The section of Judge Wilson's opinion entitled "Balance of Hardships" is three sentences long. *See Shelley*, 278 F. Supp. 2d at 1143.

[99] *Shelley*, 344 F.3d at 907 (citing Bernhardt v. Los Angeles County, 339 F.3d 920, 931 (9th Cir. 2003)) ("[T]he public interest analysis in preliminary injunction cases is focused on the impact on non-parties rather than parties.").

Since the Paez panel's opinion had earlier indicated that "those whose votes are not counted by the punchcard machines are irreparably denied their vote,"[100] it quickly focused on the harm to the Secretary of State without reanalyzing the harm to the plaintiffs.[101] The panel acknowledged that the state had already spent a lot of money to be prepared for the October 7, 2003, election.[102] The panel noted that, in this case, "the great difference in cost between regularly scheduled and special elections is not as significant a factor as in the usual election case."[103] An injunction here would be much less costly than an injunction prohibiting the conducting of a regularly scheduled election, since it would postpone the vote on the recall (and Propositions 53 and 54) until the regularly scheduled March 2004 election, for which the state had already budgeted money. Again, since the panel had found that the plaintiffs had a strong equal protection claim, it concluded that the balance of hardships favored them.[104]

C. Different Perceptions of the "Public Interest"

After analysis of the probability of plaintiffs' success on the merits, acknowledgement of the existence of an irreparable injury, and a balancing of hardships, Judge Wilson and the Paez panel turned to the public interest factor of the test for a preliminary injunction. Ultimately, Judge Wilson and the Paez panel reached opposite conclusions as to the issue of the public interest. Both agreed that the secretary of state had "an interest in complying with state election law."[105] The Paez panel discussed the supremacy of federal law (meaning the Equal Protection Clause) over state law and the secretary's "abstract interest in strict compliance with the letter of state law."[106] The panel could have adhered strictly to the letter of the California Constitution. However, acknowledging the public "interest in lively...debate," "confidence in fair elections," and "speed" in dealing with recall elections, the panel focused on the "spirit," as opposed to the "letter," of the state laws, in effect, to conclude that the spirit of the constitutional provisions trumped

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[100] *Id.*

[101] *Id.* ("There is no possible post-election remedy that could remedy this violation.").

[102] The panel repeated that "there is undoubtedly a burden and expense to the State in canceling the election, although the Secretary of State chose not to quantify this cost in his submissions." *Id.* at 908. It was unclear why the state would have had to spend any more money, other than to pay those companies or state employees who printed up and distributed the official ballots and the related booklets. The Secretary might have had to mail out information on Propositions 53 and 54 again. It might have been unrealistic to expect voters to keep those booklets from September or October 2003 until March 2004.

[103] *Id.*

[104] *Shelley*, 344 F.3d at 908.

[105] *Id.* Judge Wilson probably concluded that this interest was much stronger than the Paez panel ultimately did.

[106] *Id.* at 908-909.

the letter of Article 2 of the state constitution.[107] While the panel implicitly drew a distinction between the interests of the public and those of the state,[108] Judge Wilson did not do so – at least not to the same extent. The panel was correct that "placing dispositive weight on compliance with state law as part of the public interest calculus would introduce a deference to state law that is entirely inappropriate" in the equal protection context.[109] It further noted that the government would not stop functioning if the election were held in March 2004, since Propositions 53 and 54 could simply be voted on then and Governor Davis was already in office.[110] This, however, would frustrate the expectations of those who signed the recall petition (or donated to the candidates' gubernatorial campaigns) and the expectations of the candidates, who spent time and money "in reliance on" the abbreviated, constitutionally mandated campaign schedule.[111]

The Paez panel emphasized the public's interest in having fair elections, the results of which the citizens could respect as legitimate and accurate.[112] Again, since the panel found that the plaintiffs were likely to succeed on the merits, it also noted that "it is always in the public interest to prevent the violation of a party's constitutional rights."[113] The panel also faulted Judge Wilson for not sufficiently considering the public interest regarding the ballot initiatives. It was correct in that the "case for postponing the election is even stronger with respect to the votes on Propositions 53 and 54."[114]

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[107] *Id.* at 908. Judge Wilson set himself an arguably more modest goal: that of reading the California Constitution and considering his position in the federal system of government. *See Shelley*, 278 F. Supp. 2d at 1143-45.

[108] *Shelley*, 344 F.3d at 909.

[109] *Id.* at 909. Reynolds v. Sims, 377 U.S. 533 (1964), in which the Court invalidated the way in which Alabama drew its electoral boundaries, and Gray v. Sanders, 372 U.S. 368 (1963), in which it invalidated a Georgia voting system that (among other things) weighted rural county votes more heavily than urban county votes, suggest that "state law is [not] the only relevant consideration" in Equal Protection Clause jurisprudence. *Shelley*, 344 F.3d at 909. In these cases, the Court announced the "one-man, one-vote" principle. *Id* at 909.

[110] *Id.* Governmental paralysis might be particularly disturbing in the wake of the September 11, 2001, attacks. Even if the governor were somehow incapacitated, the lieutenant governor could assume his duties in accordance with the California Constitution. CAL. CONST. art. 5, § 10.

[111] *Shelley*, 344 F.3d at 909.

[112] *Id.* at 910. That such a public interest existed should have been clear in light of the events surrounding the November 2000 election in Florida. The public also had an interest in saving money by postponing the gubernatorial recall and the vote on Propositions 53 and 54 until March 2, 2004.

[113] *Id.* (quoting Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 974 (9th Cir. 2002)).

[114] *Shelley*, 344 F.3d at 911. Secretary of State Jones had originally ordered these two initiatives placed on the March 2004 ballot. *Id.* Secretary Shelley put these initiatives on the October 7 ballot *sua sponte*. *Id.* When Lieutenant Governor Bustamante announced the date of the special election as required under the state constitution, he only mentioned the gubernatorial recall. *Id.* "No mention was made of the initiatives[.]" *Id.*

Proposition 53 asked voters to decide whether or not to set up the "California Twenty-First Century Infrastructure Investment Fund," which would have forced the legislature to set aside money for public works projects (e.g., acquisition, construction, or renovation).[115] Since the proposition would not have changed anything until 2006,[116] there was no urgent need to vote on it in October 2003 instead of in March 2004. More importantly, Proposition 54 would have "prohibit[ed] state and local governments from using race, ethnicity, color, or national origin to classify current or prospective students, contractors, or employees in public education, contracting, or employment operations."[117] That Proposition 54 dealt with the issue of race should have indicated that minority voters would have been particularly interested in having their votes on the matter counted. As the panel noted, "there [was] a significant public interest in avoiding disproportionate disenfranchisement of the population most affected by the proposition."[118]

The Paez panel indicated that putting Propositions 53 and 54 on the October 7 ballot was particularly inappropriate, since doing so violated the spirit and the letter of the state constitution.[119] The California Constitution provides for an extended period of time between the qualification of an initiative and the date of the election at which it appears on the ballot.[120] Underlying this constitutional provision and

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[115] *Id.* at 911. Proposition 53 did not pass on October 7, 2003. *See Losing Propositions*, editorial, ORANGE COUNTY REGISTER, Oct. 9, 2003, *available at* 2003 WL 7012055.

[116] *Shelley*, 344 F.3d at 911.

[117] *Id.* This initiative was not scheduled to take effect until January 1, 2005. *Id.* Therefore, a vote on Proposition 54 was not urgent either.

[118] *Id.* at 912. The impact of Proposition 54 on medical research and the tracking of diseases alone could have been substantial. The proposition's author, University of California regent Ward Connerly, included an "exemption for 'medical research subjects and patients,'" thinking that was broad enough. Rebecca Trounson, *The Recall Campaign; Ad Watch*, LOS ANGELES TIMES, Sept. 28, 2003, at A35, *available at* 2003 WL 2437536. Public health experts, however, opposed the proposition, citing fears that research might be hindered. *Id.* Most notably, former United States Surgeon General Dr. C. Everett Koop appeared in television advertisements paid for (in part) by the California Teachers Association and the Service Employees International Union, saying, "Proposition 54 would block information that can help save lives, and it would end prevention efforts directed to those at risk for cancer, diabetes, and other diseases." *Id.* In addition to Proposition 54's impact on the medical field, it would have affected hiring, housing, and education. Carrie Sturrock, *Voters Reject Race Tracking Ban, Prop. 54*, CONTRA COSTA TIMES, Oct. 8, 2003, at 4, *available at* 2003 WL 65735390. For example, Proposition 54 would have "eliminated racial data from birth and death certificates." *Id.*

[119] *Shelley*, 344 F.3d at 911 ("[S]cheduling a vote on the initiatives [i.e., Propositions 53 and 54] on the special election ballot would not vindicate California's statutory election procedure. On the contrary, it would impair it and its underlying principles.").

[120] CAL. CONST. art. 2, § 8(c) states:

> The Secretary of State shall then submit the measure [i.e., the ballot initiative] at the next general election held at least 131 days after it qualifies or at any special

the distribution of ballot pamphlets is a desire for a more informed electorate.[121] Arguably, voters become informed after hearing public officials (and political commentators) discuss the ballot initiatives at length.[122] In putting Propositions 53 and 54 on the October 7, 2003, ballot, the Secretary of State arguably did not give interested parties sufficient time to complain in court or to his office about the inadequacy of the proposed explanatory language related to the initiatives.[123] Thus, the Paez panel wrote that an analysis of the public interest favored the plaintiffs.[124]

D. Conclusion

The panel cast the choice as one between a fundamentally fair election held on March 2, 2004, and an unconstitutional, "hurried" election held on October 7, 2003.[125] The panel indicated that it wished to avoid a situation similar to that in Florida after the 2000 presidential election.[126] It concluded that the plaintiffs were "likely to succeed on the merits,"[127] that res judicata and laches did not bar the plaintiffs' cause of action,[128] that "the [p]laintiffs would suffer irreparable harm",[129] and that the balance of hardships[130] and the public interest[131] favored the plaintiffs. Noting that the American way of conducting elections should be an example to other countries, the Paez panel unanimously reversed Judge Wilson's order and granted the plaintiffs a preliminary injunction.[132]

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statewide election held prior to that general election. The Governor may call a special statewide election for the measure.

[121] *Shelley*, 344 F.3d at 911-12. The California Elections Code requires election officials to meet certain deadlines. For instance, they are "required to make the ballot pamphlet available for public inspection...at least 100 days prior to the election." *Id.* at 912 (citing CAL. ELEC. CODE § 9092 (West 2003).

[122] Some voters, on the other hand, do not pay much attention to ballot initiatives until the last few days before an election.

[123] *Shelley*, 344 F.3d at 912. Voters could presumably challenge the explanatory language on the ground that it dealt with multiple subjects. *See* CAL. CONST. art. 2, § 8(d)("An initiative measure embracing more than on subject may not be submitted to the electors or have any effect.")..

[124] *Shelley*, 344 F.3d at 912.

[125] *Id.*

[126] *Id.* at 912-13 ("These issues are better resolved prophylactically than by bitter, post-election litigation over the legitimacy of the election, particularly where the margin of voting machine error may well exceed the margin of victory.").

[127] *Id.* at 907.

[128] *Id.*

[129] *Id.*

[130] *Shelley*, 344 F.3d at 908.

[131] *Id.* at 907, 912.

[132] *Id.* at 913.

IV. SCHROEDER PANEL DISAGREES WITH THE PAEZ PANEL

In granting the preliminary injunction, the Paez panel "stay[ed its] order for seven...days",[133] correctly anticipating that the Secretary of State would appeal. In accordance with a federal statute, the Ninth Circuit reheard the case *en banc*.[134] The *en banc* panel, led by Chief Judge Schroeder ("Schroeder panel"), emphasized that it was engaging in deferential review.[135] After noting that reasonable people could (and did) differ regarding the strength of the plaintiffs' claims, the Schroeder panel affirmed Judge Wilson's ruling.[136] The plaintiffs "made a stronger showing on their Voting Rights Act claim" than on their equal protection claim.[137] The Schroeder panel, however, still refused to order Judge Wilson to enjoin the administration of the October 7, 2003, election, because *inter alia*, the plaintiffs failed to show a sufficiently strong possibility of success on the merits.[138]

The Schroeder panel noted that the gubernatorial candidates and the Secretary of State had relied on the October 7, 2003, deadline.[139] Some of the gubernatorial candidates (e.g., Congressman Darrell Issa) had dropped out of the race, reasoning that they could not gather enough support by October 7, 2003 to win the race.[140]

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[133] *Id.*

[134] Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 913 (2003) (ordering rehearing en banc and telling future litigants not to cite to the Paez panel's decision as binding precedent in most cases).

First, 28 U.S.C. § 46(c) (2000) states:

> Cases and controversies shall be heard and determined by a court or panel of not more than three judges . . . , unless a hearing or rehearing before the court [en] banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court [en] banc shall consist of all circuit judges in regular active service, or such number of judges as may be prescribed in accordance with [another statute] . . .

FED. R. APP. P. 35(a) states:

> A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
>
> (2) the proceeding involves a question of exceptional importance.

[135] *Shelley*, 344 F.3d at 918 ("We review [Judge Wilson's] decision to grant or deny a preliminary injunction for abuse of discretion . . . Our review is limited and deferential.").

[136] *Id.* at 919-20.

[137] *Id.* at 918.

[138] *Id.* at 919 ("[A]lthough the plaintiffs have shown a possibility of success on the merits, we cannot say that at this stage they have shown a strong likelihood.").

[139] *Shelley*, 344 F.3d at 919.

[140] Congressman Issa dropped out of the race on August 7, 2003, the same day that Schwarzenegger signed the official papers to run for governor at the Los Angeles County Registrar-Recorder's office. *Court Dismisses Recall Challenges; Bush Says*

The panel, however, also relied upon some less persuasive reasons. For instance, the panel noted that some public officials had diverted "their attention from their official duties in order to campaign."[141] Though this election became the focus of Governor Davis, Lieutenant Governor Bustamante, and Senator Tom McClintock, it might not have diverted other officials' attention from their official duties to any meaningful degree. In addition, one might question how many voters paid close attention to the candidates' messages before mid-September. Postponing the election did not have a great impact on absentee voters who had already cast their ballots, aside from the minimal cost of postage and the possibility that they might not be eligible to vote in March 2004.[142]

The Schroeder panel was correct in that the "investments of time [and] money . . . [could not] be returned."[143] The panel, however, ironically stated: "If the election is postponed, citizens who have already cast a vote will effectively be told that the vote does not count and that they must vote again."[144] The voters for whom the plaintiffs fought were arguably "told" the same thing (i.e., that their votes did not count, or at least were less likely to count) when the election was *not* postponed, and those voters did not have a chance to vote again.

The Schroeder panel's decision was a reasonable one, in part because it acknowledged that "there [might have been] a stronger case on the merits for delaying the initiatives [i.e., Propositions 53 and 54] than the recall[.]"[145] Furthermore, it noted that the Elections Code "violations . . . implicated the public interest[.]"[146] In these ways, the Schroeder panel's opinion, while short, was more even-handed than that of Judge Wilson. Neither one, however, was nearly as comprehensive as that of the Paez panel. The author of this Note submits that the Paez panel's ruling was correct, insofar as it pertained to the ballot initiatives.

V. CONCLUSION

According to the Secretary of State's office, approximately 5 million people voted to recall Governor Davis, while about 4 million voted against recalling

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Schwarzenegger Would Be 'Good Governor,' CABLE NEWS NETWORK, *at* http://www.cnn.com/2003/ALLPOLITICS/08/08/calif.candidates/index.html (Aug. 8, 2003).

[141] *Shelley*, 344 F.3d at 919.

[142] Some absentee voters who cast their ballots before October 7, 2003 might have become ill, might have died, or might have forgotten to vote in March 2004. Other absentee voters, however, might have been able to vote "in person" in March 2004. Some absentee voters (namely, those who lived in the nine counties mentioned in note 29) might even have benefited from a postponement of the recall election, because their counties would have had better (i.e., non-punchcard) voting systems in place by March 2004. Thus, by waiting, there would have been a better chance of having their votes counted.

[143] *Shelley*, 344 F.3d at 919.

[144] *Id.*

[145] *Id.*

[146] *Id.*

him.[147] Had the margin of victory been narrower for those who supported the recall of Governor Davis, Californians would have been in a position similar to that of Floridians in late 2000. In fact, all three courts in the recall litigation mentioned *Bush v. Gore*[148] in their separate opinions. Judge Wilson, though admitting that one could read *Bush* as "implying, or at least employing, an elevated standard of review" of equal protection claims in the context of voting, acknowledged that there was reason to believe that the *Bush* analysis was "limited to its unique context."[149] The Paez panel also quoted language from *Bush* and even tried to emphasize the similarities between the issues involved in *Bush* and in *Shelley*.[150] The Schroeder panel, on the other hand, only cited *Bush* in passing.[151]

Though *Bush* might be of limited precedential value in voting rights or equal protection cases, it has had some impact outside of Florida. State officials now recognize the serious flaws associated with punchcard voting machines.[152] The contested election results in Florida contributed to the enactment of the "Help America Vote Act of 2002."[153] If *Bush* and *Shelley* did nothing else, they forced regular citizens to reflect upon the quality of their voting tabulation machines, along with the qualifications of elections officials and poll workers.[154]

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[147] The results of the October 7, 2003, election (as far as the recall is concerned) were as follows: votes in favor (4,976,274 or 55.4%), votes opposed (4,007,783 or 44.6%), and votes not cast (429,431 or 4.6%). *Official Declaration, supra* note 67. The following is a list of some of the major candidates along with the percentage of the vote each received: Arnold Schwarzenegger (48.6%), Cruz Bustamante (31.5%), Tom McClintock (13.5%), Peter Camejo (2.8%), Arianna Huffington (0.6%), Peter Ueberroth (0.3%), Larry Flynt (0.3%), and Gary Coleman (0.2%). *Id.*

[148] 531 U.S. 98 (2000).

[149] *Shelley*, 278 F. Supp. 2d at 1140. In Bush v. Gore, 531 U.S. 98 (2000), the Supreme Court wrote: "The recount process ... is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the *special instance* of a statewide recount under the authority of a single state judicial officer. Our consideration is *limited to the present circumstances*, for the problem of equal protection in election processes generally presents many complexities." *Id.* at 109 (emphasis added).

[150] *Shelley*, 344 F.3d at 895 ("Plaintiffs' claim presents almost precisely the same issue as the Court considered in [Bush v. Gore], that is, whether unequal methods of counting votes among counties constitutes a violation of the Equal Protection Clause.").

[151] *Shelley*, 344 F.3d at 917, 918. One of the times that the Schroeder panel cited Bush v. Gore was to note that the Paez panel had done so. *Id.* at 917.

[152] After the recounts and legal challenges to the presidential election results in Florida in 2000, "many election officials looked to technology to come to their rescue. They rushed to buy new, high-tech electronic voting equipment, expecting features such as touch screens to prove more reliable than older systems' punch cards [*sic*]." Marsha Walton, *Electronic Voting No Magic Bullet: Specialists Seek Input of Academia, Technology, Election Officials*, CABLE NEWS NETWORK, *at* http://www.cnn.com/2003/ALLPOLITICS/12/11/elec04.nist.evoting/index.html (Dec. 12, 2003).

[153] *Id.*

[154] The "average age" of "poll workers and election judges" in Colorado, for instance, "is about 70." *Id.*

After candidates, voters, and election officials have spent time and money preparing for a statewide election, it is very difficult for any group to postpone the administration of that election, even when a constitutional violation is alleged. Admittedly, no voting system is perfect.[155] Some state officials are concerned, since some direct recording electronic voting "machines [do not] create a separate paper receipt, or ballot" for voters to make sure that "the machine accurately recorded their choice."[156] Others might allow hackers to manipulate [the election] results."[157] As a Broward County commissioner put it, "The vendors [of the electronic voting machines are] . . . going to tell you it's perfect and wonderful. [But] there are a lot of issues out there that haven't been answered. It's a scary thing."[158] While this may be true, one cannot help but think that Californians will be better off in the future without punchcard voting machines.

Paul S. Mistovich

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[155] "[F]or every 10,000 votes cast, punchcard systems result in 250 more nonvotes than optical-scan systems." Bush v. Gore, 531 U.S. at 126 n.4 (Stevens, J., dissenting). With optical-scan voting systems, voters use a "pen or pencil to fill in an oval or connect dots on a paper ballot." *Voting After Florida*, *supra* note 17. These are different from direct recording electronic systems, in which a "computerized voting machine ... allows voters to register their votes using a touch screen, ATM-machine-like terminal, or a panel with buttons and lights." *Id. Voting After Florida* also provides a brief analysis of some of the benefits and disadvantages of other types of voting systems (e.g., mechanical lever, punchcard, hand-counted paper ballots, and Internet voting).

[156] *Worries Grow Over New Voting Machines' Reliability, Security: Touchscreen Machines Not the Cure-All Some Expected, at* http://www.cnn.com/2003/ALLPOLITICS/10/30/elec04.election.worries/index.html (Oct. 30, 2003).

[157] *Id.*

[158] *Id.*