



The University of New Mexico

School of Law Library
MSC11 6080
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone (505) 277-0939
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other that private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

501 INTRODUCTION TO CONSTITUTIONAL LAW

Semester I, 2000-2001

Final Examination/Paper
UNM School of Law
Three Credits

Professors Browde and Ellis
December 12, 13, 14, or 15, 2000
7:30 a.m. to 4:00 p.m.

INSTRUCTIONS

This is a 1-day take-home examination/paper. You have no more than 8 1/2 hours to complete your answer.

The examination consists of a single question involving multiple lawsuits. Grading will be on the basis of the percentages allocated among the lawsuits as indicated in the body of the question..

Please pick up your packet from Janet Cox's office on any one of the four days when the exam is offered (Dec. 12, 13, 14 or 15) any time after 7:30 a.m., but before 8:45 a.m.

It shall be a violation of the Honor Code to consult with any other person about the subject of this course anytime after you have picked up your packet.

In preparing your answer you may consult the textbook, supplement, handouts, hornbooks, your notes, or any other materials you might find helpful. You may use a word processor, and are encouraged to do so, because typed/printed final products will be much appreciated.

Your answer may not exceed 3,500 words (approx. 14 typed pages). It may, of course, be shorter than that, and we are certain that an excellent exam can be written in fewer pages. Please count the words in your answer and write the total on the first page of your answer; you may do so by counting the words on a few representative pages, and multiplying the per/page average by the number of pages. (Running the spell-checker in WordPerfect for DOS will do an automatic count; WordPerfect for Windows will do a count from "File, Document Info"; and MS Word does it from "Tools, Word Count.")

Be sure to put your exam number, the course number and name, and the instructor's name on each page of your answer. Also, please number each page of your answer.

Return your answer to Janet Cox's Office by 4:00 p.m. on the same day you pick up the packet.

[EXAMINATION BEGINS ON PAGE 2]

QUESTION

We are now well into the happy times of the Whatsisname administration. After having ended world hunger, cured the common cold, and obtained a just and lasting peace settlement in the Middle East, the administration turned its attention to the national voting machine problem which surfaced in the wake of the election debacle of 2000. Without much fanfare or publicity, Congress enacted and the President has signed into law the Electronic Voting Machine Act of 2001 (reproduced in the Appendix). The Federal legislation also included a provision, attached by Tom DeNigh, the House majority whip that prohibited the use of voting machines that had not been manufactured by companies in the private sector. DeNigh argued on the House floor that “We can’t have American elections decided by un-American, socialist machines.”

The State of West Dakota has for years, under the compulsion of state law, (also reproduced in the Appendix), used the mechanical-lever type of voting machines for all of its state-wide and local elections, except separate school district elections in small school districts with fewer than 1000 registered voters, where paper ballots are allowed.

Indeed, the mechanical-lever machines, which were devised in the early 1960’s, are incredibly accurate, and there were no difficulties with those machines in West Dakota during the 2000 general election. In fact, the data gathered after the election demonstrated a 99.5% accuracy in the West Dakota count—the highest in the nation, and higher than most states that have since switched to electronic voting machines.

There is one problem, however, with mechanical-lever voting machines—the candidate levers on the face of the machine tend to deteriorate and break over time. Indeed, West Dakota is the one state that anticipated the problem. Given the need for a ready supply of levers, and not wanting to be beholden to the PregChad Corp., the single manufacturer of the machine, West Dakota, in 1965, set up a semi-private corporation in the state to produce replacement levers for the machine—West Dakota DimpledLever Co. Although some of its stock is publicly traded, the State of West Dakota owns 51% of the stock, and the statute provides that the company may only sell its shares to citizens of West Dakota.

When PregChad Corp. went out of business in 1970, DimpledLever picked up a lot of business—becoming the supplier of replacement levers for all the states that use PregChad Corp machines. Since the recommendation is that each machine be refitted with new levers for each election cycle, DimpledLever did very well indeed. It has long-term contracts for bi-annual refitting of PregChad machines with West Dakota and twenty other states that continue to use that highly reliable voting apparatus.

After the 2000 election year difficulties, the State of Wyotana—a PregChad mechanical-lever machine state—although pleased with the accuracy of its vote tallies, decided that the cost of running an efficient election was prohibitive. After completing a study, it determined that the electoral process could be as efficiently run in a more cost-effective manner if it were administered by a private company. Wyotana, therefore, contracted with the Gruff Operations & Resources

Entity, Inc. (GORE), a West Dakota private corporation, to administer the tallying of votes for Wyotana for the next 10 election cycles, and it assigned its contracts with DimpledLever to GORE. All of GORE's employees reside outside West Dakota.

In 2001, well in advance of the 2002 general election, DimpledLever suffered some serious business-related reverses, lost much of its highly trained staff, and found itself unable to meet all of its contractual obligations to its purchasers. Fortunately, DimpledLever's long-term contracts allowed it to terminate those contacts if DimpledLever is unable to deliver the goods, but make no such provision to protect customers from paying substantial liquidated damages if customer-states stop using the PregChad Corp machines. In addition, DimpledLever summarily (without notice or any opportunity for hearing) fired two long-term employees—Jeb Shrub, and Tipper Bore—who had worked for the firm since its startup, but who had recently incurred the wrath of management by criticizing DimpledLever policy regarding out-of-state customers.

Faced with its inability to manufacture enough levers to meet the demand, DimpledLever found itself having to decide which of its many contracts for the delivery of replacement levers it would honor, in compliance with West Dakota Election Code § 70-02(c). Wyotana (which is situated 1,000 miles from the West Dakota border) was notified that the limited additional supply of replacement levers was sufficient to supply only those states contiguous with West Dakota for the 2002 election cycle, and therefore DimpledLever would not be able to meet Wyotana's 2002 needs.

In addition to the other problems that the Federal statute poses for DimpledLever, it would also interfere with a project, still in the preliminary planning stages, to expand the business by branching out into the manufacture of electronic voting machines.

Part I. (60%) It is now early in the year 2002. As the states have begun to gear up for the 2002 election season, West Dakota and Wyotana have awakened to the difficulties they confront in getting ready for the next election cycle.

As a result, West Dakota and DimpledLever have sued to declare the federal Electronic Voting Machine Act of 2000 unconstitutional and to enjoin its enforcement in whole or in part. You are the law clerk for the federal judge to whom the lawsuit has been assigned. He has asked you to write the first draft of the opinion deciding the challenge to the federal act, making clear which, if any, of the provisions of the Act can survive.

WRITE THE OPINION DECIDING THE CHALLENGE TO THE FEDERAL STATUTE.¹

¹ You know that the Supreme Court's equal protection cases have held that racial classifications are subject to strict scrutiny, while classifications that discriminate against the elderly and the disabled are only subject to rational basis review. Also, the Supreme Court has made clear that a 14th Amendment equal protection claim can only succeed if there is both discriminatory effect and discriminatory purpose.

* * * * *

Part II. (30%) For purposes of this Part only, assume that the challenge to the federal act succeeded and that the act was declared invalid. Wyotana and GORE then sue West Dakota and DimpledLever to invalidate the West Dakota Act on federal constitutional grounds. You are the state court judge to whom the lawsuit has been assigned.

WRITE THE OPINION DECIDING THE CHALLENGE TO THE STATE LAW.

* * * * *

Part III. (10%) Finally, Shrub and Bore, sue DimpledLever in federal court (diversity jurisdiction exists) for damages in relation to their firing. They claim violation of their due process rights. You are the law clerk for the federal judge to whom the lawsuit has been assigned. She has asked for a memo on how she should decide the case, but she tells you not to address the merits of the procedural due process claim.

WRITE THE MEMO TO THE JUDGE.

[APPENDIX STARTS ON FOLLOWING PAGE]

APPENDIX

THE ELECTRONIC VOTING MACHINE ACT OF 2001

Section 100. Congressional Findings.

Congress finds the following:

(a) Although much less expensive than electronic voting machines, paper ballots and punch card ballot voting machines are inherently unreliable because the former necessarily require hand counting of ballots with attendant human error, and the latter foster human error by voters and are subject to mechanical difficulties resulting in unacceptable high percentages of ballots which are misread;

(b) Punch card voting machines are particularly difficult to use for the elderly, the disabled, and because they are utilized primarily in counties with high percentages of black and latino residents, they work an unconstitutional discrimination against these discrete and insular minorities among the American population;

(c) The continued use of paper ballots and punch card voting machines undermines the integrity of the electoral process with respect to both federal and state elections;

(d) The continued use of paper ballots and punch card voting machines undermines the republican form of government;

(e) The continued use of paper ballots and punch card voting machines lessens American prestige among other nations of the world, for whom our democratic processes have been a model of integrity and efficiency;

(f) The development, sale and purchase of voting machines is a multi-billion dollar industry, which has enormous economic consequences for buyers, sellers, and public budgets;

(g) Free enterprise is what made America great. States should support the capitalist system in purchasing equipment with which American elections are to be conducted.

(h) Congress has the affirmative power to enact this law, including but not limited to its authority under sections 4 and 8 of article I, the necessary and proper clause, and section 5 of the Fourteenth Amendment.

Section 101. Mandatory electronic voting machines.

(a) It shall be unlawful for any federal, state, or local election to be conducted without the use of electronic voting machines which meet the standards established by regulations promulgated by

the Secretary of Commerce. The Secretary of Commerce may not approve any machine that is manufactured by a state-owned enterprise.

(b) At least four months prior to any state or federal general election, each state must ensure that every subdivision of state government responsible for the conduct of that election is properly equipped with sufficient electronic voting machines which meet the standards established by the Secretary of Commerce, and has sufficient staff and volunteers trained in the use of those machines, to conduct the next general election with utmost accuracy and efficiency.

(c) The Chief Election Officer of each of the States shall survey all counties and municipalities within the State, and shall report the results of that survey to the U.S. Secretary of Commerce by January 1st of each year:

(1) Indicating the number and type of all voting machines in use in those counties and municipalities, and;

(2) Ascertain that each is in compliance with sub-sections (a) and (b).

Failure to file an accurate and timely report will result in a reduction of that State's disbursement from the Federal Highway Trust Fund of five percent.

Section 102. Voting Machine Fund.

(a) A federal Voting Machine Fund is hereby created, to assist states in making the necessary transition from paper ballot, mechanical lever, and punch ballot systems to electronic voting machines.

(b) Disbursements from the fund shall be made to applying states based on a formula devised by the Secretary of Commerce which shall include the scope of the compliance problem, the cost of complying, and the per-capita income in each state, but no disbursement to any state will exceed 35% of that state's cost of becoming fully compliant with the provisions of this act.

(c) Any state which receives a disbursement from the fund but fails to meet the requirements of Section 101 and any valid regulations promulgated thereunder by the Secretary of Commerce shall forfeit any and all federal funds provided to the state for the support of the electoral process.

Section 103. Private Litigation for Enforcement.

Any person who is aggrieved by state failure to comply with this act may bring an action in the United States District Court of any District, seeking compliance with this Act.

WEST DAKOTA ELECTION MACHINE CODE

Section 70-01. Legislative Findings

The legislature of West Dakota finds that:

- (a) The people of this state have a paramount interest in insuring that the votes cast in every election are accurately and efficiently tallied;
- (b) Securing an accurate tally of all elections in the state is of paramount importance to the political health and welfare of this state;
- (b) Mechanical-lever voting machines are the most accurate and most efficient tally devices of votes cast in an election;

Section 70-02. Mandatory Mechanical-Lever Machines

- (a) All elections held within the state of West Dakota shall use the mechanical-lever machine manufactured by the PregChad Corp., except that separate school district elections in school districts with fewer than 1000 registered voters shall be permitted to use paper ballots.
- (b) A semi-public corporation shall be created to manufacture replacement levers for the PregChad Corp. mechanical-lever voting machine. The public offering of shares for the corporation shall be limited to 49% of the shares outstanding, with the remainder held by the State. The State may sell its shares, but only to citizens of West Dakota.
- (c) Any company located in West Dakota which manufactures replacement levers for the PregChad Corp. mechanical-lever voting machine shall first serve the needs of West Dakota voting machines, before it can provide replacement levers to any other state, and preference shall then be given to adjoining states.

[END OF EXAMINATION]