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Opinion No. 05-045

Constitutionality of Voting Center Legislation

QUESTION

House Bill 1117/Senate Bill 1635 would allow county election commissions to combine precincts and establish vote centers for an election. The law would require at least one vote center for every twenty-five thousand registered voters. Voting in vote centers would begin the twentieth day before the day of election and continue through the day of the election. Under the current statewide system, voters may participate in early voting from the twentieth day to the fifth day before the election. Further, under the current system, where voting machines are used, precincts shall, whenever practicable, be limited in size to a maximum of five thousand registered voters. Would this dual system violate state constitutional law?

OPINION

The bill would result in different voting schedules in counties that chose to operate under it. Further, the bill would allow some counties to conduct polling through a few centralized polling places and others to conduct polling through a larger, less centralized system of precinct polling places. But it is not clear whether this disparity would violate equal protection guarantees. No Tennessee or United States Supreme Court case definitively addresses whether Equal Protection prohibits counties from using different voting schedules or polling center arrangements. Nor is it clear whether the disparity would be subject to "close scrutiny" or the less exacting rational basis test. We think the bill would be subject to review under the rational basis test because it does not substantially interfere with the fundamental right to vote and contains no suspect classification. We think the bill is constitutional under that test because it is reasonably related to the legitimate interest in reducing administrative costs and confusion related to the use of widely scattered polling places.

ANALYSIS

This opinion concerns the constitutionality of a "dual voting system" proposed under House Bill 1117/Senate Bill 1635. Under current law, Tenn. Code Ann. §§ 2-3-101, *et seq.*, elections are held in polling places designated by the county election commission. Each polling place serves a precinct established by the county election commission. Precincts where voting machines are used shall, whenever practicable, be limited in size to a maximum of five thousand registered voters. Tenn. Code Ann. § 2-3-103. Where voting machines are used, there shall be, as nearly as practicable, no more than seven hundred fifty registered voters per voting machine. Tenn. Code

Ann. § 2-3-105. Under Tenn. Code Ann. §§ 2-6-101, *et seq.*, voters may vote early at the county election commission office between twenty and five days before election day. Tenn. Code Ann. § 2-6-102.

The bill would add a new part 3 to Tenn. Code Ann. §§ 2-3-101, *et seq.* Under the bill, a county election commission could establish a program allowing the county to combine precincts or polling places or establish one or more vote centers for any election. Where vote centers are used, precinct polling places may not be used in the same election. The county election commission must establish at least one vote center for every twenty-five thousand registered voters. The statute contains notice requirements to voters if the county establishes vote centers. The opinion request indicates that in vote center counties, no voting will take place on election day but, under the bill, the voting period for all vote centers begins the twentieth day before the day of the election and continues through the day of the election. Vote centers must be closed on Sundays and state holidays in the voting period. The statute includes hours during which the county election commission must be open during the voting period.

The request points out that, once one or more counties implements a vote center system, voting in the same election in different counties would take place on different days. The request gives the example of a multi-county congressional district, where one county establishes vote centers but the others retain the current precinct system with early voting. In that case, voting in the vote center county would take place in a limited number of vote centers each day from the twentieth day before the election (excluding Sundays and state holidays), through election day. Voting in the other counties would take place in a limited number of early voting centers from the twentieth day through the fifth day. Voting in counties that have not established vote centers would take place at precinct centers on election day. The same result would occur in state elections in multi-county legislative districts, as well as elections for United States Senator and Tennessee Governor.

The request asks whether the dual system that would be implemented under the bill is constitutional. The General Assembly has legislative authority to establish the method of election in all elections in Tennessee — local, state and federal. *See* U.S.Const. art. II, § 1, cl. 2 (selection of Presidential electors delegated to states); U.S. Const. art. I, § 4, cl. 1 (the times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature); Tenn. Const. art. IV, § 1 (the General Assembly has the power to enact laws regulating state and local elections). The only constitutional provision that appears to be implicated is the Equal Protection Clause of the United States and the Tennessee Constitutions. The question is whether the existence of two systems with different methods for determining the place of voting and different times during which voting may take place violates the equal protection guarantees under the United States or Tennessee Constitution. No authority binding in this jurisdiction directly addresses the issue. This Office has noted that, under present state law, various election machines and devices are used in different counties during an election throughout the State. Op. Tenn. Att'y Gen. 01-012 (January 30, 2001). But, as that opinion notes, it is not clear under current case law that Equal Protection prohibits the use of different voting systems throughout the State.

It has long been established that "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right." *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976). Although the right to vote, per se, is not a "constitutionally protected right," the Supreme Court has found, "implicit in our constitutional system, [a right] to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population." *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35, n. 78, 93 S.Ct. 1278, 1298, n. 78, 36 L.Ed.2d 16 (1973); *see also Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995, 1000, 31 L.Ed.2d 274 (1972) ("This Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction"). However, the Supreme Court has also held that "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Bullock v. Carter*, 405 U.S. 134, 142, 92 S.Ct. 849, 855, 31 L.Ed.2d 92 (1972). Thus, an "exacting approach" with respect to voting classifications was not required where the distinctions drawn by a statute were not based on wealth or race, and there was nothing to indicate that the statutory scheme had an impact on the ability to exercise the fundamental right to vote. *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802, 89 S.Ct. 1404, 1407, 22 L.Ed.2d 739 (1969).

Similarly, in *Bullock*, the Court examined the Texas primary election filing fee system, under which candidates bore the cost of primary elections and were required to pay sizeable filing fees before they could appear on the primary ballot. The Court first addressed the appropriate standard of review. The Court noted that the system did not place a condition on the exercise of the right to vote, or "quantitatively dilute votes that have been cast." 92 S.Ct. at 856. The Court noted that the system created barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. The Court acknowledged that the existence of these barriers did not, of itself, compel close scrutiny. But the Court noted, "in approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Id.* The Court found that the exclusionary effect of the fee system on voters was "neither incidental nor remote." *Id.* The Court found that, by requiring candidates to rely on contributions from voters in order to pay the fees, the system denied some voters the opportunity to vote for a candidate of their choosing, and at the same time gave the affluent the "power to place on the ballot their own names or the names of persons they favor." *Id.* The Court concluded that, because the filing fee scheme had a "real and appreciable impact" on the exercise of the franchise, and because the impact was related to the resources of the voters supporting a particular candidate, it must be closely scrutinized "and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." *Id.*

In a recent *per curiam* opinion, the United States Supreme Court found that the Florida Supreme Court's order for a statewide hand recount of punch card ballots violated the Equal Protection Clause because there were no standards for determining how to count the punch card ballots. *Bush v. Gore,* 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). As for the use of different voting systems in different counties and potential equal protection problems, however, the *per curiam* opinion expressly declined to address whether the use of different voting systems in

different counties in the same election raised equal protection problems. The opinion states that it was not considering the issue of "whether local entities, in the exercise of their expertise, may develop different systems for implementing elections." *Id.* at 532. Justice Stevens, in dissent, with whom Justices Breyer and Ginsburg joined, suggested the use of different voting systems in different counties "might" raise equal protection concerns:

> Admittedly, the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns. Those concerns are alleviated — if not eliminated — by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process. . . . If it were otherwise, Florida's decision to leave to each county the determination of what balloting system to employ — despite enormous differences in accuracy — might run afoul of equal protection. So, too might the similar decisions of the vast majority of state legislatures to delegate to local authorities certain decisions with respect to voting systems and ballot design.

Bush v. Gore, 125 S.Ct. at 541 (Stevens, J., dissenting). On the other hand, Justice Souter, also dissenting, expressed the view that "the Equal Protection Clause does not forbid the use of a variety of voting mechanisms within a jurisdiction, even though different mechanisms have different levels of effectiveness in recording voters' intentions; local variety can be justified by concerns about the cost, the potential value of innovation, and so on." *Bush v. Gore*, 125 S.Ct. at 544 (Souter, J. dissenting in part and concurring in part).

The impact of *Bush v. Gore* on the use of different voting systems in different jurisdictions is not clear. A number of cases relying on *Bush v. Gore* to challenge the use of different voting systems in different localities have been brought. But courts in these cases have reached no decision that is conclusive or binding in Tennessee. *See, e.g.*, Edmund S. Sauer, *Note, "Arbitrary and Disparate" Obstacles to Democracy: The Equal Protection Implications of Bush v. Gore on Election Administration*, 19 J.L. & Pol. 299 (2003)*; Stewart v. Blackwell*, 356 F.Supp.2d 791(N.D. Ohio 2004), *appeal pending*(use of different voting technology in different counties in 2004 presidential election did not violate Equal Protection or the Voting Rights Act).

The bill would result in different voting schedules in counties that chose to operate under it. Further, the bill would allow some counties to conduct polling through a few centralized polling places and others to conduct polling through a larger, less centralized system of precinct polling places. But it is not clear whether this disparity would violate equal protection guarantees. We do not think this issue would arise in county-wide or municipal elections. In those elections, all voters within the voting jurisdiction would be treated equally. We have found no Tennessee or United States Supreme Court case addressing whether schedules and allocation of voting centers must be uniform from county to county in an election covering more than one county. Nor is it clear whether the different systems would be subject to the "close scrutiny" applied in *Bullock* or to the less exacting rational basis standard applied in *McDonald.* The different systems draw no distinctions

based on wealth or race; differences, instead, are based on whether a particular county opts into the optional system. Further, on its face, the different systems would not prevent citizens in any county from exercising the fundamental right to vote, nor would they "quantitatively dilute" votes that have been cast. Unless challengers could introduce evidence to show that use of the different systems has an impact on the exercise of the right to vote that is neither incidental nor remote, we think that the legislation would be subject to review under the rational basis test, and upheld so long as it is rationally related to a legitimate state purpose. We think the bill is constitutional under that test because it is reasonably related to the legitimate interest in reducing administrative costs and confusion related to the use of widely scattered polling places.

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