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One Man, One Vote and a Denial of Democracy: An Analysis of Marks v. Stinson under the Public Law Litigation Model

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I. Introduction

American elections produce winners and losers. The distinction between the two has traditionally been made by the voters. In Pennsylvania's recent state senate special election, however, there was a departure from this time-honored democratic practice. The winner of that election was chosen by a federal district court judge.[1] Thus, despite our nation's high regard for the will of the electorate, his vote became the only vote that mattered.

The purpose of this paper is to summarize and examine the dynamics of this special election and the events that led to the involvement of the federal judiciary. The activities of the federal court in this case will be examined within the framework of the public law litigation model. This paper suggests that defining the Pennsylvania election in terms of the public law litigation model offers some explanation for the federal judges' activist behavior in this case.

However, this paper further posits that our inquiry should extend beyond mere acceptance of the public law model as a given. Specifically, the appropriateness of the federal judiciary's intervention into state matters as well as the propriety of the remedies granted by the federal district court in this case need to be explored. Only after looking closely at these issues can we really begin to assess who the winners and losers in this "special" election are.

II. Background: Pennsylvania's "Special" Senatorial Election

A. Vacancy in Senate

The death of Pennsylvania Senator Francis Lynch, a Democrat from Philadelphia, created a vacancy in the Pennsylvania Senate prompting a special election on November 2, 1993 to fill the position.[2] Both Republican Bruce S. Marks and Democrat William Stinson ran for the seat.[3] This election was particularly important since the result established either Democratic or Republican control of the senate.[4]

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1. *See* Marks v. Stinson, No. CIV. A. 93-6157, 1994 WL 146113, at *35 (E.D. Pa. Apr. 26, 1994).

2. Russell E. Eshleman Jr., *Senate Republicans Propose Election Law Changes—The Legislation Comes After the Second District Mess and Last Year's Special Election in Bucks County*, PHILA. INQ., Jan. 26, 1994, at B5.

3. *Id.*

4. *Id.*

B. Campaign Trail

During the election, though both candidates garnered much support, Marks ran slightly ahead of Stinson according to a pre-election poll.[5] To remedy this, the Stinson Campaign began innovative tactics to gain voters' support in predominantly white areas of town.[6] They also initiated an absentee ballot campaign targeting Hispanics and Blacks in Philadelphia.[7] Stinson supporters, some reading from "scripts" prepared by the Stinson Campaign, contacted voters and explained that using absentee ballots was the "new way" to vote.[8] As such, many persons relied upon the information provided, accepted ballots from campaign workers, and wrongfully completed absentee ballots.[9]

C. State Level (in)Action

In order to prevent the illegally cast ballots from being counted, Marks went to the Philadelphia County Court of Common Pleas on November 1, 1993, seeking a temporary restraining order to impound all absentee ballots.[10] The following day, Election Day, Marks was permitted to present his complaint before Judge Maier of the County Court of Common Pleas.[11] Judge Maier retained jurisdiction of the case but refused to hear any evidence of fraud.[12] On November 3, 1993 Maier began to consider Marks' absentee ballot challenges under section 3146.8(e) of Pennsylvania election law.[13] With a limited amount of evidence presented, Judge Maier found that only eleven of Marks' absentee ballot challenges were appropriate.[14] Therefore, the rest of the absentee ballots were allowed to be counted by the Philadelphia County Board of Elections (hereinafter "Board of Elections" or "Board").[15]

On November 10, 1993, Marks filed an emergency petition with the Pennsylvania Supreme Court to stay any further proceedings in the

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5. Marks v. Stinson, 10 F.3d 873, 877 (3d Cir. 1994).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*; *see also* Mark Duvosin et al., *Improper Ballots Turned Election—A Review Indicates 540 Were Tainted*, PHILA. INQ., Mar. 25, 1994 at A1 (describing the extent to which the Stinson Campaign misled voters).
10. *Marks*, 19 F.3d at 879.
11. *Id.*
12. *Id.*
13. *Id.*; *see also* PA. CONS. STAT. ANN. § 3146.8(e) (1994) (requiring that the county boards of elections hear initial absentee ballot challenges).
14. *Marks*, 19 F.3d at 879.
15. *Id.*

election.[16] The Pennsylvania Supreme Court granted Marks' stay motion on November 13 and four days later ruled that Judge Maier had lacked jurisdiction over the initial section 3146.8(e) proceeding.[17] As such, the matter was remanded to the Board of Elections for proper consideration of the absentee ballot challenges.[18]

The Board of Elections convened on November 18, 1993 to consider Marks' absentee ballot challenge,[19] but refused to allow Marks to introduce evidence of fraud.[20] Testimony was limited to that of actual pollwatchers.[21] Since there were no pollwatchers present at the hearing, however, the Board rejected all 551 absentee voter challenges and almost immediately certified Stinson as winner of the election.[22] This early instant certification was somewhat irregular since Stinson was the only winning candidate who was certified on November 18.[23] All other winners were certified on November 22, 1993.[24] Furthermore, the Board certified Stinson although, statutorily, Marks had two days to appeal its ballot decision.[25] Marks had every intention of doing so and contended that the Board knew, but ignored, his intentions.[26]

Marks again went to the Pennsylvania Supreme Court—this time to request a stay to prevent Stinson from voting on any bills when the senate session reconvened.[27] The Pennsylvania Supreme Court refused to grant Marks' stay.[28] Thus, the certified results of the election showed that Marks lost by 461 votes. On November 22, 1993, the Pennsylvania Senate approved and certified Stinson by a 25-24 vote.[29]

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16. *Id.*
17. *Id.* at 880.
18. *Marks*, 19 F.3d at 880.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Marks*, 19 F.3d at 880.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*; *see also* Brief of Appellee—Bruce Marks at 11, Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994) (explaining that Stinson was waiting in Harrisburg, Pennsylvania during this proceeding and was sworn into office within an hour of the decision).
27. *Marks*, 19 F.3d at 880. Note that the Pennsylvania Senate reconvened after a five month recess initiated by Democrats who wanted to insure that they maintained a majority in the senate. Robert Zausner & Wanda Motley, *Republicans Try To Hold Back Stinson—It Was A Nasty Reunion in the Senate*, PHILA. INQ., Nov. 23, 1993, at A1.
28. *Marks*, 19 F.3d at 880.
29. *Id.*; *see also* 1994 WL 146113, at *2 (recounting that Marks received 19,691 machine votes and 371 absentee votes while Stinson received 19,127 machine votes and 1,396 absentee votes). Senator Robert Jubelier, Republican, objected to the fact that Stinson was permitted to vote as a member of the senate. *Marks*, 19 F.3d at 880. Because of this and other questionable acts taken by

A frustrated Marks sought further relief on November 19, 1993 by appealing the Board's decision to the Philadelphia County Court of Common Pleas.[30] Marks and the Republican State Committee again tried to introduce evidence of fraud.[31] However, Judge Mark I. Bernstein said that he could not hear any new evidence and could only review the Board's decision based on the evidence presented below.[32] As such, on December 14 Bernstein was forced to affirm the Board's decision that the absentee ballots were proper.[33]

Meanwhile, disgruntled voters from the second senatorial district separately filed an election contest pursuant to section 3401 of Pennsylvania election law in the Philadelphia County Court of Common Pleas on November 18, 1993.[34] On January 10, 1994 Judge Bernstein ruled on their election claim as well.[35] Judge Bernstein found that by law the voters needed to post a bond of $50,000 before they could pursue their cause of action.[36] Since the voters were unable to raise the money, their claim was dismissed without a hearing on the merits.[37]

Marks and the Republican State Committee appealed Judge Bernstein's December 14, 1993 decision to the Pennsylvania Supreme Court.[38] Marks also appealed the election contest to the Pennsylvania State Senate.[39]

III. Federal Courts Take Charge

A. Enter Judge Clarence Newcomer

Feeling hopeless in the state court system, Marks, the voters who had earlier filed suit in state court, and a new group of Latino voters took

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the Democratic members of the senate, Jubelier filed a lawsuit. *See* Jubelier v. Singel, 638 A.2d 352 (Pa. Commw. 1994) (finding that the state senate was permitted to certify Stinson, a Democrat, before a Republican senator elected several months earlier).

30. *Marks*, 19 F.3d at 880.

31. *Id.* at 881.

32. *Id.*

33. *Id.*

34. *Marks*, 19 F.3d at 880. *See also* PA. CONS. STAT. ANN. § 3401 (1963) (granting the courts of common pleas jurisdiction to hear election contests).

35. *Marks*, 19 F.3d at 881.

36. *Id.*; *see also* PA. CONS. STAT. ANN. § 3459 (1994) (requiring petitioners in an election contest to post a bond in a sum that the court "shall designate").

37. *Marks*, 19 F.3d at 881.

38. *Id.*

39. *Id.*; *see also* PA. CONS. STAT. ANN. § 3407 (1963) (providing that a candidate who runs in a General Assembly election may, if aggrieved by a decision of the courts, appeal his election contest to the House for which he ran).

action in federal court to prevent Stinson from acting as senator.[40] In late December 1993 Marks filed a first amended complaint with the United States District Court for the Eastern District of Pennsylvania (hereinafter "district court").[41] This complaint alleged that Stinson and those involved in the fraud violated the First Amendment of the Constitution, the Equal Protection Clause of the Constitution, the Voting Rights Act, and 42 U.S.C. section 1983 by misleading the minority voters and knowingly counting wrongly cast ballots.[42]

After deciding jurisdiction was proper and following a three day trial, the district court rendered a decision on the plaintiffs' claims.[43] In his February 18, 1994 decision, Judge Clarence Newcomer found that Stinson had indeed perpetrated "a massive scheme" upon the voters.[44] He further found that the Board of Elections obstructed justice since it essentially prevented Marks' and the voters' claims from being heard.[45] Newcomer granted Marks' requested relief by enjoining William Stinson from acting as state senator.[46] In his order, Judge Clarence Newcomer decreed that future absentee ballots be written in English and in Spanish, that the Board of Elections be enjoined from distributing absentee ballots to candidates or their agents in a discriminatory manner and that the Board be prohibited from collecting completed absentee ballots from any campaign workers.[47] The district court then took the unusually bold step of ordering the Board of Elections to nullify *all* absentee ballots, and to certify Bruce Marks as the winner of the election based only upon votes cast in the voting machines.[48]

B. Third Circuit Review

Stinson and the other defendants appealed to the United States Third Circuit Court of Appeals (hereinafter "Third Circuit" or "appellate court").[49] The appellate court examined whether or not the federal judiciary had a duty to abstain from hearing the case given the pending actions in the state supreme court and the state senate.[50] The Third

40. Brief of Appellee—Bruce Marks at 13.
41. *Id.*; *see also* Marks v. Stinson, No. CIV.A. 93-6157, 1994 WL 37722, at *1 (E.D. Pa. Feb. 7, 1994).
42. 1994 WL 37722 at *1.
43. Marks v. Stinson, No. CIV.A. 93-6157, 1994 WL 47710 (E.D. Pa. Feb. 18, 1994).
44. *Id.* at *14.
45. *Id.* at *10.
46. *Id.* at *16.
47. *Marks*, 1994 WL 47710, at *16.
48. *Id.*
49. Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994).
50. *Id.* at 881-885.

Circuit issued its decision on March 16, 1994, holding that federal court was an appropriate forum and upholding the ousting of Stinson.[51] However, the Third Circuit found Newcomer's bold move of certifying Marks based solely on the voting machine count improper.[52]

The Third Circuit remanded the decision and instructed the lower court to seat Marks only if it could be shown "but for the wrongdoing" Marks would have won the election by a plurality.[53] The appellate court granted Judge Newcomer broad discretion since it did not require the issue to be decided with "mathematical certainty."[54] The appellate court also advised the lower court of alternative remedies such as calling a special election or creating an opening in the second senatorial district so that state entities would deal with the vacancy.[55] Interestingly, the Third Circuit never mentioned the appropriateness of the other remedies granted by Newcomer.[56]

C. *Reenter Newcomer*

On remand, Judge Newcomer heard evidence for two weeks, listened to analysis from three experts and dealt with twelve lawyers in the courtroom.[57] His opinion, issued on April 26, 1994, was remarkably similar to his first. All of the same relief was granted—including the unseating of Stinson and the naming of Marks as senator.[58] According to Newcomer this latest decision did not disenfranchise any absentee voters as the experts' testimony met the standard of "reasonable degree of scientific certainty."[59]

IV. *Marks v. Stinson* as Public Law Litigation

Obviously, the Marks-Stinson senate race and the litigation that followed present an elaborate and complex set of facts for any observer.

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51. *Id.* at 886.
52. *Id.* at 887.
53. *Marks*, 19 F.3d at 887.
54. *Id.* at 888.
55. *Id.* at 889.
56. *See generally id.* (neglecting to comment upon many of the injunctive measures granted).
57. *See* Henry Goldman, *Bickering Mars Trial on Vote Fraud—2 People Testified in the 2d District Case—12 Lawyers Argued*, PHILA. INQ., Mar. 30, 1994, at B1 (discussing Judge Newcomer's agitation with the twelve attorneys involved in the case); *see also* Henry Goldman, *U.S. Trial Judge in Vote Case Decries Lawyers' Fees—Newcomer Scolded Lawyers for Prolonging the Second District Case*, PHILA. INQ., Apr. 8, 1994, at A1 (reporting that Judge Newcomer believed the two weeks of trial could have been accomplished in just a few days had it not been for the attorneys' behaviors).
58. *Compare Marks*, 1994 WL 146113 (E.D. Pa. Apr. 26, 1994) *with Marks*, 1994 WL 47710 (E. D. Pa. Feb. 18, 1994).
59. *Marks*, 1994 WL 146113, at *29.

But, amidst all of the confusion, the federal judges in this scenario took some unusual steps. Most would agree, after reading through the facts presented above, that the steps taken are not those Americans associate with scales of justice. In fact, many would assert the federal judges behaved quite out of the ordinary.

Professor Abram Chayes, in a 1976 Harvard Law Review article, offered insight into such federal judicial behaviors.[60] In his article, Chayes described a transformation in the role of the federal court judge.[61] Notions of removed neutrality, he contended, were fast becoming a thing of the past—judges were now active participants in the litigation.[62] He explained that the actual nature of the disputes was shifting as well.[63] Private party disagreements were being replaced by those involving public policy determinations.[64] He described this modern movement as the public law litigation model.[65]

Traditional litigation, according to Chayes (1) was bi-polar in nature (i.e. a contest between two competing interests); (2) was compensatory and retrospective; (3) involved a remedy that clearly fit and logically followed the situation at hand; (4) had an effect only on the parties involved in the suit; and (5) was party initiated and party controlled.[66] This he contrasted with public law litigation which involves: (1) amorphous party structures; (2) future relief that is more equitable than compensatory in nature; (3) increasingly credible factfinding procedures; and (4) resolution in the form of a deliberately fashioned decree.[67]

Thus, as per the Chayes model, the behavior of the federal judiciary in the *Marks* case was not so unusual. Chayes would explain this litigation as right on target, given the climate of the modern court. If we examine the facts of *Marks v. Stinson* under Chayes' model we find it does fit the bill.

A. Party Structure

Marks' initial attempts to obtain judicial relief in the state system stretched far beyond a mere request for compensation from an opponent. The equitable relief demanded, impounding the absentee ballots, intimated

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60. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 29 HARV. L. REV. 1281 (1976).
61. *Id.*
62. *Id.* at 1284.
63. *Id.*
64. Chayes, *supra* note 60, at 1284.
65. *Id.*
66. *Id.* at 1285-88.
67. *Id.* at 1288-1304.

profound effects upon other persons not even party to the suit. Further, the plaintiffs' claims were directed not only at Stinson but the Board of Elections as well.

The party composition became more complex as the case moved through the state and federal courts. For instance, a group of Hispanic voters who felt their rights had been violated joined Marks in the suit.[68] A non-partisan, non-profit "watchdog" organization of citizens called the "Committee of Seventy" became involved at the state court level and later filed an amicus brief with the Third Circuit Court of Appeals.[69] Although this organization essentially shared the plaintiffs' concerns that Stinson's confirmation was invalid, they were in favor of calling another special election.[70]

In addition, the defendants' cast of characters by the time the suit was decided on remand included William Stinson, the William Stinson Campaign, the Philadelphia County Board of Elections and various Doe and Roe defendants. A motion to intervene was granted to another group of voters who claimed the absentee ballots they cast were proper and deserved to be counted.[71] Though the court never clearly delineated this latter group along party lines, these voters seemed to be aligned with the defendants since they wanted Judge Newcomer to reconsider his decision to invalidate their legally cast ballots.[72]

Such an amorphous group of actual parties is inapposite with the traditional model of "two unitary interests, diametrically opposed."[73] Under Chayes' model the broad range of interests and the number of groups involved was conducive to Judge Newcomer's exercise of broad authority.

B. Equitable Relief

Judge Newcomer explained on remand that a hearing on damages was pending, but this was not the focal point of his decision.[74] The appellate court did not discuss how or what compensation the district

68. *Marks*, 1994 WL 37722 (E.D. Pa Feb. 7, 1994) (discussing the Latino voters' standing to bring suit in federal court). *See supra* note 40.

69. *See* Brief of Amicus Curiae—The Committee of Seventy, Marks v. Stinson, Nos. 94-1247 & 94-1248, 1994 WL 80795 (3rd Cir. Mar. 16, 1994) (explaining and justifying the non-profit's involvement in the case).

70. *Id.* at 3.

71. *Marks*, 1994 WL 146113, at *1 (E.D. Pa. Apr. 26, 1994).

72. *Id.*

73. Chayes, *supra* note 60, at 1282.

74. *Marks*, 1994 WL 146113, at *36 (E.D. Pa. Apr. 26, 1994).

court should award,[75] but instructed the district court to "exercise its own discretion in light of the circumstances."[76] Notions of equity and fairness were indeed the focus of both the Third Circuit and district court opinions.

On remand, Judge Newcomer, discussed the importance of a decision that would insure "free and fair elections."[77] But, Newcomer must have recognized how extraordinary the relief he granted was as he explained "[f]ederal courts in shaping equity decrees are 'vested with broad discretionary powers.'"[78]

The unseating of Stinson, the seating of Marks and the various injunctions granted against the Board of Elections were all forms of equitable relief which insured that a continuing judgment was created which would need enforcement or clarifications in the future. As explained by Chayes, equitable relief in public law cases "is not a terminal compensatory transfer, but an effort to devise a program to contain future consequences in a way that accommodates the range of interests involved."[79]

C. Factfinding Methodology

Given the number of parties and the plethora of competing interests, there was certainly more than one version of "the story" to be told to the federal courts. In addition, the factual complexity of the situation insured that a casual assessment of the case would not be fair or appropriate.

Chayes suggested that such is often the case in public law litigation.[80] These situations, he contended, lend themselves to a more active role for the trial judge in "shaping, organizing and facilitating the litigation."[81] And, although the litigants usually produce the facts, the many complexities of such cases do not permit the parties in public law litigation to exercise complete autonomy over presentation of the case.[82]

The appellate court recognized that the situation in *Marks v. Stinson* called for more than the average presentation of evidence. They instructed the district court to demonstrate that their result would be

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75. *See generally* Marks v. Stinson, 19 F.3d 873 (3d Cir. 1994).

76. *Id.* at 890.

77. *Marks*, 1994 WL 146113, at *34 (E.D. Pa. Apr. 26, 1994) (citing Reynolds v. Sims, 377 U.S. 533 (1964)).

78. *Id.* at *34 (citing Lemon v. Kurtzman, 411 U.S. 192 (1973)).

79. Chayes, *supra* note 60, at 1294.

80. *See id.* at 1298 (explaining that "sheer volume of factual material" in the modern federal court case may cause the judge to become more active in the litigation).

81. *Id.*

82. *Id.* at 1297.

"worthy of the confidence of the electorate."[83] The Third Circuit further explained that courts have been able to meet this standard with the aid of expert testimony.[84]

In compliance with this advice, the district court on remand not only heard from experts supplied by Marks and the intervenors, but heard testimony by an "independent expert" appointed by Judge Newcomer himself.[85] This was the first time in Newcomer's twenty-two years as a judge that he had taken such a step.[86] The court-appointed expert was an economics professor from Princeton University, selected by Newcomer because he "was not aware that any experts were going to testify" and "[i]n light of the Third Circuit's mandate . . . wanted to insure that the opinions of at least one expert were going to be offered."[87]

All of the experts utilized complex statistical analysis to determine if Marks would have won the election but for the wrongdoing of Stinson.[88] Although the appointed expert used a somewhat different method of analysis than the other experts, his opinion was "considered equally with the others."[89] From the intricate statistical explanations, Judge Newcomer decided that the experts as a group proved Marks would have won the election by a plurality if the fraud had not occurred.[90]

The district court's active soliciting of its own specialist is consistent with Chayes' belief that the modern federal court needs to utilize a "visibly reliable and credible procedure for establishing and evaluating the fact elements in the litigation."[91]

D. Deliberately Fashioned Decree

The *Marks* litigation, again consistent with Chayes' assertions, concluded with a unique and "deliberately fashioned" decree.[92] Though Chayes suggested that the decree is often the result of an agreement reached between the parties, he explained that "the parties may fail to

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83. Marks v. Stinson, 19 F.3d 873, 889 n.14 (3d Cir. 1994).

84. *Id.*

85. *Marks*, 1994 WL 146113, at *27 (E.D. Pa. Apr. 26, 1994).

86. Henry Goldman, *Second District Voting Trial Ends Amid Uncertainty Over Numbers*, PHILA. INQ., Apr. 9, 1994 at B1.

87. *Marks*, 1994 WL 146113, at *27 (E.D. Pa. Apr. 26, 1994).

88. *See id.* at *22-29 (explaining the methodology and types of analysis utilized by the experts witnesses).

89. *Id.* at *27.

90. *Id.* at *29.

91. Chayes, *supra* note 60, at 1297.

92. *Id.* at 1298.

agree."[93] In this scenario, as in the case at hand, the judge must take a much more active role.[94]

Judge Newcomer's final decree listed several powerful injunctive orders. These injunctions not only prevented future actions from happening, but they carried with them "affirmative" implications of legislative acts. For instance, the Board of Elections was "enjoined from delivering or returning such records [official absentee ballot materials] to any agent or other representative of any political party or candidate."[95] Judge Newcomer stated that such relief was appropriate pursuant to section 3146.9 of Pennsylvania's election law.[96] This section of law, though, deals only with the Board's requirement to maintain such information for public records.[97] The law in no way makes any mention of the prohibition read in by Judge Newcomer.[98]

Thus, one can easily say that the *Marks v. Stinson* litigation exemplifies the modern federal court as described by Chayes. But, even using Chayes' model as a framework within which to examine the *Marks v. Stinson* case, we are still left feeling that the actions of the federal judiciary were quite extraordinary. Even if we accept Chayes' proposition that this is the way things really are within the federal courts, there are still important questions raised by the federal courts' activities in this case.

Unfortunately, analogizing to the public law model does not adequately satiate the concerns one has regarding the federal courts' behavior in the *Marks* litigation. Chayes listed some of the potential problems with this model but, with little empirical support, essentially deemed it a good system.[99] For those questioning the implications of this new model, Chayes warned that "we have invested excessive time and energy in the efforts to define . . . what the precise scope of judicial activity ought to be."[100] He instructed onlookers to attain a "more systematic professional understanding of what is being done."[101]

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93. *Id.* at 1299.

94. *See id.* at 1299-1300 (explaining that if parties do not reach an agreement the judge may need to become a "personal participant" in the lawsuit).

95. *Marks*, 1994 WL 146113, at *36 (E.D. Pa. Apr. 26, 1994).

96. *Id.*; PA. CONS. STAT. ANN. § 3146.9 (1994).

97. *See id.* (stating that absentee ballots information is "declared to be public records and shall be safely kept for a period of two years" by the boards of elections in Pennsylvania).

98. *See generally id.*

99. *See* Chayes, *supra* note 60, at 1302-1316 (describing some of the promises and problems of the public law litigation model, though urging a "hospitable reception for the developments" in the courts).

100. *Id.* at 1307.

101. *Id.* at 1313.

Chayes basically implored his reader not to question the actions of the federal courts.

The author of this paper, however, takes a different position. If a decision raises questions in our minds, we must actively address those questions. Thus, even defining *Marks* as public law litigation, we should wonder whether the federal judiciary was correct in adjudicating an essentially state election law dispute that was already being handled at the state level. Despite Chayes' admonition, we should question the propriety of the district court's remedies. As Chayes wisely recognized, "the returns are not all in" on the public law model.[102] As such, the rest of this paper will focus on the returns as seen in *Marks v. Stinson* in light of the two questions raised above.

V. Judging the Third Circuit: Propriety of Federal Intervention

While the law generally provides for the federal courts to hear cases involving federal questions and the Voting Rights Act permits a party aggrieved by discrimination to proceed to federal court before exhausting all state remedies,[103] pragmatic notions of full faith and credit require federal courts to heed the decisions that have been made during a state's adjudicative processes.[104] This must be the case even if states do not make the best decisions.

In addition, while it is true *Baker v. Carr*[105] and its progeny opened the door for federal judicial review of discriminatory state election laws, unbridled election law intervention runs counter to the idea that federal courts should refrain from hearing constitutional challenges when regarded an improper intrusion on the right of a state to enforce its own laws in its own courts.[106] Limited intervention has certainly been the policy regarding "garden variety" election disputes, such as the one at hand, which really do not go beyond a question of how election ballots should be marked and counted.[107]

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102. *Id.* at 1309.

103. 28 U.S.C.A. § 1331 (West 1994); 28 U.S.C.A. § 1971(d) (West 1994).

104. *See* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 731-36 (1994) (explaining that federal courts should give full faith and credit to state court decisions).

105. *See* Baker v. Carr, 396 U.S. 186 (1966) (holding that a federal court can review a discriminatory state legislative apportionment scheme).

106. WRIGHT, *supra* note ___, at 340.

107. *See* Welch v. McKenzie, 765 F.2d 1311, 1317 (5th Cir. 1985) (making a distinction between "garden variety" election law disputes and those which are constitutionally cognizable); *see also* Roe v. Alabama, 1995 WL 2398 at *3 (11th Cir. Jan 4, 1995) (stating "[g]enerally, federal courts do not involve themselves in 'garden variety' election disputes").

The Stinson camp questioned the propriety of the federal court's involvement in this state level election law dispute. They protested strongly against the federal court's jurisdiction over Marks' cause of action.[108] Despite Marks' amended complaint alleging violations raising proper federal questions, Stinson articulated that lack of standing as well as various abstention doctrines should prevent the federal court from hearing the case.[109] One of the major issues in the district court became the *Younger* abstention doctrine.[110]

The *Younger* abstention doctrine,[111] although initially a criminal law theory, has been applied in civil cases as well.[112] The central message of *Younger* is that a federal court should not interfere with pending state court proceedings.[113] The doctrine is now embodied in a three part test. In order for a party to challenge federal court jurisdiction, that party must show (1) that there are ongoing state proceedings involving the would be federal plaintiffs that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise the federal claims.[114] Under this doctrine, the district court found the federal system to be an appropriate forum for Marks.[115] Specifically, the district court stated that under the third prong the state did not provide an adequate forum in which Marks could raise federal claims.[116] Even if the state forum was adequate, the court explained, given the irreparable harm Marks and the voters could suffer from not being heard in a timely fashion, the federal court had a duty to the public to hear the case.[117]

The Third Circuit's appellate assessment of the *Younger* abstention doctrine was considerably different. The court stated it did not believe

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108. *See* Marks v. Stinson, No. CIV.A. 93-6157, 1994 WL 37722 (E.D. Pa. Feb. 7, 1994) (assessing defendants' claims that the federal court lacked jurisdiction to hear Marks' complaint).

109. *Id.* at *1.

110. *Id.* at *2-3.

111. The *Younger* abstention doctrine was created in Younger v. Harris, 401 U.S. 37 (1971) (holding that a federal court acted improperly by enjoining a state court from prosecuting an individual under the state's criminal syndicalism act).

112. *See* Middlesex Co. Ethics Comm. v. Garden Stat Bar Ass'n, 457 U.S. 423, 432 (1982) (expanding the scope of Younger abstention doctrine to include civil disputes); *see also* PETER W. LOW & JOHN CALVIN JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS 1233-43 (1989) (discussing *Younger's* application to civil cases in the federal courts).

113. *Middlesex*, 457 U.S. at 431.

114. *Id.* at 432.

115. *Marks*, 1994 WL 37722, at *2-3 (E.D. Pa Feb. 7, 1994).

116. *Id.*

117. *Id.* at *3.

the state proceedings to be conducted in bad faith.[118] And, while the appellate court recognized the utility of the three part test, they explained it did not apply to the case at hand.[119] The court opined that "where federal proceedings parallel but do not interfere with the state proceedings, the principles of comity underlying *Younger* abstention are not implicated."[120]

The Third Circuit, while it expressed that the federal and state proceedings were "parallel," never really defined the term or explained what it meant. The appellate court reasoned that plaintiffs fighting the war on both the federal and state front was permissible because "the relief they have sought and received does not *in any way* interfere with the judicial process of the state."[121] The Third Circuit added that "[t]his is not a case in which the federal plaintiffs are seeking relief which will *in any way* impair the ability of the state courts of Pennsylvania to adjudicate anything currently before them."[122]

Such statements by the court are misleading at best. The Third Circuit seemed to be trying to step lightly on state territory. But their vague rationale obfuscated notions of issue and claim preclusion. This is particularly true since the Board of Elections had already rendered a decision with regard to the issues involved.[123]

But, even if we are to assume there was not a final judgment on the merits of the Marks group's claims, the Third Circuit's assessment of the future of the litigation seems disingenuous. Though the appellate court did concede that "parallel proceedings always involve a likelihood that a final merits judgment will effectively terminate the other . . .,"[124] such a statement is not a clear assessment of what actually would occur. Here it would seem the "likelihood" was unavoidable.

While it may be argued that the different adjudicative proceedings could continue to exist harmoniously, any final decision reached by the federal court would have necessarily controlled the state supreme court and prevented them from rendering their own decision on the same issues and claims.[125] There would be no way for Judge Newcomer to seat

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118. *Marks v. Stinson*, 19 F.3d 873, 882 n.5.

119. *Id.* at 884.

120. *Id.* at 882 (citing Gwynedd Properties v. Lower Gwynedd Township, 970 F.2d 1195, 1201 (3d. Cir. 1992)).

121. *Id.* at 885 (emphasis added).

122. *Marks*, 19 F.3d at 884 (emphasis added).

123. *Id.*

124. *Id.* at 885.

125. *See* ROBERT C. CASAD, RES JUDICATA/PRECLUSION (1969) (describing the ways in which litigants can be barred or precluded from addressing issues and claims in a court once such matters

Marks under federal law and for the Pennsylvania Supreme Court to decide differently.[126]

The Third Circuit's discussion of "parallel proceedings," therefore, is deceptive, and is hardly a good example for the federal court to be setting in the midst of claims of fraud. Essentially, the Third Circuit has actively encouraged unhappy state litigants to disempower their own state courts by shopping for a federal forum to solve local election law disputes.

Interestingly, the Third Circuit applied the same "parallel" rationale to the proceedings in the Pennsylvania Senate. Though reluctant to consider the senate's appeal process as "judicial" in nature, they announced that "certification of Marks would not preclude an election contest in the senate, any more than the prior certification of Stinson precluded one."[127] The Court then immediately dropped a footnote stating, "we do not mean to suggest that a federal court would be without power to enjoin an election contest in the Senate upon finding a violation of the Voting Rights Act of the Civil Rights Act, or that the Senate would not be required to give full faith and credit to a final district court judgment in this case. Those issues are not before us and we express no opinion thereon."[128]

This treatment of the senate proceedings is problematic in two ways. First, the Third Circuit offered the state senate no clear guidance as to how it should deal with an inconsistent decision should one be reached. Second, the appellate court created a frightening image of an omnipotent federal court.

Thus, it is clear from the foregoing analysis that the appellate court's application of abstention and preclusion doctrines effectively deprived the state system of any meaningful review of Marks' state claims. But assuming that a federal court should have heard this dispute, how far should they have gone in fashioning relief for the claimants?

VI. Judging the District Court: Propriety of Remedial Discretion

Recently, Chayes reexamined the scope of judicial activism in relation to remedies.[129] He acknowledged that "the general tone of scholarly, journalistic and political commentary has been increasingly

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have been handled by a prior court).

126. *See generally id.*

127. *Marks*, 19 F.3d at 885.

128. *Id.* at 885 n.9.

129. Abram Chayes, *The Supreme Court 1981 Term—Foreword: Public Law Litigation and The Burger Court*, 96 HARV. L. REV. 4 (1982).

skeptical of judicial efforts to ride herd on state and federal bureaucracies."[130] He further recognized "[t]o be sure, the purpose of the decree is to rectify a course of conduct that has been found to abridge rights asserted by plaintiffs . . . [c]ontrol of remedial discretion is therefore an insistent problem in a public law system."[131]

After this realization, however, Chayes still did not draw a line in the sand. Rather, he again warned of the "futility of trying to deal with problems raised by public law litigation in terms derived from the classic law model" and suggested that federal decisions should not be overly scrutinized under a right-remedy analysis.[132] His main concern was that the United States Supreme Court, when examining "remedial discretion," constructed an "effigy of the traditional lawsuit" which was incoherent and diverted attention from other concerns that should be taken into account.[133]

Even if we accept Chayes' proposal that we should not impose strict, traditional guidelines upon our federal judiciary, we as onlookers must still be left feeling cheated by Judge Newcomer's decision. Newcomer's single-handed "election" of Marks stirs emotions that stem from something deeper than the esoteric notion of sufficient links between rights and remedies. Rather, there is a strong, instinctive belief that the relief granted by Judge Newcomer is destructive to our democratic ideals.

Assuming the federal court should have been hearing this case, the District Court had a difficult task in deciding what to do once it removed Stinson from office. But, of the options offered by the Third circuit — to seat Marks, call a new election, or declare a vacancy and permit the state to take care of the rest, Judge Newcomer chose the worst.

This is not to say that the Federal Court should not have ousted Stinson, because clearly he was not the winner of the election. But, as clear as this is, so too is the fact that Marks was not the winner. Despite the numbers game played by Judge Newcomer, after review of the experts' testimony there was no way to tell who won by a plurality of the vote. Further, no matter how Judge Newcomer attempted to slice it, promises of "one man-one vote" were not fulfilled in this election. Some men and women's votes were simply not counted. As was pointed out by Richard A. Sprague, the attorney for the defendant intervenors, "[o]ne thing is crystal clear: There's not a person in the courtroom who can say

130. *Id.* at 7.
131. *Id.* at 46.
132. *Id.* at 47-55.
133. *Id.* at 8.

who would have won but for the fraud."[134] It seems as though Newcomer, on remand, merely lined up his dominoes in such a way that it at least created the appearance of a well-founded opinion.

The selection of the expert from Harvard supports this inference. After the Third Circuit instructed the district court to provide more reliable evidence that Marks was chosen by a plurality of the vote, Newcomer actively sought his own expert. It seems unrealistic that Newcomer would have chosen someone he knew would prove him wrong on remand. Instead, the judge selected an acquaintance—someone he met at a statistics seminar.[135] Hardly an insurance of neutrality.

Moreover, in *Milliken v. Bradley*,[136] the Supreme Court warned that "[t]he Federal Court in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution."[137] By naming Marks as Senator, Judge Newcomer usurped power specifically granted to the Pennsylvania Lieutenant Governor pursuant to Pennsylvania election laws.[138] Though the contested senate seat remained empty throughout the litigation, Lieutenant Governor Singel was prevented from fulfilling his obligation because technically there was no "vacancy."[139] Judge Newcomer could have bowed out gracefully and avoided the title of extreme activist by opting to leave the seat open and permitting Lieutenant Governor Singel to do his job. Even recent redistricting cases have recognized the necessity of intervening only as much as is necessary and permitting state governments to formulate their own remedies.[140]

Additionally, just because the Board of Elections and the Stinson Campaign acted deceptively does not mean that the entire electorate is incapable of making informed decisions. Newcomer's paternalistic

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134. Henry Goldman, *Second District Voting Trial Ends Amid Uncertainty Over Numbers*, PHILA. INQ., April 9, 1994, at B1.

135. *Id.*

136. 433 U.S. 267 (1977).

137. *Id.* at 280-81.

138. The lieutenant governor must call a special election to fill any vacancy in the senate. *See* PA. CONS. STAT. ANN. § 2778 (1994) (explaining how vacancies in the Pennsylvania Legislature should be filled).

139. *See* Marks v. Stinson, 19 F.3d 873, 889 (3d Cir. 1994) (permitting the district court to create an "interim period without representation" for the second senatorial district while the district court made its decision). *See also* Russell E. Eshleman Jr. & Henry Goldman, *Second District Partisans Skirmish—Singel Asks a Court to Let Him Set A May 10 Election—Fumo Sues Singel For Not Setting One—Marks Drops An Appeal*, PHILA. INQ., Mar. 15, 1994 at A1 (recounting the confusion surrounding the interim "vacancy" in the senate and Lieutenant Governor Mark Singel's concerns about calling a special election).

140. *See, e.g.*, McDaniels v. Mehfoud, 702 F. Supp. 588, 596 (1988) (granting a state legislature seventy-five days to create a remedial plan).

decision prevented this from happening. The cost of prolonging the process by calling a special election would have been outweighed by the need to maintain the state's democratic structure. Further, had Newcomer chosen to order a special election when the case was first before him, that special election could have occurred sooner than the actual district court decision.

The irony in all of this is that the Voting Rights Act was created to ensure that all persons have the right to vote.[141] However, in attempting to remedy this election dispute, and perhaps in contravention of the Voting Rights Act,[142] the court ensured that some votes were not counted.

An 82 year old man who voted by absentee ballot in the special election eloquently criticized Newcomer's initial decision.[143] He wrote:

> I was always taught . . . that I was one man in a democracy with one vote, and that this vote counted no matter what. How then does a challenge by Bruce Marks of some absentee votes disqualify my vote? I am perplexed and confused over this.
>
> Judge Newcomer . . . has violated the very principles of our democracy, let alone our precious Constitution . . . Could it be that Judge Newcomer, an appointed Judge for life who answers to no one, doesn't quite understand our democratic system because he is so far removed from it? I think that is so.

Though Mr. Fitzpatrick's comments were directed at Newcomer's first decision, they apply equally to the final decision as well.

VII. Conclusion

Marks v. Stinson is an interesting and complex case that raises a multiplicity of issues relating to civil rights, election law, federal supremacy, judicial discretion and basic notions of democracy. This paper clearly leaves many a stone unturned. It is, however, a cursory review of the litigation in light of Chayes' public law litigation model.

This paper, within the framework of Chayes' model, has attempted to look more closely at some of the issues raised by current federal judicial activism. Specifically, this paper addressed: (1) whether the federal judiciary should have heard the *Marks* case even though it was

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141. *See e.g.* South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (explaining the purpose of the Voting Rights Act).

142. *See* 42 U.S.C.A. § 1973(n) (West 1994) (stating that the provisions of the Voting Rights Act should not be construed to adversely affect the right of any person to vote).

143. John J. Fitzpatrick, *Editorial*, PHILA. INQ., Mar. 3, 1994 at A14.

under consideration within the state's adjudicative systems; and (2) if we believe that the federal court should have accepted the case, did the federal judiciary go too far in formulating its equitable relief.

After this basic deconstruction of the Pennsylvania State Senate special election and the *Marks v. Stinson* litigation, one should recognize that there is not one clear winner or loser in this scenario. Despite the federal courts' well-meaning intentions to intervene on behalf of democracy and the public interest, such ambitions were not fulfilled. In *Marks v. Stinson* the ideal of "one man—one vote" was taken to extremes and the American dream of an empowered democratic nation was denied a victory.

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