Twitter Thread by Ben Pontz



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I don’t think that yesterday’s fracas in the #PASenate is quite as straightforward as either side would make it out to be (shocker, I know). The politics are for others to analyze, but just a few points on the law. (THREAD 1/29)

Off the bat, it’s worth noting that what distinguishes this from the Trump mayhem is that there is a pending legal challenge that deals with enough votes to be dispositive of the election result depending how the court rules. That was not the case in any state for Trump. (2/29)

That doesn’t necessarily justify the GOP’s actions yesterday, but it is not an apples-to-apples comparison to say this is mere Trumpianism. (3/29)

The federal judge hearing the case, J. Nicholas Ranjan, is a Trump appointee, though he has ruled against Trump on election-related matters already this cycle. (4/29) https://t.co/goXcXD9R7h

As near as I can tell, there are two potential legal issues here: first, is there a “case or controversy” per Article III of the U.S. Constitution and, if so, has the Ziccarelli campaign sued the right party (the Allegheny County Board of Elections). (5/29)

Allegheny County thinks not. Because the Department of State has certified the election results, they contend they are absolved at this point and, presumably, if the campaign has a problem, they should sue someone else. https://t.co/NC1jnN4RwQ (6/29)

It’s possible, then, that the case gets kicked on those procedural grounds. That would not necessarily prevent a refiling with a new defendant, however. So, one way or another, the court may well get to the legal question that Ziccarelli raises. (7/29)

The crux of that question is whether there is an equal protection violation under the 14th Amendment to the U.S. Constitution for one county to count a class of votes that does not meet the letter of the PA Election Code and another county not to in the same election. (8/29)

In other words, are voters in county A (where the letter of the law was followed) disenfranchised in having their votes diluted by county B’s decision (arguably in following the spirit of the law) not to count the class of votes in question? (9/29)

Although he declined to issue an injunction, Judge Ranjan appeared open to the argument back in November. Final briefs on the matter are not due until January 8. https://t.co/hPtpOIWMEC (10/29)

Bush v. Gore affirmed existing SCOTUS precedent that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” (Reynolds v. Sims, 1964) (11/29)

Applying that concept to the proposed Florida recount, the Court held that differing standards in different counties effectively diluted some voters’ franchise and thus constituted an equal protection violation. https://t.co/XzmfYKCeIt (12/29)

BUT, and this is a big but, variation between counties is not, itself, an Equal Protection violation. As the Third Circuit ruled earlier this year … (13/29)

“Even when boards of elections ‘vary . . . considerably’ in how they decide to reject ballots, those local differences … do not violate equal protection.” (Trump v. Secretary, citing Ne. Ohio Coal. for the Homeless v. Husted, 6th Cir. 2016) https://t.co/Qxy7USr01Q (14/29)

The key distinction between PA and Florida 2000, the 3rd Circuit ruled, was that the “intent of the voter” was, itself, arbitrary and fostered arbitrary treatment. “Here, by contrast, Pennsylvania’s Election Code gives counties specific guidelines.” (15/29)

Ah, but the PA Election Code does provide guidelines and one county failed to follow them, one might argue. The PA Supreme Court received several such petitions in November and consolidated them into one case. https://t.co/A6gQU3MiQ7 (16/29)

The PA Election Code requires that voters “fill out, date, and sign” the declaration on the outside envelope of mail-in ballots. The question is whether failure to date the ballot contravenes that requirement and thus requires such ballots to be tossed. (17/29)

The Court held that, despite the Election Code’s use of the word “shall,” the requirement is “directory” and not “mandatory,” meaning failure to comply does not AUTOMATICALLY require a ballot to be tossed. (18/29)

The key, the court ruled, is to determine whether the requirement is a “minor irregularity” or whether it constitutes a “weighty interest” such as fraud prevention. (19/29)

The court ruled it was the former. “The date that the declaration is signed is irrelevant … [because] a board can reasonably determine that a voter’s declaration is sufficient even without the date of signature.” (20/29)

BUT (yes, another but)—four of the seven SCOPA justices signed onto opinions that, at minimum, cast doubt on this conclusion about undated ballots. (21/29)

HOWEVER (had to change it up), Justice Wecht said that the requirement to include the date should only be enforced prospectively (i.e. in future elections) and not invalidate ballots in this one and thus provided the fourth vote to toss the

proximal controversy. (22/29)

And that brings us back to the pending federal court case. Federal courts tend to offer deference to state courts in interpreting state law unless a federal constitutional violation is implicated. Is that the case here? (23/29)

Maybe. Ziccarelli certainly can argue that a majority of SCOPA justices agreeing on the law and then deciding not to grant the protections of it to certain voters is an equal protection violation akin to that in Bush v. Gore. (24/29)

Indeed, she has. It’s hard to say whether Judge Ranjan will go for it. (25/29)

BUT (last one, I promise)—the argument floating around that federal courts have no jurisdiction in state elections is not one I would think Democrats would want to lean in to very heavily. (26/29)

Federal courts have used the 14th Amendment to assert jurisdiction and ensure equal protection in all kinds of areas reserved to the states (e.g., education / school desegregation). Civil rights often depend on it. (27/29)

So, while Democrats obviously find this particular potential invocation of the 14th Amendment problematic, I’d think they should be cautious about throwing the baby out with the bathwater. (28/29)

All of that is to say, who knows what will happen? But the floor of the PA Senate tends not to be a good place to air complex legal arguments and I was curious, so I thought I’d do a dreaded tweet storm. Any of this could be wrong, but thanks for reading to the end. (29/29)

Addendum: Proofreading this, two minor errors. Tweet 13 should say "in 2020" rather than "earlier this year" (though I do get a real 2020 feeling from the first six days of 2021), and tweet 24 should say "proximate" instead of "proximal." Alas.