Role of the Courts in Election Contest Proceedings

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2813

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
The Role of the Courts in Election Contest Proceedings

One aspect of the inherent state power to control and regulate elections has usually been delegated to the courts—that of conducting election contests. But the state legislatures have failed to promulgate adequate judicial procedures, so that election contests are often inefficient. The author of this Note surveys the most prevalent problems of judicially conducted election contests. He concludes, specifically, that the state legislatures, to override the inadequacies of the remedy of mandamus, should create a judicial remedy allowing the contestants to compel the correction of errors and the canvassing board to petition for an amendment and, to overcome the effective disfranchisement of many voters by the distinguishing mark statute, should provide a voting stamp or require voting machines.

The November, 1962, gubernatorial election in Minnesota ended in an election contest that attracted nationwide attention. On the original canvass, candidate Karl Rolvaag won over incumbent Elmer L. Andersen by 53 votes out of 1,299,350 tabulated. After ten county canvassing boards voluntarily recanvassed and amended their returns to correct errors, Andersen had 142 more votes than Rolvaag. The election contest that followed lasted nearly four months before Rolvaag was ultimately declared the winner. During the delay, however, Andersen continued to serve as governor, his term extending well into the 1963 legislative session, with legal and political repercussions that continue to this date. The shortcomings of the judicial contest procedure, as evidenced by this delay in reaching a final decision, will be examined by this Note in light of the apparent policies that underlie the procedure itself.

2. The Board’s voluntary amendments were held valid in In re Andersen, 264 Minn. 257, 119 N.W.2d 1 (1962).

Five other Minnesota contests resulted from the 1962 election. In Sperl v. Wegwerth, 265 Minn. 47, 120 N.W.2d 355 (1963), John V Sperl success-
I. THE ROLE OF THE COURT

Each sovereign state has the power, subject to the limitations of the federal constitution, to control and regulate all phases of elections, including election contests, held within its boundaries. Although this power rests in the legislative branch of the state government, the legislature has usually empowered the state judiciary to hear election contests. By delegating this jurisdiction to the judiciary, the legislature has sacrificed expediency and expertise for the procedural safeguards and judicial aura of a court proceeding. Although, alternatively, a special legislative agency could conduct election contests, the decision to delegate them to the courts appears sound, for a contest easily lends itself to the judicial forum: The courts not only are adapted to the functions of statutory construction and the following of precedent, but they also maintain instruments of process that might be required. In the absence of any authority for the courts to hear a contest, moreover, the losing candidate’s judicial remedy would fully contested the election of Mrs. Leonard Wegwerth as county commissioner. Originally Mrs. Wegwerth was declared the winner by 9 votes, but after the recount Sperl had won by 2 votes. In Fitzgerald v Morlock, 264 Minn. 417, 120 N.W.2d 336 (1963), a contest for the state representative’s seat, Henry J. Morlock, whose original margin of victory was 14 votes, ultimately defeated John M. Fitzgerald by only 10 votes. In Johnson v Swenson, 264 Minn. 449, 119 N.W.2d 723 (1963), C. A. Johnson contested the victory of Donald E. Swenson for the state legislative representative. The court upheld the argument that the votes of two precincts, with a total of 700 votes, should not be rejected because of the election judges’ error in numbering the ballots and gave Johnson the election. In Odegard v. Olson, 264 Minn. 439, 119 N.W.2d 717 (1963), Robert J. Odegard, who lost by 380 votes to Alec G. Olson in the Sixth Congressional District, was denied an order restraining the issuance of the Certificate of Election because of the court’s lack of jurisdiction to handle a contest for a federal office. Finally, in Christenson v Allen, 264 Minn. 395, 119 N.W.2d 35 (1963), Gerald W Christenson contested the 66 vote margin of Claude H. Allen for the office of state senator. The court dismissed the action because of improper pleadings.


6. An example of an absence of authority occurred in Minnesota in the area of school elections. Originally, it had been held that there was no jurisdiction for such a contest. Johnson v Duboun, 208 Minn. 557, 294 N.W. 839 (1940); MINN. ATT’Y GEN. OPS. 187–A–4 (1954); cf. State ex rel. Kitzke v Independent Consol. School Dist. No. 88, 240 Minn. 335, 61 N.W.2d 410 (1953) (quo warranto). In 1955 the state legislature amended the election
be limited to a writ of quo warranto, an inadequate substitute at best.7

The legislative grant might include jurisdiction to entertain election contests for all county and municipal offices, state executive and judicial offices, or, even, state legislature seats.8 A delegation of authority to hear a contest for a state legislative seat is, however, somewhat complex, for many state constitutions provide that each house shall be "the judge of the election returns and eligibility of its own members."9 Most state legislatures circumvent this constitutional restriction by giving the judiciary power merely to determine which of the candidates received the highest number of votes legally cast at the election, while retaining the power to accept or reject the court’s final decision.10 This delegation, being simply a convenient method of securing evidence in advance of the meeting of the legislature, is usually considered constitutional.11 Despite this added complication, courts handle a state legislative contest the same as they would any other contest, the only practical difference being the finality of decision; in all contests, a trial court usually has the authority to supervise a recount for the correction of tabulation errors and to interpret and apply the state’s election statute to provide authority.  

---

7. A quo warranto writ provides a basis for inquiry into the authority by which a person assumes to exercise the functions of a public official. A claim of error in the tabulation of ballots, however, is usually not considered grounds for a quo warranto proceeding. See, e.g., State ex rel. Dowdall v. Dahl, 69 Minn. 108, 71 N.W. 910 (1897); Loposser v. State ex rel. Gause, 110 Miss. 240, 70 So. 345 (1915). See generally Brightly, Leading Cases on Elections 663 (1871); Lewis, Handbook on Election Laws 170–74 (1919).


laws to determine if there were any procedural irregularities adversely affecting the conduct of the election.

A similar problem arises out of contests for a federal congressional seat. The federal constitution provides that "each House shall be the judge of the Elections, Returns and Qualifications of its own Members." As a result, most courts, state and federal, have held that a general state legislative grant to hear all contests does not confer the necessary jurisdiction to hear an election contest for a congressional seat, or even to supervise a recount of the ballots. Underlying these decisions is the concept that Congress has exclusive jurisdiction, that therefore the state legislatures do not have the power to delegate it to the courts. Recently, however, a few states, following the example of state legislative contests, have expressly delegated to the state judiciary the authority to determine which candidate received the highest number of legally cast votes in a congressional election. Although such a delegation might be questioned on the same ground as the general legislative grant of jurisdiction to the state courts, a broader constitutional view — that Congress and the states have concurrent powers over election contests with Congress having the final determination — is supported by strong considerations:

The state courts not only are the most convenient forums in

---


13. Keogh v Horner, 8 F Supp. 933 (S.D. Ill. 1934); Youngdale v Eastvold, 239 Minn. 134, 44 N.W.2d 459 (1950); Ekwall v Stadelman, 146 Ore. 439, 30 P.2d 1057 (1934); Wettenzel v Zimmermann, 249 Wis. 237, 24 N.W.2d 504 (1946).


15. A state legislature is the judge of its own members and may delegate to the state courts the power to obtain evidence. Hames v Searle, 50 Minn. 489, 61 N.W. 555 (1894). The federal analogy, however, would be for Congress, as the ultimate judge, to delegate power to the federal district courts to obtain evidence.


which to conduct a contest, but they are much better suited than Congress to apply the applicable state law. Further, since the state-granted Certificate of Election has no constitutional status, holding the certificate in abeyance will not conflict with congressional jurisdiction and, in fact, will only allow the state to determine which candidate should be given the initial advantage in Congress.18

II. CONTROL OF ELECTION OFFICIALS

The canvassing procedure employed by most states is relatively simple.19 In Minnesota, for example, the precinct judges, at the close of the voting, tabulate the ballots to determine the total number of votes cast for each candidate and then, with the ballots locked in a safe place, transmit the precinct results on a return to the County Auditor. A County Canvassing Board is then convened, which canvasses these precinct returns to determine which candidate received the largest number of votes and, in a statewide election, which transmits the county results on a return to the Secretary of State’s office where the State Canvassing Board assembles and determines the winner. If no contest is then initiated, the appropriate official will issue a Certificate of Election to the declared winner, which is prima facie evidence of the election result.

Judicial intervention into the elective process may occur initially on a petition for a writ of mandamus to control the conduct of the precinct judges or the canvassing board.20 Both bodies, being composed of public officials charged with performing a statutory duty, may be the subjects of a mandamus action if they refuse to act at all.21

20. See, e.g., State ex rel. Smith v. Carey, 49 Del. 143, 112 A.2d 26 (1955); Hilton v. Grand Rapids, 112 Mich. 500, 70 N.W. 1043 (1897); Hunt v. Hoff- man, 125 Minn. 249, 146 N.W. 738 (1914); State ex rel. Weltz v. McFadden, 46 Neb. 668, 65 N.W. 800 (1896). See generally Lewis, op. cit. supra note 7, at 178. Compare Whited v. Fugate, 198 Va. 328, 94 S.E.2d 292 (1956) (mandamus was allowed because the duty to be performed was ministerial), with Hall v. Stuart, 198 Va. 315, 94 S.E.2d 284 (1956) (mandamus was not allowed because the duty to be performed was judicial). A discussion of these two cases is set forth in 1 WM. & MARY L. REV. 107 (1957).
21. E.g., Dotson v. Ritchie, 211 Ark. 784, 202 S.W.2d 503 (1947); State ex rel. Malcolm v. Thrasher, 77 Ga. 671 (1886); Laumbach v. Board of County
Where public officials have performed their duties, but have done so in such a negligent manner that the election results are tarnished, mandamus, although perhaps desirable, is not so clearly available. Upon discovery of such errors, mandamus might be sought to compel the officials to amend their results or an order sought to compel the acceptance of new totals if the officials voluntarily amend. Both the precinct judges and the canvassing board members are capable of making inadvertent errors that may alter the outcome of the election, and although these errors could be corrected by a subsequent contest, compelling the officials to correct the errors at this earlier date will save both time and expense. The difficulty with allowing mandamus as a remedy to this problem is that a mandamus will not lie to force an official to perform an act which that official could not have performed voluntarily. The statutes regulating both the precinct judges and the canvassing boards usually require that these bodies commence and perform their duties and adjourn sine die; since they are arguably functus officio upon adjournment, they could not amend voluntarily. The predominant view, however, is that

Comm'ts, 60 N.M. 226, 290 P.2d 1067 (1955); State ex rel. Fanning v Mercer County Court, 129 W Va. 584, 41 S.E.2d 855 (1946).
22. See, e.g., State ex rel. Nuccio v Williams, 97 Fla. 160, 120 So. 310 (1929); State ex rel. Fanning v Mercer County Court, 129 W Va. 584, 41 S.E.2d 855 (1946).
23. See In re Andersen, 264 Minn. 257, 119 N.W.2d 1 (1962).
24. In the recent Rolvaag-Andersen contest it was estimated that there were mathematical errors in about 60% of the precincts. Kuderling, Recount Uncovers Problems in Election Procedures, 48 Minnesota Municipalities 76 (1963).
25. The significance of the totals of the original canvass should not be overlooked. First, the result will determine which of the two candidates will bear the burden of contesting the election, which in some jurisdictions includes proving the identity of the ballots and that the ballots have not been tampered with. E.g., Hicks v Kimbro, 210 Ky. 265, 275 S.W 814 (1926), 14 Ky. L.J. 250 (1926); Sullivan v Ebner, 195 Minn. 232, 262 N.W 574 (1935). Second, while a contest is in progress the contestee will often occupy the contested position, and may exercise certain powers of that office. In the recent Minnesota Rolvaag-Andersen contest, contestee Andersen made 120 valid political appointments before Rolvaag took office. State ex rel. Todd v Essling, Doe. No. 39199, Minn., May 1, 1964; see The Long Recount, Newsweek, March 11, 1963, pp. 27-28.
26. Rosenthal v. State Bd. of Canvassers, 50 Kan. 129, 32 Pac. 129 (1898); Clark v Buchanan, 2 Minn. 346 (Gil. 298) (1858); see McCrary, Elections §§ 267-269 (4th ed. 1897).
27. See note 26 supra. It is generally accepted that the canvassing board is required to accept the totals on the returns as they are received from the precinct judges, and it may not go beyond the returns to sift out any unlawful or fraudulent votes that allegedly were cast at the polls. E.g., State
the statutory duty to tabulate the votes correctly may not be avoided merely by adjournment, that the duty is continuous, and that a mandamus will be granted to force the board to reconvene and amend its results.\textsuperscript{28}

If a court allow a mandamus to compel the precinct judge or the canvassing board to change its results, it necessarily follows that such bodies could voluntarily reconvene and amend their results. Usually their amendment power is limited to the correction of obvious errors,\textsuperscript{29} the same as the limitation on the canvassing board's correction power during the original canvass.\textsuperscript{30}


\textsuperscript{28} Most courts feel that calling the board \textit{junctus officio} is merely stating a desired conclusion and that the statutory duty to canvass the votes properly may not be avoided by adjournment. \textit{E.g.,} Taft v. Has, 34 Cal. App. 309, 167 Pac. 306 (D.C. 1917); Hunt v. Hoffman, 125 Minn. 249, 146 N.W. 733 (1914); Alderson v. Commissioners, 32 W. Va. 454, 9 S.E. 863, 866 (1889).

\textsuperscript{29} \textit{E.g.,} State \textit{ex rel.} Nuccio v. Williams, 97 Fla. 159, 120 So. 310 (1929); Mohoney v. Board of Supervisors, 205 Md. 325, 109 A.2d 110 (1954); \textit{In re Andersen}, 264 Minn. 257, 119 N.W.2d 1 (1962); State \textit{ex rel.} Fanning v. Mercer County Court, 129 W. Va. 584, 41 S.E.2d 855 (1946). \textit{But see Gray v. Huntley}, 77 Colo. 478, 238 Pac. 58 (1925) (court placed no apparent limitation on the scope of the voluntary amending).

\textsuperscript{30} In \textit{In re Andersen}, 264 Minn. 257, 119 N.W.2d 1 (1962) the Minnesota court felt that the following errors were sufficiently obvious:

1. Where more votes were cast for the office than there were registered voters in the precinct.

2. Where an unusual number of votes were cast for a third party.

3. Where absentee ballots were not counted because of a misapplication of the election laws.

4. Where there are more votes for a lesser office than for the contested office.

5. Where two election officials swear by affidavits that the figures are wrong.

In addition, the court allowed the amended returns from two counties where there was no indication as to what the obvious errors were. \textit{Compare Matter of Hearst}, 183 N.Y. 274, 36 N.E. 28 (1905), \textit{with Rosenthal v. State Bd. of Canvassers}, 50 Kan. 129, 32 Pac. 129 (1893).

Some state statutes do permit the canvassing board to reject a precinct's return and order that the ballots be inspected if an obvious error appears on the face of the return itself. \textit{E.g.,} \textit{Minn. Stat.} § 204.30 (1961). Such an obvious error would be where there are more votes for an office than there are registered voters in the whole precinct. \textit{In re Andersen}, 264 Minn. 257, 119 N.W.2d 1 (1962); see \textit{Minn. Att'y Gen. Op.} 64-6 (1961); \textit{cf. State \textit{ex rel.} Mitchell v. Wolcott}, 46 Del. 368, 83 A.2d 726 (1951). This exception, however, is intended to permit the correction of mistakes during the original meeting of the canvassing board and is not authorization for a board that has performed...
The rationale advanced in support of allowing voluntary amendments is basically that the will of the majority of electors should not be thwarted by the negligence or inadvertence of officials occurring during the vote tabulation.\(^1\) In addition, disallowing amendments unfairly places the burden of contesting the election on the candidate who actually received the highest number of votes,\(^2\) perhaps promoting fraudulently created mistakes in the original counting.\(^3\) Furthermore, even though a court advances a contest on its docket for early consideration,\(^4\) allowing voluntary amendments might save valuable time and expense, especially if the amended results, by increasing the margin of defeat, persuade the losing candidate that a contest would be futile.

Several considerations, notwithstanding the desirability of allowing a mandamus to compel the precinct judge or canvassing board to amend, weigh against permitting voluntary amendments.\(^5\) An election contest, which is available to the losing candidate, is arguably an adequate remedy.\(^6\) Second, to determine and announce the winner of an election as quickly as possible is in the

its duties and adjourned subsequently to reconvene, reject a return, and order that the ballots be inspected.

31. [It must be conceded that the amended returns from the ten counties involved reflect the true vote of the people. To now hold that the results of this election must be based on the return that everyone conceives to be erroneous would be a perversion of our whole election process in the pursuit of strict adherence to statutes that need not be so strictly construed.

In re Andersen, 264 Minn. 257, 260, 119 N.W.2d 1, 8 (1962).

32. See note 25 supra; Moore v Pullem, 150 Va. 174, 142 S.E. 415 (1928).

33. See Roemer v Board of City Canvassers, 90 Mich. 27, 51 N.W. 267 (1892).

34. In most states this is required by statute. E.g., Mo. Rev Stat. § 124.00 (1909); N.Y. Election Laws § 385. But cf. Oliver v Freeland, 74 S.W.2d 711 (Tex. Civ App. 1944), 48 Harv. L. Rev. 944 (1935). The United States Supreme Court, however, will not advance an election case on its docket, for it has indicated that there would not be irreparable damage even where the issue might become moot before it is considered. See Shub v Simpson, 190 Md. 177, 76 A.2d 332, cert. granted but case not advanced on docket, 340 U.S. 861, dismissed as moot per curiam, 340 U.S. 881 (1950), 51 Colum. L. Rev. 551 (1951); 19 Geo. Wash. L. Rev. 552 (1951). See generally Note, 49 Colum. L. Rev. 1137 (1949).

35. See generally McCrary, Elections §§ 267-70 (4th ed. 1897); Lewis, Handbook on Election Laws 175-84 (1912); Mechem, Public Officers & Officers § 211 (1890); Thorup, Public Officers § 155 (1892); Annot., 168 A.L.R. 855 (1947).

36. See Gibson v Twaddle, 1 Cal. App. 126, 81 Pac. 727 (1906); State ex rel. Toon v Thompson, 204 Ind. 560, 185 N.E. 117 (1933); Hall v Webber, 229 Ky 320, 17 S.W.2d 198 (1929).
public's interest, and to allow amendments would necessarily delay a final determination.\textsuperscript{37} Also, allowing voluntary amendments might open up a greater door of fraud, for the election officials, who after adjournment become aware of the closeness of the election, will be under increased pressure to reconvene and fraudulently select certain errors to correct and others to ignore.\textsuperscript{38} Most important, however, is that the officials, usually lacking in judicial training and guidance, would often inadvertently inspect a precinct's ballots without notifying all the interested parties or without following other elementary safeguards that are often required by statute.\textsuperscript{39}

The most desirable approach appears to be allowing amendments under the control of the courts for the correction of errors and, at the same time, prohibiting any voluntary amendments. This plan would not only reflect the true intent of a large number of voters and provide a quick remedy to the parties, but, being under the auspices of the court, it would tend to lessen the possible frauds and procedural abuses that can exist with voluntary amendments. The difficulty with this solution is, of course, the established rule that mandamus, the only common-law remedy presently available, will not lie to force a public official to do that

\begin{quote}
\textsuperscript{37} See Matter of Hearst, 183 N.Y. 274, 76 N.E. 28 (1905).

\textsuperscript{38} For us to hold otherwise would be to open wide the door and provide the opportunity for the perpetration of every conceivable fraud. Indeed, it would be a monstrous thing, because destructive of the government of a free people, for corrupt and designing election officials, seeing that the candidate of their choice is defeated, to be given the right to file amended and supplemental returns for the purpose of overcoming a possible majority.

\textsuperscript{39} In In re Andersen, 264 Minn. 257, 273, 119 N.W. 2d 1, 13 (1962) (Murphy, J., dissenting). Actually, however, errors in each precinct are independent of any other errors, and the correction of some errors will not prejudice a candidate unless the board acts fraudulently in selecting which errors to correct.

\textsuperscript{39} In In re Andersen, 264 Minn. 257, 273, 119 N.W. 2d 1, 11 (1962), two of the county canvassing boards amended their returns without attempting to follow the statute which provides for notice to both candidates before the ballots are inspected. The other counties also committed errors in failing to follow the statute. Such misapplication presumably would not occur under the auspices of the court.
which he could not have done voluntarily. While some courts may override this rule on the basis of the strong policy considerations, most courts, sticking to the traditional approach, will undoubtedly require a legislative mandate. The legislature should create a judicial remedy somewhat similar to a mandamus, in which the parties could compel the correction of errors and the canvassing board could petition to amend; this procedure would be under the auspices of the court, thereby preventing voluntary amendments by the officials.

III. PROBLEMS WITH THE CONTEST

A. COMMENCEMENT OF THE ACTION

The statutes authorizing courts to entertain an election contest also contain provisions relating to the persons that have standing to contest an election and to what notices and pleadings are proper to commence an action. Most states, although a few have some minor restrictions, provide that any voter, including a candidate, may contest the election of any person for whom he had the right to vote; many states, however, assess the cost of an unsuccessful contest against the losing party.

This latter restriction at first glance seems unfortunate, for, costs in a recount possibly being prohibitive, it might limit the


41. The Minnesota legislature provided, in 1959, a statutory remedy whereby a "judge of the supreme court" may order the correction of errors made by the election judges or the canvassing boards. Minn. Stat. § 203.38(d) (1961). The court in In re Andersen, 264 Minn. 257, 119 N.W.2d 1 (1962), however, held that it is not mandatory that the parties proceed under this statute, and that the errors could be corrected by voluntary amendments. See id. at 278, 119 N.W.2d at 12 (Murphy, J., dissenting).

42. E.g., Fla. Stat. § 99.192 (1960) (ability to contest limited to a losing candidate); Ky. Rev Stat. § 122.020 (1962) (same); Miss. Code Ann. § 9287 (1942) (same); N.D. Cent. Code § 16-15-03 (1960) (requires the state attorney or district court judge to approve of the contest).


45. At the end of the 1962 gubernatorial election contest between Karl Rolvaag and Elmer Andersen, the Minnesota Legislature appropriated $150,000 from the general fund to help pay part of the huge costs. Minn. Laws 1963, ch. 868.
ability of a poorer candidate to contest. To provide that the legislature absorb the expense appears most just, yet, this solution would open the door to frivolous suits. Even if the legislature agreed to pay only for those contests where the parties were within a certain percentage of each other, any losing candidate within this limit would have nothing to lose by requesting a recount. Furthermore, since most candidates are supported by political parties or other interested groups that likely would contribute to the cost of a meritorious contest, a contestant will seldom be financially unable to conduct a contest.

A real difficulty with assessing the cost of a recount against the loser arises where a contestee is originally declared the winner and then loses a contest to his opponent. A losing candidate may always weigh the probable cost of a failure with the possibility of success before he commences a contest, but the contestee has no such choice. A losing candidate may refuse to contest an election unless assured sufficient financial support and, by using this lever, may find it relatively easy to raise contributions for a contest; the contestee, on the other hand, whose only alternative to defending the contest is to relinquish the office to which he has a prima facie right, may well have difficulty finding financial assistance after he is deposed. The Minnesota legislature, recognizing the difficult choice facing the contestee, has endeavored to ease the burden that befalls a losing contestee by taxing the cost of a recount, at the judge's discretion, proportionally against the municipalities responsible for errors in counting the votes or in canvassing the returns. This provision not only benefits the losing contestee, but also creates an incentive for municipalities to take better precautions against possible errors.

A person with standing to contest, and who is financially able to contest, must satisfy certain requirements regarding notice and the pleadings when he commences his action; while the notice requirements are relatively straightforward, there are aspects

47. Generally, statutes require that notice of a contest be filed in the trial court and that copies thereof be served upon the contestee and upon the official authorized to issue the Certificate of Election. E.g., Ill. Rev. Stat. ch. 46, § 23–13 (1963); Minn. Stat. §§ 209.02(2)–(4) (1961). Failure to comply will allow the contestee to make a special appearance to contest jurisdiction. Whittier v. Village of Farmington, 115 Minn. 182, 131 N.W. 1070 (1911). To avoid the possibility that the candidate may avoid service by disappearing, see Odegard v. Lemire, 107 Minn. 315, 119 N.W. 1057 (1909), the statute might provide for notice by registered mail. See Minn. Stat. § 209.02(4) (1961). If the contestant alleges irregularities in the tabulation of votes, notice is also required to be served upon the clerk of the municipality in which the
of the pleading requirements that merit consideration. Pleadings to secure a recount of the votes are defective if they fail to state the claim upon which the election is contested — generally, an irregularity in the conduct of the election or in the canvass of votes or a deliberate, material violation of the election laws — for a recount is only an ancillary proceeding to allow for the preparation of the election contest. Unless such a claim is properly asserted, the courts apparently fear that the recount will be used as a mere "fishing expedition." A contestant, moreover, must plead that the election results would have been different had the alleged irregularities not occurred. A conscientious pleader, however, often cannot allege an incorrect result since he will not have had access to the ballots after the original tabulation. The legislatures, by allowing contest proceedings, have apparently decided that seating the official who was actually elected overrides the policy favoring quick determination of elections, and, therefore, only a minimal burden should be imposed on a candidate who wishes to get into court where discovery procedures may disclose the merits of his claim. Difficulties with the courts' strict view of pleading are compounded by their holding that a properly amended pleading does not secure jurisdiction if the amendment was made after the time during which the original contest could have been brought. Since the courts appear firm in their position, statutory provison should be enacted that would allow the courts to hear a contest commenced within the proper time although pleaded improperly.


50. Id. at 401, 119 N.W.2d at 46; O’Gorman v. Richter, 31 Minn. 25, 28, 16 N.W. 416, 417 (1883).

51. Otherwise, proof of the pleadings — that there were mistakes — would not necessarily entitle the contestant to the relief he demanded. See, e.g., Lammot v. Walz, 48 Del. 532, 107 A.2d 905 (1954); Free v. Wood, 137 Kan. 939, 22 P.2d 978 (1933); Moon v. Harris, 122 Minn. 138, 142 N.W. 12 (1913). See generally Pirsig, Minnesota Pleadings §§ 854-85 (1956).

B. Problems Occurring During the Recount of Ballots

Another important area of judicial participation in an election contest is in the actual recounting of the ballots. Generally, there are two statutory systems for conducting a recount: a recount before a panel of appointed district judges, or a recount conducted by the county board of canvassers under the supervision of a district judge. Under each method the recounting panel has the authority, subject to review by the state supreme court, not only to correct any mathematical errors, but also to examine the disputed ballots to determine if the election laws had been applied correctly in accepting or rejecting them.

Any ballot where the voter's intention can be ascertained should generally be counted, but where the ballot is marked in a manner that makes it impossible to determine the voter's choice it should not be counted. As a general rule there is no right to a jury trial in an election contest. Kennard v. Louisiana ex rel. Morgan, 92 U.S. 480 (1875); Pedigo v. Grimes, 113 Ind. 148, 13 N.E. 700 (1887); Ashley v. Three Justices, 228 Mass. 68, 116 N.E. 961, writ of error dismissed, 250 U.S. 652 (1919); Taylor v. Carr, 195 Tenn. 235, 141 S.W. 745 (1911). But see Miss. Code Ann. § 3287 (1957); N.D. Code § 16-15-04 (1960). In Minnesota this is the rule despite the constitutional provision which provides that "the right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy ...." Minn. Const. art. I, § 4. Interpreting this section, the Minnesota court concluded that election contests are not "cases at law" within the meaning of the constitution. Hawley v. Wallace, 187 Minn. 185, 187-88, 169 N.W. 127, 129 (1917). The Wisconsin court, interpreting a similar provision, reached the opposite result and held that the constitution did require a jury trial for election contests. State ex rel. Schumacher v. Markham, 160 Wis. 431, 436, 152 N.W. 161, 163 (1915).


The state statutes prescribe the methods of counting ballots and the rules to apply to determine if a ballot should be counted. E.g., Ariz. Rev. Stat. Ann. §§ 16-945 to -950 (1956); Minn. Stat. §§ 204.19-24 (1961). The ballots which are rejected, however, are not destroyed and their rejection can be reviewed by the recounting panel.

Some statutes expressly require the determination of the voter's intention. E.g., Minn. Stat. § 204.22 (1961), which provides "a ballot may not be rejected for any technical error that does not make it impossible to determine the voter's choice ...." In other states, where the election code does not mention the voter's intention, the courts have implied that the intention of the voter should control even though the ballot does not conform strictly to the statute. E.g., Parker v. Orr, 188 Ill. 609, 41 N.E. 1002 (1895); see Flanders v. Roberts, 182 Mass. 524, 65 N.E. 902 (1903). See generally Comment, Judicial Legerdemain and the Disappearing Right to Vote, 1960 U. Ill. L.F. 336.
with a symbol or mark other than those expressly prescribed by the statute, it is nevertheless rejected. Usually the statute provides that a ballot should be marked by making a “cross (X) opposite the name.”

Most courts, however, have interpreted the parenthetical “X” as merely directory and not mandatory, resulting in the counting of ballots with marks that contain two intersecting lines resembling a cross. A stricter interpretation would disqualify many good faith voters simply because of a technical failure to adhere to the statute. The California legislature has attempted to avoid this problem by providing the voter a rubber stamp with which to mark his ballot, thereby insuring uniform marks. Other states have enacted legislation to allow marking the ballot with any number of different symbols.

Ballots will also be disqualified, notwithstanding that the voter’s intention can be ascertained, where the ballot is so defaced with markings that they would distinguish it and identify the voter. This disqualification reflects the legislative policy of prohibiting one person from controlling the voting choice of a second person by either the fraudulent purchase of votes—a briber could


60. See, e.g., Parker v. Orr, 158 Ill. 609, 615, 41 N.E. 1002, 1004 (1895) (permitted the use of a capital T or a plus (+) sign); Coulchan v. White, 95 Md. 703, 53 A. 786 (1902) (allowed the greek or latin cross); Comment, 1900 U. Ill. L.F. 336.

While the courts are liberal in allowing intersecting lines to count as cross marks, a failure to have intersecting lines is fatal. See Isenburg v. Martin, 298 Ill. 408, 127 N.E. 663 (1920) (circles invalid); Hawkins v. Voisine, 284 Mich. 181, 278 N.W. 811 (1938) (arrows invalid); In re Slevin, 179 App. Div. 618, 167 N.Y. Supp. 72 (Sup. Ct.), appeal dismissed, 221 N.Y. 683, 117 N.E. 1085 (1917) (diamonds invalid).

61. See Parker v. Orr, 158 Ill. 609, 615, 41 N.E. 1002, 1004 (1895).

62. E.g., Cal. Election Code § 14412. Under such a statute the stamp mark may still be improperly placed so as to disqualify the ballot. Garrison v. Rourke, 92 Cal. 2d 490, 126 P.2d 884 (1942).


64. The Minnesota statute provides that:

When a ballot is so marked by distinguishing characteristics that it is evident that the voter intended to identify his ballot, the entire ballot is defective.

demand a certain unusual mark and thereby assure a method of discovering compliance with the bargain — or the possible intimidation and subtle coercion by a person who represents authority to the voter — an intimidator could exert pressure over that voter to cast his ballot in a certain manner and require an identifying mark to show compliance. The rule preserves the secrecy of the ballot and attempts to prevent the corruption of the elective process.

Theoretically, prohibiting distinguishing marks seems reasonable and justified. When the recount panel conducts the actual inspection of the ballots, however, there is an inevitable conflict between the policy of prohibiting a distinguishing mark and the policy favoring effecting the voter’s intention: Obviously there are a multitude of possible marks that could identify the voter notwithstanding the clarity of the voter’s intention. Even unusual symbols that might be accepted under a liberal construction of the statute prescribing marking might nevertheless be distinguish-

65. No man has ever placed his money corruptly without satisfying himself that the vote was cast according to the agreement, or ... that ‘the goods were delivered;’ and when there is to be no proof but the word of the bribe-taker (who may have received thrice the sum to vote for the briber’s opponent), it is idle to place any trust in such a use of money.

WIGMORE, THE AUSTRALIAN BALLOT SYSTEM 30 (3d ed. 1889). This fear was expressed in Truesen v. Hugo, 81 Minn. 73, 74, 88 N.W. 500, 501 (1900), where it was felt that to permit distinguishing marks would “open wide the door to a violation of one of the main features of our election law,— the feature intended to prevent electors from so marking their ballots as to indicate that they had voted according to contract.” However, this legislative purpose had been earlier questioned in Pennington v. Hare, 60 Minn. 146, 155, 62 N.W. 116, 120 (1895) (Collins, J., dissenting), in which it was observed that “if there is danger of facilitating corruption and bribery by means of ballots so marked that they can be distinguished, [the opportunity to write in a candidate’s name] affords a most excellent opportunity, for the handwriting could easily be seen and recognized as the ballots are counted.”

66. See 8 Wigmore, EVIDENCE § 2214(b) (McNaughton rev. ed. 1931).

67. Most states require election by secret ballot either expressly by their constitution, e.g., Cal. Const. art. 2, § 5; Colo. Const. art. VII, § 8; Del. Const. art. V, § 1, or by the courts interpreting the constitutional phrase “election by ballot” as encompassing the Australian or secret ballot, see Brisbin v. Cleary, 26 Minn. 107, 1 N.W. 825 (1879) (interpreting Minn. Const. art. VII, § 6, and declaring unconstitutional Minn. Laws 1878, ch. 84, § 8 that allowed election judges to number the ballots); State ex rel. Birchmore v. Board of Canvassers, 78 S.C. 461, 59 S.E. 145 (1907). Contra, Ex parte Owens, 148 Ala. 402, 42 So. 676 (1906); see Ark. Const. art. III, § 3 (demands that election officials number the ballots); Mo. Const. art. VIII, § 3 (same).
Each state, by statute and through numerous court decisions, has indicated which marks are to be considered “distinguishing.” The courts have reached somewhat inconsistent results, however, apparently depending on the weight given to the voter’s intention as compared to the weight given to the policy behind prohibiting identifying marks. For example, in Indiana a cross mark similar to the letter “T” invalidated a ballot because it was a mark that “fairly imputes upon its face design and dishonest purpose,” while a cross mark similar to the letter “V” was allowed because it may have been caused by “dim light, defective sight, and lack of skill in the use of a pencil.”

A similarly inconsistent result was reached in a New York contest where the first four of the following marks were considered valid, while the latter four were considered “distinguishing”:

\[\begin{array}{c}
  \text{\textbullet} \\
  \text{x} \\
  \text{X} \\
  \text{X} \\
  \text{\#} \\
  \text{\textbullet} \\
  \end{array}\]

The test formulated by most courts in determining whether a mark is distinguishing is one of intention: If the voter intended to

---

68. See text accompanying notes 59–63 supra.
69. In Minnesota the statute, for example, provides that a vote for two candidates for the same office, a mark made outside of but close to the proper box, a misspelled or abbreviated write-in vote, or an erasure of a voting mark will not be considered as being distinguishing. Minn. Stat. §§ 204.22(a), (d), (f) & (i) (1961).
70. The chain of decisions in Minnesota has dealt with almost every conceivable distinguishing mark. E.g., Sperl v Wegerth, 265 Minn. 47, 120 N.W.2d 355 (1963); Fitzgerald v Morlock, 264 Minn. 520, 120 N.W.2d 399 (1963); Johnson v. Swenson, 264 Minn. 449, 119 N.W.2d 723 (1963); Marshall v Stepka, 259 Minn. 553, 108 N.W.2d 614 (1961).
72. Wright v Walker, 197 Ind. 561, 570, 151 N.E. 424, 427 (1920).
identify himself by using a mark, his ballot will be disqualified.\textsuperscript{74} Applying this test, a mark placed on the ballot by an election official after the ballot had been cast clearly will not invalidate the vote,\textsuperscript{75} indeed, one court has held that marks placed on the ballot by election officials before the ballot is cast will not cause disqualification.\textsuperscript{76} When considering marks made by the voter himself, however, the determination of the voter’s intention becomes difficult—there is usually only a fine line between an intentionally placed mark\textsuperscript{77} and an accidental one.\textsuperscript{78} Generally, the courts feel that “it is not the voter’s private intention, but the natural inference from what he has done, which must control.”\textsuperscript{79} Thus, when the recount panel rejects a ballot because of a distinguishing mark, it is really inferring a dishonest purpose to the voter from the mark itself.

The present status of ballot law does not achieve the two-fold purpose that supports a distinguishing mark statute, preventing the purchase of votes and preventing the intimidation of voters. In

\textsuperscript{74}.

\textit{Where marks are made by a voter upon his ballot in a place or in such manner that it can reasonably be seen or inferred that they were made in an attempt to indicate his choice or vote for candidates or measures to be voted for, the marks are generally held not to be identifying marks. But if a voter intentionally makes marks upon his ballot in an unauthorized place not connected in any way with the efforts of the voter to indicate his choice of candidates or measures to be voted for and not otherwise reasonably explained, such marks may well be held to be identification marks.}


\textsuperscript{76.} In Johnson v. Swenson, 264 Minn. 449, 119 N.W.2d 723 (1963), the election judge numbered the ballots before the voting, a gross misdemeanor under Minn. Stat. § 210.14 (1961). However, the court did not feel that the wrong was chargeable to the voters who had not assisted or cooperated with the wrongdoers. \textit{But cf.} Harvey v. Sullivan, 406 Ill. 472, 94 N.E.2d 424 (1950), 64 Harv. L. Rev. 1007 (1951).

\textsuperscript{77.} E.g., Murray v. Floyd, 216 Minn. 69, 11 N.W.2d 780 (1943) (indecent remarks); Pye v. Hanzel, 200 Minn. 135, 273 N.W. 611 (1937) (numbers written on the ballots); McVeigh v. Spang, 178 Minn. 578, 228 N.W. 155 (1929) (cross marks on the back of the ballots); Bloedel v. Cromwell, 104 Minn. 487, 116 N.W. 947 (1908) (name or initials of the voter).

\textsuperscript{78.} E.g., Sperl v. Wegwerth, 265 Minn. 47, 120 N.W.2d 355 (1963) (cross mark extending through two boxes); Fitzgerald v. Morlock, 264 Minn. 520, 120 N.W.2d 339 (1963) (cross marks half in ink and half in pencil); Pye v. Hanzel, 200 Minn. 135, 273 N.W. 611 (1937) (torn ballots); Frayola v. Zanna, 193 Minn. 48, 257 N.W. 660 (1934) (circle around a cross mark).

\textsuperscript{79.} Bloedel v. Cromwell, 104 Minn. 487, 489, 116 N.W. 947, 948 (1908).
one respect, it provides an opportunity for frustrating the election process since an intelligent briber or intimidator can easily require that a voter identify his ballot by making a mark that has been judicially or legislatively indicated acceptable. Also, a voter may easily identify his ballot by exercising his right to write in a candidate's name, an act that does not disqualify the ballot, even if the name is misspelled. Another fraudulent scheme, which is not arrested by disqualifying distinguishing marks, involves marking the ballot by the briber even before the voter enters the polling place. More importantly, disqualifying ballots with distinguishing marks naturally enhances the utility of "short penciling," a plan calling for an election official to place a distinguishing mark on the ballot, thereby invalidating it. The ballot will count if the marks were obviously made by an election official, but such a determination is usually impossible.

While it is estimated that a large number of good faith voters are disfranchised by the present status of the law, the courts have little alternative in the application of the statute, except to the extent that they should construe them liberally in favor of follow-

80. See cases cited note 78 supra.
81. See note 65 supra.
82. This distinction was explained as follows:

[W]here only one voter in a precinct votes by means of writing in the name of the candidate of his choice, the ballot can be identified, but it cannot be legally rejected because the voter was but exercising his right to vote in a manner authorized by law.

Aura v Brandt, 211 Minn. 281, 283, 1 N.W.2d 281, 284-85 (1941); accord, Pupin v Sullivan, 355 S.W.2d 676 (Ky 1962); Brown v Carr, 130 W. Va. 455, 43 S.E.2d 401 (1947); State ex rel. Bledgett v Eagan, 115 Wis. 417, 91 N.W. 984 (1902). See also MINN. STAT. § 204.22(f) (1961). See generally Annot., 86 A.L.R.2d 1025 (1962).

83. Under a "chain voting" system a dishonest election official hands a dishonest voter two ballots, one which he casts and one which he will take outside the polling place. This latter ballot will be filled in according to the purchaser's wish and then be given to the bribe-taker. He in turn casts the filled-out ballot and returns outside with a clean ballot again to start the cycle. See Quilici, Contempt Prosecutions for Elections, 2 JOHN MARSHALL L.Q. 514, 520 (1937).

84. It has been reported that some election judges have hadlead under their fingernails, or pencils in their palms, and will then place a distinguishing mark on a ballot which was validly cast for the opposition. Pollack, They'll Steal Your Vote, 46 N.A. MUN. REV 323 (1956); Quilici, supra note 83, at 520; Ross, Caution: Vote Thieves at Work!, Reader's Digest, Oct. 1962, p. 120. "Short penciling" originally occurred in states where a voter could vote a straight party ticket by placing one cross in the circle of the party of his choice. When a voter only voted part of his ballot, the election official, by making a cross in the party circle of his choice, could cast a vote for all the
ing the elector’s intention. The real solution ultimately rests with the legislatures. They should relieve the courts and the public from the present inconsistent position either by limiting the applicability of the distinguishing mark statute to extreme situations, by providing a rubber stamp for the voter to mark the ballot, or by requiring a statewide use of voting machines—a suggestion that would completely eliminate the problem of distinguishing marks.

CONCLUSION

Although the judiciary is the best equipped body to handle election contests and their related problems, the courts are necessarily hampered by the legislative limitations on their authority. When exercising control over the conduct of the canvassing boards, the courts face the unpleasant choice of either refusing compulsory amendments and prohibiting voluntary amendments or allowing mandamus and permitting voluntary amendments—a choice that could be obviated by a legislative remedy. Also, the courts are ensnared by the legislative standard expressed in prohibiting “distinguishing marks”—a problem that could be solved by express direction to follow the voter’s ascertainable intention. The legislative action in these two areas would greatly facilitate election contests and would better effectuate the will of the electorate.

candidates for the offices for which the voter failed to cast any. See Quilici, supra note 83, at 520.

85. In fact, fraud and corruption at the polls is not often a major problem. For an analysis of the problems presented when frauds are committed during an election, see Quilici, supra note 88; Comment, 11 Loyola L. Rev. 110 (1962); Note, Correction of Election Frauds, 48 Yale L.J. 1434 (1939).

86. See note 62 supra and accompanying text.

87. A few states have, under peculiar statutory or constitutional provisions, invalidated the use of voting machines. E.g., City of Little Rock v. Henry, 233 Ark. 492, 342 S.W.2d 12 (1961); Nicholas v. Board of Election Comm’rs, 196 Mass. 410, 82 N.E. 60 (1907).