UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 79 | Number 6 Article 10

9-1-2001

Could Florida 2000 Happen Here: The Application of the Equal Protection Clause to North Carolina'a Intent of the Voter Standard in the Aftermath of the 2000 Presidential Election

David Bryant Baddour

Could Florida 2000 Happen Here?

The Application of the Equal Protection Clause to North Carolina's "Intent of the Voter" Standard in the Aftermath of the 2000 Presidential Election

Last year, the U.S. Supreme Court effectively determined the winner of the 2000 presidential election.[1] The impact of the decision in *Bush v. Gore*[2] will not end with the term of the current resident of 1600 Pennsylvania Avenue, however. The majority's holding that Florida's "intent of the voter" standard is unconstitutional questions the constitutionality of similar standards used in other states, including North Carolina. The holding's equal protection portion leaves these states in the unenviable position of deciding whether to: (1) provide additional guidance to ballot counters by attempting to predict, analyze and resolve specific voter errors that are, at least at the margins, indefinable; or (2) abandon the "intent of the voter" standard altogether.[3] Unfortunately, neither of these solutions offers an improvement over the time honored "intent of the voter" standard used in North Carolina because both solutions would necessarily entail the disenfranchisement of voters whose ballots, although technically deficient, nevertheless clearly reveal their intent.

North Carolina General Statutes section 163-169(b) states that: "No official ballot shall be rejected because of technical errors in marking it, *unless it is impossible to determine the voter's choice* under

---

1. Samuel Issacharoff, *The Courts Legacy for Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39. Al Gore conceded the presidential election to George W. Bush, Jr. on December 13, 2000, less than twenty-four hours after the Supreme Court rendered its decision, halting the manual recounts in Florida. *See* POLITICAL STAFF OF WASH. POST, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION 226, 235 (Leonard Downie, Jr. ed., 2001).

2. 121 S. Ct. 525 (2000) (per curiam).

3. Another alternative may be to alter the process of evaluating the ballots to ensure consistent results. *See* SAMUEL ISSACHAROFF ET AL., WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000, at 50 (2001) (hypothesizing that had Florida's intent of the voter standard been applied to all of the ballots by a single judge or panel of judges, the Florida electoral system might have survived the Court's equal protection scrutiny). Given the practical difficulties that would arise in the administration of such a system—almost six million ballots were cast in Florida's 2000 presidential race—this Recent Development will focus on legislative solutions to the intent of the voter standard.

the rules for counting ballots."[4] Section 163-170 restates this general rule and provides additional guidance on its application.[5] First, if it is impossible to determine a voter's choice for a particular office, the ballot is not counted for that office but is counted for all other offices.[6] Second, if a ballot is marked for more candidates than there are positions to be filled, the ballot is not counted for that office but is counted for all other offices.[7] Third, if a ballot is torn or defaced such that it is impossible to determine a voter's choice for a given office or offices, the ballot is not counted for those offices but is counted for any offices for which the voter's choice can be determined.[8] Finally, if a voter properly marks a ballot in pen or pencil, and in addition attaches or affixes a sticker to the ballot, or marks it with a stamp, the ballot is counted unless the voter's action makes it impossible to determine the voter's choice.[9] The statute also provides guidance for the counting of write-in votes,[10] split-ticket votes,[11] and votes cast for a straight ticket.[12]

The North Carolina General Statutes, however, do not provide specific guidance on how a vote counter should interpret the meaning of an ambiguous ballot, nor do they specifically define the circumstances under which it is "impossible to determine the voter's

4. N.C. GEN. STAT. § 163-169(b) (1999) (emphasis added). The general rules for counting the ballots at precincts after the primary and general elections include provisions: allowing witnesses to observe the precinct count, *id.* § 163-169(c); stating that the counting should be continuous, *id.* § 163-169(d); allowing "straight ticket" votes to be counted first in a general election, *id.* § 163-169(f)(1); and instructing that ballots shall be emptied from the ballot box onto a table, organized, and counted, *id.* § 163-169(e). The statute further provides that during the precinct count, "[a]ll questions arising with respect to how a ballot shall be counted or tallied shall be referred to the chief judge and judges of election for determination before the completion of the counting of the ballots in the box from which the questioned ballot was taken." *Id.* § 163-169(g).

5. *Id.* § 163-170.

6. *Id.* § 163-170(1).

7. *Id.* § 163-170(2).

8. *Id.* § 163-170(3).

9. *Id.* § 163-170(4).

10. *Id.* § 163-170(5).

11. *Id.* § 163-170(6). This section explains that if a voter marks the party circle of one party and also the individual voting square of a candidate of another party, the ballot shall be counted as a straight ticket for all candidates of the party whose circle was marked except for the office in which the individual candidate was marked, which is counted as a vote for that individual. *Id.*

12. *Id.* § 163-170(7). A straight ticket vote is a ballot that is counted as a vote for every candidate whose name is printed in the column of a given political party. *Id.* In North Carolina, a voter who wishes to vote a straight ticket may: (1) mark the party circle printed at the top of the party column; (2) mark the voting square appearing to the left of every candidate of the same party; or (3) mark the party circle in addition to marking some or all of candidates appearing in that column. *Id.*

choice" for an office.[13] Nevertheless, two common themes emerge from the relevant statutory provisions. First, every effort should be made to count each ballot; only those ballots on which it is *impossible* to determine a voter's choice should be discarded.[14] Second, when it is impossible to determine a voter's choice for a particular office on a given ballot, the ballot should still be counted for all other offices that are contained on the ballot and for which there is no confusion.[15] Both of these themes reflect the view that a ballot is simply a means by which a voter conveys his choice; a failure to follow specific instructions on *how* to cast a ballot properly should not prevent a voter from exercising that choice.[16] The few North Carolina cases that address ballot interpretation reinforce these themes.

Bray v. Baxter[17] represents the North Carolina Supreme Court's earliest recognition of the paramount importance of the will of the voter. In *Bray*, the court held that a ballot cast with the top torn off was properly counted to the extent that its intact portion contained proper votes.[18] The state supreme court reaffirmed this idea in *Britt v. Board of Canvassers*,[19] stating in dicta that an election's purpose is to ascertain the will of the voter, and that "when [the voter's] will is expressed, it ought not to be set aside on light grounds."[20] The *Britt* court wrote that had the issue been properly before it, it would have allowed the disputed ballot to be counted, concluding that "no one can doubt what [the voter's] purpose and intention was when he voted a congressional ticket with only one name on it."[21]

In re Election of Cleveland County Commissioners[22] provides an example where the court easily discarded a ballot on which it was impossible to determine the voter's intent.[23] The issue facing the court was whether the State Board of Elections properly refused to count a ballot on which the voter marked the straight ticket circle, indicating that he wanted to vote a straight Democratic ticket, but

13. *Id.* § 163-170.

14. *See supra* notes 4–12 and accompanying text.

15. *See supra* notes 4–12 and accompanying text.

16. N.C. GEN. STAT. § 163-169(b) (1999) ("[N]o official ballot shall be rejected because of technical errors in marking it . . . .").

17. 171 N.C. 6, 86 S.E. 163 (1915).

18. *Id.* at 9, 86 S.E. at 164.

19. 172 N.C. 797, 90 S.E. 1005 (1916).

20. *Id.* at 808, 90 S.E. at 1009. The court stated that when there is one candidate listed on a ballot, and that ballot is cast unmarked, it should be counted as a vote for the candidate whose name appears on the ballot. *Id.*

21. *Id.*

22. 56 N.C. App. 187, 287 S.E.2d 451 (1982).

23. *Id.* at 192–93, 287 S.E.2d at 454–55.

also wrote in two names for a three-seat county commissioner's race.[24] Because it was mathematically impossible for the State Board of Elections to determine which of the three Democratic candidates should have her vote superceded by the two write-in votes, the court of appeals agreed that the ballot was properly excluded for that race.[25]

In each of these cases, the courts emphasized the importance of counting all of the ballots on which the voter's intent could be discerned. Only when it was mathematically impossible for the Board of Elections to determine which candidate should receive the vote did the court agree that the ballots could not be counted.[26] Even then, however, the court cautioned that the ballot should be disregarded only with respect to that particular race.[27]

Based on this limited statutory and judicial guidance, the standard used to evaluate ambiguous ballots in North Carolina appears to be somewhat more forgiving than the one used in Florida. Florida law requires a "clear indication of the intent of the voter" in order for the ballot to be counted,[28] whereas North Carolina law states that a ballot should be counted unless it is "*impossible* to determine the voter's choice."[29]

North Carolina's use of a more forgiving standard does not change the impact of the equal protection analysis applied by the U.S. Supreme Court in *Bush v. Gore*. According to the Supreme Court,

---

24. *Id.* at 192, 287 S.E.2d at 455. The North Carolina statute clearly indicates that a voter who marks a straight party ticket and also writes in a candidate has cast a legitimate vote for the write-in candidate as well as for each of the other candidates who are members of the party for whom the straight ticket was voted. N.C. GEN. STAT. § 163-170(5)(d)(1) (1999). In addition, § 163-170.1 was added in 1998 to clarify that in a multi-seat race, when a citizen votes a straight ticket for one party and also votes for individual candidates of the same party in a multi-seat race, the ballot is counted for that office, but only for those candidates for whom the citizen voted individually. *Id.*

25. In re Election of Cleveland of County Commissioners, 56 N.C. App. at 192, 287 S.E.2d at 455. In 1983 the North Carolina legislature amended § 163-170 to include § 163-170(5)(d)(3), which codified the holding of *In re Election of Cleveland County Commissioners*. Act of July 31, 1987, ch. 713, § 6, 1987 N.C. Sess. Laws 1350, 1308 (codified as amended at N.C. GEN. STAT. § 163-170(5)(d)(3)(2000)).

26. *Supra* note 25 and accompanying text.

27. *Supra* note 24 and accompanying text.

28. FLA. STAT. ANN. § 101.5614(5) (West 2000) ("No vote shall be declared invalid or void if there is *a clear indication of the intent of the voter* as determined by the canvassing board....") (emphasis added).

29. N.C. GEN. STAT. §§ 163-169(b), 163-170 (1999) (emphasis added). When the language of the two statutes is compared, the slight difference in wording arguably shifts the burden of proof from a presumption that all ballots are legal unless it is impossible to discern a voter's choice (in North Carolina) to a presumption that all ballots are illegal unless the clear intent of the voter is indicated on the ballot (in Florida).

the equal protection problem in Florida was not *what* standard should be applied in evaluating an ambiguous ballot (i.e., the "intent of the voter" in Florida versus the "impossible to determine the voter's choice" in North Carolina), but *whether such standard was applied consistently* throughout the state.[30] Without specific guidelines that would help confine the ballot counter's search for intent, it would be purely coincidental for an ambiguous ballot to be interpreted in the same manner by two different Florida (or North Carolina) ballot counters, according to the Supreme Court.[31]

The differences between Florida's and North Carolina's intent of the voter standards become significant when evaluated in light of Chief Justice Rehnquist's concurring opinion, however.[32] Chief Justice Rehnquist argued that Florida's electoral scheme might be interpreted as allowing the disqualification of technically improper ballots on which the voter's intent was nevertheless clear.[33] This illuminates the key difference between Florida's system and North Carolina's. North Carolina's current electoral scheme simply would not allow for a similar interpretation. That is, North Carolina's current system would not support the argument that a ballot that clearly reveals a voter's intent—but is for some reason technically deficient—should not be counted.[34] In North Carolina, the statute quite clearly states: "[N]o official ballot shall be rejected because of technical errors in making it . . . ."[35] If a majority of the Court adopts the logic of the Chief Justice's concurrence, North Carolina's fundamental understanding of the primary purpose of elections—discerning the will of the people—would no longer be the only acceptable one.

---

30. Bush v. Gore, 121 S. Ct. 525, 530–31 (2000) (noting that "the standards for accepting or rejecting contested ballots might vary not only from county to county, but indeed within a single county from one recount team to another").

31. *See id.* at 530.

32. *See id.* at 537 (Rehnquist, C.J., concurring).

33. In his concurring opinion, Chief Justice Rehnquist criticizes the Florida Supreme Court's decision effectively to "*require* the counting of improperly marked ballots" as a departure from the legislature's electoral scheme, as it had been interpreted by the Secretary of State. *Id.* at 537 (Rehnquist, C.J., concurring). The Chief Justice notes that each precinct in Florida provides instructions on how to properly cast a vote, as well as a working model of the voting machine and sample ballots (and even specific language on punch-card ballots instructing voters to punch out the ballot cleanly). *Id.* (Rehnquist, C.J., concurring). Based on these explicit instructions, it was not at all unreasonable for the Florida Secretary of State to interpret the state's electoral scheme in a way that did not *require* the counting of improperly marked ballots, according to Chief Justice Rehnquist. *Id.* (Rehnquist, C.J., concurring).

34. *See supra* notes 4–25 and accompanying text.

35. N.C. GEN. STAT. § 163-169(b) (1999).

Currently, only eight counties in North Carolina use the infamous "punch-card" ballot system[36] that was the source of much of the confusion in the 2000 presidential election in Florida.[37] Nevertheless, it remains possible that a North Carolina election could turn on the interpretation of a mere handful of ambiguous ballots,[38] even in counties that use more reliable vote counting systems.[39] In such an election, one can easily envision the "losing" party seeking

36. Telephone Interview with Gary Bartlett, Director, North Carolina State Board of Elections (Mar. 1, 2001); *see also* Rob Christensen, *Problems Abound with N.C. Ballot*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 15, 2000, at A20 ("Eight counties use the punch-card ballots that caused so much confusion in Florida. Forty-nine counties use optical scan readers, thirty-four use some kind of direct record device, six use old-fashioned voting machine levers, and three use paper ballots."). However, recently passed legislation will prohibit the use of punch-card ballot systems in North Carolina by 2006. An Act to Ban Butterfly and Punch Card Ballots, Sess. Law 2001-310 (July 28, 2001) (to be codified at N.C. GEN. STAT. § 163-140.3), *available at* http://www.ncga.state.nc.us/html2001/bills/AllVersions/House/H34vc.html; Lynn Bonner, *General Assembly Looks at Election Reforms*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 3, 2001, at A1; Telephone Interview with Gary Bartlett, *supra*.

37. The "punch-card" ballot system requires the voter to use a sharp, pointed instrument (called a "stylus") to punch out a perforated square (called a "chad") next to the name of the candidate for whom they intend to vote. *See* Bush v. Gore, 121 S. Ct. 525, 530 (2000). In Florida, all too often the voter failed to completely detach the chad from the ballot (the so-called "hanging chad"), resulting in an "under-vote" (a ballot on which the vote counting machine did not record a vote for president). *Id.*

38. Extremely close elections are not uncommon in North Carolina. *See, e.g.*, Christensen, *supra* note 36 ("[In a November 2000 race for Watauga County Commissioner] the initial winner, a Republican, won by eight votes; a machine recount had the runner up, a Democrat, winning by two votes; and then a manual recount had the Democrat winning by 11 votes."); Manya A. Brachear & Ann Saker, *Ruth Wins by 6 in Primary Recount*, NEWS & OBSERVER (Raleigh, NC), May 20, 1998, at B1 (stating that an Apex lawyer won the closest judicial primary in Wake County history by a mere six votes); Kristin Collins, *Some in Fuquay Tired of Barker's Election Protest*, NEWS & OBSERVER (Raleigh, N.C.), Dec. 17, 1999, at B3 (discussing local reaction to the losing candidate's continued challenges of a sixteen vote loss on election night); T. Keung Hui, *Vote Total Official, But Not Final*, NEWS & OBSERVER (Raleigh, N.C.), Nov. 6, 1999, at B3 (discussing the possibility of recounts in several races, including Apex Board of Commissioners (five votes), Morrisville Board of Commissioners, District 1 (three votes) and Commissioner at-large (nine votes), and Knightdale Council (five votes)). Even in an election that is not close, those precincts that continue to rely solely on manual ballot counts would benefit from additional specific statutory guidance on how to interpret ambiguous votes. *See supra* note 30 and accompanying text.

39. Telephone Interview with Gary Bartlett, *supra* note 36. Mr. Bartlett commented that other voting systems, including optical scanners, are vulnerable to mistakes caused by voter error, and other problems such as dust accumulation, moisture, and incorrect cut or thickness of a ballot. *Id. But see* Ellen Nakashima & Dan Keating, *Technology Slashes Detroit Voting Error; 'Second Chance' Scanners Allow Correction*, WASH. POST, Apr. 5, 2001, at A15 (citing a congressional study that found that the number of voters in Detroit whose ballots were invalidated dropped by almost two-thirds after the city switched from punch-card to optical-scan voting machines that were equipped with the so-called "second chance" technology).

redemption through the judicial process, relying on the equal protection argument that was successful in *Bush v. Gore*.[40] Given the current lack of specific statutory or judicial guidance on how to interpret ambiguous ballots in North Carolina beyond the "impossible to determine the voter's choice" standard found in the statute,[41] such a challenge would have a reasonable chance of succeeding,[42] notwithstanding the limiting language found in *Bush v. Gore*.[43]

In order to correct this potential problem, North Carolina has at least two options. First, it could amend its statutory regime to provide more specific guidance on how to interpret an ambiguous ballot.[44] Second, it could abandon the "intent of the voter" standard altogether, replacing it with a system that would demand strict compliance with voting instructions in order to cast a legal ballot.[45] Unfortunately, neither of these options presents a practical improvement over North Carolina's current "intent of the voter" standard.

At first glance, the concept of providing ballot counters with additional guidance on how to interpret ambiguous ballots seems unassailable. Such guidance would not only provide practical assistance to the people who actually conduct manual recounts, it would also (not coincidentally) appear to satisfy the equal protection test articulated in *Bush v. Gore*.[46] The problem with developing such guidance is that it would fail by definition in the precise situation in which it would have been most useful: in evaluating non-obvious voter errors. Any voter error that could be successfully predicted, articulated and analyzed to discern voter intent would be easy to examine under North Carolina's current "intent of the voter" standard, especially in a post-punch card ballot environment. If the universe of legal but technically improper ballots were limited to certain pre-defined voter errors, the voter who makes an

40. *See supra* note 30 and accompanying text. It should be noted that the Court in *Bush v. Gore* clearly stated that its holding was limited to the peculiar situation before it. Bush v. Gore, 121 S. Ct. at 532 ("Our consideration is limited to the present circumstances . . . .").

41. N.C. GEN. STAT. § 163-169(b) (1999). *See supra* note 4 and accompanying text.

42. *See supra* note 30 and accompanying text.

43. *See supra* note 40.

44. In *Bush v. Gore*, the U.S. Supreme Court held that the problem with the Florida Supreme Court's system of counting votes was its lack of specific guidance to ensure the equal application of the "intent of the voter" standard. *Id.* at 530.

45. Chief Justice Rehquist's analysis would clearly permit this second option.

46. 121 S. Ct. 530 ("The want of [specific rules designed to ensure uniform treatment of ambiguous ballots] has led to unequal evaluation of ballots . . . .").

"unacceptable" voter error, but whose ballot nevertheless clearly reveals his intent, would be disenfranchised unnecessarily under this system, whereas his vote would have been counted under the subjective "intent of the voter" standard.

Given the publicity of the problems in Florida and the nature of the punch-card ballot, developing additional specific guidelines for the punch-card ballot system would appear to be relatively straightforward. A statewide study of the Florida under-votes conducted after the 2000 election revealed the following categories of voter errors on the punch-card ballots: dimples; pinpricks;[47] one-corner chads; two-corner chads; three-corner chads; and punch card ballots that were hand-marked.[48] If this study is indicative, the North Carolina legislature could provide additional guidance for punch-card ballots by making a simple legislative determination of which of these actions provide sufficient evidence of the voter's intent.[49]

Similarly, the most common voter errors that arise repeatedly in other voting systems could also be identified and evaluated in advance, even in the absence of a highly publicized, systemic problem such as the one surrounding the Florida punch-card system. For example, the same study of the Florida punch-card under-votes identified 8,909 optical-scan under-vote ballots, 5,360 of which nevertheless revealed the intent of the voter.[50] According to the study, the most common categories of voter errors found in that type of voting system were: placing an "X" or an "O" next to the candidate's name (587 ballots); circling the candidate's name (512 ballots); using the wrong pencil (328 ballots); circling the bubble next to the candidate's name (230 ballots); and underlining the candidate's name (72 ballots).[51] The North Carolina State Board of Elections could identify, fairly easily, the most common voter errors committed by North Carolinians by conducting a similar study of under-votes that typically accompany each of the voting systems used in North Carolina. Again, the legislature could turn the results of that study

47. Pinpricks are ballots that have a hole in or near a chad that does not remove any edges of the chad.

48. *See How Bush Kept the Lead in the Florida Recount*, USA TODAY, Apr. 4, 2001, at 9A. Several under-vote ballots had not been counted even though the chad was removed completely, perhaps due to machine error or because a partially removed chad may have fallen off during the handling of the ballots. *Id.*

49. For example, the statute could state that all ballots containing dimples, pinpricks, one-corner and two-corner chads are not counted, while three-corner, hand-marked and clean-punch under-votes are.

50. *See How Bush Kept the Lead in the Florida Recount*, *supra* note 48.

51. *Id.*

into additional statutory guidance, stating that certain voter errors will be deemed to provide sufficient indicia of the voter's intent and should be counted, while others that are too ambiguous should be discarded.

Although additional guidance on how to interpret an ambiguous ballot would appear to bring North Carolina into compliance with the U.S. Supreme Court's equal protection analysis in *Bush v. Gore*, the question remains as to whether such guidance would be a practical improvement over the "intent of the voter" standard currently in place. In the case of obvious voter errors, the same result arguably follows regardless of the ballot counter's application of his own subjective "intent of the voter" standard or the legislatively determined one. However, the difference between the two systems becomes dramatically clear when viewed in light of their impact on "non-acceptable" voter errors. Simply put, under the legislatively determined intent of the voter system, a voter who makes a "non-acceptable" voter error that had not been enumerated by the legislature as demonstrating the requisite indicia of intent would be disenfranchised even if her ballot was unambiguous despite its technical deficiencies.

It goes without saying that in close elections, the disenfranchisement of even a small number of voters could shift the outcome from one side to the other. For example, according to the same Florida study, eighty-two of the optical-scan under-vote ballots cast in Florida contained non-categorizable "other" voter errors.[52] The accounting firm that examined the ballots was able to determine that thirty-two of these "other" voter errors were actually votes for Bush and fifty were votes for Gore.[53] The study concludes in part that had the strictest standard for counting all of the under-vote ballots been used,[54] Gore would have won Florida, and thus the presidency, by a grand total of three votes.[55] This three-vote margin obviously falls well within the range of the eighty-two non-categorized ("other") optical-scan ballots, indicating that the outcome of the Florida election could have rested upon the interpretation (or non-inclusion) of those eighty-two ballots.[56] Even if specific statutory

52. *Id.*

53. *Id.* The report does not specify what standard the accounting firm applied to these particular ballots. *Id.*

54. The strictest standard would have only counted those punch-card ballots in which the chad was completely removed. *Id.*

55. *Id.*

56. *See id.*

guidance had been in place addressing each of the voter errors that were catalogued during the study, the outcome of the 2000 presidential election could have been determined by the disenfranchisement of the eighty-two voters whose ballots were not described as "acceptable" voter errors in the statute, but nevertheless appear clearly to have indicated their intent.[57] In fact, creating a list of statutorily "acceptable" voter errors would have the same net effect as insisting on technical compliance with voting instructions provided at the polling place. Both methods effectively tell the voter: "mark your ballot this way, or else it will not be counted."[58]

In order to ensure that its electoral scheme would survive the equal protection analysis articulated in *Bush v. Gore*, a second option for North Carolina would be to abandon the "intent of the voter" standard altogether. In its place, the state could employ a completely objective rule that would forbid counting a vote unless the ballot was marked in strict accordance with the instructions provided at the polling place.[59] Given the fundamental nature of the right to vote, such a move could certainly spark a debate over the constitutional permissibility of a rule that abandons the "intent of the voter" standard.[60] Nevertheless, this option would resolve the equal

57. *See id.* When the study applied three other standards to the under-votes, Bush won the election by anywhere from 1,665 votes to 363 votes. *Id.*

58. Of course, instead of looking on the wall of the voting booth to see how to cast a legal vote, a voter would have to refer to the appropriate section of the North Carolina General Statutes to determine whether the "error" was "acceptable."

59. Alternatively, the state could achieve a similar result by simply outlawing the use of manual recounts altogether. Replacing a human vote counter with a machine would by definition create a scenario in which only those ballots that were marked in a way that is recognized by the machine could be counted.

60. *Compare* Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (noting that "No right is more precious in a free country [than the right to vote]") *and* United States v. Mosley, 238 U.S. 383, 386 (1915) (stating that the Court finds it "unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box"), *with* Chief Justice Rehnquist's concurring opinion in Bush v. Gore, *supra* notes 32–34 and accompanying text (stating that it would be permissible for Florida to discard technically deficient ballots on which the voter's intent was nevertheless clear). Ultimately, this question concerns whether it is more important to insist upon technical compliance with voting instructions than it is to give as many citizens as possible the right to participate in the electoral process. Given the fundamental nature of the right to vote, the latter seems preferable. Also, see Gregory Stuart Smith, Note, *Statutory Preference For Straight-Ticket Voting in Counting Crossover Ballots*—Hendon v. North Carolina State Board of Elections, 62 N.C. L. REV. 1173, 1177–80 (1984) for a discussion of the legislature's role in statutorily dictating the method by which a vote shall be counted. Smith notes that although the court in *Hendon v. North Carolina State Board of Elections*, 710 F.2d 177, 180–81 (4th Cir. 1983) favorably cited language from New Hampshire's state supreme court's case that "[t]he legislature . . . cannot direct how the ballot [a voter] casts shall be counted," *Murchie v. Clifford*, 79 A. 901, 904 (N.H. 1911), the General Assembly

protection issue identified by the majority in *Bush v. Gore*. Regardless of its constitutionality, eliminating the "intent of the voter" standard would entail the reversal of at least eighty-five years of North Carolina legislative and judicial policy.[61]

The political and legal repercussions of the events surrounding the 2000 presidential election in Florida will surely resonate for years to come. Perhaps if any good at all is to come from this saga, it will be an intense self-examination by state legislatures of the systems they employ in effecting one of the most fundamental rights of citizens: the right to have a vote counted as a vote. In North Carolina, such self-examination may be absolutely critical in order to avoid an episode similar to the one that occurred in Florida. Unfortunately, neither of the solutions that the Court alludes to in *Bush v. Gore* is a practical improvement over the time-honored "intent of the voter" standard currently used in North Carolina.

DAVID BRYANT BADDOUR

has done precisely that since at least 1955. Smith, *supra*, at 1179. The relevant issue in *Murchie* was "[f]or whom did the voter cast his ballot." *Murchie*, 79 A. at 902. The *Murchie* court held that this ballot interpretation was a "judicial question" and that "the power to decide it upon all the competent evidence in the case cannot be abridged by any act of the legislature." *Id.*

Also, the Michigan electoral scheme, in which the state legislature has significantly moved away from the "intent of the voter" standard, has not been successfully challenged to date. *See, e.g.*, McCartney v. Mayor of Norton Shores, 332 N.W.2d 426 (Mich. App. 1982) (holding that the statute controls in a conflict between a voter's intent and the clear statutory requirements governing the counting and recounting of votes). In Michigan, the statutory rules for counting ballots state that only "crosses or check marks" may be used to designate the intention of the voter, and that all other marks shall *not* be counted. MICH. COMP. LAWS ANN. § 168.803(1)(c) (West 2000) (emphasis added). In addition, a cross or check mark, the intersection or angle of which is not inside or on the appropriate box or circle, is a *void* mark that is *not* counted in evaluating a voter's intent. *Id.* § 168.803(1)(b) (emphasis added). With respect to electronic voting systems that require a voter to place a mark in a predefined area, only those ballots that contain a mark in the predefined area may be considered valid. *Id.* § 168.803(2).

61. *See supra* notes 4–25 and accompanying text.