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Florida on Trial:

Federalism in the 2000 Presidential Election

Jon L. Mills*

I. BACKGROUND

While the 2000 presidential election failed to inspire more than a tiny majority of citizens to visit the polls on Election Day,¹ the Florida recount provided drama that engaged the entire world and generated instant and constant legal analysis.² In the space of two months, the post-election period generated three Florida Supreme Court cases and two U.S. Supreme Court cases, which will be studied and critically analyzed for years to come.³ Our television sets broadcast images of the confused voters in Palm Beach County who claimed that the “butterfly ballot” utilized during the 2000 election caused many of them to mistakenly cast presidential votes for Reform Party candidate Pat Buchanan rather than Democratic Party candidate Al Gore.⁴ Some of these frustrated voters took their grievances to the streets, while others brought their grievances to the Florida courts.⁵

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¹ Curtis Gans of the Committee for the Study of the American Electorate stated that turnout for the 2000 presidential election was very low, drawing around 50.7 percent of eligible voters. Susan Schmidt & John Mintz, *Voter Turnout Up Only Slightly Despite Big Drive; Battleground States Had Major Gains*, WASH. POST, Nov. 9, 2000, at A35.

² The author was part of the instant legal analysis and appeared on television to comment on the recount controversy for PBS, CNN, NPR and the BBC.

³ For a sampling of the recent scholarship, see Linda Greenhouse, *Learning to Live with Bush v. Gore*, 4 GREEN BAG 2D 381 (2001); Theresa H. Hammond, *Judicial Jabberwocky in the Presidential Election 2000: When Law and Facts Collide with Politics*, 52 MERCER L. REV. 1569 (2001); Gerald P. Moran, *Bush v. Gore: A Renaissance of Legal Realism*, 2 FLA. COASTAL L.J. 347 (2001); see also Jack M. Balkin, *Bush v. Gore and the Boundary Between Law and Politics*, 110 YALE L.J. 1407 (2001); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Richard A. Epstein, “*In Such Manner as the Legislature Thereof May Direct*”: *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001); Cass R. Sunstein, *Bush v. Gore: Order Without Law*, 68 U. CHI. L. REV. 757 (2001).

⁴ See *infra* Part III.

⁵ *Id.*

America watched intently as canvassing boards in three Florida counties searched for the correct standards by which to divine the “intent of the voter” in a manual recount of the non-certified votes.⁶ The events following the 2000 presidential election presented uncharted waters for lawyers and judges alike.⁷ Finally, the U.S. Supreme Court brought closure to the electoral controversy by reversing the Florida Supreme Court and stopping the Florida recount.⁸ And, in the final chapter of this stage of the 2000 controversy, the state legislature enacted voluminous election reforms.⁹

Once it began, the electoral drama played out in a struggle involving Florida courts, Florida election laws, the U.S. Supreme Court, principles of federalism, and the realities of politics. Federal law ultimately proved dispositive. In response to controversy surrounding the 1876 presidential election, Congress passed the Electoral Count Act,¹⁰ which was intended to fix statutorily the meeting time of the electors for the offices of President and Vice President.¹¹ Enacted more than 100 years ago, the Electoral Count Act’s deadlines and requirements became central to the protest and contest litigation and established the boundaries for the Florida conflict in 2000. This nineteenth-century federal law ultimately was the central factor in the outcome of the election by posing issues of federal law decided by the U.S. Supreme Court.

At first, the litigation turned on issues of Florida state election law. The Florida courts consistently followed the intent of Florida law and case precedent in seeking the “intent of the voter” and to resolve election controversies. The primary and actual causes of the recount fiasco were antiquated voting machinery and ambiguous recount standards. In response, the legislative reforms of 2001 directly addressed those issues and will probably prevent a replay of the 2000 Florida disaster, although they will certainly not eliminate all possible problems.

This article analyzes how Florida’s state election laws operated during the aftermath of the 2000 election. The intersection of law and politics in this controversy was critical. Political considerations affected decisions in both the Bush and Gore camps.¹² The aftermath of the 2000 election found the

⁶ See *infra* Part IIIC.

⁷ See University of Florida Election Forum, Florida Election 2000: Insiders at the Intersection of Law, Politics and the Media (Feb. 26, 2001) [hereinafter Election Forum] (transcript of four panel discussions on file with Stanford Law & Policy Review).

⁸ See *infra* Part IIID.

⁹ See *infra* Part IV.

¹⁰ 3 U.S.C.A §§ 5,6,15 (West, WESTLAW through Pub. L. No. 107-89) (no amendments since 2000). The 2000 election did not mark the first time in U.S. history that the State of Florida and its electors were embroiled in a high-stakes presidential conflict. Preceding the 1876 U.S. presidential election, the political landscape seemed favorable for the Democratic nominee, Samuel Tilden, to defeat the Republican nominee, Rutherford B. Hayes. Tilden won the popular vote over Hayes by a margin of fifty-one percent to forty-eight percent. The Electoral College count, however, showed Tilden one vote short of a majority with Hayes trailing by twenty ballots. Florida, along with Louisiana, South Carolina and Oregon, became the epicenter of the election dispute. In the three Southern states, both parties claimed voting fraud by the other party. The controversy made its way to the U.S. Congress, where the parties argued over which body of the legislature would choose the President. On January 25, 1877, months after the election, Congress passed the Electoral Commission Bill, establishing a bipartisan fifteen-member commission, which issued a victory for Hayes by an eight-to-seven margin. HARPER’S WEEKLY, *Finding Precedent: Hayes vs. Tilden—The Electoral College Controversy of 1876-1877*, available at <http://www.elections.harpweek.com/9Controversy/overview-controversy-1.htm> (last visited March 11, 2002).

¹¹ William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 166 (1996).

¹² For example, some counseled Gore to forego the protest phase of litigation, allow the election to be certified, and proceed with a more judicially controlled contest. However, other Gore advisors feared that Bush’s certification as the winner of

federal government, the National Conference of State Legislatures, and the State of Florida (among others) commissioning task forces and committees to investigate and suggest election reforms.

Ultimately, the State of Florida passed significant election reform legislation.¹³ On May 10, 2001, Florida enacted sweeping election reform legislation entitled the Florida Election Reform Act of 2001.¹⁴ This legislation overhauls and reforms many sections of Florida's election code and addresses reform of voting equipment, ballot uniformity, and poll worker training.¹⁵ Critics, including the U.S. Commission on Civil Rights, argue that the new legislation fails to address some of the critical issues of voter disenfranchisement.¹⁶

Most importantly, this article analyzes the events in Florida following the litigation that culminated in *Bush v. Gore*¹⁷--the aftermath and its consequences--and concludes that the state's new elections laws will prohibit a future crisis of the kind seen in the 2000 presidential election. In Part II, this article sets out the specific factors that caused Florida to become the epicenter of the 2000 election controversy. In Part III, this article further describes the Florida perspective and the theory of "counting the votes" which is derived from Florida case law and concludes that *Bush v. Gore* was correctly decided by the Florida Supreme Court as a matter of Florida law. In Part IV, this article discusses the recent electoral reform legislation enacted by the State of Florida, concluding that these changes will improve the election system in Florida. Under these new reforms, there will never again be a "hanging chad" in Florida because punch card ballots have been eliminated from further use in Florida elections.¹⁸ Despite the anger and confusion aroused by the electoral controversy in Florida, these struggles will ultimately improve the election process in the state of Florida and most likely the nation as a whole.

II. THE STATE IN THE 2000 PRESIDENTIAL ELECTION: WHY FLORIDA?

A series of circumstances dictated that Florida would become the center of the election maelstrom of 2000. First, the Florida election was a statistical dead heat between Bush and Gore. As several observers put it, "The margin of error exceeded the margin of victory."¹⁹ Second, the existence of flawed voting machines across Florida provided a valid concern for accuracy and lost votes. For example, Alachua County machines disqualified only 0.48 percent of presidential votes, whereas Duval County disqualified

Florida's electoral votes would make Gore appear to be a "sore loser." For a good look at the behind-the-scenes decisionmaking in both the Bush and Gore camps, see the Washington Post front-page series published from January 28, 2001 through February 2, 2001.

¹³ See *infra* Part IV.

¹⁴ Brad Hahn, *Florida Overhauls Balloting; Governor Bush Signs Bill to Modernize*, CHI. TRIB., May 10, 2001, at 14; FLA. STAT. ch. 2001-40.

¹⁵ See *infra* Part IV.

¹⁶ U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION: EPILOGUE (June 2001) (on file with Stanford Law & Policy Review). Moreover, Charles Major, Jr. and the Florida Voter League, Inc. recently filed suit against Monroe County Elections Supervisor Harry L. Sawyer, Jr. and Florida Secretary of State Katherine Harris, claiming that sections of the new reform statute could operate as an illegal return to "Jim Crow" laws. Alisa Ulferts, *Lawsuit: 'Jim Crow' Taints Vote Law*, ST. PETERSBURG TIMES, Aug. 16, 2001.

¹⁷ 531 U.S. 98 (2000).

¹⁸ See *infra* Part IV. For a discussion of "hanging chads" and other ballot problems, see notes 35-38 *infra* and accompanying text

¹⁹ Election Forum, *supra* note 7 (remarks of Thom Rumberger).

over nine percent of presidential votes.²⁰ Given these statistics, the statement that “the margin of error exceeded the margin of victory” was credible. Third, Florida election laws, which included timeframes and recount schedules, were not adequate for a dead heat presidential election.²¹ The Florida Supreme Court concluded that the period of time for recounts during the protest phase was statutorily too short to allow the ballots in larger counties to be recounted.²² Observers of this election with a background in Florida election law believed these laws were not designed for presidential elections, but rather state and local elections.²³ As this was a presidential election, legal disputes needed to be resolved before December 12, 2000, because of the existence of 3 U.S.C. § 5.²⁴ This federally-specified date affected Florida election law and the pace of the dispute in Florida.

If any one of these circumstances²⁵ had not existed at the time of the 2000 U.S. presidential election, Florida probably would not have been put “on trial.”

III. THEORY OF FLORIDA ELECTION LAWS BEFORE *BUSH V. GORE*: “WILL OF THE VOTER”

The circumstances discussed above centered the controversy in Florida and Florida courts. The threshold issue was what law and precedent the Florida courts would employ to resolve these issues. The Florida Constitution explicitly states that the right to vote is fundamental and that “all political power is inherent in the people.”²⁶ In election controversies, the theory articulated in *Beckstrom v. Volusia County Canvassing Board*²⁷ and prior Florida Supreme Court cases²⁸ supports a general commitment to determining the “will of the voter.”

²⁰ Sydney P. Freedberg, *Many Counties Had Imperfect Election Night, Series: Election 2000*, ST. PETERSBURG TIMES, Dec. 1, 2000, at 1A; Sally Kestin et al., *The Disenfranchised Poor, Uneducated Rejected Most in 2000 Election*, S. FLA. SUN-SENTINEL, Nov. 18, 2001, at 1F (showing ballots were spoiled more often in precincts that were black, poor, less-educated and Democratic).

²¹ *Contra* Richard K. Scher, *Grasping at Straws, Rushing to Judgment: Election Reforms in Florida, 2001*, 13 U. FLA. J.L. & PUB. POL’Y 81 (forthcoming 2002) (on file with Stanford Law & Policy Review) (arguing that Florida election law would have worked fine but for the interference of lawyers, judges, and politics).

²² *See infra* Part IIIC.

²³ Election Forum, *supra* note 7 (remarks of CNN’s David E. Cardwell).

²⁴ *Bush v. Gore*, 531 U.S. 98, 110 (2000) (discussing the safe harbor established by 3 U.S.C. § 5).

²⁵ Professor Scher further argues that multiple minor party candidates, twelve in all, gained around 137,000 votes, many of which would have gone to either Bush or Gore, but for the presence of these candidates on the ballot. *Supra* note 21 at 87-88. For example, 3,226 of Green Party candidate Ralph Nader’s votes in Florida came from Alachua County; yet as of April 20, 2001, Alachua County only had 247 registered Green Party members. *Id.* at 88.

²⁶ FLA. CONST. art. I, § 1.

²⁷ 707 So. 2d 720, 725 (Fla. 1998) (noting that a court can void a contested election even in the absence of fraud or intentional wrongdoing if there is reasonable doubt that the election did not express the will of the voters).

²⁸ *See Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) (observing that, concerning the contest of an election, real parties in interest are voters); *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940) (noting that in construing statutes relating to elections, courts should give a liberal construction in favor of the citizen whose right to vote they tend to restrict).

This philosophy is based on democratic principles, repeated in the first *Harris* case, and seeks to allow participation where ballots may be flawed but are not illegal or fraudulent.²⁹ For example, absentee ballots that were clearly illegal were discarded in the 1996 Miami mayoral election.³⁰ Moreover, discarding corrupt or illegal ballots is also consistent with views of other states concerning election recounts.³¹

The questions of election law prior to *Bush v. Gore* were: What were the “legal” votes that should be counted? What were illegal votes that should not be counted? Vice President Gore’s attorneys emphasized the need to count the legal votes.³² The Bush attorneys’ response was that the votes had been counted twice.³³ Is a vote legal if a voter fails to follow instructions? It depends on the standard used to determine intent. To illustrate, a voter in Gadsden County marked a paper ballot for Gore and also wrote in “Al Gore.”³⁴ The intent is clear, but so is the fact the voter failed to follow instructions.

The more difficult question, which was ultimately at the center of the controversy, was how to evaluate a ballot that appears ambiguous as to the intent of the voter. America became familiar with election ballot lingo, such as “hanging chads”³⁵ and “dimpled chads,”³⁶ which constituted the critical “undervotes.”³⁷ Undervotes were critical because these votes were the target of the manual recount drives. “Overvotes,”³⁸ in which the voter indicated more than one preference for an office, were unambiguously illegal and were not counted.³⁹ The voters who “overvoted” on a machine ballot may have been mistaken, but their intent was not clear so their votes could not count as legal votes.

²⁹ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000) (“It is the intention of the law to obtain an honest expression of the will or desire of the voter.”).

³⁰ *In re Protest of Election Returns and Absentee Ballots*, 707 So. 2d 1170 (Fla. Dist. Ct. App. 1998) (holding that despite the massive absentee voter fraud, the legally appropriate remedy is to invalidate all absentee ballots and not to call a new election).

³¹ *See, e.g., Rogers v. Holder*, 636 So. 2d 645 (Miss. 1994) (holding that invalidation of all absentee ballots is improper if only twelve absentee ballots are corrupt).

³² David Von Drehle et al., *In Florida, Drawing The Battle Lines; Big Guns Assembled as Recount Began*, WASH. POST., Jan. 29, 2001, at A1.

³³ *Id.*

³⁴ Paul Brinkley-Rogers, *Election Hopes Dashed: Illiteracy, Confusion are Blamed for Gadsden’s Ballot Trouble*, MIAMI HERALD, Dec. 3, 2000, at 33A.

³⁵ A chad is a small piece of a punchcard ballot that should detach from the ballot when punched with a stylus by a voter. A hanging chad is a chad that has only detached from three corners and thus “hangs” from the ballot.

³⁶ A dimpled chad is a chad that shows some evidence of indentation but has not detached from the ballot.

³⁷ An undervoted ballot is one on which the voter did not choose a candidate for president (according to the machine reading the ballot).

³⁸ An overvote is a ballot on which the voter chose more than one candidate for president.

³⁹ The Chief Justice of the Florida Supreme Court has implied that the courts should have addressed the arguments of those who felt certain “overvotes” *could* be counted. *Gore v. Harris*, 772 So. 2d 1243, 1264 n.26 (Wells, C.J., dissenting). Those who advocated counting “overvotes” in some instances had argued the intent of the voter could be discerned where a ballot contained a cleanly punched hole for one candidate and a hanging chad for the other candidate.

We should note that “wrong votes” generally have no remedy.⁴⁰ This issue was raised by the “butterfly ballot” controversy, which arose when voters stated that they had voted for Pat Buchanan but had intended to vote for Al Gore. The “overvoter,” the person who voted twice for the same office, is analytically like the mistaken voter. The physical ballot cannot reveal the intent to vote for a particular person.

Hence, the litigation in Florida ultimately focused on “undervotes.” The “undervote” may, in some cases, have had some actual indication of the intent of the voter on the physical ballot. Therefore, some direct evidence of the intent of the voter still existed on such ballots. The question of law in the *Bush* litigation was exactly what standard should be utilized to determine such intent. The arguments regarding determination of the voter’s intent ranged from physical to metaphysical. Because of the physical deficiencies of the punch card ballot, i.e. “hanging chads” and “dimpled chads,” physical evidence of the “intent of the voter” was ambiguous and susceptible to different interpretations by canvassing officials in conjunction with different standards set by local election boards. In fact, different standards were used in the recounts of different counties.

At the time, there were no defined statutory standards for a recount other than the Florida statutory standard of “intent of the voter,” the same standard utilized in other states.⁴¹ This is the problem that ultimately proved insoluble in *Bush v. Gore* and was remedied by the Florida Legislature through the 2001 reforms discussed in Part IV. *Bush v. Gore* ultimately held that different standards in different counties for conducting recounts were inherently unfair, a violation of equal protection under the law.⁴² A colleague of mine has made the analogy that using different county standards in counting ballots is like using different standards for grading a multiple-choice test for two different classes.

Although it culminated in a U.S. Supreme Court decision, many observers believed at the outset that the legal issues raised by the Florida election controversy would be resolved in the Florida Supreme Court and not in federal courts. Some also felt the controversy would be over in a few days.⁴³ The post-election litigation in Florida can be divided into four categories, of which only the latter two were based on a theory that “undervotes” should be counted: (1) “butterfly ballot” litigation; (2) absentee ballot litigation; (3) protest litigation (culminating in the U.S. Supreme Court decision *Bush v. Palm Beach Canvassing Board*);⁴⁴ and (4) contest litigation (culminating in *Bush v. Gore*).

A. BUTTERFLY BALLOT LITIGATION: NO LEGAL REMEDY FOR MISTAKEN VOTES

Fladell v. Palm Beach County Canvassing Board,⁴⁵ the first state lawsuit challenging Palm Beach’s “butterfly ballot,” was filed on November 8, 2000. Other similar cases were filed in the following

⁴⁰ *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (holding that plaintiffs who claimed the butterfly ballot was confusing and caused them to vote wrongly were not entitled to revote).

⁴¹ *Bush v. Gore*, 531 U.S. 98, 124 n.2 (2000) (Stevens, J., dissenting) (discussing many states’ use of the “intent of the voter” standard as commonplace).

⁴² *Bush v. Gore*, 531 U.S. 98 (holding that Bush’s equal protection argument reached the level of constitutional injury); see *Siegel v. LePore*, 120 F. Supp. 2d 1041, 1053 (S.D. Fla. 2000) (holding that Bush’s equal protection argument did not reach the level of constitutional injury).

⁴³ Election Forum, *supra* note 7 (remarks of David Boies).

⁴⁴ *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

⁴⁵ No. CL 00-10965 AB (Fla. Cir. Ct. Nov. 20, 2000).

weeks,⁴⁶ many of which were consolidated.⁴⁷ At issue was the “butterfly ballot” used in precincts in Palm Beach County. The ballot consisted of two leaves in book form, with the “chad” to be punched out from the center.

Despite the fact that data showed that it was highly probable that many voters mistakenly voted for Pat Buchanan, the trial court held that there was no remedy at law for such voters.⁴⁸ Even if the ballot was flawed, no remedy existed to reallocate secret ballots. Moreover, the trial court found federal law to prohibit holding a new election.⁴⁹ In Florida, unless the mistaken votes are the result of a legally flawed ballot in substantial noncompliance with the law, there can be no remedy.⁵⁰ Hence, the first case of the controversy reached an unsatisfying and frustrating conclusion for many voters.

B. ABSENTEE BALLOT LITIGATION: “SUBSTANTIAL COMPLIANCE” WITH FLORIDA LAW

Two types of absentee ballot litigation were brought to challenge the validity of absentee ballots. The first challenge dealt with overseas ballots lacking postmarks, in contravention of Florida election law.⁵¹ The second area of dispute centered on absentee ballots received and counted in Seminole and Martin counties.⁵² The principal issue was whether these absentee ballots, which contained technical violations of Florida election law, could still be in “*substantial compliance*” with the law.⁵³ Ultimately, the Florida court allowed the ballots lacking postmarks to be counted as in “*substantial compliance*” with Florida law.⁵⁴

⁴⁶ See *Katz v. Election Canvassing Comm’n*, No. CL 11302 AB (Fla. Cir. Ct. Nov. 20, 2000); *Elkin v. LePore*, No. CL 00-10988 AB (Fla. Cir. Ct. Nov. 20, 2000); *Gibbs v. Palm Beach County Canvassing Bd.*, No. CL 00-11000 AB (Fla. Cir. Ct. Nov. 20, 2000).

⁴⁷ *In re Multiple Cases Involving the 2000 Presidential Election*, Administrative Order No. 2.061-11/00 (Fla. Cir. Ct. Nov. 13, 2000) (issuing order consolidating five of the Palm Beach cases).

⁴⁸ *Fladell v. Palm Beach County Canvassing Bd.*, No. CL 00-10965 AB (Fla. Cir. Ct. Nov. 20, 2000), *rev’d* 772 So. 2d 1240 (Fla. Dec. 1, 2000). Critics of the lower court’s decision argue that the “butterfly ballot” was illegal on two bases. First, the punch slot to vote for Al Gore was third from the top, a change in the voting design which confused many voters into voting for Buchanan (Florida election law circa 2000 specified that the candidate for president of the party that finished second in the last governors race should be second on the ballot). The second basis of challenge was that the statute states that voting should be indicated to the *right* of the candidate’s name.

⁴⁹ *Id.* For a lucid critique of the reasoning in *Fladell*, see Hugh M. Lee, *An Analysis of State and Local Remedies for Election Fraud: Learning From Florida’s Presidential Election Debacle*, 63 U. PITT. L. REV. 159 (2001).

⁵⁰ *Fladell v. Palm Beach County Canvassing Bd.*, 72 So. 2d 1240, 1242 (Fla. 2000) (“As a general rule, a court should not void an election for ballot form defects unless such defects cause the ballot to be in substantial noncompliance with the statutory election requirements . . . [W]e conclude as a matter of law that the Palm Beach County ballot does not constitute substantial noncompliance with the statutory requirements . . .”).

⁵¹ *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000).

⁵² *Jacobs v. Seminole County Canvassing Bd.*, 2000 WL 1793429 (Fla. Cir. Ct. Dec. 8, 2000), *aff’d*, 773 So. 2d 519 (Fla. 2000); *Taylor v. Martin County Canvassing Bd.*, 2000 WL 1793409 (Fla. Cir. Ct. Dec. 8, 2000), *aff’d*, 773 So. 2d 517 (Fla. 2000).

⁵³ *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000).

⁵⁴ *Id.* at 1317 (“Election officials must diligently count every vote that substantially complies with a state’s election law absent any indication of fraud.”).

In the second area of absentee ballot litigation, a Seminole County lawsuit was filed to disqualify 4,700 ballots.⁵⁵ The suit alleged that the Seminole County election supervisor's office illegally allowed Republican activists to fill in missing voter registration numbers on requests submitted by voters requesting absentee ballots while not according such rights to Democratic supporters.⁵⁶ The issue then became whether Florida's absentee voting laws required strict compliance with all their provisions or whether substantial compliance could still make a ballot a legal vote for counting purposes.⁵⁷ In response to this issue, Judge Nikki Clark, a Democratic appointee, ruled in favor of the Republican defendants, noting that any irregularities that were demonstrated did not taint the integrity of the voting and still amounted to "substantial compliance."⁵⁸ Judge Terry Lewis (also a Democratic appointee) reached the same conclusion in the Martin County case, which contained similar facts.⁵⁹

Why did these Democrat-appointed judges uphold the counting of technically illegal absentee ballots that would benefit the Republican candidate? It is significant to note that these judges were Democratic appointees, since there were charges of a partisan judiciary in Florida. Some analysts, especially legal realists, conclude that judges vote in accordance with their actual political leanings or personal views.⁶⁰ The judges in these absentee ballot cases cited the principle of "counting the votes" which underlies Florida election law.⁶¹ Both trial courts held that these absentee votes, despite being technically illegal, still *substantially complied* with Florida election law. Furthermore, the intent of the voter could easily be discerned despite the lack of a voter registration number (in the case of the Martin and Seminole County controversies). The Florida Supreme Court affirmed these holdings.⁶²

At the Election Forum held at the University of Florida Levin College of Law, Gore attorney David Boies reflected that the Florida judiciary seemed nonpartisan.

If you look at Seminole County and Martin county, where it was the Democrats making the challenges, you had the Florida courts turning them down. The Florida courts have taken a long-term view that you count the votes and that you look for the intent of the voter. There are these old cases that go back 80 years in which you had paper ballots and people were told, "You've got to make an X in the box." They would do everything except place an X in the box. They'd point an arrow. They'd underscore. They'd circle the name. They'd put an X on the other side of the name. The Florida Supreme Court repeatedly said, "Look, you got to count the vote." I think that the Florida Supreme Court and the Florida lower courts, generally, were taking exactly the same view and it was really a nonpolitical, in a sense of nonpartisan approach.⁶³

⁵⁵ *Jacobs v. Seminole County Canvassing Bd.*, 2000 WL 1793429 (Fla. Cir. Ct. Dec. 8, 2000).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at *5.

⁵⁹ *Taylor v. Martin County Canvassing Bd.*, 2000 WL 1793409 (Fla. Cir. Ct. Dec. 8, 2000), *aff'd*, 773 So. 2d 517 (Fla. 2000).

⁶⁰ See Gerald P. Moran, *Bush v. Gore: A Renaissance of Legal Realism*, 2 FLA. COASTAL L.J. 347 (2001).

⁶¹ See *infra* Part III.

⁶² *Jacobs v. Seminole County Canvassing Bd.*, 2000 WL 1793429 (Fla. Cir. Ct. Dec. 8, 2000).

⁶³ Election Forum, *supra* note 7 (remarks of David Boies).

Determining substantial compliance was a central conclusion in the butterfly ballot and absentee ballot litigation. The determination of compliance resulted in counting ballots in furtherance of the principle of fulfilling the “will of the voter.” When it came to the protest and contest phases of the controversy, “will of the voter” proved to be the deciding issue in the Florida courts.

C. THE ELECTION PROTEST PHASE AND *BUSH V. PALM BEACH COUNTY CANVASSING BOARD*

Under section 102.166 of the Florida Statutes as it existed during the 2000 election, any candidate had the right to protest the returns of the election as being erroneous by filing a sworn, written protest with the appropriate canvassing board.

In the case vacated by *Bush v. Palm Beach County Canvassing Board*,⁶⁴ the Florida Supreme Court concluded that since a recount was statutorily available, the certification deadline should not prevent it.⁶⁵ The court observed that the certification date in Florida was quite close to the election, making time-consuming recounts in large counties problematic.⁶⁶ The Florida Supreme Court also added a discussion of the Florida Constitution’s reference to the importance of the vote and the “will of the people.”⁶⁷ Interestingly, the constitutional references became a point of controversy as to whether the court was making new law or interpreting existing law in its opinion. The Florida court in its subsequent opinion in the protest litigation indicated that it was interpreting the law and not making new law.⁶⁸

To implement its remedy, the court in *Palm Beach County Canvassing Board v. Harris* used its equitable power to extend the date for certification to allow manual recounts to continue.⁶⁹ In so doing, the Florida Supreme Court concluded that the legislature intended the federal safe harbor provision to be a consideration in recounts in presidential elections.⁷⁰ This conclusion was fateful since the U.S. Supreme Court, in vacating the final appeal from the protest phase, focused on this finding in determining that Florida law fixed a deadline that made the further recounts impossible.⁷¹

D. THE ELECTION CONTEST PHASE AND *BUSH V. GORE*

The contest phase culminating in *Bush v. Gore* was the last stand for the Gore camp. The contest phase was a very different and distinct process from the protest phase in that it allowed for a challenge of the entire election and placed the controversy in the hands of a judge (here, Judge N. Sanders Sauls), who was empowered to devise an appropriate remedy. It is extremely significant to note that some of Gore’s attorneys wanted to go to the contest phase immediately after November 7, rather than going through a

⁶⁴ 531 U.S. 70 (2000).

⁶⁵ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1240 (Fla. 2000).

⁶⁶ *Id.* at 1233.

⁶⁷ *Id.* at 1236-38.

⁶⁸ *Gore v. Harris*, 772 So. 2d 1243, 1249 (Fla. 2000).

⁶⁹ *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1240.

⁷⁰ *See Bush v. Gore*, 531 U.S. at 105-06.

⁷¹ *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000).

protest phase.⁷² The result would have been to begin the counting under the contest standards sooner, and the counts would have been directed by a judge rather than determined by local canvassing boards.

The canvassing boards created much controversy because of their various standards and approaches during the protest phase. The protest recount was interrupted by demonstrations and provided the visual image to the world of people peering through ballots to divine voter intent. If the recount had gone straight to the judicially run contest phase, arguably, these demonstrations might have been averted.

The contest litigation focused on the standard necessary to initiate a statutory contest. Judge Sauls concluded that the standard to initiate a recount of certified votes was a probability that the contest would change the outcome of the election.⁷³ Under this standard, Judge Sauls determined that the plaintiff failed to show such a probability. In fact, the plaintiffs had put on very little evidence,⁷⁴ in an effort to move the case rapidly in order to meet the approaching deadline of December 12, 2000, the end of the “safe harbor” prescribed in 3 U.S.C. § 5. A divided Florida Supreme Court reversed and remanded Sauls’ decision, stating that the statutory standard was whether the circumstances would “place in doubt” the result of the election under section 102.168(c).⁷⁵ In dissent, Chief Justice Wells wrote, “[t]o me, it is inescapable that there is no practical way for the contest to continue for the good of this country and state.”⁷⁶

With what the U.S. Supreme Court ultimately described as a “standardless” recount in violation of the Equal Protection Clause, the recount was doomed.⁷⁷ In retrospect, the only circumstance that could have possibly changed the Florida result would have been a statutory standard for hand counting in effect before November 7, 2000 that would have satisfied the U.S. Supreme Court. Hence, the recount proceeded until halted by the U.S. Supreme Court’s restraining order.⁷⁸ At that point, some of the Gore attorneys felt that they had lost.⁷⁹

Bush v. Gore contained several ironies. First, the Court upheld the constitutionality of the Florida statute on determining the intent of the voter—the very statute that could be considered the reason for the inability to recount.⁸⁰ Second, the Court held that the Florida Supreme Court could have set the standard for recounting under that statute in response to the opinion declaring the recount procedures “standardless.”⁸¹ The irony, of course, is the catch-22 of this holding. Any setting of standards by the Florida Supreme Court would undoubtedly be considered a “change of law” under 3 U.S.C. § 5, coming after the election date and breaching the standard set out by such federal law. Therefore, the Court’s

⁷² Election Forum, *supra* note 7 (remarks of Gore attorney Dexter Douglass).

⁷³ *Gore v. Harris*, No. 00-2808 (Fla. Cir. Ct. Dec. 1, 2000) (Sauls, J.); *rev’d*, 772 So. 2d 1243 (Fla. 2000); *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

⁷⁴ There were only two witnesses relating to punch card machines during the trial phase of *Gore v. Harris*. See Election Forum, *supra* note 7 (remarks of Steve Zack).

⁷⁵ *Gore v. Harris*, 772 So. 2d at 1255.

⁷⁶ *Id.* at 1269 (Wells, C.J., dissenting).

⁷⁷ *Bush v. Gore*, 531 U.S. 98, 103 (2000).

⁷⁸ *Id.*

⁷⁹ Election Forum, *supra* note 7 (remarks of David Boies).

⁸⁰ *Bush v. Gore*, 531 U.S. at 105-6.

⁸¹ *Id.* at 110.

opinion clearly allows Florida to set its own election standard for recounts, but any change would have resulted in losing the “safe harbor” under federal law. In other words, you can set your standard, but it just will not work in *this* election—you have run out of time. Third, the Court found that the recount could not continue because of the December 12 deadline, which was the next day.⁸² But, again ironically, the Court preserved the state election prerogative by saying that the December 12 deadline was determinative because the Florida Supreme Court had, in its November 21 opinion extending the protest count deadline, previously concluded that the “safe harbor” was intended by the legislature to be part of Florida’s election law.⁸³ Consequently, the contest ended with the U.S. Supreme Court concluding that the count could not continue *because of Florida law, not despite it*. Evidently, a standardless recount violates the Constitution, but clarifying the standards for the 2000 recount would have been unconstitutional as well.

E. PERSPECTIVE ON THE FLORIDA LITIGATION: NO WAY OUT

Ultimately, during the controversy of 2000, the State of Florida and its courts had no way out, given the U.S. Supreme Court’s conclusion on equal protection. In other words, the conclusion that Florida was standardless left no remedy available after November 7, 2000. Any recount would have been standardless, and new standards would have created new laws, thus allowing Florida to drift out of the safe harbor.

Was the U.S. Supreme Court decision political? Historically, the Court has not shied away from high-profile policy decisions that have had a broad political impact.⁸⁴ Viewed in a narrow sense, this is just a case reviewing state election laws. Justice Stevens in his *Bush v. Gore* dissent emphatically stated that he believed the Court should not have taken the case.⁸⁵ Put in a more general light, the decision could be viewed as an effort to avoid the political turmoil of an extended controversy.⁸⁶ The principle of the Supreme Court’s holding contrasts sharply with the philosophy of all deciding Florida courts. In the butterfly ballot, the absentee ballot, protest, and contest cases, the Florida courts opted for a broad interpretation that allowed more votes to count. By comparison, the U.S. Supreme Court found the recount unconstitutional based on a lack of standards, a narrow interpretation allowing fewer votes to be counted.

Was the Florida Supreme Court political? There were charges that the Florida Supreme Court was a Democratic-leaning court because Democratic governors appointed six of the justices. Also, the press reported that Gore attorney Dexter Douglass, who was Governor Lawton Chiles’ general counsel, had been directly involved in the appointments of six of the justices. However, attorneys familiar with the court, including attorneys for Bush, believed strongly that the Florida Supreme Court would have decided the case exactly the same way if Republicans had been seeking the recount.⁸⁷ Nevertheless, the Florida Supreme Court has become the subject of proposals ranging from limiting the terms of justices to making

⁸² *Id.*

⁸³ *Id.* (finding that “[t]he Supreme Court of Florida has said that the legislature intended the State’s electors to participat[e] fully in the federal electoral process, That statute, in turn, requires that any controversy or contest that is designed to lead to a conclusive selection of electors be completed by December 12”).

⁸⁴ *See, e.g.,* *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a “right of privacy” is broad enough to protect a woman’s decision whether to terminate a pregnancy or not); *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding that “in the field of public education the doctrine of ‘separate but equal’ has no place”).

⁸⁵ 531 U.S. at 123 (Stevens, J., dissenting).

⁸⁶ Election Forum, *supra* note 7 (remarks of David Boies).

⁸⁷ Election Forum, *supra* note 7 (remarks of Joseph P. Klock, Jr.).

service on the Court an elected position. Opposition has already been announced for merit retention elections in 2002.

The Florida voting process was inadequate to resolve the conflict that arose because of the lack of standards and was flawed because of inadequate voting machines. Moves for reform began immediately after the controversy.⁸⁸

IV. THE NEW FLORIDA ELECTION REFORM ACT OF 2001: HOW IT RESPONDS TO THE MOST SEVERE PROBLEMS OF THE 2000 ELECTION

The legislature was anxious to respond comprehensively to the election crisis and proposed reforms. On May 10, 2001, Governor Bush signed into law the Florida Election Reform Act of 2001.⁸⁹ These reforms will alleviate the problems seen throughout the 2000 litigation by eliminating antiquated voting machines, setting specific recount standards, and clarifying voting procedures. The major classifications of those reforms are as follows.

A. VOTING TECHNOLOGY: THE NEW FLORIDA STATUTE WILL IMPROVE BALLOTING ACCURACY AND UNDERSTANDABILITY

Arguably, the major villain of the 2000 election was the punch card machine used in forty Florida counties. The new Act decertifies punch card balloting and certifies touch screen systems.⁹⁰ Reforms require that better systems be used by local supervisors of elections, who are required by the Act to use some form of electronic device.⁹¹ Since the Act's various reforms are costly, the legislature provided additional funding for new systems.⁹² The new law provides that the Department of State review and certify each system with each county.⁹³ In the summer of 2002, Hillsborough County selected touch screen voting.⁹⁴ The Act also requires each precinct to use technology that can catch undervotes or overvotes on individual ballots and allow the voter to correct those ballots.⁹⁵ Through these measures, the thorny problem of the punch card has been solved. The word "machine" is not even in the statute anymore.

But has the state of Florida replaced one problem with another? Professor Richard K. Scher argues that using new technology such as optical scanners will only confuse voters as much as the old punch card system.⁹⁶ However, assuming that proper voter education is successful, these systems will dramatically reduce invalid votes and result in more individuals having their vote actually counted, which is a definite improvement.

⁸⁸ THE GOV.'S SELECT TASK FORCE ON ELEC. PROCEDURES, STANDARDS & TECH., REVITALIZING DEMOCRACY IN FLORIDA (Mar. 2001) (on file with Stanford Law & Policy Review).

⁸⁹ 2001 Fla. Sess. Law Serv. § 40 (West).

⁹⁰ *Id.* §§ 2, 17.

⁹¹ *Id.* §§ 2, 16.

⁹² *Id.* §§ 71, 74, 76.

⁹³ *Id.* §§ 6, 18.

⁹⁴ Thomas C. Tobin, *Technical Reality of Election Reform Hit Hard*, ST. PETERSBURG TIMES, Aug. 6, 2001, at 1A.

⁹⁵ *Id.* § 18.

⁹⁶ Scher, *supra* note 21.

B. THE NEW FLORIDA STATUTE INTENDS TO MAXIMIZE VOTER PARTICIPATION

Some citizens charged the existence of voter purges that wrongfully denied them their right to vote.⁹⁷ The new Act states that if it is unclear whether an individual is eligible to vote, that voter shall cast a provisional ballot, which will be counted as soon as the voter's eligibility is determined.⁹⁸ This reform allows anyone who comes to the polls to vote.

This measure should presumably eliminate the problem of voters who were improperly purged in the last election and were turned away from the polls. Under this change, the voter executes a provisional ballot, even if he or she was not on the registration list.⁹⁹ The ballot is later reviewed and counted if he or she was properly registered in that precinct.¹⁰⁰ This reform makes sense and would eliminate the frustration of people who believe they are registered but are refused the right to vote.

Also, the Act creates a new section of the Election Code that provides for the development of a statewide voter registration database.¹⁰¹ This database will be maintained online and will contain voter registration information from each of the sixty-seven supervisors of elections in the state.¹⁰² Moreover, the Act repeals section 98.0975, which called for the State to outsource maintenance of the voter registration lists to a private entity¹⁰³ Arguably, this will stem the abuses concerning the overzealous purging of registered voters.

C. THE NEW STATUTE WILL MINIMIZE VOTER MISTAKES

The Palm Beach butterfly ballot and other evidence indicated that voters believed they voted incorrectly. Votes were also left uncounted as a result of undervotes and overvotes. Some voters marked their presidential ballots twice after an incorrect direction saying they must vote "on each page" of the Duval County ballot.¹⁰⁴

The new Act seeks improvement by focusing on training poll workers. It creates an entire section specifically dedicated to poll worker recruitment and training.¹⁰⁵ The Act requires that the supervisor of elections ensure that poll workers have met certain minimum training requirements.¹⁰⁶

⁹⁷ See *supra* Part III.

⁹⁸ 2001 Fla. Sess. Law Serv. 40, § 35 (West).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* § 70.

¹⁰² *Id.*

¹⁰³ *Id.* § 73.

¹⁰⁴ Scher, *supra* note 21.

¹⁰⁵ 2001 Fla. Sess. Law Serv. 40 § 64 (West).

¹⁰⁶ *Id.* § 64.

Furthermore, the Department of State will review all proposed ballots.¹⁰⁷ The new Act also amends section 101.151, defining in detail the specifications for ballots.¹⁰⁸ This procedure seeks to avoid another butterfly ballot fiasco and make ballots easier for voters to use.

Lastly, the legislation seeks to place some responsibility on the voter in a “Bill of Rights and Responsibilities.”¹⁰⁹ This provision has, incidentally, been challenged as a potentially intimidating process analogous to an illegal “literacy test.”¹¹⁰

D. THE STATUTE HAS BEEN IMPROVED TO MAKE IT MORE CONSISTENT, LOGICAL, AND ADEQUATE

The conflicting timeframes of the protest phase and election certification in the 2000 statutes have been addressed. The certification takes longer, and recounts are automatic.¹¹¹ Moreover, the thorny issue of determining the “clear intent” of the voter has been replaced with the determination of whether the voter made “a definite choice.”¹¹² The Department of State shall enunciate what constitutes “a definite choice,” subject to certain qualifications.¹¹³ This result will produce the uniform standards for recounts that the U.S. Supreme Court found lacking.

The Department of State Specific will establish specific standards for each voting system.¹¹⁴ Also, requests for a manual recount in federal elections now go to the state Elections Canvassing Commission, as opposed to each local canvassing board.¹¹⁵

¹⁰⁷ *Id.* § 18.

¹⁰⁸ *Id.* § 7.

¹⁰⁹ *Id.* § 101.031. The new Act requires a ten-point list of voters’ rights be published and posted inside every polling place in the state. The Voter’s Bill of Rights includes the right of each voter to:

- (1) [v]ote and have his or her vote accurately counted;
- (2) [c]ast a vote if he or she is in line when the polls are closing;
- (3) [a]sk for and receive assistance in voting;
- (4) [r]eceive up to two replacements ballots if he or she makes a mistake prior to the ballot being cast;
- (5) [a]n explanation if his or her registration is in question;
- (6) [i]f his or her registration is in question, cast a provisional ballot;
- (7) [p]rove his or her identity by signing an affidavit if election officials doubt the voter’s identity;
- (8) [w]ritten instructions to use when voting, and upon request, oral instruction in voting from election officers;
- (9) [v]ote free from coercion or intimidation by elections officers or any other person;
- (10) [v]ote on a voting system that is in working condition and that will allow votes to be accurately cast. *Id.*

The Act also enumerates a list of voter responsibilities, which include obligations of each voter to:

- (1) [s]tudy and know candidates and issues;
- (2) [k]eep his or her voter address current;
- (3) [t]o know his or her precinct and its hours of operation;
- (4) [b]ring proper identification to the polling station;
- (5) [k]now how to operate voting equipment properly;
- (6) [t]reat precinct workers with courtesy;
- (7) [r]espect the privacy of other voters;
- (8) [r]eport problems or violations of election law;
- (9) [a]sk questions when confused;
- (10) [c]heck his or her completed ballot for accuracy.” *Id.*

¹¹⁰ Professor Scher further argues that the daunting new technology, for example, optical scanners, will serve as a “literacy test” for many voters. *See* Scher, *supra* note 21.

¹¹¹ 2001 Fla. Sess. Law Serv. 40 (West).

¹¹² *Id.* § 42.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

The contest statute was also amended by the Florida legislature, though the changes here were minimal. The new law omits the statutory language giving a circuit judge authority to fashion an appropriate remedy as that judge sees fit.¹¹⁶ However, a circuit judge confronted with fraudulent votes or other violations would have the general authority of all circuit judges to remedy a statutory violation.

E. THE NEW STATUTE IS IN TECHNICAL COMPLIANCE WITH ELECTION LAW STANDARDS ESTABLISHED BY THE FLORIDA CONSTITUTION

Recall that with respect to the overseas absentee ballots and absentee ballots in Martin and Seminole counties, the votes were ultimately accepted as “substantial compliance” with election laws. The response to these issues was to specify standards for overseas ballots which are less restrictive and make them easier to count.¹¹⁷ The actual language allows electronic voting and reduces the information required for an overseas ballot.¹¹⁸ The new Act also eliminates the requirement of social security numbers or voter identification numbers on absentee ballots.¹¹⁹ Lastly, the new law requires placing the name of the party on the ballot next to the candidate’s name.¹²⁰

Ironically, in the attempt to remedy the problem concerning absentee voting, the legislature may have sown the seeds for future problems—especially that of fraud. Recently, the *New York Times* performed a study showing that the Bush campaign successfully persuaded Florida officials to accept hundreds of overseas absentee ballots that failed to comply technically with state election laws.¹²¹ Out of 2,490 overseas ballots that were deemed legal, i.e., as having substantially complied, the *New York Times* found 680 questionable votes.¹²² Four out of five were accepted in counties that were carried by Bush in an election decided by 537 votes.¹²³

Making absentee voting “easier” may not be wise. Perhaps the standards and process of evaluating absentee ballots should actually become more stringent, especially in light of the *New York Times* study.¹²⁴ Eliminating the need for social security numbers and voter identification numbers, compounded by using electronic mail balloting, creates the possibility of voter fraud.

¹¹⁶ *Id.* § 44.

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 51, 52.

¹¹⁹ *Id.* § 52.

¹²⁰ *Id.* § 7.

¹²¹ David Barstow & Don Van Natta, Jr., *Examining the Vote: How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at A1.

¹²² *Id.* These votes included “ballots without postmarks, ballots postmarked after the election, ballots without witness signatures, ballots mailed from . . . within the United States, and even ballots from voters who voted twice.”

¹²³ *Id.*

¹²⁴ *Id.*

F. THE STATUTE PROVIDES FOR REFORMS THAT WILL MAKE THE ELECTION PROCESS APPEAR MORE FAIR

The new Act calls for an inquiry by both the Division of Elections and the Florida State Association of Supervisors of Elections into the feasibility of having uniform poll opening and closing times in Florida.¹²⁵ One reform recommended by both Governor Bush's Task Force and the National Association of State Legislatures was to ban state election officials from participating in a campaign unrelated to their own.¹²⁶ However, the final legislation did not contain this reform, which would have signaled a commitment to avoid the appearance of impropriety.

V. CONCLUSION: THE NEW ELECTION STATUTE WILL LIKELY PREVENT A FUTURE CRISIS SUCH AS THE 2000 ELECTION LITIGATION IN FLORIDA

History and law professors will have much to say concerning the election of 2000 in Florida. Florida laws were inadequate for this crisis and failed to consider the potential consequences of a dead heat presidential election. Then again, many other states could likely have been in the same position with a similar dead heat. Because there are thousands of overvotes that will never be counted and constant disputes as to the recounts of the undervotes, we can never actually know how the election would have come out if every person who sought to vote in Florida had had his or her vote counted.

The Florida legislature made a sincere effort to respond to perceived major problems. The problems included inaccuracies in counting and inefficient machines. The focus of the reform is accuracy. Recall that in 1876 the issue was a process that took too long to resolve; thus, the "safe harbor" was created with time limitations to encourage a quicker resolution in presidential elections. Those solutions gave rise to some of the complexities and problems in election 2000.

With machines that are more efficient, foreign ballots that are easier to count, and computers that avoid human error, we most likely will increase the number of votes that will be counted. But we need to remember that almost all solutions create new problems. All reformers and election officials should take care that the efficiencies created by "voting systems" are carefully protected against fraud. Our wired society has experienced the hardships and distractions from computer viruses and hackers. We should take care that the computer hacker does not replace the old precinct ballot stuffer who fills out votes for the dead. How much more massive could the problem be with a hacker affecting an entire system as compared to fraud at one ballot box?

Would all of these reforms have changed the result of the election? Possibly. The sheer number of additional votes counted with better voting systems would have changed the overall totals dramatically. What would have happened under the new system if the vote had still been so close? First, the number of ballots discarded, and thus in question, would be fewer. Under the new system, all ballots would be rerun through the system. Then the validity and accuracy of the system is reviewed. Under a touch screen system, remember there will be no direct physical evidence of the voters' intent. Any paper record will be indirect, since the voter never had a direct contact with the ballot, such as by punching the hole or by hand-marking the ballot.

If the system checks still revealed a close vote, then a recount would be required. We cannot know if the totals would have yielded different results in the 2000 election. But if the new system had been in

¹²⁵ 2001 Fla. Sess. Law Serv. 40 § 63.

¹²⁶ Robert Tanner, *Legislatures Weigh in on Voting Reform*, ASSOC. PRESS, Aug. 11, 2001.

place, the margin for error would have been drastically reduced. Since far fewer votes would have been discarded, the level of frustration and suspicion would probably have been reduced as well.

The likelihood of another Florida-like dispute is remote. As a culture, we hate mechanical failures. Changing machines substantially reduces the probability that an election will occur in which numbers of contested ballots will be so large as to place in doubt the entire election result. Nevertheless, after so much speculating, the press and private recounts still seem to show that this election was within 2000 votes in Florida. No doubt an election that close, even with excellent machines or systems, would generate a challenge by the losing party. However, new machines and new legal standards would likely allow a quicker and perhaps quieter resolution of the controversy. We can only hope the struggles in Florida translate into beneficial reforms for the entire country and that history will not repeat itself.

