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WHO'S RESPONSIBLE FOR A TAINTED BALLOT?

*Tom Fiedler**

Jay Leno, the late-night television comedian, got an easy laugh at Florida's expense when he took notice of President George W. Bush's decision to host Little Leaguers on the White House lawn. These youngsters play a kid-friendly version of baseball called T-ball, which differs from the real game in two major respects: First, rather than trying to hit a pitched ball, the kids swing away at a ball perched on a tee; second, nobody keeps track of the score. "Just like Florida elections," Leno quipped.

Elsewhere in this journal some of the most adept lawyers in Florida and the nation write with depth and passion about the torturous legal path that the case known to the world as *Bush v. Gore*¹ worked its way through the state and federal courts. They discuss in detail the legal ramifications of contests and protests, of hanging chads and pregnant dimples, and of undervotes and overvotes. All of this is interesting and important. The issues raised by the post-election period in Florida will provide the guideposts for the nation to future election disputes.

But to almost all other Americans and interested observers of Florida's role in this contentious presidential election, these legal arguments are somewhere between irrelevant and empty. Most Americans were not interested in learning about equal protection of the laws or about the safe-harbor provision.² They wanted to know how it came to be that a state as large and seemingly as sophisticated as Florida could so badly screw up an election. How could it be that so many Jewish voters, most of them democratic liberals, would find themselves casting their votes for reform party candidate Pat Buchanan, an ultra-conservative who in years past has been suspected of being — how shall I put this — less than pro-Jewish? Yet, the former television commentator did as much as six-times better in many Palm Beach County precincts than his statewide average.

While many voters blamed the confusing "butterfly ballot," many Americans — egged on by the television comics — simply blamed "Flori-duh." Acerbic commentators asked how the stereotypical Florida retiree could simultaneously play several bingo cards, yet become totally befuddled by a ballot that opened on facing pages with the holes to be punched along the seam. The web site, modernhumorist.com, devoted an entire section to Flori-duh, selling tee-shirts, bumper stickers, coffee mugs and more with

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1. 531 U.S. 98 (2000).

2. 3 U.S.C. § 5 (2000).

such sayings as, “Palm Beach voters do it twice,” “My grandma voted in Palm Beach and all I got was this lousy president!,” “I don’t have a voting problem. . . I vote. . . I f--- up. . . . I sue. . . . No problem.” A Canadian newspaper columnist’s parody of Dr. Seuss’s GREEN EGGS AND HAM made the web site. The writer called his ditty, “Dr. Seuss Goes to Flori-duh.” It went like this:

Can we count them with our nose? Can we count them with our
toes? Should we count them with a band? Should we count them all
by hand? If I do not like the count, I will simply throw them out! I
will not let this vote count stand, I do not like them, Al Gore I
am. . . .

Behind the jokes and the insults lay a serious question: Was this a breakdown of the voting process, a distortion of constitutional law — or the simple failure by thousands of voters to carry out their responsibilities? In other words, voting is a human process and humans make mistakes. The question then becomes, what responsibility — if any — does government and the law have to prevent such mistakes? Should voting be idiot-proof? Or, as some will argue persuasively, do voters have the duty to learn how to cast ballots, just as they are expected to learn how to drive before taking the license test? I am not talking here about voters whose best efforts were thwarted by faulty equipment: The State clearly has an obligation to see that the balloting machinery is in proper order. But the innovative ways by which thousands of Floridians spoiled their votes should give one pause for the efficacy of popular democracy.

In the weeks after the election, the *Miami Herald* sent teams of reporters and accountants into each of Florida’s sixty-seven counties to review the disputed ballots, the undercounts (ballots that did not register a vote for any candidate) and the overvotes (ballots that were disqualified because more than one ticket appeared to be marked). A story published in the *Miami Herald* on April 4, 2001, carried the headline: “FLORIDIANS ZANY, CREATIVE IN SPOILING THEIR BALLOTS.” It told of voters who, despite instructions to fill in a circle next to the candidate of their choice, circled the circle or underlined it. Punchcard ballots were put in backwards and upside down. In one case a voter must have mistakenly punched out the chad next to the wrong candidates, so he or she used finger-nail polish to stick the chad back into place, although backwards. In some counties, voters took too literally the instructions on the ballot. Not only did they properly mark the ballot next to the name of their preferred candidate, they also wrote that candidate’s name adjacent to the words “write-in candidate” — as if that was a directive. As a result, the tallying machine tossed out the ballot on the assumption that the voter had named two different candidates, the classic overvote.

Hundreds of Duval County voters also took to heart the message from Democratic Party leaders to make sure that they cast ballots for "Gore and Brown." That was a reference to the Vice-President and to U.S. Rep. Corrine Brown, also on the ballot. But these voters were apparently thrown for a loop when, after marking their ballots for Gore, came across the name of Harry Browne, the Libertarian Party candidate for president, and marked his name as well. Out went those ballots. But those errors were not as bad, perhaps, as the Bay County citizen who left the ballot blank, but wrote this note on the bottom: "I forgot my glasses and cannot see this. Please put Bush down for my vote." All told, some 174,000 Floridians who went to the polls missed their chance to influence an election decided by just 537 official tallies. Many of these uncounted votes can be blamed on carelessness or ignorance.

Some might argue that government is better off without such participants — a contention that raises the hackles of many small-D democrats. Listen to Hillsborough County Supervisor of Elections, Pamela Iorio, in testifying before the Governor's Select Task Force on election procedures, standards, and technology on January 8, 2001:

I have heard the view expressed by some members of the public that elections officials should not be concerned with the rate of voter error; it is the responsibility of the voter to get it right and if the voter can't figure out how to use a voting system, then they shouldn't vote at all. . . . But in America, the illiterate voter stands next to the most highly educated one, and both votes count the same. It is our role as elections officials to provide a voting system that makes it difficult for voters to make mistakes. It is our job to bring simplicity and clarity to election-day procedures.

But this circles us back to the question of how far government should go, in Ms. Iorio's words, to make it difficult for mistakes to be made. The Florida Legislature acted quickly in its 2001 session to eliminate what many believe is the major source of the problem, the punchcard ballot.³ That also eliminates the possibility of any county using a butterfly ballot. The result is that most of the state's sixty-seven counties will begin using so-called optical scan technology in 2002, while a handful might opt for the "touch-screen" machines that are often compared to ATMs. Yet the experts now say that even those changes will not eliminate errors. The prestigious National Commission on Federal Election Reform, headed by former Presidents Carter and Ford, said in its report, "the performance of voting

3. Florida Election Reform Act of 2001, 2001 Fla. Laws ch. 2001-40 (2001) (codified at FLA. STAT. § 101.5604 (2001)).

systems is affected by several factors that go beyond equipment. Some of the most important are ballot design, voter education and the skill and training of poll workers.”

Deborah Phillips, executive director of the Voting Integrity Project, lent support to this view. “There is no such thing as a ‘perfect’ voting system,” she said in remarks prepared for Congress. She went on to state that:

Every voting system has its strengths and weaknesses. Given sufficient resources for voter education and election personnel, any voting system currently in use can be made to work with a high degree of integrity and public confidence. . . . Most election problems that appear to be technology-driven, are usually reduced to issues relating to how a particular technology was employed. The best system can be completely undermined by inadequate voter education, worker training, or flawed procedures. If you peel away the technology veneer of elections, like pulling back the curtain of Oz, elections are surprisingly manual — and that is the source of most election irregularities.

The Election Center’s National Task Force on Election Reform, in a report issued on August 9, 2001, hit the election irregularities even more directly: “The problem was created by people, not machines, and any reform of substance will deal with what people do or do not do, rather than focusing on a machine that can do only what it’s designed to do.”

So what is the answer? It is not entirely facetious to say that if we want to fix the problem we should fix the people. The myriad of task forces that have looked into this issue have been nearly unanimous in concluding that voter education is critical and that more public resources should be devoted to that end. But education only goes so far. The overarching issue is voter motivation — that is, how seriously a voter approaches this most fundamental obligation of citizenship.

The Florida Legislature, as part of its landmark election-reform bill that became law earlier this year, addressed this issue.⁴ It directed county elections supervisors to post in every precinct a ten-point list of voter rights and responsibilities.⁵ Among the latter was an assertion that the voter should know his or her precinct and hours of operation, how to operate the voting equipment, ask questions when confused, and how to report violations of election law.⁶ But most important on the list is the responsibility to “study and know the candidates and issues.”⁷ The law did

4. 2001 Fla. Laws 2001-40.

5. *Id.* (codified at FLA. STAT. § 101.031 (2001)).

6. *Id.*

7. *Id.*

not mandate these qualities, but simply listed them as if they were the election equivalent of the Beatitudes (“blessed are those who study the issues”). These items would seem to be inherent in being a good citizen.

Incredibly, however, at least one group — the Florida Equal Voting Rights Project — filed suit in federal court seeking to strike the requirement that the list be posted.⁸ The group’s spokesman said that the presence of the list could intimidate some voters — especially, according to the suit, the poor and minorities — to the point where they could not exercise their rights.⁹ The group said the list was tantamount to the notorious literacy tests of the Jim Crow era, which were designed explicitly to keep even those African-Americans who had registered to vote from casting ballots. That is nonsense.¹⁰ There is precedent in Florida law, although indirect, postulating that voters hold a responsibility to act, well, responsibly.

In the 1974 case of *Nelson v. Robinson*,¹¹ Chief Judge McNulty dismissed the complaints of several candidates who argued that a confusing ballot may have cost them the election.¹² While the ballot may indeed have been confusing, the judge made clear his belief that voting was such an important duty that the burden fell on the voter to figure it out. Indeed, the judge said the Constitution “assumes [the voter’s] ability to read and his intelligence to indicate his choice with the degree of care commensurate with the solemnity of the occasion.”¹³

Ponder those words, solemnity of the occasion. Implicit in them is the belief that the voter who makes a bonehead mistake — as many Floridians clearly did — has ignored that high purpose, perhaps even committed sacrilege, and just may not deserve to be a participant. As this is written, the suit filed by the Florida Equal Voting Rights Project is undecided. But, one cannot help but wonder, what the nation will think of Florida voters if the courts decide to ban the ten-point lists from polling places. The message will apparently be that it is too much to ask — not demand, just ask — that the right to vote carries with it the concomitant responsibility to do it wisely. Jay Leno will have a field day.

8. Paul Brinkley Rogers, *State’s New Voting Guidelines Illegal, Rights Lawsuit Charges*, MIAMI HERALD, Aug. 16, 2001, Online Ed.

9. *Id.*

10. *Id.*

11. 301 So. 2d 508 (Fla. 2nd Dist. Ct. App. 1974).

12. *Id.*

13. *Id.* at 512.

