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Election 2000: The Law of Tied Presidential Elections

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Election 2000: The Law of Tied Presidential Elections^{*}

Mitchell W. Berger^{**} & Candice D. Tobin^{***}

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* The phrase the “The Law of Tied Presidential Elections” is attributed to Ron Klain, the lawyer who brilliantly led Vice President Al Gore’s and Senator Joseph Lieberman’s legal efforts in Florida, and who promised Mitchell Berger that he could teach the course on tied presidential elections having been the lawyer who developed most of the material for the course in less than the forty days of the recount. The authors would like to thank Amanda M. Gruzas and Brian H. Koch for their research assistance and helpful comments in preparing an earlier draft of this article. The views expressed herein are solely those of the authors and not Ms. Gruzas or Mr. Koch. Ms. Gruzas and Mr. Koch anticipate graduating from the University of Florida, Levin College of Law in December 2002. The authors would also like to recognize the contributions of all members of the legal profession who took part in the election controversies to insure the peaceful transition of power in the world’s oldest democracy. As William Safire stated on *Meet the Press* on November 21, 2000, “in moments like these, some nations turn to their generals, and we [the United States of America] turn to our lawyers.” The authors are thankful for the rule of law and the professionals who uphold the ethic of the rule of law.

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Since numerous cases in the litigation concerning the 2000 Presidential Election had the same litigants, we have labeled cases with Roman numerals as a helpful guide to the reader.

Palm Beach County Canvassing Board I v. Harris, 772 So. 2d 1220 (Fla. 2000). Trial court orders were appealed to the First District Court of Appeal, which certified the orders to the Supreme Court of Florida. The decision was issued on November 21, 2000.

Palm Beach County Canvassing Board II v. Harris, 772 So. 2d 1273 (Fla. 2000). This case was before the Supreme Court of Florida on remand from the United States Supreme Court decision in *Bush v. Palm Beach County Canvassing Board*. The decision was issued on December 11, 2000.

Gore I v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000).

Gore II v. Harris, 779 So. 2d 270 (Fla. 2000). The Supreme Court of Florida dismissed a petition for writ of mandamus on December 1, 2000.

Gore III v. Harris, 779 So. 2d 1243 (Fla. 2000). Trial court final judgment was appealed to the First District Court of Appeal, which certified the judgment to the Supreme Court of Florida. The decision was issued on December 8, 2000.

Gore IV v. Harris, 779 So. 2d 524 (Fla. 2000). This case was before the Supreme Court of Florida on remand from the United States Supreme Court decision in *Bush II v. Gore*. The decision was issued on December 22, 2000.

Siegel I v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000). A request was made to enjoin four canvassing boards from proceeding with manual recounts of the presidential election. The request was denied on November 13, 2000.

Siegel II v. LePore, 531 U.S. 1005 (2000). The United States Supreme Court denied writ of certiorari on November 24, 2000.

Siegel III v. LePore, 234 F.3d 1163 (11th Cir. 2000). This case was an appeal from the district court to the Eleventh Circuit Court of Appeals. The court affirmed the district court's decision on December 6, 2000.

Siegel IV v. LePore, 234 F.3d 1218 (11th Cir. 2000). The Eleventh Circuit denied a petition for rehearing on December 9, 2000.

Bush I v. Gore, 531 U.S. 1046 (2000). The United States Supreme Court treated an application for stay as a petition for writ of certiorari, and granted both, in regards to *Palm Beach County Canvassing Board I v. Harris* on December 9, 2000.

Bush II v. Gore, 531 U.S. 98 (2000). The United States Supreme Court reversed the Supreme Court of Florida and remanded the case for further proceedings.

I. INTRODUCTION

On the evening of November 7, 2000, anyone watching the media coverage of the presidential election knew that they were observing history in the making. After an extraordinarily divisive presidential campaign, America and the world sat in anticipation of who would be the next President of the United States. Some people went to bed late, thinking that when they awoke they would know the identity of the nation's next leader. Others stayed up into the early morning hours of November 8th in order to be one of the first to know the name of the next President. When the votes came in, the news media created a color-coded mosaic map of the nation, assessing either red or blue to the respective candidate, as it became clear who had won each state. However, two states remained yellow, Florida and New Mexico, with neither being assessed to a candidate. One of those states, Florida, had a significant number of electoral votes, enough to determine the outcome of the election.

Once it became clear that the eyes of the nation were turning to the Sunshine State, Florida election law became extraordinarily important. Pursuant to Florida law, because there was less than one-half of one percent of the total votes cast in the election separating the two leading candidates, the Division of Elections began a statutorily mandated machine recount of the ballots. Once the machine recount was completed, twenty-four hour news networks began carrying "election tickers" carrying the phrase "Florida

Recount: Bush by 537.” Almost instantaneously, the election entered the Florida courts and, ultimately, the United States Supreme Court.

The purpose of this paper is to explore some of the prominent legal issues surrounding the 2000 Presidential Election. First, it will examine the State of Florida election law prior to the 2000 election. Second, it will provide the events leading to the various legal challenges. Third, it will examine the important issues involved in the election protest and contest that followed. Exploring these cases will demonstrate that the reasoning of many of the cases, especially those of the United States Supreme Court, whether because of result-oriented reasoning or incredible time pressures, have created law that is difficult to reconcile with precedent and is harmful to state and federal government.

II. FLORIDA ELECTION LAW BEFORE THE 2000 ELECTION

A. *The Florida Constitution and the Right to Vote*

Immediately after the preamble, the Florida Constitution, unlike the federal constitution, begins with a Declaration of Rights that is guaranteed to all Florida citizens.¹ The framers of the Florida Constitution gave primacy of position to the Declaration of Rights with good reason.² It sets forth a series of rights that the framers of the Florida Constitution deemed basic to all Floridians.³ The Declaration of Rights limits the power of the state, saying “[t]hus far shalt thou come, but no farther.”⁴

1. FLA. CONST. art. I.

2. See *State ex rel. Davis v. City of Stuart*, 120 So. 335, 347 (Fla. 1929) (“Primacy of position in our State Constitution is accorded to the Declaration of Rights. It comes first, immediately after the preamble.”).

3. *Traylor v. State*, 596 So. 2d 957, 963 (Fla. 1992) (“The text of our Florida Constitution begins with a Declaration of Rights—a series of rights so basic that the Framers of our Constitution accorded them a place of special privilege.”). See *Davis*, 120 So. at 347 (“It is significant that our Constitution thus commences by specifying those things which the state government must not do, before specifying certain things that it may do.”).

4. *Id.*

These Declarations of Rights . . . have cost much, and breathe the spirit of that sturdy and self-reliant philosophy of individualism which underlies and supports our entire system of government. No race of hothouse plants could ever have produced and compelled the recognition of such a stalwart set of basic principles, and no such race can preserve them. They say to arbitrary and autocratic power, from whatever official quarter it may advance to invade these vital rights of personal liberty and private property, “Thus far shalt thou come, but no farther.”

Id.

The Declaration of Rights places more rigorous restraints on government intrusion than the federal constitution, increasing the fundamental protections accorded to Florida citizens above those accorded by the federal government.⁵ The federal constitution represents the floor for basic freedoms, but the Florida Constitution is the ceiling of fundamental rights retained by its citizens.⁶ While the federal Bill of Rights provides common uniformity, Florida's Declaration of Rights provides a higher level of protection from governmental intrusion to Floridians.⁷

The first right pronounced in the Declaration of Rights is the "political power" provision, which provides that "[a]ll political power is inherent in the people."⁸ Almost seventy years ago, the Supreme Court of Florida determined that the right to vote is a constitutional right in the State of Florida.⁹ More recently, the Supreme Court of Florida determined that the right to vote was within the Florida Constitution's political power provision.¹⁰

5. *Traylor*, 596 So. 2d at 962. When the rights provided by the Florida Constitution should be construed in the same manner as the federal constitution, the Florida Constitution has set forth "conformity clauses." See FLA. CONST. art. I, § 12.

6. *Traylor*, 596 So. 2d at 962. *Traylor* states:

Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation.

Id. See Stewart G. Pollock, *State Constitutions As Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 709 (1983).

7. *Traylor*, 596 So. 2d at 962. See *Palko v. Connecticut*, 302 U.S. 319, 324–25 (1937) ("[I]mmunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states"); see, e.g., *Powell v. Alabama*, 287 U.S. 45, 73 (1932) (finding the right to counsel applicable to the states because it is of "fundamental character"); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.").

8. FLA. CONST. art. I, § 1. Specifically, the Florida Constitution provides: "Section 1. Political power—*All political power is inherent in the people.* The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." *Id.* (emphasis added).

9. *State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933) ("The right to vote, though not inherent, is a constitutional right in this state.").

10. *Treiman v. Malmquist*, 342 So. 2d 972, 975 (Fla. 1977) ("The declaration of rights expressly states that 'all political power is inherent in the people.' The right of the people to select their own officers is their sovereign right . . .") (citations omitted).

B. The Florida Statutory Scheme

The Florida Legislature had set forth a statutory scheme to establish and provide for elections.¹¹ Although a specific portion of the scheme was reserved for the election of presidential electors,¹² the statutes regulating the conduct of the actual election were the same for every elected political office, including presidential electors.¹³ Chapter 102 of the *Florida Statutes* was specifically dedicated to regulating the conduct of elections and ascertaining the results.¹⁴

Each county had both a supervisor of elections,¹⁵ and a county canvassing board.¹⁶ The supervisor of elections was an elected official responsible for “the registration books and had the exclusive control of matters pertaining to registration of electors.”¹⁷

The county canvassing board was a three-member body, normally composed of a county court judge who acts as chair, the supervisor of elections, and the chair of the board of county commissioners.¹⁸ Each county canvassing board had the responsibility to canvass the number of votes returned for each candidate, nominee, constitutional amendment, or other measure submitted to the county’s electorate.¹⁹

Pursuant to the statutes, under some circumstances, the county canvassing board had the discretion to order a recount of the ballots from a precinct.²⁰ If the results from a precinct were missing, if the returns had omissions, or if any of the returns had an obvious error, the county canvassing board could choose to order a recount from the affected precincts.²¹ If the county canvassing board chose to engage in a recount,²²

11. See FLA. STAT. §§ 101.001–103.151 (2000).

12. §§ 103.011–.151.

13. §§ 102.012–.171.

14. *Id.*

15. § 98.015.

16. § 102.141.

17. § 98.015(3).

18. § 102.141(1). If a member of the commission was unable to serve, that member could be replaced under the statute. § 102.141(1)(a)–(d).

19. § 102.141(3).

20. § 102.166(4)(c).

21. § 102.141(3).

22. § 102.166. Note that once a county canvassing board had decided to engage in a recount, they could not then reverse that decision, and they had to complete the recount. *Id.* But see *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179, 1180–81 (Fla. 3d Dist. Ct. App. 2000) (determining that mandamus will not lie where a recount would be impossible by the deadline, but, dismissing without prejudice to

the county canvassing board would make an initial quasi-judicial legal determination of what is a "legal vote," which is subject to *de novo* review by the Florida courts.²³ Furthermore, under certain circumstances, specifically where a candidate was defeated or eliminated by less than one-half of one percent of the votes, where a judicial officer was retained or not retained by one-half of one percent or less, or where a measure appearing on the ballot was approved or rejected by one-half of one percent or less, the county canvassing board was required to order a mandatory recount, unless the losing candidate requests in writing that a mandatory recount was unnecessary.²⁴

1. The Protest Procedure, *Florida Statutes* § 102.166

The results certified by the county canvassing board were not the final determination of the number of votes cast in the county. A candidate or a voter qualified to vote in the questionable election had the right to protest the election returns as being erroneous.²⁵ Furthermore, any candidate on the ballot, political committee, or political party could request, in writing, that

Miami-Dade County Democratic Party and the Florida Democratic Party "to seek relief in the Florida Supreme Court from the court-ordered deadline and to ask the Supreme Court to fashion an equitable remedy tailored to the conditions of Miami-Dade County").

23. The review accorded to a county canvassing board was similar to that of other state administrative agencies. The board engaged in quasi-legislative action when it engaged in an action "with respect to transactions to be executed in the future," such as enacting ordinances. *Bd. of County Comm'rs v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993). Quasi-legislative actions are accorded considerable deference on review and will be sustained so long as they are fairly debatable. *Nance v. Indiatlantic*, 419 So. 2d 1041, 1041 (Fla. 1982). However, the board engages in quasi-judicial action when the action has "an impact on a limited number of persons . . . on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and where the decision can be functionally viewed as policy application, rather than policy setting . . ." *Snyder*, 627 So. 2d at 474 (emphasis added). Quasi-judicial actions are reviewed by Florida courts *de novo* and will only be sustained if they are supported by substantial competent evidence. *DeGroot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

24. FLA. STAT. § 102.141(4) (2000).

25. § 102.166(1). The candidate or voter had to file a sworn, written protest of the returns before the canvassing board certified the results to the Department of State, or within five days after midnight of the date the election was held, whichever was later. § 102.166(1)-(2). Therefore, candidates or voters had a minimum of five days in which they could file a protest with the county canvassing board. § 102.166(2). As amended in section 102.168 of the 2001 *Florida Statutes*, the section now allows a protest to be filed within ten days rather than only five.

the county conduct a manual recount of the ballots.²⁶ The county canvassing board had the discretion to authorize a manual recount that must include at least three precincts and at least one percent of the total votes cast.²⁷ If the manual recount indicated an error in vote tabulation that could affect the outcome of the election, the county canvassing board had three options.²⁸ First, the board could correct the tabulation error and recount the other precincts with the same tabulation problem.²⁹ Second, the board could “request the Department of State to verify the tabulation software.”³⁰ Finally, the board could manually recount all of the ballots.³¹

When conducting a manual recount, whether of a three-precinct sample of the ballots or of all the ballots in the election, the Florida Legislature had provided counting procedures. The county canvassing board appoints as many counting teams as necessary.³² Each counting team was required to have at least two electors that, when possible, must be of at least two political parties.³³ However, the candidate in the protested race could not be a member of a counting team.³⁴ If a counting team could not discern the voter’s intent when casting the ballot, the ballot must be presented to the county canvassing board to determine the voter’s intent.³⁵

26. § 102.166(4)(a). Any request for a manual recount had to be made prior to the county canvassing board’s certification of the results, or within seventy-two hours after midnight of the date the election was held, whichever was later. § 102.166(4)(b).

27. § 102.166(4)(d). The person requesting the manual recount could select the three precincts to be recounted. *Id.* If more than three precincts were recounted, then the county canvassing board selected the additional precincts. *Id.*

28. § 102.166(5). The definition of the phrase “error in the vote tabulation” was not defined in the statute. *Id.* The inherent vagueness of this phrase was a legal issue presented to the Supreme Court of Florida for determination in *Palm Beach County Canvassing Board I v. Harris*, 772 So. 2d 1220 (Fla. 2000). That case and the issue of the definition of the phrase “error in the vote tabulation” is discussed *infra* Part IV.

29. § 102.166(5)(a). This solution appears directed at mechanical errors that have lead to erroneous results, such as a situation where an optical scanning machine does not count every third ballot.

30. § 102.166(5)(b). Like the first remedy, this remedy appears to be directed at a technical or mechanical problem in the tabulation of votes. *See* § 102.166(5)(a). The procedures to verify the tabulation software also appeared in the protest statute. § 102.166(8)–(9).

31. § 102.166(5)(c).

32. § 102.166(7)(a).

33. *Id.*

34. *Id.*

35. § 102.166(7)(b). In full, this provision provided, “[i]f a counting team is unable to determine a voter’s intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter’s intent.” *Id.* This provision may be viewed as a codification of the “will of the voter” standard discussed *infra* Part II.

2. The Contest Procedure, *Florida Statutes* § 102.168

After the election has been certified or a candidate had been nominated for office (after a primary election), an unsuccessful candidate, an elector qualified to vote in the election, or a taxpayer could contest the election in a Florida circuit court, by bringing an action against the county canvassing board or election board.³⁶ The purpose of such a contest was for the complainant to establish the right of the unsuccessful candidate to the elected office.³⁷ A contesting complainant was entitled to an immediate hearing on the issues presented in the contest.³⁸

In order to successfully contest an election, a complainant had to demonstrate one of five grounds.³⁹ First, a complainant could prove “[m]isconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.”⁴⁰ Second, a complainant could prove “[i]neligibility of the successful candidate for the nomination or office in dispute.”⁴¹ Third, and most significant to the 2000 Presidential Election, a complainant could prove “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.”⁴² Fourth, a complainant could provide the circuit court with “[p]roof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the successful candidate’s nomination or election”⁴³

36. § 102.168(1); *see also* § 102.168(4). In order to invoke the contest provision, the contestant had to file a complaint in a Florida circuit court

within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the result of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest . . . whichever occurs later.

§ 102.168(2).

37. § 102.168(3). If the election contested was for a referendum, the purpose of the contest was to set aside the result of the referendum vote. *See id.*

38. § 102.168(7).

39. *See* § 102.168(3).

40. § 102.168(3)(a).

41. § 102.168(3)(b).

42. § 102.168(3)(c). The phrases in this section, what constitutes a “rejection” or a “legal vote,” were significant issues in the election contest regarding the 2000 Presidential Election.

43. § 102.168(3)(d). This provision also allowed for a contest in a referendum election.

Finally, the statute provided a catch-all provision that would allow a contest for “[a]ny other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question”⁴⁴

There were two remedies provided by statute if the complainant was successful.⁴⁵ The first remedy was a broad delegation of remedial power in the contest provision.⁴⁶ In the contest provision, the legislature made a broad delegation that a circuit court could “provide any relief appropriate under [the] circumstances” in order “to prevent or correct any alleged wrong” brought out in an election contest.⁴⁷

The second remedy was a judgment of ouster.⁴⁸ If the successful candidate “has been commissioned or has entered upon the duties . . . or is holding the office” then the circuit court could enter a judgment of ouster against the successful candidate.⁴⁹ The judgment of ouster could then be presented to the Governor.⁵⁰ Upon presentation of the judgment of ouster, “the Governor shall revoke [the] commission [of the wrongfully elected candidate] and commission the person found in the judgment to be entitled to the office.”⁵¹

C. The “Intent of the Voter” Standard and Other Guiding Principles

Long before the 2000 Presidential Election, the Florida courts, considering the state constitutional underpinnings of the right to vote, had set forth a number of guiding principles in resolving election disputes.⁵² One

44. § 102.168(3)(e). This provision also contained an opportunity for a contest to a referendum. *See id.* As discussed *infra* Part V, this provision, if employed properly, may have impacted the jurisprudence of the election cases with respect to the “butterfly ballot” issue.

45. *See* § 102.168–.1682. The statutory remedy does not “abridge any remedy that may now exist by quo warranto” at common law. § 102.169.

46. § 102.168(8).

47. *Id.*

48. § 102.1682. If a referendum was set aside by a contest, the circuit court could enter a judgment setting aside the referendum and voiding the election. § 102.1682(2).

49. § 102.1682(1).

50. *See id.*

51. *Id.* This remedy was decidedly ineffective for presidential electors whose duties of office were completed once they vote for the presidential candidate for whom they were pledged to vote. Significantly, the entire contest provision has been significantly amended since the 2000 Presidential Election. Ch. 2001-40, § 17, 2001 Fla. Laws 117, 127 (amending FLA. STAT. § 101.5604 (2000)).

52. The Florida Legislature delegated the adjudication of election disputes to the courts. *See* § 102.168.

principle that guides Florida courts is the “will of the voter.” One of the earliest cases where the Supreme Court of Florida relied on the “will of the voter” standard was the 1917 case of *Darby v. State ex rel. McCollough*.⁵³

In *Darby*, a school district bond election dispute, a total of fifty-five votes were cast.⁵⁴ Of those votes, twenty-seven votes were in favor of issuing the bonds, and twenty-six votes were against issuing bonds.⁵⁵ Two ballots, however, were not counted because they were marked by a cross mark after the words “Against Bonds” rather than before it as required by Florida’s general election law.⁵⁶

On a writ of error, the Supreme Court of Florida first established that mandamus was appropriate because it determined that the question of whether a ballot is illegal and should not be counted because of the mark the voter places on the ballot “is a question of law.”⁵⁷ The court then determined that “[w]here a ballot is so marked as to plainly indicate the voter’s choice and intent in placing his marks thereon, it should be counted as marked unless some positive provision of law would be thereby violated.”⁵⁸ Because no provision in the law required the ballots to be discounted, the *Darby* court reasserted that the issue was a proper question of law and affirmed the lower court’s issuance of mandamus, requiring the counting and inclusion of the two ballots.⁵⁹

In 1940, the Supreme Court of Florida decided a similar case, *State ex rel. Carpenter v. Barber*,⁶⁰ and provided a clearer statement of the standard by which courts were to decide the legal question of whether ballots were to be counted.⁶¹ In *Carpenter*, a Democratic primary election dispute, two candidates for Orange County Commissioner received the identical number of votes—1193.⁶² Carpenter petitioned for a writ of mandamus, compelling the election board to recount the votes.⁶³ On the two ballots that the election

53. 75 So. 411 (Fla. 1917).

54. *Id.* at 412.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Darby*, 75 So. at 412. The Supreme Court of Florida’s use of the phrase “the choice as expressed” provides a similar standard to the “intent of the voter” standard that evolved thirty years later. *Id.* See *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940); see also *Boardman v. Esteve*, 323 So. 2d 259 (Fla. 1976).

59. *Darby*, 75 So. at 412.

60. 198 So. 49 (Fla. 1940).

61. *Id.*

62. *Id.*

63. *Id.* Carpenter’s motivation for the recount was that “19 ballots were not marked for either . . . Carpenter or Bourland, and 2 votes were marked as ‘not counted’ for either

board refused to count, the elector had marked an “X” after the name of the candidate rather than before the name of the candidate as the statute required.⁶⁴

The *Carpenter* court determined that election statutes should be construed liberally in favor of the voters “to prevent disfranchisement of legal voters.”⁶⁵ Furthermore, when counting ballots, the intention of the voters should prevail because the purpose of election law is “to obtain an honest expression of the will or desire of the voter.”⁶⁶ Therefore, the *Carpenter* court concluded that the intention of the voter should be ascertained from manually examining the ballot, and a vote should be counted for the candidate if the will and intention of the voter could be determined.⁶⁷

The “will of the voter” standard has continued to thrive in Florida. In *Boardman v. Esteva*,⁶⁸ the Supreme Court of Florida determined that the “will of the voter,” if discernable, trumps the technical requirements of the statutes.⁶⁹ *Boardman* involved a contested election for a seat on the Florida Second District Court of Appeal.⁷⁰ Esteva received a majority of the machine votes, but Boardman gained such an overwhelming majority of the absentee votes that Boardman sustained an overall majority of 249 votes, declaring him the winner.⁷¹ Esteva brought suit in circuit court alleging “1450 irregularities or errors in the absentee ballots,” and, because the ballots had been commingled, he requested that the absentee ballots be thrown out and that he be declared the winner.⁷² The circuit court found that only eighty-eight of the allegations set forth illegalities, most of which were

candidate.” *Id.* Although under the 2000 statutory scheme, an automatic machine recount would have occurred in this situation; in 1940, no statute with a similar effect was in place. See FLA. STAT. § 102.141(4) (2000).

64. *Carpenter*, 198 So. at 51. See also Ch. 17898, § 8, 1937 Fla. Laws 359, 362 (amending section 1275 of the *Revised General Statutes of Florida* (1920)).

65. *Carpenter*, 198 So. at 51.

66. *Id.*

67. *Id.* Rather than remanding to the election board to determine the intent of the voter, the *Carpenter* court itself actually examined the two ballots at issue. The court determined that the intention of the voter was not discernable on one ballot, but that on the second ballot the voter clearly intended to vote for Carpenter. *Id.*

68. 323 So. 2d 259 (Fla. 1976).

69. *Id.*

70. *Id.*

71. *Id.* at 261.

72. *Id.*

“unsubstantial.”⁷³ The First District Court of Appeal reversed, concluding that the trial court erred by not strictly complying with the statutory requirements for absentee voting.⁷⁴

The Supreme Court of Florida disagreed.⁷⁵ Reversing the First District Court of Appeal and reinstating the trial court’s order, the *Boardman* court began by noting that the real parties in interest in an election dispute are the voters.⁷⁶ While the candidate has an interest in the outcome of the dispute, the electorate has the ultimate interest because the candidate is elected to serve the public interest.⁷⁷ The Supreme Court of Florida reiterated that the right to participate in the electoral process is constitutional.⁷⁸ Therefore, the voters, not the candidate, are the party that the court must give primary consideration.⁷⁹

In order to protect the rights of the voters, the *Boardman* court determined that strict adherence to the technical statutory requirements could frustrate the rights of the voters.⁸⁰ The court determined that when dealing

73. *Boardman*, 323 So. 2d at 261–62. Among the eighty-eight ballots, thirteen did not have the application signed by the applicant, seventeen did not have the return envelopes signed across the flap, thirty-nine did not indicate the official title of the subscribing witness, and nineteen did not have the names of the electors on record. *Id.* at 261.

74. *Id.* at 262.

75. *Id.* at 263–64.

76. *Id.* at 263 (“We first take note that the real parties in interest here, not in the legal sense but in realistic terms, are the voters.”).

77. *Boardman*, 323 So. 2d at 263 (“The contestants have direct interests certainly, but the office they seek is one of high public service and of utmost importance to the people, thus subordinating their interests to that of the people.”).

78. *Id.*

Ours is a government of, by and for the people. Our federal and state constitutions guarantee the right of the people to take an active part in the process of that government, which for most of our citizens means participation via the election process. *The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard.* We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice.

Id. (emphasis added).

79. *Id.* (“[The voters] are possessed of the ultimate interest and it is they whom we must give primary consideration.”).

80. *Id.* at 263. The court stated:

By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right If we are to countenance a different result, one contrary to the apparent will of the people, then we must do so on the basis that the sanctity of the ballot and the integrity of the election were not maintained, and not merely on the theory that the . . . ballots cast were in technical violation of the law.

Boardman, 323 So. 2d at 265.

with election irregularities the fundamental inquiry is “*whether or not the irregularity complained of has prevented a full, fair and free expression of the public will.*”⁸¹ While the *Boardman* court agreed with the First District’s assessment that absentee ballot law must be strictly construed, it did not agree that strict construction of law necessarily equates to requiring strict compliance to that law,⁸² specifically where it does not guarantee the purity of the ballot.⁸³ Instead, the *Boardman* court held that “the primary consideration in an election contest is whether the will of the people has been effected.”⁸⁴

The Supreme Court of Florida’s precedent of liberally construing the election statutes in favor of effectuating the will of the voter continued in *State ex rel. Chappell v. Martinez*.⁸⁵ In *Chappell*, the court considered a request by Chappell, an unsuccessful candidate to the United States House of Representatives, to disregard the votes cast in Flagler County.⁸⁶ The successful candidate for Florida’s Fourth Congressional District, James, received 125,467 votes while Chappell received 124,735 votes.⁸⁷ After a statutorily required recount,⁸⁸ Chappell requested that Flagler County’s ballots be ignored, and he be declared the winner.⁸⁹ Chappell claimed that because Flagler County’s certification was not received “by 5 p.m. of the seventh day after an election,” the statute required that the “missing counties shall be ignored, and the results shown by the returns on file shall be certified”⁹⁰

As a matter of statutory interpretation, the *Chappell* court determined that the “missing counties” language did not turn the certification process into a “‘ministerial’ duty.”⁹¹ Rather, there is a level of judgment that the

81. *Id.*

82. *Id.* at 265–67.

83. *Id.* at 267 (“Strict compliance is not some sacred formula nothing short of which can guarantee the purity of the ballot.”).

84. *Id.* at 269.

85. 536 So. 2d 1007 (Fla. 1988).

86. *Id.* at 1008.

87. *Id.*

88. See FLA. STAT. § 102.141 (1987).

89. *Chappell*, 536 So. 2d at 1008. Chappell argued that without the Flagler County ballots, he would have the majority of ballots cast in the election and would be the winner. *Id.* at 1008–09.

90. *Id.* at 1008. See FLA. STAT. § 102.111 (1987).

91. *Chappell*, 536 So. 2d at 1008.

state canvassing commission should exert when complying with the statutes.⁹²

To support its holding, the *Chappell* court turned to *Boardman*'s ruling that the object of holding an election is not a "hypertechnical compliance with statutes," but "the electorate's effecting its will through its balloting."⁹³ The *Chappell* court determined that the statutes are "no magic," and if complied with to the extent that they can ascertain the will of the electorate, then there is no reason to discount any votes that are questioned.⁹⁴

The Supreme Court of Florida's most recent examination of an election dispute and the "will of the voter" standard arose in *Beckstrom v. Volusia County Canvassing Board*.⁹⁵ *Beckstrom* stemmed from a protest of election returns from a Volusia County election for sheriff.⁹⁶ *Beckstrom*, the unsuccessful candidate, protested the election returns based upon allegations of fraud.⁹⁷ The county canvassing board tabulated the votes and certified the results to the Department of State, declaring *Beckstrom*'s opponent, incumbent Sheriff Vogel, the winner.⁹⁸

On *Beckstrom*'s motion, the circuit court ordered a manual recount of the ballots, which, once again, revealed Vogel to be the winner.⁹⁹ *Beckstrom*

92. *Id.* The court also determined that the literal terms of the statute were complied with because "the returns arrived telephonically" prior to the deadline set by section 102.111 of the 1987 *Florida Statutes*. *Id.*

93. *Id.*

94. *Id.* at 1008–09. Specifically, the Supreme Court of Florida quoted the *Boardman* Court's rhetorical question when it stated:

There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain that the statute has not been literally and absolutely complied with?

Chappell, 536 So. 2d at 1008–09. It was not until the 2000 Presidential Election that an unexpected answer to the court's question appeared.

95. 707 So. 2d 720 (Fla. 1998).

96. *Id.* at 721–22 n.1. The protest was filed pursuant to section 102.166(11) of the 1995 *Florida Statutes*, which provides in relevant part:

Any candidate for nomination or election, or any elector qualified to vote in the election related to such candidacy, shall have the right to protest the returns of the election or the practices attendant thereto as being fraudulent by presenting to any circuit judge of the circuit wherein such fraud is alleged to have occurred a sworn, written protest.

FLA. STAT. § 102.166(11) (1995).

97. *Beckstrom*, 707 So. 2d at 722. Specifically, *Beckstrom* claimed that the staff of the Volusia County Supervisor of Elections had engaged in fraudulent conduct. *Id.*

98. *Id.*

99. *Id.* The recount revealed 79,902 votes for Vogel and 77,012 votes for *Beckstrom*.

filed a second amended protest making the same allegation of fraud and adding allegations of substantial failure of election officials to comply with absentee ballot election laws.¹⁰⁰ On the second set of allegations, Beckstrom claimed that election officials tampered with the absentee ballots, violating Florida law.¹⁰¹ Specifically, Beckstrom alleged that election officials violated the law by marking over the voter-created marks of at least 6500 absentee ballots with a black felt-tip marker, because the voters had not followed the instructions to mark the ballot with a number two pencil.¹⁰² An

Id. The certified results showed that Beckstrom received fifty-two percent of the precinct vote but only forty percent of the absentee vote. *Beckstrom*, 707 So. 2d at 722 n.3. The recount revealed that Beckstrom's claim that receiving such a discrepancy between the precinct vote and the absentee vote was evidence of fraud by the Supervisor of Elections was erroneous. The *Beckstrom* court noted that the United States presidential election held on the same day "showed a 9-percent margin between [the Republican Party candidate's] percentage of absentee votes and percentage of precinct votes." *Id.* at 722. Additionally, in the congressional election in the same district, the Republican Party candidate "had a 15-percent margin between absentee and precinct vote percentage totals." *Id.*

100. *Id.* at 722. ("The absentee ballots were of crucial importance to the sheriff's election."). As the court explained, "although [Beckstrom] received more votes than Vogel in the precincts, Vogel received a sufficient majority in the absentee votes to overcome [Beckstrom's] precinct vote margin of victory." *Id.* Thus, if Beckstrom could have established that the absentee ballots should have been thrown out, the court's remedy would have been to declare him the winner. See, e.g., *In re Protest of Election Returns and Absentee Ballots in the November 4, 1997 Election for the City of Miami*, 707 So. 2d 1170, 1173-74 (Fla. 3d Dist. Ct. App. 1998).

101. *Beckstrom*, 707 So. 2d at 722. Beckstrom alleged that the election officials violated section 101.5614 of the *Florida Statutes* by marking over the voter-created marks of at least 6500 absentee ballots with a black felt-tip marker. *Id.* Section 101.5614(5) of the 1995 *Florida Statutes* provides, in relevant part:

If any ballot card . . . is damaged or defective so that it cannot properly be counted by the automatic tabulating equipment, a true duplicate copy shall be made of the damaged ballot card in the presence of witnesses and substituted for the damaged ballot If any paper ballot is damaged or defective so that it cannot be counted properly by the automatic tabulating equipment, the ballot shall be counted manually at the counting center by the canvassing board After duplicating a ballot, the defective ballot shall be placed in an envelope provided for that purpose, and the duplicate ballot shall be tallied with the other ballots for that precinct.

FLA. STAT. § 101.5614(5) (1995).

102. *Beckstrom*, 707 So. 2d at 722. Similar problems occurred in the 2000 Presidential Election in Seminole County and in the counties composing the Florida panhandle where optical scanning machines were used. In Seminole County, a heavily Republican county, "any ballot the machine rejected was then examined by hand to see if they could determine the 'will of the voter.' If they could make an accurate judgment, they prepared a new ballot to replace the original one and added the newly crafted ballot to the count." JIM HUCK, *THE ANOINTED ONE: THE RISE OF GEORGE W. BUSH*, Ch. 15, at <http://www.angelfire.com/ca3/jphuck/>

additional 1000 absentee ballots were also marked with a black felt-tip marker, but “it was impossible to determine whether they were marked over or newly marked.”¹⁰³

The circuit court concluded that the “re-marking procedure” was the key issue.¹⁰⁴ The court determined that the re-marking procedure “was not in substantial compliance with section 101.5614(5)” because the procedure provided no way to verify the results of the election.¹⁰⁵ The circuit court found that this noncompliance arose to “gross negligence” and created an “opportunity for fraud.”¹⁰⁶ However, the circuit court found that “no fraud was proven.”¹⁰⁷ Applying *Boardman v. Esteve*,¹⁰⁸ the circuit court held that “there was a ‘full and fair expression of the will of the people. Vogel won it.’”¹⁰⁹

Beckstrom appealed the circuit court’s decision to the Florida Fifth District Court of Appeal.¹¹⁰ This court affirmed the circuit court, but

Book4Ch.15.html (last visited Sept. 13, 2001). “[M]ore than 10,000 ballots were duplicated in at least twenty-six Florida counties.” Paul Lukasiak, *Evidence Suggests Ballot Tampering in Florida’s Escambia County*, at http://www.onlinejournal.com/Special_Reports/Lukasiak_071301/lukasiak071301.html (last visited Sept. 15, 2001). In Escambia County alone, the canvassing board duplicated more than 2400 absentee ballots. *Id.*

103. *Beckstrom*, 707 So. 2d at 722–23. In 1996, Volusia County, along with five other Florida counties, used an optical scan tabulating system named “Accu-Vote.” *Id.* at 722 n.5. Voters are instructed to mark their ballots with number two pencils, and the machine rejects any ballot marking with something other than a number two pencil. *Id.* The Volusia County Supervisor of Elections, undertaking the same procedure with respect to rejected ballots as the supervisors in three other counties, used a black felt-tip marker to re-mark ballots the scanner could not read. *Id.* The re-mark was placed over the voter’s original mark, allowing the machine to read the vote. *Id.*

104. *Beckstrom*, 707 So. 2d at 723.

105. *Id.* In the 2000 amendments to the *Florida Election Code*, counties continue to be able to choose their voting method. Ch. 2001-40, § 17, 2001 Fla. Laws 117, 127. One method that has already been explored is computer touchscreen voting. While touchscreen voting has already been criticized, the technology also raises the question of how it will fulfill the requirements of substantial compliance under section 101.5614(1) of the *Florida Statutes* so that county canvassing boards and courts will be able to later verify the results. Paul M. Schwartz, *Bye to Chads; Hello to What?*, NAT’L L.J., June 11, 2001, at A24 (asserting that direct recording electronic devices result in as many discarded or invalid ballots as lever machines and a considerably higher error rate than optical scanners).

106. *Beckstrom*, 707 So. 2d at 723.

107. *Id.*

108. 323 So. 2d 259 (Fla. 1976).

109. *Beckstrom*, 707 So. 2d at 723.

110. *Id.*

certified the issue to the Supreme Court of Florida.¹¹¹ Specifically, the Fifth District recognized that *Boardman* did not provide guidance on the degree of negligence in the handling of absentee ballots or the use of automatic tabulating equipment to conduct an election, absent fraud, that would require judicial intervention.¹¹²

Proceeding from the *Boardman* court's holding that the "real parties in interest" in elections are the voters,¹¹³ the Supreme Court of Florida turned to two of Beckstrom's claims: "that the trial court erred as a matter of law by refusing to invalidate the absentee ballots, [and] that the trial court erred when it concluded that there was no evidence of fraud in the absentee ballot process."¹¹⁴ In order to resolve these claims, the *Beckstrom* court reframed the issue presented and determined that a circuit court not only can sustain an election result when it has found substantial noncompliance with the election statutes, but also when it has found that the result reflects the will of the people.¹¹⁵ The *Beckstrom* court then held that a court should void a contested election, absent fraud or intentional wrongdoing, if two elements are present: 1) "substantial noncompliance with statutory election procedures," and 2) substantial noncompliance resulted in reasonable doubt "as to whether the certified election expressed the will of the voters."¹¹⁶

111. *Id.*

112. *Id.* at 723–24.

113. *Id.* at 724. *See also Boardman* which stated:

[T]he real parties in interest here, not in the legal sense but in realistic terms, are the voters. They are possessed of the ultimate interest and it is they whom we must give primary consideration Our federal and state constitutions guarantee the right of the people to take an active part in the process of . . . government, which for most of our citizens means participation via the election process. The right to vote is the right to participate; it is also the right to speak, but more importantly the right to be heard. We must tread carefully on that right or we risk the unnecessary and unjustified muting of the public voice. By refusing to recognize an otherwise valid exercise of the right of a citizen to vote for the sake of sacred, unyielding adherence to statutory scripture, we would in effect nullify that right.

Boardman, 323 So. 2d at 263.

114. *Beckstrom*, 707 So. 2d at 724–25.

115. *Id.* at 725.

116. *Id.* The court stated:

[I]f a court finds substantial noncompliance with statutory election procedures and also makes a factual determination that reasonable doubt exists as to whether a certified election expressed the will of the voters, then the court in an election contest brought pursuant to section 102.168, Florida Statutes (1997), is to void the contested election even in the absence of fraud or intentional wrongdoing.

Id. This case could have had a significant impact on the "butterfly ballot" litigation if the "butterfly ballot" claim was brought at the appropriate time in the election litigation. *See* discussion *infra* Part V.

However, the *Beckstrom* court was careful to point out that it was *not* holding that a court lacks authority to void an election where there is a substantial unintentional failure to comply with the statutory procedures.¹¹⁷ The *Beckstrom* court determined that a court could void an election if the first element was present—that there was a substantial unintentional failure to comply with statutory election procedures—and there was evidence of the second element.¹¹⁸ However, the *Beckstrom* court failed to determine whether a court could void an election where only the second element was present, that reasonable doubt exists as to whether the certified election expressed the will of the voter, whatever its source. Indeed, the holding of the *Beckstrom* court was that if *both* elements are present and that the first element causes the second, a court *must* void the election.¹¹⁹ The *Beckstrom* court established that substantial noncompliance *alone* is not enough of a basis of authority for a court to void an election.¹²⁰

The *Beckstrom* court determined its holding by making a “necessary distinction” between judicial determinations of fraud and judicial determinations of substantial noncompliance.¹²¹ *Boardman* established that even if the election result expressed the will of the voters, a result obtained by fraud cannot be sustained.¹²² If there is *unintentional*, substantial noncompliance with the election statutes however, the *Beckstrom* court held only that such unintentional noncompliance can be “excused” if the result of the election reliably reflects the will of the voters.¹²³ Essentially, an election that reliably

117. *Beckstrom*, 707 So. 2d at 725 (“We stress, however, that we are *not* holding that a court lacks authority to void an election if the court has found substantial unintentional failure to comply with statutory election procedures.”).

118. *Id.*

119. *See id.* at 725 (“In sum, we hold that even in a situation in which a trial court finds substantial noncompliance caused by unintentional wrongdoing as we have defined it, the court is to void the election *only* if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.”).

120. *Id.*

121. *Id.*

122. *Boardman*, 323 So. 2d at 267.

123. *Beckstrom*, 707 So. 2d at 725. The *Beckstrom* court stated that “the essence of our *Boardman* decision is that a trial court’s factual determination that a contested certified election reliably reflects the will of the voters outweighs the court’s determination of unintentional wrongdoing by election officials in order to allow the real parties in interest—the voters—to prevail.” *Id.*; *see also Boardman*, 323 So. 2d at 259. The *Beckstrom* court defined “unintentional wrongdoing” to be “statutorily mandated election procedures in situations in which the noncompliance results from incompetence, lack of care, or . . . the election officials’ erroneous understanding of the statutory requirements.” *Beckstrom*, 707 So. 2d at 725.

reflects the will of the voters outweighs the unintentional wrongdoing of election officials.¹²⁴ Such a holding, the *Beckstrom* court noted, is necessary to allow the voters, the real parties in interest, to prevail.¹²⁵ Therefore, the necessary amount of negligence is “gross negligence” or “negligence that is so pervasive that it thwarts the will of the people.”¹²⁶

Turning to the facts, the *Beckstrom* court determined that although the re-marking procedure was not in substantial compliance with the *Florida Statutes*¹²⁷ and presented the opportunity for fraud, the circuit court was acting in its discretion when it determined that there was no actual fraud.¹²⁸ Furthermore, the *Beckstrom* court determined that the trial court’s finding of gross negligence was a measure of the culpability of the election officials, not the election’s expression of the will of the voters.¹²⁹ Rather, the *Beckstrom* court affirmed, finding that the trial court was within its discretion when the trial court found that the election was a “full and fair expression of the will of the people.”¹³⁰

III. FACTS OF THE 2000 PRESIDENTIAL ELECTION

On November 7, 2000, Florida voters cast almost 6,000,000 ballots in the general election for President and Vice President of the United States.¹³¹ On November 8, 2000,¹³² the Florida Division of Elections reported that Republican candidates Governor George W. Bush and

124. *Id.*

125. *Id.*

126. *Id.* The *Beckstrom* court clearly established that the term “gross negligence,” as used in this context, should not be confused for the type of negligence in a “tort action.” *Id.*

127. See FLA. STAT. § 101.5614(5) (1998).

128. *Beckstrom*, 707 So. 2d at 726.

129. *Id.* at 727.

130. *Id.* The *Beckstrom* court also noted that it disapproved of the statement of the final judgment of the trial court: “I do not have jurisdiction to set aside this election.” *Id.* Rather, the *Beckstrom* court stated, “[t]he trial court clearly had jurisdiction to consider and decide the issue presented.” *Id.* Instead, the *Beckstrom* court explained that a “correct statement of the law is that the trial court found no factual basis for requiring that the election be set aside.” *Beckstrom*, 707 So. 2d at 727. Similar logic as that applied in *Beckstrom* was used to sustain the 2000 Presidential Election as a full and fair expression of the will of the people, despite the documented irregularities in the Supervisor of Elections offices for Seminole and Martin Counties. See discussion *infra* Part VI.

131. Palm Beach County Canvassing Bd. I v. Harris, 772 So. 2d 1220, 1225 (Fla. 2000).

132. On the same day, Florida Governor Jeb Bush removed himself from the Florida Elections Canvassing Commission. *Id.* at 1273 n.12.

Secretary Richard Cheney received 2,909,135 votes, and Democratic candidates Vice President Al Gore and Senator Joseph Lieberman received 2,907,351 votes, a margin of 1784 votes.¹³³ The other candidates on the presidential ballot received 139,616 votes.¹³⁴ Because the margin of difference between the two leading candidates was less than “one-half of a percent . . . of the votes cast,” section 102.141(4) of the *Florida Statutes* required each of Florida’s sixty-seven counties to conduct an automatic recount of the ballots.¹³⁵

The automatic recount showed the Republican candidates were still winning the race, but their lead had been reduced from the initially stated 1784 votes to 300 votes.¹³⁶ After the automatic statewide recount was conducted, the Florida Democratic Party requested manual recounts in Broward, Miami-Dade, Palm Beach, and Volusia Counties.¹³⁷ The manual recounts revealed tabulation discrepancies that could affect the outcome of the election. In conformity with the requirements of section 102.166(5)(c) of the *Florida Statutes*, the four counties decided to manually recount all of the ballots.¹³⁸

Concerned that it would not be able to complete the manual recount by November 14, 2000, the deadline imposed by sections 102.111 and 102.112 of the *Florida Statutes* for certifying the results of the election, Palm Beach County sought an advisory opinion from Florida’s Division of Elections.¹³⁹ An advisory opinion was issued by the Division of Elections stating that, absent unforeseen circumstances, all county election returns had to be received by November 14, 2000 by 5:00 p.m. in order to be included in the

133. *Id.* at 1225.

134. Siegel I v. LePore, 120 F. Supp. 2d 1041, 1044 (S.D. Fla. 2000).

135. Bush II v. Gore, 531 U.S. 98, 100–01 (2000). Section 102.141 of the *Florida Statutes* mandated a recount whenever a candidate was defeated by “one-half of a percent or less of the votes cast.” FLA. STAT. § 102.141 (2000). In 1999, the Florida Secretary of State’s office ruled that this mandated recount must consist of running the ballots through the counting machines again, not merely checking the reported totals against the machine readout without actually reading the ballots. However, sixteen of Florida’s sixty-seven counties re-ran their computer tapes or inspected the electronic memories of their tabulating equipment instead of recounting the ballots as required. Lisa Getter, *Decision 2000: America Waits*, L.A. TIMES, Nov. 21, 2000, at A17.

136. Touchston III v. McDermott, 234 F.3d 1133, 1135 (11th Cir. 2000).

137. Gore III v. Harris, 772 So. 2d 1243, 1273 n.16 (Fla. 2000). See also *Bush II*, 531 U.S. at 101. Governor Bush did not request a manual recount in any Florida county. Brief in Opposition of Respondents Al Gore, Jr., and Florida Democratic Party at 7, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836).

138. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1225.

139. *Id.*

certification of the statewide results.¹⁴⁰ On November 13, 2000, Florida's Secretary of State, Katherine Harris, issued a statement announcing that absent unforeseen circumstances, returns from the county must be received by 5:00 p.m. on the seventh day following the election in order to be included in the certification of the statewide results.¹⁴¹

On November 13, 2000, Volusia County initiated a lawsuit against the Secretary of State seeking a declaratory judgment that it was not bound by the November 14, 2000 deadline.¹⁴² This lawsuit was later joined by Palm Beach County, Vice President Gore, and Senator Lieberman. In that action, Volusia County and Palm Beach County also requested an injunction prohibiting the Secretary of State from ignoring election returns submitted after November 14, 2000.¹⁴³ On November 14, 2000, the Second Circuit Court of Florida, which is located in Leon County,¹⁴⁴ held that while the county canvassing boards were mandated to certify and file their returns with the Secretary of State by 5:00 p.m. November 14, 2000, there was nothing to prevent the county canvassing boards from filing with the Secretary of State further returns after completing a manual recount.¹⁴⁵ It would then be up to the Secretary of State to determine whether any such corrective or supplemental returns filed after 5:00 p.m. November 14, 2000 were to be ignored.¹⁴⁶ The court admonished the Secretary of State, stating that she could not decide ahead of time what late returns should or should not be ignored and directed her to properly exercise her discretion in making a decision on the returns.¹⁴⁷

In response to the circuit court's order, the Secretary of State announced that she was in receipt of certified returns resulting from the initial recount from all counties in the state.¹⁴⁸ She then issued a directive instructing all counties who intended to submit late returns to submit to her by 2:00 p.m. on November 15, 2000, a written statement of "the facts and circumstances" justifying any belief on their part that they should be allowed

140. Deadline for Certification on County Results, Advisory Op. Fla. Div. of Elections 00-10 (Nov. 13, 2000). See also *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1225-26.

141. See also *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1226.

142. *Id.*

143. *Id.*

144. The capital of Florida is Tallahassee, which is located in Leon County.

145. *McDermott v. Harris*, No. 00-2700, 2000 WL 1693713, at *1 (Fla. 2d Cir. Ct. Nov. 14, 2000).

146. *Id.* at *3.

147. *Id.* at *4.

148. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1226.

to amend the certified returns previously filed.¹⁴⁹ Four counties complied.¹⁵⁰ On November 15, 2000, the Secretary of State rejected the counties' reasons and announced that she would not accept the amended returns, but rather would rely on the earlier certified totals for the four counties.¹⁵¹

On November 16, 2000, Vice President Gore and the Florida Democratic Party filed a motion in the Second Circuit Court seeking to compel the Secretary of State to accept the amended returns.¹⁵² On November 17, 2000, the circuit court denied relief in a brief order.¹⁵³ On the same day, the Florida Democratic Party and Vice President Gore appealed the second order.¹⁵⁴ The First District Court of Appeal consolidated that appeal with the Volusia County Canvassing Board's appeal that was already pending, and certified both appeals to the Supreme Court of Florida.¹⁵⁵

Thereafter, on November 21, 2000, the Supreme Court of Florida imposed a deadline of 5:00 p.m. on November 26, 2000 for a return of ballot counts (extending the November 14, 2000 deadline of section 102.111 of the *Florida Statutes* by twelve days) and directed the Secretary of State to accept manual counts submitted prior to the deadline.¹⁵⁶ On November 22, 2000, the Miami-Dade County Canvassing Board declared that it would not conduct a manual recount because it could not comply with the November 26, 2000 deadline.¹⁵⁷

The Palm Beach County Canvassing Board requested the Secretary of State to extend the November 26, 2000 deadline until the morning of November 27, 2000 so that it could complete its manual recount.¹⁵⁸ On November 26, 2000, the Secretary of State denied Palm Beach County's request.¹⁵⁹ On November 26, 2000, at approximately 7:30 p.m., Florida's Secretary of State certified that Governor Bush and Secretary Cheney had received 2,912,790 votes and Vice President Gore and Senator Lieberman

149. *Id.*

150. *Id.*

151. *Id.* at 1227.

152. *Id.*

153. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1227.

154. *Id.*

155. *Id.* The Supreme Court of Florida granted Volusia County Canvassing Board's motion to voluntarily dismiss its appeal in the Supreme Court of Florida. *Id.*

156. *Id.*

157. *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. App. 2000).

158. *Id.*

159. *Id.*

had received 2,912,253 votes, a difference of 537 votes.¹⁶⁰ On November 27, 2000, following the certification of Governor Bush as the winner of the presidential election in Florida, Vice President Gore commenced an election contest action in the Second Circuit Court of Florida challenging the certification on the grounds that the certified results included “a number of illegal votes” and failed to include “a number of legal votes sufficient to change or place in doubt the result of the election.”¹⁶¹

On December 4, 2000, following a two-day evidentiary hearing, the court denied all relief and entered a final judgment.¹⁶² Vice President Gore appealed to the First District Court of Appeal, which certified the judgment to the Supreme Court of Florida.¹⁶³

IV. THE PROTEST CASES

A. *Supreme Court of Florida*

When Secretary of State Harris set forth an interpretation of Florida election law that county canvassing boards were to certify and report their election results to the Department of State by 5:00 p.m. on November 14, 2000,¹⁶⁴ the Volusia County Canvassing Board and the Palm Beach County Canvassing Board sought a temporary injunction against the Secretary of State in the Second Circuit Court of Florida mandating that she consider the certified results of Volusia and Palm Beach Counties, even if they were filed

160. *Touchston v. McDermott II*, 234 F.3d 1130, 1136 (11th Cir. 2000).

161. *Bush II v. Gore*, 531 U.S. 98, 101 (2000). *See also Gore III v. Harris*, 772 So. 2d 1243, 1247 (Fla. 2000).

162. *Gore III*, 772 So. 2d at 1247.

163. *Id.*

164. The November 13, 2000 opinion provides in pertinent part:

[I]f the Palm Beach County Canvassing Board fails to certify the county returns to the Elections Canvassing Commission by 5:00 p.m. of the seventh day following the election, the votes cast in Palm Beach County will not be counted in the certification of the statewide results.

....

[A]bsent such unforeseen circumstances, returns from the county must be received by the Elections Canvassing Commission by 5 p.m. on the seventh day following the election in order to be included in the certification of the statewide results. . . .

[T]he county canvassing board may certify other electin [sic] results to the Department of State while the manual recount continues for the presidential election.

Deadline for Certification on County Results, Advisory Op. Fla. Div. of Elections 00-10 (Nov. 13, 2000).

late.¹⁶⁵ Initially, the circuit court granted the temporary injunction in part and denied the injunction in part.¹⁶⁶ In a second hearing on the matter,

165. *McDermott v. Harris*, No. 00-2700, 2000 WL 1693713, at *1 (Fla. 2d Cir. Ct. Nov. 14, 2000).

166. *Id.* at *4. Perhaps due to the expediency exercised in the cases following, there has been little analysis of the court's order. The court's analysis, however brief it was, is illustrative of Florida courts deference for administrative agencies and respect for coordinate branches of government. The central basis of the court's reasoning was that it seemed appropriate to yield "great deference" to the Secretary of State's construction of election laws. *Id.* at *1. However, despite that "great deference," the court did not agree with Secretary Harris' conclusions. *Id.* While the court believed that the election laws did provide Secretary Harris with some discretion, it stopped short of chastising her as abusing that discretion. Rather, the court determined only that the discretion the statutes gave to Secretary Harris had not been exercised. Under the court's analysis, in order to exercise her discretion, Secretary Harris must have contemplated her "decision based upon a weighing and consideration of all attendant facts and circumstances." *Id.* at *3. However, the court shirked from setting forth a mandatory duty upon Secretary Harris to consider "all attendant facts and circumstances" by making Secretary Harris' duty to "consider all of the facts and circumstances" discretionary as well. *McDermott*, 2000 WL 1693713 at *3. Indeed, the court only established that "[t]he Secretary may, and should, consider all of the facts and circumstances." *Id.* (emphasis added).

The court's opinion accomplished its central purpose, outlining the issues for the Supreme Court of Florida to consider in the inevitable appeal to follow. The court effectively set forth five issues for the Supreme Court of Florida. First, whether the balance of legislative intent in the *Florida Election Code* should fall towards accuracy or finality. The court recognized that the Secretary's strict interpretation of the deadline imposed by section 102.112 of the *Florida Statutes* "has come down hard on the side of finality;" however, the contest provision of section 102.168, which provided for a manual recount of all ballots under certain circumstances, could be the countervailing balance of accuracy. *Id.* at *1.

Second, the court recognized that section 102.166 of the *Florida Statutes*, the protest provision, provides to "any candidate, or qualified elector, the right to protest the returns of a county canvassing board by filing a sworn written protest, and that protest may be filed within five (5) days of the election, or any time before the Canvassing Board certifies the results, whichever occurs later." *Id.* at *2 (emphasis added). The court recognized that this provision raises the possibility that the canvassing board will have to "address a protest of its returns the day before, or hours before, it was to certify the results pursuant to the deadline in Section 102.112, Florida Statutes, thus making it impossible to correct any error before the deadline." *Id.* However, the other possibility that the court's opinion does not explicitly acknowledge is that the canvassing board may also be placed in the position that it would have to address a protest, and possibly manually recount all the ballots, *after* it has submitted its certified results to the Department of State.

Third, the court recognized that the *Florida Election Code* "suggests that certifications of the results in an election might occur later than usual if there is a protest of the returns." *McDermott*, 2000 WL 1693713 at *2. The court demonstrates that the text of section 102.168, the contest provision, contemplates the situation that an election is contested after a protest has occurred. However, perhaps recognizing that it had set forth the issue

absent record evidence of a failure by the Secretary of State to exercise appropriate discretion, the circuit court denied the request to issue an injunction.¹⁶⁷ Rather than pass judgment on the case, the First District Court of Appeal certified the question directly to the Supreme Court of Florida.

In *Palm Beach County Canvassing Board I v. Harris*,¹⁶⁸ the Supreme Court of Florida considered the issues raised by the circuit court: whether the county canvassing boards may permit manual recounts of the ballots, and whether Secretary Harris must accept the manual recounts if submitted after the statutory deadline.¹⁶⁹ Eventually, the court suffered by defending central principles of Florida's democracy while attempting to accord respect to a coordinate branch of government. While the underlying basis for the Supreme Court of Florida's decision necessitated a rather basic analysis of the guiding principles of Florida law and the *Florida Election Code*, the court stopped short of characterizing and castigating Secretary Harris' actions as an abuse of discretion. Instead, the court set forth a cryptic rationale for the remedy provided.

effectively for a subsequent appeal, the court did not attempt to examine how the protest and contest provisions can be best effectuated in an election for presidential electors.

Fourth, the court raised concern about the inconsistency between the consent decree, between the State of Florida and the federal government, and the *Florida Election Code*. The consent decree provides that "absentee ballots of overseas electors must be counted if received up to ten (10) days after the election." *Id.* The Secretary of State claimed that the consent decree functions as a "supplemental certification" date. *Id.* However, the court found no basis in the statutes for any "supplemental certification" date, raising the issue of the effect of the consent decree certification date. *Id.*

Fifth, the court raised the scope of the Secretary of State's discretion to ignore later returns pursuant to section 102.112 of the *Florida Statutes*. *Id.* at *3. Since the statute used the discretionary term "may," the court determined that the duty was discretionary and "[t]hat the Secretary *may* ignore late filed returns necessarily means that the Secretary *does not have to* ignore such returns." *McDermott*, 2000 WL 1693713 at *3. By recognizing this duty as permissive, the court raised the question of whether Secretary Harris' actions were an abuse of her discretion, a question it avoided by characterizing Secretary Harris' actions as a failure to exercise discretion.

The deference afforded the Secretary of State was evidenced in the court's second order refusing to enjoin the Secretary of State from certifying the election in the absence of testimony creating record evidence that the Secretary was abusing her discretion by certifying the presidential election, while Broward, Miami-Dade, Palm Beach, and Volusia Counties had still not certified their election returns to the Secretary of State and were involved in recount procedures. *See McDermott v. Harris*, No. 00-2700, 2000 WL 1714590, at *1 (Fla. 2d Cir. Ct. Nov. 17, 2000).

167. *Id.*

168. 772 So. 2d 1220 (Fla. 2000).

169. *Id.* at 1228.

Guiding the Supreme Court of Florida's analysis was the long standing principle espoused by the court in *Boardman v. Esteve*,¹⁷⁰ which stated the paramount consideration in any election dispute is the will of the people.¹⁷¹ Therefore, the court determined that the goal, like that of the *Boardman* court, was to reach the result that reflected the will of the voters, or in the instant case, that determined the will of the voters.¹⁷² Accordingly, the court made clear that to decide the issues before it, the court would rely upon the "will of the voter" principle and principles of statutory construction.¹⁷³

Turning to the first issue, whether the county canvassing boards could permit a manual recount of the election ballots, the court looked to the Division of Elections' opinion construing the language "error in vote tabulation" to exclude a discrepancy between the original machine return and the sample manual recount, based upon the manner that the ballots were marked or punched.¹⁷⁴ The court determined that the Division of Elections' opinion was contrary to the plain meaning of section 102.166(5) of the *Florida Statutes*, which allowed for the manual recount of all ballots. Despite the deference normally provided to an agency's opinion,¹⁷⁵ it could not be followed because the agency's construction was against the law.¹⁷⁶ Rejecting the Division's contention that "error in vote tabulation only means

170. 323 So. 2d 259 (Fla. 1976).

171. *Palm Beach Canvassing Board I*, 772 So. 2d at 1227-28.

172. *Id.* at 1228.

173. *Id.* Indeed, Broward County was permitted to join this action on appeal and in doing so put the issue of the standard for the legal intent of the voter squarely before the Supreme Court of Florida. The court did not take up the issue directly, but instead, cited several cases to give the canvassing boards guidance on the intent of the voter standard, including *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990). *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1238.

174. *Id.* at 1228. See Manual Recount Procedures and Partial Certification of County Returns, Advisory Op. Fla. Div. of Elections 00-13 (Nov. 13, 2000).

175. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1228. See *Donato v. American Tel. & Tel. Co.*, 767 So. 2d 1146, 1153 (Fla. 2000); *Smith v. Crawford*, 645 So. 2d 513, 521 (Fla. 1st Dist. Ct. App. 1994).

176. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1228. It should be noted that the Division of Elections' opinions concerning "error in vote tabulation" were issued while the hearing in the Second Circuit courtroom was in process. On November 13, 2000, the Division of Elections released two opinions on manual recount procedures. The first was addressed to Judge Charles E. Burton, Chairperson of the Palm Beach County Canvassing Board. Manual Recount Procedures and Partial Certification of Count Returns, Advisory Op. Fla. Div. of Elections 00-13 (Nov. 13, 2000). The second opinion was addressed to Al Cardenas, Chairman, Republican Party of Florida. Definitions of Errors in Vote Tabulation, Advisory Op. Fla. Div. of Elections 00-11 (Nov. 13, 2000).

a counting error resulting from incorrect election parameters or an error in the vote tabulating software,” the Supreme Court of Florida observed that the statute includes no words of limitation.¹⁷⁷ Furthermore, the court recognized that the Florida Legislature used phrases other than “vote tabulation” when it referred to the voting system rather than the vote count, such as “vote tabulation system” or “automatic tabulating equipment.”¹⁷⁸ The court also contrasted the section with other sections of the *Florida Election Code* to support a broader reading of “error in vote tabulation.”¹⁷⁹

Besides the textual basis for its conclusion, the Supreme Court of Florida felt it important to note that, despite the increased importance of technology in American society, “our society has not yet gone so far as to place blind faith in machines.”¹⁸⁰ Indeed, “humans routinely correct the errors of machines” in “almost all endeavors, including elections.”¹⁸¹ Therefore, the Division of Election’s opinion placing such “blind faith” in the counting machines was contrary to the plain meaning of the *Florida Election Code*.¹⁸²

The Supreme Court of Florida then turned to the second issue, whether the Elections Canvassing Commission must accept a return after the seven-day deadline set forth in the *Florida Election Code*.¹⁸³ Beginning with the Florida Constitution, the court began with the principle that “[a]ll political power is inherent in the people.”¹⁸⁴ The court turned to another state

177. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1229.

178. *Id.* See FLA. STAT. § 102.166 (2000).

179. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1229 (recognizing that “error in vote tabulation” is more than machinery errors because “[s]ection 101.5614(5) provides that ‘[n]o 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,’” “section 101.5614(6) provides that any vote in which the Board cannot discern the intent of the voter must be discarded,” and section 102.141 requires the county canvassing board to look for discrepancies between the machine count and the sample hand count).

180. *Id.*

181. *Id.* See also Pullen v. Mulligan, 561 N.E.2d 585 (Ill. 1990) (determining ballots without completely dislodged chads that had not been read by a tabulating machine were legal votes that must be manually counted because the legislature had not explicitly labeled them void and discounted them from inclusion in the election); Delahunt v. Johnston, 671 N.E.2d 1241, 1243 (Mass. 1996) (examining punch card ballots to discern the “intent of the voter” despite the tabulating machine’s inability to read a ballot with an undislodged chad).

182. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1229–30.

183. Specifically, the seven-day deadline appears in section 102.111 and section 102.112 of the 2000 *Florida Statutes*.

184. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1230 (quoting FLA. CONST. art. I, § 1).

constitutional provision providing that elections are to be regulated by law.¹⁸⁵ The statutes, however, provide no deadline for a county canvassing board wishing to file corrected, amended, or supplemental returns.¹⁸⁶

As a result, the Supreme Court of Florida recognized that there were two areas where the statutes were ambiguous.¹⁸⁷ First, the time frame for conducting a manual recount conflicted with the time frame for submitting county returns.¹⁸⁸ Second, the statutes establishing whether the Secretary of State could ignore county returns conflicted because one statute made the duty mandatory, while the other made the duty permissive.¹⁸⁹

The first area, the recount conflict, results from the protest provision, section 102.166, and the deadline established by section 102.111 and section 102.112 of the *Florida Statutes*. Section 102.166(1) allowed “[a]ny candidate . . . or any elector qualified to vote in the election related to such candidacy” the right to protest the returns “as being erroneous.”¹⁹⁰ The time period for filing a protest pursuant to section 102.166(1) was “prior to the time the canvassing board certifies the results for the office being protested or within 5 days after midnight of the date the election is held, whichever occurs later.”¹⁹¹ Section 102.166(4)(a) allowed a candidate to provide the county canvassing board with a written request for a manual recount.¹⁹² The time period for a written request for a manual recount, according to section 102.166(4)(b), could be made prior to the time the canvassing board certified the returns or within seventy-two hours after the election, whichever occurred later.¹⁹³ The court recognized that a manual recount could be requested at any point prior to certification, but the manual recount could lead to a full recount which could require several days, especially in a

185. *Id.* The court quotes Article VI, Section 1 of the Florida Constitution, which provides:

SECTION 1. Regulation of elections.—All elections by the people shall . . . be determined by a plurality of votes cast. *Registration and elections shall, and political party functions may, be regulated by law;* however, the requirements for a candidate with no party affiliation or for a candidate of a minor party for placement of the candidate’s name on the ballot shall be no greater than the requirements for a candidate of the party having the largest number of registered voters.

Id. (emphasis in original).

186. *Id.* at 1231.

187. *Id.*

188. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1231.

189. *Id.*

190. FLA. STAT. § 102.166(1) (2000).

191. § 102.166(2).

192. § 102.166(4).

193. *Id.*

populous county.¹⁹⁴ Therefore, the court determined that the protest provision, section 102.166, conflicted with the deadline by which the county canvassing boards “must” submit their returns to the Elections Canvassing Commission established by sections 102.111 and 102.112, 5:00 p.m. of the seventh day following the election.¹⁹⁵

The second area of ambiguity in the *Florida Statutes* dealt with by the Supreme Court of Florida involved a conflict between two statutes, section 102.111 and section 102.112. The former mandated that missing counties be ignored if submitted after 5 p.m. of the seventh day following the election,¹⁹⁶

194. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1232–33.

195. *Id.* at 1233.

196. Section 102.111 of the *Florida Statutes* provides in relevant part:

(1) Immediately after certification of any election by the county canvassing board, the results shall be forwarded to the Department of State concerning the election of any federal or state officer. The Governor, the Secretary of State, and the Director of the Division of Elections shall be the Elections Canvassing Commission. The Elections Canvassing Commission shall, as soon as the official results are compiled from all counties, certify the returns of the election and determine and declare who has been elected for each office. In the event that any member of the Elections Canvassing Commission is unavailable to certify the returns of any election, such member shall be replaced by a substitute member of the Cabinet as determined by the Director of the Division of Elections. *If the county returns are not received by the Department of State by 5 p.m. of the seventh day following an election, all missing counties shall be ignored, and the results shown by the returns on file shall be certified.*

§ 102.111 (emphasis added).

During the 2000 Presidential Election, Florida Governor Jeb Bush chose to recuse himself from the Elections Canvassing Commission because of the conflict of interest presented since his brother, George W. Bush, was the Republican Presidential candidate. However, Katherine Harris, Florida’s Secretary of State and Florida’s Chair for George W. Bush’s Presidential campaign felt that no conflict of interest meriting recusal from the Elections Canvassing Commission existed. Harris’ decision has led to considerable criticism and various attempts at election reform directed at the Secretary of State’s involvement in elections. See JAKE TAPPER, *DOWN AND DIRTY: THE PLOT TO STEAL THE PRESIDENCY* 55, 78, 88–89, 165, 176–79, 350, 476 (2001) (raising questions of Secretary Harris’ political involvement and inability to be impartial); Editorial, *Reformer of the Moment*, PALM BEACH POST, Mar. 25, 2001, at 2E (implying improper conduct by functioning as state co-chair of the Bush campaign and stopping recounts to “certify her boss”); Editorial, *An Unseemly Mix of Data*, MIAMI HERALD, Aug. 10, 2001, at 8B (questioning the presence of George W. Bush’s campaign speeches on the same state-owned computers as Secretary Harris’ official statements as Florida’s top elections officer); S.B. 1138, 103d Leg., Reg. Sess. (Fla. 2001) (legislative bill, which died in Committee of Government Oversight and Productivity, proposing that the Secretary of State not be allowed to engage in partisan activities including, *inter alia*, “act[ing] as a leader of or hold an office in a political organization”); H.B. 1625, 103d Leg., Reg. Sess. (Fla. 2001) (legislative bill, which died in Committee on Rules, Ethics and

and the latter provided discretion to ignore any missing counties submitted after the same deadline.¹⁹⁷ In order to resolve this “shall vs. may” conflict, the Supreme Court of Florida first turned to traditional rules of statutory construction to discern the intent of the legislature when enacting the *Florida Election Code*.¹⁹⁸

The first rule of construction that the court turned to was that “the specific statutes controls the non-specific statute.”¹⁹⁹ The court concluded that section 102.112 specifically addressed the “deadline” for submitting returns and the corresponding penalties, while section 102.111 examined the duties of the Elections Canvassing Commission and only tangentially referred to the deadline for submitting returns.²⁰⁰ Second, the court turned to recency.²⁰¹ It determined that section 102.111 was enacted in 1951,²⁰² but section 102.112 was enacted in 1989 in a revision of chapter 102.²⁰³

Third, the court considered that a statute should not be read as to render any other provision meaningless or absurd.²⁰⁴ The court determined that reading the provisions as mandatory would render the alternative penalty of personal fines against the canvassing board meaningless, because if the returns were required to be ignored, there is no need for a personal penalty

Elections, proposing that the Secretary of State be eliminated as a mandatory member of the Elections Canvassing Commission).

197. Section 102.112 of the *Florida Statutes* provides in relevant part:

(1) The county canvassing board or a majority thereof shall file the county returns for the election of a federal or state officer with the Department of State immediately after the certification of the election results. Returns must be filed by 5 p.m. of the 7th day following the first primary and general election and by 3 p.m. on the 3rd day following the second primary. *If the returns are not received by the department by the time specified, such returns may be ignored and the results on file at that time may be certified by the department.*

§ 102.112 (emphasis added).

198. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1234. *See also* Capers v. State, 678 So. 2d 330 (Fla. 1996).

199. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1234. *See, e.g.,* State ex rel. Johnson v. Vizzini, 227 So. 2d 205 (Fla. 1969).

200. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1234.

201. *Id.* (“[I]t is also well-settled that when two statutes are in conflict, the more recently enacted statute controls the older statute . . . The more recently enacted provision may be viewed as the clearest and most recent expression of legislative intent.”). *See, e.g.,* McKendry v. State, 641 So. 2d 45 (Fla. 1994).

202. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1287.

203. *See* Ch. 89-338, § 30, 1989 Fla. Laws 2162.

204. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1234. *See, e.g.,* Amente v. Newman, 653 So. 2d 1030 (Fla. 1995).

for submitting late returns.²⁰⁵ Fourth, the court looked to whether a particular reading would allow the statutory scheme to be read as a whole.²⁰⁶ If the Elections Canvassing Commission were required to reject any late returns, then the manual recount provisions of the protest statute, section 102.166, if followed, would require rejections of the returns. The court determined that the legislature did not intend to disenfranchise a county's voters because the county officials followed the dictates of the *Florida Election Code*.²⁰⁷ Fifth, the Supreme Court of Florida looked to the intent of the *Florida Election Code* when enacted in 1951.²⁰⁸ The court found that the legislature contemplated *all* ballots being received by the Elections Canvassing Commission by the statutory deadline.²⁰⁹ However, some ballots have been extended beyond those dates.²¹⁰ Because the original intent of the legislature could no longer be effectuated, the Supreme Court of Florida determined that "the mandatory language [of] section 102.111 has been supplanted by the permissive language of section 102.112."²¹¹

The Supreme Court of Florida then returned to the Florida Constitution and construed the statutes in favor of the right of suffrage.²¹² The Florida Constitution recognizes that "[a]ll political power is inherent in the

205. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1234–35.

206. *Id.* at 1235. See *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452 (Fla. 1992). While the Supreme Court of Florida set forth a distinguishable analysis under this rule of statutory construction, the rule of reading all statutory provisions in harmony with one another could easily be read as another way of stating that no statutory provision should be read to render any other meaningless or absurd. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1235. Nevertheless, the Supreme Court of Florida treated these rules as separate rules of construction. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. First, overseas absentee ballots are not regulated by the *Florida Statutes*, but by a consent decree with the federal government. Overseas absentee ballots are therefore provided with a ten-day extension beyond the statutory deadline. Overseas absentee ballots and the legal ramifications of the consent decree are discussed at length *infra* in Part VI. Second, the deadline has to be considered in connection with section 101.5614(8) of the *Florida Statutes*, which requires that the "official return of the election" consist of "write-in, absentee and manually counted results." FLA. STAT. § 101.5614(8) (2000). If those results must be obtained to constitute the official return of the election, reading the mandatory provision as controlling would allow for those types of ballots required to be included in the official return of the election to be excluded because they cannot be obtained by the mandatory statutory deadline.

211. *Palm Beach County Canvassing Board I*, 772 So. 2d at 1235–36.

212. See *id.* at 1236.

people.”²¹³ Part of that inherent political power is the sovereign right of the people to select their own leaders, and that right may not be infringed upon by unreasonable and unnecessary restraints.²¹⁴ Therefore, the court determined that because election laws were intended to facilitate the right of suffrage, the laws should be liberally construed in favor of the citizen’s right to vote.²¹⁵ Indeed, the court recognized that the fundamental purpose of election law was “to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy.”²¹⁶ Therefore, technical requirements of election law could not subvert its central constitutional purpose.²¹⁷

The court then turned to the Secretary of State’s discretion under section 102.166 of the *Florida Statutes* and determined that while the Secretary is statutorily delegated discretion in determining whether to accept amended election returns, that discretion is constitutionally limited and can only be exercised under certain circumstances.²¹⁸ As stated previously, the Florida Constitution provides that “[a]ll political power is inherent in the people.”²¹⁹ The court established that the “political power” provision made

213. FLA. CONST. art. I, § 1.

214. See *Treiman v. Malmquist*, 342 So. 2d 972, 975 (Fla. 1977) (“The declaration of rights expressly states that ‘all political power is inherent in the people.’ The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable [restraints on that right] . . . Unreasonable or unnecessary restraints on the elective process are prohibited.”); see also *Pasco v. Heggen*, 314 So. 2d 1, 3 (Fla. 1975) (“We have also stated that only unreasonable or unnecessary restraints on the elective process are prohibited.”); *State ex rel. Landis v. Dyer*, 148 So. 201, 203 (Fla. 1933) (“The right to vote, though not inherent, is a constitutional right in this state. The Legislature may impose reasonable rules and regulations for its governance, but it cannot under the guise of such regulation unduly subvert or restrain this right.”).

215. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237. See *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940).

Generally, the courts, in construing statutes relating to elections, hold that the same should receive a liberal construction in favor of the citizen whose right to vote they tend to restrict and in so doing to prevent disfranchisement of legal voters and the intention of the voters should prevail when counting ballots . . . It is the intention of the law to obtain an honest expression of the will or desire of the voter.

Id.

216. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237. See *State ex rel. Landis v. Dyer*, 148 So. 201, 203 (1933).

217. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237. See *Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) (“In summary, we hold that the primary consideration in an election contest is whether the will of the people has been effected.”).

218. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237.

219. FLA. CONST. art. I, § 1.

clear that, in the State of Florida, the right to vote is a constitutional right.²²⁰ Therefore, the right to vote is a paramount right in the State of Florida. As a result, if the Secretary of State exercised her discretion in a way that provided an “unreasonable and unnecessary restraint” on the right to vote, that exercise of discretion would run afoul with the Florida Constitution.²²¹

Based on this constitutional precept, the Supreme Court of Florida limited the Secretary of State’s discretion to ignore a county’s returns to two situations that raise questions about the integrity of the electoral process.²²² First, the Secretary of State could properly take the drastic remedy of ignoring a county’s late returns if including the late returns precluded a contest of the certification of the election.²²³ Second, the Secretary of State could properly ignore a county’s late returns if including the late returns precludes “Florida voters from participating fully in the federal electoral process.”²²⁴

Irrespective of which situation the Secretary claimed had arisen that justified ignoring a county’s returns, the Supreme Court of Florida made it clear that the Secretary of State may not set forth a sweeping, prospective rule that disenfranchises the electorate in order to deter county canvassing boards from granting manual recounts if the boards deem that a manual recount is appropriate.²²⁵ The court determined that the Secretary of State could only invoke such a remedy after the returns had been submitted, and the Secretary must set forth her basis for ignoring the returns, which must be a basis adequately supported by the law.²²⁶ Essentially, the court determined

220. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237.

221. *See id.* at 1237–38.

222. *Id.* at 1237.

223. *Id.* (“Ignoring the county’s returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process . . . by precluding a candidate, elector, or taxpayer from contesting the certification of an election pursuant to section 102.168 . . .”).

224. *Id.* (“Ignoring the county’s returns is a drastic measure and is appropriate only if the returns are submitted to the Department so late that their inclusion will compromise the integrity of the electoral process . . . by precluding Florida voters from participating fully in the federal electoral process.”).

225. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237–38 (“To disenfranchise electors in an effort to deter Board members, as the Secretary in the present case proposes, is unreasonable, unnecessary, and violates longstanding law.”). Interestingly, although the Supreme Court of Florida claimed that the Secretary’s actions violated “longstanding law,” the court offered no support for this proposition. *Id.* at 1238. However, the court could have supported this proposition, if it so desired. *See Darby v. State ex rel. McCollough*, 75 So. 411 (1917); *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (1988).

226. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237 (“In either case, the Secretary must explain to the Board her reason for ignoring the returns and her action must be adequately supported by the law.”).

that each instance in which the Secretary of State determines whether to ignore a county's returns must be analyzed by the Secretary on an individual, case-by-case basis.²²⁷ However, the Supreme Court of Florida dealt with all of these issues without explicitly stating that Secretary Harris had indeed abused her discretion.²²⁸ Rather, the court seemed content by claiming that Secretary Harris' discretion was limited to two specific sets of circumstances.

The Secretary, however, characterized the basis for the manual recounts as a mere "possibility that the results . . . *could* affect the outcome of the election if certain results obtain."²²⁹ She claimed that the county canvassing boards had not asserted actual substantial noncompliance with the *Florida Election Code*, and absent an assertion of substantial noncompliance,

227. *Id.* The Supreme Court of Florida supported the proposition that recounts should proceed expeditiously with United States Supreme Court precedent. *Id.* at 1238. The court noted that in *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972), the United States Supreme Court determined that "[a] recount is an integral part of the Indiana electoral process and is within the ambit of the broad powers delegated to the States by Art. I, s 4." *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1238. However, whether conducting federal elections are a power "delegated to the States" or a power reserved by the states is an issue discussed *infra* in Part VII.

Furthermore, the Supreme Court of Florida turned to the Supreme Court of Illinois to support the proposition that "an accurate vote count is one of the essential foundations of our democracy." *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1238. See Pullen v. Mulligan, 561 N.E.2d 585, 611 (Ill. 1990).

228. Compare *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237 ("Based on the foregoing, we conclude that the authority of the Florida Secretary of State to ignore amended returns submitted by a County Canvassing Board may be lawfully exercised only under limited circumstances . . ."), and *id.* at 1238 ("The court, however, erred in holding that the Secretary acted within her discretion in prematurely rejecting any amended returns that would be the result of ongoing manual recounts."), with *Palm Beach County Canvassing Board II v. Harris*, 772 So. 2d 1273, 1289 (Fla. 2001) ("We conclude that, consistent with the Florida election scheme, the Department may not reject a Board's amended returns that are filed on or before the day after the date that the overseas ballots are due. *Such a rejection constitutes a clear abuse of discretion*, as the Elections Canvassing Commission cannot certify the election prior to that date.") (emphasis added). It may have been in the interest of the Vice President Gore's and Senator Lieberman's attorneys to place any possible conflict of interest involving Secretary Harris on the record. This may have contributed to their contention that Secretary Harris had abused her discretion by making such a claim more plausible by providing a motive or by establishing impropriety and allowing them to argue that the Florida cases involving fraud were more likely to be applicable. See discussion *supra* note 166.

229. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1239 ("The Board has alleged the *possibility* that the results of the manual recount *could* affect the outcome of the election if certain results obtain.") (citing Letter from Katherine Harris to Palm Beach County Canvassing Board (Nov. 15, 2000)) (alteration in original).

Secretary Harris claimed that she did not believe that she could accept returns after the statutory deadline.²³⁰ The Supreme Court of Florida rejected this interpretation.²³¹ Relying primarily upon *State ex rel. Chappell v. Martinez*, the court made clear that the will of the electors supercedes any technical statutory requirements.²³²

However, in failing to explicitly set forth that Secretary Harris had abused her discretion, presumably out of respect to a coordinate branch of government,²³³ the Supreme Court of Florida was placed in an odd position of justifying a remedy when it had not emphatically established a wrong. As a result, the court invoked its “equitable powers . . . to fashion a remedy that will allow a fair and expeditious resolution of the questions presented”²³⁴ With this equitable power, the Supreme Court of Florida extended the deadline to receive amended certifications until November 26, 2000, resetting the deadline to five days from the date the opinion was issued.²³⁵

230. *Id.* (“However, absent an assertion that there has been substantial noncompliance with the law, I do not believe that the *possibility* of affecting the outcome of the election is enough to justify ignoring the statutory deadline.”) (alteration in original).

231. *Id.*

232. *Id.*

[T]he electorate’s effecting its will through its balloting, not the hypertechnical compliance with the statutes, is the object of holding an election. “There is no magic in the statutory requirements. If they are complied with to the extent that the duly responsible election officials can ascertain that the electors whose votes are being canvassed are qualified and registered to vote, and that they do so in a proper manner, then who can be heard to complain the statute has not been literally and absolutely complied with?”

See Chappell, 536 So. 2d at 1008–09 (quoting *Boardman v. Esteve*, 323 So. 2d 259, 267 (Fla. 1976)).

233. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 925 (Fla. 1978). The court held in *Askew* that:

Until the provisions of Article II, Section 3 of the Florida Constitution are altered by the people we deem the doctrine of nondelegation of legislative power to be viable in this State. Under this doctrine fundamental and primary policy decisions shall be made by members of the legislature who are elected to perform those tasks, and administration of legislative programs must be pursuant to some minimal standards and guidelines ascertainable by reference to the enactment establishing the program.

Id. *See also Chiles v. Children A–F*, 589 So. 2d 260, 264 (Fla. 1991) (delineating two precepts underlying the separation of powers doctrine and stating “[t]he doctrine encompasses two fundamental prohibitions. The first is that no branch may encroach upon the powers of another. The second is that no branch may delegate to another branch its constitutionally assigned power.” (citations omitted)).

234. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1240.

235. *Id.* The *de facto* basis for this equitable remedy became clear on remand: to provide county canvassing boards with the time to effectuate manual recounts that they lost

Time would soon demonstrate that the remedy provided by the court would raise an opportunity for federal intervention, and footnote fifty-five of the court's opinion was the vehicle for that intervention to occur. In the clause leading to footnote fifty-five, the Supreme Court of Florida determined that Secretary Harris' discretion was limited to two situations, one of which was that returns should only be ignored if Florida voters would be disenfranchised from participating in federal elections.²³⁶ To cross-reference the federal law substantiating this premise, the Supreme Court of Florida created footnote fifty-five which stated, "See 3 U.S.C. §§ 1-10 (1984)."²³⁷ In this note, the United States Supreme Court found its vehicle

when Secretary Harris abused her discretion, putting "the parties in the same position they would have been at the time the Division issued its advisory opinion on Monday, November 13, 2000." *Id.* at 1290.

236. *Id.* at 1237.

237. In the December 12, 2000 opinion, the United States Supreme Court stated that the Supreme Court of Florida ruled that "the Florida Legislature intended to obtain the safe-harbor benefits of 3 U.S.C. § 5." *Bush II v. Gore*, 531 U.S. 98, 111 (2000). There is no such expression in Florida's election laws, and any attempt by the Supreme Court of Florida to read that expression into Florida's election laws would obviously run afoul of title 3, section 5 of the *United States Code*. In addition, what the Supreme Court of Florida said in its December 11, 2000 per curiam opinion was that Florida intended to comply with title 3, sections 1-10 of the *United States Code*. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1282. The Supreme Court of Florida made no finding concerning Florida's desire to take advantage of the safe-harbor provision. Certainly, Florida can comply with sections 1-10 without taking advantage of its safe-harbor provision. In addition, on remand of this opinion on December 11, 2000, at footnotes seventeen and twenty-two, the Supreme Court of Florida made no expression or interpretation that Florida had chosen to take advantage of the safe-harbor afforded by section 5. *Id.* at 1287, 1290.

On December 22, 2000, on remand of the December 12, 2000 decision in *Gore III v. Harris* by the United States Supreme Court, the Supreme Court of Florida said that the Court had mandated that "any manual recount be concluded by December 12, 2000, as provided in 3 U.S.C. §5." *Gore IV v. Harris*, 773 So. 2d 524, 526 (Fla. 2000). The per curiam remand opinion by the Supreme Court of Florida made no mention that Florida law required recounts to be completed by December 12, 2000. *Id.* Justice Shaw, concurring with the per curiam opinion on remand, said:

In my opinion, December 12 was not a 'drop-dead' date under . . . the Florida election scheme. December 12 was simply a *permissive* "safe-harbor" date to which the states could aspire. It certainly was not a *mandatory* contest deadline under the plain language of the Florida Election Code (i.e., it is not mentioned there) or [in] this Court's prior rulings. Second, regardless of the safe-harbor date, I am not convinced that additional safeguards could have been formulated that would have satisfied the United States Supreme Court.

Id. at 528-29 (Shaw, J, concurring). It should be further noted that Justice Shaw voted with the 4-3 minority against Vice President Gore's and Senator Lieberman's position in the

into the 2000 Presidential Election controversy that had already embroiled Florida.

B. *United States Supreme Court*

The United States Supreme Court first granted certiorari²³⁸ on a Florida election issue in *Bush v. Palm Beach County Canvassing Board* on the two questions presented in Governor Bush's brief:

1. Whether post-election judicial limitations on the discretion granted by the legislature to state executive officials to certify election results, and/or post-election judicially created standards for the determination of controversies concerning the appointment of presidential electors, violate the Due Process Clause or 3 U.S.C. § 5, which requires that a State resolve controversies relating to the appointment of electors under the "laws enacted prior to" election day.
2. Whether the state court's decision, which cannot be reconciled with state statutes enacted before the election was held, is inconsistent with Article II, Section 1, clause 2 of the Constitution, which provides that electors shall be appointed by each State "in such Manner as the Legislature thereof may direct."²³⁹

When the Court granted certiorari it requested that, in addition to the issues presented in the petition, the parties brief what the consequences would be if the Court found that the decision of the Supreme Court of Florida did not comply with title 3, section 5 of the *United States Code*.²⁴⁰

original case before it went to the United States Supreme Court. *Gore III v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000) (Shaw, J., concurring). Obviously, the only mandate for December 12, 2000 came from the United States Supreme Court, *not* the *Florida Election Code* or the Supreme Court of Florida. Simply put, the United States Supreme Court, by mandate, read provisions into Florida law and into title 3, section 5 of the *United States Code* which simply did not exist.

238. 531 U.S. 1004 (2000).

239. Pet. for a Writ of Cert. at i, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (No. 00-836).

240. *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 1004, 1005 (2000) ("In addition, the parties are directed to brief and argue the following question: 'What would be the consequences of this Court's finding that the decision of the Supreme Court of Florida does not comply with 3 U.S.C. § 5?'").

In *Bush v. Palm Beach County Canvassing Board*,²⁴¹ the United States Supreme Court unanimously vacated the Supreme Court of Florida's decision in *Palm Beach County Canvassing Board I*.²⁴² The Court began its analysis by pointing out that, traditionally, the Court defers to a state court's interpretation of a state law.²⁴³ However, the Court found this situation distinguishable.²⁴⁴ Since the *Florida Election Code* establishes the method of selection of presidential electors and not simply state officers, the Court determined that the legislature, in enacting the *Florida Election Code*, was not acting under the authority given to it by the people of Florida, but by "virtue of a *direct grant* of authority made under Art. II, § 1, cl. 2, of the United States Constitution."²⁴⁵ The clause provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress"²⁴⁶

The Court turned to dicta in *McPherson v. Blacker* to support the proposition that the power to appoint presidential electors ultimately lies with the state legislature.²⁴⁷ The Court then referenced the Supreme Court of Florida's opinion and determined that there were portions of that opinion that could be read as "circumscrib[ing] the legislative power" delegated in Article II, Section 1, Clause 2 of the United States Constitution.²⁴⁸ The United States Supreme Court reasoned that because portions of the Supreme Court of Florida's opinion, based on the Florida Constitution's guarantee of paramount right to vote, invalidated laws that placed "unreasonable or unnecessary restraints on the right of suffrage" and required that "because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote," the Supreme Court of Florida could be viewed as having subverted a power delegated by the federal constitution to the state legislature.²⁴⁹

241. 531 U.S. 70 (2000).

242. *Id.* at 78.

243. *Id.* at 76.

244. *Id.*

245. *Id.* (emphasis added).

246. U.S. CONST. art. II, § 1, cl. 2.

247. *Bush*, 531 U.S. at 76; *McPherson v. Blacker*, 146 U.S. 1 (1892).

248. *Bush*, 531 U.S. at 77.

249. *Id.* While the United States Supreme Court did not acknowledge that the Florida Constitution, with the exception of amendments by initiative or an unlikely constitutional convention, is, in some form, a legislative product, the Court's analysis suffers from more severe and fundamental problems as well. See FLA. CONST. art. XI.

The Court then turned to title 3, section 5 of the *United States Code*, the “safe harbor” provision that requires Congress to accept a state’s electoral votes if the state has provided for a final determination of any controversy or contest surrounding the appointment of presidential electors at least six days before the meeting of the electors.²⁵⁰ The Court then determined that because section 5 “would assure finality of the state’s determination if made . . . before the election,” the legislature’s desire to take advantage of section 5’s “‘safe harbor’ would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”²⁵¹ However, because the Supreme Court of Florida’s opinion was deemed by the United States Supreme Court to have “considerable uncertainty as to the precise grounds for the decision,” the Court vacated the opinion and remanded the case to the Supreme Court of Florida for further proceedings not inconsistent with their opinion.²⁵²

The United States Supreme Court’s decision merits significant criticism. By determining that Article II, Section 1, Clause 2 is a “direct grant of authority” to the states by the federal government,²⁵³ the Court turns federalism on its head. Central to the federal system of government is that at the Constitutional Convention; the states delegated those powers necessary for a functioning central government to a federal government in the United States Constitution.²⁵⁴ Effectively, the several states relinquished some of their sovereign powers to the federal government.²⁵⁵ However, those powers

250. See 3 U.S.C. § 5 (2000), which provides in pertinent part:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such a State is concerned.

251. *Bush*, 531 U.S. at 78. See *supra* text accompanying note 236.

252. *Bush*, 531 U.S. at 78.

253. *Id.* at 76.

254. Cf. THE FEDERALIST No. 32 (Alexander Hamilton) (stating “the State governments would *clearly retain* all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States”) (emphasis added).

255. See PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 272 (John Bach McMaster & Frederick D. Stone eds., 1888) (“This system proposes a union between thirteen sovereign and independent states . . .”); Herbert J. Storing, *The “Other” Federalist Papers: A Preliminary Sketch*, 6 POL. SCI. REV. 215, 220 (1976) (considering the historical

that were not relinquished to the federal government were retained by the states.²⁵⁶

The United States Supreme Court's "direct grant of authority" view contemplates that the states relinquished the power to select presidential electors to the federal government at the Constitutional Convention and then, in an act of charitable benevolence, the federal government donated that power to the states. Under such logic, the federal government can "direct[ly] grant" the authority to select electors to a specific entity of the several states, namely the legislature. However, Article II, Section 1, Clause 2, rather than being a "direct grant" of authority, is a reservation of power by the states. The text of the clause itself supports this proposition. The Constitution establishes that "[e]ach *State* shall appoint" presidential electors, textually recognizing that the power to select presidential electors lies in the several states.²⁵⁷

and legal priority of the states, it is striking how widely the Federalists adopted the view of the Union as a coming together of sovereign states).

256. See THE FEDERALIST No. 39 (James Madison) ("the proposed government cannot be deemed a national one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects"); see also THE FEDERALIST No. 40 (James Madison) ("[T]he States, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.").

257. A clause similar to Article II, Section 1, Clause 2 of the United States Constitution appears in the Articles of Confederation. In order to select congressional delegates, Article V of the Articles of Confederation provides, in part, "delegates shall be annually appointed in such manner as the legislatures of each state shall direct . . ." The framers of the constitution were certainly skeptical of a centralized government. See G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–87, at 464 (1969) (noting that most Americans had a "deeply rooted mistrust of central power"); BENJAMIN FLETCHER WRIGHT, CONSENSUS AND CONTINUITY, 1776–87, at 55 (1958) (noting that Anti-Federalists "distrusted the new system because it would be remote and not so immediately subject to control."). However, when the framers created the preceding Articles of Confederation they were even more skeptical. Indeed, the Articles of Confederation did not provide the power to regulate interstate commerce, a power to enforce of laws of the Confederation, a Confederation judiciary, or even the power to collect taxes. Under the *Bush* Court's logic, the states would have relinquished the power to select delegates to the United States under Article V of the Articles of Confederation, and the United States then granted that power back to the states. From a centralized government so loosely composed as to lack the power to regulate any commerce, to enforce laws, or even to collect taxes, it is unlikely that the states would have relinquished any power to a centralized government that was not absolutely necessary. Therefore, when the language of the Articles of Confederation was imported into the Article II, Section 1, Clause 2 of the United States Constitution, it is highly unlikely that the framers would have suddenly changed the meaning of the clause.

Furthermore, the United States Constitution, by its text, does not ultimately delegate the power of selecting electors with the state legislatures.²⁵⁸ The Constitution provides that “[e]ach State shall appoint, in a [m]anner as the [l]egislature thereof *may direct*,” presidential electors.²⁵⁹ Thus, the federal constitution contemplates that the manner of selecting electors lies within the discretion of the state legislatures. If the state legislature has such clear discretion, then it should certainly be able to invoke other branches of state government in selecting presidential electors.²⁶⁰ Statutorily delegating the duty to interpret the will of the voter to the state judiciary is far from an infringement on the dictates of Article II, Section 1, Clause 2 and a subversion of legislative discretion. Indeed, by setting forth a statutory scheme, the legislature has set forth the manner of selecting electors.²⁶¹

The text of title 3, section 5 of the *United States Code* supports this view. Apparently, when creating section 5, Congress believed that the federal constitution contemplates a state legislature delegating issues of enforcement and interpretation to a coordinate branch of government.²⁶² Section 5 provides:

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its *final determination of any controversy or contest* concerning the appointment of all or any of the electors of such State, *by judicial or other methods or procedures*, and such determination shall have been . . . made at least six days prior to said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such a State is concerned.²⁶³

258. However, the state legislature can certainly determine that the manner of selection is by legislative vote. Indeed, state legislatures used legislative selection as the manner of selection for quite some time. However, such an action granted the power of selection of presidential electors to the state legislature by the state legislature itself.

259. U.S. CONST. art. II, § 1, cl. 2 (emphasis added).

260. Vikram Amar & Alan Brownstein, *Bush v. Gore and Article II: Pressured Judgment Makes Dubious Law*, FED. LAWYER 27, 31 (Mar./Apr. 2001).

261. See FLA. STAT. § 97.106 (2000).

262. The text of title 3, section 5 of the *United States Code* specifically refers to “judicial or other methods or procedures” for methods of determination.

263. 3 U.S.C. § 5 (2000) (emphasis added).

The text of section 5 makes clear that Congress recognized that the appointment of electors could result in a “controversy or contest.”²⁶⁴ Further, Congress recognized that the “final determination of any controversy or contest” could be made “by judicial or other methods or procedures” that are set in place by the state legislature “by laws enacted prior to the day fixed for the appointment of electors.”²⁶⁵ A judicial determination of a controversy or contest would have never occurred unless Congress believed that the state legislature could delegate determinations of controversies to other state governmental branches or entities.

Furthermore, the United States Supreme Court ignored central principles of state constitutional law. Under the Court’s “direct grant of authority” view of Article II, state legislatures are granted plenary power to choose the manner to select electors and, according to the Court’s reasoning, to select electors themselves.²⁶⁶ However, unlike the federal government, the several states are independent sovereigns with all the inherent powers of common law sovereignty, absent those relinquished to the federal government.²⁶⁷ State constitutions are limitations on the inherent sovereign power of states created by the people of that state.²⁶⁸

Article II, Section 1, Clause 2 as a reservation of power by the states, rather than a “direct grant of authority,” allows for limitations on the state by the people of Florida via the Florida Constitution. Those limitations operate when the Florida Legislature selects the manner to appoint electors. Therefore, if a law of the Florida Legislature operates in a manner that violates one of the paramount rights of the people of the State of Florida,

264. *Id.*

265. *Id.*

266. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000).

267. THE FEDERALIST No. 32 (Alexander Hamilton) (“the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, exclusively delegated to the United States”); see also Raoul Berger, *The Founder’s Views—According to Jefferson Powell*, 67 TEX. L. REV. 1033, 1037 (1989) (“each of [the States] was a sovereign and independent state, that is, that each of them had a right to govern itself by its own authority, and its own laws, without any control from any other power upon earth”); PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 255, at 218–19 (James Wilson characterized the United States as “composed of 13 distinct and independent States,” and the purpose of the Federal Convention was to frame a government for “thirteen independent and sovereign States.”); *id.* at 265 (preserving the state governments was the “favorite object” of the Framers).

268. See Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983) (state constitutions are limits on plenary governmental power rather than grants of power); see also John Choon Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967 (1993) (state governments exercise general plenary power).

then the legislature is subverting the sovereign limitations set forth by the people of Florida. At least one commentator has gone so far as to state that when a state legislature exceeds its constitutional authority, the legislature is no longer acting as a legislature.²⁶⁹ Article II, Section 1, Clause 2 does not bestow a power upon state legislatures that did not exist before the creation of the federal constitution. Rather, it sets forth an expression of a power reserved by the states at the Constitutional Convention. Therefore, when selecting the manner to appoint presidential electors, state legislatures are still bound by state constitutional restrictions. Essentially, the federal constitution “takes state legislative bodies as it finds them—subject to pre-existing control by the people of each state, the ultimate masters of the state legislatures—and the state constitutional limits that those people create.”²⁷⁰ As a result, the United States Supreme Court’s expression that the Florida Constitution may have “‘circumscribe[d] the legislative power’” provided by Article II, Section 1, Clause 2 rests on the faulty premise that this clause gives the Florida Legislature power that the people of Florida had not granted it.²⁷¹

The only source that the United States Supreme Court used to support the “direct grant of authority” view was *McPherson v. Blacker*.²⁷² Specifically, the Court quoted a particular portion of *McPherson* which states:

[Art. II, § 1, cl. 2] does not read that the people or the citizens shall appoint, but that ‘each State shall’; and if the words ‘in such manner as the legislature thereof may direct,’ had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.²⁷³

269. Amar & Brownstein, *supra* note 260, at 31.

270. *Id.*

271. *Bush*, 531 U.S. at 77.

272. *Id.* at 76. See *McPherson v. Blacker*, 146 U.S. 1 (1892).

273. *Bush*, 531 U.S. at 76 (alterations in original) (quoting *McPherson*, 146 U.S. at 25). Quite subtly, the United States Supreme Court qualified the quotation by stating that the issue presented in *McPherson* was not “the same question petitioner raises here.” *Id.* This subtlety does not avoid the obvious conclusion that the Court either did not understand or chose to avoid long standing understanding of the reservation to the states contained in Clause 2 as well as the nature and direction of the Florida Constitution.

Based upon the *McPherson* quotation, the Court determined that portions of the Supreme Court of Florida's opinion in *Palm Beach County Canvassing Board I* "may be read to indicate that [the Supreme Court of Florida] construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power.'"²⁷⁴ Essentially, the United States Supreme Court determined that the Supreme Court of Florida did not consider whether Article II, Section 1, Clause 2 limited the Supreme Court of Florida's interpretation of the Florida Constitution by improperly usurping the power of the legislature.

However, more than one-hundred years ago in *McPherson*, the United States Supreme Court considered whether the State of Michigan could, consistent with Article II, Section 1, Clause 2, select electors by allowing each congressional district to popularly vote for one elector.²⁷⁵ The remaining two electors would be selected by the popular vote of a compilation of the congressional districts into an "Eastern Electoral District" and a "Western Electoral District."²⁷⁶ Presidential elector nominees challenged the system of elector selection as violating Article II, Section 1, Clause 2 of the United States Constitution.²⁷⁷ The United States Supreme Court held that Article II, Section 1, Clause 2 did not limit the discretion of the Michigan Legislature from selecting the district selection of presidential electors.²⁷⁸

In order to come to this holding, the *McPherson* court responded to the prospective electors' argument that Article II, Section 1, Clause 2 mandated that presidential electors be selected by the state as a unit.²⁷⁹ The Court rejected this argument, determining that the clause did not function as a limitation of the inherent powers of the state.²⁸⁰ Absent the clause, the state legislature would still have the power to determine the manner of selection because the legislature, was limited by the state constitution, as the direct representative of the people.²⁸¹ Rather, Article II, Section 1, Clause 2 confirms that the state has the inherent authority to select presidential electors, and the legislature may determine the manner in which the state

274. *Id.* at 77.

275. *McPherson*, 146 U.S. at 2-6.

276. *Id.* at 5-6.

277. *Id.* at 2-3.

278. *Id.* at 36. The *McPherson* court also determined that the method of selection of presidential electors did not violate the Fourteenth or Fifteenth Amendments to the U.S. Constitution. *Id.* at 37.

279. *McPherson*, 146 U.S. at 24-25.

280. *Id.* at 25-28.

281. *Id.* at 25-26.

selects its electors. When read in full, *McPherson* recognizes the legislature's inherent authority to determine the manner of selection, and the state's ability to limit the inherent authority in the state constitution when it states the following:

"A State in the ordinary sense of the constitution," said Chief Justice Chase, . . . "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority *except as limited by the constitution of the State*, and the sovereignty of the people is exercised through their representatives in the legislature *unless by the fundamental law power is elsewhere reposed*. The Constitution of the United States frequently refers to the State as a political community, and also in terms to the people of the several States and the citizens of each State. *What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist*. The clause under consideration [Article II, Section 1, clause 2] does not read that the people or the citizens shall appoint, but that "each State shall"; and if the words "in such manner as the legislature thereof may direct," had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence the insertion of those words, while operating as a limitation upon the State in respect of any attempt to circumscribe the legislative power, cannot be held to operate as a limitation on that power itself.²⁸²

The *McPherson* court recognized that a state legislature's inherent authority, as limited by the state constitution, would include the power to select the manner for the state to select presidential electors.²⁸³ While *McPherson* supports the proposition that Article II, Section 1, Clause 2 functions to limit the state from circumscribing the legislature's power to determine the manner of selecting electors, *McPherson* is also clear that

282. *Id.* at 25 (emphasis added) (citation omitted).

283. *Id.*

when the legislature determines the manner of selection, the legislature must comport with the state constitution.²⁸⁴ In the Florida election cases, the Florida Constitution restricts the government by requiring that all political power remains inherent in the people and that Florida citizens retain the right of suffrage.²⁸⁵

Even under a broader view, the United States Supreme Court's decision merits criticism. The Supreme Court of Florida's decision in *Palm Beach County Canvassing Board I* established that the right to vote and to have that vote counted were paramount rights.²⁸⁶ The United States Supreme Court, however, vacated the decision,²⁸⁷ not just because the right to vote is not necessarily a federal right, but the right of the people to vote may conflict with the federal constitution. Although the federal constitution does not guarantee the right of the people of a state to vote for presidential electors, it is difficult to conceive that by constitutionally guaranteeing its citizens the right to popularly vote for presidential electors, a state constitution directly conflicts with the federal constitution.

The United States Supreme Court's decision in *Bush v. Palm Beach County Canvassing Board* sent a clear and unequivocal message to the Supreme Court of Florida on remand: do not do anything that could arguably be a change in the law.²⁸⁸ In so doing, the Court guaranteed that the Supreme Court of Florida would not be able to clarify the "intent of the voter" standard or resort to equity to resolve any of the issues that the parties set forth, including establishing a remedy. However, the basis for this message is questionable.

The reason that the Supreme Court of Florida could not "change the law" was that the United States Supreme Court determined that the Florida Legislature wished to take advantage of the "safe harbor" provision, title 3, section 5 of the *United States Code*.²⁸⁹ The provision functions as a "safe

284. *McPherson*, 146 U.S. at 25.

285. Even if the United States Supreme Court's reading of *McPherson* were proper, there has been a question of whether that proposition of *McPherson* has been superceded by more recent cases. See Amar & Brownstein, *supra* note 260, at 33. Specifically, *Williams v. Rhodes*, 393 U.S. 23 (1968), has been viewed by some commentators as a demonstration that there is a constitutional "trend" that popular voting for presidential electors is preferred. *Id.*

286. *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1227–28 (Fla. 2000).

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

288. *Id.* at 77–78.

289. *Id.*

Since [3 U.S.C.] § 5 contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a

harbor” because *if* the conditions of section 5 are satisfied, *then* Congress must accept the state’s presidential elector votes.²⁹⁰ Therefore, unless the conditions can be satisfied in the time specified in section 5, the “safe harbor” established by the section cannot be used irrespective of any legislative wish to do so.

However, the conditions set forth by section 5 are not just that the state has provided for appointment of electors by laws enacted prior to election day. Section 5 also requires that to fit within the safe harbor, if the state has provided a method to resolve controversies or contests concerning the appointment of electors, then a final determination must be made six days prior to the meeting of the electors.²⁹¹ The United States Supreme Court implies that the legislative wish to take advantage of the safe harbor commands that all final determinations be made by six days before the appointment of electors.²⁹² However, the basis of section 5 is that if a state meets the conditions, including having reached a final determination for any controversies or contests, then Congress must accept its votes. The basis of section 5 is not that if a legislature wants the protection that the state’s judicial determinations must meet a new date. Effectively, the Court reads the conditions as results and the results as conditions, reversing the if-then nature of section 5.

Furthermore, as an if-then statement, section 5 does not, alone, prevent the laws of an election from being changed after election day. Although changing the laws of an election after election day could present due process concerns,²⁹³ a plain reading of section 5, in the context of our system of

legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”

Id. at 78.

290. See 3 U.S.C. § 5 (2000).

291. *Id.*

292. *Bush*, 531 U.S. at 77. There is a clear question of whether the legislature is to “opt-in” to the safe harbor provision or “opt-out.” While the Supreme Court of Florida implies that the Florida Legislature did not explicitly opt-in to the safe harbor, *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237, the United States Supreme Court implied that by not opting out of the safe harbor provision the Florida Legislature has taken advantage of the safe harbor. *Bush*, 531 U.S. at 78 (referring only to the Supreme Court of Florida’s statement that the legislature intended to “participat[e] fully in the federal election process” as the basis for invoking title 3, section 5 of the *United States Code*, implying that it is an “opt-out” provision). On remand from the contest, the Supreme Court of Florida again established that there is no “legislative wish” to take advantage of the safe harbor of section 5. *Gore IV v. Harris*, 773 So. 2d 524, 529 (Fla. 2000) (Shaw, J., concurring).

293. Note that Vice President Gore was entitled to a recount in Miami-Dade County that was never completed. The Third District Court of Appeal found “[t]he results of th[e]

government, simply establishes that one of the conditions necessary to take advantage of the “safe harbor” provision is that the laws for the appointment of electors be enacted prior to election day. If this condition is *not* fulfilled, it does not mean the electors are somehow invalid or illegal, but that they can be subjected to congressional scrutiny.

C. Back to the Supreme Court of Florida

With the United States Supreme Court’s opinion, the Supreme Court of Florida reconsidered *Palm Beach County Canvassing Board I v. Harris*. The court reinstated the disposition it came to in that case, but the court also considered the federal constitutional and statutory provisions that the United States Supreme Court directed.²⁹⁴ The court began its analysis considering Article II, Section 1, Clause 2 of the United States Constitution and *McPherson*.²⁹⁵ Following the “direct grant of authority” mandate of the United States Supreme Court, the Supreme Court of Florida looked to another portion of the *McPherson* opinion that established that the state legislature may retain the selection of electors itself, delegate the selection of electors to another governmental entity, or “provide that [presidential electors] shall be elected by the people of the State at large.”²⁹⁶ The manner of selection in Florida, as it has been since at least 1847, is popular election by the citizens of Florida.²⁹⁷ Furthermore, in consideration of title

sample recount showed ‘an error in the vote tabulation which could effect the outcome of the election’ thus triggering the Canvassing Board’s mandatory obligation to recount all of the ballots in the county.” *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. App. 2000) (citation omitted). This finding was later cited as a reason for reversing the trial court by the Supreme Court of Florida on December 8, 2000. *Gore III v. Harris*, 772 So. 2d 1243, 1258 (Fla. 2000).

294. *Palm Beach County Canvassing Bd. II v. Harris*, 772 So. 2d 1273 (Fla. 2000).

295. *Id.* at 1281–82.

296. *Id.* See *McPherson*, 146 U.S. at 34–35 (stating presidential electors “may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large . . . and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors.” (emphasis added)).

297. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1282.

In this State, at least since 1847, the right to elect the President of the United States has been firmly vested in the citizens of this State by the Legislature. As section 103.011 of the Florida Statutes (2000), provides: “Electors of President and Vice President, known as presidential electors, shall be elected on the first Tuesday after the first Monday in November of each year the number of which is a multiple of 4.”

Id.

3, section 5 of the *United States Code*, the Supreme Court of Florida determined that “[c]onsistent with . . . federal law and . . . state law” the legislature enacted the *Florida Election Code* to regulate all elections in the state of Florida.²⁹⁸

Although the disposition of the Supreme Court of Florida remained the same, the United States Supreme Court’s opinion had some effects on the court’s analysis. The Supreme Court of Florida established that the Division of Elections could only properly exercise its discretion to ignore amended returns if failing to do so would preclude a contest pursuant to section 102.168 of the *Florida Statutes*, or if such action would preclude Florida voters from participating in the federal election process, as provided in title 3, section 5 of the *United States Code*.²⁹⁹

When applying the law to the case before it, the Supreme Court of Florida also unequivocally stated that the Division of Elections had abused its discretion by rejecting amended returns prior to the date overseas ballots were due.³⁰⁰ In *Palm Beach County Canvassing Board I*, presumably out of respect to a coordinate branch of government, the Supreme Court of Florida

298. *Id.* The court stated:

Consistent with the above provisions of federal law and with longstanding principles of state law, the Florida Legislature in 1951 enacted the Florida Election Code, contained in chapters 97-106, Florida Statutes (2000), which sets forth uniform criteria regulating elections in this state and which provides methods and procedures, including judicial methods and procedures, for the final determination of any controversy or contest concerning the appointment of all or any of the electors in this state.

Id.

299. *Id.* at 1289. Unlike *Palm Beach County Canvassing Board I*, in *Palm Beach County Canvassing Board II* the Supreme Court of Florida referred to the Division of Elections as the entity that abused its discretion, not the Secretary of State. Although only the court may be able to address the basis for this change, with all of the media and political pressure that had been placed on Florida Secretary of State Harris, it is possible that the court was attempting to provide respect to coordinate governmental entities by focusing on the Division as a whole, rather than specifically on Secretary Harris. Alternatively, with all the political pressure that had come to rest upon the court, the court may have focused on the Division to avoid making the court’s decision look anything less than professional and judicious. See Martin Merzer & Lesley Clark, *Supreme Court of Florida Allows Recounts to Proceed*, MIAMI HERALD, November 22, 2000 (stating that former Secretary of State and close aide to Bush, James Baker, claimed that the Supreme Court of Florida changed the rules and invented a new system for counting the election results.); cf. Joe Follick, *Keep Counting*, TAMPA TRIBUNE, Nov. 22, 2000, Nation/World, at 1; Linda Kleindienst et al., *Courts Allow Recounts to Go on*, SUN-SENTINEL (Ft. Lauderdale), Nov. 22, 2000, at 1A; Jennifer Sergent & Michael Peltier, *Court Unanimous: Hand Tallies Must Count*, STUART NEWS (Fla.), Nov. 22, 2000 at A1; *Counting the Vote: Update*, N.Y. TIMES, Nov. 22, 2000, at A24.

300. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1289.

stopped short of claiming that the Florida Secretary of State had abused her discretion. In *Palm Beach County Canvassing Board II*, when it was clear that the Supreme Court of Florida was not the final arbiter of the Florida election, the Supreme Court of Florida had to sacrifice civility for fidelity.³⁰¹ The court also clarified the reason that the Division abused its discretion. It began with a faulty premise that “error in vote tabulation” did *not* include a discrepancy based on the manner in which the ballot is marked or punched, making the Division’s exercise of discretion outside the confines of the law.³⁰²

Finally, when establishing a remedy, the Supreme Court of Florida explained its basis for resorting to equity in *Palm Beach County Canvassing Board I*.³⁰³ However, the court made no mention that it was relying on equity as the basis for its remedy in *Palm Beach County Canvassing Board II*.³⁰⁴ Instead, the court explained that the Division of Election’s initial decision was an attempt to place the county canvassing boards at issue in the same position that they would have been in but for the Division’s advisory opinion of November 13, 2000.³⁰⁵ Accordingly, the court explained that the *Palm Beach County Canvassing Board I* remedy was “not a new ‘deadline,’” with no prospective application.³⁰⁶ The court established that the date set allowed for all the requirements of the *Florida Election Code* to be

301. *Id.*

We conclude that, consistent with the Florida election scheme, the Department may not reject a Board’s amended returns that are filed on or before the day after the date that the overseas ballots are due. *Such a rejection constitutes a clear abuse of discretion*, as the Elections Canvassing Commission cannot certify the election prior to that date.

Id. (emphasis added). With this blatant statement of an “abuse of discretion,” the Supreme Court of Florida avoiding directly attacking Secretary Harris by attributing the abuse to the Elections Canvassing Commission. *Id.* Yet, the Elections Canvassing Commission, unlike Secretary Harris, was not a party in the case.

302. *Id.* at 1290.

[I]n this case, the Department applied its discretion in accord with a faulty premise: that an “error in vote tabulation” does not include a situation where a discrepancy between the original machine return and sample recount is due to the manner in which a ballot has been marked or punched. Accordingly, the Department did not exercise its discretion within the confines of the law.

Palm Beach County Canvassing Bd. II, 772 So. 2d at 1290 (citations omitted).

303. *Id.*

304. *Id.* at 1291–92.

305. *Id.* at 1290 (“In this Court’s original opinion, we granted a remedy which, in effect, put the parties in the same position they would have been at the time the Division issued its advisory opinion on Monday, November 13, 2000.”).

306. *Id.* at 1290.

construed consistently, allowing both for an election contest under section 102.168 of the *Florida Statutes* and for Florida to meet the federal deadline set in title 3, section 5 of the *United States Code*.³⁰⁷

In a strong conclusion, the Supreme Court of Florida reiterated that it was not creating “new law,” but was determining issues of statutory construction of election laws in accord with legislative intent.³⁰⁸ Significant among the policy considerations made by the Florida Legislature, the court expressed that it identified the rights of suffrage and the election being determined by the will of Florida voters.³⁰⁹ The Florida Legislature, the court explained, vested the power of selection of presidential electors in the hands of Florida voters, and in so doing, placed that election within the bounds of the *Florida Election Code*.³¹⁰ Thus, the court is limited to construing the *Florida Election Code*.³¹¹ With the novelty of the nature of *Palm Beach County Canvassing Board II*, the court explained that it is required to examine disputes involving state and local elections.³¹²

Irrespective, the court explained that there is no basis in the *Florida Election Code* for the court to apply the code “one way for presidential elector elections and another way for all other elections.”³¹³ Rather, the Florida Legislature has established that the code should apply equally to all elections.³¹⁴ However, based on the “clear legislative policy” of elector suffrage and having those votes count, the court construed the statutory timetable as “directory.”³¹⁵ Finally, in order to attempt to avoid any further federal intervention in construing the *Florida Election Code*, the Supreme Court of Florida, “as the ultimate arbiter of conflicting Florida law,” concluded that its “construction of the [Election Code] results in the

307. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1289.

308. *Id.* at 1291.

309. *Id.*

310. *Id.*

311. Such a conclusion lies in diametric opposition to the principles espoused in *McPherson*. See cases cited *supra* notes 247–49 and accompanying text.

312. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1291 (“[T]he parties have provided us no citations to court cases in Florida involving disputes over presidential electors under Florida’s election laws. This case may be the first.”).

313. *Id.*

314. *Id.*

315. *Id.* The Supreme Court of Florida also set forth that it had an “unbroken line of cases” supporting these principles. See *id.* Further, the legislature, in its most recent amendments to the *Florida Election Code* “have been crafted not only to be consistent with these policies, but also to ensure adherence to them.” *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1291.

formation of no new rules of state law.”³¹⁶ Instead, the court concluded that its determination is “simply a narrow reading and clarification of those statutes, which were enacted long before the [2000 Presidential E]lection took place.”³¹⁷ Instead, the court established that if the Code needs to be revised, that lies in the discretion of the proper governmental branch, the Florida Legislature.³¹⁸

The most practical effect of the Supreme Court of Florida’s opinion in *Palm Beach County Canvassing Board II* was that, rather than taking the more virtuous road that it had taken in *Palm Beach County Canvassing Board I*, the United States Supreme Court’s opinion in *Bush v. Palm Beach County Canvassing Board* forced the Supreme Court of Florida to look political.³¹⁹ The United States Supreme Court made clear that the Supreme Court of Florida had to avoid all possible ambiguities so that the Court could determine whether the Supreme Court of Florida was relying on federal law. However, the practical effect of that consideration was that, while the Supreme Court of Florida could be somewhat more tactful in its overruling of Secretary Harris’s decisions in *Palm Beach County Canvassing Board I*, the court was forced to directly state that the decision was a “clear abuse of discretion” in *Palm Beach County Canvassing Board II*.³²⁰ Although the Supreme Court of Florida attempted to avoid the political ramifications of this action by attributing the decision to the Division of Elections rather than Secretary Harris in *Palm Beach County Canvassing Board II*, the political effect was unavoidable.

316. *Id.*

317. *Id.*

318. *Id.* at 1292. Chief Justice Wells dissented to the court’s issuance of an opinion in *Palm Beach County Canvassing Board II* because the United States Supreme Court was considering *Bush I v. Gore*, 531 U.S. 1046 (2000), an appeal of the Supreme Court of Florida’s determination of the election contest pursuant to section 102.168 of the *Florida Statutes*. *Id.* at 1292 (Wells, C.J., dissenting). See discussion *infra* Part IX.

319. The *ad hominem* attacks of Republicans certainly predisposed the nation and contributed to that perception. See, e.g., Frank Bruni, *Counting the Vote, The Reaction: Bush Camp, Outraged, Vows to Seek Recourse to Ruling*, N.Y. TIMES, Nov. 22, 2000, at A1. Angered by the court’s ruling that Florida law permits hand recounts, Governor George W. Bush accused the Supreme Court of Florida of overreaching. Bush accused the court of using “the bench to change Florida’s election laws and usurp the authority of Florida’s election officials . . . writing laws is the duty of the legislature; administering laws is the duty of the executive branch.” *Id.*

320. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1289. However, the court still attempted to avoid being perceived as political by directing the “abuse of discretion.” *Id.*

V. THE BUTTERFLY BALLOT ISSUE

For counties that used machine ballots in the 2000 election, Florida law stated that machine ballots “shall as nearly as practicable conform to the requirements of the form of the paper ballot for that election.”³²¹ The statute

321. FLA. STAT. § 101.27 (2000). The statute provided:

(1) All ballots for voting machines shall be printed on strips of white cardboard, paper, or other material of such size as will fill the ballot frames of the machine, in plain black type as large as the space will permit, so as to show the name of the candidate, statement of the proposed constitutional amendment, or other question or proposition submitted to the electorate at any election.

(2) The captions on the ballots for voting machines shall be placed so as to indicate to the elector what push knob, key, lever, or other device is used or operated in order to cast his or her vote for or against a candidate, proposed constitutional amendment, or other question or proposition submitted to the electorate at any election.

(3) The order in which the voting machine ballot is arranged shall as nearly as practicable conform to the requirements of the form of the paper ballot for that election. The names of the unopposed candidates shall not appear on the general election ballot; each unopposed candidate shall be deemed to have voted for himself or herself. If two or more write-in candidates are seeking election for one office, only one blank space shall be provided.

(4) If the official ballot is longer than the voting machine can accommodate, paper ballots may be used in conjunction with a voting machine, in which case the order of the offices on the voting machine ballot shall be the same as prescribed in ss. 101.141(4) and 101.151(3). Where the machine ballot is filled in this order, there shall be a continuation of the ballot in the same order on paper ballots, except that no state or federal opposed officer shall be placed upon a paper ballot. In any primary election, if the official ballot is longer than the voting machine can accommodate, paper ballots may be used in conjunction with a voting machine, in which case the order of the offices on the voting machine ballot shall be the same as prescribed in s. 101.141(4), except that no portion of a category of candidates as established in s. 101.141(4) shall be divided between the voting machine ballot and the paper ballot. In the event a category of candidates must be removed from the voting machine ballot because of the foregoing provision, the supervisor of elections in such county may complete the balance of the voting machine ballot with some whole portion of another category of candidates out of its proper sequence, except that no state or federal office shall be placed upon a paper ballot.

(5) In all primary elections, supervisors of elections may print voting machine ballots in shaded colors to group and identify the number of candidates in any or all races. Colors shall be light or pastel with candidates' names overprinted in plain black type. In no case shall any particular color or pattern of colors be used to identify any political party in the general election.

(6) Should the above directions for the complete preparation of the ballot be insufficient, the Department of State shall determine and prescribe any additional matter or form in which the ballot may be printed.

Id.

entitled “[s]pecifications for general election ballot” provided, in pertinent part, “[t]o vote for a candidate whose name is printed on the ballot, place a cross (X) mark in the blank space at the right of the name of the candidate for whom you desire to vote.”³²² The statute then went on to lay out the form of the ballot, dependent on an order determined by which political party received the highest vote total for Florida Governor in the last general election, followed by the party receiving the next highest vote total.³²³ The

322. § 101.151(3)(a).

323. § 101.151. The statute provided:

In counties in which voting machines are not used, and in other counties for use as absentee ballots not designed for tabulation by an electronic or electromechanical voting system, the general election ballot shall conform to the following specifications:

(1) The ballot shall be printed on paper of such thickness that the printing cannot be distinguished from the back.

(2) Across the top of the ballot shall be printed “Official Ballot, General Election,” beneath which shall be printed the county, the precinct number, and the date of the election. The precinct number, however, shall not be required for absentee ballots. Above the caption of the ballot shall be two stubs with a perforated line between the stubs and between the lower stub and the top of the ballot. The top stub shall be stub No. 1 and shall have printed thereon, “General Election, Official Ballot,” and then shall appear the name of the county, the precinct number, and the date of the election. On the left side shall be a blank line under which shall be printed “Signature of Voter.” On the right side shall be “Initials of Issuing Official,” above which there shall be a blank line. The second stub shall be the same, except there shall not be a space for signature of the elector. Both stubs No. 1 and No. 2 on ballots for each precinct shall be pre-numbered consecutively, beginning with “No. 1.” However, a second stub shall not be required for absentee ballots.

(3)(a) Beneath the caption and preceding the names of candidates shall be the following words: “To vote for a candidate whose name is printed on the ballot, place a cross (X) mark in the blank space at the right of the name of the candidate for whom you desire to vote. To vote for a write-in candidate, write the name of the candidate in the blank space provided for that purpose.” *The ballot shall have headings under which shall appear the names of the offices and names of duly nominated candidates for the respective offices in the following order: the heading “Electors for President and Vice President” and thereunder the names of the candidates for President and Vice President of the United States nominated by the political party which received the highest vote for Governor in the last general election of the Governor in this state, above which shall appear the name of said party. Then shall appear the names of other candidates for President and Vice President of the United States who have been properly nominated. Votes cast for write-in candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates.* Then shall follow the heading “Congressional” and thereunder the offices of United States Senator and Representative in Congress; then the heading “State” and thereunder the offices of Governor and Lieutenant Governor, Secretary of State, Attorney General, Comptroller, Treasurer, Commissioner of Education, Commissioner of Agriculture, state attorney, and public defender, together with the names of the candi-

Florida Legislature included a sample ballot in the statute.³²⁴ These statutes

dates for each office and the title of the office which they seek; then the heading "Legislative" and thereunder the offices of state senator and state representative; then the heading "County" and thereunder clerk of the circuit court, clerk of the county court (when authorized by law), sheriff, property appraiser, tax collector, district superintendent of schools, and supervisor of elections. Thereafter follows: members of the board of county commissioners, and such other county offices as are involved in the general election, in the order fixed by the Department of State. When a write-in candidate has qualified for any office, a subheading "Write-in Candidate for . . . (name of office) . . ." shall be provided followed by a blank space in which to write the name of the candidate. With respect to write-in candidates, if two or more candidates are seeking election to one office, only one blank space shall be provided.

(b) Immediately following the name of each office on the ballot shall be printed, "Vote for One." When more than one candidate is nominated for office, the candidates for such office shall qualify and run in a group or district, and the group or district number shall be printed beneath the name of the office. The name of the office shall be printed over each numbered group or district and each numbered group or district shall be clearly separated from the next numbered group or district, the same as in the case of single offices. Following the group or district number shall be printed the words, "Vote for One," and the names of the candidates in the respective groups or districts shall be arranged thereunder.

4) The names of the candidates of the party which received the highest number of votes for Governor in the last election in which a Governor was elected shall be placed first under the heading for each office, together with an appropriate abbreviation of party name; the names of the candidates of the party which received the second highest vote for Governor shall be second under the heading for each office, together with an appropriate abbreviation of the party name.

(5) Minor political party candidates and candidates with no party affiliation shall have their names appear on the general election ballot following the names of recognized political parties, in the same order as they were certified.

(6) Except for justices or judges seeking retention, the names of unopposed candidates shall not appear on the general election ballot. Each unopposed candidate shall be deemed to have voted for himself or herself.

(7) The same requirement as to the type, size, and kind of printing of official ballots in primary elections as provided in s. 101.141(5) shall govern the printing of official ballots in general elections.

(8) Should the above directions for complete preparation of the ballot be insufficient, the Department of State shall determine and prescribe any additional matter or form. Not less than 60 days prior to a general election, the Department of State shall mail to each supervisor of elections the format of the ballot to be used for the general election.

(9) The provisions of s. 101.141(7) shall be applicable in printing of said ballot.

FLA. STAT. 101.151 (2000) (emphasis added).

324. Section 101.191 of the *Florida Statutes* is entitled "[f]orm of general election ballot." In pertinent part, the statute provided:

(1) The general election ballot shall be in substantially the following form:

OFFICIAL BALLOT GENERAL ELECTION

No. _____ COUNTY, FLORIDA

Precinct No. _____
(Date)

(Signature of Voter)

(Initials of Issuing Official)

Stub No. 1

OFFICIAL BALLOT GENERAL ELECTION

No. _____ COUNTY, FLORIDA

Precinct No. _____
(Date)

(Initials of Issuing Official)

Stub No. 2

OFFICIAL BALLOT GENERAL ELECTION

____ COUNTY, FLORIDA

Precinct No. _____
(Date)

TO VOTE for a candidate whose name is printed on the ballot, mark a cross (X) in the blank space at the RIGHT of the name of the candidate for whom you desire to vote. To vote for a candidate whose name is not printed on the ballot, write the candidate's name in the blank space provided for that purpose.

ELECTORS

For President

and

Vice President

(A vote for the candidates will actually be a vote for their electors) Vote for group

DEMOCRATIC

(Name of Candidate)

For President

(Name of Candidate)

For Vice President

REPUBLICAN

(Name of Candidate)

For President

(Name of Candidate)

For Vice President

(NAME OF MINOR PARTY)

(Name of Candidate)

For President

(Name of Candidate)

For Vice President

NO PARTY AFFILIATION

(Name of Candidate)

For President

(Name of Candidate)

For Vice President

were part of a statutory framework designed to prevent voter confusion and to facilitate voters in making their choices.³²⁵

The Democratic Party received the second highest vote total in Florida's 1998 gubernatorial election, and, accordingly, the Democratic ticket of Vice President Gore and Senator Lieberman appeared second on the ballot under the office of President and Vice President of the United States. The second hole punch from the top and to the right of the names of Gore and Lieberman was designated for Mr. Pat Buchanan and Ms. Ezola Foster of the Reform Party and appeared to the left of Buchanan's and Foster's names. For the office of President and Vice President, the Palm Beach County "butterfly ballot" required voters to make their selections by punching holes at the right of some candidates' names and at the left of other candidates' names. In the case of Gore-Lieberman, the Buchanan-Foster hole punch was to the right of their names.

Whether this ballot was in substantial compliance with the election laws was the issue decided in *Fladell v. Palm Beach County Canvassing Board*,³²⁶ the Palm Beach County butterfly ballot case. In *Fladell*, the Supreme Court of Florida determined the effect of the noncompliant butterfly ballot, during the protest phase of the presidential election.³²⁷ The complaint asked for

WRITE-IN

For President

For Vice President

....

FLA. STAT. § 101.191 (2000).

325. *See, e.g.*, § 101.161 (requiring amendments to be printed in clear and unambiguous language); § 101.051 (allowing electors to seek assistance in casting ballots); § 101.131(1) (requiring the Department of State to print, in large type on cards, instructions for the electors to use in voting and display the cards in the polling places as information for electors); § 101.131(2) (requiring two election officers to provide further instructions concerning the manner of voting when requested by an elector).

326. 772 So. 2d 1240 (Fla. 2000).

327. *Id.* at 1241-42. The protest phase of the election ended on November 26, 2000. The contest phase of the election could not occur until the election had been certified under Florida law. FLA. STAT. § 102.168(2) (2000). Logically, the contest phase must follow certification of the election results because one of the grounds for filing a contest is "[p]roof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property, or any other thing of value for the purpose of procuring the *successful candidate's* nomination or election or determining the result on any question submitted by referendum." § 102.168(3)(d) (emphasis added). Moreover, the statute required that "[t]he canvassing board or Election Canvassing Commission shall be the proper party defendant, and the *successful candidate* shall be an indispensable party to any action brought to contest the election or nomination of a candidate." § 102.168(4) (emphasis added). Thus, a

declaratory relief.³²⁸ However, it was not clear from the face of the complaint as to whether relief was being sought under sections 102.166 or 102.168 of the *Florida Statutes*, since neither statute was specifically mentioned in the complaint.³²⁹ Further, it was not clear whether relief was being sought pursuant to the analysis and holding of *Beckstrom v. Volusia County Canvassing Board*.³³⁰

The trial court in Palm Beach County treated the complaint as a complaint for declaratory relief under section 102.168 of the *Florida Statutes*.³³¹ In the order filed November 20, 2000, the court cited *Beckstrom* for a court's authority to void a state election pursuant to section 102.168. *Beckstrom* provides that

[i]f a court finds substantial non-compliance with statutory election procedures and also makes a factual determination that reasonable doubt exists as to whether a certified election expressed the will of the voters, then the court in an election contest brought pursuant to section 102.168, Florida Statutes (1997), is to void the contested election even in the absence of fraud or intentional wrongdoing.³³²

The trial court never reached the issue framed by *Beckstrom* because it bifurcated the proceedings to determine first whether a revote or new election was permitted by law.³³³ Accordingly, the trial court failed to

contest phase could not occur until the election has been certified because otherwise, the successful candidate, an indispensable party to the contest action, would not be determined until the election has been certified. Not only did Vice President Gore contest the certification of Governor Bush as the winner of Florida's electoral votes, Vice President Gore also challenged the certifications of the canvassing boards in Miami-Dade, Palm Beach, and Nassau Counties. *Gore III v. Harris*, 772 So. 2d 1243, 1247-48 (Fla. 2000).

328. *Fladell*, 772 So. 2d at 1240-41.

329. *Id.*

330. 707 So. 2d 720 (Fla. 1998). In *Beckstrom*, the court held:

In sum, we hold that even in a situation in which a trial court finds substantial non-compliance caused by unintentional wrongdoing as we have defined it, the court is to void the election only if it finds that the substantial noncompliance resulted in doubt as to whether a certified election reflected the will of the voters.

Id. at 725.

331. See generally *Fladell v. Elections Canvassing Comm'n*, 8 Fla. L. Weekly Supp. 36 (Fla. 15th Cir. Ct. 2000).

332. *Id.* at 37.

333. *Id.* at 36.

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OFFICIAL BALLOT, GENERAL ELECTION
PALM BEACH COUNTY, FLORIDA
NOVEMBER 7, 2000

OFFICIAL BALLOT, GENERAL ELECTION
PALM BEACH COUNTY, FLORIDA
NOVEMBER 7, 2000

<p>ELECTORS FOR PRESIDENT AND VICE PRESIDENT (A vote for the candidates will actually be a vote for their electors.) (Vote for Group)</p>		<p>(REPUBLICAN) GEORGE W. BUSH - PRESIDENT DICK CHENEY - VICE PRESIDENT</p> <p>3</p>	<p>(DEMOCRATIC) AL GORE - PRESIDENT JOE LIEBERMAN - VICE PRESIDENT</p> <p>5</p>	<p>(LIBERTARIAN) HARRY BROWNE - PRESIDENT ART OLIVIER - VICE PRESIDENT</p> <p>7</p>	<p>(GREEN) RALPH NADER - PRESIDENT WINONA LA DUKE - VICE PRESIDENT</p> <p>9</p>	<p>(SOCIALIST WORKERS) JAMES HARRIS - PRESIDENT MARGARET TROWE - VICE PRESIDENT</p> <p>11</p>	<p>(NATURAL LAW) JOHN HAGELIN - PRESIDENT PAT GOLDHABER - VICE PRESIDENT</p> <p>13</p>
<p>(REFORM) PAT BUCHANAN - PRESIDENT EZOLA FOSTER - VICE PRESIDENT</p> <p>4</p>	<p>(SOCIALIST) DAVID McREYNOLDS - PRESIDENT MARY CAL HOLLIS - VICE PRESIDENT</p> <p>6</p>	<p>(CONSTITUTION) HOWARD PHILLIPS - PRESIDENT J. CURTIS FRAZIER - VICE PRESIDENT</p> <p>8</p>	<p>(WORKERS WORLD) MONICA MOOREHEAD - PRESIDENT GLORIA La RIVA - VICE PRESIDENT</p> <p>10</p>	<p>WRITE-IN CANDIDATE To vote for a write-in candidate, follow the directions on the long stub of your ballot card.</p>			

TURN PAGE TO CONTINUE VOTING

conduct an evidentiary hearing on the question of whether the butterfly ballot was substantially noncompliant, causing reasonable doubt concerning whether the election (still uncertified at this point) expressed the will of the voters.³³⁴ The trial court proceeded to rule that a revote was not permissible in a presidential election.³³⁵

The Supreme Court of Florida ruled this holding a nullity.³³⁶ Rather than dismiss the *Fladell* case as being premature for a contest under section 102.168, because no election had been certified, the court concluded “as a matter of law that the Palm Beach County [butterfly] ballot does not constitute substantial noncompliance with the statutory requirements mandating the voiding of the election.”³³⁷ The court decided this without the benefit of any findings by the trial court below. This holding was unusual considering the mandatory venue for a contest for statewide office was in Leon County, Florida, *not* Palm Beach County.³³⁸ Accordingly, the Supreme Court of Florida had additional grounds for not hearing the case in the first instance. The Supreme Court of Florida chose to take *Fladell* and rule upon it despite the fact that: 1) no election had been certified; 2) the trial court did not have venue for the action; and 3) the trial court did not develop a record on the issue the Supreme Court of Florida decided. In *Palm Beach*

334. *Id.* at 36. In 1974, the Second District Court of Appeal decided *Nelson v. Robinson*, 301 So. 2d 508 (Fla. 2d Dist. Ct. App. 1974), which involved a post-election challenge to a form of ballot which listed the candidates for a single office in alphabetical order using the same color ink, but on different lines. *Nelson*, 301 So. 2d at 509–10. Robinson claimed that the organization of the ballot denied the individual candidates equal protection of the law. *Id.* at 509. The fundamental question that the Second District Court of Appeal set forth for lower courts to answer was, “[c]an it be said that the election was *not* a free expression of the public’s will?” *Id.* at 511. The court analyzed the case solely on constitutional grounds and determined that the “mere confusion” that stemmed from the ballot did not operate to deny the voters their “free choice.” *Id.* at 511. The court found that the equal protection rights of the voters were not violated because voters could properly effectuate their will if they took the time to examine the ballot and cast their vote. *Id.* at 511. The court also determined that a candidate had no constitutional rights to a particular place on a ballot, rather the equal protection rights of candidates extend only to guaranteeing that their name will appear on the ballot. *Nelson*, 301 So. 2d at 511–12.

335. *Fladell*, 8 Fla. L. Weekly Supp. at 39.

336. *Fladell*, 772 So. 2d at 1243.

337. *Id.* at 1242.

338. See FLA. STAT. § 102.1685 (2000), which reads:

The venue for contesting a nomination or election or the results of a referendum *shall* be in the county in which the contestant qualified or in the county in which the question was submitted for referendum or, if the election or referendum covered more than one county, then in Leon County.

Id. (emphasis added).

County Canvassing Board I, the Supreme Court of Florida allowed for a true demarcation between the contest portion of the post-election period and the protest period.³³⁹ This decision was rendered less than ten days before deciding *Fladell*.³⁴⁰ In *Fladell*, the Supreme Court of Florida ignored its decision in *Palm Beach County Canvassing Board I* when it decided a case initiated and tried in the protest period prior to the election being certified, but under the contest statute.³⁴¹

While the issue was never directly addressed in the court's reasoning, one can only surmise that the reason the court did not find "substantial non-compliance" sufficient to meet the test set forth in *Beckstrom* was because section 101.27(3) of the *Florida Statutes* stated that "the order in which the voting machine ballot is arranged shall as nearly as practicable conform to the requirements of the form of the paper ballot for that election."³⁴² Without explanation of a factual record, the Supreme Court of Florida seemed to infer that the butterfly ballot conformed as nearly as "practicable" with the requirements of the form of paper ballot under section 101.151 of the *Florida Statutes*.³⁴³ Clearly, on its face, the butterfly ballot did not conform. Whether there were "practicable" considerations for it not conforming was not a matter of record.³⁴⁴ Given the pronouncement of the

339. *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1231 (Fla. 2000).

340. *Id.*

341. *Fladell*, 772 So. 2d at 1242.

342. FLA. STAT. § 101.27(3) (2000).

343. § 101.151.

344. It would be hard to understand an argument for this type of nonconformance with the requirements of the paper ballot statute, but in any event, no record was made or required to show any "practicable" reasons for the noncompliance. Without a record to determine the "practicable" reasons for the noncompliance, it is hard to see how the court concluded that the noncompliance was not substantial.

In addition, the butterfly ballot does not appear to have complied with the requirements of Florida law that "sample ballots shall be in the form of the official ballot as it will appear at that polling place on election day." § 101.20(1). Palm Beach County's sample ballot, distributed in the days before the election, was not in the form of the actual ballot used at the polls because it did not show the punch holes down the middle of the ballot. *See generally id.* This additional reason for substantial noncompliance was never developed in a factual record because of the decision of the Supreme Court of Florida. There is little doubt as to the statistical anomaly of the discrepancy in the unusual amount of votes received by Patrick Buchanan as a result of his hole punch being second, not third on the ballot. *See Jake Tapper, Buchanan Camp: Bush Claims are "Nonsense,"* Salon.com, at <http://www.salon.com/politics/feature/2000/11/10/buchanan/> (last visited Feb. 20, 2002). The butterfly ballot was "used to explain the 3407 votes in the county for Buchanan, as compared with the 561 votes for Buchanan in Dade County, which is much larger than Palm Beach County, and the 789 votes for him in Broward County." *Id.* Similarly, the large number of double punched ballots

Supreme Court of Florida in *Jacobs v. Seminole County Canvassing Board* that “nothing can be more essential than for a supervisor of elections to maintain strict compliance with statutes in order to ensure credibility in the outcome of the election,”³⁴⁵ it will remain a mystery as to why the Supreme Court of Florida avoided having the courts of Florida address the substantive issues of the butterfly ballot. No doubt a considerable factual record could have been created under these circumstances to support the proposition that the butterfly ballot did not “as nearly as practicable conform to the requirements of the form of the paper ballot” for the election.³⁴⁶

Contrary to media reports and impressions to the contrary, Vice President Gore and Senator Lieberman were not plaintiffs in the butterfly ballot case. No election had been certified. The contest action by Vice President Gore and Senator Lieberman was not commenced until November 27, 2000, after Secretary Harris had certified Governor Bush and Secretary

was being attributed to people who thought they needed to vote for both Vice President Gore (the second hole punch) and Senator Lieberman (the third hole punch) on the butterfly ballot. For instance, the Palm Beach Post stated “[t]he ballots show [at least] 5,330 Palm Beach County residents, many of them in Democratic strongholds, invalidated their ballot cards by punching chads for Gore and Reform Party candidate Pat Buchanan, whose hole on the punch card appeared just above Gore’s.” Joel Engelhardt and Scott McCabe, *Over-votes Cost Gore the Election in Florida*, PALM BEACH POST, Mar. 11, 2001, at 1A.

345. *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519, 524 (Fla. 2000).

346. FLA. STAT. § 102.27(3) (2000). The 2001 Florida Legislature effectively eliminated the butterfly ballot by amending section 101.151 of the *Florida Statutes* to require a uniform primary and general election ballot for each certified voting system.

(6) The general election ballot shall be arranged so that the offices of President and Vice President are joined in a single voting space to allow each elector to cast a single vote for the joint candidacies for President and Vice President and so that the offices of Governor and Lieutenant Governor are joined in a single voting space to allow each elector to cast a single vote for the joint candidacies for Governor and Lieutenant Governor.

....

(8)(a) The Department of State shall adopt rules prescribing a uniform primary and general election ballot for each certified voting system. The rules shall incorporate the requirements set forth in this section and shall prescribe additional matters and forms that include, without limitation:

1. Clean and unambiguous ballot instructions and directions;
2. Individual race layout; and
3. Overall ballot layout.

(b) The department rules shall graphically depict a sample uniform primary and general election ballot form for each certified voting system.

FLA. STAT. § 101.151(6)–(8) (2001). See Ch. 2001-40, § 7, 2001 Fla. Laws 117, 121–24.

Cheney the winners at 7:30 p.m. on November 26, 2000.³⁴⁷ Because *Fladell* was *sub judice* before the Supreme Court of Florida and was interpreted as an election contest case when Gore and Lieberman filed their contest complaint, they were precluded from bringing the butterfly ballot case as part of their contest.³⁴⁸

While there is no question that the remedy would have been dramatic, Florida law permitted a revote for statewide elections.³⁴⁹ It is for this reason that the Supreme Court of Florida was correct in declaring the balance of the

347. Todd S. Purdum, *Counting the Vote: The Overview, Bush Is Declared Winner in Florida, but Gore Vows to Contest Results*, N.Y. TIMES, Nov. 27, 2001, at A1.

348. It is clear that lawyers and others representing Vice President Gore and Senator Lieberman asked Mr. Fladell and others not to file this lawsuit at this time. TAPPER, *supra* note 196, at 148. One is reminded of the Will Rogers' lament "I am not a member of any organized party. I am a Democrat." When it became clear that Democratic operatives and other plaintiffs were not going to let Vice President Gore and Senator Lieberman control their own fate and strategy with respect to which claims would be brought and when they would be brought, the Will Rogers' lament once again became self-evident. If the butterfly ballot had been contested properly during the contest phase by Vice President Gore and Senator Lieberman, the Supreme Court of Florida would have been confronted with the noncompliance issues of the butterfly ballot, coupled with the defective punch card voting machines in Palm Beach County. Whether or not they would have satisfied *Beckstrom* and section 102.168(3)(e) of the *Florida Statutes* requiring the voiding of the election and a revote would have made for a more interesting question. Certainly, a factual record would have been developed on the butterfly ballot, with affidavits of some people indicating the ballot confused them. Pedro Ruz Gutierrez, *Broward Wraps up as Palm Beach Hurries*, ORLANDO SENTINEL, Nov. 26, 2000, at A1 (stating Democratic lawyers collected 10,000 "complaints and affidavits they plan to use in challenging the Palm Beach vote totals. The voters cited everything from misaligned ballot cards to contradictory voting instructions to unhelpful poll workers."); Brad Hahn & Jeff Shields, *Both Sides Vow Fight to the End, Battle Expected to Go On and On*, SUN-SENTINEL (Ft. Lauderdale), Nov. 26, 2000, at 16A (stating "voters . . . were confused by the two-page layout of the presidential tickets and fear they cast their ballot for the wrong candidates."); Don Van Natta, Jr., *Counting the Vote: Palm Beach County, Gore Set to Fight Palm Beach Vote*, N.Y. TIMES, Nov. 25, 2000, at A1 (stating that "[a]nother basis for [a] challenge is 10,000 sworn affidavits signed by residents ranging in age from 18 to 98. Many of these voters said they were confused by the butterfly ballot's design or were denied assistance or given wrong instructions by harried and often rude poll workers . . ."). The Supreme Court of Florida's holding that additional votes from the Palm Beach County recount should be counted because the punch card machines created non-counted votes for President and Vice President, or "undervotes" would seemingly make a prima facie case for satisfying the requirements of *Beckstrom* for a revote. *Gore III v. Harris*, 772 So. 2d 1243, 1260 (Fla. 2000).

349. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998). See also *In re Protest of Election Returns and Absentee Ballots in Nov. 4, 1997 Election of the City of Miami*, 707 So.2d 1170, 1174 (Fla. 3d Dist. Ct. App. 1998) (recognizing that a new election is available as a judicial remedy if it is appropriate).

trial court's opinion concerning the remedy as a nullity. Had the butterfly ballot's effects been challenged in the contest phase of the election, a circuit judge in Leon County would have had the power to initiate an order deemed necessary to correct any alleged wrong, and to provide any relief appropriate under the circumstances.³⁵⁰ Revotes have been ordered in other state and federal elections.³⁵¹

Congress specifically contemplated that a state's appointment of presidential electors might be inconclusive on election day when it enacted title 3, section 5 of the *United States Code*, which states: "[w]henver any State has held an election for the purpose of choosing electors, and has failed to make a choice on the day prescribed by law, the *electors may be appointed on a subsequent day* in such manner as the legislature of such state may direct."³⁵²

As previously discussed, Article II, Section 1, Clause 2 of the United States Constitution, reserves to the states the power to appoint its presidential electors.³⁵³ Under title 3, section 5 of the *United States Code*, Congress granted the states a safe harbor to resolve their election disputes concerning presidential electors in such a manner as was provided by laws enacted prior to the day fixed for the appointment of the electors. Congress, as the certifying authority for presidential electors under the federal constitution, has within its authority to create this safe harbor for certification.³⁵⁴

Under section 102.168 of the *Florida Statutes*, a law enacted prior to the 2000 election, the Florida Legislature delegated the power to resolve disputes concerning the election of presidential electors to the judicial branch of Florida's government.³⁵⁵ Having delegated that power, any change in that delegation after the date of the election would have violated title 3,

350. FLA. STAT. § 102.168(8) (2000); *Beckstrom*, 707 So. 2d at 725.

351. *E.g.*, *Hadnott v. Amos*, 394 U.S. 358, 367 (1969) (directing state and local officers to conduct a new election in Greene County, Alabama); *LaCaze v. Johnson*, 310 So. 2d 86 (La. 1974) (recognizing that the trial court properly annulled a congressional election and properly ordered a new election because a voting machine failed to record votes for a candidate and the missing votes may have altered the election outcome); *State v. Bakken*, 329 N.W.2d 575 (N.D. 1983) (determining that a new election for a state house race was proper when the result of the original election was encircled in doubt).

352. 3 U.S.C. § 2 (2000) (emphasis added).

353. *See also supra* note 257.

354. U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

355. FLA. STAT. § 102.168 (2000) (stating "the certification of election or nomination of any person to office . . . may be contested in the circuit court. . .").

section 5 of the *United States Code*.³⁵⁶ It is interesting to note the current statute specifically reserves to the Florida Legislature the jurisdiction and the sole authority to hear any contest of the election of a member to either house of the Florida Legislature.³⁵⁷ The Florida Legislature could have reserved jurisdiction in presidential contests or other elections held for state elective office in a similar fashion, but failed to do so. Accordingly, and correctly, the Supreme Court of Florida applied section 102.168 of the *Florida Statutes* to the election of presidential electors from Florida and consistently declared the trial court's rulings with respect to these matters a "nullity."³⁵⁸ It is important to note, the United States Supreme Court in *Bush II v. Gore* never questioned the ability of the Supreme Court of Florida to resolve an election dispute for presidential electors in Florida. They only questioned the application of the Supreme Court of Florida's remedy for the dispute, thereby approving that portion of the court's decision in *Fladell* declaring

356. Attempts by the Florida Legislature after the election to appoint a slate of electors would have been a violation of title 3, section 5 of the *United States Code*, because the legislature had delegated its authority to resolve election disputes to the courts before the election. If the Florida courts had been permitted to complete the task delegated to them by the Florida Legislature, only one slate of presidential electors would have been sent to Congress—either the set certified by Secretary Harris on November 26, 2000, or a judgment of ouster for those electors would have been ordered with a mandamus that a new slate of electors be certified. If Governor Jeb Bush refused to execute the judgment of ouster, or Secretary Harris refused to certify the new slate of electors, then indeed Congress would have been the arbitrator of competing claims. Other appropriate action would have been taken to enforce the Florida courts' orders in order to eliminate the competing claims. See FLA. STAT. § 102.1682(1) (2000) (describing judgment of ouster remedy).

357. Section 102.171 of the *Florida Statutes* states:

The jurisdiction to hear any contest of the election of a member to either house of the Legislature is vested in the applicable house, as each house, pursuant to s. 2, Art. III of the State Constitution, is the sole judge of the qualifications, elections, and returns of its members. Therefore, the certification of election of any person to the office of member of either house of the Legislature may only be contested in the applicable house by an unsuccessful candidate for such office, in accordance with the rules of that house. This section does not apply to any contest of the nomination of any person for the office of member of either house of the Legislature at any primary or special primary election in which only those qualified electors who are registered members of the political party holding such primary election may vote, as provided for in s. 5(b), Art. VI of the State Constitution. This section does apply to any contest of a primary or special primary election for the office of member of either house of the Legislature in which all qualified electors may vote, as provided for in s. 5(b), Art. VI of the State Constitution, and the recipient of the most votes is deemed to be elected according to applicable law.

FLA. STAT. § 102.171 (2000).

358. See *Bush II v. Gore*, 531 U.S. 98 (2000).

the court's holding that section 102.168 did not apply to presidential election contests a nullity.

The Florida Constitution states that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”³⁵⁹ The Florida Legislature is not free to re-delegate as much of its lawmaking power as it may deem appropriate.³⁶⁰ The application of section 102.168 of the *Florida Statutes* to presidential elections passes constitutional muster because there has been no redelegation of power.³⁶¹ The legislature has directed Florida courts to act in accordance with specific guidelines in resolving election disputes. Further, Florida's nondelegation doctrine is not violated because the review of elections is not “textually assigned” to the legislature by the Florida Constitution.³⁶² The Supreme Court of Florida was free, in the appropriate context, to order any remedy in an election for presidential electors that it could have ordered for election of any other state officials.³⁶³

If the Supreme Court of Florida was confronted with challenges to strict legality and ballot effects in the contest phase, no one knows whether Florida would have ordered a revote due to time constraints and logistical uncertainties. It is well known that to take advantage of the safe harbor rule, the revote would have to have occurred and been certified by December 12, 2000.³⁶⁴ There is guidance with respect to who would be eligible to vote in a new election.³⁶⁵ The Florida courts would have faced a difficult task of

359. FLA. CONST. art. II, § 3. Contrary to the United States Constitution, the Florida Constitution contains an express limitation of power.

360. *B.H. v. State*, 645 So. 2d 987, 992 (Fla. 1994). The court stated that Florida has repeatedly and expressly rejected the federal doctrine, noting that “the federal approach might be more aptly called a ‘nondoctrine,’ because it consists primarily of the refusal to act despite earlier precedent.” *Id.* at 992 n.3.

361. *Gore III v. Harris*, 772 So. 2d 1243, 1253 (Fla. 2000).

362. *See Chiles v. Children A–F*, 589 So. 2d 260, 264 (Fla. 1991) (declaring that if a statute purports to give one branch powers textually assigned to another by the Constitution, then that statute is unconstitutional).

363. *See Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 727 (Fla. 1998).

364. 3 U.S.C. § 5 (2000). Had a revote been certified after December 12, 2000, Congress could still have accepted the results of the revote, but the revote would have occurred without the safe harbor rule.

365. The question of whether state election officials could “restrict the right to vote in a new, curative election to those who participated in the original, defective election” was answered in *Ayers-Schaffner v. Distefano*, 37 F.3d 726, 726 (1st Cir. Ct. App. 1994). In *Ayers-Schaffner*, the court noted that the deprivation of “a qualified voter of the right to cast a ballot because of failure to vote in an earlier election [was] almost inconceivable.” *Id.* at 727

determining how to handle overseas and absentee ballots in a new election,³⁶⁶ but one imagines that the same statutory and regulatory rules in existence would had to have been deployed for the new election. In *Gray v. Sanders*,³⁶⁷ the United States Supreme Court held that “[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote.”³⁶⁸ Applying this principle, the geographic area in question for the presidential election was Florida, not Palm Beach County. Allowing only Palm Beach County voters to vote twice would have raised a handful of equal protection problems.

First, it would have been unfair for Palm Beach County voters that voted for Nader and other third party candidates to switch their votes to one of the two major party candidates, an option not available to other Florida voters.³⁶⁹ Second, a limited revote would have allowed Palm Beach County voters to correct their improperly cast punch card votes, an option not available to voters in other punch card counties.³⁷⁰ A statewide revote would pass equal protection muster for Florida citizens, because all votes would be treated equally.

In *Fladell*, the Fifteenth Circuit Court of Florida held, based on the United States Supreme Court’s decision in *Foster v. Love*,³⁷¹ that a revote may give a state an unfair advantage in a presidential election.³⁷² A state

(referencing *Reynolds v. Sims*, 377 U.S. 533, 554–55 (1964) which stated that “[a]ny restrictions [on the right to vote] strike at the heart of representative government”). The court stated that “depriving eligible voters of the right to vote in the ‘effective’ election shakes that foundation [of our democratic process] and weakens, rather than supports, the broad goal of preserving the integrity of the electoral process.” *Id.* at 729 (alterations in original). The court concluded that “present voting status is the only appropriate yardstick for eligibility” in a new election. *Id.* at 731.

366. See discussion *infra* Part VI.

367. 372 U.S. 368 (1963).

368. *Id.* at 379.

369. The Court of Appeals of New York noted that a limited voting system would be constitutional for local elections but not for statewide elections. *Blaikie v. Power*, 13 N.Y.2d 134, 143 (1963).

370. Obviously, beyond the butterfly punch card problems, it is clear that those who used punch card machines were less likely to have their votes counted and that this may now be a constitutional violation. See *Bush II v. Gore*, 531 U.S. 98 (2000); B.J. Palermo, *Bush-Gore Lives On*, NAT’L. L.J., Sept. 17, 2001, at A1. After *Bush II v. Gore*, it is clear that any revote would have to have been statewide to satisfy constitutional muster.

371. 522 U.S. 67 (1997).

372. *Fladell v. Elections Canvassing Comm’n*, 8 Fla. L. Weekly Supp. 36, 38–39 (Fla. 15th Cir. Ct. 2000). In *Foster*, the United States Supreme Court held that a Louisiana “open primary” in October was in violation of title 2, section 7 of the *United States Code* because

would have an undue advantage if it voted before other states because it could influence future outcomes and force candidates to give those states more attention. However, this concern was not present in Florida because there was no undue influence over the other states. Each state is its own sovereign when it comes to selecting presidential electors, and each state has a right to determine the method in which it chooses electors.³⁷³ For example, Oregon allows a statewide mail-in ballot, giving their citizens more time to vote in advance of election day.³⁷⁴ Nebraska and Maine split their presidential electoral votes by House district, rather than having a statewide winner take all.³⁷⁵ A revote would have been constitutional because other states could not be influenced by a revote, and Florida would have no greater voice in the Electoral College when convened than that already constitutionally assigned to Florida.

During the election dispute, the Florida Legislature debated whether it could name its own slate of electors to the Electoral College. Since the *Florida Election Code* and the Florida Constitution vest a right to vote in the people, this act would have been unconstitutional.³⁷⁶ Once a state legislature vests its rights to vote in the people, the right to vote as the legislature has prescribed is fundamental.³⁷⁷ As the Supreme Court of Alabama has held, once the legislature has provided for the appointment of electors, its powers and functions have ended.³⁷⁸ Since section 102.168 of the *Florida Statutes* and the rest of the *Florida Election Code* had been prescribed as the method to resolve presidential election disputes in Florida, the legislature had

congressional candidates were elected on a date other than the date prescribed by Congress. *Foster*, 522 U.S. at 68. The Court noted instances in which runoff elections were held after election day. *Id.* However, the court stated in *Fladell* that it was the intent of Congress to require presidential elections to be held on a specific day. *Fladell*, 772 So. 2d at 1242–43. The court’s analysis ignored the broad discretion Congress granted the states under title 3, section 5 of the *United States Code* to resolve election disputes.

373. See *McPherson v. Blacker*, 146 U.S. 1 (1892). See discussion *supra* Part IV.

374. OR. REV. STAT. § 253.065 (2000).

375. ME. REV. STAT. ANN. tit. 21-A, § 802 (1985); NEB. REV. STAT. § 32-714 (1998).

376. See FLA. STAT. § 103.021 (2000) (providing that presidential electors should be elected by the people).

377. See *McPherson v. Blacker*, 146 U.S. 1, 4 (1892). In *McPherson*, the United States Supreme Court noted that, under the Fourteenth Amendment, “[w]henver presidential electors are appointed by popular election, then the right to vote cannot be denied or abridged.” *Id.* The right to vote intended to be protected refers to the right to vote as established by the laws and constitution of the state. See also *Bush II v. Gore*, 531 U.S. 98 (2000).

378. Opinion of Justices, 34 So. 2d 598 (Ala. 1948).

provided for the appointment of electors and would not be able to circumvent the people's right to choose their electors.³⁷⁹

In 2001, the Florida Legislature amended section 102.168 of the *Florida Statutes*, deleting a circuit judge's ability to provide any relief appropriate under such circumstances. The legislature also deleted section 102.168(3)(e), which provided a catchall exception to allow an election contest to show that a person other than the successful candidate was the person duly elected to the office in question.³⁸⁰ As a result, Florida courts can no longer provide "any relief" that they see fit, but must follow the common law *quo warranto* standard set forth in section 102.169 of the *Florida Statutes*.³⁸¹

We will never know if the Supreme Court of Florida, confronted with an admittedly noncompliant ballot in the contest phase of the election, would have used its statutory powers to order a statewide revote. Given that the Supreme Court of Florida ordered a statewide recount of the undervotes in an attempt to remedy the punch card ballot problems, and the United States Supreme Court's holding in *Bush II v. Gore* on the unconstitutionality of the attempted recount, it seems the only constitutional remedy may have indeed been a new statewide election. The effects of the butterfly ballot would have been brought under section 102.168(3)(e) of the *Florida Statutes*.³⁸² The irony is Vice-President Gore and Senator Lieberman never had an

379. See discussion *supra* note 214.

380. Ch. 2001-40, § 44, 2001 Fla. Laws 117, 153.

381. Quo warranto is a "common law writ designed to test whether a person exercising power is legally entitled to do so." BLACK'S LAW DICTIONARY 1256 (6th ed. 1990). At common law, Florida courts could void an election, but the standard for doing so was much narrower than section 102.168 of the *Florida Statutes*. See *Nelson v. Robinson*, 201 So. 2d 508, 511 (Fla. 2d Dist. Ct. App. 1974) (requiring a showing of irregularities to void an election).

382. FLA. STAT. § 102.168(3)(e) (2000) (granting grounds to contest an election for any allegation which, if sustained, "would show that a person other than the successful candidate was the person duly nominated to the office in question."). If a complaint had been filed by Vice President Gore to contest the election on butterfly ballot issues, it may have alleged the following: 1) a ballot format was used in Palm Beach County that did not meet mandated legislative requirements; 2) thousands of Palm Beach County voters signed affidavits that they incorrectly cast their votes; 3) there was an unexplainable statistical discrepancy between Buchanan votes in Palm Beach County and the rest of Florida and the country; and 4) the order of the candidates on the ballot did not as nearly as practicable conform to the requirements of the form of the paper ballot for the election—all of which resulted in substantive non-compliance with statutory election procedures resulting in reasonable doubt as to whether the certified election expressed the will of the voters. See *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998).

opportunity to present the butterfly ballot problem because a private plaintiff usurped the issue,³⁸³ attaining an unfavorable legal result. The *Fladell* case was brought in the wrong phase of the post-election process, in the wrong trial court, and without developing a factual record on the critical issues in the case. As a result, the issues surrounding the butterfly ballot were never fully litigated under Florida law, which allowed Florida courts to avoid addressing the possibility of a revote or new election for presidential electors.

VI. OVERSEAS ABSENTEE BALLOT ISSUE

A. *History of the Law*

In 1955, Congress passed the Federal Voting Assistance Act (FVAA) in an effort to extend the right to vote to military personnel that were absent from their homes during primary, general, or special elections.³⁸⁴ The FVAA was an effort to preserve the right to vote with ease for military citizens overseas and provided express recommendations to state legislatures for proposed implementation.³⁸⁵ To accommodate military personnel utilizing absentee ballot suffrage rights, the FVAA provided that all balloting materials should be shipped free of postage and established safeguards to protect against invalidation of absentee ballots.³⁸⁶

383. *Fladell v. Elections Canvassing Comm'n*, 8 Fla. L. Weekly Supp. 36 (Fla. 15th Cir. Ct. 2000).

384. *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1307 (N.D. Fla. 2000) (citing H.R. REP. NO. 1385 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2067, 2068; S. REP. NO. 580 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2777, 2779).

385. *Id.* at 1307–08. The FVAA's recommendations for state implementation suggested, in pertinent part:

(1) accept a state absentee ballot application as an application 'for registration under such States' election laws'; (2) waive registration of individuals covered under the Act 'who, by reason of their service, have been deprived of an opportunity to register'; (3) accept a federal post card application 'as simultaneous application for registration and for ballot'; and (4) 'authorize and instruct . . . election officials, upon receipt of the [federal] post card application . . . to mail immediately to the applicant a ballot, instructions for voting and returning the ballot, and a self-addressed envelope.

Id. (alterations in original).

386. *Id.* at 1308 (citing Federal Voting Assistance Act § 102, 69 Stat. 584, 584–85 (1955); S. REP. NO. 580 (1955), *reprinted in* 1955 U.S.C.C.A.N. 2777, 2779). This free postal privilege applied whether the balloting materials were "transmitted individually or in bulk." *Id.* See also Federal Voting Assistance Act §§ 303-05, 69 Stat. 584, 588–89 (1955).

While this absentee ballot voting right was extended in all states to military persons under the FVAA by 1968, civilian citizens were not extended the same or even similar rights.³⁸⁷ In response, Congress amended the FVAA to include citizens “temporarily residing abroad and engaged in business, the professions, teaching, the arts, and other walks of life.”³⁸⁸ However, only slightly more than a majority of the fifty states responded to this newly initiated FVAA amendment, resulting in discriminatory treatment of civilian citizens residing overseas.³⁸⁹

In an effort to curb this obvious discrimination, Congress passed the Overseas Citizens Voting Rights Act of 1975 (OCVRA) to “assure the right of otherwise qualified private U.S. citizens residing outside the United States to vote in Federal elections.”³⁹⁰ The OCVRA, by eliminating strict residency requirements formerly imposed on overseas citizens, re-enfranchised overseas civilian citizens through a “simplified absentee voting registration procedure.”³⁹¹ The contemporaneous enactment of the OCVRA and the FVAA caused conflicts in individual state implementation because of the inconsistencies of standards between the two federal acts.³⁹² In 1978, Congress responded by amending the two acts to harmonize the prior inconsistencies.³⁹³

387. *Bush*, 123 F. Supp. 2d at 1308 (citing H.R. REP. NO. 1385; S. REP. NO. 1025 (1968)), reprinted in 1968 U.S.C.C.A.N. 2064, 2065).

388. *Id.* (citing S. REP. NO. 1025; see also Act of June 18, 1968, Pub. L. No. 90-343, 82 Stat. 180, 180–81 (1968) (repealed 1986)).

389. *Bush*, 123 F. Supp. 2d at 1308. “Only twenty-eight States and the District of Columbia enacted statutes ‘expressly allowing absentee registration and voting in Federal elections for citizens ‘temporarily residing’ outside the United States.’” *Id.* (citing H.R. REP. NO. 94-649, at 2 (1975), reprinted in 1975 U.S.C.C.A.N. 2358, 2359.). However, of the states that did implement this amendment, insistence on residency requirements provided obstacles that civilian citizens overseas found difficult to meet. *Id.* (citing H.R. REP. NO. 94-649, at 3).

390. *Id.* (quoting H.R. REP. NO. 94-649, at 1). The OCVRA required in pertinent part: “Each citizen residing outside the United States shall have the right to register absentee for, and to vote by, an absentee ballot in any Federal election in the State . . .” Overseas Citizens Voting Rights Act § 3, 89 Stat. 1142.

391. *Id.* at 1309.

392. *Bush*, 123 F. Supp. 2d at 1309.

393. *Id.* (citing H.R. REP. NO. 95-1568, at 2 (1978), reprinted in 1978 U.S.C.C.A.N. 5759, 5760); see also Act approved Nov. 4, 1978, Pub. L. No. 95-593, 92 Stat. 2535 (1978) (repealed 1986)). The deficiencies noted by the Committee on House Administration, in part, are as follows: “the fact that State laws were not uniform and the existence of substantial disparities ‘as to filing requirements and deadlines, the right to register and vote absentee, and other provisions relating to absentee voting by person recovered under the FVAA.’” *Id.* at 1309–10. (quoting H.R. REP. NO. 95-1568, at 2).

While Congress made diligent attempts to provide suffrage rights to military and civilian citizens through the FVAA and the OCVRA, by the early 1980s, Florida still remained unable to adequately implement these federal guidelines into an effective state statutory scheme.³⁹⁴ Florida's absentee ballot statutory scheme, at that time, did not provide timely distribution of ballots to overseas citizens, giving these citizens inadequate time to return overseas absentee ballots prior to the election night deadline.³⁹⁵ The federal government had the power to regulate franchise rights provided to citizens by state legislatures,³⁹⁶ and as a result, intervened to remedy Florida's inadequate statutory scheme.³⁹⁷

The Florida statutory scheme in the early 1980s only allowed absentee ballots to be counted if received by 7:00 p.m. the night of the election.³⁹⁸ This deadline, while adequate for a majority of the states,³⁹⁹ proved

394. *United States v. Florida*, No. 80-1055 (N.D. Fla. Apr. 2, 1982) (consent decree).

The United States was seeking

injunctive relief to remedy the failure of defendants [State of Florida] to ensure that United States citizens located abroad, who are guaranteed by the [OCVRA] or the [FVAA] the right to vote absentee in federal elections conducted by the State of Florida, receive absentee ballots on a date sufficiently preceding election day to permit them to return their ballots in a timely manner.

Id. at 2.

395. *Id.* at 2-3. "Florida counties did not begin to mail ballots to overseas citizens for the November 1980 election until at least 20 days prior to the election . . . [This] mailing of absentee ballots . . . threatened to deprive a substantial number of these voters of the opportunity and right to vote . . ." *Id.*

396. *Oregon v. Mitchell*, 400 U.S. 112, 292 (1970). The court held in pertinent part that "[t]he power of the States with regard to the franchise is subject to the power of the Federal Government to vindicate the unconditional personal rights secured to the citizen by the Federal Constitution." *Id.*

397. *Florida*, No. 80-1055 at 1. The Attorney General of the United States sought to enforce the provisions provided for in 42 U.S.C. § 1973dd (OCVRA) and 42 U.S.C. § 1973cc(b) (FVAA) within the state of Florida. *Id.*

398. *Id.* at 2. (citing FLA. STAT. § 101.67(2) (1982)).

399. See generally ALA. CODE § 17-10-23 (1996); ALASKA STAT. § 15.20.170 (Michie 2000); ARK. CODE ANN. § 7-5-411(1) (Michie 2000); CONN. GEN. STAT. ANN. § 9-158(g) (West 1999); DEL. CODE ANN. tit. 15, § 5515 (1999); GA. CODE ANN. § 21-2-386(2) (1998); IDAHO CODE § 34-1005 (Michie 2000); 10 ILL. COMP. STAT. ANN. 5/19-9 (West 1993); 10 ILL. COMP. STAT. ANN. 5/20-9 (West 1993); IND. CODE ANN. § 3-11-10-3 (Michie 1998); KY. REV. STAT. ANN. § 117.086(1) (Michie 2000); LA. REV. STAT. ANN. § 18:13-11 (West 2000); ME. REV. STAT. ANN. tit. 21-A, § 755 (West 1993); MASS. GEN. LAWS ANN. ch. 54, § 93 (West 1991); MICH. COMP. LAWS § 168.765 (West 2000); MINN. STAT. ANN. § 203b.08(1) (West 1992); MISS. CODE ANN. §§ 23-15-731, 733 (2000); MO. ANN. STAT. § 115.293(1) (West 1997); MONT. CODE ANN. § 13-13-229(3) (1999); NEB. REV. STAT. § 32-950 (1998); N.H. REV. STAT. ANN. § 659:47 (1996); N.J. STAT. ANN. § 19:57-26 (West 1999); N.M. STAT.

unworkable in Florida due in part to the September and October dates in which it held initial and second primary elections.⁴⁰⁰ At the time, Florida held a “first primary election” on the first Tuesday falling on the sixth day or later of September.⁴⁰¹ Following this initial primary, a second primary election was held four weeks later, usually falling in the first week of October.⁴⁰² Finally, the general election followed during the first week of November.⁴⁰³

Essentially, Florida’s initial and second primary election statutory scheme provided, at most, twenty days in which to send out overseas absentee ballots and receive valid responses prior to the general election deadline.⁴⁰⁴ The Florida scheme was found to be in conflict with the provisions set forth in the OCVRA and FVAA, which guaranteed overseas military and civilian citizens the right to vote.⁴⁰⁵ This conflict arose because the four week interval separating Florida’s second primary election from the actual general election gave Florida election officials insufficient time in which to conduct the process of mailing out ballots, while also denying ample opportunity for a timely response from overseas voters.⁴⁰⁶ This conflict was quite apparent during the 1980 election in which more than half of Florida’s sixty-four counties had not mailed absentee ballots to the overseas voters twenty days prior to November’s general election.⁴⁰⁷

ANN. § 73-14-31 (Michie 2000); N.Y. ELECT. LAW § 8-412 (McKinney 1998); N.C. GEN. STAT. § 163-231(4) (1999); OKLA. STAT. ANN. tit. 26, § 14-104 (West 1997); OR. REV. STAT. § 253.082 (1999); R.I. GEN. LAWS § 17-20-26(a)(1)(iv) (2000); S.C. CODE ANN. § 7-15-230 (Law Co-op. 2000); S.D. CODIFIED LAWS § 12-19-12 (Michie 1995); TENN. CODE ANN. §§ 2-6-303(a)(1)–(b) (1994); UTAH CODE ANN. § 20a-3-306 (2)(a) (1998); VT. STAT. ANN. tit. 17, § 2543 (1992); VA. CODE ANN. § 24.2-712(d) (Michie 2000); WASH. REV. CODE ANN. § 29.36.060 (West 1993); W. VA. CODE ANN. § 3-3-5(f) (Michie 1999); WIS. STAT. ANN. § 6.87(6) (West 2000); WYO. STAT. ANN. § 22-9-118 (Michie 2000).

400. *Florida*, No. 80-1055 at 4. However, this is no longer the case due in part to the Election Reform Act of 2001, and its elimination of Florida’s second primary.

401. *Id.* See FLA. STAT. § 100.031 (1982).

402. *Florida*, No. 80-1055 at 4. See FLA. STAT. § 100.061 (1982).

403. *Florida*, No. 80-1055 at 4. See FLA. STAT. § 100.091 (1982).

404. *Florida*, No. 80-1055 at 4.

405. *Id.* The federal government felt that Florida did not permit overseas voters the right to vote, which is guaranteed by the OCVRA and the FVAA. *Id.*

406. *Id.*

407. *Id.* at 3.

The following chart sets forth the mailing dates for Florida counties [in the 1980 election]:

The 1980 election likely caused the action by the federal government in 1981 against the State of Florida and its Secretary of State, George Firestone.⁴⁰⁸ The federal government's intervention in Florida's absentee ballot statutory scheme resulted in a "temporary" consent decree.⁴⁰⁹ The consent decree extended Florida's deadline for receipt of absentee ballots ten extra days to allow Florida overseas voters ample time to cast a vote in the November general election.⁴¹⁰ The ten-day extension was to be utilized in the 1982 federal election, followed forty-five days later by a report from Florida compiling the absentee voting results.⁴¹¹ The Florida Legislature was then required to draft a plan of compliance, remedying the problems encompassed in Florida's absentee ballot law, and submit it within sixty days of the close of the 1983 legislative session.⁴¹²

Meanwhile, the federal government was still struggling to ensure that the overseas voters were not disenfranchised. Realizing that the main problem overseas voters faced was untimely receipt of ballot materials, the federal government enacted the Uniform and Overseas Citizens Absentee Voting Act (UOCAVA).⁴¹³ Enacted in 1986, the UOCAVA's main purpose

Date 1980	No. of Counties	Date 1980	No. of Counties
October 11	1	October 19	2
October 12	0	October 20	5
October 13	1	October 21	13
October 14	3	October 22	7
October 15	5	October 23	1
October 16	9	October 24	2
October 17	11	October 25	1
October 18	5		

(October 15 was 20 days prior to the election.)

Florida, No. 80-1055 at 3.

408. *Id.* at 1.

409. *Id.* at 7. While the consent decree was a "temporary" solution (applicable only to the 1982 federal election) to Florida's overseas absentee ballot situation, the current *Florida Administrative Code* regulating overseas absentee ballots implements virtually the same solution. See FLA. ADMIN. CODE ANN. r. 1s-2.013 (2000).

410. *Florida*, No. 80-1055 at 7.

411. *Id.* at 8. Florida was required to report the dates each county mailed out their ballots for the first primary, second primary, and the general election. *Id.* Additionally, Florida's report was to include the number of ballots received before the close of polls, after the close of polls, the number per county, and the number not counted because the ballot was not postmarked by the general election date or received after the ten-day deadline. *Id.*

412. *Id.*

413. *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1310 (N.D. Fla. 2000) (citing Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended at 18 U.S.C. §§ 608-609, 39 U.S.C. § 3406, and 42 U.S.C. §§ 1973ff to 1973ff-6)).

was to facilitate absentee ballot voting, while also providing “for a write-in absentee ballot that may be used in federal general elections by overseas voters who, *through no fault of their own*, fail to receive a regular [State] absentee ballot in sufficient time to vote and return the ballot prior to the voting deadline in their State.”⁴¹⁴ Additionally, the UOCAVA repealed the FVAA and the OCVRA in an effort to consolidate their provisions.⁴¹⁵

The UOCAVA provided overseas voters the added safeguard of the federal write-in ballot.⁴¹⁶ This safeguard is available to overseas voters, as provided in the UOCAVA, upon showing both a timely application for a state absentee ballot and the failure to receive such a ballot.⁴¹⁷ However, a federal write-in ballot is only valid if the applying voter’s state absentee ballot application is received thirty days prior to the general election or if the voter’s absentee ballot is received no later than the state absentee ballot law permits.⁴¹⁸ Additionally, the federal write-in ballot must be submitted from outside the United States.⁴¹⁹

In the aftermath of the “temporary” consent decree and the enactment of the UOCAVA, Florida made efforts to ensure the right to vote to its residents overseas. Due in part to the consent decree of 1982, Florida’s overseas absentee ballot law was bifurcated on the state level.⁴²⁰ Essentially, Florida’s overseas absentee ballots were governed by both the *Florida Statutes* and the *Florida Administrative Code*.⁴²¹ Therefore, technically Florida’s overseas absentee ballot law was governed by the *Florida Statutes*, the *Florida Administrative Code*, and the UOCAVA. Florida’s three-tiered

414. *Bush*, 123 F. Supp. 2d at 1310–11. (quoting H.R. REP. NO. 99-765, at 5 (1986), reprinted in 1986 U.S.C.C.A.N. 2009, 2009 (emphasis added)).

415. *Id.* at 1311.

416. *Id.*

417. *Id.* (citing 42 U.S.C. § 1973ff-2(a)).

418. *Id.* at 1311–12. (citing 42 U.S.C. § 1973ff-2(b)(2) & (3)).

419. *Bush*, 123 F. Supp. 2d at 1311 (citing 42 U.S.C. § 1973ff-2(b)(1)).

420. *Id.* at 1313–14.

421. FLA. STAT. §§ 101.6101–72 (2000); FLA. ADMIN. CODE ANN. r. 1S-2.013 (2000). Given the changes in Florida law, specifically section 102.528 of the *Florida Statutes*, it became clear that absent a specific grant of authority to an administrative agency, an administrative regulation cannot exceed or change a grant of authority given by a legislative statute. See *S.W. Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st Dist. Ct. App. 2000); *State v. Day Cruise Ass’n*, 794 So. 2d 696 (Fla. 1st Dist. Ct. App. 2001). Given that the administrative code exceeded the specific authority of the statute, it seems that Florida’s law governing absentee ballots, to the extent it was being regulated by an administrative code and absent specific legislative authority, was not enforceable.

overseas absentee ballot statutory scheme remained in effect during the 2000 Presidential Election.⁴²²

During the 2000 Presidential Election, the *Florida Statutes* set forth the proper procedure in which an overseas absentee voter could request a ballot. It was required that the absentee voter receive an absentee ballot thirty-five days prior to the first primary, and forty-five days prior to the second primary and general election.⁴²³ Additionally, during the 2000 Presidential Election, the *Florida Statutes* required that the returned overseas absentee ballots have “an APO, FPO, or foreign postmark” to be considered valid and count towards a vote in that election.⁴²⁴ Finally, the *Florida Statutes* set forth specifications regarding who qualified an “absent qualified elector overseas.”⁴²⁵

In addition to the guidelines set forth by the *Florida Statutes* during the 2000 Presidential Election, the overseas absentee ballot law in Florida was also governed by a provision in the *Florida Administrative Code*.⁴²⁶ This provision, incorporated into the code in 1984,⁴²⁷ reiterated the *Florida Statutes* by requiring the mailing of ballots to overseas absentee voters thirty-five days prior to the first primary,⁴²⁸ and provided that ballots be

422. See generally FLA. STAT. §§ 101.6101–.72 (2000); FLA. ADMIN. CODE ANN. r. 1S-2.013 (2000); 42 U.S.C. § 1973ff-2(a) (2000).

423. FLA. STAT. § 101.62(4)(a) (2000).

424. § 101.62(7)(c). This requirement has since been found, by the United States District Court for the Northern District of Florida, to conflict with federal law and has been eliminated by the Florida Election Reform Act of 2001. *Bush*, 123 F. Supp. 2d at 1315–16; Ch. 2001-40, § 52, 2001 Fla. Laws 117, 158 (to be codified at FLA. STAT. § 101.62 (2001)). APO and FPO are the abbreviated forms of Army Post Office and Fleet Post Office.

425. FLA. STAT. § 101.62(7)(a)(1)–(3) (2000). The statute sets forth in pertinent part that the following are qualified:

1. Members of the Armed Forces while in the active service who are permanent residents of the state and are temporarily residing outside of the United States and the District of Columbia;

2. Members of the Merchant Marine of the United States who are permanent residents of the state and are temporarily residing outside the territorial limits of the United States and the District of Columbia; and

3. Other citizens of the United States who are permanent residents of the state and are temporarily residing outside the territorial limits of the United States and the District of Columbia.

Id.

426. FLA. ADMIN. CODE ANN. r. 1S-2.013 (2000).

427. *Id.*

428. r. 1S-2.013(4).

distributed at least thirty-five days prior to the second primary.⁴²⁹ The code provided a lower threshold of compliance than the *Florida Statutes* requirement of an APO, FPO, or foreign postmark requirement, requiring only that the returned ballots bear a postmark or signature dated “no later than the date of the federal election.”⁴³⁰ Additionally, the 1982 “temporary” consent decree’s ten-day hiatus for absentee ballot validation was codified in this code, thereby allowing the acceptance of Florida overseas absentee ballots ten days following the close of polls in a presidential preference primary and the federal general election.⁴³¹

Combined together, the *Florida Administrative Code* provision and the *Florida Statutes* simultaneously provided Florida’s state guidelines for overseas absentee ballot law during the 2000 Presidential Election.⁴³² However, while facially these two authorities appear to have resolved any apparent conflict arising between the UOCAVA and Florida’s previous overseas absentee ballot statutory scheme, the aftermath of the 2000 Presidential Election proved otherwise.⁴³³

B. *The Effect on the 2000 Presidential Election*

By passing the UOCAVA, Congress attempted to simplify the voting process for American citizens abroad, while simultaneously providing each state with discretionary power to adopt individual state overseas absentee

429. r. 1S-2.013(5). This allows a shorter period than the *Florida Statutes*, which requires forty-five days for mailing ballots prior to the second primary and general election. See § 101.62(4)(a). Following the 2000 Presidential Election, the State of Florida temporarily eliminated the second primary from its election statutory scheme. Ch. 2001-40, § 34, 2001 Fla. Laws 117, 140 (to be codified at FLA. STAT. § 101.97.021 (2001)).

430. Compare FLA. ADMIN. CODE ANN. r. 1S-2.013(7) (2000), with FLA. STAT. § 101.62(7)(c) (2000). The *Florida Administrative Code* and the *Florida Statutes*, while operating simultaneously to regulate overseas absentee ballots, provide different thresholds for the validation of overseas absentee ballots. This variation in thresholds created an anomaly where a statute was overridden by an administrative code, which is unconstitutional and illegal in Florida. However, it remained intact to comply with the 1983 consent decree. This anomaly spanned twenty years and leaves questionable the Florida Legislature’s inaction in consolidating the two thresholds into one standard, an action that may have minimized confusion as to the proper standard for a valid overseas absentee ballot.

431. FLA. ADMIN. CODE ANN. r. 1S-2.013(7) (2000). “With respect to the presidential preference primary and the general election, any absentee ballot cast . . . shall be counted if received no later than ten days from the date of the federal election . . .” *Id.*

432. *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1313–14 (N.D. Fla. 2000).

433. See generally *Bush*, 123 F. Supp. 2d at 1305.

voting procedures.⁴³⁴ While Congress gave the states discretionary power to regulate the overseas absentee ballot law within each state, the UOCAVA trumps individual state law when conflicts arise.⁴³⁵ In the aftermath of the 2000 Presidential Election, Governor Bush and Secretary Cheney challenged Florida's overseas absentee ballot statutory scheme, alleging that several of Florida's requirements conflicted with UOCAVA mandated requirements.⁴³⁶

During the 2000 Presidential Election, Florida required that an overseas ballot for a federal office must be "postmarked or signed and dated no later than the date of the Federal election" to be deemed a valid vote.⁴³⁷ Specifically, Bush and Cheney alleged that Florida's requirement that overseas ballots bear a postmark or a dated signature was in direct conflict with the UOCAVA.⁴³⁸ Florida's inclusion of this requirement was due to the ten-day extension following the actual election in which overseas absentee votes were accepted, coupled with a necessity to avoid the threat of voter fraud by assuring that all votes were cast prior to the close of polls.⁴³⁹

The United States District Court for the Northern District of Florida, agreeing with Bush and Cheney, found Florida law in conflict with the "spirit of the UOCAVA."⁴⁴⁰ The UOCAVA explicitly requires all "balloting materials . . . shall be carried expeditiously and free of postage," demonstrating that postmarks are not required for validity.⁴⁴¹ Requiring a postmark at

434. *Id.* at 1314. "[C]ongress has directed the states to provide a simplified procedure for overseas citizens . . . [and] federal law continues to leave many of the details of overseas absentee voting procedure to the States." *Id.*

435. *Id.* "[S]tate procedures must be reasonable for the congressional mandate to have any meaning. . . . [A]ny state requirement that conflicts with the mandatory provisions of the Uniformed and Overseas Citizens Absentee Voting Act is preempted and invalid." *Bush*, 123 F. Supp. 2d at 1314 (citing U.S. CONST. art. VI, cl. 2; *Prigmore v. Renfro*, 356 F. Supp. 427, 430, 433 (N.D. Ala. 1972)).

436. *Bush*, 123 F. Supp. 2d at 1314. Initially, it may appear that only the absentee voter or the federal government would have the appropriate standing to challenge Florida's overseas absentee ballot scheme's compliance with federal guidelines. However, presidential candidates may obtain standing by claiming the possibility of a direct, cognizable injury in the absence of the ability to pose such a challenge.

437. FLA. ADMIN. CODE ANN. r. 1S-2.013(7) (2000).

438. *Bush*, 123 F. Supp. 2d at 1314. "Plaintiffs claim that Defendant's rejection of ballots with no postmark, an illegible postmark, or a postmark dated after the election day conflicts with federal law, which does not require any postmark at all." *Id.*

439. *Id.* at 1315.

440. *Id.* The court stated that the "[p]laintiffs are correct that nowhere in the federal legislation does the requirement of a postmark appear." *Id.* at 1314.

441. *Bush*, 123 F. Supp. 2d at 1315. (quoting 39 U.S.C. § 3406(a)(1) (alteration in original)).

the time UOCAVA was enacted was not necessary because at that time no state allowed overseas absentee ballots to be counted past the close of polls on the day of the general election.⁴⁴² However, contrary to when the UOCAVA was enacted, Florida currently does allow a ten-day period following the close of polls in which acceptance of overseas absentee ballots is allowed.⁴⁴³ While the UOCAVA and the *Florida Administrative Code* had both been enacted since the 1980s, this clear-cut contradiction of federal and state law was not apparent until the 2000 Presidential Election.⁴⁴⁴

Following Florida's requirements, the Hillsborough County Canvassing Board rejected overseas absentee ballots during the 2000 Presidential Election on the basis of lack of postmark.⁴⁴⁵ However, the court did not deem Florida's statutory requirements invalid.⁴⁴⁶ While the court recognized that the federal legislation lacked a requirement for a postmark,⁴⁴⁷ it also recognized that the federal legislation allowed states to provide safeguards against overseas absentee voting fraud.⁴⁴⁸ Therefore, the court, by upholding Hillsborough County's rejection of undated overseas absentee ballots, approved of Florida's requirement of a postmark or dated signature for a valid overseas absentee ballot.⁴⁴⁹

442. *Id.* (citing 39 U.S.C. § 3406(a)(1) n.7).

443. *Id.* The *Florida Administrative Code* holds in pertinent part:

(7) With respect to the presidential preference primary and the general election, any absentee ballot cast for a federal office by an overseas elector which is postmarked or signed and dated no later than the date of the Federal election shall be counted if received no later than 10 days from the date of the Federal election as long as such absentee ballot is otherwise proper.

FLA. ADMIN. CODE ANN. r. 1S-2.013(7) (2000).

444. Whether or not the court's ruling in *Bush v. Hillsborough County Canvassing Board* would have violated both the safe harbor provisions of title 3, section 5 of the *United States Code* and the admonition of the Supreme Court in its remand opinion in *Bush v. Palm Beach County Canvassing Board* makes for an interesting question.

445. *Bush*, 123 F. Supp. 2d at 1314. The Hillsborough County Canvassing Board rejected overseas absentee ballots on the basis of "no postmark, an illegible postmark, or a postmark dated after the election." *Id.*

446. *Id.* at 1315.

447. *Id.* at 1314.

448. *Id.* at 1315. The legislative history of the OCVRA reveals the congressional intent that "States would still be free under this bill to establish further safeguards against [overseas absentee] fraud." *Bush*, 123 F. Supp. 2d at 1309 n.7 (citing H.R. REP. No. 94-649, at 4, 1975 U.S.C.C.A.N. 2358, 2361).

449. *Id.* However, while the court upheld Florida's postmark requirement and approved of Hillsborough County Canvassing Board's rejection of ballots without the required postmarks, some Florida counties ultimately accepted overseas absentee ballots without postmarks, a practice unprecedented from prior presidential elections. See David Barstow & Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*,

While Governor Bush and Secretary Cheney raised, and the court directly addressed Florida's absentee ballot postmark requirement, the second option available to overseas absentee voters for validly casting a vote, merely signing and dating the envelope, was left unaddressed. Bush and Cheney merely attacked the Hillsborough County Canvassing Board's rejection of overseas absentee ballots based upon their lack of postmark, illegible postmarks, and post election postmark,⁴⁵⁰ but refrained from challenging the Board's possible rejection of ballots for lack of postmark coupled with a lack of dated signature.⁴⁵¹ Additionally, while the court recognized that Bush and Cheney were challenging "Florida's requirement that overseas ballots be postmarked *or* signed and dated,"⁴⁵² the court's ruling focused primarily upon whether the postmark requirement conflicted with federal law.⁴⁵³ Therefore, it appears that neither Bush and Cheney, nor the court, found conflict between Florida's requirement of a dated signature and the federal law regulating overseas absentee voting.⁴⁵⁴

While the court upheld Florida's requirement that overseas ballots be postmarked or signed and dated and Hillsborough County Canvassing Board's implementation of such, it denounced the fact that the Board neglected to inform overseas absentee voters of such a requirement.⁴⁵⁵ Unfortunately, federal law does not require a state to provide overseas absentee voters notice of the postmark or dated signature prerequisites.⁴⁵⁶ Nevertheless, the court indirectly suggested that the Florida Legislature remedy this apparent "deficiency" in Florida's absentee ballot procedures.⁴⁵⁷

N.Y. TIMES, July 15, 2001, at 1. Unequal application of the overseas absentee ballot requirement by Florida counties, if not remedied, likely could raise an equal protection question in future elections.

450. *Bush*, 123 F. Supp. 2d at 1314.

451. *See id.* Ironically, only one of Florida's sixty-seven counties provided an area on the absentee ballot for an overseas absentee voter to provide a dated signature. *See* Barstow & Van Natta, Jr., *supra* note 449, at 17.

452. *Bush*, 123 F. Supp. 2d at 1314.

453. *Id.* at 1314–15.

454. *See id.* However, since in actuality Florida's goal was to curb voter fraud, it would seem that a postmark would be a more reliable source than a dated signature for purposes of determining when a vote is cast.

455. *Id.* at 1315. "[T]he fact that Florida neglect[ed] to . . . [advise voters of the postmark prerequisite] is disappointing and just plain wrong." *Id.*

456. *Bush*, 123 F. Supp. 2d at 1315. "[T]here is no federal requirement that Florida advise overseas voters of the postmark or signed and dated prerequisite to receiving the extra ten mailing days . . ." *Id.*

457. *Id.* "The court has the utmost confidence that Florida's legislature will quickly resolve this deficiency." *Id.*

However, the court agreed with Bush's and Cheney's allegations that the Hillsborough County Canvassing Board's rejection of write-in ballots because "they lacked an APO, FPO, or foreign postmark conflicted with federal law."⁴⁵⁸ The court found that the UOCAVA's only apparent exclusion of federal write-in ballots occurs if submission is from within the United States.⁴⁵⁹ Additionally, the court found that the UOCAVA requires that a voter sign an oath that the write-in ballot was mailed from outside the United States of America.⁴⁶⁰ Finally, the court found that the UOCAVA explicitly states that a write-in ballot may be "submitted," which may connote a method other than mail.⁴⁶¹

The court found that Florida's APO, FPO, and the foreign postmark requirement for write-in ballots was in direct conflict with federal law.⁴⁶² The court reasoned that Florida's postmark requirements allowed election officials to disregard the signed oath on the write-in ballot, conflicting with federal law.⁴⁶³ Additionally, the court found that Florida's postmark requirement conflicted with the "submitted" language of the UOCAVA, placing an unnecessary limitation on the method in which an overseas voter may cast a write-in ballot.⁴⁶⁴ Ultimately, the court decided that Florida's postmark requirement for federal write-in ballots disrupted the "spirit" of the UOCAVA,⁴⁶⁵ namely to provide overseas voters ease in casting their vote in a federal election.⁴⁶⁶

Therefore, while the court appears to recognize a state's right to provide safeguards against voter fraud,⁴⁶⁷ it does not allow for a broad extension of that right with regard to federal overseas write-in ballots.⁴⁶⁸ The court

458. *Id.*

459. *Bush*, 123 F. Supp. 2d at 1316 (citing 42 U.S.C. § 1973ff-2(b)(1)).

460. *Id.*

461. *Id.* "Also noteworthy is Congress' choice of words. The UOCAVA only requires that federal write-in ballots be 'submitted,' rather than mailed, from a location outside the United States." *Id.* See also 42 U.S.C. § 1973(2)(b)(1).

462. *Bush*, 123 F. Supp. 2d at 1316. While the court appears to initially address the rejection of both overseas absentee ballot and federal write-in ballot based on lack of foreign postmark, its analysis appears to only address the effect on write-in ballots. *Id.* at 1315-16.

463. *Id.* at 1316.

464. *Id.* "While a *mailed* ballot would likely receive a postmark, a *submitted* ballot could encompass a wide range of methods of delivery that would not." *Id.*

465. *Bush*, 123 F. Supp. at 1315.

466. *Id.* at 1309.

467. *Id.* at 1315.

468. *Id.* "[A]ny state statute that requires a foreign postmark on a federal write-in ballot conflicts with the UOCAVA." *Id.*

strictly read the UOCAVA's language regarding federal write-in ballots,⁴⁶⁹ limiting write-in ballot exclusions to ballots "submitted" from within the United States.⁴⁷⁰ Additionally, the court recognized that states are limited to this narrow exclusion of write-in ballots, because protection against voter fraud is provided by the required signed oath that the ballot is mailed from outside the United States.⁴⁷¹ This logic is incomplete however, because the oath is devoid of any language certifying that the ballot was cast prior to or on the date of the election. Therefore, a voter could swear or affirm that he or she voted overseas without certifying that the ballot was cast prior to the election. The problems with this certification by the voter are self-evident in the context of the 2000 Presidential Election.⁴⁷²

Consequently, protection against voter fraud seemed to provide an underlying foundation in Florida's overseas absentee ballot statutory scheme, while becoming a paramount concern on the federal level.⁴⁷³ The federal government, while providing that the UOCAVA would be the ultimate governing authority in overseas absentee ballot issues, allowed state governments a minimal amount of authority in providing individual safeguards against the possibility of voter fraud.⁴⁷⁴ Florida's compliance with the UOCAVA required that overseas absentee ballots be counted ten days following the close of the general election polls.⁴⁷⁵ Thereby, Florida implemented precautions, unlike those required by the UOCAVA, to protect

469. *Bush*, 123 F. Supp. 2d at 1316. "The UOCAVA only requires that federal write-in ballots be 'submitted,' rather than mailed, from a location outside the United States. While a mailed ballot would likely receive a postmark, a submitted ballot could encompass a wide range of methods of delivery that would not." *Id.*

470. *Id.*

471. *Id.* at 1317.

472. *Id.* at 1316. "[T]he UOCAVA demands that the states permit the use of federal write-in ballots and provides the mechanism to determine if they were submitted from outside the United States." *Bush*, 123 F. Supp. 2d at 1316. However, this oath is devoid of any language guaranteeing that the ballot was cast prior to or on the date of election. *See id.* This signed oath protection against voter fraud with the addition of a date guarantee, may likely be a guidepost for future absentee ballot reformation. However, the elimination of the second primary coupled with the elimination of the ten-day hiatus for counting the overseas absentee ballot would, in effect, eliminate the need for a guarantee that the ballots were mailed prior to the date of the election. Florida could have required that all overseas ballots be received by election day like other states required.

473. *See id.* at 1315.

474. *Id.*

475. *See* FLA. ADMIN. CODE ANN. r. 1S-2.013 (2000). *See generally* United States Florida, No. 80-1055 (N.D. Fla. Apr. 2, 1982) (consent decree).

against the threat of voter fraud.⁴⁷⁶ However, in light of the aftermath of the 2000 Presidential Election and the potential federalization of electors, it is questionable whether protecting against voter fraud should remain in the power of the individual states rather than a uniform federal safeguard reflected in a uniform UOCAVA. Additionally, following the 2000 Presidential Election, it remained questionable whether Florida's requirements of postmarks and dated signatures would be necessary, absent the ten-day hiatus between the close of polls and the counting of Florida absentee ballots. Finally, it is obvious that Florida's excessive protections against voter fraud can be remedied by reform of the overseas absentee ballots statutory scheme.

C. *Reform of Florida's Overseas Absentee Ballot Scheme*

The 2000 Presidential Election brought out the distinct differences between Florida's overseas absentee ballot law and the majority of the country's similar statutory schemes.⁴⁷⁷ Florida's ten-day hiatus between the close of polls and the acceptance of absentee ballots was unheard of in a vast majority of the fifty states, most of which required overseas absentee ballots by the close of polls on the day of the general election.⁴⁷⁸ Additionally, Florida was the only state holding primaries in September and October, a prime contributing factor in the necessity of the unusual ten-day period between the close of election polls and Florida's acceptance of overseas absentee ballots.⁴⁷⁹ At the time of the 2000 Presidential Election, Florida's overseas absentee ballot scheme allowed for an overseas voter to have the opportunity to potentially cast a vote three times: 1) thirty-five days prior to the first primary, overseas voters are sent their first absentee ballot;⁴⁸⁰ 2) thirty-five to forty-five days prior to the second primary and the general election, overseas voters are sent a second absentee ballot;⁴⁸¹ and 3) through

476. See FLA. ADMIN. CODE ANN. r. 1S-2.013 (2000); FLA. STAT. § 101.62 (2000).

477. See, e.g., OHIO REV. CODE Ann. § 3509.05 (2000).

478. See, e.g., sources cited *supra* note 398.

479. See generally *United States v. Florida*, No. 80-1055 (N.D. Fla. Apr. 2, 1982) (consent decree).

480. FLA. ADMIN. CODE ANN. r. 1S-2.013(4) (2000). See also FLA. STAT. § 101.62(4)(a) (2000).

481. r. 1S-2.013(5) (requiring that supervisor of elections mail overseas voters absentee ballots thirty-five days prior to the secondary primary). See also § 101.62(4)(a) (requiring that supervisor of elections mail overseas voters absentee ballots at least forty-five days prior to the second primary and general election).

the use of a federal write-in ballot.⁴⁸² During the aftermath of the 2000 Presidential Election, the combination of all of these unique characteristics brought to light the various opportunities available for overseas absentee ballot fraud,⁴⁸³ the exact problem the UOCAVA sought to abolish.⁴⁸⁴

In May of 2001, the Florida Election Reform Act of 2001 was enacted in an attempt to clarify the discrepancies in Florida's election statutory scheme, including the overseas absentee ballot issues.⁴⁸⁵ As a likely response to the court's holding in *Bush v. Hillsborough County Canvassing Board*, section 101.62 of the *Florida Statutes* was reformed to reflect the omission of the requirement for an APO, FPO, or foreign postmark.⁴⁸⁶ This will impact both write-in and overseas absentee ballots.

However, this lack of an APO, FPO, or foreign postmark requirement, coupled with Florida's ten-day acceptance of overseas absentee ballots following the actual election appears to heighten the risk of voter fraud. Section 101.64 of the *Florida Statutes* was amended to reflect an alteration requiring that the oath, which the overseas voters sign prior to returning their overseas ballots, is "solemnly" sworn and affirmed.⁴⁸⁷ This language likely reflects Florida's response to its limited ability to safeguard against the arena of voter fraud by use of write-in ballots, as prescribed in *Bush v. Hillsborough County Canvassing Board*.⁴⁸⁸

Additionally, the Florida Election Reform Act of 2001 inaugurated several statutes and provisions following numerous undertones suggested by

482. 42 U.S.C. §§ 1973ff-1, 2(a) (1994).

483. See generally Barstow & Van Natta, Jr., *supra* note 449. While denounced publicly as attempting to disenfranchise military voters, in reality Democratic Party attorney Mark Herron's memorandum, dated November 15, 2000, was actually bringing to the public knowledge the reality of opportunity for voter fraud in Florida. Further, the Republican Party ultimately relied on arguments nearly indistinguishable from those set forth in Mark Herron's memorandum when arguing subsequent absentee ballot cases. *Id.*

484. See *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1315 (N.D. Fla. 2000).

485. See generally Ch. 2001-40, 2001 Fla. Laws 117.

486. *Id.* at 157.

487. *Id.* at 158. This amendment added the language "do solemnly swear and affirm that I," which previously was not incorporated in the language of the oath. *Id.* Additionally, the reform amended the oath to reflect language saying "that I [the absentee voter] have not and will not vote more than one ballot in this election." *Id.* This language was probably added to curb any allegation that a voter may have the opportunity to vote on numerous occasions through the use of the absentee ballot process. See *id.*

488. *Bush*, 123 F. Supp. 2d at 1316. The Florida Election Reform Act of 2001 strengthened the language of the oath the voter's sign, likely to provide a safeguard against fraud by the only means available as a result of the *Bush* court's holding. See *id.*

the *Bush II* court. Statutes were initiated separately dealing with write-in ballots and overseas absentee ballots.⁴⁸⁹ Additionally, the election reform act added a provision to section 101.65 of the *Florida Statutes* embodying instructions regarding overseas absentee ballot validity.⁴⁹⁰ However, perhaps most significantly, section 100.061 of the *Florida Statutes* was inaugurated to effectively eliminate Florida's use of the second primary election until January 1, 2004.⁴⁹¹

While write-in ballots have been permitted in Florida through federal mandate,⁴⁹² the Florida Election Reform Act of 2001 codifies the use of write-in ballots on a state level as well.⁴⁹³ This act sets forth the process to receive,⁴⁹⁴ execute,⁴⁹⁵ validate,⁴⁹⁶ and develop a write-in ballot.⁴⁹⁷ Again, the absence of an APO, FPO, and foreign postmark requirement for the write-in ballot's validity is evident.⁴⁹⁸ Therefore, the *Florida Statutes* now provides within Florida's absentee ballot statutory scheme, guidelines to follow regarding write-in ballots that facially appear in compliance with the UOCAVA.⁴⁹⁹

In addition to the newly initiated write-in ballot, the Florida Election Reform Act of 2001 also inaugurated a statute specifically addressing the issue of overseas absentee voters.⁵⁰⁰ This newly initiated statute provides for a modernization of overseas absentee ballot law through the use of e-mail

489. Ch. 2001-40, §§ 48-50, 2001 Fla. Laws 117, 155-56. Section 101.6951, entitled "[s]tate write-in ballot," was added to Florida's election statutory scheme, directly addressing write-in ballot voting. *Id.* Section 101.6952, entitled "[a]bsentee ballots for oversea voters," was added to Florida's election statutory scheme, directly addressing overseas absentee ballot voting. *Id.* at 156.

490. *Id.* at 160.

491. FLA. STAT. § 100.061 n.2 (2001). "Notwithstanding S. 100.091, *Florida Statutes*, or any other provision of the Florida Election Code to the Contrary, there shall be no second primary election between the effective date of this act and January 1, 2004." *Id.*

492. *See* 42 U.S.C. § 1973ff-1(3) (1994).

493. Ch. 2001-40, § 48, 2001 Fla. Laws 117, 155-56.

494. FLA. STAT. § 101.6951(1) (2001).

495. § 101.6951(2).

496. § 101.6951(3).

497. § 101.6951(4).

498. *See id.* In addition, as stated previously, such language was also eliminated from section 102.62(3)(c) of the *Florida Statutes*, which previously housed such a requirement for write-in ballots and overseas absentee ballots. *Id.*

499. *See* § 101.6951. This write-in ballot statute has yet to be implemented. Therefore, while it appears to be in compliance with the UOCAVA, it has not been proven, upon application, to be in compliance.

500. § 101.6952.

services,⁵⁰¹ and explicitly details the date requirements for validity of overseas absentee ballots.⁵⁰² Following the holding in *Bush v. Hillsborough County Canvassing Board*,⁵⁰³ Florida reiterated in section 101.6952(2) of the *Florida Statutes* the necessity of either a postmark or a signature and date no later than the date of election for a valid overseas absentee ballot.⁵⁰⁴ However, this new statute also provides for the acceptance of an overseas absentee ballot that is postmarked after the date of the election if the signature and date on the outside of the envelope reflects a date that is prior to the date of election.⁵⁰⁵ While facially this newly initiated statute appears to comply with the state right to protect against fraud,⁵⁰⁶ this statute permits a problem to arise. An overseas voter is now given the ability to falsely sign and date an envelope, to reflect a date prior to the election, and in turn cast their vote following the date of the election.⁵⁰⁷ While this inauguration of a specific overseas absentee voter statute facially appears in compliance with

501. § 101.6952(1).

502. § 101.6952(2).

503. 123 F. Supp. 2d 1305, 1314–15 (holding that based on a state's right to protect against voter fraud a postmark or signature and date requirement does not conflict with the UOCAVA).

504. See Ch. 2001-40, § 49, 2001 Fla. Laws 117, 156 (to be codified at FLA. STAT. § 101.6952 (2001)).

505. *Id.* The revised statute states in pertinent part:

For absentee ballots received from overseas voters, there is a presumption that the envelope was mailed on the date stated and witnessed on the outside of the return envelope, regardless of the absence of a postmark on the mailed envelope or the existence of a postmark date that is later than the date of election.

FLA. STAT. § 101.6952(2) (2001). Extrinsic evidence reveals that votes cast after the date of election were tabulated into Florida's final vote count in the 2000 Presidential Election. See Barstow & Van Natta, Jr., *supra* note 449. The lower standard of section 101.6952(2) of the *Florida Statutes* for absentee ballot validity may likely lead to an increase in such voter fraud incidences, clearly the opposite goal of Florida's election reform.

506. See *Bush*, 123 F. Supp. 2d at 1315.

507. However, relying on a signature and date rather than a legible postmark will likely give rise to allegations of voter fraud, similar to allegations that arose during the 2000 Presidential Election. See Barstow & Van Natta, Jr., *supra* note 449. "Might Democrats now quietly—illegally—reach out to overseas supporters, particularly in Israel, and urge them to send in their ballots? Could the Clinton-Gore [or Republican] administration interfere with the delivery of ballots from Navy ships, military installations and American embassies?" *Id.* It appears, from the language of this new statute, that such rumored illegal tactics could be entertained with greater ease in future elections.

the UOCAVA and a state's right to protect against voter fraud,⁵⁰⁸ application of such a statute may reflect an opposite result.⁵⁰⁹

The United State District Court for the Northern District of Florida, coincident with permitting Florida to protect against voter fraud through postmarks and signature and date requirements, reprimanded Florida for its inaction in notifying oversea absentee voters of such a requirement.⁵¹⁰ The Florida Election Reform Act of 2001 reflects a response to this reprimand through the introduction of section 101.65(7) to the *Florida Statutes*.⁵¹¹ While in the past absentee voters were not required to be notified of a postmark or signature and date requirement for a valid ballot,⁵¹² this new provision requires supervisors of elections to enclose instructions reflecting the signature and date requirement with each absentee ballot that is mailed.⁵¹³ This required instruction, while reinforcing the importance of a signature and date on a voter's certificate, fails to do so for the same on the outside of the envelope.⁵¹⁴ Therefore, because there is no mandated instruction to inform the voter of the importance of a signature on the outside of the envelope, the required instruction implemented by section 101.65(7) of the *Florida Statutes*⁵¹⁵ does not aid voters in executing a valid absentee ballot in compliance with the newly initiated validity default provision of section 101.6952. The latter places heavy reliance on the date and signature reflected on the return envelope.⁵¹⁶ While the District Court did not require, but merely hoped, that Florida would inform voters of such

508. See Ch. 2001-40 § 49, 2001 Fla. Laws 117, 156 (to be codified at FLA. STAT. § 101.6952 (2001)).

509. Reliance on a written date above a postmark's date may result in ease in voting after an election and validly casting a vote.

510. *Bush*, 123 F. Supp. 2d at 1315.

511. Ch. 2001-40 § 54, 2001 Fla. Laws 117, 159-60 (to be codified at FLA STAT § 101.65 (2001)).

512. *Bush*, 123 F. Supp. 2d at 1315.

513. Ch. 2001-40 § 54, 2001 Fla. Laws 117, 159-60. The United States District Court for the Northern District of Florida was unable to require that Florida provide overseas absentee voters instructions. *Bush*, 123 F. Supp. 2d at 1315. However, Florida appears to have taken the court's suggested reprimand serious, and the new provision holds in pertinent part: "VERY IMPORTANT. If you are an overseas voter, you must include the date you signed the Voter's Certificate on the line above [date] or your ballot may not be counted." Ch. 2001-40, § 54, 2001 Fla. Laws 117, 160.

514. See *id.* at 159-60.

515. *Id.*

516. *Id.* at 156. The instruction still fails to inform the absentee voters of the possible necessity of a signature and a date on the outside of the envelope for the validity of their vote. See *id.* at 160.

requirements,⁵¹⁷ it appears that the implementation of section 101.65(7) of the *Florida Statutes* does not fulfill the high hopes of the court.⁵¹⁸

Finally, the promulgation of section 100.091 of the *Florida Statutes* likely reflects the Florida Legislature's awareness of the need to eliminate the second primary, or at the very least its belated timing.⁵¹⁹ While never directly addressing the validity of Florida's ten-day period of acceptance of overseas absentee ballots, the *Bush* court uncovered the discrepancies faced by the state canvassing boards in protecting against voter fraud.⁵²⁰ While section 100.091 of the *Florida Statutes* temporarily eliminates the second primary election until January 2004,⁵²¹ it does not facially eliminate the ten-day period for acceptance of overseas absentee ballots, a period which was implemented into the *Florida Administrative Code* in response to Florida's belated second primary.⁵²² Since the elimination of the second primary is occurring on an experimental basis, it would seem that the ten-day period set forth in the *Florida Administrative Code* should be eliminated as well.⁵²³

Overall, it appears that the Florida Election Reform Act of 2001 is an attempt to remedy the deficiencies set forth by *Bush v. Hillsborough County Canvassing Board*. However, it would appear that a simpler solution to the overseas absentee ballot issue would be to eliminate the ten-day period between the general election and the counting of the overseas absentee ballots.⁵²⁴ The extension of the time period in which Florida allowed overseas absentee ballots to be accepted resulted from the lack of adequate time in which overseas voters had to cast a vote between the second primary

517. See *Bush*, 123 F. Supp. 2d at 1315. "The Court has the utmost confidence that Florida's legislature will quickly resolve this deficiency." *Id.*

518. See Ch. 2001-40 § 54, 2001 Fla. Laws 117, 160.

519. See FLA. STAT. § 100.091(2) (2001).

520. See generally *Bush*, 123 F. Supp. 2d at 1305.

521. § 100.091(2).

522. See generally *United States v. Florida*, No. 80-1055 (N.D. Fla. Apr. 2, 1982) (consent decree).

523. See FLA. STAT. § 100.061 n.1 (2001). Essentially, the language of the statute expressly negates § 100.091 of the *Florida Statutes* and "any other provision of the Florida Election Code to the contrary" until January 1, 2004. *Id.* However, the language of rule 1S-2.013 of the *Florida Administrative Code* is not contrary to the elimination of a second primary, and therefore would likely not be negated by the implementation of § 100.091(2), preserving Florida's ten-day acceptance period for overseas absentee ballots. It would seem that the elimination of the ten-day period would be the best protection against fraud because following its elimination; the timely delivery of the ballot on the day of the election would provide the necessary fraud protection.

524. See FLA. ADMIN. CODE ANN. r. 1S-2.013 (2000).

election and the general election.⁵²⁵ The resulting impact of such an extension was Florida's requirement of a postmark or signature and date requirement to curb against voter fraud by casting votes following the close of elections.⁵²⁶

However, the elimination of Florida's second primary election logically results in an extermination of the need for such a ten-day acceptance period.⁵²⁷ The temporary implementation of section 100.061 of the *Florida Statutes* will allow, for roughly the next three years, the supervisors of elections in Florida counties to have ample opportunity to distribute and collect overseas absentee balloting material,⁵²⁸ a remedy to the problem that led to the necessity of the ten-day period initially.⁵²⁹ The absence of the ten-day period results in the absence of a postmark or dated signature protection against voter fraud, and in turn a remedy to the deficiencies set forth in the holding of *Bush v. Hillsborough County Canvassing Board*.⁵³⁰ However, the Florida Legislature's solutions set forth in the Florida Election Reform Act of 2001 are illogical in that they are a response to a system which contemplates a late second primary, one which has been eliminated. So long as the reason for the ten-day period was eliminated in the second primary, it would seem that election reform would also require the elimination of the ten-day period as well.

D. *Florida's Absentee Ballot Voter Fraud Issue in the 2000 Presidential Election*

While the integrity of Florida's overseas absentee ballots was threatened by the concept of voter fraud,⁵³¹ accusations concerning voter fraud were stirred on the local non-overseas absentee ballot front as well.⁵³² Both *Taylor* and *Jacobs* involved attempts to invalidate absentee ballot votes for lack of strict compliance with the Florida absentee ballot laws.⁵³³

525. See *Bush*, 123 F. Supp. 2d at 1314. See generally *Florida*, No. 80-1055.

526. See FLA. STAT. § 101.6952(2) (2001).

527. See § 100.061(2).

528. This would be the result because the supervisor of elections would be given more than five weeks to compile the results of the primary election, distribute the absentee ballots, and collect the absentee ballots.

529. See generally *Florida*, No. 80-1055.

530. *Bush*, 123 F. Supp. 2d at 1317-18.

531. See generally *id.* at 1305.

532. See generally *Jacobs v. Seminole County Canvassing Bd.*, 773 So. 2d 519 (Fla. 2000); *Taylor v. Martin County Canvassing Bd.*, 773 So. 2d 517 (Fla. 2000).

533. *Jacobs*, 773 So. 2d at 521; *Taylor*, 773 So. 2d at 518.

However, the fraud regarding the absentee ballot issue during the aftermath of the 2000 Presidential Election was addressed on the application level,⁵³⁴ not the actual voting level, as it was in *Bush v. Hillsborough County Canvassing Board*.⁵³⁵

Prior to the 2000 Presidential Election, Republican and Democratic Party officials disseminated absentee ballot request forms to prospective absentee voters of their affiliation.⁵³⁶ At this time, *Florida Statutes* required that, among other requirements, the “person making a request for an absentee ballot must disclose . . . the elector’s voter registration number”⁵³⁷ Consequently, in Martin and Seminole Counties, the Democratic Party preprinted their elector’s registration numbers or left an appropriately marked area for the registration number on their party’s absentee ballot request forms, while the Republican Party left off any type of instruction or area requesting the voter’s registration number on their party’s absentee ballot forms.⁵³⁸ As a result, numerous Republican request forms were returned incomplete because the request forms lacked the voter’s identification number.⁵³⁹

Both Martin and Seminole Counties’ Supervisors of Elections, recognizing the omissions from the Republican absentee ballot request, informed and allowed only Republican Party officials access to the incomplete absentee ballot request forms, providing these officials an opportunity to fill in the omitted voter registration numbers.⁵⁴⁰ While

534. *Id.*

535. *See generally Bush*, 123 F. Supp. 2d at 1305.

536. *Jacobs*, 773 So. 2d at 521.

537. *Taylor*, 773 So. 2d at 518 n.1 (quoting FLA. STAT. § 101.62(1)(b) (2000)).

538. *Jacobs*, 773 So. 2d at 521; *Taylor*, 773 So. 2d at 518.

The request form prepared by the Democratic Party had a space provided for the voter identification number or the voter identification number was preprinted on the request form. In contrast, the request form prepared by the Republican Party did not include either a space for the voter identification number or the preprinted number. In addition there was no instructions on the Republican form informing the voter to include the voter identification number.

Jacobs, 773 So. 2d at 521.

539. *Taylor*, 773 So. 2d at 518. “The Martin County Supervisor of Elections received a number of Republican request forms which had missing or incorrect voter identification numbers on them.” *Id.* *See also Jacobs*, 773 So. 2d at 521. “[T]housands of request forms without voter identification numbers were returned to the Supervisor’s office.” *Id.*

540. *Taylor*, 773 So. 2d at 518. In *Taylor*, the supervisor actually allowed Republican party officials to physically remove the ballots from the supervisor’s office to remedy the absent registration numbers. *Id.* In *Jacobs*, the Republican Party officials were permitted to utilize the Seminole County Supervisor of Elections office and equipment to remedy the absent registration numbers. *Jacobs*, 773 So. 2d at 521.

Republican officials were given access to the absentee ballot request forms to remedy such problems, no other political party was notified of or given the same or even similar access to absentee ballot request forms.⁵⁴¹ While allegations and the appearance of partisan favoritism resulted from the specialized treatment afforded the Republican Party officials, the *Taylor* and *Jacobs* courts justified such treatment as fair.⁵⁴² Both courts found that no other political parties lacked the problem arising from the omission of the registration number, and therefore found it unnecessary for each county's supervisor of elections to contact parties unaffected by such a problem. This left the Republican Party as the sole party affected and consequently contacted.⁵⁴³

Additionally, the courts, in finding against fraud or misconduct, recognized that no other party, aside from the Republican Party, requested the opportunity to obtain access or was denied access, to the request forms.⁵⁴⁴ Thereby, the *Taylor* and *Jacobs* courts found no disparity in allowing the Republican Party exclusive access to the inadequate absent ballot request forms.⁵⁴⁵

However, while the *Taylor* and *Jacobs* courts recognized the lack of effect or request on any other party,⁵⁴⁶ both courts seem to bypass the fact that at the time only the Republican Party was made aware of the fact that the Supervisor of Elections in Martin and Seminole Counties would not strictly construe section 101.62 of the *Florida Statutes* and allow alterations

541. *Jacobs*, 773 So. 2d at 522–23; *Taylor*, 773 So. 2d at 518. Not only were Republican Party officials the only party officials given access to the request forms, they were also the only party officials given notice of such discrepancies in the request forms. See *Jacobs*, 773 So. 2d at 523.

542. *Taylor*, 773 So. 2d at 518–19. The court found “despite these irregularities . . . the sanctity of the ballot and the integrity of the election were not affected.” *Id.* at 519. See also *Jacobs*, 773 So. 2d at 522–23.

543. *Id.* at 523. “Unlike the Republican mail-out, the Democratic mail-out did not suffer from the general omission of the voter identification numbers. Therefore, there was no need for the Democrats to request access to the request forms to correct them . . .” *Id.* See also *Taylor*, 773 So. 2d at 518.

544. *Jacobs*, 773 So. 2d at 523.

[T]here was no evidence that such a request [for access to absentee ballot request forms] was made by the Democratic Party or any other political subdivision. . . . [T]here was no evidence that the request of any representative, including any Democrat, was denied by the Supervisor. Thus, there was no adequate showing that there was disparate treatment of Republicans.

Id.

545. *Id.* *Taylor*, 773 So. 2d at 519.

546. *Id.*

made to the request forms.⁵⁴⁷ While apparent from the facts that all political parties, other than the Republican Party, were not informed of the Supervisor of Elections' deviation from policy standards, the courts declined finding against the Supervisor of Elections' decision because, unlike the Republican Party, access to the ballots was not requested by any other political party representatives.⁵⁴⁸ In effect, this construction of facts avoided any need to confront the equitable issue of whether it was fair and lawful that a single political party was permitted to engage in those activities without the knowledge or observation of any other party or candidate.⁵⁴⁹ If it was unlawful for a party to be given access to the absentee ballot request forms, then the remedy for that wrong would have been to void the absentee ballots. A partial voiding of the absentee ballots for this wrong appears to have been available pursuant to Florida law.⁵⁵⁰

Additionally, both courts recognized that the Supervisor of Elections in Martin and Seminole Counties deviated from strict policies against the

547. This strict construction was not applied to the language of the statute, but rather to estop the alteration of applications to conform with the language of the statute. *Jacobs*, 773 So. 2d at 523. While it facially appears that the Democratic party's absentee voter application did not strictly comply with the language of the statute, because the identification numbers were preprinted and not provided by the voter, such action was taken prior to the filing of the application, and therefore did not constitute an alteration after the initial application. *Taylor*, 773 So. 2d at 519. Whereas, the Republican Party altered the absentee ballot applications following the initial application, after the voter had an opportunity to view and approve such alterations. *Id.*

[T]he Supervisor of Elections "treated the interests of the non-Republican voters differently from those of Republican voters" because she informed the public that she would strictly enforce the requirements of Section 101.62, Florida Statutes, including the disclosure of the voter identification number, yet she honored the request of a Republican representative to obtain access to the incomplete request forms and add the voter identification numbers and did not notify the Democratic Party or any other group of this development.

Jacobs, 773 So. 2d at 523. See also *Taylor*, 773 So. 2d at 518 (showing that the Supervisor of Elections policy was not to allow corrections of request forms, followed by the approval of Republican official's request to change the forms).

548. *Taylor*, 773 So. 2d at 519. The court justified exclusive Republican access to absentee ballot request forms because they were the only party that suffered from the omission of voter identification numbers. *Jacobs*, 773 So. 2d at 523. However, that seems quite speculative when not all of the Democrat absentee ballot request forms provided the voter identification number.

549. Democrats and Independents may have had need of similar ministerial corrections made to their ballots. However, they were unaware of such an option.

550. See *In re Protest of Election Returns and Absentee Ballots* in Nov. 4, 1997 Election for City of Miami, 707 So. 2d 1170 (Fla. 3d Dist. Ct. App. 1998).

amendment of any omissions apparent on absentee request forms.⁵⁵¹ At that time, the Supervisor of Elections for all Florida counties was Secretary of State Harris.⁵⁵² At the same time, Secretary Harris was also the co-chairperson of Governor Bush's and Secretary Cheney's campaign in Florida.⁵⁵³ Because the Secretary of State supervises the actions taken by each county's Supervisor of Elections,⁵⁵⁴ Harris' simultaneous undertaking of both positions contributed to the appearance and allegations of partisan favoritism in Martin and Seminole Counties.⁵⁵⁵ This conflict of interest demonstrates Florida's need to implement reformation regarding the permitted activities of its Secretary of State, calling for an elimination of either the current duties of the Secretary of State or, more logically, activities that would pose a conflict of interest with such required duties.⁵⁵⁶

In addition to partisan favoritism, the *Jacobs* court addressed the issue of strict compliance with absentee voting law.⁵⁵⁷ Specifically section 101.62 of the *Florida Statutes* provided that the person requesting an absentee ballot *must* provide their registration number on the request form for the absentee ballot.⁵⁵⁸ The *Jacobs* court, recognizing that the *Florida Statutes* lacked a provision specifying the penalty for missing elements of an absent ballot request form, interpreted section 101.62 as being necessary, not mandatory.⁵⁵⁹ In actuality, if information was missing from an absentee ballot

551. *Taylor*, 773 So. 2d at 518; *Jacobs*, 773 So. 2d at 523.

552. See Jack W. Germond & Jules Witcover, Editorial, *Eliminate Electoral College?*, BALT. SUN, Nov. 29, 2000, at 31A; *Fox Hannity & Colmes* (Fox News Network, Inc. television broadcast, Nov. 19, 2000).

553. Germond & Witcover, *supra* note 552.

554. See FLA. STAT. § 97.012(1)–(2) (2000). “The Secretary of State is the chief election officer of the state, and it is his or her responsibility to: (1) Obtain and maintain uniformity in the application, operation, and interpretation of the election laws. (2) Provide uniform standards for the proper and equitable implementation of the registration laws.” *Id.*

555. See *Fox Hannity & Colmes*, *supra* note 552. The apparent deviation from strictly held standards required the approval of the Secretary of State of Florida. See § 97.012(1). Florida may likely look to reform the requirements of such governmental positions, amending the requirements to reflect that such positions should remain nonpartisan. The holder of such a position should not run a campaign that their position can effect or influence, ultimately displaying an appearance of impropriety.

556. Obviously, Republican operatives in the *Taylor* and *Jacobs* cases were permitted to correct mistakes from a campaign being run by Secretary of State Harris, as the Bush-Cheney co-chairperson for the state of Florida. See Germond & Witcover, *supra* note 552.

557. *Jacobs*, 773 So. 2d at 521.

558. *Id.* See also FLA. STAT. § 101.62(2)(b)(4) (2000).

559. *Jacobs*, 773 So. 2d at 522. (citing *McLean v. Bellamy*, 437 So. 2d at 737, 742–43 (Fla. 1st Dist. Ct. App. 1983).

request, then the voter would never have received an absentee ballot, and likewise the absentee ballot containing the voter's choices would not have been received by the Supervisor of Elections. What the court should have considered but failed to address was whether the actions of the Supervisor of Elections, by permitting the Republican party to fill in missing blanks on the absentee ballot requests, resulted in one party benefiting from inequitable and perhaps unlawful conduct pursuant to section 102.169 of the *Florida Statutes*. This issue was avoided by the court. Accordingly, the analyses required by *Beckstrom v. Volusia County Canvassing Board* and *Boardman v. Esteva* was avoided by the court redefining the issue.⁵⁶⁰

The *Jacobs* court further compared section 101.62 of the *Florida Statutes* to similar statutes, demonstrating the absence of an invalidating directive in only section 101.62.⁵⁶¹ Thereby, in upholding the integrity of an absentee ballot request, and contingent on an applicant providing adequate information for identification, the *Jacobs* court "sidestepped" the explicit requirements set forth by the *Florida Statutes* in applying for an absentee ballot.⁵⁶² The *Jacobs* court found that such a "sidestep" was valid because the language of Florida's statute did not provide that "a lack of information

560. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998); *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1976).

561. *Jacobs*, 773 So. 2d at 522. "In comparison, Section 102.68(2)(c), *Florida Statutes* require that a voters name, address and signature must be included on the request. That section goes on to provide specifically that the failure to include the absentee voter's name address and signature voids the ballot." *Id.* This demonstrates the *Jacobs* court's process of distinguishing the process to apply for an absentee ballot opposed to casting an absentee ballot. *See id.*

562. *Id.* "It cannot be said that the lack of a voter registration identification number on an absentee ballot request is calculated to effect the integrity of the request itself or the election, when substantial other identifying information has been included on the request." *Id.*

Section 101.62 of the *Florida Statutes* required the person making the request for an absentee ballot to disclose:

1. The name of the elector for whom the ballot is requested;
2. The elector's address;
3. The last four digits of the elector's social security number;
4. The registration number on the elector's registration identification card;
5. The requester's name;
6. The requester's address;
7. The requester's social security number and, if available, driver's license number;
8. The requester's relationship to the elector; and
9. The requester's signature (written requests only).

FLA. STAT. § 101.62(1)(b) (2000).

voids the ballot.”⁵⁶³ Recognizing that the current absentee ballot requirements were implemented to avoid fraud, the *Jacobs* court found that the lack of information would only void an absentee ballot application if there was a lack of sufficient information to identify the voter, not merely for the omission of a voter identification number.⁵⁶⁴

The Florida Election Reform Act of 2001 specifically targeted the requirement of the requesting party’s registration number, eliminating it from the text of section 101.045.⁵⁶⁵ However, the act replaced this registration element with a requirement of the requesting party’s date of birth.⁵⁶⁶ Additionally, the language of the statute was not altered to reflect an invalidating directive,⁵⁶⁷ which likely would lead a court to the conclusion that the decision in *Jacobs* remains intact.

VII. THE FEDERAL CASES

Rather than raising constitutional concerns about the manual recount procedure or the *Florida Election Code* in the Palm Beach County Canvassing Board cases heard before the Supreme Court of Florida,⁵⁶⁸ Governor George W. Bush chose to bring those concerns in federal court.

563. *Jacobs*, 773 So. 2d at 522. “Unless a statutory provision also specifically states that the lack of information voids the ballot, the lack of the information does not automatically void the ballot.” *Id.*

564. *Id.* “After rampant absentee voter fraud occurred in the Miami mayoral election, the Miami Beach City Commission election and the Hialeah mayoral election, the Florida Legislature amended the detailed absentee voter laws to include the requirements now found in *Section 101.62, Florida Statutes.*” *Id.* Given the United States Supreme Court’s reliance and interpretation of title 3, section 5 of the *United States Code*, requiring no damages or interpretation of state election law after election day which varies from pre-election interpretation, it would have been interesting to see what would have happened if the United States Supreme Court was confronted with an appeal in the Seminole and Martin county cases based upon a violation of section 5.

565. Ch. 2001–40, § 36, 2001 Fla. Laws 117, 142 (to be codified at FLA. STAT. § 101.45(3) (2001)).

566. *Id.* § 35, 2000 Fla. Laws at 141 (to be codified at FLA. STAT. 101.048 (3) (2001)). This replacement was likely spurred by the familiarity the requesting party has with their date of birth as opposed to their voter registration number, likely leading to less omission.

567. *See* Ch. 2001–40, § 36, 2001 Fla. Laws 117, 142 (to be codified at FLA. STAT. § 101.45(3) (2001)).

568. The Supreme Court of Florida was quite clear that no party had raised the issue of the constitutionality of the *Florida Election Code* in the state protest proceedings. *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1228 n.10; *Palm Beach County Canvassing Bd. II v. Harris*, 772 So. 2d 1273, 1281 n.7. With the protest statute outlining the

A. Siegel v. LePore, 120 F. Supp. 2d 1041 (S.D. Fla. 2000)

1. Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Complaint for Declaratory and Injunctive Relief

On November 11, 2000 at 9:47 a.m., the Republican candidates for President and Vice-President, Governor Bush and Secretary Cheney, and registered voters from seven Florida Counties (collectively the “Bush plaintiffs”) filed an Emergency Motion for Temporary Restraining Order and Preliminary Injunction and a Complaint for Declaratory and Injunctive Relief in the United States District Court for the Southern District of Florida.⁵⁶⁹ In that action, the Bush plaintiffs sued the members of the electoral canvassing boards for Miami-Dade, Broward, Palm Beach and Volusia Counties.⁵⁷⁰ The Bush plaintiffs sought relief under the First and Fourteenth Amendments to the United States Constitution and title 42, section 1983 of the *United States Code*.⁵⁷¹ The Florida Democratic Party intervened in the district court proceedings and filed an opposition to the Bush plaintiffs’ emergency motion.⁵⁷²

The Bush plaintiffs alleged that the canvassing boards had “violated the Voter Plaintiffs’ rights under the Fourteenth Amendment by arbitrarily denying them the effective exercise of their right to vote and to have that

procedure for a manual recount, constitutional objections to the process are inherently constitutional objections to the *Florida Election Code*.

569. Siegel I v. LePore, 120 F. Supp. 2d, 1041, 1044–45 (S.D. Fla. 2000). This was the first legal action filed by either candidate. See Emergency Motion for Temporary Restraining Order and Preliminary Injunction and Supporting Memorandum of Law at 1, *Siegel I* (No. 00-9009). On November 13, 2000, another action was filed by registered voters in Brevard County, Florida. *Touchston I v. McDermott*, 120 F. Supp. 2d 1055 (M.D. Fla. 2000). In that case the plaintiffs made essentially the same arguments as in *Siegel I*. *Id.* In the court’s order on the *Touchston I* plaintiffs’ Emergency Motion for Temporary Restraining Order, it adopted the reasoning contained in *Siegel I* issued on Nov. 13, 2000. Therefore, because the plaintiffs in *Touchston I* made the same arguments as the Bush plaintiffs and because the court in *Touchston I* adopted the *Siegel* court’s reasoning, this article will not discuss the *Touchston I* case.

570. *Siegel I*, 120 F. Supp. 2d at 1044. In Florida, each county electoral canvassing board ordinarily is “composed of the supervisor of elections; a county court judge, who shall act as chair; and the chair of the board of county commissioners.” FLA. STAT. § 102.141(1) (2000). The county canvassing boards are charged with publicly canvassing [counting] the vote given each candidate. § 102.141(2).

571. Complaint for Declaratory and Injunctive Relief at 3, *Siegel I* (No. 00-9009).

572. Opposition of the Florida Democratic Party to Plaintiffs’ Emergency Motion for Temporary Restraining Order and Preliminary Injunction, *Siegel I* (No. 00-9009).

vote counted in an equal and consistent fashion with all other voters in [the] election.”⁵⁷³ In their emergency motion, the Bush plaintiffs requested the district court to enjoin the four county canvassing boards from proceeding with manual recounts of the November 7, 2000 election.⁵⁷⁴

2. The District Court’s Order on the Emergency Motion for Temporary Restraining Order and Preliminary Injunction

On November 13, 2000, the court entered a straightforward and legally sufficient Order denying the preliminary injunction, and held that the Bush plaintiffs had failed to show that they had a likelihood of success on the merits of their constitutional claims and that they faced imminent irreparable harm.⁵⁷⁵ The court began with an introduction of plaintiffs’ claims and a review of Florida’s statutes on the administration of elections.⁵⁷⁶ The status of the manual recounts that had been requested in Broward, Miami-Dade, Palm Beach and Volusia counties was then outlined.⁵⁷⁷ The court then addressed the standard for injunctive relief and, in reviewing the Bush

573. Complaint at 11, *Siegel I* (No. 00-9009). The same argument was made by Governor Bush in *Bush II v. Gore*, 531 U.S. 98 (2000). In that case, without any discussion of the merits, the United States Supreme Court granted the emergency application and stayed the mandate of the Supreme Court of Florida. *Bush I v. Gore*, 531 U.S. 1046 (2000).

574. *Siegel I*, 120 F. Supp. 2d at 1044. In their complaint, the Bush plaintiffs’ prayer for relief included the following:

(a) Declaring that Defendants may not subject any vote totals to manual recounts;

(b) In the alternative, declaring that *Florida Statutes* § 102.166(4) is unconstitutional to the extent it does not limit the discretion of Defendants to conduct manual recounts in this case;

(c) Declaring that Defendants should certify and release forthwith all vote totals that have been the subject of two vote counts since November 7, 2000;

(d) Declaring that the form of ballot used in Palm Beach County was valid;

(e) Declaring that any ballot punched or marked for two Presidential candidates not previously counted cannot now be counted;

(f) Consolidating or removing to this Court any and all actions filed across the State of Florida purporting to challenge the results of the November 7 statewide election or otherwise delay the certification and release of those results; and

(g) Granting such other and further relief as this Court shall deem just and proper.

Complaint at 16–17, *Siegel* (No. 00-9009).

575. *Siegel I*, 120 F. Supp. 2d at 1052–54.

576. *Id.* at 1044–45 (noting the administration of elections in Florida includes statewide and local features and reviewing sections 97, 98, and 102 of the *Florida Statutes*).

577. *Id.* at 1045–47.

plaintiffs' claims for injunctive relief, applied the traditional four-factor test that the Bush plaintiffs were required to demonstrate: "1) substantial likelihood of success on the merits; 2) irreparable injury will be suffered unless the injunction issues; 3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and 4) if issued, the injunction would not be adverse to the public interest."⁵⁷⁸

The court observed Eleventh Circuit case law, stating: "[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishe[s] the 'burden of persuasion' as to the four requisites,"⁵⁷⁹ and the "burden of persuasion in all of the four requirements is at all times upon the plaintiff."⁵⁸⁰

Next, the court proceeded with an analysis of the Bush plaintiffs' claims,⁵⁸¹ quoting and reviewing the United States Constitution.⁵⁸² The court pointed out that the election of a President or Vice-President is not by popular vote but that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . to choose a President and Vice President."⁵⁸³ Touching upon three United States Supreme Court cases, the court affirmed that Article II gives the states extensive power to pass laws regulating the selection of electors.⁵⁸⁴ The court crystallized that Congress had given control of these matters to the states and that "federal law gives states the exclusive power to resolve controversies over the manner in which presidential electors are selected."⁵⁸⁵

If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the elec-

578. *Id.* at 1047 (quoting *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998)).

579. *Id.*

580. *Siegel I*, 120 F. Supp. 2d at 1047 (quoting *Snook v. Trust Co. of Ga. Bank of Savannah, N.A.*, 909 F.2d 480, 483 (11th Cir. 1990)).

581. *Id.*

582. *Id.* at 1047-48.

583. *Id.* at 1048 (quoting U.S. CONST. art. II, § 1).

584. *Id.* (quoting *Williams v. Rhodes*, 393 U.S. 23, 30-31 (1968)).

585. *Siegel I*, 120 F. Supp. 2d at 1048 n.3.

tors shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.⁵⁸⁶

The court went on to explain “while this power is broad, ‘these granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution.’”⁵⁸⁷

The Bush plaintiffs alleged that section 102.166(4) of the *Florida Statutes*⁵⁸⁸ violated the First and Fourteenth Amendments by denying them the effective exercise of their right to vote and to have that vote counted in an equal and consistent fashion with all other voters in the election.⁵⁸⁹ But before addressing the Bush plaintiffs’ specific claims, the district court observed that the United States Supreme Court had adopted a balancing test “which weighs ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments’ versus the legitimacy, strength, and necessity of the state interests underlying the electoral scheme.”⁵⁹⁰

586. *Id.* (quoting 3 U.S.C. § 5 (2000)).

587. *Id.* at 1048 (quoting *Fitzgerald v. Green*, 134 U.S. 377, 379–380 (1890)).

588. Section 102.166(4) of the *Florida Statutes* provides:

(4)(a) Any candidate whose name appeared on the ballot, any political committee that supports or opposes an issue which appeared on the ballot, or any political party whose candidates’ names appeared on the ballot may file a written request with the county canvassing board for a manual recount. The written request shall contain a statement of the reason the manual recount is being requested.

(b) Such request must be filed with the canvassing board prior to the time the canvassing board certifies the results for the office being protested or within 72 hours after midnight of the date the election was held, whichever occurs later.

(c) The county canvassing board may authorize a manual recount. If a manual recount is authorized, the county canvassing board shall make a reasonable effort to notify each candidate whose race is being recounted of the time and place of such recount.

(d) The manual recount must include at least three precincts and at least 1 percent of the total votes cast for such candidate or issue. In the event there are less than three precincts involved in the election, all precincts shall be counted. The person who requested the recount shall choose three precincts to be recounted, and, if other precincts are recounted, the county canvassing board shall select the additional precincts.

FLA. STAT. § 102.166(4) (2000).

589. *Siegel I*, 120 F. Supp. 2d at 1048. This is precisely the same argument advanced by Bush in *Bush II v. Gore*, 531 U.S. 98 (2000).

590. *Siegel I*, 120 F. Supp. 2d at 1048 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), citing *Williams v. Rhodes*, 393 U.S. 23, 30–31(1968)).

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify the restrictions.'⁵⁹¹

The district court emphasized that while election laws will invariably impose burdens on voters, the government must play an active role in structuring elections if they are to be fair, honest, and orderly.⁵⁹² In this context, the court then addressed plaintiffs' claims.

The Bush plaintiffs first alleged that the provisions of section 102.166 of the *Florida Statutes* "provide no standards to guide the discretion of the canvassing board in determining whether a manual recount is warranted in the first place or, if so, what the scope, nature, manner, and method of such recount should be."⁵⁹³ The Florida Democratic Party argued that the Bush plaintiffs' claim was "sheer hyperbole" and that "the statute makes clear that the only purpose of the manual recount is to determine whether there is 'an error in the vote tabulation which could affect the outcome of the elections.'"⁵⁹⁴

Second, the Bush plaintiffs alleged that section 102.166 of the *Florida Statutes* failed to establish any criteria limiting the discretion of the canvassing boards in their determination of how to conduct the tallying of

591. *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (citations omitted)). In stark contrast, on December 9, 2000, the United States Supreme Court issued a stay of the mandate of the Supreme Court of Florida without any discussion whatsoever regarding the state's interest in elections. See *Bush I v. Gore*, 531 U.S. 1046 (2000). In addition, the Court treated the application for a stay as a petition for a writ of certiorari and granted certiorari. *Id.* at 1046. In his dissent, Justice Stevens said that a stay should not be entered unless the Bush plaintiffs made a substantial showing of a likelihood of irreparable harm, and that they had failed to carry that heavy burden. *Id.* (Stevens, J., dissenting). In fact, he noted that there was a danger that a stay might "cause irreparable harm to the respondents—and, more importantly, the public at large—because of the risk that 'the entry of the stay would be tantamount to a decision on the merits in favor of the applicants.'" *Id.* (citations omitted).

592. *Siegel I*, 120 F. Supp. 2d at 1049.

593. Complaint for Declaratory and Injunctive Relief at 11–12, *Siegel I* (No. 00-9009).

594. Opposition of the Florida Democratic Party to Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction at 25, *Siegel I* (No. 00-9009).

votes.⁵⁹⁵ The Florida Democratic Party asserted that the Bush plaintiffs' argument was without merit because:

In fact, § 102.166 sets forth detailed standards and procedures governing when and how a manual recount is to be conducted. Specifically, § 102.166(5) sets the basic standard for a manual recount by requiring reason to believe there has been "an error in the vote tabulation which could affect the outcome of the election." Section 102.166(6) then provides that "[a]ny manual recount shall be open to the public." Section 102.166(7) provides that "[t]he county canvassing board shall appoint as many counting teams of at least two electors as is necessary to manually recount the ballots" and that a "counting team must have, when possible, members of at least two political parties." And, most important for present purposes, the decision how to count a ballot must be governed by the "voter's intent" in casting the ballot; whenever the counting teams cannot determine intent, "the ballot shall be presented to the county canvassing board for it to determine the voter's intent."⁵⁹⁶

Third, the Bush plaintiffs alleged that if a manual recount gave effect to partially punched ballots, or counted ambiguous ballots based on the canvassing board's subjective interpretation of voters' intent, then it would have the effect of unconstitutionally diluting the votes of other voters in the affected county and in counties that were not subject to a recount.⁵⁹⁷ In their opposition, the Florida Democratic Party argued that "[i]t does not 'dilute' the vote of a citizen of one county to ensure that all properly cast votes in another county are actually included in the final vote tally any more than counting absentee ballots dilutes the votes of those who voted at the polling booth on election day."⁵⁹⁸

In addressing plaintiffs' claims, the court first quoted and reviewed the wording of section 102.166 of the *Florida Statutes*. The court found Florida's "state election scheme reasonable and non-discriminatory on its face."⁵⁹⁹ Looking to United States Supreme Court decisions, the district court determined Florida's manual recount provision was a "generally-applicable and evenhanded" electoral scheme designed to "protect the

595. Complaint at 12, *Siegel I* (No. 00-9009).

596. Opposition at 29, *Siegel I* (No. 00-9009).

597. Complaint at 12, *Siegel I* (No. 00-9009).

598. Opposition at 26, *Siegel I* (No. 00-9009).

599. *Siegel I*, 120 F. Supp. 2d at 1050.

integrity and reliability of the electoral process.”⁶⁰⁰ The district court identified Florida’s manual recount provision as precisely the kind of electoral law the United States Supreme Court has often upheld in legal challenges.⁶⁰¹ The court stated that on its face, the manual recount provision did not limit a candidate’s access to the ballot or interfere with a voter’s right to vote.⁶⁰² On the contrary, the court found that the manual recount provision “safeguard[ed] the integrity and reliability of the electoral process by providing a structural means of detecting and correcting clerical or electronic tabulating errors in the counting of ballots.”⁶⁰³ Although the court recognized that Florida’s manual recount provision was discretionary in its application, it was not “wholly standardless.”⁶⁰⁴ Instead, the plain language of the statute revealed that the central purpose of the statute was to “remedy ‘an error in the vote tabulation which could affect the outcome of the election.’”⁶⁰⁵ The court noted “once a decision to conduct a manual recount is made by the canvassing board, the Florida manual recount law articulates a structured process for conducting the recount.”⁶⁰⁶ The statute strengthens rather than dilutes “the right to vote by securing as near as humanly possible an accurate and true reflection of the will of the electorate.”⁶⁰⁷ The court held that because the four county canvassing boards involved had reported discrepancies between the initial automated count and recount, the statute served “important governmental interests.”⁶⁰⁸

The district court further determined that Florida’s manual recount provision was the “type of state electoral law that safely resides within the broad ambit of state control over presidential election procedures.”⁶⁰⁹ In support of that determination, the court relied upon an Eleventh Circuit case explaining that “[t]he functional structure embodied in the Constitution, the nature of the federal court system and the limitations inherent in the concepts both of limited federal jurisdiction and of the remedy afforded by § 1983’ operate to restrict federal relief in the state election context.”⁶¹⁰ The district court went on to emphasize that while federal courts may scrutinize state

600. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

601. *Id.* (citing *Anderson*, 460 U.S. at 787–89).

602. *Id.*

603. *Id.*

604. *Siegel I*, 120 F. Supp. 2d at 1050.

605. *Id.* (citing FLA. STAT. § 102.166(5) (2000)).

606. *Id.* at 1050 n.8.

607. *Id.* at 1050.

608. *Id.*

609. *Siegel I*, 120 F. Supp. 2d at 1050.

610. *Id.* (quoting *Curry v. Baker*, 802 F.2d 1302, 1314 (11th Cir. 1986)).

laws that infringe on voters' rights, federal courts should not intervene to examine the validity of individual ballots or supervise administrative details of an election, and then only in extraordinary circumstances will the challenge of an election rise to the level of a constitutional deprivation.⁶¹¹ The court relied upon a United States Supreme Court case that reviewed and upheld a state procedure providing for a recount in an election for the United States Senate.⁶¹² The United States Supreme Court had held "[a] recount is an integral part of the . . . electoral process and is within the ambit of the broad powers delegated to the States."⁶¹³ In essence, the district court stated "federal courts should tread cautiously in the traditional state province of electoral procedures and tabulations . . . [o]therwise federal courts run the risk of being thrust into the details of virtually every election."⁶¹⁴

a. *Bush Plaintiffs' Equal Protection Argument Fails*

Next, the district court summed up the plaintiffs' equal protection argument:

The thrust of Plaintiffs' position is that Florida's decentralized county-by-county electoral system can yield disparate tabulating results from county to county. For instance, similarly-punched ballots in different counties may be tabulated differently in a manual recount due to the introduction of human subjectivity and error. Further, if manual recounts are held in certain counties but not others, ballots previously discarded by electronic tabulation in manual recount counties would be counted while similarly-situated ballots in non-manual recount counties would not—thereby diluting the vote in non-manual recount counties.⁶¹⁵

First, the court said the plaintiffs' concerns were real but most importantly, they were unavoidable given the "inherent decentralization involved in state electoral and state recount procedures."⁶¹⁶ Forty-eight states employ recount procedures, and many of those procedures differ in

611. *Id.*

612. *Id.* at 1051 (referring to *Roudebush v. Hartke*, 405 U.S. 15 (1972)).

613. *Id.* (quoting *Roudebush v. Hartke*, 405 U.S. 15 (1972)).

614. *Siegel I*, 120 F. Supp. 2d at 1051. Obviously, this is what some critics of *Bush II v. Gore* say will result.

615. *Id.* at 1051.

616. *Id.* at 1051–52.

their methods of tabulation.⁶¹⁷ Florida has sixty-seven counties, in which twenty-six counties use punch-card ballots, thirty-nine counties use optical-scanning systems, one county uses a mechanical lever machine, and the other uses manually-tabulated paper ballots.⁶¹⁸ The district court recognized that disparate tabulation systems will result in tabulation differences from county to county.⁶¹⁹ Of course, different tabulation systems will also result in tabulation differences from state to state. What the court correctly recognized and what the United States Supreme Court failed to consider is that “[u]nless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions and the like), there will be tabulating discrepancies depending on the method of tabulation.”⁶²⁰ The district court did not view this as a sign of weakness or a constitutional injury, rather, the court opined:

[S]ome solace can be taken in the fact that no one centralized body or person can control the tabulation of an entire statewide or national election. For the more county boards and individuals involved in the electoral regulation process, the less likely it becomes that corruption, bias, or error can influence the ultimate result of an election.⁶²¹

b. Bush Plaintiffs Failed to Demonstrate that Manual Recounts Were So Unreliable that Their Use Would Rise to the Level of a Constitutional Injury

The district court next turned to the Bush plaintiffs’ claim that the manual recounts were unreliable, and stated the burden of proof was on the Bush plaintiffs to demonstrate that manual recounts are so unreliable that their use rises to the level of a constitutional injury.⁶²² The court noted that manual recounts “have been available in numerous states since the time of the Founding.”⁶²³ While observing that some level of error is inherent in manual tabulation, it was recognized that no method is error free.⁶²⁴ The purpose of a manual recount following electronic tabulation is to provide a

617. *Id.* at 1052.

618. *Id.* at 1050, 1050 n.12.

619. *Siegel I*, 120 F. Supp. 2d at 1052.

620. *Id.*

621. *Id.*

622. *Id.*

623. *Id.*

624. *Siegel I*, 120 F. Supp. 2d at 1052.

check on the accuracy of the ballot tabulation.⁶²⁵ The Bush plaintiffs failed to produce sufficient evidence to declare the use of Florida's manual recount statute to be unconstitutional on its face.⁶²⁶ Quoting a recent United States Supreme Court case, the district court affirmed that "[f]acial invalidation 'is, manifestly, strong medicine' that 'has been employed by the Court sparingly and only as a last resort.'"⁶²⁷ The court found it unconvincing that the Bush plaintiffs argued that a process structured to render a vote tally more accurate somehow diluted the voting rights of the people.⁶²⁸ Merely delaying the certification of presidential election result did not result in diluting voting rights any more than counting the absentee ballots would dilute the votes cast on election day.⁶²⁹

c. *Bush Plaintiffs Alleged Injuries on an As-Applied Basis Were Speculative*

The district court found the Bush plaintiffs' alleged injuries were speculative and far from irreparable because: 1) the four-county canvassing boards were still in the process of conducting manual recounts; 2) each of the four county canvassing boards were at different stages of the manual recount process; 3) no results had been announced; and 4) there was no evidence to suggest that the manual recounts had generated erroneous tabulations.⁶³⁰ Preliminary injunctive relief would have been premature.⁶³¹

d. *Bush Plaintiffs Had an Adequate Remedy in State Court*

The district court stated that the Bush plaintiffs had failed to produce any evidence that they lacked an adequate remedy in state court to challenge the manual recount results or the canvassing boards' decisions concerning commencement and administration of manual recount procedures.⁶³² It was stressed that the *Florida Statutes* provide a process by which an unsuccessful candidate can contest the certification of an election in circuit court.⁶³³ Furthermore, the court noted Florida courts have the power to void

625. *Id.*

626. *Id.*

627. *Id.* (quoting *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 580 (1998)).

628. *Id.*

629. *Siegel I*, 120 F. Supp. 2d at 1052.

630. *Id.* at 1052-53.

631. *Id.* at 1053.

632. *Id.*

633. *Id.*

a contested election even in the absence of fraud or intentional wrongdoing.⁶³⁴ The Bush plaintiffs would have a remedy in a state court claim, if they could show that the manual recounts would lead to state certification of an election result contrary to the will of the voters.⁶³⁵

In essence, the district court found that the Bush plaintiffs had failed to demonstrate a “clear deprivation of a constitutional injury or a fundamental unfairness in Florida’s manual recount provision.”⁶³⁶ Although it recognized the election had assumed national prominence due to the closeness of the presidential election and the resulting indecision of who would be our next president, the court labeled the Bush plaintiffs’ claims “‘garden variety’ election dispute[s]” which do not “rise to the level of constitutional deprivation.”⁶³⁷ It was stressed that there were no allegations of clear and direct infringements of the right to vote through racial intimidation or fraudulent interference with an election.⁶³⁸ The court pointed out that the mere possibility that the president-elect would be enveloped in a cloud of illegitimacy did not justify enjoining the manual recount process that was already underway.⁶³⁹ “One of the strengths of our Constitution’s method for selection of the President is its decentralization. Florida, one of the 50 states, has 67 counties, each with a supervisor of election, a canvassing board, and different voting and tabulation equipment.”⁶⁴⁰ Federal courts should not be the arbiters of disputes in elections. They have a limited role and should only interfere when there is an immediate need to correct a constitutional violation.⁶⁴¹

B. *Siegel v. LePore*, 234 F.3d 1163 (11th Cir. 2000)

1. Procedural Posture

On November 14, 2000, the Bush plaintiffs filed a notice of appeal of the November 13th United States District Court order denying their request for a preliminary injunction with the Eleventh Circuit Court of Appeals. In their opening brief, the Bush plaintiffs requested oral argument because

634. *Siegel I*, 120 F. Supp. 2d at 1053.

635. *Id.*

636. *Id.*

637. *Id.* at 1054 (quoting *Curry v. Baker*, 802 F. 2d 1302 (11th Cir. 1996)).

638. *Id.*

639. *Siegel I*, 120 F. Supp. 2d at 1054.

640. *Id.*

641. *Id.*

“[t]his case presents important questions regarding First and Fourteenth Amendment protections of the fundamental right to vote.”⁶⁴² The Bush plaintiffs also filed an Emergency Motion for an Injunction Pending Appeal.⁶⁴³ Pursuant to *Federal Rule of Appellate Procedure*, the Eleventh Circuit ordered that the case be heard initially *en banc*.⁶⁴⁴

The United States Court of Appeals for the Eleventh Circuit denied the emergency motion for an injunction on November 17, 2000.⁶⁴⁵ On November 22, 2000, the Bush plaintiffs filed a petition for certiorari before judgment in which they sought to invoke the United States Supreme Court’s rarely-used certiorari jurisdiction before judgment pursuant to title 28, section 1254(1) of the *United States Code*⁶⁴⁶ under which the Court may exercise certiorari jurisdiction “before or after rendition of judgment or decree” by a federal appellate court.⁶⁴⁷ On November 24, 2000, the United States Supreme Court declined to hear the equal protection claims presented in *Siegel*. However, that same day, the Court granted certiorari in *Bush v. Palm Beach County Canvassing Board*.⁶⁴⁸ Obviously, the Court could have heard the equal protection claims simultaneously with the issues regarding title 3, section 5 of the *United States Code* that it interposed into the conflict in *Bush v. Palm Beach County Canvassing Board*. If the Court had done so, then the Court would have been able to reconcile the tensions between the equal protection issues, the title 3, section 5 of the *United States Code* issues, and the concern for a timely resolution of the dispute. All of those issues were ultimately addressed in the various opinions in *Bush II v. Gore* on December 12, 2000.⁶⁴⁹ By choosing not to hear those issues simultaneously and determining fifteen days later⁶⁵⁰ that the equal protection issue was worthy of review, the Court helped create an urgent problem of time that was easily preventable. On December 5, the Eleventh Circuit heard oral

642. Opening Brief for Appellants at v, *Siegel III v. LePore*, 234 F.3d 1163 (11th Cir. 2000) (No. 00-15981).

643. *Siegel III v. LePore*, 234 F.3d 1163, 1170 (11th Cir. 2000).

644. *Id.* at 1170 n.2.

645. *Id.* at 1163.

646. Title 28, section 1254(2) of the *United States Code* provides “[c]ases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.”

647. *Petition for a Writ of Certiorari*, at 2, 531 U.S. 1005 (No. 00-837).

648. 531 U.S. 1004 (2000).

649. 531 U.S. 98 (2000).

650. *Bush I v. Gore*, 531 U.S. 1046 (2000).

argument on the merits in *Siegel v. LePore*.⁶⁵¹ On December 6, 2000, the Eleventh Circuit handed down its opinion affirming the denial of the preliminary injunction.⁶⁵²

While the instant case was on appeal, several Florida cases were appealed to the Supreme Court of Florida.⁶⁵³ In those cases, plaintiffs challenged Florida's Secretary of State's decision refusing to accept the results of manual recounts submitted after November 14, 2000 at 5:00 p.m.⁶⁵⁴ On November 21, 2000, the Supreme Court of Florida ruled that Florida's Secretary of State was required to accept results of manual recounts submitted by the evening of November 26, 2000.⁶⁵⁵ The United States Supreme Court vacated the Supreme Court of Florida's opinion on December 4, 2000.⁶⁵⁶

2. Bush Plaintiffs' Emergency Motion for an Injunction Pending Appeal

The Bush plaintiffs' Emergency Motion for an Injunction Pending Appeal requested the Eleventh Circuit to enjoin the county canvassing boards from conducting manual ballot recounts and/or to enjoin them from certifying the results of the presidential election which contain any manual recounts.⁶⁵⁷ On November 17, 2000, the Eleventh Circuit denied the Bush plaintiffs' request for injunctive relief and stated in pertinent part:

Both the Constitution of the United States and 3 U.S.C. § 5 indicate that states have the primary authority to determine the manner of appointing Presidential Electors and to resolve most controversies concerning the appointment of Electors. The case law is to the same effect, although, of course, federal courts may act to preserve and decide claims of violations of the Constitution of the United States in certain circumstances, especially where a state remedy is inadequate. In this case, the State of Florida has enacted detailed election dispute procedures. These procedures have been invoked, and are in the process of being implemented, both in the form of administrative actions by state officials and in the form of actions

651. *Siegel III*, 234 F.3d at 1172.

652. *Id.* at 1163.

653. *Id.* at 1170.

654. *Id.*

655. *Id.*

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

657. *Siegel III*, 234 F.3d at 1172. *See also* *Touchston II v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000).

in state courts, including the Supreme Court of Florida. It has been represented to us that the state courts will address and resolve any necessary federal constitutional issues presented to them, including the issues raised by Plaintiffs in this case. If so, then state procedures are not in any way inadequate to preserve for ultimate review in the United States Supreme Court any federal questions arising out of such orders.⁶⁵⁸

3. Bush Plaintiffs' Broad Request on Appeal

Plaintiffs' request on appeal was broader than their request for injunctive relief pending appeal.⁶⁵⁹ On appeal, the Bush plaintiffs requested the Eleventh Circuit to "reverse the district court's decision, enjoin the canvassing board Defendants from conducting manual recounts or certifying election results that include manual recounts, or order the deletion and/or non-inclusion of final vote tabulations that reflect the results of manual recounts."⁶⁶⁰ The Eleventh Circuit declined to convert the appeal of the preliminary injunction into a final hearing on the merits of the Bush plaintiffs' claims.⁶⁶¹ The Eleventh Circuit recognized that in some instances, an appellate court may decide the merits of a case in connection with its review of a denial of a preliminary injunction.⁶⁶² In *Thornburgh v. American College of Obstetrician & Gynecologists*,⁶⁶³ the United States Supreme Court held that an appellate court may decide the merits of a case when it has the benefit of "an unusually complete factual and legal presentation from which to address the important constitutional issues at stake."⁶⁶⁴ However, as the United States Supreme Court noted in *Thornburgh*, "[a] different situation is presented, of course, when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial."⁶⁶⁵ The Eleventh Circuit stated that the instant case clearly fell within the latter category because the answers to the constitutional questions were "anything but clear" and noted that the factual

658. *Siegel III*, 234 F.3d at 1170–71 (quoting *Touchston II*, 234 F.3d at 1132–33).

659. *Id.* at 1171.

660. *Id.* at 1171.

661. *Id.* at 1171 n.4.

662. *Id.* at 1171.

663. 476 U.S. 747 (1986).

664. *Id.* at 757 (quoting *Am. Coll. of Obstetricians & Gynecologists*, 737 F.2d 283, 290 (3d Cir. 1984)).

665. *Id.* at 757 n.8.

record before it was “largely incomplete and vigorously disputed.”⁶⁶⁶ The Eleventh Circuit pointed out that the district court’s denial of the preliminary injunction was based solely on limited affidavits and documents, there was no discovery, no trial or plenary hearing, and the evidence presented was not tested by cross-examination.⁶⁶⁷ “Mere expediency” was not a reason to reach the merits of the Bush plaintiffs’ claims in the absence of evidence and thus, the Eleventh Circuit denied the Bush plaintiffs’ request.⁶⁶⁸

4. Rooker-Feldman Doctrine, *Res Judicata*, and Collateral Estoppel Did Not Bar Subject Matter Jurisdiction Over the Bush Plaintiffs’ Claims

First the court considered whether the Rooker-Feldman doctrine⁶⁶⁹ barred them from exercising jurisdiction over the Bush plaintiffs’ claims.⁶⁷⁰ The Rooker-Feldman doctrine provides that federal courts, other than the United States Supreme Court, have only original subject matter, and not appellate jurisdiction, and may not entertain appellate review of a state court judgment.⁶⁷¹ The doctrine applies to constitutional claims presented or adjudicated by a state court and claims that are “inextricably intertwined” with a state court judgment.⁶⁷² As the Eleventh Circuit explained, a “federal claim is inextricably intertwined with a state court judgment ‘if the federal claim succeeds only to the extent that the state court wrongly decided the issues before it.’”⁶⁷³ The Eleventh Circuit observed that the United States Supreme Court had vacated the Supreme Court of Florida’s November 21, 2000 decision, and it was unclear whether any final judgments giving rise to Rooker-Feldman concerns existed.⁶⁷⁴ Moreover, the parties had not asserted any basis for a Rooker-Feldman bar.⁶⁷⁵ Thus, the Eleventh Circuit concluded that the Rooker-Feldman doctrine did not bar the Bush plaintiffs

666. *Siegel III*, 234 F.3d at 1171.

667. *Id.*

668. *Id.*

669. The Rooker-Feldman doctrine is derived from two United States Supreme Court cases decided sixty years apart: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), and *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983).

670. *Siegel III*, 234 F.3d at 1172.

671. *Id.* (citing *Feldman*, 460 U.S. at 486; *Rooker*, 263 U.S. at 415–16)

672. *Id.* (citing *Feldman*, 460 U.S. at 482 n.16).

673. *Id.* (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring)).

674. *Id.*

675. *Siegel III*, 234 F.3d at 1172.

from asserting constitutional challenges to the implementation of Florida's manual recount provision.⁶⁷⁶ After a brief review of Florida law regarding application of *res judicata* and collateral estoppel,⁶⁷⁷ the court concluded that neither of those doctrines were a bar to their consideration of the issue of the constitutionality of Florida's statutory manual recount provision.⁶⁷⁸

5. Defendant Canvassing Boards Argue the Case Is Moot

Next, the court addressed the Defendant canvassing boards' argument that the case was moot because the manual recounts had been completed and the canvassing boards had certified the vote tabulation with the Elections Canvassing Commission.⁶⁷⁹ Federal jurisdiction is limited to live cases or controversies throughout all stages of the federal judicial proceedings.⁶⁸⁰ The Eleventh Circuit relied upon its earlier decision in *Reich v. Occupational Safety & Health Review Commission*,⁶⁸¹ where it held that "[a] claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation."⁶⁸² The court concluded that neither element was satisfied because there were various lawsuits pending in Florida courts contesting the election results, and there were still manual recount votes pending from at least two counties in the November 26th official election results of the Florida Secretary of State.⁶⁸³

676. *Id.*

677. "Res judicata is defined as a legal or equitable issue which has been decided by a court of competent jurisdiction; a thing or matter settled by judgment." *Gray v. Gray*, 107 So. 261, 262 (1926). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Ashe v. Swenson*, 397 U.S. 436, 443 (1970).

678. *Siegel III*, 234 F.3d at 1172 n.5.

679. *Id.* at 1172.

680. *Id.*

681. 102 F.3d 1200 (11th Cir. 1997).

682. *Siegel III*, 234 F.3d at 1172-73 (11th Cir. 2000) (quoting *Reich*, 102 F. 3d at 1201).

683. *Id.* at 1173.

6. Defendants Argue the Court Should Abstain From Hearing the Case Under the Burford Abstention Doctrine

The Defendant canvassing boards argued that the Eleventh Circuit should refrain from hearing the appeal under the *Burford v. Sun Oil Co.* abstention doctrine.⁶⁸⁴ The Eleventh Circuit explained:

The Burford abstention doctrine allows a federal court to dismiss a case only if it presents difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar, or if its adjudication in a federal forum would disrupt state efforts to establish a coherent policy with respect to a matter of substantial public concern A central purpose furthered by Burford abstention is to protect complex state administrative processes from undue federal interference.⁶⁸⁵

The Eleventh Circuit determined that the case did “not threaten to undermine all or a substantial part of Florida’s process of conducting elections and resolving election disputes.”⁶⁸⁶ Rather, the court said the Bush plaintiffs’ claims targeted certain discrete practices set forth in section 102.166 of the *Florida Statutes*.⁶⁸⁷ The court maintained that the *Burford* abstention doctrine should be applied “when federal interference would disrupt a state’s effort, through its administrative agencies, to achieve uniformity and consistency in addressing a problem.”⁶⁸⁸ The Eleventh Circuit maintained that the case did “not threaten to undermine Florida’s uniform approach to manual recounts,” primarily because the basis of the Bush plaintiffs’ complaint was that there was an “absence of strict and uniform standards” in Florida for initiating or conducting recounts.⁶⁸⁹

684. *Id.* *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

685. *Siegel III*, 234 F.3d at 1173 (referencing *Boyes v. Shell Oil Prods. Co.*, 199 F.3d 1260, 1265 (11th Cir. 2000); *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361–62 (1989)).

686. *Id.*

687. *Id.*

688. *Id.* (citing *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 727–28 (1996)).

689. *Id.*

7. Defendants Argue the Court Should Abstain From Hearing the Case Under the Pullman Abstention Doctrine

The Defendant canvassing boards also argued that the court should abstain from hearing the case under *Railroad Commission of Texas v. Pullman Co.*⁶⁹⁰ The Pullman abstention doctrine provides that “a federal court will defer to ‘state court resolution of underlying issues of state law.’”⁶⁹¹ Before this doctrine may be applied, two elements must be met: “(1) the case must present an unsettled question of state law, and (2) the question of state law must be dispositive of the case or would materially alter the constitutional questions presented.”⁶⁹² As the court explained, “[t]he purpose of *Pullman* abstention is to ‘avoid unnecessary friction in federal-state functions, . . . tentative decisions on questions of state law, and premature constitutional adjudication . . . [and] is only appropriate when the question of state law can be fairly interpreted to avoid adjudication of the constitutional question.’”⁶⁹³ Although the court was aware of the limited role of federal courts in assessing a state’s electoral process, the court placed great weight on the fact that the Bush plaintiffs had alleged a constitutional violation of their voting rights and concluded abstention was inappropriate.⁶⁹⁴

8. The Eleventh Circuit Affirms the Denial of the Preliminary Injunction

The district court denied the Bush plaintiffs a preliminary injunction because it found no likelihood of success on the merits and because the Bush plaintiffs “had failed to show that an irreparable injury would result if no injunction were issued.”⁶⁹⁵ In considering whether or not to reverse the district court’s order, the Eleventh Circuit Court of Appeals applied a clear

690. 312 U.S. 496 (1941); *Siegel III*, 234 F.3d at 1174.

691. *Siegel III*, 234 F.3d at 1174. (quoting *Harman v. Forssenius*, 380 U.S. 528, 534 (1965)).

692. *Id.*

693. *Id.*

694. *Id.* (citing *Duncan v. Poythress*, 657 F.2d 691, 697 (5th Cir. 1981) (stating that “while an alleged denial of voting rights does not preclude federal abstention, United States Supreme Court precedent indicates that a federal court should be reluctant to abstain when voting rights are at stake”); *Edwards v. Sammons*, 437 F.2d 1240, 1243 (5th Cir. 1971) (stating the general rule that abstention is not appropriate “in cases involving such a strong national interest as the right to vote”)).

695. *Id.* at 1175.

abuse of discretion standard of review.⁶⁹⁶ The Eleventh Circuit held that the Bush plaintiffs “still have not shown irreparable injury, let alone that the district court clearly abused its discretion in finding no irreparable injury on the record” and affirmed the decision of the district court.⁶⁹⁷

9. Standard for Injunctive Relief

The Eleventh Circuit applied the same traditional four-factor test used in the district court when it denied the injunctive relief:

A district court may grant injunctive relief only if the moving party shows that: 1) it has a substantial likelihood of success on the merits; 2) irreparable injury will be suffered unless the injunction issues; 3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and 4) if issued, the injunction would not be adverse to the public interest.⁶⁹⁸

Citing the same case law as the district court, the Eleventh Circuit noted that “a preliminary injunction is an extraordinary and drastic remedy,” and the burden of persuasion as to all four factors rests upon the Plaintiff.⁶⁹⁹

The Eleventh Circuit first addressed the irreparable injury factor and said it is “the sine qua non of injunctive relief.”⁷⁰⁰ The court emphasized that even if the Bush plaintiffs demonstrated a likelihood of success on the merits, the requirement to show an actual and imminent irreparable injury must still be met.⁷⁰¹ The Eleventh Circuit found that the Bush plaintiffs had not demonstrated a threat of continuing irreparable harm.⁷⁰² The court elaborated and said Governor Bush and Secretary Cheney were not suffering “serious harm” let alone “irreparable harm” because they had been certified as the winners of Florida’s electoral votes.⁷⁰³ Moreover, even if manual

696. *Siegel III*, 234 F.3d at 1175 (citing *Carillon Imps., Ltd. v. Frank Pesce Int’l Group Ltd.*, 112 F.3d 1125, 11267 (11th Cir. 1997); *Revette v. Int’l Ass’n of Bridge, Structural & Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir. 1984); *Harris Corp. v. Nat’l Iranian Radio & Television*, 691 F.2d 1344, 1354 (11th Cir. 1982)).

697. *Id.* at 1175–76.

698. *Id.*

699. *Id.* at 1176 (citing *All Care Nursing Serv., Inc. v. Bethesda Mem’l Hosp., Inc.*, 887 F.2d 1535, 1537 (11th Cir. 1989)).

700. *Id.* (citations omitted).

701. *Siegel III*, 234 F.3d at 1176.

702. *Id.* at 1177.

703. *Id.*

recounts were resumed in Florida pursuant to a state court order, it would be highly speculative whether the results would place Vice President Gore and Senator Lieberman ahead.⁷⁰⁴ The court noted that the case on appeal involved recounts ordered by county canvassing boards and that if a state court were to order recounts in a contest proceeding, it might raise different legal issues.⁷⁰⁵ The Eleventh Circuit also declined to find that the “voter plaintiffs”⁷⁰⁶ were facing serious harm or imminent injury.⁷⁰⁷ The voter plaintiffs did not claim they were either prevented from registering to vote, prevented from voting, prevented from voting for the candidate of their choice, or that his or her vote was rejected or not counted.⁷⁰⁸

The Eleventh Circuit rejected the Bush plaintiffs’ contention that if manual recounts proceeded “simply rejecting the results of those recounts after the conclusion of this case will not repair the damage to the legitimacy Bush presidency cause by ‘broadcasting’ the flawed results of a recount that put Vice President Gore and Senator Lieberman ahead.”⁷⁰⁹ The Eleventh Circuit rejected the Bush plaintiffs’ assertion “that a violation of constitutional rights always constitutes irreparable harm” and said that our case law has not reached that point.⁷¹⁰

In conclusion, the Eleventh Circuit reiterated that they “may reverse a district court’s denial of a preliminary injunction if and only if we find that the court clearly abused its discretion.”⁷¹¹ The court upheld the district court’s finding that the Bush plaintiffs had failed to show that immediate irreparable harm would result if preliminary injunctive relief was not ordered.⁷¹² “That critical finding remained just as compelling, and the irreparability of the alleged injury is no more established, today [December 6, 2000]” than it was on November 13, 2000.⁷¹³ The Eleventh Circuit declined to decide the merits of the Bush plaintiffs’ constitutional arguments and stated “it is a ‘fundamental and longstanding principle of judicial restraint . . . that courts avoid reaching constitutional questions in advance of

704. *Id.*

705. *Id.* at 1177 n.10.

706. The “voter plaintiffs” had each alleged that they had voted for Governor Bush and Secretary Cheney. *Siegel III*, 234 F.3d at 1177.

707. *Id.*

708. *Id.*

709. *Id.*

710. *Id.*

711. *Siegel III*, 234 F.3d at 1178.

712. *Id.*

713. *Id.*

the necessity of deciding them.”⁷¹⁴ Given the court’s view on the issue of injury, it concluded there was no necessity to decide the constitutional arguments.⁷¹⁵

10. Chief Judge Anderson’s Concurring Opinion on Equal Protection⁷¹⁶

Joining the per curiam opinion, Chief Judge Anderson set forth his reasons why the Bush plaintiffs failed to state a violation of the Equal Protection Clause.⁷¹⁷ The chief judge began his discussion of equal protection by stating the crux of the Bush plaintiffs’ argument is that “some ballots in counties not conducting manual recounts will not be counted despite the voters’ intent, because the ballots are not machine-legible, while identical ballots in counties conducting manual recounts will be counted.”⁷¹⁸

The chief judge began his review of the equal protection claim by restating the United States Supreme Court’s framework: “when a state election law severely burdens voters’ constitutional rights, it must be narrowly tailored to serve a compelling interest; however, lesser burdens trigger less exacting review, and a state’s important regulatory interest are typically enough to justify reasonable, nondiscriminatory restrictions.”⁷¹⁹

In the first step of his analysis, the chief judge considered whether Florida’s manual recount provision severely burdened the right of voters in counties that did not conduct manual recounts. He stated that the Bush plaintiffs could credibly argue that an inequitable burden would be placed on voters simply because manual recounts were available in some counties and not others.⁷²⁰ Logically, this would “lead to the untenable position that the method of casting and counting votes would have to be identical in all states

714. *Id.* at 1179 n.12.

715. *Id.*

716. In Chief Judge Anderson’s concurrence, he addressed the standard of review and constitutional delegation of authority to the states and concluded that the Bush plaintiffs failed to make the requisite showing of a substantial likelihood of success on the merits of their claims, and the district court did not abuse its discretion in refusing to grant a preliminary injunction. *Siegel III*, 234 F.3d at 1179–81. This section of the article will focus on Judge Anderson’s concurring opinion regarding the Bush plaintiffs’ equal protection claim. Judges Tjoflat, Birch, Dubina and Carnes entered dissenting opinions, which are not discussed in this article.

717. *Id.* 234 at 1181–86.

718. *Id.* at 1181–82.

719. *Id.* at 1182 (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

720. *Id.*

and in every county of each state The only apparent way to avoid this disparity would be for every state to use an identical method of counting.”⁷²¹ The chief judge pointed out that “no court has held that the mere use of different methods of counting ballots constitutes an equal protection violation” and that it would be “manifestly inconsistent with the command of Article II, Section 1, Clause 2, that presidential electors are to be appointed in the manner directed by each state legislature.”⁷²² The chief judge also noted that the United States Supreme Court has acknowledged that the recount provisions are “within the ambit of the broad powers delegated to the States by Art. I, § 4.”⁷²³

The chief judge next turned to the Bush plaintiffs’ unsuccessful attempt to bolster their argument that all ballots should be treated exactly alike.⁷²⁴ The Bush plaintiffs had suggested to the court that partisan influences tainted Florida’s manual recount procedures. Because the Florida Democratic Party had requested manual recounts in Democratic counties and because Florida’s statute lacked guidelines to grant those manual recounts, the canvassing boards’ decisions whether to grant manual recounts were affected by partisan influences.⁷²⁵ Instead, the chief judge said the statute itself specifically provides several safeguards, which reduce the risk of partisan influences and, combined with judicial review, reduces the risk of partisan influences tainting the process.⁷²⁶ Additionally, the chief judge noted that “any candidate has an equal right and an equal opportunity to request manual recounts in any county,” and the political parties were on notice of this right and opportunity.⁷²⁷

The chief judge then turned to an assessment of the severity of the impact on the right to vote.⁷²⁸ In his view, the scarcity of the evidence in the record was significant. The Bush plaintiffs had not established partisan manipulation or fraud nor did they claim that any canvassing board had

721. *Siegel III*, 234 F.3d at 716. This is the same logic used by the district court, which stated “[u]nless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be systems malfunctions and the like), there will be tabulating discrepancies depending on the method of tabulation.” *Siegel I v. LePore*, 120 F. Supp. 2d 1041, 1052 (S.D. Fla. 2000).

722. *Siegel III*, 234 F.3d at 1182 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 796 n.18 (1983); *Williams v. Rhodes*, 393 U.S. 23, 29 (1968)).

723. *Id.* (quoting *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972)).

724. *Id.*

725. *Id.* at 1182–83 (referring to FLA. STAT. § 102.012–.171 (2000)).

726. *Id.* at 1183.

727. *Siegel III*, 234 F.3d at 1183.

728. *Id.*

unfairly refused to conduct a manual recount.⁷²⁹ Instead, the Bush plaintiffs merely argued that the canvassing board officials in Broward, Miami-Dade, Palm Beach and Volusia Counties may have had strong personal interests in the outcome of the election.⁷³⁰ The chief judge labeled the Bush plaintiffs' argument as a "vague allegation of a possible manipulative or discriminatory motive" that did not rise to the level of strict scrutiny of an equal protection claim.⁷³¹

Based on his assessment of the Bush plaintiffs' equal protection claims, the chief judge applied a reasonableness standard to judge the constitutionality of Florida's manual recount statute:⁷³² "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, the 'State's important regulatory interests are generally sufficient to justify' the restrictions."⁷³³ Chief Judge Anderson concluded that Florida had sufficiently strong interests which justified the manual recounting of votes. He qualified his conclusion by finding that: 1) Florida's manual recount provisions were designed to remedy vote tabulation errors which could affect the outcome of the election; 2) Florida's manual recount provisions were designed to arrive at the true voters' intent; 3) Florida's manual recount provisions provide an alternative method to discern the will of voters when doubt has been cast as to the validity of a machine count; and 4) Florida has a strong interest in insuring that the results of an election accurately reflect the intent of its voters.⁷³⁴

Turning to the Bush plaintiffs' argument that county-by-county differences violated their equal protection rights, the chief judge reiterated that the Florida Legislature had delegated to each county the power to decide whether and how to conduct manual recounts and the state statute provided the necessary guidelines and procedures.⁷³⁵ The chief judge identified Florida's important regulatory interest as the efficient administration of elections, which justified implementation of manual recount provisions on a decentralized, localized basis.⁷³⁶

729. *Id.*

730. *Id.* at 1183–84.

731. *Id.* at 1184.

732. *Siegel III*, 234 F.3d at 1184.

733. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

734. *Siegel III*, 234 F.3d at 1184.

735. *Id.*

736. *Id.* at 1184–85.

In further support of the chief judge's determination that the Bush plaintiffs' claim of violation of equal protection did not warrant strict scrutiny, he contrasted the facts of the instant case with United States Supreme Court cases that had applied strict scrutiny.⁷³⁷ Unlike the Bush plaintiffs' claims, the plaintiffs in those cases alleged they had been denied the right to vote, or alleged that weighted voting systems arbitrarily and systematically granted a lesser voice to some voters based on their geographic location.⁷³⁸ He further supported his conclusion by citing constitutional delegation of authority to the states to direct their own method of appointing presidential electors and confirmed the authority by case law.⁷³⁹ The chief judge concluded that although inevitable variances will result because manual recounts of ballots may take place in some counties while ballots will be counted and recounted only by machine in other counties, this alone does not severely burden the right to vote.⁷⁴⁰

In conclusion, the chief judge said Florida's manual recount provision does not limit a voters' ability to cast their votes, nor does it undermine the certainty that their vote will be counted.⁷⁴¹ Although some ballots may receive more scrutiny than others, the statute provided safeguards that recounts will be open, fair, and accurate.⁷⁴² There was no evidence establishing partisan fraud or misconduct, nor was there any evidence of errors in manual counting generating erroneous vote tabulations.⁷⁴³ Chief Judge Anderson, in his special concurrence, said the Bush plaintiffs had failed to demonstrate a severe impact on their equal protection rights and thus, strict scrutiny of Florida's manual recount was not merited.⁷⁴⁴ Florida's important regulatory interests justified the reasonable, nondiscriminatory impact on the Bush plaintiffs' voting rights.⁷⁴⁵

C. *Summary of the Federal Cases*

It is important to keep in mind that what was at stake here was the rights of the voters. The right to vote is a fundamental right and thus, may trigger

737. *Id.* at 1185.

738. *Id.* (citing, for example, *Moore v. Ogilvie*, 394 U.S. 814 (1969)).

739. *Siegel III*, 234 F.3d at 1185.

740. *Id.*

741. *Id.*

742. *Id.*

743. *Id.* at 1186.

744. *Siegel III*, 234 F.3d at 1186.

745. *Id.*

equal protection concerns. Indeed, it sounds simple enough to say no state shall “deny to any person within its jurisdiction the equal protection of the laws.”⁷⁴⁶ When the 2000 Presidential Election occurred, Florida had in place an election statute that provided guidelines and procedures for when and how manual recounts were to take place. Only a few of Florida’s counties were proceeding with manual recounts when *Siegel I v. LePore* was filed in the United States District Court for the Southern District of Florida.

As the district court held and Chief Judge Anderson said in his specially concurring opinion, unless and until each state, and each county within those states, utilize the exact same voting methods and procedures, there may be unequal treatment of ballots. The Eleventh Circuit refused to overturn the district court’s denial of an injunction against the recounts then proceeding under section 102.166 of the *Florida Statutes*. Indeed, three of those recounts proceeded to completion, and the vote totals from two of those counties were included in the certified vote total signed by Secretary Harris, which was approved by the United States Supreme Court in *Bush II v. Gore*.⁷⁴⁷

Fifteen days after denying certiorari of Governor Bush and Secretary Cheney’s petition for certiorari review in *Siegel II v. LePore*,⁷⁴⁸ and without citing any factual evidence or any prior precedent, Justice Scalia said, in writing his concurrence when the Court issued its injunction against further recounts:⁷⁴⁹

The issue is not, as the dissent puts it, whether “[c]ounting every legally cast vote ca[n] constitute irreparable harm.” One of the principal issues in the appeal we have accepted is precisely whether the votes that have been ordered to be counted are, under a reason-

746. U.S. CONST. amend. XIV, § 1.

747. 531 U.S. 98 (2000). The recounted vote totals of Broward County and Volusia County were certified in the vote totals of Secretary Harris on November 26, 2000, as well as those from other Republican leaning counties that had completed recounts on their own prior to November 26, 2000, without a request from any party. *See Manual Recount of Ballots, Error in Voter Tabulation, Advisory Legal Op. Fla. Att’y Gen. 2000-65 (Nov. 14, 2000)*. The counties that conducted recounts on their own prior to certification were Franklin, Gadsden, Hamilton, Lafayette, Seminole, Union, and Taylor Counties. *See Aff. of Achim Bergmann, Florida Democratic Party v. Palm Beach County Canvassing Bd.*, 8 Fla. L. Weekly Supp. 35 (Fla. 15th Cir. Ct. 2000) (No. CL00-11078).

748. 531 U.S. 1005 (2000).

749. *Bush I v. Gore*, 531 U.S. 1046 (2000) (granting application for stay; ordering that the mandate of the Supreme Court of Florida, Case No. SC00-2431, stayed, pending further order of the Court; treating the application for stay as a petition for writ of certiorari; and granting the writ of certiorari).

able interpretation of Florida law, “legally cast vote[s].” The counting of votes that are of questionable legality does in my view threaten irreparable harm to petitioner Bush, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.⁷⁵⁰

The determination of what constituted a legal vote, whether under the procedure employed pursuant to section 102.166 or section 102.168 of the *Florida Statutes*, belonged to the courts of the State of Florida and ultimately on appeal to the Supreme Court of Florida.⁷⁵¹ It was an interpretation of Florida law to be made by Florida courts. In denying certiorari of *Siegel v. LePore* while accepting certiorari in *Bush v. Gore*, the United States Supreme Court sustained the hand recounting of votes under section 102.166 of the *Florida Statutes*, the statute litigated on equal protection grounds in *Siegel*, while vacating the hand recounting of votes under section 102.168 of the *Florida Statutes*, the statute litigated on equal protection grounds in *Bush*. Under either statute, the hand recounting of votes was to be supervised by the Supreme Court of Florida, which makes the ultimate determination of what constitutes a legal vote. An analysis that leaves constitutional hand-recounted votes under section 102.166, while declaring unconstitutional hand-recounted votes under section 102.168 is hard to grasp. The Supreme Court of Florida was delegated the authority by the Florida Legislature to determine what constituted a legal vote in an election of presidential electors. If an equal protection problem existed as to the disparate treatment of legal votes, it would have existed on election day when some voters’ votes were processed by machines better able to determine voter intent than the malfunctioning punch card ballot machines.⁷⁵² This disparate treatment was compounded in Palm Beach County by the existence of the butterfly ballot. If an equal protection problem existed on election day, because votes did not have an equal chance of being

750. *Id.* at 1046–47 (Scalia, J., concurring) (alterations in original).

751. *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1238 (Fla. 2000); *Gore III v. Harris*, 772 So. 2d 1243, 1256 (Fla. 2000) (citing *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996)) (holding that a vote should be counted as a legal vote if it properly indicates the voter’s intent with reasonable certainty); *Pullen v. Mulligan*, 561 N.E.2d 585, 613 (1990)) (holding that votes could be recounted by manual means to the extent that the voter’s intent could be determined with reasonable certainty, despite the existence of a statute which provided that punch card ballots were to be recounted by automated tabulation equipment).

752. See generally Palermo, *supra* note 370.

counted on that day, the remedy was not to stop counting votes. The remedy was to effectuate an election that counted all votes and honored democracy.

VIII. THE CONTEST CASES

A. *Florida Circuit Court Cases*

After the Supreme Court of Florida issued its decision in *Palm Beach County Canvassing Board I v. Harris*, the manual recounts of the ballots in four counties proceeded. However, they did not proceed without incident. Specifically, in either the manual recounts based on the protest or in the post-election statutorily required automatic recount, four series of events occurred which would be the subject of future litigation. Those events were: 1) the Miami-Dade County Canvassing Board's refusal to manually review approximately 9000 ballots which the machine registered as non-votes; 2) the approximately 3300 votes that were reviewed by the Palm Beach County Canvassing Board under what Vice President Gore alleged to be an incorrect per se rule; 3) the Nassau County Canvassing Board's decision to transmit the election night returns, rather than the machine recount returns, to the Secretary of State for inclusion in the certified result; and 4) the Florida Election Canvassing Commission's decision to certify the election results without the inclusion of the revised Miami-Dade, Palm Beach, and Nassau Counties results.

1. Miami-Dade County's Refusal to Count

"On November 9, 2000, the Miami-Dade Democratic Party made a timely request for a manual recount under section 102.166 of the *Florida Statutes*."⁷⁵³ Initially, the Miami-Dade County Canvassing Board decided against a full manual recount. However, the Board later voted to begin a manual recount of all the ballots cast in Miami-Dade County, and the recount began on November 19, 2000.⁷⁵⁴ The Board decided the morning of November 22, 2000 that, in order to meet the certification deadline set by the Supreme Court of Florida,⁷⁵⁵ it would focus its manual recount on the approximately 10,500 ballots that had not registered a vote in the presiden-

753. *Gore III*, 772 So. 2d at 1258.

754. *Id.*

755. See generally *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1220.

tial election, commonly referred to as nonvotes or undervotes.⁷⁵⁶ During the two days of counting, the Board had reviewed approximately twenty percent of the 635 Miami-Dade precincts, finding approximately 1750 untabulated ballots, 388 of which had legal votes that the machines had failed to tabulate.⁷⁵⁷ Later in the afternoon of November 22, 2000, the Board discontinued its manual count.⁷⁵⁸ The Board also voted to discard the 388 votes that it had tabulated up until that point.⁷⁵⁹

2. Palm Beach County Canvassing Board's Alleged Use of the Wrong Rule

Pursuant to a protest on November 9, 2000, the Palm Beach County Canvassing Board commenced a manual recount of the ballots in the presidential election. To count these ballots, the Board adopted a per se rule that, unless there is a physical perforation showing the separation of one or more corners of the rectangular chad, the ballot would not be considered to have a legal vote.⁷⁶⁰ On November 14, 2000, the Florida Democratic Party moved the Fifteenth Circuit Court of Florida, located in Palm Beach County, for emergency declaratory relief that the Board's rule for exclusion of ballots conflicted with Florida law. On November 15, 2000, the circuit court granted the declaratory relief and issued an oral order in that regard.⁷⁶¹ In a

756. Pet. for Writ of Mandamus or Other Writ or, in the Alternative, Review of Trial Ct. Rulings and Brief of Appellants at 13, *Gore II v. Harris*, 779 So. 2d 270 (Fla. 2000) (No. SC00-2385).

757. *Id.*

758. The basis of the Miami-Dade County Canvassing Board's decision to discontinue its manual recount is of considerable dispute to this day. Vice President Gore and Senator Lieberman claimed that the Miami-Dade County Canvassing Board's decision was impacted by a "campaign of personal attacks upon Canvassing Board members and election personnel."

Id. According to Gore and Lieberman, this "near riot" significantly compromised the decision making of the canvassing board. *Id.* They pointed to a news report of the incident that stated: "One nonpartisan member of the board, David Leahy, the Supervisor of Elections, said after the vote that the protests were one factor that he had weighed in his decision." *Id.* See also Dexter Filkins & Dana Canedy, *Counting the Vote, Miami-Dade County: Protest Influenced Miami-Dade's Decision to Stop Recount*, N.Y. TIMES, Nov. 24, 2000, at 41A.

The Supreme Court of Florida avoided embroiling itself in this heated issue by simply stating that the Board's stated reason for the suspension of the manual recount was that it would be impossible to complete the recount before the deadline. *Gore III*, 772 So. 2d at 1258.

759. Pet. for Writ of Mandamus at 14, *Gore II* (No. SC00-2385).

760. *Id.* at 15.

761. The declaratory order stated in full:

written order on November 22, 2000, the circuit court clarified its oral ruling declaring that the Palm Beach County Canvassing Board “cannot have a policy in place of per se exclusion of any ballot.”⁷⁶² Rather, the circuit court declared that “[w]here the intention of the voter can be *fairly and satisfactorily* ascertained, that intention should be given effect.”⁷⁶³ The Board was ordered to cease applying the per se exclusion of the ballots. However, Vice President Gore and Senator Lieberman maintained that the wrong standard continued to be applied to some 3300 ballots that were excluded by the Palm Beach County Canvassing Board.⁷⁶⁴

3. Nassau County Canvassing Board’s Transmission of Election Night Results

Nassau County, a small, northeastern county in Florida, played a significant role in the 2000 Presidential Election contest. On November 7,

The State election statute contemplates that where an electronic or electromechanical voting systems are used, no vote is to be declared invalid or void if there is a clear indication of the intention of the voter.

The present policy utilized by the local election officials restricts the canvassing board’s ability to determine the intention of the voter.

Therefore, the Palm Beach Canvassing Commission has the discretion to utilize whatever methodology it deems proper to determine the true intention of the voter and it should not be restricted in that task. To that end, the present policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the intention of the law.

The Canvassing Board has the discretion to consider those ballots and accept them or reject them.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 15th day of November, 2000.

Dec. Order, Florida Democratic Party v. Palm Beach County Canvassing Bd., 8 Fla. L. Weekly Supp. 35 (Fla. 15th Cir. Ct. 2000) (No. CL00-11078).

762. Florida Democratic Party v. Palm Beach County Canvassing Bd., 8 Fla. L. Weekly Supp. 35, 36 (Fla. 15th Cir. Ct. 2000).

763. *Id.* The court also provided guidance to the Palm Beach County Canvassing Board when it stated that “each ballot must be considered in light of the totality of the circumstances.” *Id.* The court’s order was not clear on what the legal intent of the voter standard should be. Vice President Gore and Senator Lieberman might have made a strategic error by allowing this Order to stand, allowing the Palm Beach County recount to continue during the protest phase instead of appealing this circuit court decision. This appeal would have stopped the counting in Palm Beach County in the protest phase, but it would have also required the Supreme Court of Florida to directly address the intent of the voter standard for what we now know would have been a necessary contest phase in the election.

764. Pet. for Writ of Mandamus at 15, *Gore II* (No. SC00-2385).

2000, the Nassau County Supervisor of Elections informed the Florida Department of State that Vice President Gore and Senator Lieberman received 6952 votes, and Governor Bush and Secretary Cheney received 16,404 votes.⁷⁶⁵ On November 8, 2000, after conducting a machine recount, the Nassau County Canvassing Board certified the results of a machine recount which gave Gore and Lieberman 6879 votes and Bush and Cheney 16,280 votes.⁷⁶⁶ The difference in the margin resulted in a net gain of fifty-one votes for Gore and Lieberman. On November 24, 2000, the Board submitted a new certification of election results, adopting the unofficial totals calculated on November 7th.⁷⁶⁷ Subsequently, Vice President Gore included the vote discrepancy in his complaint to contest the election.

Section 102.141(4) of the *Florida Statutes* stated that a canvassing board shall order a recount of votes cast with respect to an office where a candidate was defeated by one-half of a percent or less of the votes cast for such office. The statute also stated that if there was a discrepancy between the returns of the machine count and the tabulation of the ballots cast, the tabulations of the recount shall be presumed correct and such votes shall be canvassed accordingly.⁷⁶⁸ The canvassing board was obligated, in the absence of a protest, to certify the results of the recount to the Department of State, the clerk of the court, and the supervisor of elections.⁷⁶⁹ No protest was ever filed by the Bush legal team to challenge the certified results of the November 8th recount.⁷⁷⁰ Vice President Gore claimed that the statutorily mandated machine recount was the binding total to be used in the certified results. If this claim was sustained, Gore and Lieberman would have gained

765. Allison Schaefer, *Recount of Ballots Flawed*, FLA. TIMES-UNION (Jacksonville), Nov. 29, 2000, at P1.

766. *Id.*

767. See Richard Perez-Pena, *Counting the Vote, Nassau County: One County Is Puzzling over a Mystery Involving 218 Votes*, N.Y. TIMES, Nov. 27, 2000, at A15.

768. FLA. STAT. § 102.141(4) (2000). No evidence was ever presented by Nassau County to overcome the statutory presumption under section 102.141(4) of the *Florida Statutes*.

769. *Morse v. Dade County Canvassing Bd.*, 456 So. 2d 1314 (Fla. 3d Dist. Ct. App. 1984).

770. See Perez-Pena, *supra* note 767 (noting that the Nassau County Supervisor of Elections called for a manual recount as the only way to resolve the discrepancy, but the board could not order one without a request from one of the campaigns, and no such request was made). "Bush opposed Gore's bid for manual recounts in southern Florida, and Republican officials in Nassau County said the governor's case would have been undermined by asking for one elsewhere." *Id.*

a fifty-one total vote advantage against Bush and Cheney in the certified vote total.

4. Florida Election Canvassing Commission's Refusal to Include the Results of Manual Recounts

On November 26, 2000 the Florida Election Canvassing Commission certified the results of the 2000 Presidential Election that took place on November 7th.⁷⁷¹ The results did not include the results of either the completed or the partial Palm Beach County manual recount.⁷⁷² The results also did not include the results of the partial manual recount in Miami-Dade County or the untabulated votes in Miami-Dade County.⁷⁷³ Furthermore, the certification did not include the results of the statutorily mandated Nassau County machine recount.⁷⁷⁴

B. *Supreme Court of Florida*

On direct appeal, the Supreme Court of Florida considered the Gore contest in *Gore v. Harris*.⁷⁷⁵ In a 4-3 decision, the Supreme Court of Florida affirmed in part, reversed in part and held that all the undervotes in the State of Florida must be manually counted and included in the certified totals.⁷⁷⁶

After considering the federal law at issue, including title 3, section 5 of the *United States Code* requirement that "by laws enacted prior to the day fixed for the appointment of the electors," the Supreme Court of Florida determined that the issues were controlled by section 102.168 of the *Florida Statutes*.⁷⁷⁷ That provision, the court determined, established that the manner chosen by the legislature to contest an election shall occur in a judicial forum.⁷⁷⁸ The court also recognized that the purpose of the contest provisions was "to afford a simple and speedy means of contesting election

771. Pet. for Writ of Mandamus at 18, *Gore II* (No. SC00-2385).

772. *Id.*

773. *Id.*

774. *Id.*

775. The Supreme Court of Florida once again accepted jurisdiction based on its "pass-through" jurisdiction, avoiding a hearing by a Florida District Court of Appeal. FLA. CONST. art. V, § 3(b)(4).

776. *Gore III v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000).

777. *Id.* at 1248.

778. *Id.* at 1249. See FLA. STAT. § 102.168(1) (2000) ("[T]he certification of election . . . of any person to office . . . may be contested in the circuit court by any unsuccessful candidate for such office . . .") (emphasis added).

to stated offices.”⁷⁷⁹ Furthermore, the court acknowledged that the contest provision had been substantially revised in 1999, improving the access of a losing candidate to a judicial resolution and providing additional grounds for a candidate to contest an election.⁷⁸⁰ The court then undertook a “common-sense” approach to construing the election code and the contest statute.

779. *Gore III*, 772 So. 2d at 1249. See *Farmer v. Carson*, 148 So. 557, 559 (Fla. 1933).

780. The 1999 amendments to section 102.168 of the *Florida Statutes* are as follows (words stricken are deletions; words underlined are additions):

(1) ~~Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.~~

(2) Such contestant shall file a complaint, together with the fees prescribed in chapter 28, with the clerk of the court within 10 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of the election being contested or within 5 days after midnight of the date the last county canvassing board empowered to canvass the returns certifies the results of that particular election following a protest pursuant to s. 102.166(1), whichever occurs later. ~~adjourns, and~~

(3) The complaint shall set forth the grounds on which the contestant intends to establish his or her right to such office or set aside the result of the election on a submitted referendum. The grounds of contesting an election under this section are:

(a) Misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election.

(b) Ineligibility of the successful candidate for the nomination or office in dispute.

(c) Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.

(d) Proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property or any other thing of value for the purpose of procuring the successful candidate's nomination or election or determining the result on any question submitted by referendum.

(e) Any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board.

(4) The canvassing board or election board shall be the proper party defendant, and the successful candidate shall be an indispensable party to any action brought to contest the election or nomination of a candidate.

(5) A statement of the grounds of contest may not be rejected, nor the proceedings dismissed, by the court for any want of form if the grounds of contest provided in the statement are sufficient to clearly inform the defendant of the particular proceeding or cause for which the nomination or election is contested.

In the 1999 legislative revision of the contest provision, the majority determined that the amendments strengthened the rights of unsuccessful candidates,⁷⁸¹ including the statutory right to a proper count that had existed since 1845.⁷⁸² That right was reemphasized with the contest provision amendments.⁷⁸³

(6) A copy of the complaint shall be served upon the defendant and any other person named therein in the same manner as in other civil cases under the laws of this state. Within 10 days after the complaint has been served, the defendant must file an answer admitting or denying the allegations on which the contestant relies or stating that the defendant has no knowledge or information concerning the allegations, which shall be deemed a denial of the allegations, and must state any other defenses, in law or fact, on which the defendant relies. If an answer is not filed within the time prescribed, the defendant may not be granted a hearing in court to assert any claim or objection that is required by this subsection to be stated in an answer.

(7) Any candidate, qualified elector, or taxpayer presenting such a contest to a circuit judge is entitled to an immediate hearing. However, the court in its discretion may limit the time to be consumed in taking testimony, with a view therein to the circumstances of the matter and to the proximity of any succeeding primary or other election.

(8) The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.

Ch. 99-339, § 3, 1999 Fla. Laws 3544, 3547.

781. To illustrate, the court pointed to the unsuccessful candidate's right to an immediate hearing, and the express authority of the circuit judge to fashion any necessary orders to ensure that each allegation in the complaint is investigated, examined or checked. See FLA. STAT. § 102.168(7)–(8) (2000).

782. *Gore III*, 772 So. 2d at 1251. See *State ex rel. Millinor v. Smith*, 144 So. 333, 335 (Fla. 1932).

The right to a correct count of the ballots in an election is a substantial right which it is the privilege of every candidate for office to insist on, in every case where there has been a failure to make a *proper count*, call, tally, or return of the votes as required by law, and this fact has been duly established as the basis for granting such relief.

Id. (emphasis added).

783. See *Gore III*, 772 So. 2d at 1251–52.

Recounts are an internal part of the election process. For one's vote, when cast, to be translated into a true message, that vote must be accurately counted, and if necessary, recounted. The moment an individual's vote becomes subject to error in the vote tabulation process, the easier it is for that vote to be diluted.

Furthermore, with voting statistics tracing a decline in voter turnout and an increase in public skepticism, every effort should be made to ensure the integrity of the electoral process.

Integrity is particularly crucial at the tabulation stage because many elections occur in extremely competitive jurisdictions, where very close election results are always possible. In addition, voters and the media expect rapid and accurate tabulation

Turning to the trial court's order,⁷⁸⁴ the Supreme Court of Florida addressed Vice President Gore's three claims of error based on the trial court's analysis of the Miami-Dade ballots. First, the court dealt with the claim that the trial court erred by using an improper standard of review. The court determined that the trial court improperly applied an appellate abuse of discretion standard to the contest proceedings, a *de novo* judicial proceeding.⁷⁸⁵ As a result, the court determined that the trial court improperly relinquished its own authority to the canvassing boards.⁷⁸⁶

Second, the court addressed Bush's argument that all the votes in Miami-Dade County and all the votes cast statewide, not a particular class of votes in particular counties, must be hand counted. The court looked to the text of the contest statute, highlighting that the grounds for contest to include "*rejection of a number of legal votes sufficient to change or place in doubt the result of the election.*"⁷⁸⁷ The court determined that in order for a contestant to bring a challenge to a specific number of legal votes, logic dictated that the contestant establish the "number of legal votes" that were not counted.⁷⁸⁸ The court determined that the text of the statute mandated that the number is limited to the votes identified and challenged under the statute, not those in the entire county.⁷⁸⁹ Because Vice President Gore had

of election returns, regardless of whether the election is close or one sided. Nonetheless, when large numbers of votes are to be counted, it can be expected that some error will occur in tabulation or in canvassing.

Id. (quoting from the Florida House of Representatives Committee on Election Reform 1997 Interim Project on Election Contests and Recounts).

784. *See Gore I v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000).

785. *Gore III*, 772 So. 2d at 1252. The trial court order stated "[t]he local boards have been given broad discretion which no Court may overrule, absent a clear abuse of discretion." *Id.* "The court further finds that the Dade Canvassing Board did not abuse its discretion . . . The Palm Beach County Board did not abuse its discretion in its review and recounting process." *Id.*

786. *Id.* ("In applying the abuse of discretion standard of review to the Boards' actions, the trial court relinquished an improper degree of its own authority to the Boards. This was error.").

787. *Id.* at 1253. *See* FLA. STAT. § 102.168 (3)(c) (2000) ("Receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election.").

788. *Gore III*, 772 So. 2d at 1253.

789. *Id.* The court also discussed, as an evidentiary matter, whether uncontested votes would be relevant. *Id.* The court determined that counting uncontested votes would be irrelevant because it does not establish that there are legal votes that have been rejected. *Id.* However, the court recognized that the legal votes that exist in the statewide undervotes

met the threshold requirement to contest the election by establishing that there were a sufficient number of uncounted votes to “at least place in doubt the result of the election,” Gore was entitled to relief on his claim in Miami-Dade.⁷⁹⁰

Although Gore had only contested the undervotes in Miami-Dade County, the Supreme Court of Florida then determined, absent any reference to authority or precedent, that it is “absolutely essential” to conduct a statewide manual recount.⁷⁹¹ Relief that did not include all similarly situated voters, stated the court, would not be “valid under [the] circumstances.”⁷⁹² The basis for this conclusion is that the election should be determined by the Florida voters, not by a party’s choice of ballots to contest,⁷⁹³ because the Florida Legislature had vested the citizens of Florida with the right to elect presidential electors,⁷⁹⁴ placing the election of presidential electors under the Florida election scheme.⁷⁹⁵ Furthermore, when a candidate contests an election, however, the legislature had provided a broad grant of judicial authority to resolve the dispute and fashion relief. The court explained that, consistent with the legislative policy, it had relied upon the will of the voter.⁷⁹⁶

would be proper evidence in a contest proceeding and would be relevant to fashioning any relief. *Id.*

790. *Gore III*, 772 So. 2d at 1254–55.

791. *Id.* at 1253.

792. *Id.*

793. *Id.* (“This election should be determined by a careful examination of the votes of Florida’s citizens and not by strategies extraneous to the voting process.”).

794. FLA. STAT. § 103.011 (2000).

795. *Gore III*, 772 So. 2d at 1253.

796. *Id.* The Supreme Court of Florida established this “legislative policy” by looking to section 101.5614(5)–(6) of the *Florida Statutes*. *Id.* at 1254 (“[T]he Legislature has mandated that no vote shall be ignored ‘if there is a clear indication of the intent of the voter’ on the ballot, unless it is ‘impossible to determine the elector’s choice’”). In his dissent, Chief Justice Wells questioned the majority’s use of section 101.5614 to establish a “legislative policy” of proper hand counts because section 101.5614 authorizes the creation of a duplicate ballot when a ballot is too damaged to go through a counting machine. *Id.* at 1267 (Wells, C.J., dissenting). However, presumably out of concern of overarching title 3, section 5 of the *United States Code*, the court diminished the value of its reliance of other states that have decided issues regarding the “intent of the voter,” citing those cases only to illustrate that “other states also have recognized [the] principle.” *Id.* at 1256. *See also* Delahunt v. Johnston, 671 N.E.2d 1241 (Mass. 1996) (holding that a vote should be counted as a legal vote if it properly indicates the voter’s intent with reasonable certainty); Duffy v. Mortenson, 497 N.W.2d 437 (S.D. 1993) (determining and applying that every marking found where a vote should be should be treated as an intended vote in the absence of clear evidence to the

Finally, the court addressed the burden of proof placed upon Vice President Gore by the trial court. Basing the necessary burden on a case from 1982,⁷⁹⁷ the trial court determined that Gore had not demonstrated by a “preponderance of a reasonable probability” that the results would have been different if the votes in Miami-Dade County were counted.⁷⁹⁸ The Supreme Court of Florida explained that this interpretation was erroneous because the Florida Legislature amended the burden in 1999. Among the 1999 amendments to the contest provision was the inclusion of a list of grounds to contest an election, including section 102.168(3)(c), which stated that the “receipt of a number of illegal votes or a number of legal votes sufficient to change *or place in doubt* the result of the election.”⁷⁹⁹ Implying reasonableness to the statutory standard, the Supreme Court of Florida determined that demonstrating a “reasonable probability” is a significantly higher burden than demonstrating a “reasonable doubt” in order to obtain relief.⁸⁰⁰ Because there were 9000 undervotes in an election decided by only 537 votes, Gore met the statutory threshold contest burden.⁸⁰¹

With the proper standard of review, the Supreme Court of Florida considered the allegations in the complaint, requiring them to determine what constituted a “legal vote.”⁸⁰² The court turned to the “legislative policy” established in the statutory scheme, determining that the legislature strongly emphasized discerning a voter’s intent.⁸⁰³ Furthermore, the court determined that it, like other states, has repeatedly held that if the voter’s intent may be discerned from the ballot then the vote constitutes a legal

contrary); Pullen v. Mulligan, 561 N.E.2d 585 (Ill. 1990) (holding that votes could be recounted by manually to the extent that voter’s intent could be determined with reasonable certainty, despite the existence of a statute which provided that punch card ballots were to be recounted by automated tabulation equipment). Both *Delahunt* and *Pullen* were cited by the Supreme Court of Florida in *Palm Beach County Canvassing Board I v. Harris*.

797. *Gore III*, 772 So. 2d at 1255.

[I]t is well established and reflected in the opinion of Judge Joanos and Smith v. Tine [sic], that in order to contest election results under Section 102.168 of the Florida Statutes, the Plaintiff must show that, but for the irregularity, or inaccuracy claimed, the result of the election would have been different, and he or she would have been the winner.

Id. (quoting the trial court’s analysis in *Gore I v. Harris*, which referenced *Smith v. Tynes*, 412 So. 2d 925 (Fla. 1st Dist. Ct. App. 1982)).

798. *Id.*

799. FLA. STAT. § 102.168(3)(c) (2000).

800. *Gore III*, 772 So. 2d at 1255.

801. *Id.* at 1256.

802. *Id.*

803. *Id.*

vote.⁸⁰⁴ Therefore, a legal vote is one in which there is a “clear indication of the intent of the voter.”⁸⁰⁵

The court then turned to whether the failure of a county canvassing board to count a legal vote constituted “rejection.”⁸⁰⁶ The court looked to the legislative intent to import the common law meaning of “rejection,”⁸⁰⁷ and the cases interpreting the common law quo warranto action.⁸⁰⁸ By doing so, the court recognized that “rejection” includes the failure to count legal votes.⁸⁰⁹ It concluded that its analysis of the word “rejection” comported with United States Supreme Court precedent and with other jurisdictions.⁸¹⁰

1. The Trial Court’s Refusal to Review Approximately 9000 Miami-Dade Undervotes

Turning to the facts of the instant case, the Supreme Court of Florida first considered the trial court’s refusal to review approximately 9000 Miami-Dade undervotes.⁸¹¹ The court determined that the trial court erred on two grounds.⁸¹² First, the Supreme Court of Florida determined that the trial court erred by finding that the Miami-Dade County Canvassing Board had not abused its discretion by failing to count the ballots.⁸¹³ Rather, the Supreme Court of Florida determined that the results of the sample manual recount and the commencement of a full manual recount triggered the Canvassing Board’s “mandatory obligation to recount all the ballots in the county.”⁸¹⁴

804. *Id.*

805. *Gore III*, 772 So. 2d at 1256.

806. *Id.*

807. *Id.* at 1257.

808. *Id.* See *State ex rel. Clark v. Klingensmith*, 163 So. 704 (Fla. 1935) (discussing the court’s conclusion that not counting votes was a rejection of votes).

809. *Gore III*, 772 So. 2d at 1257.

810. *Id.* See *Roudebush v. Hartke*, 405 U.S. 15 (1973). The *Roudebush* court stated:

If a recount is conducted in any county, the voting machine tallies are checked and the sealed bags containing the paper ballots are opened. The recount commission may make new and independent determinations as to which ballots shall be counted. In other words, it may reject ballots initially counted and count ballots initially *rejected*.

Id.

811. *Gore III*, 772 So. 2d at 1258.

812. *Id.* at 1259.

813. *Id.*

814. *Id.* at 1258 (citing *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. App. 2000)). The Supreme Court of Florida also determined that the trial court erred by not following the controlling precedent of

Furthermore, the Supreme Court of Florida determined that the trial court erred by treating the contest as an appellate review of the Miami-Dade County Canvassing Board's actions rather than a *de novo* judicial review.⁸¹⁵ The responsibility to determine whether legal votes were rejected sufficient to change or place in doubt the results of the election lies squarely upon the trial court.⁸¹⁶ Without ever examining the ballots that Vice President Gore claimed the machine failed to register as a vote, the trial court concluded that there was no probability of a different result, refusing to address the issue and denying Gore the only evidence that can be relied upon to establish that a remedy is appropriate.⁸¹⁷

2. The Trial Court's Refusal to Consider the 3300 Votes in Palm Beach County

The Supreme Court of Florida distinguished the Palm Beach County votes from the Miami-Dade County votes.

[U]like the approximately 9000 ballots in Miami-Dade that the County Canvassing Board did not manually recount, the Palm Beach County Canvassing Board did complete a manual recount of these 3300 votes and concluded that because the intent of the voter in these 3300 bal-

the Third District Court of Appeal. *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

The trial court was confronted with motions to count votes on the first and second day of the contest based upon the decision of *Miami Dade County Democratic Party*. Given the time urgency to begin the counting process, the following motions were brought to begin the process: Mot. to Conduct Statewide Manual Recount of all 180,000 "Undervotes" & "Overvotes" in Florida; Emergency Mot. to Commence Counting of Votes in Miami-Dade and Palm Beach Counties Pursuant to Beckstrom and Request for Immediate Hr'g; Mot. to Place Disputed Miami-Dade Ballots in the Registry of the Ct.; Mot. to Place Disputed Palm Beach Ballots in the Registry of the Ct., *Gore I v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000). The Second Circuit rejected the motions and denied them. On December 1, 2000, the Supreme Court of Florida refused to hear the interlocutory appeal on the court's refusal to order the recount that Vice President Gore was lawfully entitled to in Miami-Dade County. *Gore II v. Harris*, 779 So. 2d 269, 270 (Fla. 2000). This may have been in part because of the circuit court's wrongful refusal to sign an order denying the motions to count the votes.

815. *Gore III*, 772 So. 2d at 1252.

816. *Id.* at 1250.

817. *Id.* at 1259. The Supreme Court of Florida saw this as the "ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine such evidence." *Id.* Cf. *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990).

lots was not discernible, these ballots did not constitute 'legal votes.'⁸¹⁸

The Supreme Court of Florida found no error in the trial court's determination that Vice President Gore failed to establish a preliminary basis for relief as to the 3300 Palm Beach County votes.⁸¹⁹ The court said that Gore had "failed to make a threshold showing that 'legal votes' were rejected."⁸²⁰ Although the court reiterated that the trial court does not review a canvassing board's actions under an abuse of discretion standard, the court, without explanation, went on to hold that "in a contest proceeding [the circuit court] does not have the obligation *de novo* to simply repeat an otherwise-proper manual count of the ballots."⁸²¹ The court then held that the canvassing board's actions may constitute evidence that a ballot does or does not qualify as a legal vote.⁸²² The court affirmed the trial court's denial of relief and stated that Vice President Gore "failed to introduce *any evidence* to refute the Canvassing Board's determination that the 3,300 ballots did not constitute 'legal votes.'"⁸²³ The Supreme Court of Florida selectively applied the *de novo* review standard when it held that there was to be *de novo* review by the trial court as to the Miami-Dade County ballots, but on the other hand, said the trial court was correct to accept the counts that had come out of Palm Beach County.

Vice President Gore had produced evidence at trial before the Second Circuit Court of Florida of specific examples of legal ballots that were not counted.⁸²⁴ The trial court repeatedly refused to review the contested ballots.⁸²⁵ In light of the record, the Supreme Court of Florida was presented

818. *Gore III*, 772 So. 2d at 1259.

819. *Id.* at 1259–60.

820. *Id.* at 1260.

821. *Id.*

822. *Id.*

823. *Gore III*, 772 So. 2d at 1260 (emphasis added).

824. During the contest trial, Vice President Gore admitted into evidence transcripts of the Palm Beach County Canvassing Board as well as "ballots reviewed by the Palm Beach County Canvassing Board, which [had been] determined to be an undervote, an overvote, or a vote for a candidate, other than Gore/Lieberman, which [had] been the subject of Democratic Party objections . . ." Tr. of Contest Trial Before Judge Sauls, Dec. 2, 2000, at 43–44, *Gore I v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000).

825. See *Gore II v. Harris*, No. SC00-2385 (Fla. Dec. 1, 2000) (order dismissing, without prejudice, Vice President Gore's petition for "Writ of Mandamus or Other Writ or, in the Alternative, Review of Trial Court Rulings"). This order denied Gore's request to immediately commence counting the contested ballots that the circuit court refused to

to review, the court's analysis merits criticism. The court failed to fully examine the trial court record, which contained specific examples evidencing legal ballots that were not counted in Palm Beach,⁸²⁶ and expert testimony from both sides that manual review of ballots were necessary in close elections.⁸²⁷ During the two-day evidentiary trial before the circuit court, Vice President Gore submitted 3808 ballots that were in question, as well as the transcripts of the Palm Beach County Canvassing Board.⁸²⁸ The ballots, which were admitted into evidence, contained clear evidence of legal votes that were excluded by the Palm Beach County Canvassing Board, including: 1) ballots where the voter mistakenly voted for one presidential candidate, taped over the wrongly punched chad and then voted for Al Gore, were declared overvotes and not counted;⁸²⁹ 2) a damaged ballot on which the voter wrote in the name of Al Gore for President was declared an overvote and not counted;⁸³⁰ 3) several ballots were declared undervotes and not counted where, consistent with other races on the ballot, the voter made a pinhole in the chad for Al Gore for President, which did not fully dislodge the chad;⁸³¹ and 4) a ballot was rejected as an undervote where "one corner is definitely detached, and . . . [a Board member] can see right through it"

review. Certainly, a *de novo* review to make a legal determination as to what constitutes legal votes cannot occur without a court examining the ballots.

826. Tr. of Palm Beach Canvassing Board, Nov. 19, 2000, at 66, 72–73, 75–76, 82, 84–85, Gore I v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000).

827. Experts from both sides concluded that a manual review of contested ballots was necessary to ascertain voter intent. For example, Plaintiffs' expert witness, Kimball Brace, testified that a manual review of punch card ballots might be marked due to defects or limitations in the machines, or by the failure of the voter to completely follow instructions, such that a machine would not register a vote that the voter intended to cast. Tr. of Contest Trial Before Judge Sauls, Dec. 2, 2000, at 78–83, 89–90, 95, Gore I v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000).

Defendants' expert witness, John Ahmann, testified that a manual review of punch card ballots was necessary in very close elections because of limitations in the accuracy of machine counts. The build-up of chads in machines can prevent voters from dislodging a chad, and so requires that machines need to be cleaned. Tr. of Contest Trial Before Judge Sauls, Dec. 3, 2000, at 439, 441–43, Gore I v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000).

828. See discussion *supra* note 827.

829. Tr. of Palm Beach Canvassing Board, Nov. 19, 2000, at 66, 75–76, 82, and 84–85.

830. Tr. of Palm Beach Canvassing Board, Nov. 18, 2000, at 94–97.

831. *Id.* at 20–21.

because the Board said the “policy we adopted before starting was the two-corner . . . approach.”⁸³²

Pursuant to section 102.168 of the *Florida Statutes*, “the [trial] court’s responsibility is to determine whether ‘legal votes’ were rejected sufficient to change or place in doubt the results of the election.”⁸³³ The determination of what constitutes a “legal vote” is subject to *de novo* review by Florida courts.⁸³⁴ It is a legal determination to be made by a court, not a factual determination.⁸³⁵ Without ever examining the 3300 ballots placed into evidence by Vice President Gore, the trial court simply concluded that the Palm Beach County Canvassing Board had acted within its discretion in the counting process when it refused to count those ballots as legal votes.⁸³⁶ The trial court, as well as the Supreme Court of Florida, simply chose to ignore *prima facie* evidence that legal votes had not been counted—the ballots themselves, as reflected in the transcripts of the Palm Beach County Canvassing Board.

Vice President Gore did not request a recount of all Palm Beach County ballots. He properly identified and introduced into evident 3808 legal ballots, which if properly counted, could have changed the result of the election.⁸³⁷ The Supreme Court of Florida’s analysis is based on the proposition that the Palm Beach County Canvassing Board had reviewed all of the ballots. Merely because the Palm Beach County ballots had been counted once by hand, did not satisfy the court’s obligation to determine whether there was a “rejection of a number of legal votes sufficient to change or place in doubt the result of the election.”⁸³⁸ If the Board’s review was improper and it had unlawfully ignored legal votes, then the Board’s review did not comply with their duty to manually recount the ballots and provide an accurate count.⁸³⁹ It was the court’s ultimate legal duty to determine as a matter of law whether or not a challenged ballot constituted a legal vote. The Supreme Court of Florida should not have departed from the

832. Tr. of Palm Beach Canvassing Board, Nov. 19, 2000, at 72–73.

833. *Gore v. Harris III*, 772 So. 2d 1243, 1259 (Fla. 2000).

834. See discussion *supra* note 785 (discussing the review accorded to a county canvassing board). See also discussion *supra* Part II.

835. *Darby v. State ex rel. McCollough*, 75 So. 411, 412 (Fla. 1917).

836. *Gore III*, 772 So. 2d at 1259.

837. See FLA. STAT. § 102.168(3)(c) (2000).

838. *Id.*

839. See *Darby*, 75 So. at 411; *State ex rel. Peacock v. Latham*, 169 So. 597 (Fla. 1936); *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940); *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420 (Fla. 1944); *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1976); *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1998).

de novo standard of review. The idea of a judicial manual recount is not novel. It has long been held that the determination of a sufficient intent to vote for a particular candidate “is ultimately a judicial question,” and is “subject to judicial procedure in which the courts may determine whether the vote . . . should be counted.”⁸⁴⁰

Yet, the Supreme Court of Florida seemed to struggle with and resisted applying the chosen standard to the 3300 Palm Beach ballots. Perhaps the court contemplated that allowing *de novo* review of the chosen Palm Beach County ballots would open the door for future candidates to contest elections based upon a mere assertion, without *prima facie* evidence, that a number of legal votes had not been counted. It seems the court may have feared that any losing candidate might attempt to challenge, *de novo*, millions of votes without a basis, merely by claiming that the challenged votes were “legal votes sufficient to change or place in doubt the result of the election.”⁸⁴¹ Accordingly, the court followed a *de novo* standard in Miami-Dade County, where the ballots had not been reviewed, and something less than *de novo*—an unarticulated standard, where the ballots had been reviewed once in Palm Beach County. Clearly, the court avoided its *de novo* responsibility concerning the Palm Beach County ballots in the face of evidence admitted by Vice President Gore. Rather than avoid the *de novo* standard with regard to the 3300 Palm Beach County ballots, and allowing for a glaringly inconsistent shift in legal analysis, the court could have taken the issues presented by the record below and determined what constituted a threshold showing or *prima facie* evidence necessary to receive *de novo* review afforded by section 102.168 of the *Florida Statutes*.

Clearly, Vice President Gore introduced evidence of legal votes which were not counted by the Palm Beach County Canvassing Board. If Gore’s showing failed to meet his burden to obtain *de novo* review of the ballots in evidence, it would seem the appropriate analysis would require a rejection of the claim for review, with the court stating the requirements needed for a *prima facie* showing to obtain a *de novo* review, and remand to the trial court with direction to determine whether the newly imposed test could be met by the petitioners. To simply say that no evidence had been introduced by Vice President Gore ignored the trial record. By ignoring the record below, the court avoided the rigorous legal analysis necessary to determine whether a *de novo* review of the challenged ballots was warranted.

840. State *ex rel.* Nuccio v. Williams, 120 So. 314 (Fla. 1929). See also *Darby*, 75 So. at 411; Beckstrom v. Volusia County Canvassing Board, 707 So. 2d 720 (Fla. 1998) (ordering a ballot review of 8000 absentee ballots in dispute).

841. FLA. STAT. § 102.168(3)(C) (2000).

3. The Nassau County Machine Recount

With respect to the claim in Nassau County, the circuit court held, without analysis, that “the Nassau County Canvassing Board did not abuse its discretion in its certification of Nassau County’s voting results. Such actions were not void or illegal, and was done with the proper exercise of its discretion upon adequate and reasonable public notice.”⁸⁴² The majority in the Supreme Court of Florida affirmed this holding, without analysis, stating “we find that appellants did not establish that the Nassau County Canvassing Board acted improperly.”⁸⁴³

In reaching this conclusion, the Supreme Court of Florida did not offer any explanation regarding Nassau County’s burden, under section 102.141(4) of the *Florida Statutes*, of overcoming the statutory presumption that the automatic machine recount mandated by statute was correct.⁸⁴⁴ In addition, the court ignored its own holding, just eight pages before in the opinion, that the review of the Board’s actions was a *de novo* review, and not an abuse of discretion review.⁸⁴⁵ There is no discussion in the court’s opinion on whether or not Nassau County overcame the statutory presump-

842. Proceedings in the Cir. Ct. of the Second Jud. Cir., in and for Leon County, Fla., Dec. 3, 2000 at 12, *Gore I v. Harris*, No. 00-2808 (Fla. 2d Cir. Ct. Dec. 4, 2000).

843. *Gore III*, 772 So. 2d at 1260.

844. This was yet another violation of election law. Section 102.141(4) of the *Florida Statutes* provided:

(4) If the returns for any office reflect that a candidate was defeated or eliminated by one-half of a percent or less of the votes cast for such office, that a candidate for retention to a judicial office was retained or not retained by one-half of a percent or less of the votes cast on the question of retention, or that a measure appearing on the ballot was approved or rejected by one-half of a percent or less of the votes cast on such measure, the board responsible for certifying the results of the vote on such race or measure shall order a recount of the votes cast with respect to such office or measure. A recount need not be ordered with respect to the returns for any office, however, if the candidate or candidates defeated or eliminated from contention for such office by one-half of a percent or less of the votes cast for such office request in writing that a recount not be made. Each canvassing board responsible for conducting a recount shall examine the counters on the machines or the tabulation of the ballots cast in each precinct in which the office or issue appeared on the ballot and determine whether the returns correctly reflect the votes cast. If there is a discrepancy between the returns and the counters of the machines or the tabulation of the ballots cast, the counters of such machines or the tabulation of the ballots cast shall be presumed correct and such votes shall be canvassed accordingly.

FLA. STAT. § 102.141(4) (2000).

845. *Gore III*, 772 So. 2d at 1252–53.

tion requiring a certification of the machine recount.⁸⁴⁶ There was no finding in either the trial court's ruling or the Supreme Court of Florida's opinion that Nassau County overcame the statutory presumption in favor of the machine recount.⁸⁴⁷ Furthermore, no analysis was done by the trial court or the Supreme Court of Florida as to the validity of Nassau County's reconstituted canvassing board. The reconstituted board that decided to ignore the results of the machine recount and certify the election night results was a different canvassing board than the board originally constituted to certify the election.⁸⁴⁸ The reconstituted canvassing board was constituted in violation of section 102.141(1) of the *Florida Statutes*, which required that a person who was a candidate on the ballot who had opposition in the election being canvassed could not serve as a member of that county's election canvassing board.⁸⁴⁹ Marianne Marshall was a candidate with opposition for the District 5 seat of the Nassau County Commission.⁸⁵⁰ Since the presidential election disputes involved the canvassing of the same election in which Ms. Marshall had been a candidate, her service on the Nassau County Canvassing Board on November 24, 2000 was in violation of Florida law.⁸⁵¹

Not only did Nassau County fail to overcome the statutory presumption of the validity of the machine recount, it certified the election night results with an unlawfully constituted canvassing board. Neither of these concerns was directly addressed by the trial court or the Supreme Court of Florida. Given the ultimate remedy ordered by the Supreme Court of Florida, a

846. § 102.141(4).

847. *Gore III*, 772 So. 2d 1243; *Gore I v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000).

848. Third Party Compl. of Defs. George W. Bush and Dick Cheney at 46-50, *Gore I*. David Howard, a member of the canvassing board was out of town on November 24, 2000, the day the canvassing board reconvened to certify its totals and was replaced by Marianne Marshall, a candidate for County Commission, who had opposition on the November 7, 2000 ballot. Derek L. Kinner, *All Countywide Incumbents Win in Nassau, Despite Early Trend*, FLA. TIMES-UNION (Jacksonville), Nov. 9, 2000 at B-3.

849. Section 102.141(1) of the *Florida Statutes* provided, in pertinent part:

The county canvassing board shall be composed of the supervisor of elections; a county court judge, who shall act as chair; and the chair of the board of county commissioners. In the event any member of the county canvassing board is unable to serve, is a candidate who has opposition in the election being canvassed, or is an active participant in the campaign or candidacy of any candidate who has opposition in the election being canvassed, such member shall be replaced

FLA. STAT. § 102.141(1) (2000) (emphasis added).

850. See Kinner, *supra* note 848.

851. § 102.141.

statewide recount of the undervotes, the fifty-one vote net gain for Vice President Gore in the machine recount was significant. In concluding that the appellants did not establish that the Nassau County Canvassing Board acted improperly,⁸⁵² the Supreme Court of Florida could not address the question as to whether or not the fifty-one vote net gain for Gore satisfied his burden under section 102.168(3)(c) of the *Florida Statutes*. It would seem that if the Supreme Court of Florida rendered the ultimate question presented by section 102.168(3)(c) concerned “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election,”⁸⁵³ that the court would have included the revised vote total in the current totals. Certainly, there would have been counties that had less than a fifty-one vote difference in their totals if they were permitted to conclude their count of the undervotes as ordered by the Supreme Court of Florida.⁸⁵⁴

4. Whether the Vote Totals Must be Revised to Include the Legal Votes

The Supreme Court of Florida then considered whether the votes identified by the county canvassing boards must be included in the certified totals even though they were received after the deadline set in *Palm Beach County Canvassing Board I v. Harris*.⁸⁵⁵ The court concluded that the trial court erred as a matter of law when it did not include the returns submitted after that deadline.⁸⁵⁶ The court determined that the November 26, 2000 deadline was meant to allow the most time possible for an election contest, and not to prohibit legal votes from being included in the certified totals.⁸⁵⁷ Indeed, the court reiterated that results should be included in the certified total unless their inclusion would preclude an election contest or disenfranchise Florida voters from participating in the election.⁸⁵⁸ Since the inclusion of the identified legal votes did not produce either of these harms, the court determined that they should be included.⁸⁵⁹

852. *Gore III*, 772 So. 2d at 1260.

853. § 102.168(3)(c) (emphasis added).

854. *Gore III*, 772 So. 2d at 1260–62.

855. *Id.* at 1260.

856. *Id.*

857. *Id.*

858. *Id.* See also *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000).

859. *Gore III*, 772 So. 2d at 1260.

Although the court did not address the circuit court's concern that no authority that the circuit court was aware of required that the numbers be included, authority to support the proposition does exist.⁸⁶⁰ In *Boardman v. Esteve*,⁸⁶¹ the Supreme Court of Florida had determined that the will of the voter trumps the technical requirements of the statute.⁸⁶² Furthermore, the court had previously extended *Boardman* to not just apply to the will of the voter, but to include determining the will of the voter.⁸⁶³ Therefore, the court could have again relied upon *Boardman* for the proposition that determining the will of the voters supercedes the technical, scheduling requirements of the statute, reinforcing that the circuit court erred by claiming that no authority existed that required the county canvassing board's legal votes to be included in the certified results.

Based on the error that the Supreme Court of Florida found in the circuit court's determinations regarding the Miami-Dade ballots, the court remanded the case to the circuit court to immediately begin tabulating the Miami-Dade undervoted ballots.⁸⁶⁴ Furthermore, the court created a remedy far beyond that which Vice President Gore had requested by requiring that all of the state's undervotes be counted and added to the results.⁸⁶⁵ Gore only requested that the specific ballots that he was contesting be included in the certified totals, whereas Governor Bush and the intervenors, citizens of western Florida, argued that a recount of the state's ballots, not just the ballots contested by Gore, should be done.⁸⁶⁶ By accepting the latter argument, the court turned away from *Beckstrom v. Volusia County Canvassing Board*.⁸⁶⁷ In *Beckstrom*, the Supreme Court of Florida considered whether the trial court erred as a matter of law by refusing to invalidate a particular group of ballots (absentee ballots) and by refusing to declare that particular group of ballots illegal.⁸⁶⁸ Indeed, the *Beckstrom* court did not require Mr. Beckstrom to contest *all* the ballots, just those

860. Proceedings in the Cir. Ct. of the Second Jud. Cir., in and for Leon County, Fla., Dec. 3, 2000, at 12, *Gore I v. Harris*, No. 00-2808 (Fla. 2d Cir. Ct. Dec. 3, 2000).

861. 323 So. 2d 259 (Fla. 1975).

862. *Id.* at 269.

863. *See generally* *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998).

864. *Gore III*, 772 So. 2d at 1247.

865. *Id.* at 1253.

866. *Id.* at 1247-48; Mot. to Conduct Statewide Manual Recount of All 180,000 "Undervotes" & "Overvotes" in Florida, *Gore I v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000). *See also infra* note 870.

867. 707 So. 2d 720 (Fla. 1998).

868. *Gore III*, 772 So. 2d at 720.

ballots that he believed were illegal. In *Gore III*, the court departed from that principle. Rather, the *Gore III* court did not allow Gore's contest to extend only to the ballots that he wished to contest, but to be applied to ballots that he never intended to contest.⁸⁶⁹ Essentially, the court required the recounting of ballots that were not only presumed valid, but that no party had argued should not be presumed valid.⁸⁷⁰

In a harsh dissent, Chief Justice Wells criticized the majority's conclusions because he believed that they would propel the nation and the state "into an unprecedented and unnecessary constitutional crisis" which would "do substantial damage to [the] country, [the] state, and [the Florida Supreme] Court as an institution."⁸⁷¹ The majority erred, he claimed, by ignoring viable legal theories that would allow the trial court's holding to be sustained.⁸⁷² That theory was that the judiciary should defer to the decisions of executive officials whose duty it is to implement election laws.⁸⁷³ Without allegations of dishonesty, gross negligence, improper influence, coercion, or fraud, the chief justice believed that the judiciary should not be involved in the election process.⁸⁷⁴ However, the chief justice conceded that the *Beckstrom* court allowed judicial involvement if there were substantial noncompliance with election laws.⁸⁷⁵ The chief justice would not have allowed this contest because he believed that it did not constitute substantial

869. *Id.* at 1261–62.

870. Bush asked for recounts in "several other counties." Answer and Affirmative Defenses of Defs. George W. Bush and Richard Cheney to Compl. to Contest Election at 13, *Gore I v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000). *See also* Third Party Compl. of Defs. George W. Bush and Dick Cheney, *Gore I*; Mot. to Conduct Statewide Manual Recount of all 180,000 "Undervotes" & "Overvotes" in Florida, *Gore I*.

871. *Gore III*, 772 So. 2d at 1263 (Wells, C.J., dissenting).

872. *Id.*

873. *Id.* *See* *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993) ("[E]lection laws should generally be liberally construed in favor of the elector. However, the judgment of officials duly charged with carrying out the election process should be presumed correct if reasonable and not in derogation of the law."). *See also Boardman v. Esteve*, where the court stated:

[The] judgments [of election officials] are entitled to be regarded by the courts as presumptively correct and if rational and not clearly outside legal requirements should be upheld rather than substituted by the impression a particular judge or panel of judge might deem more appropriate . . . [C]ourts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law.

Boardman, 323 So. 2d at 844–45.

874. *Gore III*, 772 So. 2d at 1264 (Wells, C.J., dissenting).

875. *Id.*

noncompliance with election laws.⁸⁷⁶ Manual recounts, the chief justice contended, were provided for under the protest provisions of the *Florida Election Code*, including manual recount procedures.⁸⁷⁷ Reading the protest and contest provisions together, the chief justice believed that the legislature's adoption of the contest provision did not set forth a ground for a "duplicative recount by an individual circuit judge."⁸⁷⁸

However, the chief justice's reasoning did not accurately depict the facts or Vice President Gore's request for contest relief. Gore never asked for a "duplicative recount" by a circuit judge. Rather, Gore first claimed that the Palm Beach County Canvassing Board's manual recount was not conducted under the proper standard, resulting in the rejection of a number of legal votes.⁸⁷⁹ Gore simply contested the ballots that were counted under this standard.⁸⁸⁰ Second, Gore claimed that the Miami-Dade County Canvassing Board's manual recount simply *did not include* a specific, segregated number of ballots in their certified total that should have been included, and that some 9000 ballots were never counted in the first instance.⁸⁸¹ Neither of these sets of ballots were counted under the proper standard a single time, therefore, if a circuit judge had determined that counting the contested ballots was the proper remedy, the count would not have been a duplicative recount.

The chief justice also determined that Gore simply restated the grounds for a contest, but did not substantiate a basis to set aside an election.⁸⁸² Accordingly, the chief justice determined that, without this burden being met, Gore was not entitled to have the ballots that he was contesting counted.⁸⁸³ This, the chief justice determined, would be granting Gore a remedy before he establishes that he is entitled to relief.⁸⁸⁴ The chief justice concluded that granting this proposition sets a future precedent that a circuit court must order partial manual recounts upon the "mere filing of a contest," a rule that the chief justice claimed had no basis in law.⁸⁸⁵ Therefore, the chief justice determined that a *pari materia* reading of the protest and

876. *Id.*

877. *Id.*

878. *Id.* at 1265.

879. *Gore III*, 772 So. 2d at 1252.

880. *Id.*

881. *Id.* at 1248.

882. *Id.* at 1264 (Wells, C.J., dissenting).

883. *Id.* at 1266.

884. *Gore III*, 772 So. 2d at 1266 (Wells, C.J., dissenting).

885. *Id.*

contest provisions was necessary.⁸⁸⁶ Accordingly, the chief justice concluded that because the county canvassing boards were statutorily required to be a party defendant to a contest action in the circuit court, the proper standard of review is whether the county canvassing board abused its discretion.⁸⁸⁷ Furthermore, because the protest provision was the only provision with manual recount procedures provided by statute, the chief justice opined that a manual recount may only occur in a protest action.⁸⁸⁸

However, the chief justice's reasoning on this point is also not an accurate depiction of the argument made at trial and on appeal. Vice President Gore claimed that the circuit court must count the ballots at issue on two grounds. First, statistically there were a sufficient number of uncounted or improperly counted ballots in the contested ballots to change or place in doubt the outcome of the election.⁸⁸⁹ Second, as a discovery matter, Gore was entitled to know the votes that are on the ballots to establish at trial that there are a sufficient number of legal votes to change the outcome of the election.⁸⁹⁰ Furthermore, as explained by the majority, the chief justice's determination placed Gore in a "[c]atch-22," requiring a count of the contested ballots to prove that they can "change the outcome" of the election, but only being allowed that count of the ballots as a remedy for the action that he needs it to prove.⁸⁹¹

Additionally, when making a determination of whether a ballot has a "legal vote," the county canvassing board is functioning in a quasi-judicial capacity, making a judicial determination. That determination is a mixed

886. *Id.*

887. *Id.* One of the chief justice's basis for this conclusion was that the county canvassing board is statutorily required to be a party to a contest action. *Id.* See FLA. STAT. § 102.168 (2000).

888. However, in the same opinion, the chief justice deviates from this proposition that the protest provisions may only apply in a protest proceedings. While explaining the "logistical difficulties" of the relief ordered by the court, the chief justice claims that, during the section 102.168 contest, the "questionable ballots must be reviewed by the judicial officer appointed to discern the intent of the voter *in a process open to the public.*" *Gore III*, 772 So. 2d at 1269 (Wells, C.J., dissenting) (emphasis added). However, to support the contention that the contest must be public, the chief justice cites section 102.166(6), the *protest* provision. *Id.* Certainly, if the protest and contest provisions are to be read as separate proceedings, whether a circuit judge's review of *contested* ballots must be public would be controlled by Florida's open record laws, not the *Florida Election Code protest* provisions.

889. *Id.* at 1253.

890. *Id.*

891. *Id.* at 1259 ("The trial court has presented the plaintiffs with the ultimate Catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine such evidence.").

question of law and fact; the board is examining the markings on the ballot and determining whether it fulfills a legal standard of “the intent of the voter.” Even if an election contest is simply an appeal of a county canvassing board’s quasi-judicial determinations, as a mixed question of law and fact, the issue appealed should be reviewed *de novo*.⁸⁹²

Therefore, the chief justice’s characterization of Gore’s action was inaccurate. Gore was not requesting a partial manual recount upon the mere filing of a contest. Rather, Gore was requesting an examination of specific, contested ballots for an initial or proper judicial determination, because the quasi-judicial determination or failure to make a quasi-judicial determination of the ballots by the county canvassing boards was erroneous as a matter of law.

The chief justice criticized the majority for referring to a section regarding “damaged or defective” ballots to establish a legislative policy that courts and county canvassing boards should look to the “clear intent of the voter.”⁸⁹³ However, laying aside that problem, the chief justice contended that whether there is a “clear indication of the intent of the voter” is a meaningless standard because it does not translate to a directive on how exactly to count punch cards.⁸⁹⁴ These “county-by-county decisions,” the chief justice concluded, would eventually cause the Florida election results to be stricken by the federal courts on equal protection grounds.⁸⁹⁵

892. See *Bd. of County Comm’r v. Snyder*, 627 So. 2d 469, 474 (Fla. 1993) (quasi-judicial action is that which has “an impact on a limited number of persons . . . on identifiable parties and interests, where the decision is contingent on a fact or facts arrived at from distinct alternatives presented at a hearing, and *where the decision can be functionally viewed as policy application, rather than policy setting . . .*”) (emphasis added). Quasi-judicial actions are reviewed by Florida courts *de novo* and will only be sustained if they are supported by substantial competent evidence. *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

893. *Gore III*, 772 So. 2d at 1267 (Wells, C.J., dissenting).

894. *Id.* The chief justice explained that the problem in application appears on whether “a county canvassing board [should] count or not count a ‘dimpled chad’ where the voter is able to successfully dislodge the chad in every other contest on that ballot.” *Id.* Without reference to the record, the chief justice concluded that “[t]he county canvassing boards disagree. Apparently, some do and some do not.” *Id.* Furthermore, the chief justice also concluded, in the same dissenting opinion, that neither the Supreme Court of Florida nor the circuit court “has the authority to create the standard by which it will count the under-voted ballots.” *Id.* at 1268. Simply stated, the chief justice’s conclusion was that the present standard did not work, but there was no one who had the power to make it work, so there would be no relief. The chief justice completely ignored Florida precedent of the intent of the voter.

895. Apparently, the chief justice believed that the equal protection concerns regarding manual recounts of punch card ballots suddenly arose in the contest proceedings. However, if

While the chief justice was correct that the protest and contest provisions were silent with regards to the “clear indication of the intent of the voter” standard, the implication made by the chief justice is that it is somehow improper to look to other provisions of the *Florida Election Code* when the legislature provided no guidance under the specific operating provision.⁸⁹⁶ This implication contrasts to the chief justice’s conclusions in *Palm Beach County Canvassing Board I v. Harris*.⁸⁹⁷ There, the chief justice agreed that “[w]here possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with another.”⁸⁹⁸ While the majority was less than clear that it was looking to another portion of the *Florida Election Code* for the “clear indication of the voter” standard,⁸⁹⁹ labeling it simply as a “legislative policy,” it would not be

one accepts that the manual recounts of punch card ballots are “fraught with equal protection concerns,” those concerns existed at the protest proceedings and were challenged in federal court at that time. The chief justice makes this point clear by an earlier citation of a dissenting opinion in an Eleventh Circuit Court of Appeals opinion on the issue. *See Gore III*, 772 So. 2d at 1266 n.28 (Wells, C.J., dissenting) (claiming that “manual recounts by the canvassing board are constitutionally suspect,” and citing *Touchston III v. McDermott*, 234 F.3d 1133 (11th Cir. 2000) (Tjoflat, J., dissenting)). As discussed *supra* in Part IV, the United States Supreme Court chose not to speak to the issue when it was presented to the court in the protest proceedings. *See Siegel II v. LePore*, 531 U.S. 1005 (denying writ of certiorari).

896. *See Bush II v. Gore*, 531 U.S. 98 (2000) (Souter, J., dissenting).

[Section 102.168 of the *Florida Statutes*] does not define a ‘legal vote,’ the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing that the court looked to another election statute, § 101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded ‘if there is a clear indication of the intent of the voter as determined by the canvassing board.’ The court read that objective of looking to the voter’s intent as indicating that the legislature probably meant ‘legal vote’ to mean a vote recorded on a ballot indicating what the voter intended.

Id. at 131. The Supreme Court of Florida need look no further than its existing precedent in defining the legal intent of the voter. *See Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917); *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988).

897. 772 So. 2d 1220 (Fla. 2000).

898. *Id.* at 1235 (per curiam) *vacated by*, *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

899. This is compounded by the fact that the Supreme Court of Florida had previously relied on the Florida Constitution and case law to support this standard. However, the United States Supreme Court’s decision in *Bush v. Palm Beach County Canvassing Board* may have “chilled” the Supreme Court of Florida from relying on the state constitution or its prior precedent, forcing the court to rely on a basis in the *Florida Election Code* to support the “intent of the voter” standard. *See Bush*, 531 U.S. at 78 (“[A] legislative wish to take advantage of the ‘safe harbor’ [of 3 U.S.C. § 5] would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”); *Bush II v. Gore*, 531

harmonious, when the legislature is silent, to construe the *Florida Election Code* to allow for a particular manual recount standard for a “damaged or defective” ballot, but a different standard for other ballots in a manual recount.⁹⁰⁰

The chief justice then criticized the court for holding that the Election Canvassing Commission abused its discretion in refusing to accept either an amended return reflecting the results of a partial manual recount or a late amended return.⁹⁰¹ The basis for the chief justice’s conclusion was that he believed it was “plain error” for the court to hold that the Election Canvassing Commission abused its discretion by enforcing a deadline set by the court.⁹⁰² However, the chief justice misconstrued the holding of the court. The court did not hold that the Election Canvassing Commission abused its discretion.⁹⁰³ Rather, the court held that there was a “rejection of legal votes sufficient to place in doubt the outcome of the election.”⁹⁰⁴ Based on the contest provision, which granted significant power to the judiciary to provide a remedy, the court ordered a manual count of the uncounted ballots.⁹⁰⁵ The court determined, as a judicial procedure, that the contest was *not* a review of the exercise of discretion of the Election Canvassing Commission or the county canvassing boards.⁹⁰⁶ Rather, a contest is a purely judicial proceeding, and the circuit court had erred by treating it otherwise.⁹⁰⁷

The chief justice then turned to Article I, Section 1, Clause 2 of the United States Constitution, and referenced the United States Supreme Court’s conclusion that the state legislature’s authority is “plenary.”⁹⁰⁸ The

U.S. 98, 145 (2000) (Breyer, J., dissenting) (pointing out the previous remand may have made the Supreme Court of Florida “reluctant” in its determinations).

900. Despite the chief justice’s determinations, he does not even attempt to set forth an alternative “uniform” standard. Rather, the chief justice was content to resolve the problem by concluding that “this contest simply must end.” *Gore III v. Harris*, 772 So. 2d at 1268 (Wells, C.J., dissenting). Furthermore, it could be claimed that by implication the ballots are “damaged” or “defective” making the statute applicable. However, the chief justice did not address this argument.

901. *Id.*

902. *Id.*

903. *Id.* at 1252.

904. *Id.* at 1253.

905. *Gore III*, 772 So. 2d at 1262.

906. *Id.* at 1252.

907. *Id.*

908. *Id.* at 1268 (Wells, C.J., dissenting). The basis for this determination was the United States Supreme Court’s reading of *McPherson v. Blacker*, 146 U.S. 1 (1892) in *Bush*

chief justice determined that the legislature has delegated to the county canvassing boards, and only the county canvassing boards, the authority to ascertain the intent of the voter.⁹⁰⁹ Furthermore, the chief justice determined that the legislature did not authorize Florida courts to order partial recounts, resulting in a conflict between the Supreme Court of Florida's order and the United States Constitution.⁹¹⁰

The chief justice's determination overlooks the plain language of the contest provision. The chief justice clearly determined that the legislature may delegate its "plenary" authority, as he concluded it did, when it delegated that authority to the county canvassing boards.⁹¹¹ However, the statute cited by the chief justice, section 102.166(7)(b) of the *Florida Statutes*, was hardly exclusive language.⁹¹² The section, in full, presented a conditional statement: "[I]f a counting team is unable to determine a voter's intent in casting a ballot, the ballot shall be presented to the county canvassing board for it to determine the voter's intent."⁹¹³ However, the contest provision provided a considerably broader delegation of authority, but to the judiciary.⁹¹⁴ It stated that "[t]he circuit judge . . . may fashion such orders as he or she deems necessary to ensure that each allegation in the complaint is investigated, examined, or checked, to prevent or correct any alleged wrong, and to provide *any* relief appropriate under the circumstances."⁹¹⁵ If a party is contesting on the grounds that "legal votes" were

v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000). The Court's analysis of this case is discussed *supra* in Part IV.B.

909. *Gore III*, 772 So. 2d at 1268 (Wells, C.J., dissenting) ("The Legislature has given to the county canvassing boards-and only these boards-the authority to ascertain the intent of the voter. See § 102.166(7)(b), FLA. STAT. (2000).").

910. *Id.* Justice Harding, joined by Justice Shaw, concluded that "partial recounts" were not the appropriate remedy under the circumstances. *Id.* at 1272 (Harding, J., dissenting). However, this is a significantly different conclusion. The chief justice determined, not that such a remedy was inappropriate, but that the legislature never delegated the judiciary the power to fashion such a remedy.

911. *Id.* at 1268 (Wells, C.J., dissenting) (noting that the Florida Legislature properly delegated authority to "ascertain the intent of the voter" to county canvassing boards).

912. *Id.* See Fla. Stat. § 102.166(7)(b) (2000). Had the legislature intended to make the county canvassing boards the only determiner of the intent of the voter, there are a number of ways that it could have drafted the statutory scheme to provide for such a result. Examples include not providing an appeal to the circuit court *de novo* or by providing a presumption to the county canvassing board by statute, statutorily overruling the default *de novo* review. See *De Groot v. Sheffield*, 95 So. 2d 912 (Fla. 1957).

913. FLA. STAT. § 102.166(7)(b) (2000).

914. See § 102.168(8) (emphasis added).

915. *Id.*

rejected, then the extremely broad delegation of the contest statute appears to allow the circuit court to examine the contested ballots to see if they contain “legal votes” and to discern whether those “legal votes” are “sufficient to change or place in doubt the result of the election.”⁹¹⁶

In a separate dissent,⁹¹⁷ Justice Harding concurred with the court that the trial court applied an incorrect standard for a contest proceeding,⁹¹⁸ and that the trial court set forth an incorrect burden of proof that had been legislatively overruled.⁹¹⁹ However, Justice Harding concluded that, despite these erroneous standards the result of the case was unchanged.⁹²⁰ Since a

916. The chief justice then provided a number of practical problems with the court’s relief. One such problem was that the Supreme Court of Florida’s opinion in *Gore III* was issued on December 8, 2000, whereas the safe harbor deadline set by title 3, section 5 of the *United States Code* was December 12, 2000. *Gore III*, 772 So. 2d at 1268 (Wells, C.J., dissenting). Therefore, the chief justice concluded that “under the majority’s time line, all manual recounts must be completed in five days, assuming the counting begins [on December 8, 2000].” *Id.* While the meaning of title 3, section 5 of the *United States Code* is discussed *supra* in Part IV.B, the Supreme Court of Florida had the opportunity to begin the relief at a much earlier date. On November 30, 2000, Vice President Gore requested that the Supreme Court of Florida order an immediate counting of the ballots to ensure that the election contest would be concluded before the deadline for certification of Florida’s electors. Pet. for Writ of Mandamus or Other Writ or, in the Alternative, Review of Trial Ct. Rulings and Brief of Appellants, *Gore II v. Harris*, 779 So. 2d 270 (Fla. 2000) (No. SC-00-2385). The Supreme Court of Florida denied the petition without prejudice. *Gore II*, 779 So. 2d at 270. Thus, the logistical problems the relief ordered were not the fault of the Appellant, Vice President Gore, who foresaw and attempted to prevent the difficulties with the United States Supreme Court’s construction of the “safe harbor” deadline of title 3, section 5 of the *United States Code*. See *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000). The other “practical problems” presented by the chief justice were examined by the United States Supreme Court in *Bush II v. Gore*, 531 U.S. 98 (2000), and will be discussed *infra* in Part IX.

917. Justice Harding was joined in his dissent by Justice Shaw. *Gore III*, 772 So. 2d at 1273 (Harding, J., dissenting).

918. *Id.* at 1270 (“While abuse of discretion is the proper standard for assessing a canvassing board’s actions in a section 102.166 protest proceeding, it is not applicable to this section 102.168 contest proceeding.”).

919. *Id.* at 1271.

[The trial court judge] cited the First District Court of Appeal’s decision in *Smith v. Tynes*, 412 So. 2d 925, 926 (Fla. 1st DCA 1982), as establishing [the reasonable probability that the results of the election would have been changed] standard for election contests *Smith v. Tynes*, which was decided in 1982, addressed the pre-amendment statute which did not specify the grounds for a contest. Thus, the current statutory standard [sufficient to change or place in doubt the result of the election] controls here.

Id.

920. *Id.*

contest action is a legal challenge to the outcome of an election, Justice Harding stated that Vice President Gore did not carry his burden to demonstrate that “the number of legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of [a] statewide election.”⁹²¹ Justice Harding concluded that because a contest action is a contest of the entire election, the purpose of the action is to determine whether the candidate certified as the winner is indeed the statewide winner.⁹²² The problem upon which Gore contested, a “no-vote problem,” was a statewide problem, the true result of which could not be determined because Gore only requested that a subset of the no-votes be counted.⁹²³

Justice Harding further concluded the evidence presented by Vice President Gore at trial did not meet the burden necessary to properly contest the election because he only set forth statistical evidence of the results in two counties.⁹²⁴ Justice Harding contended that Gore failed to present evidence that the statewide result would have been different if all statewide no-votes would have been counted.⁹²⁵ Accordingly, at trial, Gore failed to answer the question of “whether a sufficient number of uncounted legal votes could [have been] recovered from the statewide ‘no-votes’ to change the result of the statewide election.”⁹²⁶

Justice Harding also concluded that the problem with counting punch card ballots is a systemic one, and any remedy would have to be statewide.⁹²⁷ Otherwise, Florida voters would be disenfranchised, and a non-statewide remedy could violate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.⁹²⁸ The remedy requested by Gore did not provide a more accurate depiction of the will of the voters, but instead was an unfair distortion of the statewide vote.⁹²⁹

Finally, Justice Harding determined that the federal restrictions placed on the State of Florida inhibit any remedy possible under the circumstances of this case.⁹³⁰ Referencing title 3, section 5 of the *United States Code*, Justice Harding determined that election controversies and contests must be

921. *Gore III*, 772 So. 2d at 1271 (Harding, J., dissenting).

922. *Id.* at 1271–72.

923. *Id.*

924. *Id.* at 1272.

925. *Id.*

926. *Gore III*, 772 So. 2d at 1272 (Harding, J., dissenting).

927. *Id.*

928. *Id.* See discussion *infra* Part IX.B.

929. *Id.*

930. *Id.*

finally and conclusively determined by December 12, 2000.⁹³¹ With the only appropriate remedy believed by Justice Harding to be a statewide recount of more than 170,000 “no-vote” ballots in five days, he determined that such a remedy would be futile.⁹³² Criticizing the majority, he expressed deep concerns that the court’s remedy would be both impossible and chaotic.⁹³³ The result of the remedy, contended Justice Harding, would be to allow a statewide election to be determined by a manual recount of a single county, Miami-Dade.⁹³⁴ Therefore, the remedy proposed by the majority would create even more uncertainty than the uncertainty in the outcome of the election that presently existed.⁹³⁵

Justice Harding’s dissent fails to acknowledge that the court’s majority chose to fashion the same remedy under section 102.168(8) of the *Florida Statutes* that Justice Harding called for in his dissent—a statewide recount of the undervote. The court’s majority, like Justice Harding, rejected Vice President Gore’s request for a count of the undervotes in Miami-Dade and Palm Beach counties only. Gore did meet his burden under section 102.168(3)(c) of the *Florida Statutes* to place in doubt the outcome of the election. Justice Harding misstated Gore’s burden to obtain relief under this statute. The burden was merely to show that there was either “[r]eceipt of a number of illegal votes or rejection of a number of legal votes sufficient to place in doubt the result of the election.”⁹³⁶ *Beckstrom v. Volusia County Canvassing Board* makes it clear that it was up to the contestant to choose the ballots he wished to challenge to meet the burden required by section 102.168(3)(c) of the *Florida Statutes*.⁹³⁷ Once the burden was met, the court could “fashion such orders as he or she deems necessary . . . to prevent or correct any alleged wrong, and to provide any relief appropriate under such circumstances.”⁹³⁸ Justice Harding merged these two concepts in his dissent. Just because Vice President Gore met his burden under section 102.168(3)(c), by selecting certain counties’ undervotes to be challenged,

931. *Gore III*, 772 So. 2d at 1272 (Harding, J., dissenting). For a discussion of the United States Supreme Court’s construction of this provision, see *supra* Part IV.B.

932. *Id.* at 1272–73. Vice President Gore contended the relevant figure was approximately 60,000 undervotes. See also *Bush II v. Gore*, 531 U.S. 98, 133 n.1, 135 (2000) (Souter, J. dissenting) (pointing out that counsel for Gore made an uncontradicted representation to the Court that the statewide total of undervotes is about 60,000.)

933. *Gore III*, 772 So. 2d at 1273 (Harding, J., dissenting).

934. *Id.*

935. *Id.*

936. FLA. STAT. § 102.168(3)(c) (2000).

937. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998).

938. § 102.168(8).

did not mean the court was bound to accept Gore's proposed remedy if he successfully carried his legal burden.⁹³⁹ As a result of the legal votes already counted as of the date of the decision, there were less than 200 votes separating the candidates.⁹⁴⁰ There were approximately 9000 ballots in Miami-Dade County alone that were not yet counted, which Vice President Gore had a legal right to have counted.⁹⁴¹ Certainly, Gore met his statutory burden of placing in doubt the outcome of the election, and since the majority accepted Justice Harding's remedy, one must question his reason for dissent.⁹⁴²

Justice Harding concluded by stating it was impossible to complete an accurate count of the statewide undervotes in the short time remaining to complete the count.⁹⁴³ Justice Harding ended his dissent by quoting Vince Lombardi in the context of comparing the presidential race with other

939. *Id.* ("The circuit judge to whom the contest is presented may fashion such orders as he or she deems necessary to . . . provide any relief appropriate under such circumstances.").

940. The certified difference between Governor Bush and Vice President Gore was 537. As a result of adding the differences for Palm Beach and Miami-Dade counties, the difference between the candidates was either 154 votes or 193 votes on December 8, 2000. *See Gore III v. Harris*, 772 So. 2d 1243, 1247 n.4-5. (Fla. 2000). This does not include the unlawful overseas ballots. *See Barstow & Van Natta, Jr., supra* note 449. If those votes were deleted from the total, Vice President Gore and Senator Lieberman would have been ahead by ninety-nine votes on December 8, 2000. Letter from Mitchell W. Berger, Attorney at Law, to Editor, N.Y. Times (July 19, 2001) (on file with author). On December 9th, after the United States Supreme Court issued its injunction against counting further votes, Governor Bush filed a motion to prevent this vote count from being discussed with the press and the American people. *Bush I v. Gore*, 531 U.S. 1046 (2000); *Mot. For Emergency Hr'g to Enforce Court Orders, Gore I v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir Ct. Dec. 4, 2000). The Second Circuit Court of Florida denied this motion.

941. *See Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179 (Fla. 3d Dist. Ct. App. 2000). *See also Gore III*, 772 So. 2d at 1258-1261.

942. The authors' disagreement with Justice Harding's reliance on title 3, section 5 of the *United States Code* and the date of December 12 being a requirement for the conclusion of any election contest under Florida law is discussed in connection with the decision of the United States Supreme Court reversing *Gore III v. Harris*. *See discussion infra* Part IX. The authors also disagree with Justice Harding's conclusion that the legislature has plenary power to appoint electors, once the legislature has ceded that power to the citizens of the State of Florida. *See FLA. STAT. § 103.11* (2000); *McPherson v. Blacker*, 146 U.S. 1 (1892). The abiding principle governing all election law in Florida is set forth in Article I, Section 1 of the Florida Constitution: "[a]ll political power is inherent in the people. The enunciation herein of certain rights shall not be construed to deny or impair others retained by the people." FLA. CONST. art. I, § 1. *See discussion supra* Part II.A.

943. *Gore III*, 772 So. 2d at 1272-73 (Harding, J., dissenting).

closely played contests, saying, “[w]e didn't lose the game, we just ran out of time.”⁹⁴⁴ Unfortunately, it needs to be pointed out that much of the time the running of the clock was because of the referee. The Supreme Court of Florida refused to grant a Thanksgiving Day mandamus on the appeal from the decision of the Miami-Dade County Canvassing Board to stop counting ballots.⁹⁴⁵ Some fifteen days were lost on account of the refusal to grant this mandamus. This was especially troubling since the court acknowledged Vice President Gore's lawful right to enforce the “mandatory obligation [of Miami-Dade County] to recount all of the ballots in the county.”⁹⁴⁶

944. *Id.* at 1273.

945. As the Supreme Court of Florida noted:

The Miami-Dade Canvassing Board stated as its reasons that it stopped an ongoing manual recount because it determined that it could not meet this Court's certification deadline. However, nothing in this Court's prior opinion nor the statutory scheme governing manual recounts would have prevented the Board from continuing after certification the manual recount that it had properly started. The Canvassing Board is a neutral ministerial body. *See Morse v. Dade County Canvassing Board*, 456 So. 2d 1314 (Fla. 3d DCA 1984). Therefore, although the Board may have acted in a neutral fashion, the fact remains that three other Boards (Broward, Palm Beach and Volusia) completed the recounts.

On Thanksgiving Day, November 23, 2000, an Emergency Petition for Writ for Mandamus was filed in which Gore sought to compel the Miami-Dade Canvassing Board to continue with the manual recount. Although we denied relief on that same day, in our order denying this relief, the Court specifically stated that the denial was “without prejudice to any party raising any issue presented in the writ in any future proceeding.” Accordingly, at the time that we denied mandamus relief we clearly contemplated that this claim could be raised in a contest action.

Id. at 1259 n.17–18.

946. *Id.* at 1258 (citing Miami-Dade County Democratic Party, 773 So. 2d 1179). The Second Circuit also prevented the vote count from being started by denying Vice President Gore's motion to commence counting of votes in Miami-Dade and Palm Beach Counties, which was filed on November 28, 2000. Emergency Mot. to Commence Counting of Votes in Miami-Dade and Palm Beach Counties Pursuant to Beckstrom and Request for Immediate Hr'g, Gore I v. Harris, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000). The Supreme Court of Florida refused to review the circuit court's orders on an interlocutory basis, in part because Judge Sauls refused to sign an order denying Vice President Gore's motions. Gore was legally entitled to have these votes counted. “The results of the sample manual recount and the actual commencement of the full manual recount triggered the Canvassing Board's ‘mandatory obligation to recount all of the ballots in the county.’” Gore III v. Harris, 772 So. 2d 1243, 1258 (Fla. 2000) (citing Miami-Dade County Democratic Party, 773 So. 2d 1179).

IX. *BUSH V. GORE*A. *The Stay Order*

On December 9, 2000, the United States Supreme Court stayed the remedy ordered by the Supreme Court of Florida.⁹⁴⁷ In an unusual response to a stay order, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented to the Court's granting of a stay. Justice Stevens contended that by granting the stay the Court was departing from three rules of judicial restraint:⁹⁴⁸ 1) the Court had erred in failing to respect the opinion of the highest court of a State;⁹⁴⁹ 2) the Court had failed to construe its own jurisdiction narrowly and exercise that jurisdiction cautiously when the resolution of the issue presented is committed to a coordinate branch of the federal government, in this case Congress;⁹⁵⁰ and 3) the Court departed from declining to express an opinion on a federal constitutional question that was not fairly presented to the court whose judgment is being reviewed.⁹⁵¹ Justice Stevens considered a full discussion of the merits to be impossible under the time constraints, and that without a "substantial showing of a likelihood of irreparable harm,"—a heavy burden that had not been carried—relief should not be granted.⁹⁵² However, Justice Stevens

947. *Bush I v. Gore*, 531 U.S. 1046 (2000). The United States Supreme Court treated Bush's application for a stay as a writ of certiorari and expedited briefs and oral argument. *Id.* However, the Court denied certiorari on the same issues when presented from the Eleventh Circuit Court of Appeals in *Seigel II v. LePore*. 531 U.S. 1005 (2000).

948. *Bush I*, 531 U.S. at 1047 (Stevens, J., dissenting).

949. *Id.* See *Stringer v. Black*, 503 U.S. 222, 235 (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law."); *Duckworth v. Egan*, 492 U.S. 195, 211 (1989) (warning of the care that must be taken by a federal court when reviewing the judgments of state courts and that "the exercise of federal power should not be undertaken lightly where no significant federal values are at stake").

950. *Bush I*, 531 U.S. at 1047 (Stevens, J., dissenting). See *Baker v. Carr*, 369 U.S. 186 (1962) (declaring that non-justiciable political questions include those matters that are committed by the constitution to another branch of government); see also *Powell v. McCormick*, 395 U.S. 486 (1969) (stating the House of Representatives is the sole judge of the qualifications of age, residency, and citizenship because they are "textually committed"); *Nixon v. United States*, 506 U.S. 224 (1993) (stating the "Senate's decision to conduct impeachment trial in committee was non-justiciable political question because textually committed").

951. *Bush I*, 531 U.S. at 1047 (Stevens, J., dissenting).

952. *Id.* Justice Stevens contended that, in his view, counting legally cast votes cannot constitute irreparable harm. *Id.*

determined that irreparable harm could occur to both Vice President Gore and Governor Bush if the stay was granted.⁹⁵³ Considering those concerns and the ambiguity of whether the decision of the Supreme Court of Florida violated federal law, Justice Stevens dissented to the entry of the stay.⁹⁵⁴

In an extremely rare move, Justice Scalia responded to Justice Stevens' dissent, offering an opinion concurring with the entrance of the stay order.⁹⁵⁵ Without addressing the merits, Justice Scalia established that a majority of the Court "believe[s] that [Bush has] a substantial probability of success" on the merits.⁹⁵⁶ On the issue of irreparable harm, Justice Scalia dismissed Justice Stevens' framing of the issue as whether "[c]ounting every legally cast vote ca[n] constitute irreparable harm."⁹⁵⁷ Rather, Justice Scalia framed the issue before the Court as "whether the votes that have been ordered to be counted are, under a reasonable interpretation of Florida law, 'legally cast vote[s].'"⁹⁵⁸ Therefore, Justice Scalia determined that there was a threat of irreparable harm that he characterized as "a cloud upon what [Bush] claims to be the legitimacy of his election."⁹⁵⁹ Justice Scalia saw

953. *Id.* at 1047–48. Justice Stevens noted that granting the stay would harm Gore and the public because the "entry of the stay would be tantamount to a decision on the merits in favor of the applicants." *Id.* See *Nat'l Socialist Party of America v. Skokie*, 434 U.S. 1327 (1977). Further, Justice Stevens implied that by granting the stay Bush and the entire nation could suffer irreparable harm because preventing the relief "will inevitably cast a cloud on the legitimacy of the election." *Bush I*, 531 U.S. at 1048 (Stevens, J., dissenting).

954. *Id.* Justice Stevens determined that the Supreme Court of Florida's decision gave weight to a "legislative command," consistent with earlier Florida decisions "ascertaining that the will of the voters [is] paramount." *Id.* See *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1998); *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1976); *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420 (Fla. 1944); *State ex rel. Peacock v. Latham*, 169 So. 597, 598 (Fla. 1936); *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940). As well as being consistent with other states, Justice Stevens determined that the Supreme Court of Florida's decision reflects the basic principle inherent in democracy and the federal constitution, that every legal votes should be counted. *Bush I*, 531 U.S. at 1048; *accord* *Roudebush v. Hartke*, 405 U.S. 15 (1972); see *Pullen V. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *Reynolds v. Sims*, 377 U.S. 533, 544-555 (1964); cf. *Hartke v. Roudebush*, 321 F. Supp. 1370, 1378–79 (S.D. Ind. 1970) (Stevens, J., dissenting).

955. *Bush I*, 531 U.S. at 1046 (Scalia, J., concurring) ("Though it is not customary for the Court to issue an opinion in connection with its grant of a stay, I believe a brief response is necessary to JUSTICE STEVENS' dissent.").

956. *Id.* However, the same "substantial probability for success" was not enough for the United States Supreme Court to grant a stay or even hear the same issues presented in *Seigel II v. LePore*, 531 U.S. 1005 (2000).

957. *Bush I*, 531 U.S. at 1046 (Scalia, J., concurring).

958. *Id.* at 1047.

959. *Id.*

irreparable harm arising from determining which votes were legally cast after counting those votes.⁹⁶⁰

Justice Scalia also framed an additional issue not presented by the dissent: “the propriety, indeed the constitutionality, of letting the standard for determination of voters’ intent—dimpled chads, hanging chads, etc.—vary from county to county, as the Florida Supreme Court opinion, as interpreted by the [trial] [c]ourt, permits.”⁹⁶¹ Justice Scalia determined that having such a count proceed under such circumstances would prevent a “later” count.⁹⁶² Such a “later” count would be prevented he argued, as a result of the “generally agreed” upon degradation of the ballots that makes a subsequent recount “inaccurate.”⁹⁶³

B. *The Per Curiam Decision*

The United States Supreme Court issued an opinion in *Bush II v. Gore* on December 12, 2000,⁹⁶⁴ the day the “safe harbor” of title 3, section 5 of the

960. *Id.*

961. *Id.*

962. *Bush I*, 531 U.S. 1047 (Scalia, J., concurring).

963. *Id.* One is only left to wonder why Broward County ballots that were “generally agreed” to provide “inaccurate” results, according to the per curiam opinion, would later be allowed by the United States Supreme Court to be included in the results of the election, assuming the Court’s goal was indeed to avoid “inaccurate” results. See *Bush II v. Gore*, 531 U.S. 98, 111 (2000) (ending recounts, but not adjusting the changes made to the certified results by the Supreme Court of Florida).

964. *Id.* at 98. While the styling of the case was justifiable to the casual observer, the names “Bush” and “Gore” probably should have never been considered proper parties either at the Supreme Court or in any of the prior proceedings. The true individuals elected in Florida in the 2000 Presidential Election were not Governor Bush and Secretary Cheney or Vice President Gore and Senator Lieberman, but the presidential electors. See FLA. STAT. § 103.011 (2000) (“Votes cast for the actual candidates for President and Vice President shall be counted as votes cast for the presidential electors supporting such candidates.”); § 103.021(2) (“The names of the presidential electors shall not be printed on the general election ballot, but the names of the actual candidates for President and Vice President for whom the presidential electors will vote if elected shall be printed on the ballot . . .”).

This is more than an academic concern. Since the presidential electors are the individuals who are directly elected to a position (presidential elector) by the Florida electorate and not one prospective elector was a party to the suit, either in the United States Supreme Court or below, then it is arguable that the actual parties lacked standing. See Suzanna Sherry, *Essay, The 2000 Presidential Election: What Happens When Law and Politics Collide*, 31 VAND. LAW. 20 (2001). If true, Bush, Cheney, Gore, and Lieberman were limited to relying on Florida law that the real parties in interest in an election dispute are the voters, but no voters were parties in *Bush II v. Gore*. See *Boardman*, 323 So. 2d at 263.

United States Code expired.⁹⁶⁵ The reasoning of five justices appeared in a per curiam opinion.⁹⁶⁶ After reciting the facts,⁹⁶⁷ the Court framed several issues that were presented. The first issue concerned whether the Supreme Court of Florida violated Article II, Section 1, Clause 2 of the United States Constitution and failed to comply with title 3, section 5 of the *United States Code*, by establishing new standards for resolving presidential election contests. The second issue concerned whether the use of manual recounts, absent any standard, violates the Equal Protection and Due Process Clauses.⁹⁶⁸

The framing of the issues alone demonstrates the awkward position in which the Supreme Court of Florida was placed when it initially considered Vice President Gore's election contest. The first issue presents a constitutional violation if the Supreme Court of Florida had clarified the "intent of the voter" standard, a violation that was strongly implied by the remanded opinion in *Bush v. Palm Beach County Canvassing Board*.⁹⁶⁹ The second issue, however, presents the converse. If the Supreme Court of Florida *did not* clarify the "intent of the voter" standard, then the manual recounts

However, in order to establish such third party standing, whether for presidential electors or voters, the actual parties would have to show: 1) the third parties were unlikely to be able to sue, which voters can do in Florida; 2) there is a "close relationship" between the parties and the third party, such as a parent-child or doctor-patient relationship, which also did not exist in these cases; or 3) the party is claiming a statute is "overbroad," and the case is brought under the First Amendment, which clearly does not apply in the election cases. *See, e.g., Barrows v. Jackson*, 346 U.S. 249 (1953); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). Despite these concerns about a fundamental preliminary issue, *no court and no party even questioned* whether the parties had standing. That the United States Supreme Court did not even approach this issue is quite surprising considering that, somewhat recently, three of the Justices that joined in the Court's per curiam opinion have strictly limited which parties have standing by requiring that "the party seeking review be himself among the injured." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992).

965. *Bush II*, 531 U.S. at 110.

966. There has been extensive speculation on the actual author of the per curiam opinion. *See, e.g., Linda Greenhouse, Election Case a Test and a Trauma for Justices*, N.Y. TIMES, Feb. 20, 2001, at A1.

967. *Bush II*, 531 U.S. at 100-03.

968. *Id.*

969. *Id.* *See Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) ("Since [title 3, section] 5 [of the *United States Code*] contains a principle of federal law that would assure finality of the State's determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the 'safe harbor' would counsel against any construction of the [Florida] Election Code that Congress might deem to be a change in the law.") (emphasis added). However, it remains debatable whether any legislative wish exists, and how the Florida Legislature was to invoke any desire to take advantage of it.

violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.⁹⁷⁰ Essentially, by its construction of Article II, Section 1, Clause 2 of the United States Constitution and title 3, section 5 of the *United States Code*, and its “innovative” reading of *McPherson v. Blacker* in *Bush v. Palm Beach County Canvassing Board*, the United States Supreme Court set up a constitutional dilemma that came to fruition in the election contest.⁹⁷¹

As a practical matter, the Court recognized that the legal issues ensuing from the presidential election sharpened the phenomenon of under-votes.⁹⁷² Two percent of ballots cast nationwide in the presidential election did not register a vote for president for any of various reasons.⁹⁷³ The Court determined that the certified results, presumably of any state that has elected to select electors by voting, only includes those votes in the certification “meeting the properly established legal requirements.”⁹⁷⁴ The Court then called for states to attempt to avoid the issues that have arisen in Florida by avoiding punch card balloting and examining other voting mechanisms.⁹⁷⁵

Turning to the legal issues presented, the Court began by examining the dictates of the United States Constitution,⁹⁷⁶ and limiting its decision in *Bush v. Palm Beach County Canvassing Board*.⁹⁷⁷ Returning to *McPherson v.*

970. *Bush II*, 531 U.S. at 103.

971. See discussion *supra* Part IV.B.

972. *Bush II*, 531 U.S. at 103.

973. *Id.* The Court described some of those reasons as “deliberately choosing no candidate at all” or types of “voter error” including, “voting for two candidates or insufficiently marking a ballot.” *Id.* Oddly, the Court termed these “overvotes” which naturally raises a question of what “undervotes” are. However, in Florida, a party may contest particular ballots, not just the result of an election. Cf. *Carpenter v. Barber*, 198 So. 49 (Fla. 1940); *Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917).

974. *Bush II*, 531 U.S. at 103. Without citation to a statute or other authority, there is significant ambiguity in the “election results” to which the Court is referring. *Id.* Furthermore, the failure of the Court to set forth authority for this proposition also raises questions of the Court’s meaning of “properly established legal requirements.” *Id.* The Court does not answer what legal requirements are indeed “properly established” or, for that matter, what “legal requirements” even are. *Id.*

975. See *id.* “After the current counting, it is likely legislative bodies nationwide will examine ways to improve the mechanisms and machinery for voting.” *Bush II*, 531 U.S. at 104.

976. *Id.* at 103–04.

977. *Id.* at 104.

The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College. U.S. Const., Art. II, § 1. This is the source for the statement in *McPherson v.*

Blacker, the Court defined the state legislature's "plenary" authority to select the manner of appointing electors.⁹⁷⁸ *McPherson*, the Court explained, only stands for the proposition that there is no constitutional right to vote for electors "unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the Electoral College."⁹⁷⁹ The "plenary" authority of the state legislature is only to "select the manner for appointing electors."⁹⁸⁰ Once that manner of selecting electors has been vested in the people, that right is "fundamental."⁹⁸¹ The Court reiterated a statement from *McPherson* that the legislature can take back the power to appoint electors, pursuant to Article II, Section 1, Clause 2.⁹⁸² Of course, this could not take place after election day.

Blacker, 146 U.S. 1, 35 (1892) that the state legislature's power to select the manner for appointing electors is plenary

Id.

978. *Id.*

979. *Bush II*, 531 U.S. at 104.

980. *Id.* This position is a significant recession from the implication of *Bush v. Palm Beach County Canvassing Board* where the Court vacated the Supreme Court of Florida's decision in *Palm Beach County Canvassing Board I v. Harris* and "counsel[ed] against any construction of the Election Code that Congress might deem to be a change in the law." *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000).

981. *Bush II*, 531 U.S. at 104. The Supreme Court of Florida did not need to rely on the implicit federal constitutional basis for this proposition. Rather, the Florida Constitution's political power provision has historically been construed to include a fundamental right to vote. Accordingly, once the legislature grants the electorate the right to vote, then that right is subject to the restrictions of the state constitution. However, prior to the United States Supreme Court's remarkable construction of Article II, Section 1, Clause 2 of the United States Constitution, one could have made a viable argument that the Florida Constitution's political power provision limits the Florida Legislature from choosing any other manner of selection of presidential electors than popular election. See FLA. CONST. art. I, § 1; see also discussion *supra* Part IV.B.

982. *Bush II*, 531 U.S. at 104. Pursuant to this statement, the Florida Legislature attempted to revoke the power of the electorate to select electors after the election and attempted to give that power to themselves. The reason for this unprecedented move was in order to insure an "invulnerable" or "bulletproof slate of electors." *Florida House of Representatives Approves Its Own Republican Slate of Presidential Electors* (National Public Radio broadcast, Dec. 12, 2000). The decision to do so was immediately ceased at the last minute based on the United States Supreme Court's issuance of the opinion in *Bush II v. Gore*. However, by almost taking such an unprecedented step, the Florida Legislature placed itself in the position of "changing the rules after election day" and eliminating Florida electors from the "safe harbor" provisions of title 3, section 5 of the *United States Code*, subjecting them to congressional scrutiny. Ironically, the Florida Legislature's action to insure an "invulnerable" or "bulletproof slate of electors" would have done exactly the opposite, bringing all the issues that had embroiled Florida onto the congressional floor.

The Court then determined that the right to vote is protected by the Equal Protection Clause of the Fourteenth Amendment.⁹⁸³ Having granted the right on “equal terms,” the Court explained that a state is forbidden from valuing one person’s vote over another by “later arbitrary and disparate treatment.”⁹⁸⁴ The Court further explained that denying a person’s vote is not the only means of violating the clause; “debasement or dilution of the weight of a citizen’s vote” can accomplish the same result.⁹⁸⁵ Therefore, the Court determined that it must consider whether the recount procedures adopted by the Supreme Court of Florida avoid arbitrary and disparate treatment of Florida citizens.⁹⁸⁶

The United States Supreme Court’s central proposition, that Florida initially granted the right to vote “on equal terms,” is subject to criticism. The Florida Legislature gave the citizens of Florida the right to vote for presidential electors.⁹⁸⁷ However, decisions regarding the systems with which citizens would vote were delegated to the counties.⁹⁸⁸ Based on varying considerations, including each county’s population and finances, each county’s officials selected the voting system that they felt was most appropriate. Over time, the voting systems changed and during the 2000 Presidential Election, the most populous counties, which usually include Florida’s urban minority areas, used antiquated “punch card” systems. However, in the less populous, predominantly rural counties of Florida, often dominated by Republican voters, the voting systems are often the more modern “optical scanning” system. The difference between the error rates of the two types of machines is significant. Across Florida, in the 2000 Presidential Election, the “punch card” system resulted in an undervote/non-vote ratio of 1.5% (fifteen of every 1000 punch card ballots registered a non-vote).⁹⁸⁹ However, in the same area, the “optical scanner” system resulted in an undervote/non-vote ratio of 0.4% (four of every 1000 optically scanned ballots registered a non-vote).⁹⁹⁰ As one expert proffered for trial, “[t]he probability that this increase in the undervote is attributable to mere chance is practically zero.”⁹⁹¹

983. *Bush II*, 531 U.S. at 104–05.

984. *Id.*

985. *Id.* at 105.

986. *Id.*

987. *See* FLA. STAT. § 103.011 (2000).

988. § 97.102.

989. Proffer of Direct Testimony of Professor Nicolas Hengartner at 2, *Gore I v. Harris*, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000) (No. 00-2808).

990. *Id.*

991. *Id.*

Accordingly, while the Florida Legislature did grant all of Florida's citizens the equal right to enter the poll and cast a vote, the legislature did not take any steps to ensure that the right to have those votes counted was granted "on equal terms." By delegating the selection of a voting system to individual counties, the Florida Legislature allowed the institution of an election system that would not grant all Florida citizens the equal right to have their votes counted. Indeed, a person who lived in a poor urban area or a populous county had a much higher likelihood of their vote not being counted than a person living in a less populous county. The legislature's decision to delegate the choice of what election system to use to the counties, rather than to create a single, uniform election system, denied the right of suffrage "'by a debasement or dilution of the weight of a citizen's vote . . .'"⁹⁹² Most disturbing was that the debasement and dilution of votes was inherent in Florida's election system. Thus, if an equal protection problem existed under Florida's election system, it began in the legislature, and it was consummated on election day.⁹⁹³ An election protest or contest only magnified a deeply rooted systemic problem.

However, rather than look to the constitutionality of the Florida election system as a whole, the United States Supreme Court focused on the counts of the punch card ballots. The Court determined that the Supreme Court of Florida's order to discern the intent of the voter from punch card ballots, while an "unobjectionable . . . abstract proposition and . . . starting principle," does not have "specific standards to ensure its equal application."⁹⁹⁴ Without citation, the Court determined that such uniform rules were "practicable and . . . necessary."⁹⁹⁵ The Court's basis for such standards were that, while the law often sets forth the need to discern the intent of an actor, the issue in this situation is "how to interpret the marks or holes or scratches on an inanimate object, a piece of cardboard or paper . . ."⁹⁹⁶ The Court implied that such a determination is distinguishable from "whether to believe a witness," because "the fact finder confronts a thing, not a person."⁹⁹⁷ Without specific rules, the Court determined that the

992. *Bush II*, 531 U.S. at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)).

993. The equal protection problem, which existed due to the disparate treatment of votes resulting from unequal voting equipment, is currently being challenged in several states (California, Georgia, Illinois, Florida, Missouri) on the basis of *Bush II v. Gore*. Palermo, *supra* note 370.

994. *Bush II*, 531 U.S. at 106.

995. *Id.*

996. *Id.*

997. *Id.*

ballots had been “unequal[ly] evaluat[ed].”⁹⁹⁸ Based on Chief Justice Wells’ dissenting opinion that “county canvassing boards disagree” on whether to count a “dimpled chad,” the United States Supreme Court determined that whether to accept or reject contested ballots would “vary not only from county to county but indeed within a single county from one recount team to another.”⁹⁹⁹ As examples, the Court set forth the testimony of a Miami-Dade County monitor who testified that he observed the county canvassing board members each apply different standards in defining a legal vote.¹⁰⁰⁰ The Court also turned to Palm Beach County, which “switched to a [per se] rule” during the counting process, an error that the Court claimed resulted in “a court order that the county consider dimpled chads legal.”¹⁰⁰¹

998. *Id.* The citation of the Court on this point referenced a statement made in dissent by Chief Justice Wells in *Gore III v. Harris*, without reference to the record on appeal. The Court made no additional citation to the record on appeal for this point.

999. *Bush II*, 531 U.S. at 106. The statement by the Court incorrectly referenced state law. Chief Justice Wells’ statement referred to a protest proceeding, where the county canvassing board examined the ballots. With a large number of ballots, counting teams, appointed by the county canvassing board with certain procedural safeguards, initially examined the ballots. If the counting team could not come to a conclusive determination of whether the ballot contained a legal vote, the ballot was presented to the county canvassing board to make the determination of whether the ballot contained a legal vote. Therefore, the Court’s statement that the “standards for accepting or rejecting contested ballots might vary . . . from one recount team to another” was incorrect as a matter of Florida law, because any remotely questionable ballot will be presented to the county canvassing board for a final determination, coalescing any differing beliefs by the counting teams in the quasi-judicial agent delegated the power to make such determinations by the Florida Legislature. *Id.* The canvassing boards, chaired by a county court judge, were to determine a legal issue, *not* a fact issue, i.e., what constituted a legal vote. Eventually, that decision would be reviewable by the Supreme Court of Florida. See *Delahunt v. Johnston*, 671 N.E.2d 1241 (Mass. 1996) (detailing that the disputed ballots were reviewed by the Supreme Judicial Court of Massachusetts).

1000. *Bush II*, 531 U.S. at 106.

1001. *Id.* at 106–07. The Court’s statement does not effectively set forth the contents of the order issued by the Fifteenth Circuit Court of Florida. *Florida Democratic Party v. Palm Beach County Canvassing Bd.*, 8 Fla. L. Weekly Supp. 35 (Fla. 15th Cir. Ct. 2000). The Palm Beach County Canvassing Board adopted a per se rule and counted ballots using that rule rather than the “intent of the voter” standard. The Florida Democratic Party filed for declaratory relief in the circuit court. In an oral order, which was followed by a written order, the court ordered that the Palm Beach County Canvassing Board count the ballots under the “intent of the voter” standard, not a per se rule. *Id.* at 35. Nowhere in the order did the court state that “the county [must] consider dimpled chads legal,” as the United States Supreme Court stated. *Bush II*, 531 U.S. at 107. Rather, the court ordered that “[w]here the intention of the voter can be *fairly and satisfactorily* ascertained, that intention should be given effect.” *Florida Democratic Party*, 8 Fla. L. Weekly at 36. However, “Palm Beach

Oddly, the United States Supreme Court mandated that the Supreme Court of Florida erred by not creating a new, more specific, standard after election day.¹⁰⁰² Thus, the Supreme Court of Florida erred by not construing the “intent of the voter” standard with a “construction . . . that Congress might perceive as a change in the law.”¹⁰⁰³ It must be emphasized that Florida had well-developed law on the intent of the voter standard which had emerged during the era of the paper ballot.¹⁰⁰⁴ Certainly, it would not have been a violation of title 3, section 5 of the *United States Code* to apply the law for intent of the voter developed during the era of paper ballots to punch card ballots. The only difference was the technology being used, a stylus and a punch card instead of a pencil and a paper ballot. The Supreme Court of Florida was giving clear direction on the intent of the voter with its reference to *Pullen v. Michigan in Palm Beach County Canvassing Board I v. Harris*.¹⁰⁰⁵ One can only presume that the remand of this case from the United States Supreme Court,¹⁰⁰⁶ coupled with its admonition about title 3, section 5 of the *United States Code* in the remand decision, intimidated the Supreme Court of Florida, and thereby kept them from announcing an intent

County . . . began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment.” *Bush II*, 531 U.S. at 106–07.

1002. *Id.* at 108. The Supreme Court of Florida was given the opportunity to delineate a more specific standard in *Palm Beach County Canvassing Board I v. Harris*, 772 So. 2d 1220 (Fla. 2000), and declined. The Supreme Court of Florida, likely because of what it perceived as a warning not to engage in any action that “Congress might deem to be a change in the law,” declined to provide a more specific standard in the election contest. *See Gore III v. Harris*, 772 So. 2d 1243, 1270 (Fla. 2000); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000).

1003. *Bush II*, 531 U.S. at 98; *see id.* at 78 (“Since [3 U.S.C.] § 5 contains a principle of federal law that would assure finality of the State’s determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”).

1004. *See, e.g.*, *State v. Martinez*, 536 So. 2d 1007 (Fla. 1998); *Boardman v. Esteva*, 323 So. 2d 259 (Fla. 1976); *McAlpin v. State*, 19 So. 2d 420 (Fla. 1944); *State v. Barber*, 198 So. 49 (Fla. 1940); *State v. Latham*, 169 So. 597, 598 (Fla. 1936); *Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917). *See also Bush I v. Gore*, 531 U.S. 1046 (2000) (Stevens, J., dissenting).

1005. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1238 (citing *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990)).

1006. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

of the voter standard for punch card and other machine assisted ballots consistent with Florida law which existed prior to November 7, 2000. However, more questionable is the United States Supreme Court's reasoning as to why the Supreme Court of Florida erred.

Essentially, the United States Supreme Court determined that a judge or county canvassing board that examines a ballot confronts only a question of fact, whether a certain marking exists on a ballot.¹⁰⁰⁷ Accordingly, the ballot examiner needs a specific rule rather than an abstract legal principle in order to properly determine whether a ballot has a legal vote.¹⁰⁰⁸ This conclusion ignores two important principles. First, in a protest, when a county canvassing board makes a determination of whether a ballot has a "legal vote," the canvassing board, a state agent, is functioning in a quasi-judicial capacity, making a determination of a mixed question of law and fact. Further, in a contest, a Florida circuit judge acts in a judicial capacity. When considering whether sufficient "legal votes" were cast to "change or place in doubt the outcome of the election,"¹⁰⁰⁹ if a judge examines a ballot to determine whether there is a "legal vote," the judge, like the canvassing board, is determining a question of law.¹⁰¹⁰ Under the Court's analogy, questions of law remain with a judge and are not given to a jury. Furthermore, there is no need for a clarified standard, as questions of law are appealable *de novo* because the appealing party is claiming that the determination of whether a "legal vote" was cast was erroneous as a matter of law. A party appealing the determination does not argue the factual question of whether a marking exists on a ballot, but that the voter did not manifest an intention to vote for a particular candidate, a legal question. Furthermore, that question is ultimately a matter solely of state law, making the Supreme Court of Florida the final arbiter of the issue.¹⁰¹¹

The Court turned to two other cases that dealt with "arbitrary and disparate treatment to voters in . . . different counties."¹⁰¹² In *Gray v. Sanders*,¹⁰¹³ the Court determined that there was a violation.¹⁰¹⁴ The Court

1007. *Bush II*, 531 U.S. at 107.

1008. *Id.*

1009. FLA. STAT. § 102.168(7)(b) (2000).

1010. See discussion *supra* Part VII.B.

1011. See *Stringer v. Black*, 503 U.S. 222, 235 (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law."); *Duckworth v. Egan*, 492 U.S. 195, 211 (1989) (warning of the care that must be taken by federal court when reviewing the judgments of state courts and that "the exercise of federal power should not be undertaken lightly where no significant federal values are at stake").

1012. *Bush II*, 531 U.S. at 107.

1013. 372 U.S. 368 (1963).

also set forth that it had relied on the propositions espoused in *Gray*, in the context of the presidential selection process, in *Moore v. Ogilvie*,¹⁰¹⁵ where it invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process.¹⁰¹⁶ The Court returned to the principle that granting “one group . . . greater voting strength than another is hostile to the one man, one vote basis of our representative government.”¹⁰¹⁷

The Court’s use of precedent distracts from the true problem and turns the real issue on its head. The Court’s central proposition is that if hand counts were allowed to occur and ballots that were not counted by machine were counted as “legal votes,” then votes that were counted by machine would be diluted.¹⁰¹⁸ First, if voters voted in the election, then their votes should be counted if the intent of the voter can be discerned, even if the vote is imperfectly cast under Florida law.¹⁰¹⁹ Second, the Court’s solution to the “faux-dilution” of votes is to disenfranchise voters whose ballots were not counted by machine.¹⁰²⁰ Such disenfranchisement disproportionately affected punch card counties, counties with larger minority and indigent populations.¹⁰²¹

1014. *Id.* at 381.

1015. 394 U.S. 814 (1969).

1016. *Bush II*, 531 U.S. at 107.

1017. *Id.* (citing *Moore*, 394 U.S. at 819).

1018. *Id.* at 107–08.

1019. See *Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917) (counting and including votes despite imperfect marking of ballot by voter); *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940) (counting and including votes despite imperfect marking of ballot by voter); *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720 (Fla. 1998) (circuit court ordered a manual recount of ballots cast with a writing instrument other than a “No. 2 pencil,” as required by the instructions, and included them in determining the result).

1020. See ALAN M. DERSHOWITZ, *SUPREME INJUSTICE: HOW THE HIGH COURT HIJACKED ELECTION 2000*, at 57–64, 75–81 (2001). Yet, ultimately, the United States Supreme Court found no equal protection problem in allowing some manually tabulated votes from the protest counts to be included in the certified totals, despite that the same “dilution” that the Court was concerned about would occur from including such manually tabulated votes. See *Bush II*, 531 U.S. at 106–07.

1021. See U.S. COMMISSION ON CIVIL RIGHTS, *Voting Irregularities in Florida During the 2000 Presidential Election* (June 2001), at <http://www.usccr.gov/pubs/vote2000/report/main.htm> (finding that disenfranchisement fell “most harshly on the shoulders of African Americans” and “[p]oorer counties . . . were more likely to use voting systems with higher spoilage rates than affluent counties with significant white populations”). See also Bob Drogin, *2 Florida Counties Show Election Day’s Inequities*, L.A. TIMES, Mar. 12, 2001, at A1 (comparing the spoilage rates and prosperousness of Gadsen county, one of Florida’s poorest counties where one in eight votes were not counted, to Leon county, home of the state capital and two universities where less than two in 1000 votes were not counted); Stacey Singer &

The Court determined that the Supreme Court of Florida “ratified” unequal treatment of different groups by mandating that the Miami-Dade and Palm Beach recounts be included in the certified results.¹⁰²² The Court believed that, although not contested by Gore, the Supreme Court of Florida mandated the inclusion of the Broward County recount as well.¹⁰²³ The court was mistaken in this belief in that the Broward County hand count was included in the certified election totals of Secretary Harris.¹⁰²⁴ However, the Court believed including such totals violated the Equal Protection Clause because the different counties used different standards.¹⁰²⁵ As evidence of this phenomenon the Court turned to Broward County’s “uncover[ing]” of three times more votes than Palm Beach County, although the populations of the two counties were similar.¹⁰²⁶ The Court ignored (as did the Supreme Court of Florida) the record evidence of lawful votes not being counted by the Palm Beach County Canvassing Board, and the litigation required to have that Board adopt a standard for counting lawful votes consistent with Florida law as it existed on November 7, 2000.¹⁰²⁷ Without analyzing the evidence, the Court concluded that it was Broward County that was performing the count incorrectly and not Palm Beach County. The Court’s analysis also fails to explain why it was ultimately permissible to include

John Maines, *Many Disqualified Votes in Minority Areas*, CHI. TRIBUNE, Dec. 1, 2000, at 19 (News) (explaining that one-third of the disqualified votes were in predominately black areas and attributing some of the problems to difficulties in punching out chads in the punch cards). *See also* Dershowitz, *supra* note 1020, at 62–63.

1022. *Bush II*, 531 U.S. at 107.

1023. *Id.*

1024. *See* Gore III v. Harris, 772 So. 2d 1243 (Fla. 2000).

On November 9, 2000, a manual recount was requested on behalf of Vice President Gore in four counties—Miami-Dade, Broward, Palm Beach and Volusia. Broward County and Volusia County timely completed a manual recount. It is undisputed that the results of the manual recounts in Volusia County and Broward County were included in the statewide certifications.

Id. at 1258 n.16.

1025. *Bush II*, U.S. at 107. The United States Supreme Court did not refer to any portion of the record in support of this proposition.

1026. *Id.*

1027. *See* Florida Democratic Party v. Palm Beach County Canvassing Bd., 8 Fla. L. Weekly Supp. 35, 35 (Fla. 15th Cir. Ct. 2000) (holding that the Palm Beach County Canvassing Commission has the discretion to utilize whatever methodology it deems proper to determine the true intention of the voter and it should not be restricted in that task.). *See also* discussion *supra* Part VIII.B.

Broward and Volusia Counties' recounted votes in the certified election totals, while other counties would not be included.¹⁰²⁸

The Court then turned to the failure of the Supreme Court of Florida to consider "overvotes" in those ballots that were included in a recount.¹⁰²⁹ The Court presented two problems with not counting overvotes. First, a voter who casts an "overvote," a ballot where the voter voted for more than one candidate, disqualifying the ballot from being included in the results, is being treated disparately because the "overvote" ballot is not counted by hand under the Supreme Court of Florida's ruling, but undervotes would be.¹⁰³⁰ This presumption ignores the possibility that an overvote could have "the requisite indicia of intent" that could be discerned by a manual examination.¹⁰³¹ Second, a voter who casts a vote for two candidates, where only one is read by the machine, improperly has his or her vote included in the total, diluting the votes of those who correctly cast votes.¹⁰³²

There is a question of whether, under the Court's precedent, these problems are an appropriate justification for an equal protection violation. The Court has rarely accepted statistical variations as justifications for equal protection violations.¹⁰³³ Nor has the Court been willing to accept equal protection violations without the action in question being proven to have been enacted with a discriminatory purpose or invidious discrimination.¹⁰³⁴

1028. See Manual Recount of Ballots, Error in Voter Tabulation, Advisory Legal Op. Fla. Att'y Gen. 2000-65 (Nov. 14, 2000). This is especially troublesome when it is apparent that in addition to Broward and Volusia counties, several other counties conducted their own hand recounts and included those votes in the certified totals. See *Aff. of Achim Bergmann, Florida Democratic Party v. Palm Beach County Canvassing Bd.*, 8 Fla. L. Weekly Supp. 35 (Fla. 15th Cir. Ct. 2000) (No. CL00-11078) (listing those counties as Franklin, Gadsden, Hamilton, Lafayette, Seminole, Union, and Taylor counties). It seems that votes counted by hand could only be certified in the protest phase without a constitutional distinction as to why a constitutional impediment arose in the contest phase.

1029. *Bush II*, 531 U.S. at 108.

1030. *Id.*

1031. *Id.*

1032. *Id.*

1033. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279 (1987) (statistical study, assumed by the Court to be true, that indicated a risk that blacks convicted of killing whites were considerably more likely to receive the death sentence was not sufficient evidence to violate equal protection and overturn petitioner's capital punishment sentence). For a more extensive examination of this case and its relation to *Bush II v. Gore*, see Dershowitz, *supra* note 1020, at 74-81.

1034. See *Rogers v. Lodge*, 458 U.S. 613 (1982) (in election redistricting, discriminatory intent was "a requisite to a finding of unconstitutional vote dilution"). Cf. *Keyes v.*

Even if one accepts that this is an equal protection violation, the Court ignores that the violations were present during the protest and poorly substantiates why the concerns it presents are violations of the Equal Protection Clause. The Court's first concern is that overvotes not being counted could result in an inadequate vote count in some circumstances. However, generally when a citizen votes for more than one candidate on a ballot, the vote counting machine does not count a vote because of an excessive number of votes existing on the ballot. Therefore, in almost every circumstance, there is no reason to examine the ballot because there is no way to establish which candidate the voter intended to vote for.¹⁰³⁵ However, in some circumstances, the voter may have placed an additional indication establishing the candidate for which they intended to vote. For example, a visual inspection of a ballot would probably yield a legal vote if the voter marked both candidates, but wrote on the ballot "I want to vote for George W. Bush for President." This concern is a valid equal protection concern when all ballots are not counted in a manual recount. The Court's second concern was that an overvoted ballot, where the second vote did not register as a vote in the machine, would be counted as a "legal vote" improperly. Again, this too is a valid equal protection concern when all ballots are not counted in a manual recount. However, while these concerns exist, in a traditional equal protection analysis, no violation would have been found because, unlike the high number of undervotes, the number of these votes were de minimus. As Justice Stevens said in his dissent, quoting Justice Holmes, "[o]f course, as a general matter, 'the interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play

Denver Sch. Dist., 413 U.S. 189, 203 (1973) ("the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is *purpose* or *intent* to segregate"); Massachusetts Adm'r v. Feeney, 442 U.S. 256, 279 (1979) ("Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effect on an identifiable group."); Bd. of Trustees v. Garrett, 531 U.S. 356 (2001) (stating Americans with Disabilities Act was not properly enacted under the Equal Protection Clause and could not abrogate state immunity because Congress had not demonstrated a discriminatory purpose as well as a racially disproportionate impact).

1035. This was certainly true in the case of the double voted butterfly ballots in Palm Beach County where in approximately 19,120 instances people voted for more than one presidential candidate. See Linda Kleindienst, *19,120 Ballots Invalidated*, SUN-SENTINEL (Ft. Lauderdale), Nov. 9, 2000, at 1A.

in its joints.”¹⁰³⁶ If an equal protection claim applies to this problem, then “Florida’s decision to leave to each county the determination of what balloting system to employ—despite enormous differences in accuracy—might run afoul of equal protection.”¹⁰³⁷

Furthermore, the Court’s emphasis on the need to count “overvotes” is somewhat misplaced.¹⁰³⁸ First, ballots that registered more than one vote are not counted because the voter has exceeded the number of allowed votes; a manual recount would not provide a different result. The Court’s second concern was regarding ballots where the voter “marks two candidates, only one of which is discernable by the machine.” If these ballots result in a vote counted that, upon visual inspection, should have been excluded, any existing equal protection concerns result from the Florida Legislature’s and the Florida Division of Election’s choice of ballot counting machines.¹⁰³⁹ Therefore, again, the equal protection concerns did not arise from any determination by the Supreme Court of Florida, but existed on election day.¹⁰⁴⁰

Indeed, Bush set forth the argument in the Supreme Court of Florida that in order for a contest to be proper, all ballots that did not register a vote must be counted in a contest proceeding, not just the particular ballots that a candidate wants to contest; this was an argument that the court accepted.¹⁰⁴¹ Yet, Bush argued to the United States Supreme Court that by providing the

1036. *Bush II*, 531 U.S. at 126 (Stevens, J., dissenting) (quoting *Bain Peanut Co. of Tex. v. Pinson*, 282 U.S. 499, 501 (1931)).

1037. *Id.* (footnote omitted). Indeed, plaintiffs are now testing the limits of *Bush II v. Gore*, and the higher level of scrutiny required as indicated in Justice Stevens’ dissent. See Palermo, *supra* note 370.

1038. Although “overvotes” and “undervotes” imply that they are opposites, they are completely separate creatures. “Undervotes” or non-votes are ballots that *do not register* a vote when counted by machine. However, “overvotes” are ballots that “contain *more than one vote*,” requiring that they be discounted. *Bush II*, 531 U.S. at 107–08. The Court also implied that its consideration of “overvotes” included ballots that were counted, but should not have been because the second vote on the ballot was not discovered by the counting machine. *Id.* at 108. Oddly, the Court also felt it necessary to emphasize “overvotes” as “not a trivial concern.” *Id.*

1039. *Id.*

1040. Even under the Court’s unique equal protection analysis, overvotes do not present the same concerns as undervotes. See *id.* at 144–45 (Breyer, J., dissenting) (determining that overvotes did not create equal protection concerns because it is undisputed that overvotes, unlike undervotes, had been counted or recorded at least once).

1041. See *Gore III v. Harris*, 772 So. 2d 1243, 1261 (“In addition to the relief requested by appellants to count the Miami-Dade undervote, claims have been made by the *various appellees and intervenors* that because this is a statewide election, statewide remedies would be called for. As we discussed in this opinion, we agree.”); see also *supra* note 870.

statewide remedy that he argued for below, the Supreme Court of Florida had violated the United States Constitution, essentially creating his own constitutional issue.¹⁰⁴²

The Court erred by ignoring the distinction between Florida's protest and contest proceedings. In a protest proceeding, county canvassing boards who chose to manually recount ballots had to "manually recount all ballots."¹⁰⁴³ Doing so fulfilled the purpose of the protest, to ensure that the certified total reflected the voters' expression on the ballots. However, *Bush II v. Gore* was an appeal of a *contest* proceeding. In a contest, the candidate set forth the grounds for which he believed he was entitled to the office. When particular ballots were at issue, the candidate contested those individual ballots. The equal protection concerns set forth by the Court were applicable in the protest proceedings, not the contest. However, the Court refused to consider these constitutional issues when they were presented during the protest.¹⁰⁴⁴

Another equal protection problem presented by the Court was the inclusion of incomplete recount numbers from Miami-Dade County.¹⁰⁴⁵ The Court determined that the Supreme Court of Florida did not assure that the recounts would be completed by the final certification deadline; however, the Court interpreted the Supreme Court of Florida's opinion to permit incomplete recounts to be included in the final certification.¹⁰⁴⁶ The Court attributed this equal protection problem to Vice President Gore's urging for

1042. *Bush I*, 531 U.S. at 1046. Brief of Petitioners at 1, 11, 13, 19–21, 33–49, *Bush II v. Gore*, 531 U.S. 98 (2000) (No. 00-949) (arguing "the majority of the Supreme Court of Florida announced sweeping and novel procedures for recounting selected Florida ballots . . . [that] fails to adhere to Article II, s 1, cl. 2," characterizing the decision as a "creation of a complex, non-uniform and *novel* system for further manual recounts," and asserting that the "novel recount plan . . . would, by definition, conflict with 3 U.S.C. § 5" and violates Article II, and the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

1043. FLA. STAT. § 102.166(5)(c) (2000).

1044. *See Siegel II v. LePore*, 531 U.S. 1005 (2000) (denying certiorari). *Bush* chose to attack the constitutionality of the *Florida Election Code* and the recounts in federal court rather than presenting those issues in the Florida courts. Accordingly, the protest proceedings in the Supreme Court of Florida did not include a constitutional challenge. *See Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1228 n.10 (stating that the parties have not raised the constitutionality of the *Florida Election Code*); *Palm Beach County Canvassing Bd. II v. Harris*, 772 So. 2d 1273, 1281 n.7.

1045. *Bush II*, 531 U.S. at 108.

1046. *Id.* This, of course, was not correct insofar as the Supreme Court of Florida required the statewide undervote recount be completed when the Supreme Court of Florida ordered it.

a “truncated contest period.”¹⁰⁴⁷ However, the Court determined that expediency did not diminish or excuse the violation of equal protection guarantees.¹⁰⁴⁸

The Court also outlined practical difficulties with the ordered recount.¹⁰⁴⁹ The Court determined that one such difficulty was the failure of the Supreme Court of Florida to specify who would recount the ballots.¹⁰⁵⁰ This failure, stressed the Court, has “forced” a number of “county canvassing boards . . . to pull together ad hoc teams comprised of judges from various circuits who had no previous training in handling and interpreting ballots.”¹⁰⁵¹ Any observers, set forth the Court, “were prohibited from objecting during the recount.”¹⁰⁵² However, the Court overlooked the fact that a manual recount in the election contest would be overseen by a single judicial officer.¹⁰⁵³ Ironically, the potential problem of decentralized decision making that the Court determined violated the Equal Protection Clause was not present in an election contest, only in a protest, an area where the Court declined to comment.¹⁰⁵⁴

The Court next attempted to limit its holding by specifying three distinguishing characteristics of the Supreme Court of Florida’s order. First, this was a statewide recount.¹⁰⁵⁵ Second, the recount was under the authority of a single state officer.¹⁰⁵⁶ Third, the officer whose authority the recount was being conducted under was a judicial officer.¹⁰⁵⁷ Therefore, because of

1047. *Id.* However, the Court mischaracterized the source of the “truncated contest period.” The reduced contest period necessarily resulted from the “clear abuse of discretion” of Florida Secretary of State Harris. *See Palm Beach County Canvassing Board II*, 772 So. 2d at 1289. Had Secretary Harris not attempted to frustrate the manual counts of the county canvassing board, the litigation that diminished the election contest would not have been necessary. Indeed, Vice President Gore may not have chosen to contest the election at all. Obviously, the injunction of the Court further impeded and ultimately ended any chance to count the uncounted votes.

1048. *Bush II*, 531 U.S. at 108.

1049. *Id.* at 109

1050. *Id.*

1051. *Id.*

1052. *Id.*

1053. *See* FLA. STAT. § 102.168 (2000).

1054. *See Siegel II*, 531 U.S. at 1005 (denying certiorari). Ultimately, the authority for determining what constituted a legal vote belonged to the Supreme Court of Florida in both the protest phase and the contest phase of the election dispute. *See* cases cited *infra* note 1064.

1055. *Bush II*, 531 U.S. at 109.

1056. *Id.*

1057. *Id.*

the individual factual complexities that appear with each election individually, the Court limited its consideration of the issues specifically to the facts before it.

While the Supreme Court of Florida did order a statewide recount, that is hardly a distinguishable characteristic under the *Florida Election Code*. Had a party requested each county to recount their ballots in the protest and had that request been granted, then the same result would have occurred.¹⁰⁵⁸ Furthermore, the Supreme Court of Florida provided the opportunity to both parties for a full statewide recount of the ballots,¹⁰⁵⁹ and if any time constraints were the concern of the United States Supreme Court, they were purely self-created.¹⁰⁶⁰ Although the Court criticized the practice of a single state officer undertaking the recount, such a practice would eliminate the equal protection problems perceived by the Court by having a single person make the ultimate legal decision of what is a “legal vote” rather than “unequal evaluation” that “might vary . . . from one recount team to another.”¹⁰⁶¹ Furthermore, distinguishing because a judicial officer is involved rather than a county canvassing board is hardly effective. When determining what is a “legal vote,” county canvassing boards are acting in a quasi-judicial capacity in making determinations of law.¹⁰⁶² There is no basis to distinguish questions of law determined by an agency in a quasi-judicial capacity and a judicial officer, especially when the ultimate determination of what constituted a legal vote in either instance belonged to the Supreme Court of Florida.¹⁰⁶³ Therefore, limiting the case to its facts is

1058. See FLA. STAT. § 102.166(1) (2000).

1059. See *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1240 n.56; *Palm Beach County Canvassing Bd. II v. Harris*, 772 So. 2d 1273, 1290 n.21.

1060. See *Bush I*, 531 U.S. at 1046 (granting stay of contest manual recount order of Supreme Court of Florida). See also *id.* at 1047 (Scalia, J., concurring) (“The counting of votes . . . does in my view threaten irreparable harm to petitioner, and to the country, by casting a cloud upon what he claims to be the legitimacy of his election.”). But see *Boardman v. Esteve*, 323 So. 2d 259, 263 (Fla. 1976) (“We first take note that the real parties in interest [in an election], not in a legal sense, but in realistic terms, are the voters.”).

1061. *Bush II*, 531 U.S. at 106 (“[T]he 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.”).

1062. See discussion *supra* Part II.C.

1063. See *State ex rel. Chappell v. Martinez*, 536 So. 2d 1007 (Fla. 1988); *Boardman v. Esteve*, 323 So. 2d 259 (Fla. 1976); *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420 (Fla. 1944); *State ex rel. Carpenter v. Barber*, 1998 So. 49 (Fla. 1940); *State ex rel. Peacock v. Latham*, 169 So. 597 (Fla. 1936); *Darby v. State ex rel. McCollough*, 75 So. 411 (Fla. 1917). See also discussion *supra* Part II.C.

inappropriate.¹⁰⁶⁴

Considering the equal protection problems that the Court identified, the Court determined that “it is obvious” that a recount conforming to its dictates could not be conducted “without substantial additional work.”¹⁰⁶⁵ The Court determined that before such a count could be conducted, the state must first set forth a uniform, statewide standard for determining what is a “legal vote.”¹⁰⁶⁶ Second, the state must create practical procedures for implementing the uniform, statewide standard.¹⁰⁶⁷ Third, the state must set forth procedures for orderly judicial review of any disputes that may occur in applying the uniform, statewide standard.¹⁰⁶⁸ Fourth, undervotes and overvotes must be screened out from valid votes, a procedure which, according to the United States Supreme Court, must be approved by the Florida Secretary of State to comply with the *Florida Statutes*.¹⁰⁶⁹

1064. *Bush II*, 531 U.S. at 109 (“Our consideration is limited to the present circumstances.”). Indeed, one member of the Court who joined the Court’s opinion has established that he believes that it is inappropriate for the Court to limit any case to its facts. See *United States v. Virginia*, 518 U.S. 515, 596 (1996) (Scalia, J., dissenting) (“The Supreme Court of the United States does not sit to announce ‘unique’ dispositions. Its principal function is to establish *precedent*— that is, to set forth principles of law that every court in America must follow.”). For an expansive discussion of the ramifications of this holding, see Dershowitz, *supra* note 1020, at 81–84, 122–32.

1065. *Bush II*, 531 U.S. at 110.

1066. *Id.*

1067. *Id.*

1068. *Id.*

1069. *Id.* In a surprising and atypical move, the Court construed Florida law to determine that the Secretary of State would have to approve the machines before they were used to screen votes. *Bush II*, 531 U.S. at 110 (“If a recount of overvotes were also required, perhaps even a second screening would be necessary. *Use of the equipment for this purpose, and any new software developed for it, would have to be evaluated for accuracy by the Secretary of State, as required by FLA. STAT. § 101.015 (2000).*”) (emphasis added). However, by giving such a novel meaning to section 101.015 of the *Florida Statutes*, the United States Supreme Court runs afoul with its own construction of title 3, section 5 of the *United States Code* by changing the rules in the middle of the game. See 3 U.S.C. § 5 (2000).

Furthermore, since *Bush II v. Gore*, Rep. John Conyers, Jr. led the Democratic Investigative Staff of the House Committee on the Judiciary to undertake a comprehensive study of the 2000 Presidential Election, which determined that 38 states have laws that are likely unconstitutional under *Bush II v. Gore*. See Democratic Investigative Staff, House Judiciary Committee, *How to Make Over One Million Votes Disappear: Electoral Slight of Hand in the 2000 Presidential Election* (Aug. 20, 2001); see also ALA. CODE § 17-13-2 (1975); ARIZ. REV. STAT. ANN. § 16-676 (West 2001); ARK. CODE ANN. § 7-5-315 (Michie 1987); CAL. ELEC. CODE § 15631 (2001); COL. REV. STAT. § 1-7-508 (2000); CONN. GEN. STAT. § 9-311 (West 2001); GA. CODE ANN. § 21-2-437(d) (2000); LA. REV. STAT. ANN. § 18:1453 (West 2000); ME. REV. STAT. ANN. tit. 21-A; § 696 (West 2000); MASS. GEN.

The Court then turned to the Supreme Court of Florida's interpretation that "the legislature intended the State's electors to 'participat[e] fully in the federal election process.'"¹⁰⁷⁰ Therefore, the Court determined that the Supreme Court of Florida interpreted the Florida Legislature to require compliance with the "safe harbor" of title 3, section 5 of the *United States Code*, requiring all 2000 Presidential Election controversies to be finally resolved by December 12, 2000.¹⁰⁷¹ Since there is no recount procedure in place satisfying the constitutional standard that the Court set forth on December 12, 2000, the Court believed the proper remedy was to reverse the order of a counting of the ballots.¹⁰⁷² Furthermore, the Court determined that there is simply not enough time to count the ballots and comply with the deadline set in title 3, section 5 of the *United States Code*.¹⁰⁷³

The Court's use of section 5 to set a December 12th deadline is certainly questionable. Section 5, while ensuring that Congress must count the votes of presidential electors, would not have limited Congress' acceptance of the votes of presidential electors selected before December 18th. Therefore, Florida presidential electors could have participated "fully in the federal election process" if they were selected before December 18th.¹⁰⁷⁴ The United States Supreme Court, by requiring a "conclusive

LAWS ch. 54, § 135A (2000); MO. REV. STAT. § 115.453 (2000); N.H. REV. STAT. ANN. 659:64 (2000); N.J. REV. STAT. § 19:28-3 (2001); N.Y. ELEC. LAW § 9-112 (McKinney2001); N.C. GEN. STAT. §§ 163-192.1, 163-175, 163-190, 163-169 (2000); N.D. CENT. CODE § 16.1-16-01 (2000); OHIO REV. CODE ANN. §§ 3505.27, 3506.15 (West 2001); OR. REV. STAT. § 254.505 (1999); S.C. CODE ANN. § 7-13-1120 (Law. Co-op. 2000); S.D. ADMIN. R. 5:02:09:05 (2001); TENN. CODE ANN. § 2-7-133 (2001); UTAH CODE ANN. § 20A-4-401 (2001); VT. STAT. ANN. tit. 17 § 2587 (2000); VA. CODE ANN. §§ 24.2-644, 24.2-628(B)(1) (Michie 2000); WASH. REV. CODE § 29.64.070 (2000); W. VA. CODE § 3-6-5 (1999); WYO. STAT. ANN. § 22-14-104 (Michie 2001). Hawaii has no recount statute and no procedure for counting contested ballots. Kentucky, Montana, Nebraska, and New Mexico have no standards for determining unclear ballots. Ohio, while providing specific standards, appears to abrogate the power to choose electors from the state legislature in violation of the principles of Chief Justice Rehnquist's concurring opinion.

1070. *Bush II*, 531 U.S. at 109. The Supreme Court of Florida determined that returns may only be rejected if their inclusion will "compromise the integrity of the electoral process . . . by precluding Florida voters from participating fully in the federal electoral process." *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237.

1071. *Bush II*, 531 U.S. at 111.

1072. *Id.*

1073. *Id.* But see *Bush I*, 531 U.S. at 1046 (staying manual count).

1074. See *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1237.

selection of electors” that Florida never expressed, sets forth a “legislative wish” that simply never existed.¹⁰⁷⁵

C. *The Rehnquist Concurrence*

Joining the per curiam opinion, Chief Justice Rehnquist, joined by Justice Scalia and Justice Thomas set forth additional reasons for their decision to reverse the Supreme Court of Florida.¹⁰⁷⁶ The Chief Justice began by distinguishing a presidential election from any other election.¹⁰⁷⁷ By doing so, the Chief Justice implicitly justified intervention because, based on this logic, the election of presidential electors creates a federal question. However, the Chief Justice determined that the principles of comity and respect for federalism require deference in most cases.¹⁰⁷⁸ In the instant case, however, that rule does not apply because of the specific reference to state legislatures in Article II, Section 1, Clause 2 of the United

1075. While title 3, section 5 of the *United States Code* is a federal law, whether the Florida Legislature expressed a “legislative wish” to take advantage of its safe harbor is a question of state law. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000) (“Since § 5 contains a principle of federal law that would assure finality to the State’s determination if made pursuant to a state law in effect before the election, a legislative wish to take advantage of the ‘safe harbor’ would counsel against any construction of the Election Code that Congress might deem to be a change in the law.”). However, there is no statute in the *Florida Election Code* that directly provides that the legislature wanted to take advantage of the safe harbor provision. Nor did the Supreme Court of Florida state that such a “legislative wish” existed prior to election day. Also, by claiming that a “legislative wish” exists that the Florida Legislature never codified in a statute, the United States Supreme Court violated its own construction of title 3, section 5 of the *United States Code* by “changing the rules” after the election. See *Bush II*, 531 U.S. at 110 (stating that the Supreme Court of Florida’s expression that the Secretary of State’s and Division of Elections’ discretion to ignore amended returns was limited to ensuring Florida voters “participat[e] fully in the federal electoral process” was a “legislative wish” to take advantage of the “safe harbor” of title 3, section 5 of the *United States Code* requiring a conclusive selection of electors by December 12). See also *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1289–90.

Additionally, title 3, section 5 of the *United States Code* is a conditional statement. See discussion *supra* Part IV.B. If the conditions are not met, then Congress does not have to deem the electoral votes conclusive. *Id.* However, by restricting the judicial process of the state in order for Congress to consider electoral votes conclusive, the United States Supreme Court’s construction of title 3, section 5 of the *United States Code* affirms the antecedent and becomes a restriction on the state rather than a restriction on Congress.

1076. *Bush II*, 531 U.S. at 111 (Rehnquist, C.J., concurring).

1077. *Id.* at 112 (“We deal here not with an ordinary election, but with an election for President of the United States.”).

1078. *Id.*

States Constitution.¹⁰⁷⁹ Therefore, the Chief Justice determined that the statutes should be elevated in significance.¹⁰⁸⁰ To justify this elevated treatment, the Chief Justice relied upon *McPherson v. Blacker*,¹⁰⁸¹ where the Chief Justice determined that clause 2 “‘convey[s] the broadest power of determination’ and ‘leaves it to the legislature exclusively to define the method’ of appointment.”¹⁰⁸² The Chief Justice determined that a “significant departure” from the *Florida Election Code* presents a federal constitutional question, justifying the United States Supreme Court’s intervention.¹⁰⁸³

The Chief Justice’s method of establishing a federal question and justifying federal intervention is not beyond question. While stating that the instant case is one of “few exceptional cases” in which intervening in a state’s separation of powers is justified, the Chief Justice failed to present an example of any other case where the Court has undertaken the same action. Thus, the Chief Justice’s implication was that the Court’s action in the instant case was rare, but not unprecedented. However, by not providing another case where the Court took similar action, the practical effect is that the Court provided not just a rare judgment, but a unique one.¹⁰⁸⁴

Furthermore, the Chief Justice’s use of *McPherson v. Blacker* to support the elevated treatment he accords to the *Florida Election Code* appears somewhat out of context in the Chief Justice’s opinion. The Chief Justice’s opinion implies that *McPherson* specifically determined that the Constitution “conveys the broadest power of determination” to the state legislature.¹⁰⁸⁵ First, as discussed at length above, the more reasonable proposition is that Article II, Section 1, Clause 2 of the United States

1079. *Id.* Specifically, Chief Justice Rehnquist stated that there are “a few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of a State’s government.” *Id.* However, the Chief Justice cited no other case that established that such a determination is part of a select category rather than a unique determination.

1080. *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring) (“[T]he text of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance.”).

1081. 146 U.S. 1 (1892).

1082. *Bush II*, 531 U.S. at 113 (Rehnquist, C.J. concurring) (quoting *McPherson v. Blacker*, 146 U.S. 1 (1892)).

1083. *Id.*

1084. The only case cited by the Chief Justice, other than *McPherson* was *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1933), which was cited in support of the general rule that “decisions of state courts are definitive pronouncements of the will of the States as sovereigns.” *Bush II*, 531 U.S. at 112.

1085. *Id.* at 113.

Constitution, was a reservation of power by the states, rather than a grant of power by a newly formed federal government.¹⁰⁸⁶ Second, in the portion of *McPherson* quoted by the Chief Justice, the *McPherson* court was contrasting the differing methods of selecting presidential electors and contrasting it with those of congressional representatives.¹⁰⁸⁷ While the constitution provided a specific method of selection for congressional representatives, it did not infringe upon the flexibility that could be exercised by a state in the selection of presidential electors by allowing the citizens of the state, through its state representatives, to determine the manner of selection. The *McPherson* court illustrated that the manner of selection could be “by popular vote,” by “general ticket,” by plurality, or a “majority . . . alone [can] choose the electors.”¹⁰⁸⁸ Above all else, when selecting presidential electors, the *McPherson* court was clear that the constitution recognizes that the people act through their representatives in the state legislature, and leaves it to the state legislature exclusively to define the method of effecting the object.”¹⁰⁸⁹

Finally, the *McPherson* court also determined that the framers of the constitution used “words in their natural sense” so that “resort to collateral aids to interpretation is unnecessary.”¹⁰⁹⁰ Therefore, while discussing that the meaning of the word “appoint” may not be an ideal description of a popular election, the *McPherson* court established that “it is sufficiently comprehensive to cover [popular election], and was manifestly used as conveying the broadest power of determination.”¹⁰⁹¹ The *McPherson* court then turned to the use of the word “appoint” in the Articles of Confederation, in a 1787 Congressional Resolution, and at the Constitutional Convention to include popular elections.¹⁰⁹² Thus, the phrase “broadest power of

1086. See discussion *supra* Part IV.B.

1087. See *McPherson*, 146 U.S. at 27.

1088. *Id.*

1089. *Id.*

1090. *Id.*

1091. *Id.* at 27(emphasis added).

1092. *McPherson*, 146 U.S. at 27–28. Specifically, the *McPherson* court referred to Section 5 of the Articles of Confederation which provides, in a similar fashion as Article II, Section 1, Clause 2 of the United States Constitution, that “delegates shall be annually appointed in such manner as the legislature of each state shall direct.” *Id.* The framers of the Articles of Confederation were even more fearful of the dangers of a centralized, federal government than the framers of the constitution, and yet used similar language. *Id.* Furthermore, the *McPherson* court referred to another use of the word “appoint” in a resolution of Congress of February 21, 1787, declaring it expedient that “a convention of delegates who shall have been appointed by the several states.” *Id.* at 28. Finally, the

determination” does not describe the exclusive authority of the various state legislatures, as the Chief Justice implied. Rather, the *McPherson* court’s use of the phrase “broadest power of determination” describes the extent of the possible manners of selection of presidential electors.

Nonetheless, with this basis for federal intervention, Chief Justice Rehnquist turned to title 3, section 5 of the *United States Code*.¹⁰⁹³ The Chief Justice determined that section 5 “informs [the] application of” Article II, Section 1, Clause 2 to the *Florida Election Code*.¹⁰⁹⁴ The Chief Justice characterized section 5 as making the state’s selection of electors “‘conclusive’ . . . if the electors are chosen under laws enacted prior to election day, and if the selection process is completed six days prior to the meeting of the electoral college.”¹⁰⁹⁵ According to the Chief Justice, section 5 set up two conditions to Congress conclusively reading a state’s determination of its electors: first, that the electors be chosen under laws enacted prior to election day, and second, that the state’s selection process be completed prior to election day.¹⁰⁹⁶ Then the Chief Justice determined that the duty of the Court is to construe Florida election law to protect the intent of the Florida Legislature “to attain the ‘safe harbor’ provided by § 5” from any contrary construction by Florida courts.¹⁰⁹⁷

However, the Chief Justice’s construction of title 3, section 5 of the *United States Code* is not the only way to read the statute; it could also be read as a restriction upon Congress when Congress counts the votes of the electors from the several states. Thus, when Congress is counting the votes of the electors, those votes may not be contested and must be considered

McPherson court referred to a use of the word “appoint” in a September 17, 1787 resolution at the constitutional convention which expressed the opinion that Congress should have fixed a day “on which electors should be appointed by the states which shall have ratified the same.” *Id.*

1093. *Bush II*, 531 U.S. at 113 (Rehnquist, C.J., concurring).

1094. *Id.*

1095. *Id.* (quoting 3 U.S.C. § 5).

1096. *Id.*

1097. *Id.* The Chief Justice’s only citation for this proposition was *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000). Further, the Chief Justice made no reference to any provision in the *Florida Election Code* that exhibited the Florida Legislature’s desire to take advantage of the “safe harbor” provided by title 3, section 5 of the *United States Code*. Yet, the Chief Justice refers to the specific portions of the *Florida Election Code* that establish that “the [Florida] legislature has delegated the authority to run the elections and to oversee election disputes to the Secretary of State . . . and to the state circuit courts” by citing sections 97.012(1), 102.168(1), and 102.168(8) of the 2000 *Florida Statutes*. *Bush II*, 531 U.S. at 113–14.

conclusive if the two conditions are met. Such a construction creates a restriction on Congress, not the states, and would limit the federal judiciary to determining federal separation of powers issues rather than making the instant case one of “few exceptions” where the Court disregards “comity and respect for federalism.”¹⁰⁹⁸ Yet, the Chief Justice’s construction puts the Court into the position of questioning a state supreme court’s construction of the state’s own law. This result is even more disconcerting when one reads Article II, Section 1, Clause 2, of the United States Constitution as a reservation of power to the states rather than a grant of federal power to the states, as it becomes an infringement upon a power that the framers intended to be controlled solely by state governments.¹⁰⁹⁹

Based on this construction of title 3, section 5 of the *United States Code* and the fact that the election at issue is for presidential electors, the Chief Justice concluded that the Court’s duty in the instant case was to “determine whether a state court has infringed upon the [state] legislature’s authority” by “examin[ing] the law of the State [of Florida] as it existed prior to the action of the [Florida Supreme] court.”¹¹⁰⁰ The Chief Justice then turned to a series of cases to support the proposition that there are “areas in which the Constitution requires [the United States Supreme] Court to undertake an independent, if still deferential, analysis of state law.”¹¹⁰¹

Chief Justice Rehnquist, in citing *NAACP v. Alabama ex rel. Patterson*¹¹⁰² and *Bouie v. City of Columbia*,¹¹⁰³ used two landmark civil rights

1098. *Id.* at 112.

1099. *See* discussion *supra* Part IV.B. Surprisingly, a construction of the federal constitution to limit federalist principles and such a strong federal seizure of power from the states lies contrary to the vast majority of precedent established by the Rehnquist court, much of which was authored by Chief Justice Rehnquist himself. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995) (limiting federal exercise of the commerce clause to channels, instrumentalities, and substantial affect on interstate commerce); *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (finding that the only congressional abrogation of state sovereign immunity can occur through amendments enacted after the Eleventh and that the Indian Gaming and Regulatory Act was not a proper congressional action under the Fourteenth Amendment sufficient to abrogate Florida’s sovereign immunity); *College Savings Bank v. Florida Prepaid Post Secondary Ed. Expense Bd.*, 527 U.S. 666 (1999) (holding that Congress cannot subject a state to suit pursuant to Article I, Section 8 patent power).

1100. *Bush II*, 531 U.S. at 114.

1101. *Id.*

1102. 357 U.S. 449 (1958). This case concerned the right of the NAACP to organize in Alabama. *Id.*

1103. 378 U.S. 347 (1964). This case concerned the right of African Americans to remain seated at the restaurant section of a store during normal business hours, and having no prior notice that their actions would be considered a trespass. *Id.*

cases to support his conclusion that the United States Supreme Court would undertake an analysis of state law based upon his construction of title 3, section 5 of the *United States Code*.¹¹⁰⁴ *Patterson* is the most instructive. In that case, the Attorney General of Alabama, on behalf of Alabama, sought to enjoin the National Association for the Advancement of Colored People (NAACP) from conducting any activities in the State of Alabama, and to oust the association from the State of Alabama.¹¹⁰⁵ The state's claim was that the NAACP had failed to qualify to do business within the state by not complying with a state statute requiring foreign corporations to file their corporate charters with the Secretary of State and designate a place of business and an agent to receive service of process.¹¹⁰⁶ The circuit court ordered the NAACP to produce books and records, including the names and addresses of all of the NAACP's Alabama members and agents.¹¹⁰⁷ With respect to this order, the NAACP ultimately produced all the books and records requested except its membership lists.¹¹⁰⁸ The NAACP refused to produce the membership lists because it entailed a likelihood of a substantial restraint upon its members' rights to freely associate.¹¹⁰⁹ An Alabama Circuit Court held the NAACP in civil contempt for the failure to produce its membership records, and the judgment of contempt was upheld by the Supreme Court of Alabama on procedural grounds.¹¹¹⁰ In addition, the circuit court restrained the NAACP from engaging in further activities in the state or taking any steps to qualify itself to do business in Alabama.¹¹¹¹

In the case against the NAACP, the United States Supreme Court left undisturbed the state court injunction against the NAACP because the question of the injunction was reviewable only after a disposition by the Alabama appellate courts of an appeal from a final judgment entered by a lower state court, an event which had not yet occurred.¹¹¹² The United States Supreme Court did, however, reverse the Supreme Court of Alabama's judgment with respect to the civil contempt.¹¹¹³ The civil contempt was allowed by the Supreme Court of Alabama because the court reasoned the NAACP had chosen the wrong procedural writ to ask the court to overturn

1104. *Bush II*, 531 U.S. at 114–15 (Rehnquist, C.J., concurring).

1105. *Patterson*, 357 U.S. at 452.

1106. *Id.*

1107. *Id.* at 453.

1108. *Id.* at 454.

1109. *Id.* at 458–460.

1110. *Patterson*, 357 U.S. at 445.

1111. *Id.* at 453.

1112. *Id.* at 466–467.

1113. *Id.* at 466.

the contempt citation.¹¹¹⁴ The NAACP chose certiorari when the Supreme Court of Alabama ruled the appropriate writ was mandamus.¹¹¹⁵ Because of the Supreme Court of Alabama's holding, the United States Supreme Court addressed Alabama state law on the issue of the appropriate state law remedy for an appeal from a contempt citation, certiorari or mandamus.¹¹¹⁶ The United States Supreme Court found that the NAACP had a justifiable reliance that the appropriate remedy under Alabama state law was a writ of certiorari.¹¹¹⁷ As the United States Supreme Court noted:

That there was justified reliance here is further indicated by what the Alabama Supreme Court said in disposing of petitioner's motion for a stay of the first contempt judgment in this case. This motion, which was filed prior to the final contempt judgment and which stressed constitutional issues, recited that "[t]he only way in which the [Association] can seek a review of the validity of the order upon which the adjudication of contempt is based [is] by filing a petition for Writ of Certiorari in this Court." In denying the motion, 265 Ala. 356, 357, 91 So. 2d 220, 221, the Supreme Court stated:

"It is the established rule of this Court that the proper method of reviewing a judgment for civil contempt of the kind here involved is by a petition for common law writ of certiorari . . ."

"But the petitioner here has not applied for writ of certiorari, and we do not feel that the petition [for a stay] presently before us warrants our interference with the judgment of the Circuit Court of Montgomery County here sought to be stayed."

We hold that this Court has jurisdiction to entertain petitioner's federal claims.¹¹¹⁸

The United States Supreme Court reviewed state law on the appeal because it was a necessary part of the appeal concerning the NAACP's First and Fourteenth Amendment rights to freely associate.¹¹¹⁹ In this case, the State of Alabama was attempting to obtain the membership lists of the NAACP, and it was attempting to do so through judicial process in the state courts of Alabama.¹¹²⁰ The state courts of Alabama were interpreting their

1114. *Id.* at 456.

1115. *Patterson*, 357 U.S. at 456.

1116. *Id.* at 457-58.

1117. *Id.* at 458 (alterations in original).

1118. *Id.*

1119. *Id.* at 459-61.

1120. *Patterson*, 357 U.S. at 453.

state laws concerning corporations without regard to the United States Constitution's guarantees of freedom of association.¹¹²¹ As the United States Supreme Court said in that case, "[i]t is not of moment that the state has here acted solely through its judicial branch, for whether legislative or judicial, it is still the application of State power which we are asked to scrutinize."¹¹²²

In this case, it was the State of Alabama that was attempting to obtain the membership lists.¹¹²³ The Supreme Court of Alabama had made an incorrect procedural decision favoring the State of Alabama and violating the NAACP's rights. Unlike circumstances of *Bush II v. Gore*, where the state election code "may well admit of more than one interpretation,"¹¹²⁴ interpretation of valid grounds to appeal an Alabama contempt citation was not the subject matter of multiple interpretation.¹¹²⁵ It is significant that in the same case, the Supreme Court of Alabama had advised the NAACP that certiorari was the appropriate writ to appeal a contempt citation.¹¹²⁶

Unlike *Patterson*, there was no application of state power in *Bush II v. Gore*. The Supreme Court of Florida was interpreting election laws reserved to the state under Article II, Section 1, Clause 2 of the United States Constitution.¹¹²⁷ There was no state action being pursued by the State of Florida as there was in *Patterson*. There was no need to review state law absent state action. It is important to note that even in *Patterson*, the Court deferred to the state supreme court and state law by refusing to reverse the order enjoining the NAACP against operating in Alabama until the order became a final judgment.¹¹²⁸ The court cited the interlocutory nature of the injunction order and the need for the Alabama appellate courts to review the order before the United States Supreme Court would reverse a state court ruling on state law.¹¹²⁹ Certainly, Chief Justice Rehnquist in his concurring opinion was not giving the same deference to the Supreme Court of Florida when he supported an intercession prior to a completion of the state court proceedings in *Bush II v. Gore*.¹¹³⁰

1121. See U.S. CONST. amend. I, amend. XIV, § 1.

1122. *Patterson*, 357 U.S. at 463.

1123. *Id.* at 451.

1124. *Bush II*, 531 U.S. at 114 (Rehnquist, C.J., concurring).

1125. *Patterson*, 357 U.S. at 466.

1126. *Id.* at 458.

1127. *Bush II*, 531 U.S. at 112 (Rehnquist, C.J., concurring). The Florida Legislature delegated the responsibility to reserve election contests for presidential elections to the courts of Florida.

1128. *Patterson*, 357 U.S. at 467.

1129. *Id.*

1130. *Bush II*, 531 U.S. at 112 (Rehnquist, C.J., concurring).

In a footnote, the Chief Justice referred to the United States Supreme Court's taking jurisprudence in order to substantiate the proposition that an analysis of a federal constitutional issue often requires that the Court examine the state law to resolve the issue.¹¹³¹ The Chief Justice further determined that constitutional protections would be meaningless if the Court's inquiry could be concluded by a state court finding that state property law accorded a plaintiff no rights.¹¹³² While it is generally correct that the Court sometimes must examine state law to explore a constitutional issue, the Chief Justice's statement is truly one of state action. By characterizing the instant case as akin to a "state supreme court holding that state property law accorded the plaintiff no rights,"¹¹³³ or one requiring "an independent evaluation of state law in order to protect federal" rights,¹¹³⁴ the Chief Justice was not saying that the Supreme Court of Florida improperly deemed a government action unconstitutional. Rather, the Chief Justice asserted that the Supreme Court of Florida is an *unconstitutional actor*.¹¹³⁵

After substantiating federal intervention, the Chief Justice then turned to the *Florida Election Code*, characterizing it as "a detailed, if not perfectly crafted, statutory scheme."¹¹³⁶ The Chief Justice then provided an overview

1131. *Id.* at 115 n.1.

1132. *Id.*

1133. *Id.*

1134. *Id.*

1135. *Bush II*, 531 U.S. at 115 (Rehnquist, C.J., concurring). This is one of the few cases where the United States Supreme Court has charged a state's highest judicial body with *acting* unconstitutionally, rather than erring in *interpreting* a government action as unconstitutional. See, e.g., *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816) (finding that the Virginia Court of Appeals erred by failing to follow the remand instructions to enter judgment for appellant). It is little wonder that Justice Stevens criticized the majority and the concurring opinion for what he perceived were conclusions with a strong political nature that would harm the nation's faith in the judiciary, whether state or federal. *Bush II*, 531 U.S. at 123 (Stevens, J., dissenting).

1136. *Bush II*, 531 U.S. at 116 (Rehnquist, C.J., concurring). After the extensive conflicts that the Supreme Court of Florida found in the *Florida Election Code*, it is odd that the Chief Justice would provide such a complementary description of the *Florida Election Code*. See *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1231-36 (Fla. 2000); *Palm Beach County Canvassing Bd. II v. Harris*, 772 So. 2d 1273, 1284-89 (Fla. 2000). Perhaps by being so complimentary, the Chief Justice was attempting to establish that the Florida Legislature had clearly established the manner of selection of presidential electors. Therefore, the argument that the Florida Legislature never contemplated the instant case could not be considered by Congress when determining whether to question Florida's selection of presidential electors. Indeed, had the Chief Justice not considered the *Florida Election Code* to be well-crafted, it would have justified the Supreme Court of Florida's consideration of the *Florida Election Code*, and it would have provided Senators with a basis for objecting to Florida's votes when they were counted in Congress.

of the *Florida Election Code*, stressing that there is a separation of power created by the Florida legislature in the code.¹¹³⁷ After summarizing the general election procedure, the Chief Justice construed the Florida contest period to “necessarily terminate on the date set by 3 U.S.C. § 5 for concluding the State’s ‘final determination’ of ‘election controversies.’”¹¹³⁸ The Chief Justice’s construction of title 3, section 5 of the *United States Code* as applied to Florida law avoids the “if/then” construction of the statute. While the Chief Justice’s construction is one possible view of the statute, another view of the statute is that if the conditions are not fulfilled by the date set in section 5, then Congress may challenge the state’s selection of presidential electors. However, unlike the Chief Justice’s view, the latter view provides meaning to the conditional construction of the statute.

The Chief Justice discussed the underlying cases, starting with *Palm Beach County Canvassing Board I v. Harris*.¹¹³⁹ Summarizing that decision, the Chief Justice determined, without citation, that Florida law established

1137. *Bush II*, 531 U.S. at 135 (Rehnquist, C.J., concurring). While ceding deference to the separation of powers in the *Florida Election Code*, the Chief Justice does not give deference to the separation of powers in the Florida Constitution under which the Florida Legislature created the code. See FLA. CONST. art. III, § 1; art. IV, § 1; art. V, § 1. The Chief Justice also cites the Supreme Court of Florida’s decision in *Boardman v. Esteva*, 323 So. 2d 259, 268 n.5 (Fla. 1975) for the proposition under Florida law that executive decisions are presumptively correct. *Bush II*, 531 U.S. at 116 (Rehnquist, C.J., concurring). However, the Chief Justice does not defer to the Supreme Court of Florida’s determination of when executive decisions go beyond their presumptive correctness and become impermissible. *Id.*

1138. *Id.* at 117.

1139. In a footnote, the Chief Justice pointed out that the initial decision, *Palm Beach County Canvassing Board I*, was vacated by the United States Supreme Court in *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (Fla. 2000), and that the Supreme Court of Florida had subsequently issued the same judgment in a new opinion on December 11, 2000. *Id.* at 117 n.2. However, the new opinion issued by the Supreme Court of Florida in *Palm Beach County Canvassing Board II* was based upon the *Florida Election Code*, not the Florida Constitution as the *Palm Beach County Canvassing Board I* opinion had been. Such a change in analysis was surely affected by the *Bush v. Palm Beach County Canvassing Board* opinion. “[I]n the case of a law enacted by a state legislature applicable . . . to the selection of Presidential electors, the legislature is . . . acting . . . by virtue of a direct grant of authority made under Art. II, § 1, cl. 2, of the United States Constitution,” and “a legislative wish to take advantage of this ‘safe harbor’ would counsel against any construction of [the Florida] Election Code that Congress might deem to be a change in the law.” *Bush*, 531 U.S. at 76; see also *Gore IV v. Harris*, 773 So. 2d 524, 526 (Fla. 2000) (“The ‘intent of the voter’ standard adopted by the Legislature was the standard in place as of November 7, 2000, and a more expansive ruling would have raised an issue as to whether this Court would be substantially rewriting the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 (1994).”).

that “[t]he certified winner . . . enjoy[s] presumptive validity, making a contest proceeding by the losing candidate an uphill battle.”¹¹⁴⁰ The Chief Justice then concluded that the Supreme Court of Florida, in *Gore III v. Harris*, changed the law as enacted by the Florida Legislature by “empt[ying] certification of virtually all legal consequence during the contest.”¹¹⁴¹ As the basis for this proposition, the Chief Justice referenced the Supreme Court of Florida’s determination that “canvassing boards’ decisions regarding whether to recount ballots past the certification deadline . . . are to be reviewed *de novo*, although the Election Code clearly vests discretion whether to recount in the boards, and sets strict deadlines subject to the Secretary’s rejection of late tallies and monetary fines for tardiness.”¹¹⁴²

The Chief Justice’s characterization of the *Florida Election Code* implied that the Supreme Court of Florida’s holdings were an extraordinary alteration of the code. However, the alteration of the code that blurred the lines between the protest and the contest were from the Florida Legislature. The Florida Legislature amended the *Florida Election Code* in 1999 making the contest provisions more similar to the protest provisions, including allowing electors to contest an election and providing various “grounds for contesting an election” that are similar to the issues presented during the protest.¹¹⁴³ These amendments were central to the Supreme Court of Florida’s decisions.

Further, the Supreme Court of Florida’s decision that the circuit court review the determinations of the county canvassing boards *de novo* was hardly novel. The Chief Justice’s position, like the majority’s, is best

1140. *Bush II*, 531 U.S. at 118 (Rehnquist, C.J., concurring).

1141. *Id.*

1142. *Id.*

1143. *Id.* at 150 (Breyer, J., dissenting). Some of the bases for contesting an election established by the 1999 amendments include: 1) misconduct, fraud, or corruption on the part of any election official or any member of the canvassing board sufficient to change or place in doubt the result of the election; 2) ineligibility of the successful candidate for the nomination or office in dispute; 3) receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election; 4) proof that any elector, election official, or canvassing board member was given or offered a bribe or reward in money, property or any other thing of value for the purpose of procuring the successful candidate’s nomination or election or determining the result on any question submitted by referendum; or 5) any other cause or allegation which, if sustained, would show that a person other than the successful candidate was the person duly nominated or elected to the office in question or that the outcome of the election on a question submitted by referendum was contrary to the result declared by the canvassing board or election board. *Id.*

summarized in the idea that the ballot is a tangible object that must be examined; therefore, what appears on the ballot is a question of fact that must be provided deference. However, the issue is not as simple as the Chief Justice implies. While the casting of a ballot is a factual question, the ballot itself is a document, similar to a contract, which is within a court's province to interpret as a question of law. While the Florida Legislature has deemed county canvassing boards as the bodies that would provide initial legal interpretations, the final arbiter of legal interpretations lies with the Florida courts.¹¹⁴⁴

Having the status of a ballot be considered a legal determination is not without precedent in the State of Florida. Under Florida's zoning scheme, initial determinations are made by state agencies sitting in a quasi-judicial capacity. When appealed to the Florida courts, factual determinations are given considerable weight; however, legal determinations are considered *de novo*. Furthermore, there is a substantial policy basis for considering the question of whether a ballot constitutes a vote to be a legal question. Historically, non-political entities have been deemed best suited to be the ultimate arbiters of elections. If a partisan Secretary of State¹¹⁴⁵ or partisan-composed¹¹⁴⁶ county canvassing boards were to make the determination on factual grounds, there is considerable danger that many votes would not be counted. Yet, the Chief Justice determined that the Florida courts erred by holding that whether a ballot has a vote is a legal determination, requiring *de novo* review. Further, he did so without providing justification.¹¹⁴⁷

1144. See discussion *supra* Part II.B.

1145. See Editorial, *An Unseemly Mix of Data*, MIAMI HERALD, Aug. 10, 2001, at 8B (discussing Katherine Harris' duties as both Secretary of State and Florida Chair of George W. Bush's presidential campaign, and having speeches on behalf of George W. Bush and official statements of the Secretary of State as the chief elections officer appearing on the same computer).

1146. Two of the three members of a county canvassing board are affiliated with a political party. See FLA. STAT. § 102.141 (2000).

1147. See *Bush II*, 531 U.S. at 118 (Rehnquist, C.J., concurring). The question of what constitutes a legal vote being a question of law subject to *de novo* review is a different question from whether or not a canvassing board should start a review of ballots. The latter is a review which Florida law would afford discretion to the reviewing agency—in this case, the canvassing board. Of course, once a canvassing board votes to commence a review of ballots, stopping that review in the middle would constitute an unlawful act entitling a candidate to a remedy. See *Miami-Dade County Democratic Party v. Miami-Dade County Canvassing Bd.*, 773 So. 2d 1179, 1180 (Fla. 3d Dist. Ct. App. 2000); *Gore III v. Harris*, 772 So. 2d 1243, 1258 (Fla. 2000). The Supreme Court of Florida did not hold that a decision by the canvassing board to commence or not commence a ballot review was a *de novo* review. It did

The Chief Justice determined that the Supreme Court of Florida's interpretation of the term "legal vote" departed from the Florida Legislature's intent in the *Florida Election Code*.¹¹⁴⁸ The Chief Justice claimed that "Florida statutory law cannot reasonably be thought to *require* the counting of improperly marked ballots."¹¹⁴⁹ Essentially, the Chief Justice decided that the Supreme Court of Florida's determination that improperly marked ballots must be counted was so far beyond reason that it required reversal. The Chief Justice established as the basis for this conclusion that voters were instructed how to properly vote, that the tabulating machines worked "precisely in the manner designed,"¹¹⁵⁰ and that the reason ballots were not counted was due to the errors of voters to mark their ballots properly. Therefore, the Chief Justice believed that the Supreme Court of Florida's construction of Florida law, requiring the counting of votes not counted by machine, should be outweighed by the determination of the Secretary of State.¹¹⁵¹ The Chief Justice's reason for so strongly weighing the decision of the Secretary of State is that the *Florida Election Code* authorizes, by law, that the Secretary issue binding interpretations of the code.¹¹⁵² Turning to Florida case law, the Chief Justice determined that the Supreme Court of Florida failed to defer to what the Chief Justice believed was a reasonable interpretation of the *Florida Election Code* and, therefore, merited reversal.¹¹⁵³ Finally, the Chief Justice determined that because a recount had not been granted in the past in order to examine ballots that did not register a vote in the machine count, such a count could not be undertaken absent concurrence by the Florida Secretary of State.¹¹⁵⁴ For the Supreme Court of Florida to determine otherwise was an impermissible departure from the legislative scheme.¹¹⁵⁵

hold that the review of the ballots themselves by a court of law, once the canvassing board voted to conduct that review, was a *de novo* review. See *Gore III*, 772 So. 2d at 1252; see also discussion *supra* Part VIII.B. Chief Justice Rehnquist may have misinterpreted this part of the Supreme Court of Florida's holding in his concurrence.

1148. *Bush II*, 531 U.S. at 118–19 (Rehnquist, C.J., concurring).

1149. *Id.*

1150. The Chief Justice made no reference to the portion of the record establishing this proposition. Indeed, the record, if not contrary to this proposition, certainly demonstrates that it is a disputed issue.

1151. *Bush II*, 531 U.S. at 119–20 (Rehnquist, C.J., concurring).

1152. *Id.* at 118–19.

1153. *Id.*

1154. *Id.*

1155. *Id.*

The Chief Justice's analysis is based upon the proposition that tabulating machines worked properly and voter error was the sole basis for any discrepancy in tabulation. This proposition was clearly disputed,¹¹⁵⁶ and has been the subject of considerable media attention and commentary.¹¹⁵⁷ Further, the Florida Legislature's revision of the *Florida Election Code* after the election, including the elimination of punch card ballots, suggests that the voting machines, not just voter error, contributed to problems in vote tabulation.¹¹⁵⁸

Despite the obvious questions about the Chief Justice second-guessing the Supreme Court of Florida's interpretation of Florida law, the Chief Justice's analysis of the *Florida Election Code* ignored that it was enacted under the restrictions of the Florida Constitution. Under the Florida Constitution, Florida courts are ultimately responsible for interpretations of the Florida law.¹¹⁵⁹ While the Florida Legislature has delegated the Secretary of State the initial responsibility of interpreting the election code,¹¹⁶⁰ the Chief Justice's analysis implied that in so doing, the Florida Legislature had completely abrogated the Florida Judiciary's constitutional power to interpret Florida law. By giving the *Florida Election Code* a level of deference not traditionally accorded to statutes, the Chief Justice's analysis essentially stated that the Florida Legislature properly gave an executive officer and administrative agencies the ultimate authority to interpret Florida law and, necessarily, the Florida Constitution. However, this convoluted view of separation of powers does not consider that, in enacting the election code, the Florida Legislature recognized that the Florida courts would properly determine whether governmental action violated the Florida Constitution and the legislature would not, acting

1156. Brief of Respondent Albert Gore, Jr. at 1–22, *Bush II v. Gore*, 531 U.S. 98 (2000) (No. 00-949).

1157. See, e.g., Editorial, *The Election is Over, but the Debate Isn't*, VIRGINIAN-PILOT (Norfolk), Dec. 14, 2000, at B10 (“Disparities in machine error rates far exceed any that might have resulted from manual inspection.”); E.J. Dionne, *High Court Decision Regrettable*, DENVER POST, Dec. 12, 2000, at B11 (recognizing thousands of people may have been disenfranchised by machine error). See also Dershowitz, *supra* note 1020, at 57–58 (criticizing the court for basing its opinion on the false premise that voter error was the sole cause of spoiled ballots).

1158. Ch. 2001-40, §17, 2001 Fla. Laws 53, 58 (to be codified at FLA. STAT. § 101 (2001)).

1159. FLA. CONST. art. V, § 1. The Florida Constitution provides that “[t]he judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts.” *Id.*

1160. See FLA. STAT. § 97.012(1) (2000).

properly within its power, be able to completely abrogate the authority of Florida courts to determine the constitutionality of government action.¹¹⁶¹ The balance of power shifted, however, when the United States Supreme Court introduced the title 3, section 5 of the *United States Code* issue into the election contest in the remand of *Palm Beach County Canvassing Board I v. Harris*.¹¹⁶²

The Supreme Court of Florida interpreted the election statutes of Florida consistent with Florida's constitutional edict that "all political power is inherent in the people."¹¹⁶³ Having been unanimously chastised by the United States Supreme Court for looking to the Florida Constitution for guidance in interpreting its election laws, a normal practice of statutory construction,¹¹⁶⁴ the Supreme Court of Florida was reluctant to return to the constitution and its precedent in giving guidance in *Gore III v. Harris* as to a standard for the intent of the voter.¹¹⁶⁵ The failure of the Supreme Court of Florida to set an intent of the voter standard consistent with its prior case law

1161. Yet, despite his insistence that the instant case presented separation of powers issues that implicated federal law, the Chief Justice turned to Florida case law to justify his conclusion. *See Bush II*, 531 U.S. at 119–20 (Rehnquist, C.J., concurring) (citing *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844 (Fla. 1993)). While the Chief Justice's analysis of *Krivanek* is not beyond criticism, namely by the level of deference and the point at which reversal of the Secretary's interpretations is still within the province of Florida courts, in so doing, the Chief Justice demonstrates that the issue is, in reality, one for disposition in state courts. Certainly, federal intervention is not appropriate just because a state court embraces an interpretation of state law that a federal judge considers "peculiar" while rejecting one that a federal judge considers "reasonable." *Id.* The Chief Justice again assails another state law issue by deeming it "inconceivable" that there be a difference in the ballots counted in the protest and contest phases. *Id.* at 119 n.4.

1162. 772 So. 2d 1220 (Fla. 2000).

1163. FLA. CONST. art. I, § 2.

1164. The Supreme Court of Florida "is committed to the proposition that it has a duty, if reasonably possible and consistent with constitutional rights, to resolve all doubts as to the validity of a statute in favor of its constitutionality and to construe it so as not to conflict with the Constitution." *Hancock v. Sapp*, 225 So. 2d 411 (Fla. 1969); *Rich v. Ryals*, 212 So. 2d 641 (Fla. 1968). *See also* FLA. CONST. art. I (Declaration of Rights).

1165. *Gore III v. Harris*, 772 So. 2d 1243, 1256–57 (Fla. 2000); *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1236 ("The right of suffrage is the preeminent right contained in the Declaration of Rights, for without this basic freedom all others would be diminished."). "The declaration of rights expressly states that 'all political power is inherent in the people.'" FLA. CONST. art. I, § 1. "The right of the people to select their own officers is their sovereign right, and the rule is against imposing unnecessary and unreasonable [restraints on that right]... *unreasonable or unnecessary* restraints on the elective process are prohibited." *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1236 (quoting *Treiman v. Malmquist*, 342 So. 2d 972, 975 (Fla.1977)).

and the Florida Constitution, caused in great part by the remand decision of *Bush v. Palm Beach County Canvassing Board I*, resulted in the opportunity for the United States Supreme Court to find an equal protection violation for the failure of the Supreme Court of Florida to declare Florida law on standards to determine the intent of the voter.

The Supreme Court of Florida unanimously deferred to the Florida Constitution provision that “all political power is inherent in the people”,¹¹⁶⁶ in giving effect to Florida election laws and expounding upon the intent of the voter standard.¹¹⁶⁷ The United States Supreme Court expressly and unanimously scolded the Supreme Court of Florida for doing so in *Bush v. Palm Beach County Canvassing Board*.¹¹⁶⁸ Having been told they would be reversed in *Palm Beach County Canvassing Board I*, the Supreme Court of Florida could not bring itself to announce an intent of the voter standard in *Gore III*.¹¹⁶⁹ If the theory of the per curiam decision in *Bush v. Palm Beach County Canvassing Board*, as articulated by Chief Justice Rehnquist in *Bush II v. Gore*, was intended to prevent the Supreme Court of Florida from interpreting Florida law on the intent of the voter, these decisions certainly did that. The Supreme Court of Florida ignored its own precedent in not announcing an intent of the voter standard to determine legal votes.¹¹⁷⁰ It is hard to imagine an interpretation of the *Darby v. State ex rel. McCollough*¹¹⁷¹ line of cases in the context of the facts of the 2000 Presidential Election which would not have satisfied the concerns expressed by the majority in *Bush II v. Gore* regarding equal protection. The unexpressed concern was that if the Supreme Court of Florida had established this standard, then that act would have violated Article II Section I, Clause 2 of the United States Constitution and title 3, section 5 of the *United States Code*. For reasons stated elsewhere, these authors do not believe the establishment of the standard, and consistent with existing case law, would have violated either.

B. *The Dissents*

The majority and Chief Justice Rehnquist’s concerns with title 3, section 5 of the *United States Code* case were answered eloquently and

1166. FLA. CONST. art. I, § 2.

1167. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1229.

1168. 531 U.S. 70 (2000).

1169. *Gore III*, 772 So. 2d at 1256–57.

1170. See discussion *supra* Part II.C.

1171. 75 So. 411 (Fla. 1917).

simply by Justice Souter. In dismissive language, Justice Souter gave the section 5 issue all the merit it deserves:

The 3 USC § 5 issue is not serious. That provision sets certain conditions for treating a State's certification of Presidential electors as conclusive in the event that a dispute over recognizing those electors must be resolved in congress under 3 USC § 5. Conclusiveness requires selection under a legal scheme in place before the election, with results determined at least six days before the date set for casting electoral votes. But no state is required to confirm to § 5 if it cannot do that (for whatever reason); the sanction for failing to satisfy the conditions of § 5 is simply less of what has been called its "safe harbor." And even that determination is to be made, if anywhere, in the Congress.¹¹⁷²

Justice Souter also made clear that the Supreme Court of Florida's construction of the state statutory provisions governing contests did not impermissibly change Florida law from what the Florida Legislature provided and accordingly did not violate Article II, Section 1, Clause 2 of the federal constitution.

Again, in three concise paragraphs, Justice Souter explained why Article II was not violated. These paragraphs bear repeating:

1. The statute does not define a "legal vote," the rejection of which may affect the election. The State Supreme Court was therefore required to define it, and in doing that the court looked to another election statute, § 101.5614(5), dealing with damaged or defective ballots, which contains a provision that no vote shall be disregarded "if there is a clear indication of the intent of the voter as

1172. *Bush II*, 531 U.S. at 130 (Souter, J., dissenting). "Indeed, in 1960, Hawaii appointed two slates of electors and Congress chose to count the one appointed on January 4, 1961, well after the Title 3 deadlines." *Id.* (citing to William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 166 n. 154 (1996)). "Thus, nothing prevents the majority, even if it properly found an equal protection violation, from ordering relief appropriate to remedy that violation without depriving Florida voters of their right to have their votes counted. As the majority notes, "[a] desire for speed is not a general excuse for ignoring equal protection guarantees." *Id.* at 127 (alterations in original).

Republican electors were certified by the Acting Governor on November 28, 1960. A recount was ordered to begin on December 13, 1960. Both Democratic and Republican electors met on the appointed day to cast their votes. On January 4, 1961, the newly elected Governor certified the Democratic electors. The certification was received by Congress on January 6, the day the electoral votes were counted.

Id. at 127 n.5.

determined by a canvassing board.” The court read that objective of looking to the voter’s intent as indicating that the legislature probably meant “legal vote” to mean a vote recorded on a ballot indicating what the voter intended. *Gore v. Harris*, 772 So. 2d 1243, 1256–1257 (2000). It is perfectly true that the majority might have chosen a different reading. See, e.g., Brief for Respondent Harris et al. 10 (defining “legal votes” as “votes properly executed in accordance with the instructions provided to all registered voters in advance of the election and in the polling places”). But even so, there is no constitutional violation in following the majority view; Article II is unconcerned with mere disagreements about interpretive merits.

2. The Florida court next interpreted “rejection” to determine what act in the counting process may be attacked in a contest. Again, the statute does not define the term. The court majority read the word to mean simply a failure to count. 772 So. 2d, at 1257. That reading is certainly within the bounds of common sense, given the objective to give effect to a voter’s intent if that can be determined. A different reading, of course, is possible. The majority might have concluded that “rejection” should refer to machine malfunction, or that a ballot should not be treated as “reject[ed]” in the absence of wrongdoing by election officials, lest contests be so easy to claim that every election will end up in one. Cf. *id.* at 1266. (Wells, C. J., dissenting). There is, however, nothing nonjudicial in the Florida majority’s more hospitable reading.

3. The same is true about the court majority’s understanding of the phrase “votes sufficient to change or place in doubt” the result of the election in Florida. The court held that if the uncounted ballots were so numerous that it was reasonably possible that they contained enough “legal” votes to swing the election, this contest would be authorized by the statute.* While the majority might have thought (as the trial judge did) that a probability, not a possibility, should be necessary to justify a contest, that reading is not required by the statute’s text, which says nothing about probability. Whatever people of good will and good sense may argue about the merits of the Florida court’s reading, there is no warrant for saying that it transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the “legislature” within the meaning of Article II.

In sum, the interpretations by the Florida court raise no substantial question under Article II.¹¹⁷³

Certainly the same logic and analysis would have applied to any reasonable interpretation of what constituted legal votes, especially given Florida's strong pronouncements in its constitutional, statutory, and decisional law, which predated the 2000 Presidential Election.¹¹⁷⁴

Since Justices Souter, Stevens, Ginsburg, and Breyer did not think the section 5 issues were "serious" and did not think the interpretations of Florida law by the Supreme Court of Florida raised substantial questions under Article II,¹¹⁷⁵ one must ask what happened to cause these four members of the Court to join in the remand opinion in *Bush v. Palm Beach County Canvassing Board*, which said:

There are expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, "circumscribe the legislative power." The opinion states, for example, that "[t]o the extent that the Legislature may enact laws regulating the electoral process, those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage" guaranteed by the state constitution. 772 So. 2d at 1236. The opinion also states that "because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote"¹¹⁷⁶

When just eight days later these members of the Court considered these issues to not be "serious," Justice Breyer acknowledged the damage created by the remand opinion when he said: "In light of our previous remand, the Supreme Court of Florida may have been reluctant to adopt a more specific standard than that provided for by the legislature for fear of exceeding its authority under Article II."¹¹⁷⁷ But he concluded by saying that an equal

1173. *Id.* at 131–33. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicated that it intended the Supreme Court of Florida to play the same role in presidential elections that it has historically played in resolving electoral disputes.

1174. See discussion *infra* Part X.

1175. *Bush II*, 531 U.S. at 130 (Souter, J., dissenting).

1176. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 77 (2000) (alterations in original).

1177. *Bush II*, 531 U.S. at 145 (Breyer, J., dissenting).

protection problem existed, and that the Supreme Court of Florida could have addressed the problem by adopting uniform standards under Florida law.¹¹⁷⁸

Both Justice Breyer and Justice Souter would have remanded with instructions to have the Supreme Court of Florida establish uniform standards for Florida counties to use when evaluating the several types of ballots that prompted differing treatment.¹¹⁷⁹ Obviously, neither saw an Article II issue with respect to a remand.¹¹⁸⁰ The Court's per curiam opinion clearly recognized that the Supreme Court of Florida had the authority to correct the equal protection violation found by the United States Supreme Court; as the per curiam opinion said, "[i]nstead, we are presented with a situation where a state court *with the power to assure uniformity* has ordered a statewide recount with minimal procedural safeguards."¹¹⁸¹ It is safe to say that Justices Kennedy and O'Connor, who did not join Chief Justice Rehnquist's concurrence, did not see an Article II issue with respect to the Supreme Court of Florida interpreting Florida law to give guidance on a standard as to what constituted a legal vote.¹¹⁸²

The per curiam decision did not remand for this purpose, however, because it found that the Supreme Court of Florida had interpreted Florida law to conclude that the Florida Legislature interceded to avail itself of the safe harbor afforded by title 3, section 5 of the *United States Code* and have the election process completed by December 12, 2000.¹¹⁸³ There was no such prior decisional case law, legislative mandate, or Florida constitutional pronouncement prior to November 7, 2000. The Supreme Court of Florida in its opinions on the subject did not say there was a legislative instruction

1178. *Id.* at 145–46.

1179. *Id.* at 134 (Souter, J., dissenting), 146 (Breyer, J., dissenting).

I agree that, in these very special circumstances, basic principles of fairness may well have counseled the adoption of a uniform standard to address the problem. . . .

An appropriate remedy would be, instead, to remand this case with instructions that, even at this late date, would permit the Florida Supreme Court to require recounting *all* undercounted votes in Florida, including those from Broward, Volusia, Palm Beach, and Miami-Dade Counties, whether or not previously recounted prior to the end of the protest period, and to do so in accordance with a single uniform standard.

Id. at 146 (Breyer, J., dissenting).

1180. *Id.* at 134–35 (Souter, J., dissenting), 148–49 (Breyer, J., dissenting).

1181. *Bush II*, 531 U.S. at 109 (emphasis added).

1182. *Id.* at 110.

1183. *Id.* at 110–12.

on this issue.¹¹⁸⁴ In short, the December 12th date was not mandated and did not exist in Florida law.

The Supreme Court of Florida, in its decision of December 11, 2000 on remand in *Bush v. Palm Beach County Canvassing Board*¹¹⁸⁵ said the December 12th date was a reasonable date, holding “[a]lthough the Code sets no specific deadline by which a manual recount must be completed, the time required to complete a manual recount must be reasonable.”¹¹⁸⁶ Certainly, if it was in the Supreme Court of Florida’s authority, according to the United States Supreme Court, to pick a “reasonable date” to end an election contest, it surely was within their authority, given the election code, prior Florida case law, and Florida’s Constitution, to define what constituted a legal vote. While the Supreme Court of Florida indicated December 12th was a “reasonable date to end an election contest,” the court never indicated that the date was the mandatory date to end the election contest.¹¹⁸⁷ Mandating a date that did not previously exist in Florida law to end the post-election controversy is a more dramatic change in the law than interpreting prior legal precedents and applying them to current circumstances to determine the intent of the voter and what constituted legal votes. Accordingly, one must conclude the only violation of Article II and title 3, section 5 of the *United States Code* was the United States Supreme Court’s mandated date to end the election contest.

Given the intellectual gymnastics being played with respect to Article II and section 5, there is no doubt that an appropriate epitaph for *Bush II v. Gore* was written by Justice Stevens in his dissent, when he said:

It is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law. Time will one day heal the wound to that confidence that will be inflicted by today’s decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year’s Presidential election, the identity of the loser is perfectly

1184. *Palm Beach County Canvassing Bd. I v. Harris*, 772 So. 2d 1220, 1237 (Fla. 2000); *Palm Beach County Canvassing Bd. II v. Harris*, 772 So. 2d 1273, 1286 n.17 (Fla. 2000); *Gore III v. Harris*, 772 So. 2d 1243, 1248 (Fla. 2000); *Gore IV v. Harris*, 773 So. 2d 524, 526, 528–529 (Fla. 2000).

1185. 531 U.S. 70 (2000).

1186. *Palm Beach County Canvassing Bd. II*, 772 So. 2d at 1285.

1187. *Id.* at 1286 n.17; *Gore IV*, 773 So. 2d at 524, 528–29.

clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.¹¹⁸⁸

X. REMAND OPINION OF THE SUPREME COURT OF FLORIDA AND ENTRY OF JUDGMENT

After dismissing the case by order on December 14, 2000,¹¹⁸⁹ the Supreme Court of Florida expressed its views on the election controversy one last time. The Supreme Court of Florida noted the “‘intent of the voter’ standard adopted by the Legislature was the standard in place as of November 7, 2000, and a more expansive ruling would have raised an issue as to whether this court would be substantially rewriting the Code after the election, in violation of article II, section 1, clause 2 of the United States Constitution and 3 U.S.C. § 5 (1994).”¹¹⁹⁰ The court was careful not to state that if it had delivered a more expansive ruling on the intent of the voter standard that it would have violated Article II Section 2, Clause 2 of the United States Constitution and title 3, section 5 of the *United States Code*.

As discussed previously, given prior and longstanding Florida case law on legal votes predating the election, it is hard to conclude that a ruling citing *Darby v. State ex rel. McCollough*,¹¹⁹¹ *Boardman v. Esteve*,¹¹⁹² and *State ex rel. Chappell v. Martinez*¹¹⁹³ as precedents would violate Article II and section 5. The only difference between the precedents and the issue confronted in *Gore III v. Harris* was that in the punch card counties, voters used styluses instead of pencils to mark ballots. Accordingly, to determine the intent of a voter, a judge would have to read the markings of the stylus instead of the markings of the pencil. This would hardly be a decision in violation of Article II or section 5.¹¹⁹⁴ It would have been the application of precedent to current factual circumstances, hardly a novel jurisprudential event. The Supreme Court of Florida was warded off in the remand opinion of *Bush v. Palm Beach County Canvassing Board* from applying its precedent to establish an intent of the voter standard to determine legal votes in punch card and optiscan machines. However, the court would not

1188. *Bush II*, 531 U.S. at 128–29 (Souter, J., dissenting).

1189. *Gore III v. Harris* was dismissed by the Supreme Court of Florida by an order on December 14, 2000. *Gore IV*, 773 So. 2d at 526 n.1.

1190. *Id.* at 526.

1191. 75 So. 411 (Fla. 1917).

1192. 323 So. 2d 259 (Fla. 1976).

1193. 536 So. 2d 1007 (Fla. 1988).

1194. See *Bush II*, 531 U.S. at 100; cf. *id.* at 130 (Souter, J., dissenting).

concede on remand from *Bush II v. Gore*, that to establish standards for the determination of a legal vote would have conceivably violated Article II. After all, the per curiam decision in *Bush II v. Gore* acknowledged that the Supreme Court of Florida had the “power to assure uniformity.”¹¹⁹⁵ Notwithstanding this power, the Supreme Court of Florida chose to defer at this time and have the Florida Legislature “develop a specific, uniform standard necessary to ensure equal application and to secure the fundamental right to vote throughout the state of Florida”¹¹⁹⁶

On the other important issue that confronted the Supreme Court of Florida in the election controversies, the court took great pains through its per curiam decision to note that the United States Supreme Court “ultimately mandated that any manual recount be concluded by December 12, 2000, as provided in 3 USC § 5.”¹¹⁹⁷ The court left its final note to history that the United States Supreme Court, not the Supreme Court of Florida, chose the December 12, 2000 date. In so doing, the Supreme Court of Florida made it abundantly clear that the arbitrary date chosen by the United States Supreme Court was just that, not a date mandated by Florida law or the Supreme Court of Florida. The Supreme Court of Florida made certain that it was telling the Nation that they did not pick the December 12th date, Florida law did not require the December 12th date, and only the United States Supreme Court mandated that date without support of Florida law.¹¹⁹⁸ This point was punctuated by Justice Shaw in his concurring opinion.¹¹⁹⁹ As Justice Shaw said:

First, in my opinion, December 12 was not a “drop-dead” date under Florida law. In fact, I question whether any date prior to January 6 is a drop-dead date under the Florida election scheme. December 12 was simply a *permissive* “safe-harbor” date to which

1195. *Id.* at 109.

1196. *Gore IV*, 773 So. 2d at 526. It should be noted that in a concurring opinion Justice Pariente pointed out that the United States Supreme Court decision in *Bush II v. Gore* might have a sweeping implication for Florida and the way elections are conducted in Florida in the future.

Until there is modernization and uniformity of voting systems that will minimize the likelihood of a vote not being recorded and until punchcard systems are retired from use, statewide disparity in voting systems could operate to disenfranchise a number of otherwise eligible voters based upon their county of residency. This disparity, based only on one's county of residence, might have constitutional implications.

Id. at 537 (Pariente, J., concurring).

1197. *Id.* at 526

1198. *Id.* at 526, 528.

1199. *Id.* at 527 (Shaw, J., concurring).

the states could aspire. It certainly was not a *mandatory* contest deadline under the plain language of the Florida Election Code (i.e., it is not mentioned there) or this Court's prior rulings.¹²⁰⁰

Contrary to the ruling of the United States Supreme Court in *Bush v. Gore*, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000), our prior opinions discussed Title III vis-à-vis the Florida Secretary of State's authority to reject late returns arising from a pre-certification protest action, not vis-à-vis a court's obligation to stop a recount in a post-certification contest action. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla.2000); *Palm Beach County Canvassing Bd. v. Harris*, 772 So.2d 1273 (Fla.2000). To mix these two actions is to confuse apples and oranges.¹²⁰¹

In its last act concerning the election controversies, the Supreme Court of Florida was leaving no doubt as to who created new Florida law in the election cases. It was the United States Supreme Court, when they mandated December 12th to be the date the election contest had to end, a date not authorized by Florida law. Under the United States Supreme Court's decision in *Bush v. Palm Beach County Canvassing Board*¹²⁰² and Chief Justice Rehnquist's concurrence in *Bush II v. Gore*,¹²⁰³ it is ironic that perhaps the only clear violation of Article II, Section 1, Clause 2 of the United States Constitution and title 3, section 5 of the *United States Code* was committed when the United States Supreme Court mandated that December 12, 2000 end the 2000 Presidential Election contest pursuant to "Florida Law."

XI. CONCLUSION

Butterfly ballots, absentee ballots, absentee ballot applications, undervotes, punch card ballots, chads, counts, and recounts are words that the legal profession in Florida added to their lexicon in November and December of 2000. We would like to say the courts, when confronted with a legal problem, applied the presently existing facts to the law and processed a just result. We cannot.

1200. *Gore IV*, 773 So. 2d at 528–29 (alterations in original).

1201. *Id.* at 529 n.12.

1202. 531 U.S. 70 (2000).

1203. 531 U.S. 98, 111 (2000) (Rehnquist, C.J., concurring).

Our examination of these election cases lead us to conclude that the courts often ignored or controverted existing and established law in order to reach a desired result. Nowhere was this more true than in *Bush II v. Gore*. In this case, process triumphed over justice. This should not have happened; especially where the fundamental right to vote and have one's vote counted was the subject matter of the controversy. There seems to have been little dispute that a voter in a punch card machine county did not have the same chance of having his or her vote counted as a voter in an optical scanner county.¹²⁰⁴ Yet, the outcome of the judicial process was to avoid having these voters' votes counted! Justice avoided!

Hard cases make bad law. If an election contest occurs in the future, we doubt *Jacobs v. Seminole County Canvassing Board*¹²⁰⁵ will be cited for the proposition that supports supervisors of election allowing a partisan advantage for a particular political party. We doubt *Fladell v. Palm Beach County Canvassing Board*¹²⁰⁶ will be cited for the proposition that an issue concerning a statewide contest can be litigated on its merits prematurely in the wrong court. We doubt that *Gore III v. Harris*¹²⁰⁷ will be cited for the proposition that, notwithstanding the statute, a candidate for election can sit on a canvassing board for the election in which that candidate was on the ballot. We are hopeful that *Bush II v. Gore* will not be cited in some future election contest for the proposition that all votes cannot be counted as it would violate the Equal Protection Clause just because the computer touch screen system recently installed failed and did not have the same recount procedures as the optical scanner voting machines.¹²⁰⁸ Certainly these decisions will have little or no precedential value.

The authors know that the experiences of these cases will point the way to a better democracy. Like the absurdities confronted by the holdings in *Dred Scott v. Sandford*¹²⁰⁹ and *Korematsu v. United States*,¹²¹⁰ the 2000 Presidential Election decisions have led and will lead to election reform, both through legislation and litigation. The good news is our democracy will emerge from this episode reforming its voting systems and seeking a just and

1204. *Gore IV*, 773 So. 2d at 530 (Pariente, J., Concurring).

1205. 773 So. 2d 519 (Fla. 2000).

1206. 772 So. 2d 1240 (Fla. 2000).

1207. 772 So. 2d 1243 (Fla. 2000).

1208. Unfortunately, the recently revised *Florida Election Code* does not mandate one type of machine to be used in future statewide elections, thereby leaving open the possibility of facing a myriad of recount procedures for different machines in the future. See Fla. Stat. § 101.28 (2001).

1209. 60 U.S. 393 (1856).

1210. 323 U.S. 214 (1944).

equitable election system. Steps have already begun. Litigation has commenced using *Bush II v. Gore* as precedent to eliminate the unequal treatment of recording votes on election day for voters who vote in counties with punch card voting equipment.¹²¹¹ Legislation has been passed in Florida as a first step towards what the authors hope will be further legislative reform in Florida and throughout the nation. We remain hopeful.¹²¹²

1211. See Palermo, *supra* note 370.

1212. See Florida Election Reform Act of 2001, Ch. 2001-40, 2001 Fla. Laws 117. Florida law still does not require a uniform voting system, leaving the post-election system created subject to potential attack under *Bush II v. Gore*. In addition, no reform measures were taken to eliminate the delay period for acceptance of overseas ballots notwithstanding the elimination of the second primary, or to require the Secretary of State or the Attorney General to abstain from election politics for elections she will be monitoring or certifying.

The Florida Election Canvassing System

Judge Robert W. Lee*

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I. INTRODUCTION

The Presidential Election of 2000 brought international attention to the means by which votes in Florida are counted in each election. Florida is comprised of sixty-seven counties, each of which has a canvassing board having the responsibility to certify the election results for its own county.

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Although subject to much reviling¹ during the Florida Recount² process, the canvassing board system has been around in some form since the Florida territorial era more than 170 years ago.

During the 2001 legislative session, the Florida Legislature passed substantial legislation in an attempt to remedy the problems that came to light during the Florida Recount. Notwithstanding the scorn earlier heaped on the heads of the canvassers, the legislature did not touch the existing county canvassing board structure. The purpose of this article is to set forth the historical development of the Florida canvassing system; to summarize the pertinent law as it existed on the eve of the Presidential Election of 2000; to explain changes made to this law by the Florida Election Reform Act of 2001; and to provide a summary of the current chronological procedure for the canvassing of returns by a county canvassing board.

II. HISTORICAL DEVELOPMENT

The state's election canvassing system was not put into place at one time or by one piece of legislation. Rather, the system has grown and changed as experience revealed the need to address a particular area or dispute. Legislative in nature, the canvassing scheme has also been subject in much part to the political winds prevailing in the various Florida legislative bodies, including: the Territorial Legislative Council, the early statehood General Assembly, and the current State Legislature.

A. Territorial Days

The beginnings of the canvassing board system are seen in the earliest laws of territorial Florida. Florida became a United States territory in 1821.³ Several months thereafter, the United States Congress authorized the

1. See, e.g., Tom Collins, *Bar Talk*, MIAMI DAILY BUSINESS REVIEW, Feb. 2, 2001, at C1 (discussing criticism of canvassing boards that the recent "manual recount was politically motivated"); Bob Drogin, *Task Force Urges Stronger Federal Role in Elections*, SUN-SENTINEL (Ft. Lauderdale), Aug. 10, 2001, at 3A (referring to "Florida's nightmarish 2000 presidential election and ballot recount"); Letter from Mrs. Roger Jones to Judge Robert W. Lee (Jan. 2, 2001) (on file with author) (from a concerned citizen arguing that the recount should not have proceeded).

2. For ease of reference, the term "Florida Recount" shall be used in this article to refer to the process by which presidential ballots in Florida were subject to review and recount in the aftermath of the 2000 presidential election.

3. THE NEW HISTORY OF FLORIDA 207 (Michael Gannon, ed., 1996) [hereinafter GANNON].

territory to send a nonvoting delegate to Washington.⁴ As part of the legislation providing for the election of the delegate, Congress further provided a judicial process for the fledgling territory to handle any dispute concerning this election.⁵ Thus began the historical involvement of the Florida judiciary in election disputes.

In 1822, Florida justices of the peace were given the jurisdiction to investigate any election contest concerning Florida's territorial delegate to Congress. The justices of the peace would gather testimony to be compiled and then transmitted directly to the Speaker of the United States House of Representatives for Washington's disposition.⁶ One year later, the Legislative Council, as the Florida Legislative body was called at that time, provided that county judges were required to appoint "judges of the election" who would review the ballots and certify the winner of the territory-wide election of the Congressional delegate.⁷ These persons were later referred to as "inspectors of election."⁸

When the members of the Legislative Council became subject to election, county judges saw their involvement increase as they were the parties who decided where polling places would be located for the elections of both the Council Members as well as the United States Delegate.⁹ However, justices of the peace, rather than county judges, presided over any contest involving the election of a member of the Legislative Council, with the testimony transmitted to the President of the Legislative Council for action.¹⁰

In 1831, the Florida Legislative Council passed three relevant laws regarding municipal elections: An Act to Incorporate the Town of

4. *Id.* at 211.

5. *Id.*

6. Act of Aug. 12, 1822, 1822 Fla. Territory Laws 9 (providing for the election of a delegate to Congress).

7. Act of July 3, 1823, 1823 Fla. Territory Laws 91 (providing for the election of a delegate to Congress).

8. Act of Nov. 22, 1828, 1828 Fla. Territory Laws 254 (concerning the election of members of the legislative council of the Territory of Florida).

9. Act of Jan. 11, 1827, 1826-27 Fla. Territory Laws 88 (dividing the Territory of Florida into thirteen election districts and providing for the election of members to the legislative council); Act of Jan. 16, 1827, 1826-27 Fla. Territory Laws 109 (amending the Act of Jan. 11, 1827 that divided the Territory of Florida into thirteen election districts and provided for the election of members to the legislative council).

10. Act of Jan. 11, 1827, 1826-27 Fla. Territory Laws 88 (dividing the Territory of Florida into thirteen election districts and providing for the election of members of the legislative council).

Monticello, in Jefferson County;¹¹ An Act to Amend an Act Entitled, “An Act to Incorporate the Town of Quincy;”¹² and An Act to Incorporate the City of Fernandina.¹³ The Council gave the mayor of each town the duty to appoint three “inspectors”¹⁴ who had the job of supervising local elections and

whose duty it shall be to receive the votes, and to cause the name of every voter to be taken down and kept in a book for that purpose, and to cause the poll to be opened . . . and the names of the several persons . . . having the greatest number of votes shall be declared and notice of their election given to each of them.¹⁵

At this point in Florida history, there was no requirement that the mayor appoint a judge or other person trained in the law to these positions. Rather, the mayor was merely directed to appoint discreet persons to perform this responsibility.¹⁶ Thus, while justices of the peace would compile evidence in an election contest, the process of canvassing during early territorial days generally directly involved persons other than members of the judiciary.

Two years later, the Legislative Council amended legislation providing for the territory-wide election of a delegate to Congress, as well as other territory officers.¹⁷ Under this legislation, the inspectors of election for all territory offices were to be uniformly appointed by “the presiding justices or judges of the county courts.”¹⁸

11. Act of Feb. 7, 1831, 1831 Fla. Territory Laws 41–44 (incorporating the Town of Monticello, in Jefferson County).

12. Act of Feb. 7, 1831, 1831 Fla. Territory Laws 44–45 (amending the Act of Nov. 21, 1828, that incorporated the Town of Quincy).

13. Act of Feb. 10, 1831, 1831 Fla. Territory Laws 63–67 (incorporating the City of Fernandina).

14. 1831 Fla. Territory Laws 43; 1831 Fla. Territory Laws 66. The word “intendant,” used in these particular laws in lieu of the word “mayor,” was frequently used in early territorial laws and connoted the same position as mayor. Its use likely derives from the territory’s Spanish legal heritage. See BLACK’S LAW DICTIONARY 727 (5th ed. 1979) (referring to Spanish term *intendente*); BANTAM NEW COLLEGE SPANISH AND ENGLISH DICTIONARY 196 (rev. ed. 1987) (defining *intendente* as “mayor”).

15. 1831 Fla. Territory Laws 43.

16. 1831 Fla. Territory Laws 44.

17. Act of Feb. 17, 1833, ch. 675, 1833 Fla. Territory Laws 35–41 (providing for holding an election for delegate to Congress from this Territory, members to the legislative council, and certain other officers).

18. *Id.* at 35.

The function of county courts to certify results of elections can be seen from an early example in Florida's history. For the election of the members of the 1835 Legislative Council, the Council amended territorial law to require that the election be held in October rather than May.¹⁹ The County Judge in Mosquito County,²⁰ however, did not receive notice that the law had changed.²¹ Accordingly, in May he called the election and certified the results to Tallahassee. The territorial government in turn notified the Judge that the law had changed, "which fact it is presumed was not known in [Mosquito] County."²² The winner of the Mosquito County election was not recognized, and the Judge was directed to hold another election in October.²³

B. *Early Statehood*

In furtherance of the goal of Florida statehood, first expressed in the Adams-De Onís Treaty,²⁴ a group of Territory leaders and other prominent citizens met in the gulf coast town of St. Joseph in 1838 to propose a constitution and obtain congressional approval for statehood.²⁵ The Legislative Council required that the county judges call an election for delegates to the convention according to the number of delegates designated for each county.²⁶ The delegates proposed a constitution, which would become Florida's first state constitution in 1845.

In 1843, the Legislative Council approved an Election Code proposed by a "reviser" of territorial laws.²⁷ Two years later, the year Florida became

19. Act of Feb. 7, 1835, ch. 845, 1835 Fla. Territory Laws 308 (changing the time of holding the election for members of the legislative council).

20. Later, at statehood, the name of Mosquito County was changed to Orange County. Act of Jan. 30, 1845, 1845 Fla. Territory Laws 56 (altering and changing the name of Mosquito County to that of Orange).

21. Mosquito County in Central Florida was quite remote from Tallahassee during this era of poor transportation and communication links.

22. Letter from George W. Walker to Judge of the County Court Mosquitoe [sic] County (June 8, 1835) in 25 THE TERRITORIAL PAPERS OF THE UNITED STATES at 162 (C.E. Carter ed., 1960).

23. *Id.*

24. Treaty of Amity, Feb. 22, 1819, U.S.-Spain, art. 6, 1822 Fla. Territory Laws IV.

25. STUART B. MCIVER, DREAMERS, SCHEMERS AND SCALAWAGS 95-99 (1994); Florida History Internet Center, *Florida History Internet Center Home Page*, at <http://www.floridahistory.org> (visited Feb. 2, 2002).

26. Act of Jan. 30, 1838, 1838 Fla. Territory Laws 16 (calling a convention for the purpose of organising [sic] a state government).

27. Act of Mar. 15, 1843, 1843 Fla. Territory Laws 34 (concerning the revised statutes).

a state, a new Elections Code was adopted which was patterned after the previous territorial laws on the same subject.²⁸ Inspectors of elections, formerly appointed by mayors and county judges, were now uniformly appointed by probate judges.²⁹ If a person contested an election for a seat in the General Assembly, the local probate judge was required to collect the evidence on the subject and transmit it to either the Speaker of the House for a seat in the State House of Representatives, or the President of the Senate for a seat in the State Senate.³⁰

For local offices, a contest of the election was presented to a circuit judge who was required to "proceed in a summary way, to hear and determine the matters in issue, and to give judgment upon the rights of the parties."³¹ The remedy available in a successful contest was ouster of the contested winner, with seating of the petitioning candidate.³² Notwithstanding the establishment of a uniform Election Code at statehood, just five years later the General Assembly once again began to allow mayors and city councils to appoint the inspectors of elections of their own municipalities.³³

Upon statehood, the position of county judge was abolished.³⁴ The state judicial system was then comprised of circuit and probate courts.³⁵ Each county had a probate judge, who served as the head of the local election system.³⁶ The operation of the canvassing board can be seen by considering an illustrative vignette from Florida's secession movement. In November 1860, the Florida General Assembly called a state convention for the purpose of considering an act of secession from the United States.³⁷ Governor Madison S. Perry was concerned that elected delegates from Key

28. An Act Relative to Elections in this State, art. IV, § 1, 1845 Fla. Laws at 79. From 1845 to 1868, counties were served by circuit judges and probate judges. County judges did not again exist in name until 1868. See FLA. CONST. of 1868, art. VI, §§ 16-18.

29. An Act Relative to Elections in this State, *supra* note 29.

30. *Id.*

31. FLA. CONST. of 1868, art. IX, §§ 1-5, 7-10.

32. Ch. _____, § 3, 1850-51 Fla. Laws 92 (amending an act incorporating the City of St. Augustine).

33. *Id.* Ch. _____, § 5, 1850-51 Fla. Laws 90 (amending an act incorporating the City of Apalachicola).

34. Compare Act of Sept. 18, 1822, 1822 Fla. Territory Laws 93 (authorising [sic] the appointment of Justices of the Peace and defining their powers, and establishing county courts) with FLA. CONST. of 1838, art. V, §§ 1-3, 11 (1845).

35. FLA. CONST. of 1838, art. V, §§ 1-3, 9 (1845).

36. Act of Jan. 5, 1847, Ch. 72—(No. 2), §§ 1-2, 1846-47 Fla. Laws 10-11 (amending the Act relative to elections in this state).

37. JOHN EDWIN JOHNS, FLORIDA IN THE CONFEDERACY 27 (photo. reprint 1983) (1958) (U.N.C. doctoral dissertation).

West, thought necessary to the success of the convention, would not arrive on time.³⁸ Governor Perry called upon the Monroe County Probate Judge to promptly canvass and certify the election delegates so that the delegates could be placed on a steamer waiting to sail for the Florida Panhandle.³⁹ As one historian noted, “[t]he Probate Judge and three other citizens of good repute were to canvass the vote and issue certificates of election to the winners in time for delegates to board the steamer.”⁴⁰ The Monroe County Canvassing Board successfully performed the task requested by the Governor.⁴¹

At this time, canvassing laws began to more closely resemble those of modern times. New election laws provided that the canvassing boards, headed by the local probate judges, had a ten-day period to review and certify election results.⁴² The canvassing boards further had the legal obligation “to ascertain the whole number of votes cast, and who had received the highest number of . . . votes.”⁴³

C. *Post-Civil War Era*

As the Civil War and Reconstruction years passed, judges continued to play a role in the certifying of elections as they had done in Florida for decades. A new law made it a criminal offense for anyone, whether or not on the canvassing board, to change a voter’s ballot thereby not voting “as he intended.”⁴⁴ In the general election of 1870, however, the judiciary was involved in a much different capacity in a heavily disputed statewide election.⁴⁵ For this election, the statewide canvassing board was controlled by the Republicans.⁴⁶ The Democrats believed that the canvassing board was up to some type of mischief, and they sought an injunction in the Leon County circuit court to prevent the canvassing board from canvassing the returns and certifying any winners.⁴⁷ Circuit Judge Pleasant W. White was

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. Act of Dec. 17, 1861, 1861 Fla. Laws 35 (amending the laws of the State in relation to elections).

43. WALTER W. MANLEY, II, ed., *THE SUPREME COURT OF FLORIDA AND ITS PREDECESSOR COURTS, 1821–1917*, 245 (1997) [hereinafter *MANLEY*].

44. FLA. REV. STAT. § 5875 (1920). This particular law was adopted in 1868.

45. *MANLEY*, *supra* note 43, at 244–45.

46. *Id.*

47. *Id.*

persuaded by the Democrat argument and accordingly issued the injunction.⁴⁸ He presided over a grand jury investigation into whether “reports of impending violence against the governor or other state officials” were substantiated.⁴⁹

The Republicans in turn approached a federal judge in Jacksonville, claiming that Judge White’s suspension of the count was in contravention of federal voting rights laws.⁵⁰ Rather than simply seeking to overturn Judge White’s order, however, the federal authorities indicted the judge and had a federal court issue a warrant for his arrest, upon which he “was escorted to Jacksonville by a U.S. Marshall.”⁵¹ With Judge White “resting in a Jacksonville jail,” the canvassing board resumed its count and announced the results of the election.⁵²

At the same time, to avoid further delays, the Republicans appealed Judge White’s issuance of the injunction to the Supreme Court of Florida.⁵³ Before the tribunal could reach a decision, the state legislature enacted a law abolishing the state canvassing board.⁵⁴ The action had its desired effect when the supreme court ruled that no action could be taken concerning a board which no longer existed.⁵⁵ Soon thereafter, the federal prosecution of Judge White was dropped after the federal court determined the indictment had been issued in error.⁵⁶ Nevertheless, the Supreme Court of Florida decision established the principle that a court “could compel [canvassing boards] to count all the ballots,” so long as a canvassing board in fact existed.⁵⁷

Prominent election disputes involving the Florida judiciary continued just a few years later in the general election of 1876. The statewide vote for

48. *Id.* at 244.

49. RALPH LEON PEEK, *LAWLESSNESS AND THE RESTORATION OF ORDER IN FLORIDA, 1868–1871*, at 163–64 (photo. reprint 1983) (1964) (U. F. doctoral dissertation) [hereinafter PEEK].

50. *Id.*

51. *Id.*

52. MANLEY, *supra* note 43, at 244.

53. *Id.*

54. *Id.* at 245.

55. *Id.*

57. MANLEY, *supra* note 43, at 245, citing *State v. Gibbs*, 13 Fla. 55, 72–73 (1869). In *Gibbs*, the court noted how the Legislature repealed the law creating the state canvassing board prior to the conclusion of this case.

both the presidential and gubernatorial races ended up before the Supreme Court of Florida.⁵⁸ Early results had revealed a razor-thin Democratic victory in all state and national races.⁵⁹ In Florida, the Democratic presidential candidate led the Republican candidate by a margin of fewer than one hundred votes.⁶⁰ State law mandated the state canvassing board to “ratify the tallies” for the election returns to be certified.⁶¹ Rather than simply ratifying the tallies, however, the state canvassing board actually passed on the validity of many of the ballots, resulting in a win for the Republicans.⁶²

The Democrats sought and were granted injunctive relief from the Leon County circuit court requiring the canvassing board to merely tally the election precinct returns without determining the legitimacy of any votes.⁶³ Notwithstanding the court’s action, the state canvassing board disregarded the court order.⁶⁴ The matter made its way to the Supreme Court of Florida, which was controlled by Republicans, and which “ordered state officials to recount ballots and award the governor’s chair to Democrat George F. Drew, even though many of the same officials were [the Chief Justice’s] political and personal friends.”⁶⁵ The state’s presidential electoral votes were, however, awarded to the Republican candidate, Rutherford B. Hayes.

Notwithstanding the potential for chicanery, one Florida court historian has noted that “[n]umerous Floridians credited [Chief Justice] Randall and his court colleagues with rising above party and politics to resolve the dispute.”⁶⁶ The Court further ruled that the duties of the canvassing board were “strictly ‘ministerial,’ meaning that the state canvassers could only tally the votes submitted by the county canvassers.”⁶⁷ As a result, the supreme court concluded that the state canvassing board did not have judicial power,

58. *Id.* at 252.

59. *Id.* at 251.

60. *Id.*

61. *Id.* at 251–52.

62. MANLEY, *supra* note 43, at 252.

63. *Id.*

64. *Id.* at 251–52.

65. *Id.* at 219.

66. *Id.* See also JOAN E. GILL & BETH R. READ, eds., *BORN OF THE SUN* 67 (1975) (concluding that the state canvassing board “acted so unfairly that the state supreme court ordered a recount”); EDWARD C. WILLIAMSON, *THE ERA OF THE DEMOCRATIC COUNTY LEADER: FLORIDA POLITICS 1877–1893*, 44 (photo. reprint 1983) (1954) (University of Florida doctoral dissertation) (noting that a minority of the state canvassers ruled in favor of the Democratic presidential candidate, Samuel Tilden) [hereinafter WILLIAMSON].

67. MANLEY, *supra* note 43, at 252.

and therefore, a canvassing board could not “determin[e] . . . the legality of a particular vote or election.”⁶⁸

In 1877, the Florida Legislature amended the State’s Election Code to more clearly provide for a canvassing procedure. Each precinct within a county was required to have three “inspectors of election,” appointed by the County Commission, who were required to be “intelligent and discreet electors of such county, who can read and write.”⁶⁹ They were also required to be residents of the precinct for which they were appointed, and they could not all belong to the same political party.⁷⁰

On the day of each election, the inspectors at each precinct opened the polls, confirmed that the ballot box was empty at the opening of the polls, resolved any challenges to any voter qualifications, “maintain[ed] good order” at the polls, closed the polls, canvassed the ballots at the precinct, and completed a certificate of results to be forwarded to the county canvassing board.⁷¹ In canvassing the ballots, the inspectors had the discretion to refuse to count particular ballots if they did not appear to evidence the intention of the person casting it to vote for a particular candidate,⁷² a discretionary duty later provided to the county canvassers.⁷³ In exercising their discretion, the decision of a majority of the inspectors would not be overturned, even if the decision were erroneous, unless the ballots were rejected fraudulently, or unless the rejected ballots would have changed the result of the election.⁷⁴

Each county canvassing board was comprised of the county judge,⁷⁵ the clerk of the circuit court, and a justice of the peace.⁷⁶ The county judge and the clerk collectively chose the justice of the peace who would serve on the board.⁷⁷ If either the county judge or the clerk failed or refused to act, the

68. *Id.* at 253 (citing *State v. McLin*, 16 Fla. 17, 43–45, 49, 52 (1876)).

69. Ch. 97, § 19, 1881 Fla. Laws 481, 489.

70. Ch. 97, § 19, 1881 Fla. Laws 481, 487.

71. Ch. 97, §§ 24, 30, 32–33, 35, 1881 Fla. Laws 481, 493–96.

72. *State ex rel. Liliethan v. Deane*, 1 So. 698, 699 (Fla. 1887). In *Deane*, a canvassing board refused to count a single ballot for a municipal election in the city of Sanford. The board’s exercise of discretion was upheld by the Supreme Court of Florida. *Id.*

73. *See infra* text accompanying notes 274–76.

74. *Pickett v. Russell*, 28 So. 764, 770–71 (1900).

75. At this time in the State’s history, each county had only a single county judge, but at least two justices of the peace. FLA. REV. STAT. § 3357 (1920); FLA. CONST. art. V, §§ 16–17 (1885).

76. Ch. 97, § 36, 1881 Fla. Laws 481, 496.

77. *Id.*

county sheriff would act in either's place.⁷⁸ Within six days of the election, the county canvassing board was required to meet to "compile the result of the election as shown by [the] inspectors' returns."⁷⁹ The county canvassing board could not, however, reevaluate the propriety of any decision by the precinct inspectors as to the casting of any individual vote.⁸⁰

For any election involving more than a county or local race, within thirty-five days of the election, the county canvassing board would in turn forward its canvassing results to the state canvassing board. The state board was comprised of the Secretary of State, the Attorney General, and the State Comptroller.⁸¹ As with the county canvassing boards, the state canvassing board likewise had no discretion to evaluate the propriety of any tallies forwarded by the counties.⁸² The canvassing by the state board was merely a "ministerial act."⁸³ If a candidate for a state legislative seat was dissatisfied with the results of a canvassing decision, the candidate was required to file its election contest within twenty days for the General Assembly and twenty-five days for the State Senate, "after the canvass by the Board of State Canvassers."⁸⁴ Notwithstanding the implementation of a new uniform election code, the County Canvassing Boards were not authorized to canvass the returns of all elections. For instance, results from elections to authorize bonds for county improvements were to be canvassed by the board of county commissioners.⁸⁵

During the years after the Civil War, the canvassing board officials, such as the county judges and justices of the peace, were all appointed by the governor, which soon led to the white establishment "ha[ving] complete control of the election machinery."⁸⁶ In some counties, canvassing boards "shamelessly manipulated voting and counting processes on election day."⁸⁷ In particular, in the years following Reconstruction, county judges often

78. Ch. 97, § 36, 1881 Fla. Laws 481, 496. For an example of the appointment procedure, see *State ex rel. Bisbee v. Bd. of County Canvassers of Alachua County*, 17 Fla. 9, 19 (1878).

79. Ch. 97, § 36, 1881 Fla. Laws 481, 496.

80. *Id.*

81. Ch. 97, § 40, 1881 Fla. Laws 481, 497.

82. *Id.* at 498.

83. *State ex rel. Drew v. McLin*, 16 Fla. 17, 43-44 (1876).

84. Ch. 97, §§ 44, 48, 1881 Fla. Laws 481, 498-99.

86. Charles Halsey Hildreth, *A History of Gainesville, Florida* 81 (1954) (unpublished doctoral dissertation, University of Florida) (on file with *Nova Law Review*).

87. MANLEY, *supra* note 43, at 299.

ignored clearly fraudulent activity designed to disenfranchise black citizens.⁸⁸ The misconduct was somewhat ameliorated in 1870 and 1871 by the enactment of a series of federal legislation⁸⁹ which held state officials, including judges, criminally liable for violations of voting rights.⁹⁰ Nevertheless, not all corruption was eliminated, as was indicated in the elections of 1878.

The congressional elections of 1878 saw Democrat Noble Hull run against the Republican incumbent Horatio Bisbee, Jr., for the Second Congressional District.⁹¹ As the election returns came into Tallahassee, they indicated a narrow lead for the Republican.⁹² The South Florida returns had not yet been received, and Hull sent to Brevard County “an Orange County lawyer, armed with \$200 and the information that Hull must have over [a] 200 [vote] majority in Brevard” to win the race.⁹³ Upon arrival in Brevard County, however, the attorney discovered that the returns had already been tallied and that Hull had won only by seventy-nine votes.⁹⁴ The court clerk, who possessed the returns, initially refused to alter them.⁹⁵ However, upon receiving the amount of \$140, the clerk “turned his office over to [the Hull representatives] who raised Hull’s vote” to a majority of 270 votes.⁹⁶ The altered returns were provided to the Brevard County canvassing board, who certified them as the official Brevard returns.⁹⁷ The canvassing board members were subsequently arrested for election fraud and found guilty in federal court in Jacksonville.⁹⁸ They each served more than a year in prison.⁹⁹

88. See *id.*; Hildreth, *supra* note 86, at 81; PEEK, *supra* note 49, at 40.

89. 1871 Enforcement Act, 16 Stat. 140–46; 1871 An Act to Amend the Enforcement Act, 16 Stat. 433–40; 1873 An Act to Enforce the Provisions of the Fourteenth Amendment, 17 Stat. 13–15. See also PEEK, *supra* note 49, at 169, 174–77, 186–87, 190–92.

90. PEEK, *supra* note 49, at 204–08.

91. WILLIAMSON, *supra* note 66, at 74–75. Hull was the current lieutenant governor. At that time, Florida was divided into only two congressional districts. *Id.*

92. *Id.*

93. *Id.* at 81.

94. *Id.*

95. WILLIAMSON, *supra* note 66, at 81.

96. *Id.*

97. *Id.* at 81, 83.

98. *Id.* at 84.

99. *Id.* at 81, 84. Hull was seated as Congressman from the Florida Second Congressional District. WILLIAMSON, *supra* note 66 at 75. Legal proceedings to determine the propriety of his election took almost his entire term, with his being unseated just a few days before the end of his term and Bisbee taking the seat in his place. *Id.* at 83.

Continuing corruption with the canvassing of votes was one of the reasons for the emergence of a strong Independent party in the 1884 statewide elections. The Independents campaigned on a platform that included the slogan “a free ballot, a full vote and a fair count.”¹⁰⁰ The Independent candidate for Lieutenant Governor, Jonathan C. Greeley, accepted the group’s nomination with a speech that echoed the slogan, calling for “a free ballot, a full vote and a fair count.”¹⁰¹ Although Greeley gave the Democrats a strong challenge, he did not win.¹⁰²

The slogan of the Independents appeared to fall on deaf ears. Rather than assure that election laws operated fairly, the legislature took steps to further thwart a fair vote. In 1889, new laws implemented a confusing multi-box system of balloting, along with a poll tax.¹⁰³ Only a single legislator spoke out against the new laws.¹⁰⁴ State Senator Will Coulter of Levy County argued that the State’s “[e]lection laws should be plain and simple.”¹⁰⁵ By 1892, the growth of the Farmers Alliance as a statewide political force again led to calls for election reform. However, the Alliance was not able to gain sufficient power to usurp the dominance of the Democratic Party, who were firmly entrenched in their antireform position.¹⁰⁶

In 1895, James Bryan Whitfield, future justice of the Supreme Court of Florida, drafted a new general election law for the state.¹⁰⁷ The composition of the county canvassing boards was changed. Rather than the clerk of the court and a justice of the peace serving with the county judge, the county canvassing board was thereafter composed of the supervisor of voter registration,¹⁰⁸ the chair of the county commission, and the county judge.¹⁰⁹

100. *Id.* at 183.

101. *Id.* at 182–84. The gubernatorial candidate was Frank W. Pope, who “had given up [a] promising career within the Democratic Party to protest against the white supremacy extremists of the Black Belt.” *Id.* at 182. Greeley, on the other hand, was a former Republican with reform leanings, who was president of a railroad and served as state senator from Jacksonville. WILLIAMSON, *supra* note 66, at 182. Although the Independents lost the election, they lost by less than 5000 votes and carried nine of the thirty-nine Florida counties: Washington, Leon, Jefferson, Madison, Hamilton, Nassau, Duval, Alachua, and Marion. *Id.* at 207–08. Notwithstanding its strong showing, the Independent Party was not able to survive its defeat. *Id.* at 210.

102. *Id.* at 207.

103. *Id.* at 270.

104. WILLIAMSON, *supra* note 66, at 271.

105. *Id.* at 270–71.

106. *Id.* at 318; GANNON, *supra* note 3, at 287.

107. MANLEY, *supra* note 43, at 349.

108. Now called the supervisor of elections. *See infra* text accompanying note 150.

109. FLA. STAT. § 102.14 (2002).

Once again, however, the county canvassing board possessed no discretionary authority to alter any decision of the precinct inspectors of election.¹¹⁰ This was true even if ballots were found by the county canvassing board which were clearly not counted by the inspectors.¹¹¹ As for precinct inspectors, a requirement was added that they be “fair minded” in addition to the existing requirement that they be “intelligent” and “discreet.”¹¹² Finally, the election inspectors were made subject to a fine if they revealed “how any elector may have voted,”¹¹³ while county canvassing board members were subject to fine or imprisonment if they “wilfully violate[d] any of the provisions of law relating to canvassing the result of any election.”¹¹⁴

D. *The Early Twentieth Century*

Notwithstanding efforts to provide for a statewide uniform system of canvassing elections, the Florida Legislature soon began once again to create other types of canvassing mechanisms for specific types of elections. In 1899, the legislature provided a new canvassing procedure for elections to consider taxes for school districts. In such an election, the local board of public instruction served in the place of the county canvassing board.¹¹⁵ A subsequent challenge to the school boards’ authority as canvassing entities was unsuccessful.¹¹⁶

Thereafter, in 1903, the legislature authorized the boards of county commissioners to canvass the results of any election involving the creation of any special tax road districts;¹¹⁷ in 1911, to canvass the results of any election involving the creation of any special road and bridge districts;¹¹⁸ in 1917, to canvass the returns of any elections involving the levying of a county tax for the creation of a tuberculosis hospital;¹¹⁹ in 1919, reauthorized to canvass the results of any election involving the relocation of a county seat;¹²⁰ and in 1925, to canvass the results of an election involving a local

110. FLA. REV. STAT. § 287 (1920).

111. *Bisbee*, 17 Fla. at 18–19 (uncounted ballots found in a ballot box).

112. FLA. REV. STAT. § 249 (1920).

113. *Id.* § 5876.

114. *Id.* § 5880.

115. *Id.* § 564.

116. *Pickett v. Russell*, 28 So. 764, 770 (1900).

117. FLA. REV. STAT. § 1638 (1920).

118. *Id.* § 1649.

119. *Id.* § 1818.

120. *Id.* § 1583.

referendum to determine whether to permit livestock to “roam at large.”¹²¹ On occasion, elections were held in which the county canvassing board, rather than the board of county commissioners, erroneously presided as canvassers of a particular election.

One particular set of challenges took place in Polk County in the early 1900s in which a local prohibition option had been approved by the electorate in a county referendum.¹²² State law had required the results of the referendum to be canvassed by the board of county commissioners.¹²³ In a series of criminal cases brought against those violating the prohibition law, local judges declared the local prohibition laws to be “null and void” because the “wet and dry election . . . had been canvassed by the county canvassing board, instead of by the county commissioners.”¹²⁴

Notwithstanding Supreme Court of Florida rulings that the canvassing boards did not at that time possess any authority to alter the returns as tallied by the precinct boards of election, such a law did not prevent the canvassing board from asking for recounts on occasion. One such incident occurred in 1913 during the Fort Lauderdale local elections in which the city council served as canvassing entity after the election board had tallied the votes.¹²⁵ At the close of the polls, the election board had certified the results for all city council seats, one of which involved a tally of ninety-two votes to eighty-nine votes.¹²⁶ One of the sitting council members, E.T. King, requested a recount which was granted.¹²⁷ However, the result was the same.¹²⁸

At this time, no statutory provision existed for the counting of ballots that were improperly marked. As a result, improperly marked ballots were generally not counted. In his first message to the Florida Legislature in 1913, Governor Park Trammell acknowledged the frequently resulting unfairness and stated this problem as one he wanted to address during his

121. Ch. 10316—(No. 294), § 2, 1925 Fla. Laws 64, 64. See also Ch. 14715—(No. 77), § 12, 1931 Fla. Laws 187, 190–91. (authorizing the same procedure for a special election in Marion County).

122. M. F. HETHERINGTON, HISTORY OF POLK COUNTY, FLORIDA 30 (Arthur H. Cawston ed., 1928).

123. *Id.* at 30–31.

124. *Id.*

125. *Matthews Elected Mayor of City*, FORT LAUDERALE SENTINEL, Apr. 4, 1913, at 1.

126. *Id.*

127. *Id.*

128. *Id.*

administration.¹²⁹ In one of the first calls for election boards to determine the voter's intent, the Governor stated:

[M]ere irregularities in marking the ballot, if the intention of the voter is clearly indicated, should not be cause for throwing out the ballot. The primary law should be so amended as to provide that where a voter's intention is clear on the ballot, the vote should be counted, though technically there might be an error in the marking of the ticket.¹³⁰

Such a call for reform did not, however, result in immediate legislation.

The Florida Legislature more clearly provided a right of inspection in 1915, by which up to three persons were permitted "to be sufficiently near" the ballots being counted so that the observers could determine "whether or not the ballots are being correctly read and called, and the count of the votes correctly tallied."¹³¹

Beginning in 1917, absentee ballots were authorized by Florida law.¹³² Such ballots were required to be filed directly with the county judge of the county for which the absent elector was voting.¹³³ These ballots were not opened until the canvassing board met to canvass the results of an election.¹³⁴ The canvassing board had the responsibility to open and tally these ballots.¹³⁵ A decade later, the ballots were separated by precinct and delivered to the appropriate poll election board.¹³⁶ If the inspectors of election determined that an absentee voter was not eligible to vote, the ballot cast "shall not be deposited in said ballot box, but shall be left in the outer envelope and by them delivered to the canvassing board . . . and also with a notation on said envelope of their reasons for not depositing said ballot in the ballot box."¹³⁷ No provision was made, however, for a canvassing board to overrule the decision of the inspectors.

In 1921, the legislature enacted a law requiring the county commissioners to publish in a local newspaper the names of the designated inspectors of

129. Park Trammell, *First Message of the Governor to the Florida Legislature*, Apr. 8, 1913, reprinted in *FORT LAUDERDALE SENTINEL* Apr. 18, 1913, at 7.

130. *Id.*

131. FLA. REV. STAT. § 5877 (1920).

132. *Id.* § 370-72.

133. *Id.* § 370.

134. *Id.* § 371.

135. *Id.* § 371.

136. Ch. 11824—(No. 17), § 2, 1927 Fla. Laws 116, 118.

137. *Id.*

election at least fifteen days prior to the election.¹³⁸ In 1927, an unusual law was enacted which transferred all the powers and duties of a supervisor of elections from the supervisor to the county tax collector in any county which had, “according to the State census of 1925, a population of not less than 13,600 and not more than 13,800.”¹³⁹ The only county meeting this requirement under the 1925 census was Walton County, located in the central western Florida Panhandle.¹⁴⁰ As a result, the tax collector of Walton County had a seat on the county’s canvassing board.

Municipal elections generally did not involve the county canvassing boards.¹⁴¹ Rather, the Florida Legislature, in creating or modifying municipalities, typically designated the city council or commission as the canvassing board for any municipal election. In 1927, such legislation was adopted, for instance, for the city of DeLand, and in 1929 for the town of Ormond.¹⁴²

Voting equipment changes taking advantage of the latest technological advances took place in 1929 when the Florida Legislature authorized counties to “provide for the experimental use” of new voting machines.¹⁴³ The enacting legislation authorized those voting machines which contained a counter indicating how many persons have voted and which could “permit the voter to vote for as many persons for an office as he is lawfully entitled to vote for, but no more.”¹⁴⁴ Upon closing of the polls, the board of elections of each precinct prepared a “statement of canvass” which was prepared by one member reading from each counter the total votes for each candidate or proposition, and the other two members recording the figure on the statement.¹⁴⁵ This procedure was to be done “in the presence of persons who

138. *Id.* at 116–20.

139. Ch. 12317—(No. 512), § 1, 1927 Fla. Laws 1254.

140. FLA. STATE CENSUS (1925) (on file in the Florida Collection at the Jacksonville Public Library); telephone interview with Marty Sugden, Research Librarian in the Florida Collection at the Jacksonville Public Library (Sept. 5, 2001) [both hereinafter collectively referred to as 1925 CENSUS].

141. *See, e.g., supra* text accompanying note 125–28 (describing local Fort Lauderdale election).

142. Ch. 12669—(No. 864), § 4, 1927 Fla. Laws 744, 748; Ch. 14278—(No. 714), § 4, 1929 Fla. Laws 1530, 1533. The role of the city council or commission as canvassing board continued into the 1930s and 1940s. *See, e.g.,* Ch. 19960—(No. 965), § 2, 1939 Fla. Laws 982 (pertaining to the canvassing of local elections in the city of Ocala).

143. Ch. 13893—(No. 329), § 4, 1929 Fla. Laws 715, 718.

144. Ch. 13893—(No. 329), § 2, 1929 Fla. Laws 715, 716.

145. Ch. 13893—(No. 329), § 23, 1929 Fla. Laws 715, 726.

may be lawfully present at that time, giving full view of the counters."¹⁴⁶ At the end of the procedure, the figures were to be "compared with the numbers on the counters of the machine."¹⁴⁷ If reconciled, the results were announced by the board chair, and then certified by the election board. The observers were to be given "ample opportunity" to compare the results to assure no corrections were necessary.¹⁴⁸ The first six counties receiving specific legislative authorization to use the voting machines, with county commission approval, were Marion, Palm Beach, Pinellas, Nassau, Polk, and Volusia Counties.¹⁴⁹

At the same time, the canvassing board structure was affected by a legislative amendment. While the local canvassing boards were still comprised of the county judge, the supervisor of elections, and the chair of the board of county commissioners, the new law clarified that the chair of the county commission was the person responsible for designating replacements for the county judge and the supervisor of elections if either or both of them were absent, sick, refused to act, or otherwise suffered a disability preventing them from serving on the canvassing board.¹⁵⁰

In 1931, the Florida Legislature promulgated a new law implementing procedures for elections to approve the issuance of bonds for "Counties, Districts and Municipalities."¹⁵¹ The new law provided a unique duty for the canvassing board: to determine the number of "free-holders who are qualified electors who are residing in such County, District or Municipality."¹⁵² Under the law, only freeholders could vote in bond referenda.¹⁵³ Moreover, as a threshold to the validity of the election, a majority of the freeholders had to cast a vote.¹⁵⁴ Accordingly, before the results of a bond referendum could be canvassed, the canvassing board had to first determine

146. *Id.*

147. *Id.*

148. *Id.*

149. Ch. 13894—(No. 330), 1929 Fla. Laws 728. For the counties of Pinellas, Nassau, Polk, and Volusia, the session law did not refer to the county by name. Rather, the law referred to the county's population figure as it existed under the 1925 Florida census. Only one county fit each population figure: 51,700 to 51,714 (Pinellas); 9600 to 9643 (Nassau); 63,900 to 63,925 (Polk); and 40,160 to 40,165 (Volusia). See 1925 CENSUS, *supra* note 140.

150. Ch. 13761—(No. 197) § 11, 1929 Fla. Laws 480, 486.

152. *Id.*

154. *Id.*

that a sufficient number of votes had been cast using lists that were to be supplied by the pertinent governing authority.¹⁵⁵

The Florida Legislature of 1933 further adopted legislation providing for the election of delegates to any convention that might be called by Congress to propose amendments to the United States Constitution.¹⁵⁶ The returns of such elections were to be canvassed by the board of county commissioners, rather than the county canvassing board.¹⁵⁷

The next year, the Supreme Court of Florida issued a decision which seemed to echo back to Governor Trammell's plea to consider the intent of the voter. In *State ex rel. Hutchins v. Tucker*,¹⁵⁸ the high court ruled that "substantial compliance" with ballot marking requirements was sufficient to warrant the counting of a ballot.¹⁵⁹ In this case, the court considered three types of mis-marked ballots: 1) those in which a voter had pasted to the ballot another sheet of paper which indicated the voter's choices; 2) those in which a voter paper-clipped a similar sheet of paper to the ballot; and 3) those in which a voter had merely enclosed an unattached sheet of paper in the envelope with the ballot.¹⁶⁰ The court determined that the first instance was "substantial compliance," while the latter two were not.¹⁶¹

The legislative session of 1935 spawned the creation of more laws creating special canvassing mechanisms for particular elections. Although the town or city councils of some municipalities were already authorized to canvass the returns of local elections for the members of the council, such enabling laws did not refer to anything other than these types of elections.¹⁶² As a result, new legislation provided that a municipal election for the creation of a local civil service board was to be canvassed by the local municipality's "governing authority."¹⁶³ Further, the executive committees of political parties conducting primary elections in certain municipalities had the "optional" authority to appoint the members of the boards of elections, rather than their appointment by the board of county commissioners.¹⁶⁴ At

155. *Id.* §§ 6, 12.

156. Ch. 16180—(No. 323), § 1, 1933 Fla. Laws 740.

157. *Id.* This particular law continues in effect as of the 2001 Florida legislative session. See *infra* text accompanying note 316.

158. 143 So. 754 (Fla. 1932).

159. *Id.* at 757.

160. *Id.*

161. *Id.*

162. See, e.g., Ch. 16433—(No. 576), § 9, 1933 Fla. Laws 481, 484 (authorizing the town council of the town of Frostproof to canvass the returns of its own elections).

163. Ch. 16864—(No. 93), § 25, 1935 Fla. Laws 271, 280.

164. Ch. 16989—(No. 218), § 5, 1935 Fla. Laws 477, 479.

the same time, the authority of the county commissioners to appoint the members of the election boards in municipalities was removed, and this power vested in the voters for each "city and town."¹⁶⁵ The members were to be elected for four-year terms.¹⁶⁶ The statutory provisions concerning absentee ballots were also amended to provide that any absentee ballots received "after midnight of such Election Day shall be voided, and such ballots destroyed by [the] Canvassing Board of the County in which received."¹⁶⁷

The 1935 Florida Legislature implemented another piece of legislation which altered the canvassing system in one of the state's most populous counties, Duval.¹⁶⁸ The new law abolished the Board of County Commissioners and extended the jurisdiction of the Jacksonville City Council throughout the entire county.¹⁶⁹ The result was that all duties previously performed by the Board of County Commissioners fell to the City Commission, including having a member sit on the local canvassing board.¹⁷⁰ Six years later, the legislature further affected the Jacksonville area by providing that no one in Duval County could serve as an inspector of election if that person were also a government employee or official.¹⁷¹

The 1937 Florida legislative session saw substantial change to the election system in Florida. The City of Jacksonville became the first Florida jurisdiction to have state-mandated voting machines for all city elections.¹⁷² For all jurisdictions using voting machines, including those voluntarily adopting the voting machine method, a new law required that the voter produce identification and a signature as proof that the person was in fact the person registered as the voter.¹⁷³ The local clerk or inspector of election was required to make a "fair and just comparison of the signatures."¹⁷⁴ If the inspector doubted the veracity of the signature, the voter was required to

165. Ch. 16983—(No. 212), § 1, 1935 Fla. Laws 468.

166. *Id.* § 2.

167. Ch. 16986—(No. 215), § 2, 1935 Fla. Laws 472, 474. For a discussion of the enactment of the absentee ballot law, see *supra* text accompanying notes 135–41.

168. See generally Ch. 17566—(No. 795), § 1, 1935 Fla. Laws 156, 157.

169. *Id.*

170. Ch. 17566—(No. 795), art. I, §§ 1, 4, 8, 1935 Fla. Laws 156, 157–58; art. XIV, §§ 1, 3, 1935 Fla. Laws 158, 199–200.

171. Ch. 21200—(No. 992), § 1, 1941 Fla. Laws 370.

172. Ch. 18618—(No. 912), § 1, 1937 Fla. Laws 778.

173. Ch. 18407—(No. 701), § 1, 1937 Fla. Laws 1338, 1338–39.

174. *Id.* § 2.

complete an affidavit attesting to the voter's registration before the vote would be accepted.¹⁷⁵

No provision was made in the law for any further review so long as the person executed the requisite affidavit.¹⁷⁶ Upon the closing of the polls for a general or special election, if the inspectors of election discovered that more ballots had been cast than voters casting ballots, the inspectors were required to "publicly draw out and destroy unopened and unexamined as many of such ballots as shall be equal to the excess."¹⁷⁷ The legislature also definitively provided that the inspectors of election possessed "such police powers as may be necessary to carry out" some specified duties of their position.¹⁷⁸

Until 1937,¹⁷⁹ a "protest" was not a legally cognizable challenge to an election result.¹⁸⁰ In 1937, the Florida Legislature provided the right to file a protest of the canvass of returns if any voter believed the returns were "erroneous or fraudulent."¹⁸¹ The protest had to be filed with the canvassing board, not the precinct inspectors of election.¹⁸² If a protest was filed, the first action required was for the "Canvassing Board to examine the counters on the voting machines," which were the subject of the dispute.¹⁸³ The votes appearing on the counters were "presumptively correct."¹⁸⁴ The new statute was silent on how the challenging voters might rebut the presumption, but the statute retained the right to seek court intervention.¹⁸⁵

Notwithstanding earlier legislation that local inspectors of election be subject to popular vote, the 1939 Florida Legislature authorized the Auburndale City Council to appoint its own inspectors of election for municipal elections, with the City Council serving as the canvassing board.¹⁸⁶ A truly broad provision in the law also gave the right to any defeated candidate to demand a recount.¹⁸⁷ The law did not require that the

175. *Id.*

176. *See id.* §§ 1–2.

177. Ch. 17898—(No. 192), § 9, 1937 Fla. Laws 359, 362.

178. Ch. 17901—(No. 195), § 3, 1937 Fla. Laws 366, 368–69.

179. Ch. 18405—(No. 699), § 9, 1937 Fla. Laws 1327, 1334.

180. *Compare* Ch. 18405—(No. 699), § 9, 1937 Fla. Laws 1327, 1334 *with State ex rel. Drew v. McLin*, 16 Fla. 17, 49 (1876).

181. Ch. 18405—(No. 699), § 9, 1937 Fla. Laws 1327, 1334.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. Ch. 19689—(No. 694), § 7, 1939 Fla. Laws 33, 33–34.

187. *Id.* § 12.

defeated candidate set forth a reason for the demand, nor did it provide discretion to the City Council to deny the recount.¹⁸⁸ If requested, the recount was mandatory.¹⁸⁹

The same legislative session saw the enactment of a statewide school code which provided for the election of school board members in each school district.¹⁹⁰ The County School Board was given the power to appoint its own inspectors of elections.¹⁹¹ It was also designated the canvassing board for purposes of these elections.¹⁹² A further enactment required that the inspectors of election for all types of elections post the results of their canvass at their polling place after concluding the tally.¹⁹³ The posting must be done conspicuously, so that "it will be subject to public inspection even though the polling place be closed."¹⁹⁴

By the 1940s, local municipal councils or commissions typically continued to serve as the canvassing boards for municipal elections.¹⁹⁵ In Jacksonville, the city lost the right to have absentee voting in any municipal election.¹⁹⁶ However, as the nation faced the challenge of the Second World War, this legislative aberration raised concerns of the need to facilitate the ability of those serving in the military to more easily cast votes throughout the state.¹⁹⁷ The Florida Legislature responded by adopting a specific law providing for the casting of absentee ballots by those in the armed forces.¹⁹⁸ All absentee ballots returned from the military were to be forwarded to the appropriate county judge for holding.¹⁹⁹ No later than the time of the closing of the polls on election day, the county judge was required to deliver these ballots to the canvassing board.²⁰⁰ The canvassing board then determined if the ballots met the requirements imposed by the Florida Legislature, which included a determination of whether the voter had also voted in person.²⁰¹ If

188. *See id.*

189. *Id.*

190. Ch. 19355—(No. 360), art. V, § 1032(1)(e), 1939 Fla. Laws 910, 912.

191. *Id.* §§ 119(6), 1032(1)(e).

192. *Id.* § 1032(1)(g).

193. Ch. 19663—(No. 668), § 5, 1939 Fla. Laws 1612, 1618.

194. *Id.*

195. *See, e.g.*, Ch. 21224—(No. 1016), § 1, 1941 Fla. Laws 450, 450–51 (referring to the canvassing of municipal elections in the city of Fernandina).

196. Ch. 21314—(No. 1106), § 1, 1941 Fla. Laws 911.

197. Ch. 22014—(No. 380), § 1, 1943 Fla. Laws 729.

198. Ch. 22014—(No. 380), 1943 Fla. Laws 729.

199. *Id.* § 6.

200. *Id.*

201. *Id.*

the canvassing board determined that the member of the military was not registered to vote, the absentee vote could be counted, but only for the federal elections of President and Vice President, Senators, and United States Representatives.²⁰²

In 1941, the Supreme Court of Florida, in *State ex rel. Carpenter v. Barber*, again considered how election boards and canvassing boards should handle mismarked ballots.²⁰³ In *Barber*, the questioned ballot contained an "X" for a candidate which was not contained within the space designated for the "X" to be placed.²⁰⁴ The tribunal ruled that the canvassing board was required to determine the "intention of the voter . . . from a study of the ballot"²⁰⁵ Upon review, "[i]f the will and intention of the voter can be determined . . . , the vote should be counted although the mark was misplaced."²⁰⁶ Three years later, the same court considered a challenge to ballots in which voters had used characters other than an "X" as instructed on the ballot.²⁰⁷ For instance, some voters used a check mark (√).²⁰⁸ In a decision which appeared to retreat somewhat from the voter's intent standard expressed in *Barber* and earlier in *Tucker*,²⁰⁹ the Supreme Court of Florida in *McAlpin v. State ex rel. Avriett* ruled that "all ballots marked with other characters should not be counted."²¹⁰

During the 1943 legislative session, the Florida Legislature modified the canvassing board structure for those counties having a population between 105,000 and 205,000 persons under the 1940 census.²¹¹ The only county meeting these parameters was Hillsborough.²¹² Under the new law, the legislature created a new County Election Board consisting of five resident registered voters²¹³ who had the responsibility to select the local inspectors of election²¹⁴ and to inspect the county's voting machines.²¹⁵

202. *Id.* § 7.

203. *State ex rel. Carpenter v. Barber*, 198 So. 49 (Fla. 1940).

204. *Id.* at 50.

205. *Id.* at 51.

206. *Id.*

207. *McAlpin v. State ex rel. Avriett*, 19 So. 2d 420 (Fla. 1944).

208. *Id.*

209. *State ex rel. Hutchins v. Tucker*, 143 So. 754 (Fla. 1932).

210. *McAlpin*, 19 So. 2d at 421.

211. Ch. 22195—(No. 561), 1943 Fla. Laws 1070.

212. U.S. CENSUS OF THE STATE OF FLORIDA (1940).

213. Ch. 22195—(No. 561), § 2, 1943 Fla. Laws 1070, 1071.

214. *Id.* § 6(3).

215. *Id.* § 6(5).

These members were appointed by the Governor for staggered terms.²¹⁶ The County Canvassing Board was restructured to include the County Election Board, as well as the County Judge and the Supervisor of Elections.²¹⁷ The duties of the canvassing board did not change, however, as it still had no authority to alter the tallies submitted by the local inspectors of election.²¹⁸ Six years later, the jurisdictional limit of this legislation was amended to apply only to those counties with populations between 135,000 and 270,000 under the 1945 state census.²¹⁹ The only county meeting this requirement was Hillsborough.²²⁰

E. Post-World War II Era

Absentee ballots were considered once again by the 1949 Florida Legislature.²²¹ The duty of some canvassing boards to destroy illegal absentee ballots²²² was eliminated with a law requiring that the "election inspection board" mark rejected absentee ballots by the notation "rejected as illegal" across the face of the ballot.²²³ These ballots then had to be retained as part of the election records for that election.²²⁴ The canvassing board's duties for including absentee ballots differed depending on the type of voting system used by the jurisdiction.²²⁵ If voting machines were used, the canvassing board added the absentee ballot calculation results to the tallies submitted by the precinct inspectors of election.²²⁶ For those counties using paper ballots, the absentee ballots were required to actually be placed in the appropriate ballot box before counting.²²⁷ The legislature also expanded the number of election inspectors statewide.²²⁸ Each polling place was thereafter required to have two "election inspection boards" comprised each of three inspectors and a clerk, each of whom must be able to read and write

216. *Id.* § 2.

217. At that time, the various Florida supervisors of election were referred to as "Supervisor[s] of Registration." *Id.* § 3.

218. Ch. 22195—(No. 561), §§ 2, 6(3), 6(5), 7, 1943 Fla. Laws 1070, 1070-77.

219. Ch. 25522—(No. 526), § 2, 1949 Fla. Laws 1211, 1212.

220. THE FLORIDA HANDBOOK 1947-48, at 165-71 (1946).

221. Ch. 25385—(No. 389), 1949 Fla. Laws 921.

222. *See supra* text accompanying note 167.

223. Ch. 25385—(No. 389), § 1, 1949 Fla. Laws 921, 926-27.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. Ch. 25384—(No. 388), § 2, 1949 Fla. Laws 915, 916.

the English language.²²⁹ One board had to be at the polls during voting, and the other tallied the votes when the polls closed.²³⁰ Each board could not consist of members all of whom belonged to the same political party.²³¹ The names of the appointed inspectors were further required to be published in a local newspaper.²³² For counties with populations of more than 100,000, the counties could provide for even more inspection boards to assist in the operation of the election.²³³

A major review of Florida's election laws took place in 1951, when the legislature adopted significant additions to existing law.²³⁴ While the law recognized the continued use of a board of elections comprised of a clerk and inspectors,²³⁵ the enactments specified a clear procedure for the tallying of votes at the precincts, particularly for those precincts using voting machines.²³⁶ The inspectors would tabulate the votes upon the closing of the polls by one inspector reading aloud each machine total and another writing down the result.²³⁷ Each of these inspectors had another inspector standing nearby to confirm the accuracy of the designated vote total.²³⁸ When the tabulation was complete for each machine, the inspector teams would then switch places with each team performing the opposite task.²³⁹ Each inspection team was to be comprised of "two inspectors of opposite political faith, whenever practicable."²⁴⁰ Inspectors of election were uniformly appointed by the board of county commissioners, rather than have some subject to popular election.²⁴¹ Each precinct continued to be required to have two election boards, with each being comprised of "three inspectors and a clerk."²⁴² No election board could be comprised of persons all belonging to the same political party.²⁴³ For some counties, the number of

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. Ch. 25384—(No. 388), § 2.

234. Ch. 26870—(No. 391), 1951 Fla. Laws 816.

235. Ch. 26870—(No. 391), § 4, 1951 Fla. Laws 845, 900; *Id.* § 6 at 906, 907.

236. *Id.* § 5.

237. *Id.*

238. *Id.*

239. Ch. 26870—(No. 391), § 5, 1951 Fla. Laws 860, 897.

240. *Id.*

241. *Id.* § 6.

242. *Id.*

243. *Id.* at 907.

election boards could be more or less, depending on the population of the county or the number of voting machines used in the county.²⁴⁴

The 1951 legislation further detailed a protest procedure by which any voter was entitled to file a written protest with the canvassing board if the voter believed the results were “erroneous and fraudulent.”²⁴⁵ The canvassing board would handle the protest, however, by merely double-checking the accuracy of the election boards’ tallies.²⁴⁶ The new law provided for no recount procedure.²⁴⁷ At the same time, the canvassing board was delegated more duties concerning absentee ballots. After determining the legality of each absentee ballot, the canvassing board was responsible for adding the additional votes to the tallies on each precinct poll book, and then adding the total of all these votes to the total for the county.²⁴⁸ Canvassing boards were required to convene “on the third day after any election, or sooner if the returns are received.”²⁴⁹ Any returns not received by the third day were required to be ignored.²⁵⁰

Finally responding to the call of Governor Trammell,²⁵¹ and following the lead set years earlier by the Supreme Court of Florida in *Tucker*²⁵² and *Barber*,²⁵³ the 1953 Florida legislative session saw the initial development of a statutory “standard” for use in determining the propriety of particular ballots.²⁵⁴ At that time, the law continued to provide for hand-marked ballots for elections in certain counties.²⁵⁵ The legislation required the voter to use an “X” to indicate the voter’s choice.²⁵⁶ Ballots were often submitted, however, in which the voter disregarded the requirement of an “X” and instead indicated the choice by some other means.²⁵⁷ The new law provided

244. *Id.* See also Ch. 26690—(No. 211), § 2, 1951 Fla. Laws 386, 387 (involving counties with populations between 3000 and 3200); Ch. 27134—(No. 655), § 1, 1951 Fla. Laws 1499 (involving counties with populations between 200,000 and 300,000).

245. Ch. 26870—(No. 391), § 5, 1951 Fla. Laws 860, 899.

246. *Id.*

247. *Id.*

248. *Id.* § 5.

249. *Id.* § 6.

250. Ch. 26870—(No. 391), § 6, 1951 Fla. Laws 906, 911–12. This provision foreshadowed a similar change in law made during the 2001 Florida legislative session. See *infra* text accompanying notes 353–56, 391–95.

251. See *supra* text accompanying note 129–30.

252. State *ex rel.* Hutchins v. Tucker, 143 So. 745, 757 (Fla. 1932).

253. State *ex rel.* Carpenter v. Barber, 198 So. 49, 50–51 (Fla. 1940).

254. Ch. 28030, 1953 Fla. Laws 164, 164–65.

255. *Id.*

256. *Id.*

257. *Id.*

that the ballot should not be disregarded “so long as there is a clear indication thereon to the election officials that the person marking such ballot has made a definite choice.”²⁵⁸

Beginning in 1955, county judges were no longer required to be the repositories of absentee ballots pending election day. This task fell more appropriately to the supervisor of elections.²⁵⁹ Two years later, the canvassing board was again addressed, with the legislature providing that the chair of each county commission would appoint a substitute commissioner to sit on the canvassing board if either or both the county judge or supervisor of elections could not sit.²⁶⁰ However, for those counties with a population between 200,000 and 300,000 persons, a circuit judge would sit in place of the absent county judge.²⁶¹ Again, the only county meeting this requirement was Hillsborough.²⁶² An amendment to the election code in 1959 provided more specifically that each election board “possess[ed] full authority to maintain order at the polls and enforce obedience to their lawful commands during an election, and during the canvass and estimate of the votes.”²⁶³

The 1960s saw several additional revisions to the state’s election code. Voting machines became mandated in all Florida counties, as well as all municipalities in counties in which the population exceeded 260,000 residents.²⁶⁴ The number of election boards for each precinct remained at two, with the board of county commissioners entitled to reduce the number to one if determined “necessary” by the commissioners in the exercise of their discretion.²⁶⁵ Additionally, if the number of voters at the precinct exceeded 1000, the supervisor of elections must appoint an additional board.²⁶⁶ The legislature also mandated training classes for all election inspectors and clerks.²⁶⁷ Acknowledging the increasing number of voters in

258. *Id.* The language of this provision foreshadowed the standard which would be adopted by the Florida Legislature again almost five decades later arising out of the Florida Recount. See *infra* text accompanying notes 340–42, 374–78.

259. Ch. 29934, § 24, 1955 Fla. Laws 877, 888.

260. Ch. 57-104, § 1, 1957 Fla. Laws 162.

261. Ch. 57-463, § 1, 1957 Fla. Laws 41.

262. U.S. CENSUS OF THE STATE OF FLORIDA (1950).

263. Ch. 59-212, § 1, 1959 Fla. Laws 844. This provision had its genesis in legislation adopted eight decades earlier that gave precinct inspectors the duty to maintain order at the polls. See *supra* text accompanying note 71.

264. Ch. 61-481, § 1, 1961 Fla. Laws 1074, 1075.

265. Ch. 65-416, § 1, 1965 Fla. Laws 1488.

266. *Id.* at 1489.

267. *Id.* at 1488–90.

the state, the legislature authorized canvassing boards to employ “clerical help” to assist in the performance of the canvassing board tasks.²⁶⁸

The following decade saw two relevant pieces of legislation pass the Florida Legislature. In 1973, the Electronic Voting Systems Act was enacted to prescribe detailed procedures for the canvassing of returns from automatic tabulating equipment.²⁶⁹ In particular, the use of punchcard ballots came into being, with the use of a *punch* legislatively intended to “clearly indicate the intent of the voter.”²⁷⁰ While the election board of each precinct was delegated the responsibility to set up for use all voting devices at the polls,²⁷¹ the county canvassing board was required to confirm that the total number of votes from each precinct was in fact an accurate count.²⁷² If a punchcard ballot was damaged to the point where it could not be read by the automatic tabulating machine, the canvassing board was mandated to *manually* count the ballot.²⁷³ The legislature failed to provide a specific standard for the canvassing board to determine how to count the vote.

Four years later, a second major piece of election legislation was enacted.²⁷⁴ This provision mandated that the canvassing board could not disregard a damaged or defective ballot “if there is a clear indication of the intent of the voter.”²⁷⁵ The Legislature left this decision to the canvassing boards’ discretion.²⁷⁶ This same piece of legislation eliminated the right of local governing bodies to canvass the results of bond referenda when other matters were on the ballot, giving this duty to the county canvassing boards.²⁷⁷ A clear provision was included which specified who would sit on the canvassing board if a particular member could not or was not eligible to sit.²⁷⁸ In particular, the chief judge appointed the replacement for the county judge.²⁷⁹ The chair of the board of county commissioners appointed the substitute for the supervisor, who was required to be another member of the board of county commissioners.²⁸⁰ The commissioners in turn would select a

268. Ch. 65-129, § 6, 1965 Fla. Laws 234, 237.

269. Ch. 73-156, § 3, 1973 Fla. Laws 248, 298.

270. *Id.* at 299.

271. *Id.* § 10.

272. *Id.* § 14(1).

273. *Id.* § 14(5)(b).

274. Ch. 77-175, § 20, 1977 Fla. Laws 903.

275. *Id.* § 20.

276. *Id.*

277. *Id.* § 12.

278. *Id.* § 26.

279. Ch. 77-175, § 26, 1977 Fla. Laws 903.

280. *Id.*

substitute if the chair of the county commission could not sit, who again was required to be one of its own members.²⁸¹ Finally, if no county commissioner was able or willing to serve on the canvassing board as a substitute, the chief judge could appoint any “qualified elector of the county” to sit.²⁸² This legislative act also included a mandatory machine recount by the canvassing board for situations in which there were “obvious errors” on any precinct returns, as well as any situation in which the results of the tabulation reflected that a candidate or measure was eliminated by “one-half of a percent less.”²⁸³

The Florida Legislature of the 1970s adopted a smattering of additional legislation pertaining to the canvassing of elections.²⁸⁴ An early law required the Division of Elections to “adopt uniform rules for the . . . use . . . of voting machines.”²⁸⁵ Later, the legislature designated the Secretary of State as the *chief election officer* who was given the duty to “obtain and maintain uniformity in the application, operation and interpretation of the election laws.”²⁸⁶ In 1976, the legislature authorized the Division of Elections to provide advisory opinions in the application of the State’s election laws, which opinion was “binding on any person or organization who sought the opinion or with reference to whom the opinion was sought.”²⁸⁷ A special act further chipped away at the authority of municipalities to serve as canvassing entities for local elections.²⁸⁸ The legislature mandated that all municipal elections in Broward County be canvassed by the county canvassing board, and not the municipalities’ governing bodies.²⁸⁹

The early 1980s saw little legislative activity which affected the role of the canvassing board. The 1984 Florida Legislature adopted legislation which specified that the tallying duties of a precinct election board must be performed open to the public.²⁹⁰ The same act required all canvassing boards to file with the Division of Elections after any election a report which specifies any problems, “difficulties or unusual circumstances encountered

281. *Id.*

282. *Id.*

283. *Id.*

284. *See* Ch. 72-303, § 1, 1972 Fla. Laws 1135, 1136.

285. *Id.*

286. Ch. 75-98, § 1, 1975 Fla. Laws 196.

287. Ch. 76-233, § 3, 1976 Fla. Laws 532, 534.

288. Ch. 75-350, § 8, 1975 Fla. Laws 74, 75.

289. *Id.*

290. Ch. 84-302, § 17, 1984 Fla. Laws 1409, 1419–20.

by the election board or canvassing board” during an election.²⁹¹ Two years later, the Legislature added a proviso that all canvassing board meetings must be held “in a building accessible to the public.”²⁹²

By the end of the 1980s, the Florida Legislature enacted major legislation which would have a primary role in the Florida Recount, the act which authorized a manual recount.²⁹³ The new law made a manual recount discretionary, but required that any request for a manual recount be filed with the canvassing board “prior to the time the canvassing board adjourns or within [seventy-two] hours after midnight of the date the election was held, whichever occurs later.”²⁹⁴ If a manual recount were authorized, the person requesting the recount had the right to “choose three precincts to be recounted.”²⁹⁵ If this partial recount revealed “an error in the vote tabulation which could affect the outcome of the election,” the canvassing board was required to conduct a manual recount of all the ballots.²⁹⁶ The statute did not, however, define what “an error in the vote tabulation” meant.²⁹⁷ To proceed with a manual recount, the canvassing board was required to appoint counting teams who had the task of trying to determine how votes were cast.²⁹⁸ If a counting team was unable to determine how a particular ballot was cast, the ballot was to “be presented to the county canvassing board for it to determine the voter’s intent.”²⁹⁹ Again, the statute did not provide any standards for a canvassing board to use in determining the voter’s intent.³⁰⁰

291. *Id.* § 18. This statutory provision was one of the laws cited by Secretary of State Katherine Harris as supporting her refusal to extend certification deadlines during the Florida Recount. Because the county canvassing boards did not detail any problems in these reports to the Division of Elections, Harris argued that the counties could not later allege that special circumstances during the election authorized an extended certification deadline. *See* Letter from Katherine Harris, Florida Secretary of State, to Broward County Canvassing Commission [sic] (Nov. 15, 2000) (on file with author) [hereinafter Harris Letter].

292. Ch. 86-33, § 4, 1986 Fla. Laws 98, 101.

293. Ch. 89-348, § 15, 1989 Fla. Laws 2226, 2230.

294. *Id.* § 15.

295. *Id.*

296. *Id.*

297. *See id.*

298. *Id.*

299. *Id.*

300. Ch. 89-348, § 15, 1989 Fla. Laws 2226, 2230. Almost all portions of this section became controversial during the Florida Recount. For the most part, Republicans accused the Democrats of being up to “some type of mischief” by resorting to the various procedures set forth in this section. Ironically, however, it was Florida Governor Bob Martinez, a Republican, who signed this legislation into law on July 5, 1989. *Id.* *See also* THE FLORIDA HANDBOOK 1999–2000, at 32 (A. Morris & J. Perry Morris, eds., 27th ed. 1999).

The same year, the Florida Legislature also specified that members of canvassing boards could personally be fined \$200 per day for each day election returns were submitted late.³⁰¹

The canvassing board's discretionary authority to decide when to grant a protest was clarified in an appellate decision arising out of a 1991 election for the City Commission of Oakland Park.³⁰² In this race for a commission seat, the challenging candidate lost by three votes, with the results reflecting fifty-eight overvotes and forty-two undervotes out of a total of 2609 votes cast.³⁰³ The candidate filed a protest with the county canvassing board, who the appellate court noted "may, but is not obligated to, grant the request" for a manual recount.³⁰⁴ The canvassing board denied the request.³⁰⁵ The defeated candidate brought a lawsuit, and the circuit court issued a writ of mandamus requiring the canvassing board to conduct a manual recount.³⁰⁶ The appellate court quashed the issuance of the writ, holding that "the decision whether or not to hold a manual recount of the votes [is] a matter to be decided within the discretion of the canvassing board."³⁰⁷

A final piece of legislation impacting the role of a canvassing board was enacted in 1999. This act changed the deadline to request a manual recount from the time the canvassing board adjourns, to "prior to the time the canvassing board certifies the results for the office being protested or within [seventy-two] hours after midnight of the date the election was held, whichever occurs later."³⁰⁸

301. Ch. 89-338, § 30, 1989 Fla. Laws 2139, 2162.

302. *Broward County Canvassing Bd. v. Hogan*, 607 So. 2d 508 (Fla. 4th Dist. Ct. App. 1992).

303. *Id.* at 509.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Hogan*, 607 So. 2d at 509–10. Interestingly, under the Florida Election Reform Act of 2001, a machine recount would have been required in this case if it came before a canvassing board today (one-half of one percent of the votes cast would be thirteen votes). Further, if the machine recount resulted in a difference of from one to six votes, a manual recount of the undervotes and overvotes would be mandated (one-quarter of one percent would be six votes). A manual recount under these circumstances would be optional at the candidate's request if the machine recount resulted in a difference of from seven to thirteen votes. See Ch. 2001-40, §§ 41–42, Fla. Laws 117, 147–152 (*amending* FLA. STAT. §§ 102.141, 102.166). See also *infra* text accompanying notes 362–73 for a discussion of recount rights under the new law.

308. Ch. 99-339, § 1, 1999 Fla. Laws 3544–45.

III. LEGISLATIVE SCHEME ON EVE OF 2000 ELECTION.

As the general election of 2000 arrived, the various county canvassing boards of the state were guided generally by chapters 101 and 102 of the *Florida Statutes* which set forth their duties for canvassing the returns and handling any protests concerning the results.³⁰⁹ Although the canvassing process does involve some consideration of voting systems, the Florida Legislature has made it clear that the custodian of the voting equipment is the supervisor of elections, not the canvassing board.³¹⁰ With a couple of exceptions, the composition of current canvassing boards continues to be as it has been since 1895: the chair of the county commission, the supervisor of elections, and a county judge.³¹¹ The county judge serves as chair.³¹²

However, three special types of elections exist which are canvassed by the entire board of county commissioners rather than the county canvassing board.³¹³ The first type is a referendum to consider relocating the county seat.³¹⁴ The second is a referendum to determine whether to establish a water and sewer district within the county.³¹⁵ The third is an election for delegates to any convention that might be called by Congress to propose amendments to the United States Constitution.³¹⁶

One further type of election has an unusual canvassing method. For any bond referendum that is on the ballot alone, without any other measure or election on the ballot, the canvassing is conducted by “the governing authority which called the referendum.”³¹⁷ For instance, if the election involves solely a county bond referendum, the board of county commissioners is the

309. FLA. STAT. §§ 102.141, 102.166 (2001).

310. § 101.34.

311. *See supra* text accompanying notes 107–08; *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 722 n.2 (Fla. 1998); *State v. Sarasota County*, 197 So. 2d 521, 522 (Fla. 1967).

312. FLA. STAT. § 102.141(1) (2001).

313. The existence of different types of canvassing entities was held to be constitutional under the 1885 Florida Constitution. *Lasseter v. Bryan*, 65 So. 590, 591 (Fla. 1914) (board of county commissioners may serve as canvassing entity for referendum involving local option to sell alcoholic beverages).

314. FLA. STAT. §§ 138.06–09 (2001). This chapter of the Florida Statutes also provides a different means to challenge the results of this type of election instead of the “protest-contest” means provided for other types of elections. § 138.06.

315. FLA. STAT. § 153.08 (2001). This statute likewise contains a separate means to contest the results of the election. §§ 153.58(1)(a), 153.59.

316. FLA. STAT. § 107.07 (2001). This law had its inception in 1933. *See supra* text accompanying note 157.

317. FLA. STAT. § 100.271 (2001).

canvassing authority, while a local bond referendum would be canvassed by the city council or commission.³¹⁸

IV. ELECTION REFORM ACT OF 2001

The controversy of the 2000 presidential election led to an outcry to revamp the election laws of Florida to address the difficulties experienced during the "Recount."³¹⁹ In response,³²⁰ the state conducted a series of statewide hearings which culminated in the Florida Legislature's adoption of the Florida Election Reform Act of 2001.³²¹ The act was approved by Governor Jeb Bush on May 10, 2001, with an effective date of January 2, 2002.³²² The primary focus of the act concerns voting systems and recount procedures.³²³

In the Election Reform Act, notwithstanding the complaints by some of the partisan nature of canvassing boards,³²⁴ the legislature left untouched the local canvassing board structure.³²⁵ The legislature did, however, prescribe new duties for canvassing boards, as well as redefining prior responsibilities.³²⁶ The changes can be categorized as follows:

318. *Id.* In 1945, the Florida Legislature had provided that bond elections could not be held at the same time as any other election. Ch. 22545—(No. 31), § 1, 1945 Fla. Laws 60.

319. Drogin, *supra* note 1, at 3A; JAKE TAPPER, *DOWN AND DIRTY: THE PLOT TO STEAL THE PRESIDENCY* 469 (2001) [hereinafter TAPPER]. See also Kent Kensill, *Paper Hammers at the Bushes*, SUN-SENTINEL (Ft. Lauderdale), Aug. 22, 2001, at 24A (asserting that problems with election arose from "random mishaps which occur in all elections").

320. Mark Silva, *Harris: There Was No Crisis, Just Close Vote*, SUN-SENTINEL (Ft. Lauderdale), July 30, 2001, at 6B; TAPPER, *supra* note 319, at 469.

321. Florida Election Reform Act of 2001, ch. 2001-40, 2001 Fla. Laws 117.

322. *Id.*

323. *Id.* at 129.

324. See, e.g., Collins, *supra* note 1, at C6 (quoting party official who "scoffs at the . . . assertion that Broward's speedy recount was not politically motivated.").

325. However, the state canvassing board and the Elections Canvassing Commission were changed. Prior to the 2001 law, the state commission was comprised of the Governor, the Secretary of State, and the Director of the Division of Elections. The new law modified the membership to "the Governor and two members of the Cabinet selected by the Governor." FLA. STAT. § 102.111(1) (2001).

326. Ch. 2001-40, 2001 Fla. Laws 117.

A. Tabulation Testing

Although the canvassing boards had previously been required to test the accuracy of the county's voting system,³²⁷ the new law requires that the board

execute a written statement setting forth the tabulation devices tested [for the newly required voting systems], the results of the testing, the protective counter numbers, if applicable, of each tabulation device, the number of the seal securing such tabulation device at the conclusion of testing, any problems reported to the board as a result of the testing, and whether each device tested is satisfactory or unsatisfactory.³²⁸

As with the previous law, the test must be conducted “[o]n any day not more than [ten] days prior to the election day.”³²⁹ The new law, however, more clearly emphasizes that the tabulation testing is a public event, which must be properly noticed.³³⁰ Because the new law permits voting systems to have a tabulating mechanism that is either determined at a central site or at each precinct, new sections of the law, discussed in more detail hereinafter, further provide procedures for testing tabulation equipment, whether it be central or precinct on-site tabulating in nature.³³¹ Under the Election Reform Act of 2001, the resetting of the voting tabulating device, as well as its sealing, must be witnessed by the canvassing board or its representative, as well as the representatives of the political parties, and the candidates or their representatives who attended the test.³³²

327. The actual testing of the tabulation system may be called something other than “tabulation testing” in the counties. For instance, in Broward County, the tabulation testing is referred to as the “logic and accuracy test.”

328. Office of the State Courts Administrator, Supreme Court of Florida, ABSTRACTS OF NEW LEGISLATION: 2001 REGULAR LEGISLATIVE SESSION OVERVIEW 27 (2001) [hereinafter ABSTRACTS]; Ch. 2001-40, § 21, 2001 Fla. Laws 117, 129.

329. FLA. STAT. § 101.5612(2) (2001).

330. *Id.*

331. *Id.*

332. *See generally id.*

B. *Provisional Ballots*³³³

A new task falling to canvassing boards is to determine whether a provisional ballot should be counted. Under the new law, a “provisional ballot” is to be given to a voter at a poll if a question exists as to the right of the voter to cast a ballot in the election or at that particular precinct.³³⁴ The canvassing board must determine if the elector casting the provisional ballot was eligible to vote at the precinct, and further determine if the voter had cast no other ballot in the election.³³⁵ In determining the propriety of a provisional ballot, the canvassing board must also “compare the signature on the provisional ballot envelope with the signature on the voter’s registration.”³³⁶ If the signature does not match, the canvassing board cannot count the ballot even if the voter is in the proper precinct.³³⁷ Any provisional ballot not accepted cannot be opened and must be marked “[r]ejected as [i]llegal.”³³⁸ The canvassing board also retained the right to determine the propriety of questionable ballots, including undervotes and overvotes,³³⁹ but has a new standard to make this decision, with language borrowed from legislation enacted almost fifty years earlier:³⁴⁰ “if there is a clear indication on the ballot that the voter has made a definite choice as determined by the canvassing board.”³⁴¹ If the board can make such a determination, the ballot cannot be “declared invalid or void.”³⁴²

333. As of August 20, 2001, the statutory sections involving provisional ballots have been placed on hold by the United States Department of Justice as possibly being a violation of the Federal Voting Rights Act of 1965. Under the federal law, all changes to Florida’s election laws must be approved by the federal government before taking effect. Brent Kallestad, *Voting Reform Faces a Hurdle*, SUN-SENTINEL (Ft. Lauderdale), Aug. 21, 2001, at 6B [hereinafter Kallestad].

334. FLA. STAT. § 101.048(2)(a) (2001).

335. *Id.* See also ABSTRACTS, *supra* note 328, at 28.

336. § 101.048(2)(b)(1).

337. § 101.048(2)(b)(2).

338. *Id.*

339. An overvote on a ballot reflects that the voter has selected more than one candidate for a particular office. An undervote reflects that the voter has not selected any candidate for a particular office. FLA. STAT. § 97.021 (2001). See also Martin Merzer, ‘Overvotes’ Leaned to Gore, HERALD (Miami), May 11, 2001, at 1A & 34A.

340. See Ch. 28030—(No. 10), 1953 Fla. Laws 164, amending FLA. STAT. § 101.011 (1951) (referring to the standard for determination of questionable hand-marked ballots). For a discussion of this earlier legislation, see *supra* text accompanying notes 251–58.

341. FLA. STAT. § 101.5614(5) (2001).

342. ABSTRACTS, *supra* note 328, at 28.

C. *Early Release of Returns*

Although a canvassing board may begin to canvass ballots before the closing of the polls, as in the case of absentee ballots, no results of the canvass can be released by anyone, including a canvassing board member, until all polls are closed. To do so is a third degree felony.³⁴³

D. *Canvassing Procedure*

Prior to the new law, ballots could be tabulated and reconciled at either the precinct or at a central location. Effective September 2, 2002, the new law permits ballots to be tabulated and reconciled at the precinct only.³⁴⁴ Any discrepancies coming to light at the precincts are to be reported to the canvassing board on forms to be provided.³⁴⁵ The results of the on-site precinct tabulation “may be transmitted via dedicated teleprocessing lines to the main computer system for the purpose of compilation of complete returns.”³⁴⁶ The Department of State was mandated to adopt administrative rules to assure safe procedures for the on-site precinct reconciliation of the ballots and the transmission of returns.³⁴⁷ When the canvassing board prepares the unofficial returns, which are to include the precinct returns, absentee ballots, and provisional ballots, the board must consider whether the unofficial returns contain a “counting error in which the vote tabulation system failed to count votes that were properly marked in accordance with the instructions on the ballot.”³⁴⁸ If a counting error is discovered, the canvassing board has only two options: 1) correct the error and recount the ballots with the vote tabulation system; or 2) request that the Department of State verify the tabulation software affected.³⁴⁹

E. *Canvassing Deadlines*

For a primary election, a canvassing board has seven days to certify the results of an election, but, for a general election, a canvassing board has

343. *Id.* § 101.5614(9).

344. *See generally* FLA. STAT. § 101.5614 (2001).

345. *Id.*

346. § 101.5614(3).

347. § 101.5614.

348. FLA. STAT. § 102.141(5) (2001).

349. *Id.* at (5)(a) & (b).

eleven days.³⁵⁰ However, no later than noon of the day following any election, a canvassing board must provide unofficial returns to the office of the Secretary of State.³⁵¹ These deadlines can *only* be extended in the case of an emergency as defined by the Election Reform Act.³⁵² If the deadline is not met, and no emergency exists, the statewide Elections Canvassing Commission *must* ignore the missing results.³⁵³ This is quite a change from the prior law, which gave the Elections Canvassing Commission the discretion to consider the late filed results even if no emergency existed.³⁵⁴ If an emergency does exist, the Election Canvassing Commission must set a deadline for receipt of returns that will be filed late.³⁵⁵

A possible problem could develop if a significant absentee ballot response were generated in an election. The new Election Code permits anyone to vote by absentee ballot;³⁵⁶ a requirement no longer exists that the voter demonstrate “good cause” for voting absentee.³⁵⁷ Further, up to four days prior to the election may begin the canvassing board to process all absentee ballots through the tabulating equipment,³⁵⁸ but must still have the

350. FLA. STAT. § 102.112 (2001).

351. ABSTRACTS, *supra* note 328, at 28.

352. FLA. STAT. § 102.112 (2001).

353. *See also id.* The issue of whether this particular provision violates the equal protection clause is beyond the scope of this paper. Because each county is comprised of a canvassing board of the same size (three members), it is quite possible that a canvassing board in a large county will have a more difficult time meeting a canvassing deadline than a smaller county. Florida counties currently range in population from 7021 residents to 2,253,362. THE WORLD ALMANAC AND BOOK OF FACTS 2002, at 425 (2002). The Florida Secretary of State Katherine Harris has, however, opined that the difference in size of counties should not be a factor to consider when determining whether to extend a canvassing deadline. *See Harris Letter, supra* note 291 (refusing to extend certification deadline for Broward County). The effect of the legal principle announced in *Bush v. Gore*, 531 U.S. 98, 104–07 (2000) to this new statute is at this point left to legal conjecture (“the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise”). *Id.* at 105 (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)); *see also Moore v. Ogilvie*, 394 U.S. 814, 817 (1969) (“When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy [under the equal protection clause] is presented.”); J. LIEBERMAN, THE EVOLVING CONSTITUTION 29 (1992) (access to ballot typically analyzed under equal protection clause).

354. FLA. STAT. § 102.112 (2000).

355. § 102.112(4) (2001).

356. ABSTRACTS, *supra* note 328.

357. *Id.*

358. *Id.* at 29.

certified returns to Tallahassee in either seven or eleven days, as the case may be.³⁵⁹

F. *Machine Recounts*

A machine recount is mandatory “if the margin of victory is one-half of a percent or less” for any election or judicial retention, unless the losing party waives the recount in writing.³⁶⁰ If a recount is authorized, it must be conducted in “each affected jurisdiction.”³⁶¹ For instance, in an election crossing county lines, “all counties comprising the district of the candidacy or ballot measure are required to recount.”³⁶² As for procedures used by a canvassing board during a recount, the Secretary of State is required to

adopt detailed rules prescribing additional recount procedures for each certified vote system which shall be uniform to the extent practicable, and at a minimum address the following areas: security of ballots during the recount process; time and place of recounts; public observance of recounts; objections to ballot determinations; record of recount proceedings; and procedures relating to candidate and petitioner representatives.³⁶³

G. *Manual Recounts*

The right to bring a protest before the canvassing board has been largely repealed and replaced by a manual recount procedure which is triggered only under certain specific sets of circumstances.³⁶⁴ If a *machine* recount indicates a margin of victory of one-quarter of one percent or less, the canvassing board must conduct a *manual* recount of overvotes and undervotes, regardless of whether any candidate asks for the recount.³⁶⁵ A *manual* recount of only the overvotes and undervotes is mandatory if the election was decided by a margin of victory between one-quarter and one-half of one percent of the vote.³⁶⁶ A manual recount of the overvotes and undervotes is mandatory so long as the losing party requests a manual

359. Fla. Stat. § 102.112 (2001).

360. ABSTRACTS, *supra* note 328, at 29.

361. *Id.*

362. *Id.*

363. *Id.* at 28.

364. FLA. STAT. § 102.166(1) (2001).

365. ABSTRACTS, *supra* note 328, at 28.

366. FLA. STAT. § 102.166(2)(a) (2001).

recount “in writing no later than the second day after the election.”³⁶⁷ Partial recounts are no longer authorized.³⁶⁸ In September 2001, the Division of Elections proposed rules governing the conduct of a manual recount, which were subsequently amended.³⁶⁹ In addition to following the standards set forth by the Division of Elections for determining the propriety of a questioned ballot,³⁷⁰ the proposed rule requires that the canvassing board “set aside”³⁷¹ each challenged ballot, “with a notation of the precinct number, the unique identifier number, how the ballot was counted, the reasoning behind the challenge, and the name of the person bringing the challenge.”³⁷² The canvassing board is required to have “copies of the[e] record” of the manual recount available to the public “within two weeks of the recount.”³⁷³

H. *Standard of Ballot Review*

For the review of any damaged ballot,³⁷⁴ or if a situation arises when a manual recount is authorized, the canvassing board must count a ballot “if there is a clear indication on the ballot that the voter has made a definite choice”³⁷⁵ However, the Secretary of State is mandated “to adopt specific rules” which set forth “what constitutes a clear indication.”³⁷⁶ If the ballot does not clearly indicate that “the voter has made a definite choice”³⁷⁷ for an office or ballot measure, the vote cannot be counted for any office or ballot measure for which there is no clear definite choice.³⁷⁸ Specific rules required under this provision were proposed by the Division of Elections in

367. *Id.*

368. ABSTRACTS, *supra* note 328, at 29.

369. Florida Department of State, *Laws & Procedures, Recount Procedures Notice of Change* (to be codified as Fla. Admin. Code r. 1S-2.031), available at <http://election.dos.state.fl.us/laws/ProposedRules/notice031.shtml> [hereinafter Proposed Rule 1S-2.031; see *Uniform Rules: Fix Flaws First*, Sun-Sentinel (Ft. Lauderdale) Oct. 19, 2001, at 30A [hereinafter *Uniform*].

370. See *infra* text accompanying notes 372–76, 458–62.

371. Proposed Rule 1S-2.031(1)(i) & (3)(l), *supra* note 369.

372. *Id.*

373. *Id.* rule 1S-2.031(1)(l) & (2)(m).

374. FLA. STAT. § 101.5614(5) (2001).

375. *Id.*

376. ABSTRACTS, *supra* note 328, at 28. This standard, similar to the prior standard, was specifically upheld by the United States Supreme Court so long as adequate specific guidelines were in place to make this decision. *Bush v. Gore*, 531 U.S. 98, 105–06 (2000).

377. FLA. STAT. § 101.5614(5) (2001).

378. § 101.5614(6).

September 2001 and subsequently amended.³⁷⁹ At least one critic has charged that although most of the proposed rules in this area are “reasonable and fair,” some of the proposals are “way too lenient.”³⁸⁰

I. Other Matters

The Election Reform Act also addresses the requirement that voting systems in Florida be fairly uniform and be limited to “electromechanical, or electronic apparatus,” thus outlawing punchcard ballots, lever machines, and hand-counted paper ballots.³⁸¹ This new requirement has little significance on the direct role of the canvassing board.³⁸² Nevertheless, the Florida Legislature continues to provide that “substitute ballots” may be used if “the required official ballots for a precinct are not delivered in time to be used on election day.”³⁸³

V. CURRENT CHRONOLOGICAL PROCEDURE

To better understand the overall effect of the statutory and rule changes to the canvassing process, one should consider the current step-by-step process in which a canvassing board engages. The responsibility of a canvassing board for a particular election begins well before election day.

379. Florida Department of State, *Laws & Procedures*, Clear Indication of Voter's Choice on a Ballot Notice of Change (2001) (to be codified as FLA. ADMIN. CODE rule 1S-2.027), available at <http://election.dos.state.fl.us/laws/ProposedRules/notice027.shtml> (last visited Mar. 23, 2002) [hereinafter Proposed Rule 1S-2.027].

380. See *Uniform*, *supra* note 369, at 30A.

381. FLA. STAT. § 97.021(36) (2001). An “electronic or electromechanical voting system” is defined as “a system of casting votes by use of voting devices or marking devices and counting ballots by employing automatic tabulating equipment of data processing equipment,” and the term includes touchscreen systems. *Id.*

382. Other statutory changes enacted to address issues arising during the Florida Recount, but not directly impacting upon the canvassing board's duties, include a requirement that all voting systems use a feature which “reject[s] a ballot and provide[s] the elector an opportunity to correct the ballot where the number of votes for an office or measure exceeds the number which the voter is entitled to cast or where the tabulating equipment reads the ballot as a ballot with no votes cast.” FLA. STAT. § 101.5606 (2001). In other words, it provides a feature that advises the voter that the cast ballot contains an overvote or an undervote. *Id.* After being advised that the ballot contains an undervote or overvote, the voter is free, however, to cast an uncorrected ballot. FLA. STAT. § 101.5608 (2001). If a voting machine rejects a ballot, the poll worker “without examining the ballot, shall state the possible reasons for the rejection and direct the voter to the instruction model . . .” § 101.5608(b).

383. FLA. STAT. § 101.43 (2001).

A. Before Election Day

In facing a new election the canvassing board must conduct the “public preelection test” by which the automatic tabulating equipment of the local voting system is tested by use of a “preaudited group of ballots.”³⁸⁴ The responsibility for providing notice of the test to candidates, party officials, and the public falls upon the supervisor of elections.³⁸⁵ The test must be conducted no more than ten days prior to the election.³⁸⁶ The testing procedure differs depending on the type of tabulation equipment available in the county, a central tabulation system, or a precinct on-site tabulation system.³⁸⁷ Although the statute requires that “each member of the canvassing board shall certify the accuracy of the test,” it further provides in apparent contradiction that “the canvassing board may designate one member to represent it” at the test.³⁸⁸

For a central tabulation system, preaudited ballots must be run through the voting equipment until “an errorless count shall be made.”³⁸⁹ If the test reveals an error, the canvassing board is responsible for ensuring that “the cause therefore shall be corrected.”³⁹⁰ For a precinct on-site tabulation system, the canvassing board is required to test a random sample of all devices to be used in the election to consist of “at least 5 percent or 10 of the devices, whichever is greater.”³⁹¹ If the canvassing board discovers an error in any tested tabulating device, the board must “take steps to determine the cause of the error, shall attempt to identify and test other devices that could reasonably be expected to have the same error, and shall test a number of additional devices sufficient to determine that all devices are satisfactory.”³⁹² If the canvassing board is unable to find a device satisfactory, it “may require that all devices to be tested or may declare that all devices are unsatisfactory.”³⁹³

384. Ch. 2001-40, § 21, 2001 Fla. Laws 129, 130.

385. *Id.*

386. FLA. STAT. § 101.5612(2) (2001).

387. § 101.5612(3) & (4).

388. § 101.5612(2). The supervisor of elections must have already prepared a “preaudited group of ballots” for the test which must include a number of overvoted ballots. § 101.5612(3).

389. § 101.5612(2).

390. *Id.*

391. § 101.5612(4)(a)(1).

392. § 101.5612(4)(a)(2).

393. *Id.*

Upon completion of the tabulation testing, each tested device must be reset and resealed.³⁹⁴ This must be done in the presence of the “canvassing board or its representative, the representatives of the political parties, and the candidates or their representatives who attended the test.”³⁹⁵ Records of all testing procedures and results must be maintained “as part of the official records of the election.”³⁹⁶

B. *On Election Day, Before Polls Close*

Upon convening on election day,³⁹⁷ the canvassing board needs to promptly evaluate whether any emergency has arisen which may result in the inability of the canvassing board to timely certify the returns.³⁹⁸ If so, the canvassing board must determine whether such an occurrence meets the definition of emergency as set forth in the Election Reform Act.³⁹⁹ This analysis is of critical importance, because under the new law, late returns may be accepted *only* in the instance of an emergency.⁴⁰⁰ Any returns submitted late without a statutory emergency arising *must* be ignored by the statewide Elections Canvassing Commission.⁴⁰¹ If the local canvassing board believes an emergency exists that justifies the late filing of returns, the canvassing board must request a new deadline from the Elections Canvassing Commission.⁴⁰²

394. § 101.5612(4)(b).

395. *Id.*

396. § 101.5612(4)(e).

397. By this time, the local supervisor of elections is required to have already given at least forty-eight hours prior notice of the convening of the canvassing meeting. FLA. STAT. § 102.141(2) (2001). Such notice must be given “by publication once in one or more newspapers of general circulation in the county . . .” *Id.*

398. *Id.*

399. FLA. STAT. § 101.732 (2001).

400. FLA. STAT. § 102.112(4) (2001).

401. This type of provision is not foreign to Florida election law. In 1951, the Florida Legislature enacted statutes which barred the local canvassing boards from including any precinct returns which were not timely submitted. See discussion *supra* text accompanying note 250.

402. FLA. STAT. § 102.112 (4) (2001). Under earlier case law, the returns were deemed timely submitted even if they were submitted by telephone to the Secretary of State. State *ex rel.* Chappell v. Martinez, 536 So. 2d 1007 (Fla. 1988). The continuing viability of this holding is in doubt because the earlier statute merely required that the returns be *forwarded* to Tallahassee, whereas the current version of the statute requires that they be *filed*, and *received*. The rationale of *Chappell* appears to continue to exist, however, because in neither the old statute nor the new does the language *explicitly require that the returns be in writing*.

The law requires that absentee and provisional ballots be canvassed before other returns are canvassed.⁴⁰³ Under existing case law, the canvassing board is not required to canvass ballots for those candidates who are no longer eligible for office.⁴⁰⁴ The canvassing of absentee ballots may begin “at 7 a.m. on the fourth day before the election, but not later than noon on the day following the election.”⁴⁰⁵ If the canvassing board decides to canvass absentee ballots before polls close on election day, no one must release any results until the closing of the polls.⁴⁰⁶ The supervisor of elections shall deliver to the board all absentee ballots received and kept by the supervisor’s office prior to election day.⁴⁰⁷ The supervisor could have already confirmed that the signature on each ballot matches the signature on file for that voter, although this procedure may also be done at the time of canvassing.⁴⁰⁸ However, none of the absentee ballots may be opened until the canvassing board convenes its session, whenever that may be.⁴⁰⁹

If a review of the ballots indicates more than one absentee ballot has been received from a voter, the canvassing board must determine “which ballot, if any, is to be counted.”⁴¹⁰ To accept an absentee ballot, the canvassing board must determine that: a) the ballot has been signed by the voter;⁴¹¹ b) the ballot includes a postmark, or if an overseas voter, the date signed,⁴¹² which must be a date before the election; and c) the voter’s ballot has also been signed by a witness who is eighteen years of age or older.⁴¹³ Any absentee ballot not meeting these requirements must be marked “rejected as illegal.”⁴¹⁴

Additionally, by administrative rule, the Division of Elections has authorized overseas voters to submit their ballots to the supervisor of elections by fax, so long as they contain the voter’s signature, the date of signature, and the statement, “I understand that by faxing my voted ballot I

403. § 102.141(2) (2000) (*amended by Fla. Laws ch. 2001-40, § 41*).

404. *Hancock v. Sapp*, 225 So. 2d 411, 415 (Fla. 1969). In *Hancock*, a candidate for office had accepted another public office prior to election day. The appellate court construed this as evidence that the candidate intended to relinquish his right to the seat on the ballot.

405. FLA. STAT. § 101.68(2)(a) (2001).

406. *Id.*

407. § 101.67 (2001).

408. § 101.68(1) (2001).

409. *Id.*

410. § 101.6103(5) (2001).

411. § 101.65(6) (2001).

412. § 101.65 (2001).

413. *Id.*

414. § 101.68(2)(c)(1) (2001).

am voluntarily waiving my right to a secret ballot.”⁴¹⁵ The canvassing board should also consider whether the Elections Canvassing Commission has declared an emergency, which would authorize the waiver for overseas voters of some of the stringent requirements of absentee ballots. In such a case, the state commission would have provided the necessary emergency rules for the county canvassing board to consider.⁴¹⁶ Court decisions have established that “compliance with statutory requirements for absentee voting [is] mandatory,” with any deficiency “fatal to the ballot cast.”⁴¹⁷

The absentee ballots themselves are “open for public inspection . . . while in the custody of the . . . county canvassing board at any reasonable time.”⁴¹⁸ A member of the public, however, is not permitted to handle any ballot.⁴¹⁹ If a person wants to inspect the absentee ballots, the supervisor is required to “make a reasonable effort to notify all candidates whose names appear on such ballots or ballot cards by telephone or otherwise of the time and place of the inspection.”⁴²⁰ The inspection is a public proceeding.⁴²¹ If any voter believes an absentee ballot is illegal due to failure to meet statutory requirements discussed above, that voter may “file with the canvassing board a protest against the canvass of that ballot.”⁴²² The protest must specify “the precinct, the ballot, and the reason [the voter] believes the ballot to be illegal.”⁴²³ This must be done before the ballot is removed from the envelope or the right to protest the ballot will be lost.⁴²⁴

C. On Election Day, After Polls Close

Upon the closing of the polls, the canvassing board will begin to receive the returns from the precincts. The canvassing board must consider any discrepancies concerning the total number of ballots assigned to the precinct

415. Florida Dep’t of State, *Laws and Procedures*, Electronic Transmission of Absentee Ballots (to be codified at FLA. ADMIN. CODE ANN. r. 1S-2.030), available at <http://elections.dos.state.fl.us/laws/ProposedRules/1S2.030.shtml> (last visited Mar. 23, 2002).

416. FLA. STAT. § 101.698 (2001).

417. *Wood v. Diefenbach*, 81 So. 2d 777 (Fla. 1955); FLA. STAT. § 101.698 (2001).

418. FLA. STAT. § 101.572 (2001).

419. *Id.*

420. *Id.*

421. *Id.*

422. § 101.68 (2)(c)(2).

423. *Id.*

424. *Id.*

as noted by the precinct workers on the transfer form.⁴²⁵ The canvassing board must further evaluate any provisional ballot received to determine whether the voter was entitled to vote in the precinct forwarding the ballot, and further whether the voter's signature on the ballot envelope matches the voter's registration.⁴²⁶ Ballots not meeting these two criteria must be marked *rejected as illegal*.⁴²⁷ Further, the canvassing board must consider any damaged ballots which could not be read by the tabulation equipment and were not corrected by duplicate ballot to determine whether they contain a "clear indication . . . that the voter has made a definite choice for an office or ballot measure."⁴²⁸ However, other than these areas, the canvassing board cannot review the propriety of any returns submitted by the precinct elections boards.⁴²⁹ The compilation of the precinct returns is merely a ministerial act to be performed by the canvassing board.⁴³⁰ The bifurcation of duties between the precinct election boards and the county canvassing board continues as it has for decades, as clearly expressed by the Supreme Court of Florida in *State ex rel. Barrs v. Pritchard*:

Election [precinct] inspectors, as such, have no power to declare the result of an election, even in or for the particular precinct for which they act. Their sole duty is to count, tally, tabulate, and return the votes as they find them to have been cast. The declaration of the result is a duty confided to the canvassing board to which the

425. § 101.5614 (2001). In the new law, the precinct workers responsible for the reconciliation and tabulation are referred to as the election board of each precinct, appointed by the supervisor of elections. *Id.* See also Fla. Laws ch. 2001-40, § 26. The election board for each precinct is responsible to open and close the polls at the precinct. The statute permits a second election board for each precinct, so long as the first election board arrives at the precinct not later than 6:00 a.m. on election day and stays until the closing of the polls. The second election board would then be responsible to "count the votes cast." FLA. STAT. § 102.012(4) (2001). An election board is comprised of a clerk and additional inspectors. § 97.021(8) (2001).

426. § 101.048(2)(a).

427. FLA. STAT. § 101.048(2)(b)(2) (2001).

428. § 101.5614(5) (2001). As with the law in effect prior to the Election Reform Act, damaged ballots can be corrected by election personnel so long as the duplicate ballot is made "in the presence of witnesses." In lieu of a duplicate ballot, however, the damaged ballot may be presented to the canvassing board for its determination. *Id.*

429. § 101.5614.

430. *Gough v. State ex rel. Sauls*, 55 So. 2d 111, 116 (Fla. 1951).

election returns are required to be sent for the purpose of being canvassed and there having the result declared and announced.⁴³¹

During the canvassing process, the canvassing board has the “full authority to . . . enforce obedience to its lawful commands during . . . the canvass of the votes.”⁴³² The Division of Elections has proposed rules which further provide that public observers of any manual recount may not “interfere or disturb the recount in any way.”⁴³³ Under the previous law, all returns must have been transmitted from the precincts to the canvassing board by noon of the next day.⁴³⁴ Under the new law, however, the returns must be transmitted no later than 2:00 a.m. the next day, a much shorter deadline which may pose some difficulty particularly in geographically large counties with heavy voter turnout.⁴³⁵

Once the canvassing board has completed the canvass, it is required to issue unofficial returns to the Department of State no later than noon the day after the election.⁴³⁶ Thereafter, before issuing official returns, the canvassing board must determine whether: a) a counting error exists;⁴³⁷ b) whether a machine recount is required;⁴³⁸ or c) whether a manual recount is required.⁴³⁹

D. After Election Day

If the unofficial returns reveal to the canvassing board that a counting error exists in the manner in which *properly marked* ballots have been counted, the board’s options are limited only to correcting the error and then conducting a machine recount, or requesting that the Department of State verify the county’s tabulation software.⁴⁴⁰

431. State *ex rel.* Barrs v. Pritchard, 149 So. 58, 59 (Fla. 1933).

432. FLA. STAT. § 102.031(1) (2001).

433. Proposed Rule 1S-2.031(1)(a), (2)(g), *supra* note 369.

434. FLA. STAT. § 102.141(3) (2001).

435. § 102.141(3).

436. Ch. 2001-40, § 41, 2001 Fla. Laws 131,147 (to be codified at FLA. STAT. § 102.141 (2001)).

437. *Id.*

438. *Id.*

439. Ch. 2001-40, § 42, 2001 Fla. Laws 137, 149 (to be codified at FLA. STAT. § 102.166 (2001)).

440. Ch. 2001-40, § 41, 2001 Fla. Laws 131, 147 (to be codified at FLA. STAT. § 102.141 (2001)).

If the unofficial results reveal that any candidate or ballot measure was “defeated or eliminated by one-half of a percent or less of the votes cast for such office” or ballot measure, then the canvassing board must conduct a machine recount unless the losing candidate requests in writing that the recount not be done.⁴⁴¹ The operation of this provision can be viewed by looking at a couple of examples. Assume in a particular race only 199 votes are cast with a breakdown of 100 to 99. A single vote is not “one-half of a percent or less of the votes” cast. Apparently then, no machine recount could ever be required for a race involving this number of ballots cast or less. Under the new law, it appears that a minimum of 201 votes must be cast in a race before a machine recount could ever be required under the new statutory provision. A breakdown of 101 to 100 would be within the requisite “one-half of a percent or less of the votes:” one-half of a percent of 200 votes being one vote, and the difference between the closest breakdown of 201 votes being a single vote.⁴⁴²

If a machine recount is necessitated, the board must then test the tabulating equipment as previously provided if the county has voting equipment that utilizes ballots.⁴⁴³ If the tabulation test indicates no error, then the ballots are to be run back through the automatic tabulating equipment.⁴⁴⁴ If the test indicates no tabulating error, then the recount is presumed to be the correct tally.⁴⁴⁵ If an error in the tabulating equipment is detected, then the procedure to be handled is the same as that for tabulating the equipment at the beginning of canvass.⁴⁴⁶ If a county uses a system that

441. FLA. STAT. § 102.141(4) (2000), *amended by* Fla. Laws ch. 2001-40, § 41. For smaller elections, machine and manual recounts may be able to take place on the day of election after polls close, although the detailed procedures now required make a manual recount less likely to occur on the same day as the election. *Id.*

442. The question remains whether a court will construe this law as applying to all numbers of votes cast, in order to pass constitutional muster. Florida courts recognize the principle that “the Legislature in its enactments is always presumed to have intended to enact constitutional acts.” *Gough v. State*, 55 So. 2d 111, 116 (Fla. 1951). Additionally, in construing the meaning of a new statute, Florida courts look primarily to the plain meaning of the words used by the Legislature. *Sieniarecki v. State*, 756 So. 2d 68, 75 (Fla. 2000). By using the plain meaning of the words in the statute, however, the new statute arguably runs afoul of the legal principle at issue in *Bush v. Gore*, 531 U.S. 98, 105–06 (2000) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”). *See also supra* note 254 and discussion contained therein.

443. FLA. STAT. § 101.5612 (2001).

444. *Id.*

445. *Id.*

446. *Id.*

does not use actual ballots, such as a touch-screen system, the canvassing board conducting a machine recount must “examine the counters on the precinct tabulators to ensure that the total of the returns on the precinct tabulators equals the overall election return.”⁴⁴⁷ If they do, the results are presumed to be correct.⁴⁴⁸

The second set of unofficial returns must be submitted “no later than noon on the second day after any election.”⁴⁴⁹ If the canvassing board cannot complete the machine recount within this deadline, then the canvassing board must submit the initial returns again as second unofficial returns, together with “a detailed explanation of why it was unable to timely complete the recount.”⁴⁵⁰ In conducting the machine recount, the canvassing board must remember that it will be required to make reports of its proceedings available to the general public.⁴⁵¹

If a machine recount is conducted, and the second set of unofficial returns indicates any candidate or ballot measure “was defeated or eliminated by one-quarter of a percent or less,” then a manual recount of the entire undervotes and overvotes is mandated.⁴⁵² If, however, the amended returns indicate a defeat of “between one-quarter and one-half of a percent of the votes cast,” a manual recount of the entire undervotes and overvotes is not required unless requested in writing by the “candidate, the political party of such candidate, or any political committee that supports or opposes such ballot measure.”⁴⁵³ The written request is to be directed to the county canvassing board for races within county boundaries, and to the State Elections Canvassing Commission for races crossing county lines.⁴⁵⁴ This procedure takes the place of the “protest” which was previously provided under Florida law.⁴⁵⁵

When conducting a manual recount, the canvassing board shall use “counting teams of at least two electors,” which are required to be “when

447. FLA. STAT. § 102.141(6)(b) (2001).

448. *Id.*

449. *Id.* § 102.141(6)(c) (2001).

450. *Id.*

451. *Id.* § 102.141(8) (2001).

452. FLA. STAT. § 102.166 (2001).

453. *Id.* FLA. STAT. § 102.166(2)(a) (2001).

454. FLA. STAT. § 102.166(2)(b) (2001). In order to cull overvotes and undervotes, all approved voting equipment must include the ability to sort while “simultaneously counting votes” using hardware or software approved by the Department of State. *Id.* § 102.166(3)(a).

455. § 102.166. The word “protest” now no longer appears in the Florida election lexicon except concerning a challenge to an absentee ballot. *See supra* text accompanying note 316–18.

possible, members of at least two political parties.”⁴⁵⁶ If the counting team cannot reach a decision on any particular ballot, the ballot is to be presented to the county canvassing board for a determination.⁴⁵⁷ The standard to be used by the canvassing board in counting undervotes and overvotes in a manual recount is if there is “a clear indication [on the ballot] that the voter has made a definite choice.”⁴⁵⁸

The Department of State was mandated to adopt rules specifying what constitutes a clear indication.⁴⁵⁹ These rules were proposed in September 2001 and subsequently amended.⁴⁶⁰ As they affect the responsibility of a county canvassing board, the rules appear to require the canvassing board to answer a primary question in determining the propriety of a questioned ballot: Is the ballot clear? For instance, if the voter does not substantially fill in the oval on an optiscan sheet, the vote should still be counted if the voter placed “any other mark . . . within the blank space . . . that clearly indicates the voter intended the oval or arrow to be marked.”⁴⁶¹ Moreover, if the voter attempts to change his or her mind by marking out an original choice and choosing another candidate, the ballot should be counted so long as the correction “is clearly evident in the space where the voter could indicate a ballot choice” or that the correction is “indicated in a clear fashion.”⁴⁶² Additionally, the proposed rules provide that the canvassing board should ignore any stray marks on the ballot if they are “clearly unrelated to the voter’s intent.”⁴⁶³

For those counties adopting a direct recording voting system, rather than the optical scan voting system, the task facing the canvassing board is not quite as onerous because the absence of printed ballots shifts the focus

456. *Id.* § 102.166(6)(a) (2001).

457. *Id.* § 102.166(6)(b).

458. *Id.*

459. FLA. STAT. § 102.166(6)(c) (2001).

460. Proposed Rule 1S-2.027, *supra* note 369; see *Uniform*, *supra* note 369, at 30A. Although the proposed rule purports to set forth standards for determining a voter’s choice “in a manual recount,” the standards would appear, for uniformity sake, to be equally applicable to those ballots reviewed by a canvassing board as part of the election itself: absentee ballots, provisional ballots and damaged ballots. Legal counsel with the Division of Elections concurs with this conclusion, acknowledging that the Division was not given the statutory authority to address standards for any ballots other than those involving a manual recount. Telephone Interview with Amy K. Tuck, Assistant General Counsel, Florida Division of Elections (Oct. 22, 2001) (Ms. Tuck is the attorney who drafted the proposed rule).

461. Proposed Rule 1S-2.027, *supra* note 369, rule 1S-2.027(1)(e).

462. *Id.* rule 1S-2.027(1)(i) & (j).

463. *Id.* rule 1S-2.027(1)(k) & (l).

primarily to any write-in candidates, absentee ballots, and provisional ballots.⁴⁶⁴ In either case, in determining the propriety of any ballot, the canvassing board must set aside each challenged ballot “with a notation of the precinct number, the unique identifier number, how the ballot was counted, the reasoning behind the challenge, and the name of the person bringing the challenge.”⁴⁶⁵

Under existing case law, canvassing boards are given some “latitude of judgment” in making decisions.⁴⁶⁶ Moreover, a canvassing board’s decision on the validity of a ballot is “presumptively correct.”⁴⁶⁷ If the board’s decision is “rational and not clearly outside legal requirements, [it] should be upheld rather than substituted by the impression a particular judge or panel of judges might deem appropriate.”⁴⁶⁸ Finally, a determination by a canvassing board should not be overturned by a court unless “there are clear, substantial departures from essential requirements of law.”⁴⁶⁹

If a recount is conducted pursuant to the new law, the county canvassing board must follow procedures that are to be promulgated by the Department of State addressing several issues, including: 1) the security of ballots during the recount; 2) the time and place of any recounts; 3) the public observance of the recount; 4) any objections to ballot determinations; 5) any record of the recount proceedings; and 6) procedures concerning candidate or other representatives.⁴⁷⁰ In conducting the manual recount, the canvassing board must remember that it will be required to make transcripts of its proceedings available to the general public.⁴⁷¹

Thereafter, when the returns are finally certified, the canvassing board must issue in duplicate a certified return of election.⁴⁷² The official return is comprised of “the return printed by the automatic tabulating equipment, to which has been added the return of write in, absentee and manually counted votes and votes from provisional ballots.”⁴⁷³ The certificate is required to contain “the total number of votes for each person nominated or elected, the

464. *Id.* rule 1S-2.027(2).

465. Proposed Rule 1S-2.031(1)(i) & (2)(i), *supra* note 369.

466. Boardman v. Esteva, 323 So. 2d 259, 268–69 n. 5 (Fla. 1975).

467. *Id.* at 269 n. 5.

468. *Id.*

469. *Id.* McLean v. Bellamy, 437 So. 2d 737, 746 (Fla. 1st Dist. Ct. App. 1983); Anderson v. Canvassing & Election Bd. of Gadsen County, 399 So. 2d 1021, 1022–23 (Fla. 1st Dist. Ct. App. 1981).

470. FLA. STAT. § 102.166(5)(c) (2001).

471. § 102.141(8).

472. § 102.151.

473. § 101.5614(8).

names of persons for whom such votes were cast, and the number of votes cast for each candidate or nominee.⁴⁷⁴ One copy of the certificate is to be filed with the local supervisor of elections.⁴⁷⁵ The other copy goes to the local government entity involved in the election, or to the Secretary of State if the election crosses county lines.⁴⁷⁶ For those elections crossing county lines, the state Elections Canvassing Commission provides the statewide ministerial act of compiling cumulative results.⁴⁷⁷

If challenged beyond the recount stage in an election contest, the canvassing board may be involved as a “proper party defendant” in the circuit court.⁴⁷⁸ The canvassing board is not, however, an indispensable party to such a lawsuit.⁴⁷⁹ Nor is it a proper party to a lawsuit if the election dispute does not involve claims of improper balloting or counting.⁴⁸⁰ The canvassing board itself has no standing to challenge the results of an election.⁴⁸¹ Its responsibilities involve the certifying of election results, with any challenge left to other parties.⁴⁸² Even if a canvassing board is grossly negligent in the manner in which it handles its responsibilities, the election results as certified by the board will nonetheless be upheld so long as they “reflect the will of the voters.”⁴⁸³ However, if a canvassing board willfully refuses to perform its duties, its members can be charged criminally.⁴⁸⁴

Another responsibility of the canvassing board that may occur after an election is concluded is to retest any tabulating device that has previously been determined to be unsatisfactory, and that has thereafter been “reprogrammed, repaired, or replaced.”⁴⁸⁵ As with pre-election testing, the

474. § 102.151.

475. *Id.*

476. *Id.*

477. § 102.111(1). The duties of the statewide board are beyond the scope of this article. For a brief discussion of the composition of the Elections Canvassing Commission, see *supra* note 235.

478. FLA. STAT. § 102.168(4) (2001).

479. See FLA. STAT. § 102.168 (2002). See also FLA. STAT. § 102.171 (2001) (mandating that contests involving general elections of members of the State Legislature shall be determined according to the rules of each legislative body); *Farmer v. Carson*, 148 So. 557, 560 (Fla. 1933).

480. *People Against Tax Revenue Mismgmt., Inc. v. Leon County Canvassing Bd.*, 573 So. 2d 31, 32–33 (Fla. 1st Dist. Ct. App. 1990).

481. *Morse v. Dade County Canvassing Bd.*, 456 So. 2d 1314, 1316 (Fla. 3d Dist. Ct. App. 1984).

482. *Id.*

483. *Beckstrom v. Volusia County Canvassing Bd.*, 707 So. 2d 720, 725 (Fla. 1998).

484. *Overstreet v. Whiddon*, 177 So. 701, 703–05 (Fla. 1938).

485. § 101.5612(4)(d).

subsequent testing may be attended by only a single authorized member of the canvassing board.⁴⁸⁶ Before this subsequent testing, however, the canvassing board must provide notice to all parties who were present at the original testing.⁴⁸⁷ This may be done orally at the “close of the first testing,” or may be subsequently done via telephone.⁴⁸⁸

VI. CONCLUSION

The Florida election canvassing system has developed gradually throughout the State’s history. The presidential election of 2000 provided an impetus for vast changes to the canvassing system, although the structure of the county canvassing boards remains intact. The Election Reform Act of 2001, designed to resolve controversy arising out of the presidential election, is not, however, without criticism.⁴⁸⁹ An analysis of various provisions in the new law, including the new proposed administrative rules, indicates several unanswered questions, assuring future tweaking of the canvassing system and continued development of the historical role of judges in the process.

486. *Id.*

487. *Id.*

488. *Id.*

489. Within two months of the effective date of the Election Reform Act, litigation had already been filed challenging the constitutionality of several of its provisions. Thus far, however, the challenge has had little to do with provisions involving the responsibilities of the county canvassing board. Ellis Berger, *Group Sues over Legislature’s Reforms*, SUN-SENTINEL (Ft. Lauderdale), Aug. 16, 2001, at 11A. Moreover, as of August 20, 2001, the federal government temporarily halted the new statutory sections dealing with voter education, voter registration lists, and provisional ballots. Kallestad, *supra* note 333, at 6B; *Election Reform: Answer Uncle Sam’s Questions*, SUN-SENTINEL (Ft. Lauderdale), Aug. 25, 2001, at 14A.

Juvenile Law: 2001 Survey of Florida Law

Michael J. Dale *

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I. INTRODUCTION

Rulings in the Florida state courts, with one exception, raised no major issues this past year. A number of technical matters were resolved, and the appeals courts continued the ongoing process of holding trial courts accountable for the protection of constitutional rights and enforcement of Florida statutory provisions. The Supreme Court of Florida rendered one major opinion, however. It held that it was constitutional to close termination of parental rights proceedings against a challenge by the media that such hearings should be public. The Florida Legislature was less active than it had been in recent years, tightening several provisions and making just a few substantive changes to services in the dependency field and to provisions of the delinquency law governing delinquent acts.

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II. JUVENILE DELINQUENCY

A. Adjudicatory Issues

In re Gault,¹ decided thirty-four years ago, requires that juveniles be provided counsel in delinquency cases and, if indigent, are entitled to an attorney paid for by the state.² In juvenile law survey articles going back almost one third of that time, this author has recounted the ongoing failure of Florida trial courts to comply with *Gault*.³ In *T.S. v. State*,⁴ a young teenager pleaded guilty to violation of the City of Orlando's youth protection ordinance, a curfew, which barred juveniles from certain areas of downtown Orlando after midnight, and was placed in a Level Eight Facility.⁵ At the plea hearing, the child was not represented by counsel and was not informed of her right to counsel in violation of rule 8.165(a) of the *Florida Rules of Juvenile Procedure*.⁶ The trial court made a brief comment that it had explained to the child her rights under the constitution, to which she had agreed, although the statement did not appear in the transcript.⁷ There were written waivers of the right to counsel but they had not been witnessed.⁸ Recognizing that there is a right to counsel at all critical stages of a juvenile proceeding in Florida,⁹ the court held that a plea is a critical stage and warrants the same guarantee of effective assistance of counsel as do trial proceedings.¹⁰ The court reversed.¹¹

In another right-to-counsel case, *D.C.W. v. State*,¹² the child appeared for arraignment in a delinquency proceeding at which the court gave a speech to the group of juvenile defendants before him and informed them of

1. 387 U.S. 1 (1967).

2. *Id.*

3. See Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 92 and n.2 (2000).

4. 773 So. 2d 635 (Fla. 5th Dist. Ct. App. 2000).

5. *Id.* at 636.

6. *Id.*

7. *Id.*

8. *Id.*

9. *T.S.*, 773 So. 2d at 635 (citing *A.D. v. State*, 740 So. 2d 565 (Fla. 5th Dist. Ct. App. 1999)).

10. *Id.*

11. *Id.*

12. 775 So. 2d 363 (Fla. 2d Dist. Ct. App. 2000).

their rights.¹³ The appeals court held that the specific colloquy with the child, to the effect that the child had heard and understood the speech to the group, was inadequate to meet the requirements of the *Florida Rules of Juvenile Procedure*.¹⁴ The court held that the colloquy about the right to counsel must include an inquiry into the juvenile's comprehension of the right to counsel and his capacity to waive the right in an intelligent and understanding fashion.¹⁵ The issue came up a third time in *G.E.F. v. State*.¹⁶ In that case, at the detention hearing, when asked whether the child wanted an attorney, the father replied in the negative and the court made no further inquiry.¹⁷ Then at the plea hearing, the only colloquy among the child, the parent, and the court concerned the court stating that it had offered the child an attorney, asking whether the parent could afford an attorney, and then when the mother replied that she could not, the court explaining the right to a public defender, and the parent decided to waive that right.¹⁸ The court failed to make any further inquiry as required by rule 8.165 of the *Florida Rules of Juvenile Procedure*, which explicitly states what is necessary. The appeals court reversed.¹⁹

Under Florida law, prior juvenile delinquency adjudications may be treated as convictions to enhance the classification of a subsequent delinquency offense charge.²⁰ In *State v. T.T.*,²¹ a juvenile was charged with a felony petit theft on the basis of prior convictions.²² In the *T.T.* case, the prior delinquency proceedings resulted in withheld delinquency adjudications and not in convictions, and as a result the juvenile moved to dismiss the delinquency charge.²³ The trial court granted the motion and the First District Court of Appeal affirmed, finding that because there was no express statutory language that a withheld adjudication may be considered a conviction for purposes of charging a juvenile in a subsequent delinquency proceeding as occurs with adults.²⁴

13. *Id.*

14. *Id.* at 364 (citing FLA. R. JUV. P. 8.165(b)(2)).

15. *Id.*

16. 782 So. 2d 951 (Fla. 2d Dist. App. 2001).

17. *Id.* at 952.

18. *Id.*

19. *Id.*

20. FLA. STAT. § 985.228(6) (2001).

21. 773 So. 2d 586 (Fla. 1st Dist. Ct. App. 2000).

22. *Id.* at 587.

23. *Id.*

24. *Id.* (citing FLA. STAT. § 784.03(2) (1999)).

Proper application of Florida's risk assessment instrument and other standards for secure detention have been the subject of discussion in this survey on a number of occasions.²⁵ The risk assessment instrument is a tool used by the court to determine whether a child may be held in secure detention.²⁶ The issue before the court in *J.J. v. Frier*²⁷ arose in the context of the writ of habeas corpus to overturn a trial court order that a child be held in secure detention.²⁸ Florida Statutes provide that the court may order a placement more restrictive than that demonstrated by the statistical results of the risk assessment instrument.²⁹ Under those circumstances, the court shall state its clear and convincing reasons for the placement in writing.³⁰ In *J.J.*, the appellate court described the pertinent statute as a "departure provision."³¹ The trial court did not state in writing the reasons for exceeding the risk assessment instrument, and all the appellate court had before it was a transcript of the detention hearing.³² The appeals court understood the statutory obligations of the court to be specific and aimed at controlling juvenile detention.³³ Therefore, it could not "casually dispense with the writing requirement[s]."³⁴ The court added that the statutory provision required the judge's reasons rather than a statement of evidence.³⁵ Thus, the appellate assessment of the reasons given by the judge to validate a variation from the risk assessment requirement of the statute is not a deferential review, but rather de novo review.³⁶

Florida cities, like those in many jurisdictions, have passed juvenile curfew ordinances.³⁷ The constitutionality of the City of Pinellas Park's

25. Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 23 NOVA L. REV. 819, 831-34 (1999); Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179, 180-84 (1997); Michael J. Dale, *Juvenile Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 189, 190-93 (1996); Michael J. Dale, *Juvenile Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 191, 192-94 (1995).

26. See FLA. STAT. § 985.213(2)(b)1. (2001).

27. 765 So. 2d 260 (Fla. 4th Dist. Ct. App. 2000).

28. *Id.* at 261.

29. FLA. STAT. § 985.215(2)(j) (2001).

30. *Id.*

31. *J.J.*, 765 So. 2d at 264.

32. *Id.*

33. *Id.* at 265.

34. *Id.*

35. *Id.*

36. *J.J.*, 765 So. 2d at 266.

37. See Michael J. Dale, *Representing the Child Client*, 3-38-3-41(2000).

Juvenile Curfew Ordinance was before the Supreme Court of Florida in *T.M. v. State*.³⁸ The ordinance made it unlawful for a juvenile to be or remain in a public place or establishment between 11:00 p.m. and 6:00 a.m. of the following day on Sundays through Thursdays and 12:01 a.m. through 6:00 a.m. on Saturdays, Sundays, and legal holidays.³⁹ The child could be the subject of a juvenile delinquency petition for violation of the ordinance.⁴⁰ The supreme court reversed the Second District Court of Appeal without ruling that the statute was or was not constitutional because the intermediate appellate court had applied a heightened scrutiny test rather than the strict scrutiny test.⁴¹ The Office of the Attorney General essentially conceded that the wrong standard was applied and the case was remanded for application of the strict scrutiny test.⁴²

B. *Dispositional Issues*

At the close of the adjudicatory stage of a juvenile delinquency proceeding, if the court finds that the allegations of the petition have been proven, it may either enter an order of adjudication or withhold adjudication.⁴³ When the court withholds adjudication, it shall place the child on probation and set additional conditions such as restitution, community service, curfew, urine monitoring, and driver's license revocation or suspension, among others.⁴⁴ When the court elects to adjudicate a child delinquent, it may enter a disposition that the child be placed on probation.⁴⁵

The issue before the appellate court in *S.R.A. v. State*⁴⁶ was what length of probation may be imposed upon a juvenile when the court withholds adjudication of delinquency.⁴⁷ The general rule in Florida is once the court obtains jurisdiction over the juvenile under chapter 985, the court retains

38. 784 So. 2d 442 (Fla. 2001).

39. *Id.* at 442-43.

40. *Id.* at 443.

41. *Id.* at 443-44.

42. *Id.* at 444.

43. FLA. STAT. § 985.231(1)(a)1. (2001).

44. § 985.228(4); FLA. R. JUV. P. 8.110(g) (2001).

45. §§ 985.03(43), 985.231. Until recently probation in Florida was known as community control. Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA. L. REV 91, 96 (2000).

46. 766 So. 2d 277, 278 (Fla. 4th Dist. Ct. App. 2000).

47. *Id.*

jurisdiction until the child reaches the age of nineteen.⁴⁸ When the court adjudicates the child to be delinquent and places the child on probation, Florida law explicitly limits the term of probation.⁴⁹ But for a second-degree misdemeanor, the statute limits probation to the maximum sentence that could be imposed if the juvenile were committed to the Department of Juvenile Justice, which may not exceed the maximum term of imprisonment that an adult could serve for the same offense.⁵⁰ However, where adjudication is withheld, chapter 985 allows an indeterminate probation sentence until the juvenile turns nineteen.⁵¹ Several courts have previously upheld the statutory provision for indeterminate probation in the withheld adjudication setting.⁵² On the other hand, the Fifth District Court of Appeal rejected the distinction in *G.R.A.*⁵³ Deciding that the juvenile justice system area is remedial in nature, the Fourth District Court of Appeal in *S.R.A.* upheld the legislative prerogative, although certifying the conflict with the Fifth District Court of Appeal.⁵⁴ The Supreme Court of Florida subsequently approved the *S.R.A.* decision without opinion.⁵⁵

The general rule in Florida is that the trial court has exclusive original jurisdiction over a child who is alleged to have committed a delinquent act until the child reaches the age of nineteen.⁵⁶ An exception occurs when the court enters a disposition in which it commits the child to the Department of Juvenile Justice when under certain circumstances the term of the commitment shall be until the child is charged by the Department or until he or she reaches the age of twenty-one.⁵⁷

In *S.L.K. v. State*,⁵⁸ the trial court committed the child to a Level Eight Department of Juvenile Justice program, suspending that commitment until the child was accepted and completed a Level Six boot camp, and then

48. FLA. STAT. § 985.201(4)(a) (2001).

49. § 985.231(1)(a)1.a.

50. *Id.*

51. *Id.*

52. See *M.B. v. State*, 693 So. 2d 1066 (Fla. 4th Dist. Ct. App. 1997); *N.W. v. State*, 736 So. 2d 710 (Fla. 2d Dist. Ct. App. 1999) *reh'g granted*, 744 So. 2d 455 (Fla. 1999); *M.G. v. State*, 696 So. 2d 1340 (Fla. 2d Dist. Ct. App. 1997) *overruled by G.R.A. v. State*, 688 So. 2d 1027 (Fla. 5th Dist. Ct. App. 1997).

53. 688 So. 2d at 1027.

54. *S.R.A.*, 766 So. 2d at 280.

55. *S.R.A. v. State*, 772 So. 2d 1217 (Fla. 2000).

56. See FLA. STAT. § 985.201(4)(a) (2001).

57. § 985.231(1)(a)(IV)d.3.

58. 776 So. 2d 1062 (Fla. 4th Dist. Ct. App. 2001).

retained jurisdiction over the child until he reached the age of twenty-one.⁵⁹ The appellate court reversed because the Department of Juvenile Justice's commitment statutory provision allows the retention of jurisdiction in the event that the commitment extends until the child's twenty-first birthday, but does not allow the court to continue to retain jurisdiction if the child is discharged from the commitment prior to the age of twenty-one.⁶⁰

*F.T. v. State*⁶¹ involved an appeal from a delinquency adjudication where the child was placed on probation.⁶² As this section of the article explains, in general, when a child is placed on probation after a delinquency adjudication, the maximum sentence cannot exceed that for which an adult would serve time for the same offense. The issue in *F.T.* was whether, under the facts of the case, the trial court had jurisdiction to adjudicate a violation of probation.⁶³ The child had initially been placed on probation on July 6, 1998.⁶⁴ The child subsequently admitted a violation of probation and on February 5, 1999 was adjudicated delinquent and placed on probation with a suspended commitment to a Level Four facility.⁶⁵ A second petition for violation of probation was filed against the child on August 10, 1999 and amended on September 23, 1999, and a hearing was held on October 7, 1999.⁶⁶ The issue involved whether, in October 1999, the trial court had jurisdiction to consider the affidavit of violation of probation.⁶⁷ The appellate court held that it did not because the one-year probation term, the maximum term for the offense had the child been charged as an adult, had expired.⁶⁸ Thus, the trial court lacked jurisdiction.⁶⁹

Florida's juvenile delinquency dispositional statute contains a provision for dealing with juvenile sex offenders.⁷⁰ The question in *C.C.M. v. State*⁷¹ was whether the sex offender probation conditions contained in the *Florida Statutes* governing adult criminal defendants apply in juvenile delinquency

59. *Id.*

60. *Id.* at 1065.

61. 766 So. 2d 1182 (Fla. 4th Dist. Ct. App. 2000).

62. *Id.*

63. *Id.* at 1183.

64. *Id.* at 1182.

65. *Id.* at 1182-83.

66. *F.T.*, 766 So. 2d at 1183.

67. *Id.*

68. *Id.*

69. *Id.*

70. See FLA. STAT. § 985.03(31) (2001).

71. 782 So. 2d 537 (Fla. 1st Dist. Ct. App. 2001).

proceedings.⁷² *C.C.M.* involved a thirteen-year-old who was found to have committed a lewd and lascivious act upon another child.⁷³ At a review hearing, after a dispositional hearing at which the child was committed to the Department of Juvenile Justice for placement in a moderate risk residential program, the court entered a modified order of adjudication and disposition, imposing the sex offender probation conditions under the adult act.⁷⁴ The appellate court reversed, finding first that the adult statute containing mandatory conditions of probation did not apply to juveniles because it was silent as to its application to juveniles and because the content of the statute also referred specifically to adult settings.⁷⁵ Although it found that the statute applied exclusively to adults and juveniles sentenced as adults, the appellate court commented in dicta that the lower court might have used its discretion to impose adult-like conditions.⁷⁶ However, it could not do so on a mandatory basis because of the language of the adult probation statute.⁷⁷ Because the court did not take discretionary authority at the time of the original disposition, it was foreclosed from doing so at a later date.⁷⁸

The juvenile delinquency disposition section of chapter 985 of the *Florida Statutes* does not provide for what are often described in the adult system as split sentences, whereby a judge orders commitment but suspends the commitment and orders completion of a probation program.⁷⁹ The First District Court of Appeal recently rejected such an approach in *Department of Juvenile Justice v. K.B.*⁸⁰ In the *K.B.* case, the trial court ordered that if a child failed to complete or violated a probation program through the Tallahassee Marine Institute, the Department of Juvenile Justice would immediately place the juvenile in a residential commitment facility without the need for a probation violation proceeding.⁸¹ The appellate court recognized that such an approach was creative, but that it was not available within chapter 985.⁸² It then concluded, as other appellate courts have, that

72. FLA. STAT. § 948.03(5) (2001).

73. *C.C.M. v. State*, 782 So. 2d 537, 538 (Fla. 1st Dist. Ct. App. 2001).

74. *Id.*

75. *Id.* at 539.

76. *Id.*

77. *Id.* at 539-40.

78. *C.C.M.*, 782 So. 2d at 540.

79. FLA. STAT. § 985.03 (2001).

80. 784 So. 2d 556, 557 (Fla. 1st Dist. Ct. App. 2001).

81. *Id.*

82. *Id.* (citing FLA. STAT. § 985.231 (2000)).

trial courts do not have unlimited discretion in establishing dispositions.⁸³ They may not place juveniles in particular facilities.⁸⁴ That is left to the discretion of the Department of Juvenile Justice.⁸⁵

C. Appellate Issues

A technical, but nonetheless important issue of appellate practice, came before the Fourth District Court of Appeal in *J.C.R. v. State*.⁸⁶ The issue involved preservation of a right to appeal an order by a trial court withholding adjudication of delinquency but impermissibly placing the child under "community control for an indeterminate amount of time not to exceed the child's twenty-first birthday. . . ."⁸⁷ The state conceded that the court lacked authority to set the term of community control beyond the child's nineteenth birthday but argued that the issue was not preserved for appeal.⁸⁸ Florida law provides that the appeal must be timely and pursuant to the statute governing criminal appeals and the *Florida Rules of Appellate Procedure*.⁸⁹ However, the court concluded that because the sentence imposed in the case was similar to one that exceeds statutory maximum, it is the type of fundamental sentencing error that can be raised on appeal without preservation of rights.⁹⁰

A second issue relates to the ability of the state to appeal from an order denying its request to impose restitution liens in a delinquency proceeding. In *State v. M.K.*,⁹¹ the appellate court held that it lacked jurisdiction because "there is no statute or court rule authorizing the state to appeal the [particular] order at issue."⁹² Recognizing that the state's right to appeal is purely statutory, the court could find nothing in chapter 985's list of orders that can be appealed by the state which would allow an appeal in the

83. *Id.*

84. *Id.*

85. 784 So. 2d at 557 (citing *R.L.B. v. State*, 693 So. 2d 130, 131 (Fla. 1st Dist. Ct. App. 1997)); *Dep't of Juvenile Justice v. J.R.*, 716 So. 2d 872 (Fla. 1st Dist. Ct. App. 1998); *Dep't of HRS v. State*, 616 So. 2d 91, 91-92 (Fla. 5th Dist. Ct. App. 1993) (citing *In re K.A.B.*, 483 So. 2d 898 (Fla. 5th Dist. Ct. App. 1998)).

86. 785 So. 2d 550 (Fla. 4th Dist. Ct. App. 2001).

87. *Id.* at 551.

88. *Id.*

89. See FLA. STAT. § 985.234(1) (2001); *J.C.R.*, 785 So. 2d at 551 n.1.

90. *J.C.R.*, 785 So. 2d at 551.

91. 786 So. 2d 24 (Fla. 1st Dist. Ct. App. 2001).

92. *Id.* at 25.

particular instance.⁹³ The court in *M.K.* then dismissed the appeal after commenting that the problem had existed in the adult criminal appeal arena but had been corrected by statute.⁹⁴

III. DEPENDENCY PROCEEDINGS

Chapter 39 of the *Florida Statutes*, as it governs dependency proceedings, is not a model of clarity and logic.⁹⁵ For example, none of the subdivisions of the chapter are actually entitled "Dependency Proceedings."⁹⁶ The definitional subpart of chapter 39 speaks of a child who is found to be "dependent" and includes several categories of children.⁹⁷ They are children who have been abandoned, abused, or neglected, who have been surrendered to the Department of Children and Families Services or to a licensed child placing agency for purposes of adoption, who have been voluntarily placed with a child caring agency or the Department, who have no parent or legal custodian capable of providing supervision and care, or who are in substantial risk of imminent abandonment, abuse, or neglect by a parent or legal custodian.⁹⁸ These categories of dependent children are then further defined in the statute,⁹⁹ but lacking precision, have been the subject of appellate review.

An abandoned child is defined in section 39.01(1) of the *Florida Statutes* as being in a situation in which the parent or custodian, through his or her absence, fails to provide for the child's support, fails to communicate with the child, thus evidencing a willful rejection of parental obligations.¹⁰⁰ The facts must demonstrate to the court a settled purpose not to assume parental duties.¹⁰¹ Incarceration may constitute abandonment.¹⁰²

The issue of how to evaluate abandonment as an evidentiary matter was recently before the Fifth District Court of Appeal in *S.C. v. Department of*

93. *Id.* at 26 (citing FLA. STAT. § 985.234(1)(b) (2000)).

94. *Id.* (citing *State v. MacLeod*, 600 So. 2d 1096 (Fla. 1992)).

95. *C.f. Z.J.S. v. Dep't of Children & Families*, 787 So. 2d 875, 878 (Fla. 2d Dist. Ct. App. 2001).

96. *But see* Part II of the *Florida Rules of Juvenile Procedure*, which is entitled "Dependency and Termination of Parental Rights Proceedings."

97. FLA. STAT. § 39.01(14) (2001).

98. *Id.*

99. *See id.*

100. § 39.01(1).

101. *Id.*

102. *Id.*

Children & Families.¹⁰³ The court recognized that there had to be a showing of willful rejection of parental responsibilities or marginal efforts to support and communicate with the child, such that there was a failure to evince the settled purpose to assume parental duties.¹⁰⁴ The appellate court's decision, as one would expect, was fact driven. The court found that there was some contact between the mother and the child while the child was not in the mother's physical custody and that the mother did not fail to provide financial support sufficient to establish abandonment because the husband and wife were used to supporting the children fully whenever that parent had custody of the child.¹⁰⁵ There had been no request for support made until the dependency proceeding was filed by the paternal great-aunt and great-uncle with whom the child periodically lived.¹⁰⁶ The court concluded that the pattern of conduct in evidence in the case was beneath the statutory threshold for abandonment.¹⁰⁷

Approximately ten years ago, the Supreme Court of Florida decided *Padgett v. Department of Health & Rehabilitative Services*,¹⁰⁸ in which it held that permanent termination of a parent's rights to one child under circumstances evidencing abuse and neglect may serve as grounds for termination of parental rights to a different child.¹⁰⁹ In *M.F. v. Department of Children & Families*,¹¹⁰ the issue before the Supreme Court of Florida was whether a court may base a final ruling of dependency "solely on the fact that the parent committed a sex act on a different child."¹¹¹ The court held that a simple showing by the Department of Children and Family Services "that a parent committed a sex act on one child does not by itself constitute proof that the parent poses a substantial risk of *imminent* abuse or neglect to the child's sibling, as required by [Florida law]."¹¹² The court recognized that the act may be quite relevant, but it is not automatically dispositive of the question of dependency, and therefore the court should focus on all the

103. 767 So. 2d 579 (Fla. 5th Dist. Ct. App. 2000).

104. *Id.* at 582.

105. *Id.*

106. *Id.*

107. *Id.*

108. 577 So. 2d 565 (Fla. 1991).

109. *Id.* at 571.

110. 770 So. 2d 1189 (Fla. 2000).

111. *Id.* at 1193.

112. *Id.* at 1194 (citing FLA. STAT. § 39.01(11) (1997)).

circumstances surrounding the petition in the particular case.¹¹³ The court thus refused to apply a *per se* rule.

The application of dependency proceedings to cases involving domestic violence was before the Fifth District in *D.D. v. Department of Children & Families*.¹¹⁴ In that case, the appellate court affirmed an adjudication of dependency in light of the trial court's finding of what Florida calls "prospective neglect" based upon proof that the child witnessed multiple incidents of domestic violence of both a physical and verbal nature, and that the violence was proof of prospective neglect sufficient to support a determination even in the absence of medical or other expert testimony.¹¹⁵ The appellate court first found that chapter 39's definition of neglect covers the situation of domestic violence,¹¹⁶ and that the state need not wait for a child to be neglected before instituting dependency proceedings.¹¹⁷ Relying upon an earlier Fourth District Court of Appeal opinion in *D.H. v. Department of Children & Families*,¹¹⁸ the court in *D.D.* held that the child must view the acts of violence.¹¹⁹ The court then added that the child's observation must be taken together with evidence indicating that the parents would more likely than not resume their relationship in the future and thus resume a cycle of domestic violence in the presence of the child in order to prove prospective neglect for purposes of a finding of dependency.¹²⁰ Finally, the court held that, unlike in the termination of parental rights setting,¹²¹ the state need not prove in a dependency proceeding that there was no prospect existing that the parent could improve his or her behavior.¹²² The rationale is that there is a different standard of proof in a termination case than in a dependency case because in the dependency proceeding, the goal is to improve the parents' behavior for the purpose of reunification in order to avoid termination.¹²³

113. *Id.*

114. 773 So. 2d 615 (Fla. 5th Dist. Ct. App. 2000).

115. *Id.* at 616.

116. *Id.* at 617; FLA. STAT. § 39.01(45) (2001).

117. *Id.* at 617.

118. 769 So. 2d 424 (Fla. 4th Dist. Ct. App. 2000).

119. *D.D.*, 773 So. 2d at 618.

120. *Id.*

121. See *Palmer v. Dep't of Health & Rehabilitative Services*, 547 So. 2d 981 (Fla. 5th Dist. Ct. App. 1989).

122. *D.D.*, 773 So. 2d at 618.

123. *Id.*

Corporal punishment periodically forms the basis for a charge of dependency.¹²⁴ In *J.C. v. Department of Children & Families*,¹²⁵ a stepfather of one child, and father of a younger child, was charged with excessive parental discipline.¹²⁶ Noting that the stepfather, while not the biological father of the older child, was in a position with approval of the mother to discipline both children, dependency might flow to him.¹²⁷ The allegations of dependency were made related to physical, mental, and emotional injury under chapter 39.¹²⁸ Florida law allows for corporal discipline so long as it is not excessive or abusive.¹²⁹ The court found that there was no evidence that the bruises were significant or that they constituted temporary disfigurement.¹³⁰ Nor was there any evidence that the children were likely to be harmed if they were returned to their home.¹³¹ Finally, the court referred to the Supreme Court ruling in *Beagle v. Beagle*,¹³² in which the high court, in the context of grandparent visitation, relied upon the privacy provisions of the Florida Constitution, which do not allow state involvement unless there is a threat of harm.¹³³

Florida, like other states, provides that in dependency proceedings, hearsay statements of a child may be offered to prove abuse or neglect.¹³⁴

124. See Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91 (2001); Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 28 NOVA L. REV. 819 (1999); Michael J. Dale, *Juvenile Law: 1997 Survey of Florida Law*, 22 NOVA L. REV. 179 (1997); Michael J. Dale, *Juvenile Law: 1996 Survey of Florida Law*, 21 NOVA L. REV. 189 (1996); Michael J. Dale, *Juvenile Law: 1995 Survey of Florida Law*, 20 NOVA L. REV. 191 (1995). Corporal punishment may also form the basis for a criminal charge. See generally *State v. MacDonald*, 785 So. 2d 640 (Fla. 2d Dist. Ct. App. 2001); *Raiford v. State*, 736 So. 2d 155 (Fla. 4th Dist. Ct. App. 2001) (holding that discipline of a child does not bar prosecution for simple child abuse if the beating produces severe bruises enough to require treatment at a hospital).

125. 773 So. 2d. 1220 (Fla. 4th Dist. Ct. App. 2000).

126. *Id.*

127. *Id.* at 1220–21.

128. See FLA. STAT. § 39.01(30)(a) (2001).

129. *J.C.*, 773 So. 2d at 1221 (citing FLA. STAT. § 39.01(30)(a)(4.) (2001)).

130. *Id.*

131. *Id.* at 1222 (citing FLA. STAT. § 39.01(2) (2001)).

132. 678 So. 2d 1271 (Fla. 1996).

133. *J.C.*, 773 So. 2d at 1222. For a discussion of Florida grandparent visitation law, see Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 98–100 (2000).

134. See generally, Michael J. Dale, REPRESENTING THE CHILD CLIENT, 1-38–3-41 (Matthew Bender & Co., Inc. 2001).

However, under Florida law there must be other corroborative evidence of the abuse or offense in order for the hearsay to be received in evidence.¹³⁵ In *R.U. v. Department of Children & Families*,¹³⁶ the court recognized that the corroborative evidence must tend “to confirm the unlawful sexual act,” that is to say, “the abuse or the offense.”¹³⁷ The problem with the case at bar was that the only evidence supporting the child’s hearsay statements was other hearsay statements made by the same child to the same therapist who testified as to the original declarations.¹³⁸ These other statements, the court concluded, do not constitute other corroborating evidence within the meaning of the Florida statute.¹³⁹ The court concluded that the word “other” refers to evidence derived from a source other than the child victim’s own statements.¹⁴⁰

Florida provides by statute that a parent has a right to counsel in a dependency proceeding.¹⁴¹ Despite the fact that counsel may be present and may agree to the parents’ consent to an adjudication of dependency of a child, it is nonetheless incumbent upon the trial court to question the parent concerning whether he or she understands the nature of the allegations against him or her and the possible consequences of consent to the dependency adjudication.¹⁴² Because the *Florida Rules of Juvenile Procedure* so require,¹⁴³ the court in *I.D.M. v. State*¹⁴⁴ held that consent by counsel alone without court colloquy with the mother on these issues was reversible error.¹⁴⁵

The need to move a dependency case in order that there be timely disposition and decision about what should happen to the child is contained both in Florida law and in federal funding statutes.¹⁴⁶ The need to move expeditiously was made clear in dicta in *A.R. v. Department of Children &*

135. FLA. STAT. § 90.803(23) (2001).

136. 777 So. 2d 1153 (Fla. 4th Dist. Ct. App. 2001).

137. *Id.* at 1159.

138. *Id.* at 1160.

139. *Id.* (citing FLA. STAT. § 90.803(23)(a)2.b. (2001)).

140. *Id.*

141. FLA. STAT. § 39.013 (2001). There is no constitutional right to counsel. *See Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 30–32 (1981).

142. § 39.013

143. FLA. R. JUV. P. 8.325(c) (2001).

144. 779 So. 2d 526 (Fla. 2d Dist. Ct. App. 2001).

145. *Id.* at 527.

146. Florida Adoption Act, FLA. STAT. §§ 63.012–63.235 (2001); Adoption and Safe Families Act of 1997, 42 U.S.C. § 671 (1997).

Families.¹⁴⁷ After ruling that the evidence did not support a finding that the mother's two children were dependent, the court explained that it was "compelled to explicate a concern presented by this case even though our reversal is not predicated on the point."¹⁴⁸ The court then explained that the record in the case contained no reason for a nearly eleven-month delay between the commencement of the dependency hearing and its completion.¹⁴⁹ Explaining that the delay was "indefensible" in light of the fundamental nature of the interest at stake, and given that the legislature had indicated that proceedings should be handled quickly and that the Supreme Court had further enunciated time standards, the court concluded "[b]y publication of this opinion, we hereby advise that delays such as those involved in this case will not be countenanced."¹⁵⁰

In *K.R. v. Department of Children & Families*,¹⁵¹ the issue was whether verbal arguments between parents may be sufficient to constitute neglect within the statutory definition which would be adequate to support an adjudication of dependency.¹⁵² The appellate court concluded that absent evidence of injury or the risk of injury to the child, there could be no finding of dependency.¹⁵³ Specifically, there was no evidence of psychological problems, which the child was experiencing, nor any deviation from normal performance and behavior.¹⁵⁴ Recognizing that arguments are commonplace and that they can be frequent and loud, verbal abuse between parents alone is insufficient for state intervention.¹⁵⁵

On the other hand, failure to protect a child from abuse may constitute grounds for adjudication of dependency. In *M.R. v. Department of Children & Families Services*,¹⁵⁶ over a vigorous dissent, the appellate court upheld a finding of dependency based upon a preponderance of the evidence that the children had been abused and that the parents had failed to protect them

147. 784 So. 2d 622 (Fla. 5th Dist. Ct. App. 2001).

148. *Id.* at 623.

149. *Id.*

150. *Id.* at 623–24.

151. 784 So. 2d 594 (Fla. 4th Dist. Ct. App. 2001).

152. *Id.* at 598. See FLA. STAT. § 39.01(43) (2001) (providing that neglect may involve a significant impairment, an injury which may be defined as "an injury to the intellectual or psychological capacity of a child as evidenced by a discernable and substantial impairment in the ability to function within the normal range of performance and behavior.").

153. *K.R.*, 784 So. 2d at 598.

154. *Id.*

155. *Id.*

156. 783 So. 2d 277 (Fla. 3d Dist. Ct. App. 2001).

from abuse.¹⁵⁷ The evidence was un rebutted that there had been vaginal penetration of two children.¹⁵⁸ The issue before the court was whether the father had sexually abused the children.¹⁵⁹ The court held that the evidence showed that the children had been abused and that the parents had failed to protect them even though there was no showing as to the cause of the children's injuries.¹⁶⁰ Judge Jorgenson vehemently dissented stating that "[b]y its decision today, the court established a new evidentiary standard in dependency cases: 'if we can't figure out what happened, Dad must have done it and Mom must have failed to stop it.'"¹⁶¹ The detail of the concurrence and the dissent demonstrate the factual difficulties that can arise in intra family dependency proceedings.

IV. TERMINATION OF PARENTAL RIGHTS

Florida law authorizes nine separate grounds for termination of parental rights.¹⁶² They include a voluntarily executed written surrender, abandonment, conduct which demonstrates continuing involvement of the parent or parents in the relationship with the child, which threatens the life, safety, well-being, or physical, mental or emotional health of the child irrespective of the provision of services,¹⁶³ the parent is incarcerated under certain circumstances and for certain times subsequent to an adjudication of dependency, the filing of a case plan, and continued abuse and neglect or abandonment, egregious conduct that threatens the life, safety, or mental or emotional health of the child or a sibling, subjection of the child to aggravated child abuse, sexual abuse or battery or chronic abuse, commission or murder or voluntary manslaughter of another child or felonious assault resulting in bodily injury to the child or another, and finally when parental rights of the parent to a sibling have been involuntarily terminated.¹⁶⁴ Several of the provisions of the Florida termination law relate to the development and application of what is known as a "case plan."¹⁶⁵ A

157. *Id.* at 278.

158. *Id.* at 279.

159. *Id.*

160. *Id.* at 280.

161. *M.R.*, 783 So. 2d at 281.

162. FLA. STAT. § 39.806(1) (2001).

163. *Id.*

164. § 39.806(1)(a).

165. § 39.601.

parent's failure to comply with the case plan for a period of twelve months can result in termination of parental rights.¹⁶⁶

The issue before the Third District Court of Appeal in *J.M. v. Florida Department of Children & Families*¹⁶⁷ was whether a termination of parental rights petition was prematurely filed because the time period within which the parents had to comply with the case plan had not passed.¹⁶⁸ The Florida termination statute provides for different case plan compliance time frames dependent upon which ground for termination is alleged.¹⁶⁹ Thus, for example, if it is determined that continuing parent involvement with the child threatens life, safety, and well-being, there is no requirement for any particular period of time under a case plan.¹⁷⁰ On the other hand, a separate section of the law provides that a petition may be filed when the child has been adjudicated dependent, a case plan has been filed, and the child continues to be abused and neglected.¹⁷¹ Under those circumstances, there must be a failure of the parent to substantially comply for a period of twelve months after adjudication of the child as a dependent child.¹⁷² This time period begins to run after the disposition.¹⁷³ In *J.M.*, the mother argued that the six-month period had run.¹⁷⁴ In fact, the petition was filed under the section which did not contain a time frame. Under the facts of the case, no time frame was required although the case plan contained a six-month period. The petition for termination of parental rights was filed eight months later and the court therefore affirmed the termination.¹⁷⁵

A second case involving application of the case plan is *Z.J.S. v. Department of Children & Families*.¹⁷⁶ The facts of the case are strange. The case plan called for a goal of termination of parental rights and then set forth tasks for the parent to complete which are the type of tasks required to achieve reunification.¹⁷⁷ At the same time, according to the appellate court, no services were offered to the parent to assist in accomplishing any of the

166. § 39.806(1)(e).

167. 762 So. 2d 1029 (Fla. 3d Dist. Ct. App. 2000).

168. *Id.*

169. FLA. STAT. § 39.806 (2001).

170. *Id.*

171. § 39.806(1)(e).

172. *Id.*

173. *Id.*

174. *J.M.*, 762 So. 2d at 1029–30.

175. *Id.*

176. 787 So. 2d 875 (Fla. 2d Dist. Ct. App. 2001).

177. *Id.* at 876–77.

tasks assigned.¹⁷⁸ The appellate court reversed because the ground for termination of parental rights urged by the Department was the failure to comply with the case plan. The problem was that the section governing compliance with the case plan deals with a situation where the case plan has the goal of reunification.¹⁷⁹ The Department conceded that it did not offer a case plan with a goal of reunification with the result that it had to establish one of the other bases for termination of parental rights. Because it only sought to terminate parental rights on the basis of the case plan, it could not meet the standard, and therefore the case was reversed and remanded for further proceedings.¹⁸⁰

The issue of what to do when a strong bond exists between a parent and children, but where termination of parental rights is in the child's best interests, came before the Second District Court of Appeal in *D.W. v. Department of Children and Families*.¹⁸¹ In that case the trial court upheld the termination of parental rights, although it recognized that the children were not likely to be adopted because of their age and special needs. The court opined that the children's best interests would be served by continued contact with the father as well as with the biological grandparents. The appellate court noted that structured contact with the parent is provided by Florida law.¹⁸² The appellate court then remanded in order to allow the trial court to obtain additional evidence prior to exercising discretion on the question of future contact between the parent and children as well as the right of grandparent contact, which is also protected by statute.¹⁸³

Because termination of parental rights involves such fundamental interests,¹⁸⁴ the process by which the rights are terminated is replete with protections for the parties. In *K.S. ex rel. A.S. v. B.C.*,¹⁸⁵ the Fifth District Court of Appeal affirmed the judgment of termination of parental rights with an important concurrence by Judge Sharpe. What disturbed Judge Sharpe was that the evidence to support the finding of termination was hearsay.¹⁸⁶ Witnesses who testified lacked first hand knowledge of the facts. Two case workers said that the parent had refused drug screenings as required by the

178. *Id.* at 877.

179. *Id.* at 878.

180. *Id.*

181. 763 So. 2d 497 (Fla. 2d Dist. Ct. App. 2000).

182. See FLA. STAT. § 39.811(7)(b) (2001).

183. *D.W.*, 763 So. 2d at 498.

184. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Lassiter*, 452 U.S. at 46-47.

185. 766 So. 2d 1224 (Fla. 5th Dist. Ct. App. 2000).

186. *Id.* at 1225-26 (Sharpe, J., concurring).

case plans although one refusal had occurred before the case plans were adopted, and neither worker was able to document any of from the case file.¹⁸⁷ Furthermore, the guardian ad litem who had recommended termination had only seen the child with the parent once and based an opinion that the parent acted inappropriately with the child upon observations of the mother's interactions with other children.¹⁸⁸ The court noted that no hearsay objections were made below and thus the issue was not preserved for appeal and waived.¹⁸⁹ Significantly, in Florida termination cases, children are not appointed counsel.¹⁹⁰ They receive the assistance of guardians ad litem on an ad hoc basis, and in this case the guardian testified. Thus, the child had no lawyer. Furthermore, while parents are appointed lawyers by statute in Florida,¹⁹¹ there is a cap on the amount that lawyers get paid unless they can convince the court of the need for additional fees.¹⁹²

The issue of whether Florida law, which requires a mandatory closure of all hearings in termination of parental rights proceedings, violates either the United States or the Florida Constitution was before the Supreme Court of Florida in *Natural Parents of J.B. v. Florida Department of Children & Families Services*.¹⁹³ The case was notorious, involving allegations that the mother of the child suffered from Munchausen by Proxy Syndrome and intentionally caused illness to the child involving many hospitalizations.¹⁹⁴ Initially, at the dependency hearing stage, the parents sought closure of the proceedings as well as a gag order to prohibit release of information, arguing that closure was in the best interest of the child.¹⁹⁵ The parents then changed their position at the termination of parental rights stage claiming that the Florida statute was unconstitutional in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 16(a) of the Florida Constitution.¹⁹⁶ The Court rejected all of the parents' arguments

187. *Id.* at 1225.

188. *Id.*

189. *Id.*

190. FLA. STAT. § 39.807 (2001); see Michael J. Dale, *Providing Counsel to Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2001).

191. FLA. STAT. § 39.013(1) (2001).

192. § 39.0134(2).

193. 780 So. 2d 6 (Fla. 2001).

194. *Id.* at 7.

195. *Id.* at 7-8.

196. *Id.*

and found that the statute was constitutional.¹⁹⁷ Judges Anstead and Pariente dissented.¹⁹⁸

Discovery issues do not appear often in either dependency or termination of parental rights appellate opinions. However, the ability to take a deposition did come before the appeals court in *S.S. v. Department of Children & Families Services*.¹⁹⁹ In that case, the parents were provided with discovery, including a witness list as a result of what the court described as continuing demands for discovery.²⁰⁰ On the Wednesday before a Monday trial, the Department of Children and Families Services filed an amendment to its discovery response in which it disclosed previously undisclosed taped statements of the parties as well as adding new witnesses, including an expert witness.²⁰¹ On the morning of trial, the court allowed a continuance until the early afternoon to take the deposition of the expert.²⁰² When counsel for the parent, due to time constraints, only briefly spoke with the expert, the attorney renewed a motion for a continuance, which was denied, and the expert then testified.²⁰³ Parental rights were then terminated.²⁰⁴ On appeal, the Fourth District concluded that disclosure is required under the *Florida Rules of Juvenile Procedure* of persons having information relevant to the case.²⁰⁵ Furthermore, the court held that while the juvenile rules do not provide for what is known as a Richardson hearing,²⁰⁶ based upon the Third District Court of Appeal ruling in *B.M. v. Department of Children & Families Services*,²⁰⁷ if the failure to produce the material is prejudicial, there must be a reversal. Such was the case in *S.S. v. Department of Children & Family Services*.²⁰⁸

Under Florida law, one of the grounds for termination of parental rights is when parents are engaged in conduct that demonstrates that continuing involvement of the parent threatens the life, safety, or well-being of the child

197. *Id.* at 11 (citing FLA. STAT. § 39.467(4), *renumbered by* § 39.809(4)(2001)).

198. *J.B.*, 780 So. 2d at 12–17.

199. 784 So. 2d 479.

200. *Id.* at 479.

201. *Id.*

202. *Id.* at 480.

203. *Id.*

204. *S.S.*, 784 So. 2d at 480.

205. *See* FLA. R. JUV. P. 8.245(b)(2)(A) (2001).

206. *S.S.*, 784 So. 2d at 480; *Richardson v. State*, 246 So. 2d 771 (Fla. 1971).

207. 711 So. 2d 616 (Fla. 3d Dist. Ct. App. 1998)

208. *S.S.*, 784 So. 2d at 480.

irrespective of the provisions services.²⁰⁹ In *In re C.W.W.*,²¹⁰ the Second District Court of Appeal, *inter alia*, discussed how the state may prove that continuing involvement of a parent with a child may threaten a child's life, safety, or health irrespective of the provision of services.²¹¹ In that case, a child was born prematurely with the presence of cocaine in its bloodstream.²¹² As a result, the state filed a dependency petition and also sought a judgment terminating parental rights.²¹³ The appeals court found that the trial court's order was not based upon the evidence in the record.²¹⁴ It was premised upon speculation by the trial court that the mother would fail to comply with the case plan which had a goal of reunification.²¹⁵ The appellate court held that speculation is not a valid basis for termination of parental rights.²¹⁶ In addition, there had to be a showing that any provision of services would be futile or that the child would be threatened with harm despite the services provided to the parent.²¹⁷ Because the trial court made no finding and there was no evidence to support its determination, apparently premised solely on the birth of a drug dependent child, the appeals court reversed.²¹⁸ It noted further that in every reported Florida case involving a newborn drug dependent child, there is a finding of a failed attempt at a case plan or other evidence of abuse or neglect to support a decision to terminate parental rights.²¹⁹

V. STATUTORY CHANGES

A. *Juvenile Delinquency*

The legislature added language to the introductory provisions of chapter 985 providing that, among other things, it is the intent of the legislature to preserve and strengthen a child's family ties.²²⁰ The emotional, legal and

209. FLA. STAT. § 39.806(1)(c) (2001).

210. 788 So. 2d 1020 (Fla. 2d Dist. Ct. App. 2001).

211. *Id.* at 1023.

212. *Id.* at 1021-22.

213. *Id.* at 1022.

214. *Id.* at 1023.

215. *In re C.W.W.*, 788 So. 2d at 1023.

216. *Id.*

217. *Id.*

218. *Id.* at 1025.

219. *Id.* at 1024.

220. FLA. STAT. § 985.02(7) (2001).

financial responsibilities of the child's caretaker shall continue while the child is in the care of the Department of Juvenile Justice.²²¹ Unfortunately, with the exception of the caretaker's ongoing financial obligations, which are enforceable against the caretaker,²²² the language is simply laudatory and thus unenforceable.

The legislature added a new paragraph to the definitional language of chapter 985 providing for a "respite" placement for juveniles "charged with domestic violence as an alternative to secure detention . . . when a shelter bed for a child in need of services or a family in need of services . . . is unavailable."²²³ The legislature also amended chapter 985 to protect victims of youth crime while in school.²²⁴ When the court determines that a victim or sibling of a victim attends or is eligible to attend the same school as the child who committed the delinquent offense, the court may enter a no-contact order in favor of the victim or sibling.²²⁵ It may alternatively note in its disposition order that the parents of the victim or sibling do not object to the offender attending the same school or riding the same bus.²²⁶

The legislature passed a complicated scheme for the expunction of nonjudicial arrest records of a minor who prior to filing the application for expunction has never been charged with a criminal offense and who has successfully completed a pre-arrest diversion program.²²⁷ The child's parent, or the child, if over eighteen, may file a signed application for expunction on a form developed by the Department of Juvenile Justice, together with an official written statement from the State Attorney certifying successful completion of the program.²²⁸ The filing fee is \$75.00 unless waived by the executive director of the Department of Law Enforcement Operating Trust Fund.²²⁹ The application must be filed within six months of successfully completing the program.²³⁰ Whether the parents of children who complete the diversion can successfully complete this process remains to be seen.

In the programs operations area, the legislature has explicitly authorized the department to contract with faith-based organizations to provide services

221. *Id.*

222. *See* § 985.02.

223. § 985.03(46).

224. § 985.23(1)(d).

225. *Id.*

226. §§ 985.23(4)(f) (2001), 985.23(1)(d).

227. § 943.0582.

228. § 943.0582(3).

229. § 943.0582(4).

230. § 943.0582(5).

to children.²³¹ It also provided that the Department collect and annually report cost data for every program it operates or with which it contracts.²³² Included is the development of a cost effective model for each commitment program.²³³ The model shall include an analysis of recidivism rates for each provider among other kinds of evaluations.²³⁴ This information, if properly collected and dissimilated, should prove helpful in analyzing dispositional alternatives.

B. *Dependency and Termination of Parental Rights*

As a probable result of legislative bargaining, the legislature introduced a system which makes mandatory the assessment of every dependent child eleven years of age or older who has been in licensed foster care and who has been moved more than once for placement in a licensed residential facility.²³⁵ The procedure, oddly, only applies in Districts Four, Eleven, and Twelve, and in the "Suncoast Region."²³⁶ The Department of Children and Families is obligated to report to the legislature every year on December 1st about this group of children.²³⁷ The underlying rationale for the amendment, at least in part, is the need for this group of children to achieve stability and permanency.²³⁸ The entire approach is subject to the availability of appropriations.²³⁹ It is also unclear from both the legislative history and discussions by this author with a legislative staff member to the Senate Judiciary Committee whether there were any data or studies to support this legislative initiative.²⁴⁰

Finally, the legislature added language governing adoptions to the termination of parental rights post-disposition relief section of chapter 39.²⁴¹

231. FLA. STAT. § 404 (2000).

232. § 985.412(3) (2001).

233. § 985.412(1)(b).

234. *Id.*

235. § 39.521.

236. § 39.521(5)(a).

237. *See* § 39.521(5)(e).

238. *See* § 39.521(5)(b).

239. § 39.521(5)(f).

240. For a study suggesting that foster care and therapeutic foster care are more desirable and efficient than group/institutional care, see Richard P. Barth, *Institutions vs. Foster Homes: The Empirical Base for a Century of Action*, School of Social Work, University of North Carolina (Feb. 17, 2002).

241. § 39.812. Adoptions are generally covered in chapter 63 of the *Florida Statutes*.

The new provision requires adoption petitions to be filed in the circuit in which the termination of parental rights judgment was entered unless a motion for a change of venue is granted.²⁴² The adoption petition may not be filed until the termination of parental rights judgment becomes final.²⁴³ And the petition must be accompanied by a form containing information about the child's medical and social history.²⁴⁴

VI. CONCLUSION

The legislature made no expansive changes in either the juvenile justice or child welfare systems. The appellate courts continue the process of supervision of trial court statutory compliance with chapters 39 and 985. The intermediate appellate courts have also continued a process of analysis of unclear statutes. Finally, the Supreme Court of Florida, in a significant ruling, held that termination of parental rights proceedings are not absolutely open to the public.²⁴⁵

242. § 39.812(5).

243. *Id.*

244. *Id.*

245. *Natural Parents of J.B. v. Fla. Dep't of Children & Families Services*, 780 So. 2d 6 (Fla. 2001).

Down for the Count: The Muhammad Ali Boxing Reform Act and Its Shortcomings¹

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I. INTRODUCTION

Though many perceive boxing as a sport, to the players,² it is a way of life.³ Boxing is a “story without words,” yet its language is most refined.⁴ Boxing is the most physical and direct of any sport.⁵ Its objective is simple. The goal: a knockout.⁶ The threat of death inevitably exists, though its possibility remains remote.⁷ Boxing is dangerous, harsh, and unforgiving.⁸ Yet, boxing is personal.⁹

1. Special recognition goes to Charles E. Lomax, John S. Wirt, and Sherman W. Smith, III for allowing the opportunity to further explore this topic. Special recognition also goes to Michelle Killian for the helpful sources; Randall Jones for the interviews; and James Groschel for the updates on boxing news.

2. See discussion *infra* Part II.

3. See generally Michael Stephens, *The Poetics of Boxing*, in *READING THE FIGHTS* 259, 259 (Joyce Carol Oates & Daniel Halpern eds., 1988).

4. JOYCE CAROL OATES, *ON BOXING* 11 (1987).

5. *Id.* at 30.

6. *Id.*

7. *Id.* at 10.

8. ROBERT SELTZER, *INSIDE BOXING* 139 (Benjamin Matt ed., 2000).

9. OATES, *supra* note 4, at 8–9 (explaining that boxers bring “everything that is themselves” to the fight).

Dating back to the ancient Greeks, boxing may be the oldest sport in existence.¹⁰ Yet, despite its age, boxing has continued to operate outside any central authority capable of enforcing minimum standards and uniform rules.¹¹ Prior to the 1994 Senate inquiry into professional boxing, it had been approximately thirty years since the Senate's last boxing investigation.¹² Now, thirty-seven years later, after years of minimal regulations, the boxing world must comply with two pieces of legislation: the Professional Boxing Safety Act of 1996¹³ and the Muhammad Ali Boxing Reform Act.¹⁴ The Muhammad Ali Boxing Reform Act ("Ali Act"), passed in May 2000, serves as an amendment to the Professional Boxing Safety Act of 1996.¹⁵

This Note illustrates the vast shortcomings of the Ali Act. Part II of this Note discusses the individuals involved in effectuating a boxing match. Parts III and IV examine the need for reform, and the Ali Act as its source. This Note concludes that, although integrity may be lacking in the sport, the Ali Act has not served the purpose of reinstating it.

II. THE PLAYERS

A. *The Boxer*

Most boxers come from impoverished backgrounds.¹⁶ Boxing:

begins in ghettos, where life is cheap and physical well-being is at risk in the food people eat and the absence of proper medical care in their daily lives. It breeds in an environment where residents carry knives and guns for protection, and fists are perceived as the least potent of weapons.¹⁷

10. H.R. REP. NO. 106-449, pt. 1, at 8 (1999), *reprinted in* 2000 U.S.C.C.A.N. 329, 330.

11. PERMANENT SUBCOMM. ON INVESTIGATIONS, CORRUPTION IN PROFESSIONAL BOXING, S. REP. NO. 103-408, at 28 (2d Sess. 1994).

12. *Id.* at 1.

13. Professional Boxing Safety Act of 1996, 15 U.S.C. § 6301 (Supp. II 1996).

14. Professional Boxing Safety Act of 1996, 15 U.S.C. § 6301 (Supp. II 1996), *amended by* Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6301 (2000).

15. *See id.*

16. OATES, *supra* note 4, at 85 (stating that about ninety-nine percent of boxers are impoverished youths). *See also* THOMAS HAUSER, THE BLACK LIGHTS 9 (Univ. of Ark. Press 2000) (1986) ("Most fighters come from tough places; small beginnings where life is hard.").

17. HAUSER, *supra* note 16, at 13.

To protect themselves and survive, they must know how to hurt others.¹⁸
Some then turn it into a profession.¹⁹

The first individual necessary to effectuate a boxing match is the boxer.²⁰
The boxer is the one entering the ring and the one placing himself²¹ in physical
peril. The boxer, as any other individual, is responsible for his own physical
well-being.²² He is the one physically training for the fight,²³ undergoing the
medical procedures,²⁴ and stepping on the scale at the weigh-in.²⁵ When the bell
rings, he is the one in the ring, roped off from the rest of the world.²⁶

18. *Id.* (statement of Michael Spinks, Montreal Olympic gold medalist and former light heavyweight champion of the world).

19. *See id.*

20. Though boxers may be viewed as the most important individuals to effectuate a boxing match, most often, the individuals not directly participating in the bout retain such power as to make them the most important individuals to the boxing industry. *See* discussion *infra* Part II.B–E.

21. Although many may believe boxing to be a man's sport, women have been competing since the eighteenth and nineteenth centuries. Jennifer Hargreaves, *Bruising Peg to Boxerobics: Gendered Boxing—Images and Meanings*, in *BOXER: AN ANTHOLOGY OF WRITINGS ON BOXING AND VISUAL CULTURE* 121, 125 (David Chandler et al. eds., 1996). *See also* SELTZER, *supra* note 8, at 147–48 (describing Christy Martin as a “pioneer” and “the most famous female boxer in the world”).

22. *See Symposium: Boxing at the Crossroads*, 11 *SETON HALL J. SPORT L.* 193, 241 (2001) [hereinafter *Symposium*] (“[T]he physical part is my responsibility.”) (statement of Evander Holyfield, Professional Boxer).

23. *See SELTZER, supra* note 8, at 29 (“Fighters are prisoners of their bodies, their physiques the stone walls that trap them, that force them to fight in a certain style.”).

24. 15 U.S.C. § 6304(1) (2000). *See also Symposium, supra* note 22, at 242 (“Every time I fight they give me a brain scan . . .”) (statement of Evander Holyfield).

25. A boxer is identified and limited by his weight class. *See* Interview with Randall Jones, Production Assistant, Don King Productions, Inc., in Deerfield Beach, Fla. (July 27, 2001). Though the same pound delineations exist between the sanctioning organizations, they are sometimes given different names. *Id.* For example, the World Boxing Council defines the classes as follows: not over 105—strawweight; not over 108—light flyweight; not over 112—flyweight; not over 115—super flyweight; not over 118—bantamweight; not over 122—super bantamweight; not over 126—featherweight; not over 130—super featherweight; not over 135—lightweight; not over 140—super lightweight; not over 147—welterweight; not over 154—super welterweight; not over 160—middleweight; not over 168—super middleweight; not over 175—light heavyweight; not over 190—cruiserweight; over 190—heavyweight. *Id.* *See also Legislative Meeting of the Pa. State Athletic Comm'n in Ass'n with the Ass'n of Boxing Comm'ns* 202 (2000) [hereinafter *Legislative Meeting*] (explaining an experience in a previous fight where the boxer did not want to get on the scale and how without which the fight would not have taken place) (statement of Murad Muhammad, Promoter).

26. *See SELTZER, supra* note 8, at 9 (“Hell is not roped off. The ring is. And that may be the only difference between the two venues.”).

The boxer is responsible for telling his corner men²⁷ about his suitability for the particular bout.²⁸ Ultimately, it is the boxer who runs the risk of falling at the hands of an opponent—of never coming out of the ring the way he entered it no more than forty-seven minutes²⁹ ago.³⁰

B. *The Manager, Trainer, and Cut Man*

The manager is a boxer's primary business representative, representing him and his interests in all business transactions that occur during their relationship.³¹ In return for his services, the manager often retains thirty-three and one-third percent of the boxer's purse for each bout.³² Though managers are not particularly liked,³³ they serve a vital function to the boxer. The choices the

27. See PHIL BERGER, PUNCH LINES: BERGER ON BOXING 157–58 (1993) (describing the importance of the corner man) (“In his sixty seconds between rounds, the corner man enforces or revises his fighter’s strategy. He is the ‘cut man,’ doing a surgeon’s work. . . . On the corner man’s instincts and advice, championships have been won and lost.”).

28. See *Symposium, supra* note 22, at 241–42 (“[I]t’s important for my corner to know [if I am not feeling well] and it is important for the referee to know cause that’s their job to see and make observations where they should stop the fight or not.”) (statement of Evander Holyfield).

29. The longest professional men’s bout is for a championship. Interview with Randall Jones, Production Assistant, Don King Productions, Inc., in Deerfield Beach, Fla. (July 18, 2001). It is scheduled for twelve rounds, each round consisting of three minutes, with a one-minute rest between rounds. *Id.* The shortest professional men’s bout is a four-rounder. *Id.* Like all other men’s bouts, each round consists of three minutes, with a one-minute rest between rounds. *Id.* On the other hand, the longest professional women’s bout, and also for a championship, is a ten-rounder. *Id.* Each round consists of two minutes, with a one-minute rest between rounds. Interview with Randall Jones, *supra* note 29. The shortest bout in which a female can participate consists of four rounds, with the same time specifications as for a ten-rounder. *Id.*

30. See Hugh McIlvanney, *Onward Virgin Soldier*, in *READING THE FIGHTS* 185, 192–94 (Joyce Carol Oates & Daniel Halpern eds., 1988) (describing the death of professional boxer Johnny Owen after a twelfth round knockout); OATES, *supra* note 4, at 89 (describing the death of professional boxer Benny “Kid” Paret at the hands of Emile Griffith in a 1962 bout); *Id.* at 98 (“Between 1945 and 1985 at least three hundred seventy boxers have died in the United States of injuries directly attributed to boxing.”).

31. HAUSER, *supra* note 16, at 24.

32. See *Legislative Meeting, supra* note 25, at 213 (discussing the thirty-three and one-third percent a manager generally takes from the purse of the boxer) (statement of Bob Duffy).

33. HAUSER, *supra* note 16, at 34.

manager makes, with and for the boxer, often direct the boxer's career.³⁴

A good manager never places his fighter in a fight he does not think his fighter can win.³⁵ In a sport where "one or two losses can kill a fighter's career,"³⁶ managers must be cautious in choosing an opponent.³⁷ To maximize the effectiveness of the manager and the success of the boxer, it is necessary that they share a good rapport.³⁸

In his capacity, the manager is responsible for selecting the boxer's trainer.³⁹ A boxer's trainer is crucial to his survival.⁴⁰ "A great trainer is a natural: he actually sees the moves and studies them, and he must have the ability to convey techniques to his fighters. He must be a psychologist and a mind reader, sometimes a father and a mother."⁴¹ Trainers must know their fighters and their fighters' opponents.⁴²

Physical labor is the first requirement to becoming a quality fighter.⁴³ The harder the boxer trains, the better he becomes.⁴⁴ The goal of training is to move quicker and get hit less.⁴⁵ The trainer makes this possible.⁴⁶ Part of being a good trainer, however, is telling the fighter at which point to stop

34. See BERGER, *supra* note 27, at 202 (quoting Shelley Finkel, Manager of Evander Holyfield, as stating the manager's basic responsibility towards the boxer is the "[m]ost money for the least risk.").

35. HAUSER, *supra* note 16, at 34.

36. *Id.* at 35.

37. *Id.* at 34. "My job is to outwit people. Every fight requires that I be in there looking for an edge. And if I can find an opponent who gives the appearance of being formidable while posing no threat whatsoever to my fighter, that's fine." *Id.* (statement of Emanuel Steward, Manager).

38. *Id.* ("You've got to love your fighter. Otherwise it's dangerous. You'll send him out and get him mangled or killed.") (statement of Eddie Futch, former Manager of Joe Frazier).

39. HAUSER, *supra* note 16, at 40.

40. *Id.*

41. ARLENE SCHULMAN, *THE PRIZEFIGHTERS: AN INTIMATE LOOK AT CHAMPIONS AND CONTENDERS* 33 (1994).

42. *Id.* at 100 ("No two fighters can do things the same way. Know their shortcomings and their idiosyncrasies and their physical makeup. And . . . always make sure you know about his opponent.") (statement of Ray Arcel, Trainer).

43. HAUSER, *supra* note 16, at 17.

44. See *id.* at 17-18. "Wasted talent is the oldest story in boxing. A fighter who coasts in training betrays his dreams and his future." *Id.* at 18.

45. *Id.* at 29. As part of his training, a boxer often boxes with a sparring partner to help him whet his skills. See generally BERGER, *supra* note 27, at 312.

46. A trainer "makes sure his fighter gets in shape. He'll be with [him] constantly. Wakes him up in the morning. [G]oes to watch him run. Sits with him when he has breakfast. Walks with him after breakfast. Et cetera, et cetera." BERGER, *supra* note 27, at 141.

training.⁴⁷ The trainer can do everything to make his fighter the best, but then the bell rings. Sometimes, his fighter gets hit with a devastating blow. Yet, the trainer's responsibilities continue. The trainer must now encourage his fighter to continue fighting.⁴⁸

When the boxer retreats to his corner between rounds, it is then that the cut man does his job.⁴⁹ The cut man, like the trainer, must know the boxer.⁵⁰ The cut man is as important to the fight as is the boxer.⁵¹ The cut man is responsible for stopping the flow of blood from the fighter's face.⁵² He uses tools such as cotton swabs, vaseline, and a paste-like substance to stop the bleeding.⁵³ The cut man also uses Enswell⁵⁴ to stop an eye from closing and reduce the swelling.⁵⁵ The fight often continues until the "third man in the ring"⁵⁶ stops the bout or the final bell sounds.

C. *The Promoter*

"The promoter is one of the most erudite men in the fight game—and one of the shrewdest."⁵⁷ What he is not, however, is well-liked.⁵⁸ Much

47. *Id.* at 198 ("[The fighter] figures if work is good, more work is better. It's not so, though. Sometimes you have to back off, so the fighter takes into the ring everything he's got and doesn't leave it in the gym or on the road.") (statement of Eddie Futch, Trainer for Riddick Bowe).

48. OATES, *supra* note 4, at 13.

49. See BERGER, *supra* note 27, at 158.

50. SCHULMAN, *supra* note 41, at 99 ("There is a secret to handling a fighter who is cut and bruised. . . . Some fellas get a small cut and they think they're gonna bleed to death. You have to know your fighter. Is the fighter able to handle the cut? . . . The most sensitive human beings in the world are boxers.") (statement of Ray Arcel).

51. See BERGER, *supra* note 27, at 141 ("Fights are lost for lack of a corner's skill in these between-round crises.").

52. *Id.*

53. *Id.*

54. Enswell is a flat, chilled iron bar that is fundamental in boxing. JACK NEWFIELD, ONLY IN AMERICA: THE LIFE AND CRIMES OF DON KING 285 (1995).

55. *Id.*

56. OATES, *supra* note 4, at 47. The "third man in the ring" is the referee—the intermediary and the conscience of the fight. *Id.* He is often the only neutral and objective observer. See *id.* "The referee holds the power of life and death at certain times since his decision to terminate a fight, or to allow it to continue, can determine a boxer's fate." *Id.* at 48.

57. SELTZER, *supra* note 8, at 113. Today, women also serve as promoter to many fighters. See Symposium, *supra* note 22, at 221 (statement of Jerry Izenberg introducing Kathy Duva).

condemnation is often cast upon the most successful promoters in the business; however, these are the promoters for whom managers want their fighters fighting.⁵⁹

Though it may appear simple, boxing promotion entails many intricacies.⁶⁰ In addition to matching two fighters to create a stimulating bout,⁶¹ promoters must be accomplished businessmen.⁶² The promoter must cultivate and nurture relationships with fighters, managers, television executives, the media, and sanctioning organizations.⁶³ There are three major sources of income for a promoter: the fight's live gate,⁶⁴ the sale of domestic and foreign television rights,⁶⁵ and incidentals.⁶⁶ This revenue, however, does not necessarily mean that the promoter makes a profit.⁶⁷ At

58. See HAUSER, *supra* note 16, at 69 (Univ. of Ark. Press 2000) (1986) (stating that, perhaps more so than managers, "promoters are treated harshly by boxing scholars").

59. *Id.* at 56 ("Don King is a liar and a thief. . . . This guy wants all the money and all the fighters. . . . If I was a fighter and needed a promotor [sic], who would I take? Don King. The man is the best. Don King delivers.") (statement of Rich Giachetti, former Manager and Trainer of Larry Holmes). See also BERGER, *supra* note 27, at 172 ("Even his most bitter rivals credit [Don] King with the intelligence and cunning to survive in a cutthroat business."); *Boxing In and Out of the Ring* (A&E television broadcast, July 22, 2001) ("Don King is not really different from other boxing promoters. He's just better than anybody else.") (statement of Thomas Hauser, Author and Boxing Historian).

60. See HAUSER, *supra* note 16, at 69.

61. Fighters are often matched by a matchmaker. See JAMES B. ROBERTS & ALEXANDER G. SKUTT, *THE BOXING REGISTER: INTERNATIONAL BOXING HALL OF FAME OFFICIAL RECORD BOOK* 417 (1997). Matchmakers and promoters often work together to match a fight that the public would want to see. See *id.* at 418.

62. See HAUSER, *supra* note 16, at 69.

63. *Id.* See also *Boxing In and Out of the Ring*, *supra* note 59 (explaining that promoters put the fights together because they maintain relationships with the managers to convince the fighters to fight and they work with the networks in agreeing upon a figure for the broadcast) (statement of Ross Greenburg, President of HBO Sports).

64. Casinos generally pay the promoter a site fee to hold the fight at their arena. HAUSER, *supra* note 16, at 70.

65. Often the promoters retain the revenue from their selling the domestic and foreign television rights. See *id.*

66. Such incidental items include the sale of advertising on ring posts, video cassettes, and fight programs. *Id.*

67. From this income, the promoter must pay the boxers' purses, other costs of the promotion, and it's company overhead. See *Legislative Meeting*, *supra* note 25, at 195 (statement of Sherman W. Smith, III, Associate General Counsel, Don King Productions, Inc., at p. 5).

times, promoters sustain a loss from the promotion.⁶⁸ Nonetheless, professional boxing remains driven by money.⁶⁹

D. *The Sanctioning Organizations*

The sanctioning organizations control championships, not lower level boxing bouts.⁷⁰ A bout must be sanctioned by one of the sanctioning organizations before it can be considered a championship match or an official title-elimination bout.⁷¹ The power of these “alphabet soup” organizations⁷² stems from this influence. The fighters want these organizations.⁷³ These organizations have the power to award the boxer a title belt and allow him to call himself the champion.⁷⁴ These organizations, therefore, promulgate money for the fighters.⁷⁵ They also “set their own rules, establish their own medical and safety standards, make their own rankings, and designate their own ‘world champions.’”⁷⁶ Each sanctioning organization is separate and distinct from the other.⁷⁷ Further, because there

68. “Everybody thinks a promoter makes money in the first, second, third fight. Sometimes we lose in ten just to make it on the 12th.” *Id.* at 192 (statement of Murad Muhammad).

69. PETER BACHO, *BOXING IN BLACK AND WHITE* 114 (1999). *See also Symposium, supra* note 22, at 200 (“[A]mateur boxing is a true sport. Professional prize fighting is a business.”) (statement of Mills Lane, Retired Boxing Referee and Retired Judge).

70. HAUSER, *supra* note 16, at 93.

71. *See id.*

72. *See Symposium, supra* note 22, at 250 (referring to the sanctioning organizations) (statement of Jerry Izenberg, Sports Columnist); *see also SELTZER, supra* note 8, at 21 (naming some of the sanctioning organizations that sponsor championships) (“Well . . . there is the IBF, the WBA, the WBC, the WBO, the IBO, the IBC, the WBF, the WBU, the . . .”).

73. *Symposium, supra* note 22, at 249 (statement of Lou DiBella, Vice President of HBO, Time Warner Sports).

74. *See id.* at 253 (“[T]he people most responsible for sustaining the meaning of those pieces of plastic that aren’t worth 20 bucks are the fighters themselves.”) (statement of Lou DiBella).

75. *See id.* at 256 (discussing the importance of a title belt) (“You are talking about a guy making 17 million dollars, now because he lost for the first time in 8 years he is making 2 million dollars. . . . [T]hey said the belt don’t make a difference but every time I get them belts the money increased.”) (statement of Evander Holyfield).

76. HAUSER, *supra* note 16, at 93.

77. *See Symposium, supra* note 22, at 217 (“There is no centralized authority in boxing.”) (statement of Max Kellerman, Boxing Broadcaster and Analyst). Though there are many “little minor league [sanctioning organizations],” there are three major sanctioning bodies. *Id.* at 206. The three major sanctioning organizations are the World Boxing

are seventeen weight classes⁷⁸ and numerous sanctioning organizations,⁷⁹ there is often more than one champion for each weight class. There is not just one world champion.⁸⁰ Many credit the sanctioning organizations as being the “root of the problem” with boxing today.⁸¹

E. *The Media*

“Television revenues pay the purses.”⁸² The technology of television has made boxing an even more lucrative business.⁸³ Closed circuit broadcasts have provided the players⁸⁴ with an opportunity for a big payday.⁸⁵ Pay-per-view buys increase the possible number of viewers, thereby increasing the profit margin of the event.⁸⁶ The biggest payday in boxing history was Holyfield/Tyson II, which has now become known as the infamous ear-biting fight.⁸⁷ This event purportedly grossed over one hundred million dollars, domestically, in one night on pay-per-view.⁸⁸

Today, networks such as Home Box Office (“HBO”) negotiate with fighters for multi-fight deals—deals for a certain amount of years and a

Association (WBA), the World Boxing Council (WBC), and the International Boxing Federation (IBF). *See id.* at 221.

78. *See supra* text accompanying note 25.

79. *See discussion supra*, note 77.

80. *See SELTZER, supra* note 8, at 21 (“[T]here are almost as many world champions as there are fans to pay for their fights.”); *see also SCHULMAN, supra* note 41, at 77 (“[I]nstead of one World Series or one Super Bowl, there are several. And for each middleweight who declares himself champion after his bout, there are four more sitting in the audience.”).

81. *See Symposium, supra* note 22, at 200 (statement of Mills Lane, Retired Boxing Referee and Retired Judge); *see also* statement of Jerry Izenberg (describing the presidents of the three major sanctioning bodies). *Id.* at 206. “The major problem as I see it is the problem raised by both Mills Lane and Jerry Izenberg and that is the sanctioning organizations. Quite frankly they have to go. They are not honest. They are not fair. They are not moral.” *Id.* at 209 (statement of Amos C. Saunders, Retired Presiding Judge). “[W]e are in this room and everybody here has just about said that the sanctioning organizations are the problem.” *Id.* at 222 (statement of Kathy Duva, Promoter).

82. SCHULMAN, *supra* note 41, at 77. “Television represents money.” *Id.*

83. *Boxing In and Out of the Ring, supra* note 59. Television makes the money. *Id.* (statement by Ron Scott Thomas, Matchmaker, Cedric Kushner Productions).

84. *See discussion supra* Part II.A–D.

85. *Boxing In and Out of the Ring, supra* note 59.

86. *Id.*

87. *Id.* This Evander Holyfield and Mike Tyson rematch took place on June 28, 1997. Interview with Randall Jones, *supra* note 29.

88. *Boxing In and Out of the Ring, supra* note 59.

certain number of fights.⁸⁹ Networks, however, like to advertise fights as “championships.”⁹⁰ This makes the fights more appealing to the public and generates more revenue.⁹¹ For a fight to be considered a championship, however, it must be sanctioned by a sanctioning organization.⁹² Sanctioning organizations work with promoters to sanction the bout, the promoters with the managers, and the managers with the fighters.⁹³ One can see how each player is vital to the success of the industry. One can also see how simple it could be to corrupt the entire sport.⁹⁴

This “commercialised [sic] system” has undoubtedly increased the profit potential for boxers.⁹⁵ However, it has also “severed [boxing’s] connection with a grass-roots culture in which its higher aspirations were bred.”⁹⁶

F. *The Fan*

To the untrained viewer, most boxing matches appear savage.⁹⁷ Though spectators often see the courage, the skill goes undetected.⁹⁸ As the spectator becomes a fan, however, the design is unraveled.⁹⁹ Though a “casual viewer will only react to the most obvious action, such as a knockdown or a knockout,” the true fan discerns the “careful steps the winning boxer took to reach that point.”¹⁰⁰ Just as in any other sport, a boxing spectator often thinks that with proper training, he, too, could become a professional boxer.¹⁰¹ To be a quality fighter, however, one must have physical attributes, such as agility, timing, power, speed, and

89. *Id.* (statement of Ross Greenburg).

90. *Id.* (statement of Thomas Hauser).

91. *See id.*

92. *See* discussion *supra* Part II.D.

93. *See* discussion *supra* Part II.B–D.

94. *Boxing In and Out of the Ring*, *supra* note 59 (“It only takes one person to corrupt the whole system because then the others have to pay just to keep the playing field level.”) (statement of Doug Beavers, Former IBF Ratings Committee Chairman).

95. David Chandler, *Introduction: The Pictures of Boxing*, in *BOXER: AN ANTHOLOGY OF WRITINGS ON BOXING AND VISUAL CULTURE* 13, 17 (David Chandler et al. eds., 1996).

96. *Id.* *See also* ROBERTS, *supra* note 61, at 410 (“No other sport can so justifiably blame television for a period of serious decline . . .”).

97. OATES, *supra* note 4, at 100.

98. BACHO, *supra* note 69, at 111.

99. *See* OATES, *supra* note 4, at 100.

100. BACHO, *supra* note 69, at 111.

101. *See* HAUSER, *supra* note 16, at 12.

endurance, “far beyond those of ordinary men.”¹⁰² To the true fan and the players, boxing “is more than a sport. It’s a skill.”¹⁰³

III. THE NEED FOR REFORM

Professional prize fighting does not advance the “safety first” attitude as amateur boxing does.¹⁰⁴ Professional boxing stresses heavy hitting.¹⁰⁵ There is no head gear, and smaller gloves are used, as compared to amateur boxing.¹⁰⁶ Further, the regulation of boxing is left to the individual states.¹⁰⁷ In response to the safety issues prevalent within the boxing industry, the Professional Boxing Safety Act of 1996 was passed.¹⁰⁸

Although the boxers now had some form of protection within the ring, protection outside of the ring was a different story.¹⁰⁹ Corruption in boxing is an old story.¹¹⁰ It is the easiest sport to fix.¹¹¹ It only takes one bribe.¹¹² In the past, boxing has been associated with organized crime.¹¹³ Some still question its prevalence within the sport.¹¹⁴

Though boxing is a multi-million dollar business, the money is often divided between those outside the ring.¹¹⁵ “Anything seems to go in a business in which larceny is sometimes mistaken for charm, and cheating for cleverness, . . . [p]eople who should be in jail are looked upon as characters instead of the scum they really are.”¹¹⁶

102. *Id.* at 12–13.

103. HAUSER, *supra* note 16, at 12 (quoting Sugar Ray Leonard, former Professional Boxer).

104. BACHO, *supra* note 69, at 113.

105. *Id.* at 114.

106. *Id.*

107. *Id.*

108. *See generally* Professional Boxing Safety Act of 1996, 15 U.S.C. § 6301 (Supp. II 1996).

109. HAUSER, *supra* note 16, at 57 (“The most insidious and dangerous enemies of boxing have not been foes from without, but the terrible breakers-down on the inside. The most serious threats to boxing always have come from within.”) (statement of Nat Fleisher, Publisher and Boxing Scholar).

110. *Boxing In and Out of the Ring*, *supra* note 59.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. HAUSER, *supra* note 16, at 58.

116. *Id.* at 57–58 (quoting Michael Katz, writer for the *New York Times*).

Sanctioning organizations often endure much of the criticism¹¹⁷ because they control the ratings.¹¹⁸ In the past, *The Ring* magazine dictated the ratings.¹¹⁹ When its ratings became corrupted, however, sanctioning organizations took over.¹²⁰ It was not long before those ratings became corrupted also.¹²¹

Ratings are important because they dictate the value of the fighter.¹²² The higher ranked he is, the more valuable to the industry—and himself.¹²³ Further, if a boxer is ranked within the top fifteen, he can fight for the championship.¹²⁴ The problem arises because often, “ratings are for sale.”¹²⁵ Just as often, however, promoters are buying.¹²⁶

Doug Beavers, former International Boxing Federation (“IBF”) Ratings Committee Chairman, served in more than one capacity.¹²⁷ He also served as the “bagman”¹²⁸ for the organization.¹²⁹ When the Federal Bureau of Investigation (“FBI”) investigated the IBF a few years ago, they arrived at Mr. Beavers’ house to question him.¹³⁰ To their arrival, he responded, “What took you so long?”¹³¹

Undoubtedly, the ratings are questionable, at best.¹³² In a sport where the object is to knockout the opponent, it is always best “to heed the referee’s warning—‘protect yourself at all times.’”¹³³

117. See discussion *supra* Part II.D and note 81.

118. *Boxing In and Out of the Ring*, *supra* note 59.

119. *Id.*

120. *Id.* (statement of Thomas Hauser).

121. *Boxing In and Out of the Ring*, *supra* note 59.

122. *See id.*

123. *See id.*

124. *Id.*

125. *Id.* (statement of Jack Newfield, Boxing Historian).

126. *Boxing In and Out of the Ring*, *supra* note 59 (“If their selling influence, he’s buying.”) (statement of Jack Newfield about Cedric Kushner, Boxing Promoter).

127. *See id.*

128. “Bagman” is often the term used for an individual accepting bribes. *Id.*

129. *Id.*

130. *Id.*

131. *Boxing In and Out of the Ring*, *supra* note 59. Mr. Beavers continued to explain that, “It was like extortion. If you want to survive in the IBF, you gotta pay.” *Id.*

132. Many often believe fights to be fixed. However, more often, it is not the fights that are fixed—it is the ratings. *Id.*

133. HAUSER, *supra* note 16, at 57.

IV. THE MUHAMMAD ALI BOXING REFORM ACT¹³⁴

Four years after the passage of the Professional Boxing Safety Act of 1996, the Ali Act was passed.¹³⁵ Congress made several findings relative to safety outside of the ring.¹³⁶ Congress found that: 1) boxing lacks a central governing body; 2) state regulation is proper; 3) promoters can take advantage of the industry by engaging in business with states having weaker regulations; 4) rankings are susceptible to corruption; 5) common practices of promoters and sanctioning organizations constitute restraints on trade; and 6) it is necessary to establish reform.¹³⁷ In response to such findings, Congress passed the Ali Act to protect professional boxers, assist boxing commissions in providing oversight, and promote honorable competition.¹³⁸ The goal of any legislation directed towards boxing should be the health and safety of its participants.¹³⁹ This is undisputed. However, this legislation, though meritorious, is misdirected. The Ali Act is not without its strengths, however.

A. *The Strengths*

The Ali Act is an effort to establish and enforce regulations to protect the boxers and public interest.¹⁴⁰ It is an effort to regulate boxing because boxing “can’t regulate itself.”¹⁴¹ This law was intended to provide boxers with greater control over their careers.¹⁴² Through several provisions of the Ali Act, boxers are economically protected.

134. Professional Boxing Safety Act of 1996, 15 U.S.C. § 6301 (Supp. II 1996), amended by Muhammad Ali Boxing Reform Act, 15 U.S.C. § 6301 (2000).

135. The Muhammad Ali Boxing Reform Act was passed on May 26, 2000. 15 U.S.C. §6301 (2000).

136. H.R. REP. NO. 106-449, pt. 1, at 2 (1999).

137. *Id.*

138. H.R. REP. NO. 106-449, pt. 1, at 2 (1999), reprinted in 2000 U.S.C.C.A.N. 329, 329.

139. See *Symposium, supra* note 22, at 208 (statement of Amos C. Saunders).

140. See *id.* (statement of Paul Feeney, representative of Senator John McCain and co-drafter of the Ali Act).

141. *Id.* at 214. (“Can boxing regulate itself? No, boxing can’t regulate itself because there are too many people right now who are benefiting from the system as it presently exists.”) (statement of Lou DiBella).

142. *Legislative Meeting, supra* note 25, at 46.

Section 7b of the Ali Act provides boxers with protection from coercive contracts.¹⁴³ This provision is intended to protect boxers from being forced into long-term contracts as a condition to their being granted a fight.¹⁴⁴ If Boxer A, who is under a promotional contract with Promoter C, would like to fight Boxer B, who is under a promotional contract with Promoter D, Promoter C can only ask for options¹⁴⁵ up to twelve months on Boxer B in the event that his boxer, Boxer A, loses.¹⁴⁶ This would entitle Promoter C to twelve months of promoting Boxer B, the winner of the bout. This provision also provides that in the last three months of this twelve-month option, Boxer B and Promoter C can freely negotiate for an extended promotional contract or end their relationship.¹⁴⁷

However, this provision only applies if the boxer and promoter are already under contract with each other for the particular bout.¹⁴⁸ If, for example, a promoter would like to set up a bout for a boxer in whom he currently has no promotional interest, he can contract with the boxer for more than the twelve-month period.¹⁴⁹ This provision prevents promoters from coercing boxers into entering extended contracts to be granted fights.¹⁵⁰ If, however, the bout is a mandatory¹⁵¹ bout, the twelve-month option would not apply.¹⁵² If one is the mandatory contender, he has earned his right to the title fight and, therefore, will not be required to grant any future promotional rights in exchange for the opportunity to the bout.¹⁵³

143. 15 U.S.C. § 6307b (2000).

144. *Legislative Meeting*, *supra* note 25, at 8 (statement of Paul Feeney). This does not apply to boxer-manager contracts, however. *Id.* at 21 (statement of Greg Sirb, President of the Association of Boxing Commissions).

145. "Options" refer to the granting of certain rights to a promoter as a condition precedent to the boxer's participation in a bout with another boxer who is under a contract with another promoter. See 15 U.S.C. § 6307b(a)(1)(A)(ii). In this example, the granting to Promoter C of promotional rights over Boxer B.

146. *Id.* See also *Legislative Meeting*, *supra* note 25, at 21 (statement of Greg Sirb).

147. See 15 U.S.C. § 6307b(a)(3).

148. See *Legislative Meeting*, *supra* note 25, at 58 (statement of Greg Sirb).

149. See *id.* at 23 (statement of Greg Sirb).

150. See generally 15 U.S.C. § 6307b.

151. Mandatory bouts are defined by the sanctioning organizations. See § 6307b(b). Mandatory bouts generally refer to bouts between the champion and the individual ranked number two in the organization's ratings. See *Legislative Meeting*, *supra* note 25, at 24. The number two ranked individual is also referred to as the number one contender. *Id.* at 30 (statement of Paul Feeney).

152. 15 U.S.C. § 6307b(b).

153. *Legislative Meeting*, *supra* note 25, at 24.

Section 7c of the Ali Act is also beneficial to the boxing industry. Section 7c addresses the sanctioning organizations and the ratings criteria.¹⁵⁴ It provides, in part, that a sanctioning organization not be entitled to compensation:

until, with respect to a change in the rating of a boxer previously rated by such organization in the top 10 boxers, the organization—

- (1) posts a copy, within 7 days of such change, on its Internet website or home page, if any, including an explanation of such change, for a period of not less than 30 days; and
- (2) provides a copy of the rating change and explanation to an association to which at least a majority of the State boxing commissions belong.¹⁵⁵

Section 7c provides that the boxers and the boxing industry be provided with an explanation for a boxer's rise or fall in the ratings.¹⁵⁶ This provision makes it more difficult for the ratings system to be arbitrary. This section also provides the boxers with an opportunity to appeal the ratings change.¹⁵⁷

The boxer can submit a request to the sanctioning organization, to which the sanctioning organization must provide the boxer with a written explanation of the criteria used in evaluating him and the rationale for the change.¹⁵⁸

Sections 7b and 7c are undoubtedly beneficial to the boxers and the boxing industry. However, these sections also have shortcomings. Section 7b does not make it illegal to enter into such contracts.¹⁵⁹ Rather, it makes the contract unenforceable.¹⁶⁰ The contract can be entered into; however, if the fighter later brings suit, the contract cannot be enforced against him.¹⁶¹ This section, therefore, presupposes that the fighter will actually bring suit. Further, under section 9, the fighter can bring a civil cause of action to recover economic injury he suffers.¹⁶² In a sport where “[a PRIZEFIGHTER’S] life is a short one”¹⁶³ a boxer may not want to endure

154. 15 U.S.C. § 6307c (2000).

155. § 6307c(c).

156. *Id.*

157. § 6307c(b).

158. § 6307c(b)(1)–(2).

159. *See* 15 U.S.C. § 6307b (2000).

160. *Id.*

161. *Legislative Meeting, supra* note 25, at 26 (statement of Robert Gordon, co-drafter of the Ali Act).

162. 15 U.S.C. § 6309(d) (2000).

163. SCHULMAN, *supra* note 41, at 119.

protracted litigation. He may, logically, remain under the coercive contract so that he is at least guaranteed a certain number of bouts per year and, therefore, a steady income.

Section 7c also has shortcomings. This section only applies to the boxers “previously rated by such organization in the top 10”¹⁶⁴ What happens to the boxer ranked eleventh? Although he is still entitled to the appeals process, he is not guaranteed notification of the change in his ranking under the Ali Act. Boxers ranked in the top ten are worth more money than those in the lower rankings. This is undisputed. However, the Ali Act is not affording all boxers the same opportunities and protections. The Ali Act is not protecting the boxers who need it most.¹⁶⁵

B. *The Weaknesses*

“[P]eople that know nothing about the sport of boxing . . . now want[] to change the tradition of the sport overnight. And that is not going to happen.”¹⁶⁶ It is quite possible that the drafters of the Ali Act do not understand the complexity involved in effectuating a boxing match.¹⁶⁷ Further, though one of the purposes is to protect the rights and welfare of professional boxers,¹⁶⁸ the boxers in need of the most protection are not being protected by this legislation.

Section 8 of the Ali Act addresses the conflicts of interest within the industry.¹⁶⁹ The Ali Act, in amending the Professional Boxing Safety Act of 1996, now provides for a “firewall” between promoters and managers.¹⁷⁰ This firewall prevents a promoter and a manager from having financial interest, direct or indirect, in the other’s operations.¹⁷¹ This provision appears to eliminate any conflict of interest between a promoter and manager that may be prevalent within the industry. However, an exception exists.

This firewall “only applies to boxers participating in a boxing match of 10 rounds or more.”¹⁷² If a boxer is participating in a ten-round match, he is, in all probability, already established within the industry. Further, if a boxer

164. 15 U.S.C. § 6307c(c).

165. *Boxing In and Out of the Ring*, *supra* note 59.

166. *Legislative Meeting*, *supra* note 25, at 35 (statement of Murad Muhammad).

167. *Id.* at 195 (statement of Sherman W. Smith, III, at p. 1).

168. See H.R. REP. NO. 106-449, pt. 1, at 2 (1999), *reprinted in* 2000 U.S.C.C.A.N. 329, 329.

169. 15 U.S.C. § 6308 (2000).

170. § 6308(b).

171. § 6308(b)(1).

172. § 6308(b)(2)(B).

is participating in a match that is more than ten rounds, he is fighting in a twelve-round bout—a championship bout.¹⁷³ These bouts are often televised.¹⁷⁴ “If [the boxer] is on pay-per-view, [he has] reached fame, and with that you don’t need protection.”¹⁷⁵ It is the boxers participating in the four-round bouts that are in need of protection. However, the exception to this provision effectively eliminates any such protection for the four-rounder. A promoter is permitted to have a direct financial interest in the management of a boxer who is participating in any bout with fewer than ten rounds. This conflict of interest affects the purse the boxer ultimately receives because the promoter and manager may be working together, when they should be on opposite sides of the bargaining table.¹⁷⁶ The Committee on Commerce rationalizes this exception by asserting that boxers participating in bouts with fewer than ten rounds cannot afford to have a separate promoter and manager.¹⁷⁷ Therefore, the firewall provision would not apply. Congress could have enacted a provision that would provide for an exception in cases where an individual serves in both capacities to the boxer. Congress has provided for an exception in cases where the boxer acts as his own promoter or manager.¹⁷⁸ Why not enact such exception where the promoter is the manager? Nonetheless, Congress enacted a provision that eliminates all boxers participating in under ten rounds of boxing from this firewall protection. Consequently, this provision of the Ali Act only affects about two percent of all fighters.¹⁷⁹ Further, the fighters to whom the protection extends are world famous and affluent.¹⁸⁰

This section also prohibits the promoter from paying for airline tickets and hotel accommodations for the manager, although such compensation is provided in connection with negotiations or the actual event—a practice that is common in the boxing industry.¹⁸¹ Such accommodations are now deemed indirect compensation, and illegal. Additionally, the fighter’s manager cannot serve as a commentator on the promoter’s telecast, even though the

173. See *supra* note 29.

174. See *supra* Part II.E.

175. *Boxing In and Out of the Ring*, *supra* note 59 (statement of Jack Newfield).

176. See *supra* Part II.B, C.

177. H.R. REP. NO. 106-449, pt. 1, at 16 (1999), *reprinted in* 2000 U.S.C.C.A.N. 329, 339.

178. 15 U.S.C. § 6308(b)(2)(A).

179. See *Symposium*, *supra* note 22, at 255 (statement of Marc Ratner, Executive Director of the Nevada Athletic Commission).

180. See *id.*

181. See *Legislative Meeting*, *supra* note 25, at 195 (statement of Sherman W. Smith, III, at p. 9).

promoter may be paying the fair market value for his services.¹⁸² To do so, would be to receive compensation from the promoter other than the consideration due under the manager's contract with the boxer.¹⁸³ The Ali Act makes such commentating illegal, thus prohibiting the manager from being employed by a promoter, except as permitted under the manager's contract with a boxer. The Ali Act is, therefore, limiting the right to contract between the manager and promoter.

With the passage of the Ali Act, several other demands have been placed upon promoters. Promoters are now required to disclose information to the boxing commissions and boxers before they may be entitled to compensation.¹⁸⁴ This requirement does not take into account the industry standards.¹⁸⁵ Section 7e of the Ali Act provides that, before he is to receive any compensation, the promoter must provide the boxer with: 1) the amount of any compensation the promoter has contracted to receive from the match; 2) all fees assessed against the boxer's purse; and 3) any reduction in the boxer's purse contrary to previous contracts.¹⁸⁶ These requirements are impossible to meet. Promoters seldom know, in advance, how much they will receive from a match.¹⁸⁷ The revenue depends greatly upon the live gate, the pay-per-view buys, and the closed circuit distribution.¹⁸⁸ Sometimes, these figures are not known until months after the event.¹⁸⁹

Also, promoters may have long-term distribution agreements with foreign broadcasters.¹⁹⁰ These agreements provide that payments are made in fixed installments for a number of events to take place over a set period of time.¹⁹¹ Therefore, a promoter receives income for events before they even take place.¹⁹² In some instances, he receives income before he knows who

182. *See id.*

183. 15 U.S.C. § 6308(b)(1)(B)(ii) (2000).

184. § 6307e(a)-(b) (2000).

185. *See generally Legislative Meeting, supra note 25, at 195* (statement of Sherman W. Smith, III, at pp. 2-9).

186. 15 U.S.C. § 6307e(b).

187. *See Legislative Meeting, supra note 25, at 195* (statement of Sherman W. Smith, III, at p. 2).

188. *See supra* Part II.C.

189. *Legislative Meeting, supra note 25, at 195* (statement of Sherman W. Smith, III, at pp. 2-3).

190. *Id.* (statement of Sherman W. Smith, III, at p. 3).

191. *Id.*

192. *Id.*

will be fighting.¹⁹³ If the Ali Act were strictly construed, these agreements would not be permitted.

Furthermore, in many instances, promoters receive advances, site fees, and letters of credit before the event takes place.¹⁹⁴ These are necessary to financially effectuate the event. However, under the Ali Act, these practices are not permitted. Also, promoters do not always know who the undercard boxers¹⁹⁵ are going to be until the weigh-in.¹⁹⁶ This lack of knowledge is due to injuries and replacements that continuously occur up until the day before the event.¹⁹⁷ The Ali Act does not take the industry standards into account. If the Ali Act were to be strictly construed, most boxing matches could not occur.

The Ali Act does more than harm promoters, however. It also harms boxers.¹⁹⁸ Boxers who come from impoverished backgrounds¹⁹⁹ have not seen the money to which they are being exposed in the boxing world.²⁰⁰ Disclosing the gross income promoters receive to boxers, hurts the boxer by presenting them with a misleading impression.²⁰¹ The promoter assumes the risk of a promotion.²⁰² Sometimes the promotion earns a profit, sometimes it sustains a loss.²⁰³ If the promoter makes a profit, it should be considered "compensat[ion] for assuming that risk."²⁰⁴

Further, in disclosing to boxers the amount of revenue the promoter receives, the boxers are not being informed of the expenses the promoter must pay.²⁰⁵ For example, from the revenue, the promoter must pay the opponent's purse, the undercard boxers' purses, and other such expenses

193. *Id.*

194. *Legislative Meeting, supra* note 25, at 195 (statement of Sherman W. Smith, III, at p. 3).

195. "Undercard boxers" refer to the boxers not participating in the main event. *See id.* Generally, an event consists of numerous bouts, including the main event. *See id.*

196. *Id.* (statement of Sherman W. Smith, III, at p. 4).

197. *Id.*

198. *Legislative Meeting, supra* note 25, at 35 ("[T]his law, that has been written, is hurting the boxer. It is not helping them. It is hurting them—hurting them tremendously.") (statement of Murad Muhammad).

199. *See supra* Part II.A.

200. *See Legislative Meeting, supra* note 25, at 38 (statement of Murad Muhammad).

201. *See id.* at 195 (statement of Ron Stevens, Matchmaker, Cedric Kushner Promotions).

202. *Legislative Meeting, supra* note 25, at 195 (statement of Sherman W. Smith, III, at p. 5).

203. *Id.*

204. *See id.*

205. *Id.*

associated with a promotion, including the promoter's overhead.²⁰⁶ In seeing a promoter's gross revenue, boxers get a false sense of their true worth.²⁰⁷ They begin to believe that they have greater leverage than they actually do.²⁰⁸ This false sense of leverage could compromise the entire event.²⁰⁹ Because the disclosures only mandate the disclosure of income, the provision is "meaningless. . . . Net receipts might mean something, but gross receipts [are] totally meaningless."²¹⁰

The Ali Act provides that the promoter must make these disclosures to all the boxers he is promoting.²¹¹ If the promoter, in addition to a main event fighter, has a contract with an undercard boxer, he must make the disclosures to him also. The undercard boxer, however, is not as responsible for most of the revenue the promoter receives. Most of the generated revenue is due to the main event fight, not the undercard.²¹² Yet, the boxer does not see this. He only sees the gross receipts for the entire event. Moreover, boxers and promoters have adverse interests and bargain for the best possible contract. Seldom are business adversaries entitled to opposition's financial information. The boxer, therefore, should not be entitled to the promoter's revenue.

In addition to promoters making disclosures to boxers, they must also make disclosures to the boxing commissions.²¹³ To the boxing commissions, promoters must disclose "all payments, gifts, or benefits the promoter is providing to any sanctioning organization"²¹⁴ When organizing an event, the promoter often contracts with the venue for complimentary rooms and food for the fighters and sanctioning organizations.²¹⁵ Before the event

206. *Id.*

207. See *Legislative Meeting*, *supra* note 25, at 195 (explaining the boxer's misperception when a promoter discloses his revenue) ("[T]he fighter is going to say . . . hey . . . [y]ou are making \$10 million. I deserve [\$]50,000 here, not [\$]5,000.") (statement of Ron Stevens).

208. *Id.* at 157.

209. *Id.* ("[W]e would have . . . major trouble because you don't understand these athletes. . . . [I]f they ever see the kind of money . . . grossed in a fight, I guarantee you . . . that when that fighter reads that, I am not fighting.") (statement of Murad Muhammad).

210. *Id.* at 151 (statement of Patrick English, Attorney for Main Events).

211. 15 U.S.C. § 6307e(b) (2000).

212. *Legislative Meeting*, *supra* note 25, at 174 ("[T]he problem comes when . . . we are getting \$6 million for . . . this fight. It is not coming from that four-round fight. It is coming from the main event.") (statement of Sherman W. Smith, III).

213. 15 U.S.C. § 6307e(a).

214. § 6307e(a)(3)(B).

215. *Legislative Meeting*, *supra* note 25, at 195 (statement of Sherman W. Smith, III, at p. 7).

can take place, however, the promoter must disclose these figures to the boxing commission. At that time, the promoter does not know the value of the food or the value of the hotel room in which the member of the sanctioning organization will be staying.²¹⁶ Therefore, in practice, this provision of the Ali Act could effectively prevent the event from occurring.

Promoters must also disclose a copy of any agreement a promoter has with any boxer participating in the event.²¹⁷ In common practice, many agreements exist between a boxer and promoter.²¹⁸ Promoters often have merchandising agreements, personal management agreements, and several expired bout agreements from which rights still extend.²¹⁹ Under the Ali Act, promoters must file all of these agreements with the Association of Boxing Commissions (“ABC”). This provision is very broad. It is possible that a promoter have twenty contracts for one boxer.²²⁰ Although most of these contracts have no relationship to the fight in question, if there are rights extending from the contract, the promoter must disclose it.²²¹ In common practice, agreements may grant the boxer clip rights for his fights.²²² Though these rights are of de minimis value,²²³ the entire contract must be disclosed to the ABC because rights still extend from it. This requirement is extremely burdensome and bears no relationship to the current boxing event.

With all the disclosures mandated, it appeared as if promoters were opening their “entire books to the world.”²²⁴ To counteract this fear, the Ali Act also includes a confidentiality provision.²²⁵ This provision provides that disclosures made under section 7e shall not be disclosed to the public “except to the extent required in a legal, administrative, or judicial proceeding.”²²⁶ Because some state law provides that information be made public, the Ali Act provides an alternative. Section 7g provides that if state law allows the information to be furnished to the public, the promoter can

216. *Id.* (statement of Sherman W. Smith, III, at p. 8).

217. 15 U.S.C. § 6307e(a)(1).

218. *See Legislative Meeting, supra* note 25, at 231.

219. *Id.* (statement of Sherman W. Smith, III).

220. *Id.* at 232 (statement of Patrick English).

221. *Id.* at 234.

222. *Id.*

223. *Legislative Meeting, supra* note 25, at 234.

224. *Id.* at 180 (explaining his fear that the world would learn how the business is done) (statement of Murad Muhammad).

225. 15 U.S.C. § 6307g (2000).

226. *Id.*

choose to file the disclosures with the ABC.²²⁷ When perusing the enforcement provision,²²⁸ however, it becomes evident that penalties are provided for the violation of several sections, not including section 7e. Therefore, the boxing commission can say they will keep the disclosures confidential, but if they do not, they suffer no penalty. The ABC, however, is under no requirement to make the disclosures public.²²⁹ They can make their own regulations.²³⁰ Therefore, promoters will undoubtedly file the disclosures with the ABC.²³¹ Consequently, the provision allowing the promoters to file the disclosures with the state is superfluous.

The enforcement provision is also deficient of any foundation. Section 9 provides that the Attorney General of the United States may bring a civil action against any individual who is reasonably believed to be in violation of any provision of the Ali Act.²³² An injunction may be granted to prevent the individual from continuing to engage in such activity.²³³ Further, if a manager, promoter, matchmaker, or licensee violates any provision, he will be fined not more than \$20,000 and/or be imprisoned for not more than one year.²³⁴ Though one year is an extensive period of time, a \$20,000 maximum fine may not discourage the affluent manager. It may be more beneficial to him to take the risk of violating the Ali Act, than it may be for him to conform.

However, section 9(b)(2) provides for harsher penalties.²³⁵ Upon conviction, any individual who violates certain provisions²³⁶ of the Ali Act shall be:

imprisoned for not more than 1 year or fined not more than—
(A) \$100,000; and

227. § 6307g(b).

228. 15 U.S.C. § 6309 (2000).

229. *Legislative Meeting*, *supra* note 25, at 182 (statement of Sherman W. Smith, III).

230. *Id.*

231. *Id.* at 190 (“[A]s it stands, as the law is today—today—simply file it with the ABC.”) (statement of Buddy Embanato, Treasurer of the ABC).

232. 15 U.S.C. § 6309(a).

233. *Id.*

234. § 6309(b)(1).

235. *See* § 6309(b)(2).

236. These sections are: Protection from Coercive Contracts; Sanctioning Organizations; Required Disclosures to State Boxing Commissions by Sanctioning Organizations; Required Disclosures for Promoters; Required Disclosures for Judges and Referees; and Judges and Referees. *See* 15 U.S.C. § 6309(b)(2). These penalties, however, do not apply to Confidentiality or Conflict of Interest. *See id.*

- (B) if a violation occurs in connection with a professional boxing match the gross revenues for which exceed \$2,000,000, an additional amount which bears the same ratio to \$100,000 as the amount of such revenues compared to \$2,000,000, or both.²³⁷

These criminal sanctions will mostly impact sanctioning organizations and promoters.²³⁸ Then, too, if one is found to have violated the conflict of interest provision, he will be fined not more than \$20,000 and/or imprisoned for not more than one year.²³⁹ Boxers, if found to be in violation of any provision, will be fined not more than \$1000.²⁴⁰ Though the boxer should be responsible for himself, he is subject to the least fines.²⁴¹

Section 9 also provides for civil sanctions. Under this enforcement provision, a boxer can bring a civil cause of action if he has suffered economic injury as a result of the violation of the Ali Act.²⁴² States can also bring a civil action on behalf of its residents to enjoin the match, enforce the provisions of the Ali Act, obtain fines, or obtain other such relief the court may deem necessary.²⁴³ This provision, however, also provides that “[n]othing in this chapter authorizes the enforcement of any provision of this chapter against the Federal Trade Commission, the United States Attorney General, or the chief legal officer . . . for . . . acting or failing to act in an official capacity.”²⁴⁴ This exception effectively limits the reach of the Ali Act on these individuals. Although it provides them with immunity from prosecution for acting in their official capacity, it also provides them with immunity for failing to act in their official capacity. They are denied the incentive to comply with the letter of the law. If the chief legal officer of a

237. *Id.*

238. *See id.*

239. § 6309(b)(3). This provision only provides for such penalties against “[a]ny member or employee of a boxing commission, any person who administers or enforces State boxing laws, and any member of the [ABC] . . .” because it was originally part of the Professional Boxing and Safety Act of 1996. *See* § 6309(b)(2) (Supp. II 1996). It, therefore, does not provide criminal penalties if one violates the firewall provision because the firewall provision was added as part of the Ali Act and no criminal sanction sections were added to reflect the firewall addition. *See generally* 15 U.S.C. § 6309 (2000).

240. § 6309(b)(4).

241. “[T]he fighter has to be responsible for himself cause we have brains, we think for ourselves. Everybody always wants to point a finger at one person. . . . You can’t only get one person.” *Symposium, supra* note 22, at 241 (statement of Evander Holyfield).

242. 15 U.S.C. § 6309(d).

243. § 6309(c).

244. § 6309(e)(1).

state knows of a violation and does not inform the proper authorities, he is under no threat of legal prosecution. He may opt to remain silent. This is legal.

Lastly, the Ali Act raises concern for American promoters.²⁴⁵ Because boxing is an international sport, foreign promoters are common in the business.²⁴⁶ However, they are not subject to the provisions of the Ali Act—a United States law. The Ali Act, therefore, may place American promoters at a disadvantage because foreign promoters will not be prohibited from entering into certain financial arrangements that American promoters are prohibited from entering.²⁴⁷ This legislation may, in effect, encourage boxers or American promoters to do business abroad.²⁴⁸

V. CONCLUSION

The Ali Act, though meritorious, provides boxers with little financial protection. This legislation does not protect boxers as much as it provides consequences for promoters.²⁴⁹ Furthermore, the boxers that the legislation does reach are not the ones in need of the most protection. Rather, the Ali Act protects the boxers that have already reached a level of success within the profession. This legislation is premature and has not been carefully considered.²⁵⁰ The Ali Act, in its hasty enactment, takes into account neither the industry standards, nor the complexity involved in effectuating a boxing match.

245. See H.R. REP. NO. 106-449, pt. 1, at 29 (1999), *reprinted in* 2000 U.S.C.C.A.N. 329, 351 (statement of Edolphus Towns & Bobby L. Rush).

246. See *id.*

247. *Id.*

248. *Id.*

249. *Legislative Meeting*, *supra* note 25, at 235–36 (discussing the disclosure provisions) (“[W]hat about managers who have contracts with fighters and a contract with the network the fighter don’t know nothing about? Now, how do [sic] the fighter gets [sic] protected by that?”) (statement of Murad Muhammad). Under the Ali Act, managers do not have to disclose agreements to the fighters. See *generally* 15 U.S.C. §§ 6301–6313 (2000). The disclosure provisions only apply to sanctioning organizations, promoters, and judges and referees. See §§ 6307d–6307f.

250. Paul Feeney, co-drafter of the Ali Act, acknowledged that he “would not be surprised if [the disclosure provisions were] changed next year.” *Legislative Meeting*, *supra* note 25, at 148. Larry Hazzard, of the New Jersey Commission, also acknowledged that he thought “we should go back now to the drawing board . . .” *Id.* at 248.

Though this legislation does little more than impede the business of promoters,²⁵¹ one thing is certain—boxing will prevail.

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251. *Id.* at 52 (“My experience tells me . . . that if the new rules significantly curtail a promoter’s ability to make money, there will be no incentive to promote boxing.”) (statement of Ron Stevens).

