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## Counts, Recounts, and Election Contests: Lessons from the Florida Presidential Election

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# FLORIDA STATE UNIVERSITY LAW REVIEW



## COUNTS, RECOUNTS, AND ELECTION CONTESTS: LESSONS FROM THE FLORIDA PRESIDENTIAL ELECTION

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COUNTS, RECOUNTS, AND ELECTION CONTESTS:  
LESSONS FROM THE FLORIDA  
PRESIDENTIAL ELECTION

STEVE BICKERSTAFF\*

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The thirty-six days following the November 7, 2000, presidential election was an amazing period in the legal and political history of the United States. Lawyers, judges, and election officials in Florida found themselves participating sometimes unwillingly in a national media spectacle. Some observers saw this postelection turmoil in Florida as a crisis for this country. Others viewed it as an international embarrassment. The outcome brought elation for many and cynicism from others who explained the result as a triumph of power and politics over justice and the will of the people.

For columnists and law faculty, the events in Florida and the ruling of the United States Supreme Court on December 12 in *Bush v. Gore*<sup>1</sup> provided an opportunity for decrying the “frail underside of elections”<sup>2</sup> and speculating about the “legacy” of the Supreme Court opinion for voting rights nationwide.<sup>3</sup> In an op-ed piece in *The New York Times*, Columbia Law School professor Sam Issacharoff posited that:

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

2. SAMUEL ISSACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000*, at i (rev. ed. 2001).

3. See Samuel Issacharoff, *The Court's Legacy for Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39.

[T]he Supreme Court may have given us an advancement in voting rights doctrine. It has asserted a new constitutional requirement: To avoid disparate and unfair treatment of voters. And this obligation obviously cannot be limited to the recount process alone. . . . The court's new standard may create a more robust constitutional examination of voting practices.<sup>4</sup>

Elsewhere in this issue, Professors Richard Briffault and Richard L. Hasen offer their informed opinions regarding the effect of *Bush v. Gore* on election law and state election systems.<sup>5</sup> In general, the recent wave of articles tends to analyze the events in Florida without regard to how an election recount and contest might proceed under more normal circumstances.<sup>6</sup> As a result, these articles underestimate the integrity and vitality of the existing state election processes nationwide and overestimate the need for corrective rules or laws by Congress or state legislatures.

This Article suggests that the events in Florida and the resulting decisions of the Florida Supreme Court and United States Supreme Court are best understood against the backdrop of the state law processes and jurisprudence that usually govern the outcome of an ordinary election dispute. Measured against this backdrop, the election recount and contest process in Florida functioned in reasonably good order under the circumstances and, had adequate time been available, probably would have produced a reasoned and credible outcome. The problems in Florida that plagued the postelection process and ultimately led to the unsettling decision in *Bush v. Gore* are largely attributable to external factors, not to flaws within the election process itself.

The circumstances that confronted the postelection process in Florida were novel only in the magnitude of the external factors affecting the operation of the recount and election contest process. The

4. *Id.*

5. See Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325 (2001); Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377 (2001).

6. See, e.g., Richard A. Epstein, "In such Manner as the Legislature Thereof May Direct": *The Outcome in Bush v. Gore Defended*, 68 U. CHI. L. REV. 613 (2001); Samuel Issacharoff, *Political Judgments*, 68 U. CHI. L. REV. 637 (2001); Michael W. McConnell, *Two-and-a-Half Cheers for Bush v. Gore*, 68 U. CHI. L. REV. 657 (2001); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001); Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001); Richard A. Posner, *Bush v Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737 (2001); Cass R. Sunstein, *Order Without Law*, 68 U. CHI. L. REV. 757 (2001); John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001); Nelson Lund, *The Unbearable Rightness of Bush v. Gore* (Apr. 26, 2001) (unpublished manuscript, from "Votes and Voices" symposium at Benjamin N. Cardozo School of Law, available at <http://papers.ssrn.com>); Robert H. Bork, *Sanctimony Serving Policies: The Florida Fiasco*, THE NEW CRITERION, Mar. 2001, at 4; Robert F. Nagel, *From U.S. v. Nixon to Bush v. Gore*, THE WKLY. STANDARD, Dec. 25, 2000, at 20.

legal issues and proceedings took on a surreal appearance primarily because of the importance of the election, the intensity of the media's scrutiny, the magnitude of the forces employed on both sides of the election conflict, and the brevity of time available for the participants and the courts to address complex legal and factual issues. These same factors often play a significant role in state recounts or election contests. The differences encountered in Florida were a matter of degree, not a matter of kind.

Examining the events in Florida in the context of general election law jurisprudence also provides important insights into what went wrong for the Gore legal strategy. The Gore team simply lost the legal battle. Gore's postelection legal strategy was flawed from the beginning, largely because it failed adequately to appreciate the general principles and dynamics that historically have governed the conduct of recounts and election contests nationwide and that almost certainly would eventually control the outcome in Florida. There was essentially no chance from the beginning of the postelection dispute that any candidate could win an election contest in the time available. Gore's sole chance for victory laid in the administrative recount process. That opportunity was squandered.

Part I of this Article provides an overview of the general principles found in election law nationwide governing the canvass, recount, and contest aspects of elections. Part II describes the postelection events in Florida. Part III discusses the major opinions of the Florida Supreme Court and the opinion of the United States Supreme Court in *Bush v. Gore*. To minimize unnecessary repetition of the descriptions available elsewhere in the papers of this symposium, I focus primarily on the *Gore v. Harris*<sup>7</sup> opinions of the Leon County Circuit Court and Florida Supreme Court. Part IV discusses the probable impact of *Bush v. Gore* and the events in Florida on election law generally. Finally, I consider the events in Florida in terms of candidate Gore's losing legal strategy.

## I. GENERAL PRINCIPLES GOVERNING POSTELECTION DISPUTES

An election is a process, not an event. The objective of this process is to determine the will of the electorate as expressed by qualified voters casting ballots in accordance with applicable state law. Detailed state statutes and administrative regulations govern the process in every state.<sup>8</sup> The specifics of these statutes and regulations

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7. *Gore v. Harris*, No. 00-2808, 2000 WL 1770257 (Fla. 2d Cir. Ct. Dec. 4, 2000), *rev'd*, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

8. State statutes often are compiled in a separate election code, such as the Texas Election Code. Administrative rules are promulgated and published by the state's chief elections officer. Florida's election law statutes appear generally in *Florida Statutes* chs.

vary significantly by state. It is possible, however, to make generalizations about the procedures followed by the states in the counting of state and federal ballots and about the election law principles applied by the state courts.<sup>9</sup> This Article examines these general procedures and principles as they exist for the canvassing and recounting of ballots and for contesting an outcome in an election.

*A. Canvassing Ballots and Certifying the Outcome of an Election*

The Secretary of State serves as the chief elections officer in most states. This official generally is responsible for implementing and enforcing the state's election laws through regulations, official opinions, and unofficial guidance for local government officials. These local government officials usually bear responsibility for conducting the election, including the obligation as governed by state law to purchase, maintain, and operate voting devices at which votes are cast, as well as any electronic or electromechanical systems used for counting ballots. The primary means of in-person voting include paper ballots read manually, levered machines, prescored punch cards, direct recording electronic (DRE) machines, and paper ballots read by optical scan equipment.<sup>10</sup> Absentee ballots are usually paper ballots read manually or with optical scan equipment. Each of these means of voting and counting votes has vulnerabilities.<sup>11</sup>

Election returns from a general election usually are tabulated by the local election officials.<sup>12</sup> For punch card ballots and paper ballots, the counting or tabulation of votes can occur at the precinct or at a central counting location as prescribed by state law. Levered machines are inspected and the vote tabulated at the precinct. This is also true of the DRE machines. Results obtained at the precinct level are communicated to the central election office and added by county election officials to the results from other precincts.<sup>13</sup> Within a prescribed period after the day of the election, these results are officially canvassed by designated local government or canvassing officials.<sup>14</sup> The canvass usually consists only of officially opening the returns

101-102. The Florida Legislature amended the election code in the 2001 session. *See Florida Election Reform Act of 2001*, 2001 Fla. Laws ch. 01-40, at 117-73.

9. *See generally* NAT'L ASS'N OF STATE ELECTION DIRS., *ELECTION ADMIN. SURVEY* (2001) [hereinafter 2001 *ELECTION ADMIN. SURVEY*] (compiled by the association following the 2000 election and in response to events in Florida), and the individual state responses on which the survey compilation is based.

10. *See* ROY G. SALTMAN, U.S. DEPT OF COMMERCE, *ACCURACY, INTEGRITY AND SECURITY IN COMPUTERIZED VOTE-TALLYING* (Aug. 1988) (Nat'l Bureau of Standards, Special Pub. No. 500-158).

11. *See id.*

12. *See, e.g.*, FLA. STAT. § 102.112 (2000) (amended 2001).

13. *See, e.g., id.* § 101.5614 (amended 2001); TEX. ELEC. CODE § 67.017 (2000).

14. *See, e.g.*, FLA. STAT. § 102.112 (2000) (amended 2001); TEX. ELEC. CODE § 67.003 (2000).

from the precincts and recording and tabulating the votes for each candidate.<sup>15</sup> In many jurisdictions, this recording and tabulation of votes already has been accomplished by election officials, and the canvass is pro forma.

The county governing body or canvassing board certifies the winner of local general elections.<sup>16</sup> An official certificate of election is issued.<sup>17</sup> The county governing body or canvassing board usually is responsible also for totaling the returns from within the county in multicounty and statewide elections and for forwarding the results for these elections to the state officer, board, or legislature responsible by law for officially canvassing the votes and certifying the outcome for these elections.<sup>18</sup> For political party primary elections, the county and state executive committees for the party usually perform the same canvass and certification duties performed respectively by the local and state officials for the general election.<sup>19</sup>

State laws strictly control the secrecy of the ballots and the access of persons to paper or punch card ballots that could be altered to change or add votes for a candidate. Meticulous records must be kept throughout the process of the names of voters, number of ballots used, number of spoiled ballots, and number of voted ballots to better prevent fraud, as well as to allow a review of the vote counting process, if necessary, after the election. Ballots and levered or DRE voting machines remain in custody for a period as prescribed by state law following the election to ensure the ability of election officials and courts to verify vote totals as necessary to resolve any disputes arising from the election.<sup>20</sup>

### B. Recounting Votes

A process for recounting votes exists in virtually every state.<sup>21</sup> The process generally is administrative in nature, with the recount conducted through the government authority responsible for conducting the election or through a special government committee or commission created for the purpose of the recount.<sup>22</sup> Sometimes, the recount

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15. See, e.g., FLA. STAT. § 102.061 (2000) (amended 2001); TEX. ELEC. CODE § 67.004 (2000).

16. See, e.g., TEX. ELEC. CODE § 67.016 (2000).

17. See, e.g., FLA. STAT. § 102.155 (2000) (amended 2001); TEX. ELEC. CODE § 67.016 (2000).

18. See, e.g., FLA. STAT. § 102.141 (2000) (amended 2001); TEX. ELEC. CODE §§ 67.007, 67.008 (2000).

19. See, e.g., TEX. ELEC. CODE §§ 172.119, 172.120 (2000).

20. See, e.g., *id.*

21. See 2001 ELECTION ADMIN. SURVEY, *supra* note 9; see, e.g., FLA. STAT. § 102.166(4)-(10) (2000) (amended 2001); TEX. ELEC. CODE §§ 211-15 (2000).

22. See, e.g., *State ex rel. Crawford v. Del. Cir. Ct.*, 655 N.E.2d 499 (Ind. 1995) (noting that under applicable Indiana law, the judge appoints a recount commission).

must occur before ballots are canvassed or election results are certified, with the recounted totals being substituted for the initial tally.<sup>23</sup> In some states, however, a recount may continue after the outcome of the election has been certified.<sup>24</sup>

Many states provide for a recount of ballots automatically if the difference of votes between candidates meets some statutory threshold.<sup>25</sup> This recount or “retabulation” of votes generally consists of simply reprocessing the same ballots back through the same manual process or counting machines used in the original tally of votes. A manual recount generally occurs only in defined circumstances and only if specifically requested by a candidate or voter.<sup>26</sup> A recount, including a manual recount, is intended to identify and to correct any inaccuracies in the initial tally caused by human error or equipment malfunction.<sup>27</sup> The government officials are concerned with accuracy in the vote totals, not the outcome of the election. It is the candidates and their partisan representatives who are concerned with using the recount to win an election.<sup>28</sup>

Most recounts occur at the local level even for statewide or multijurisdictional elections. In many states, recounts can proceed on a county-by-county<sup>29</sup> or even a precinct-by-precinct basis in multicounty and statewide elections because the alleged human error or equipment malfunction in question probably did not occur throughout the election jurisdiction.<sup>30</sup> To require a manual recount in all counties or precincts because of errors in only one or a few counties or precincts within the election jurisdiction would effectively make manual recounts impossible because of cost.

Essential to fairness under such a decentralized recount scheme for multicounty elections is the entitlement of candidates, or their partisan representatives, to witness the government officials as they recount the ballots and thereby are able to observe any irregularities in the process or any illegal votes included or legal votes excluded

23. See 2001 ELECTION ADMIN. SURVEY, *supra* note 9; see, e.g., FLA. STAT. § 102.166(4)(b) (2000) (amended 2001); TEX. ELEC. CODE § 213.057 (2000).

24. See 2001 ELECTION ADMIN. SURVEY, *supra* note 9; see, e.g., OKLA. STAT. Tit. 26, § 8-116 (2000).

25. See 2001 ELECTION ADMIN. SURVEY, *supra* note 9; see, e.g., FLA. STAT. § 102.166(4)(d) (2000) (amended 2001); NEB. REV. STAT. § 32-1119 (2001).

26. See 2001 ELECTION ADMIN. SURVEY, *supra* note 9; see, e.g., FLA. STAT. § 102.166 (2000) (amended 2001); TEX. ELEC. CODE § 214.042 (2000).

27. Siegel v. LePore, 120 F. Supp. 2d 1041, 1050 (S.D. Fla. 2000) (describing the purpose of a manual recount as “detecting and correcting clerical or electronic tabulating errors”), *aff’d*, 234 F.3d 1163 (11th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1005 (2000).

28. See TIMOTHY DOWNS ET AL., THE RECOUNT PRIMER 3 (1994).

29. The reference to “county” in this context is intended as generic for the local government generally charged with carrying out elections. Instead of a county, this local government may be a parish, township, or other local entity.

30. See, e.g., TEX. ELEC. CODE § 212.001(5) (2000).

from the vote total.<sup>31</sup> If disputes arise that cannot be resolved at the administrative stage, an election contest is available to challenge an uncorrected irregularity or vote tabulation before an impartial arbiter.

Specific aspects of the recount process in Florida during 2000 that proved important in the battle for presidential votes included: (1) a provision for an automatic recount statewide;<sup>32</sup> (2) authority for a candidate subsequently to file a protest in a county that the returns of the election in the county are erroneous and to request a manual recount;<sup>33</sup> (3) authority for a local canvassing board, in response to such a protest, to order a limited manual recount of not less than three precincts;<sup>34</sup> and (4) authority for the canvassing board to manually recount all ballots in the county if the limited manual recount “indicates an error in the vote tabulation which could affect the outcome of the election.”<sup>35</sup>

### C. *The Contesting of an Election*

Election contests were unknown at common law.<sup>36</sup> They constituted special statutory authority for courts to intervene in the otherwise legislative or political election arena.<sup>37</sup> As a result, election contest statutes as a rule are strictly construed.

An election contest generally is initiated by a losing candidate or candidates after the outcome of an election has been certified and a winner has been declared. State courts have established presumptions in favor of the accuracy of a certified election outcome.<sup>38</sup> Therefore, any contestant has the significant burden of showing that the certified results should be overturned. Moreover, state courts often have established threshold requirements for election contests by requiring specificity in the pleading of alleged election irregularities

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31. See FLA. STAT. § 102.166 (2000) (amended 2001); see also *Miller v. County Comm'n*, 539 S.E.2d 770, 776 (W. Va. 2000) (indicating that a recount gives candidates the opportunity to (1) observe the manner in which the recount is conducted, (2) notify the canvassing board of their intentions regarding requesting a recount in precincts not requested by the candidate originally requesting the recount, and (3) identify ballots that may be challenged as irregular or illegal in an election contest). “Inherent in the recount procedures is the concept of fairness to all interested candidates in an election.” *Id.* at 776.

32. FLA. STAT. § 102.166(4)(d) (2000) (amended 2001).

33. *Id.* § 102.166(4)(a) (amended 2001).

34. *Id.* § 102.166(4)(d) (amended 2001).

35. *Id.* § 102.166(5) (amended 2001).

36. See *Harless v. Lockwood*, 332 P.2d 887, 888 (Ariz. 1958); *McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); *State ex rel. Lydick v. Brown*, 516 P.2d 239, 240 (Okla. 1973); see also *Henderson v. Maley*, 806 P.2d 626, 634 (Okla. 1991).

37. These state concerns are similar to the concerns underlying the basic political question doctrine of justiciability as explained in *Baker v. Carr*, 369 U.S. 186 (1962). See *McIntyre v. Fallahay*, 766 F.2d 1078, 1087-88 (7th Cir. 1985) (Swygert, J., dissenting).

38. See, e.g., *In re Contest of the Election for the Offices of Governor and Lieutenant Governor Held at the Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 172 (Ill. 1983).

and a showing of probable success by the contestant even before the ballot boxes are opened and the contested ballots are subjected to review.<sup>39</sup> The contestant's failure to make this showing can be a basis for dismissal of the election proceeding.<sup>40</sup>

In some states the courts will uphold the declared results unless there is clear and convincing evidence that the results are inaccurate and do not reflect the will of the people. Although state election contest statutes vary, most provide that the grounds for contesting an election are established when: (1) an election official has engaged in fraud or other illegal conduct; (2) illegal votes have been counted; (3) legal votes have been rejected or excluded; and (4) an election official has been bribed.<sup>41</sup> Misconduct of an election official generally is an insufficient basis for a contest of the election result unless the illegal acts are substantial or intentional and affect the outcome of the election.<sup>42</sup> Similarly, the inclusion or exclusion of ballots is a basis for an election contest only if the contestant pleads and can show that the ballots in question were counted or excluded improperly and that these ballots are sufficient to alter the outcome of the election. Such a showing may exist as a threshold requirement for any election contest.

Remedies generally available for a court in an election contest are (1) to declare a winner of the election or (2) to order a new election. Some state courts are prohibited from changing the outcome of an election and are limited to declaring the election void and ordering a

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39. *See id.* at 175-77.

40. *See, e.g.*, *Gooch v. Hendrix*, 851 P.2d 1321, 1327 (Cal. 1993) (“[A] primary principle of law as applied to election contests [is] that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal.”); *Swift v. Registrars of Voters*, 183 N.E. 727, 728-29 (Mass. 1932); *Christenson v. Allen*, 119 N.W.2d 35, 40 (Minn. 1963) (refusing to allow an election contest as a “fishing expedition”); *Jackson v. Maley*, 806 P.2d 610, 615 (Okla. 1991) (“[C]ourts indulge every presumption in favor of the validity of an election and, where possible, that validity will be sustained. Mere probabilities will not suffice to carry this initial burden.”) (citation omitted); *In re Opening of Ballot Boxes, Montour County*, 718 A.2d 774, 777 (Pa. 1998) (invalidating a recount because of a lack of verification of signatures on recount petition); *Madigan Appeal*, 253 A.2d 271, 275 (Pa. 1969) (indicating that a showing that a partial recount of precincts discloses possible errors in other precincts is insufficient to obtain a recount of the other precincts in a state senate election).

41. *See, e.g.*, FLA. STAT. § 102.168(3) (2000) (amended 2001); TEX. ELEC. CODE § 221.003 (2000).

42. *See, e.g.*, *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (concluding as a matter of law that the Palm Beach (butterfly) ballot did not constitute substantial noncompliance with statutory requirements); *Jacobs v. Seminole County Canvassing Bd.*, CV No. 00-2816 (Fla. 2d DCA Dec. 8, 2000) (rejecting a challenge to absentee balloting in Seminole and Martin Counties on the basis that plaintiffs' evidence failed to support a finding of fraud, gross negligence, or intentional wrongdoing by election officials).

new election.<sup>43</sup> In other states, the calling of a new election is available as a remedy only if the court is unable to determine who has won the prior election.<sup>44</sup> At least two states have allowed votes to be added or subtracted from a candidate's total based on an allocation formula.<sup>45</sup>

Although local general elections usually are subject to challenge through judicial election contests, a certified result in a statewide or multijurisdictional election often is subject to challenge only before designated legislative or executive officers. For example, any contest of a general election to the United States House of Representatives or Senate ultimately is resolvable only by those legislative bodies.<sup>46</sup> State recounts and possibly even state judicial election contests can proceed as a means of policing state election laws, so long as they do not interfere with the exclusive power of the respective houses of Congress to ultimately determine the election dispute.<sup>47</sup> Similarly, in most states, state legislatures have exclusive authority to determine the outcome of any contest of the official results of a general election for membership in the state legislative body.<sup>48</sup> In addition, many states have designated the state legislature or state officials other than the judiciary to decide contests of statewide elections.<sup>49</sup>

When entrusted with power to determine an outcome in an election contest, these state<sup>50</sup> and federal<sup>51</sup> legislative bodies have fol-

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43. See, e.g., *Becker v. Pfeifer*, 588 N.W.2d 913, 918 (S.D. 1999). Under South Dakota law, the court can only uphold the election as the free and fair expression of the will of the voters or declare the election void. *Id.* At least one state has allowed a new election applicable only to one precinct or to certain specific voters previously denied the opportunity to cast a qualified ballot. See *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 579-82 (N.D. 1983).

44. See, e.g., *Green v. Reyes*, 836 S.W.2d 203, 207 (Tex. App. 1992) (indicating that in Texas “[w]hen the court, with some degree of certainty, can determine the outcome of the election based upon the evidence presented by the parties, [state law] requires it do so”). If the alleged irregularity makes it impossible to determine the will of the voters, a court may call a new election. See, e.g., *Marks v. Stinson*, 19 F.3d 873, 879-89 (3d Cir. 1994).

45. See *Canales v. City of Alviso*, 474 P.2d 417, 421-22 (Cal. 1970) (subtracting illegal votes from the vote totals in a municipal consolidating election based on circumstantial evidence that illegal voters most likely voted for the proposition); *In re The Purported Election of Bill Durkin*, 700 N.E.2d 1089, 1095 (Ill. App. Ct. 1998) (subtracting illegal votes from candidates by precinct according to the proportion of votes received by the candidate in the precinct).

46. See U.S. CONST. art. I, § 5; see also *Roudebush v. Hartke*, 405 U.S. 15, 19 (1972).

47. See *Roudebush*, 405 U.S. at 26 (allowing a statewide recount of votes for U.S. Senate so long as such state action does not interfere with the ability of the U.S. Senate to make a final determination in the dispute; the resulting recount reduced Hartke's winning margin by only fifteen votes); *Thorsness v. Daschle*, 279 N.W.2d 166, 168-70 (S.D. 1979) (holding that the United States Constitution does not bar enforcement by the state courts of state procedures designed to insure the legal outcome of its elections).

48. See, e.g., TEX. ELEC. CODE § 221.002 (2000).

49. See, e.g., *id.*

50. See, e.g., Robert A. Junnell et al., *Consideration of Illegal Votes in Legislative Election Contests*, 28 TEX. TECH L. REV. 1095 (1997).

lowed procedures akin to a judicial proceeding with an opportunity before a legislative committee for written submissions, evidence, and oral argument from the opposing candidates. In most states this power entrusted to legislative and executive officers is exclusive and is not subject to challenge in the state courts.

Primary elections pose a special problem for resolving election disputes.<sup>52</sup> Outcomes must be final in time for inclusion of the winning candidate on the general election ballot. Moreover, sometimes a primary election will not produce a winner and a runoff election is necessary. These severe time constraints have made contests difficult to prosecute. In most states the power to determine disputed primary elections is given to the local and state executive committees of the affected political party. In some states this power is exclusive. In other states the state courts retain the power to entertain a challenge to party primary elections. In each election scenario, a single judicial or administrative arbiter resolves disputes concerning voting irregularities or the inclusion or exclusion of votes from throughout the election district. Potential differences among local canvassing boards are resolved by this arbiter *de novo* in a contested proceeding by reference to the applicable standard set by state law. This requirement for a single, ostensibly unbiased arbiter is an essential principle of fairness for resolving election contests.

## II. A DISPUTED ELECTION OUTCOME<sup>53</sup>

The polls closed in most of Florida at 7 p.m. Eastern time on November 7, 2000.<sup>54</sup> Shortly thereafter, several national news organizations predicted that Gore would win Florida's twenty-five electoral votes based on voter exit polls, turnout of voters at selected election precincts, and historical voting patterns.<sup>55</sup> As the evening progressed, however, candidate Bush remained substantially ahead in the actual

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51. See *Roudebush*, 405 U.S. at 27 (Douglas, J., dissenting in part) (explaining that the United States Senate has established a custom of resolving disputes by allowing the apparent loser to allege the suspected voting irregularities and the votes affected; if the claim is not frivolous, the proceeding may involve the subpoena of ballots and the calling of witnesses to testify).

52. See *Curry v. Baker*, 802 F.2d 1302, 1304 (11th Cir. 1986) (considering a challenge to the authority of the Alabama Democratic Party Executive Committee to resolve dispute between candidates in the party primary).

53. This Article provides only a very brief and incomplete guide to some of the major events as background for its legal analysis. Many sources provide a more complete retelling of the events in Florida. See, e.g., THE NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001); THE WASHINGTON POST, DEADLOCK: THE INSIDE STORY OF AMERICA'S CLOSEST ELECTION (2001) [hereinafter DEADLOCK].

54. Polls remained open in some counties in the western panhandle of Florida until 8 p.m. Eastern time. DEADLOCK, *supra* note 53, at 35-36.

55. *Id.* at 35.

vote tally.<sup>56</sup> News organizations began to reverse their earlier decision to call Gore the victor in Florida.<sup>57</sup> By 2 a.m., it appeared that Bush had won Florida and the Presidency.<sup>58</sup> At approximately 2:30 a.m., Gore called Bush to express his intention to concede.<sup>59</sup>

Nevertheless, as interested officials of both campaigns and the general public watched in amazement, Bush's lead in Florida shrank from 50,000 votes to fewer than 6,000.<sup>60</sup> Gore called Bush to indicate that "circumstances had changed" and that he was no longer prepared to concede.<sup>61</sup> By sunrise on November 8, Bush's lead in the unofficial vote tally in Florida had dwindled to 1,784, with the state's electoral votes now clearly essential to both candidates for victory in the Electoral College.<sup>62</sup> Lawyers from both campaigns were dispatched to Florida like troops in opposing armies, maneuvering for what was to become a gargantuan, chaotic legal and political battle over final certification of the winner of the state's electoral votes.<sup>63</sup> The Presidency of the United States was the reward for the victor.

With approximately 6 million ballots cast in Florida, the miniscule difference between the two candidates automatically triggered a statewide recount.<sup>64</sup> Most election officials conducted this automatic recount using the same counting equipment and procedures they used on election night, with ballots in counties using optical scanners and punch card electronic counting systems being rerun through the same machines.<sup>65</sup> Nevertheless, the vote changed and by one unofficial count the margin between Gore and Bush had narrowed to 327 votes after the recount tabulations from Florida's sixty-seven counties were totaled on November 14.<sup>66</sup> Some absentee ballots from overseas voters remained to be counted.<sup>67</sup> Nevertheless, it was clear that the exclusion of some votes that had been counted or the inclusion of even a handful of votes from ballots that had not been counted could change the outcome of the election statewide.

Over the next several weeks, different categories of disputed ballots would be identified. In hindsight, at least each the following categories of votes, or potential votes, existed on November 8 and

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56. *Id.* at 43.

57. *Id.* at 40.

58. *Id.* at 43-44.

59. *Id.* at vii.

60. *Id.* at 46-47.

61. *Id.* at 49.

62. *Id.* at 70.

63. *Id.* at 60-62, 65, 73.

64. See FLA. STAT. § 102.141(4) (2000) (amended 2001).

65. DEADLOCK, *supra* note 53, at 77.

66. According to the Associated Press tally on November 11, Gore gained 2,520 votes in the recount, while Bush gained 1,063 votes. This reduced the difference between the two candidates from 1,784 to 327. *Id.* at viii.

67. *Id.* at 99.

were subject to possible dispute in a manual recount or through legal proceedings in state or federal court:

1. An estimated 110,000 ballots on which no vote was counted because the electronic counting equipment recorded votes on the ballot for more than one presidential candidate (overvotes);<sup>68</sup>
2. An estimated 43,000 to 70,000 ballots on which no vote for any presidential candidate was counted because the electronic counting equipment recorded no vote (undervotes);<sup>69</sup>
3. Absentee votes in at least two counties (Seminole and Martin) where local election officials allowed Republican Party officials to correct absentee ballot applications after the applications had been received in the election official's office;<sup>70</sup>
4. Differences between the initial count and a second tabulation in Nassau County that produced 218 fewer votes, with a net gain of 51 votes for Bush;<sup>71</sup>
5. Overseas absentee ballots that were counted even though the envelopes containing the ballots failed to have the date post-marked as required by state law;<sup>72</sup>
6. Differences in the condition and type of voting equipment used by Florida counties that are alleged to have caused significant disparities in the percentage of overvotes and undervotes among counties, with the highest percentage of uncounted ballots (primarily overvotes) occurring in areas of the state with large African-American or Caribbean-American neighborhoods;<sup>73</sup>

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68. More than 113,000 ballots included a vote for more than one presidential candidate, with approximately 104,000 including a vote for either Gore (75,000) or Bush (29,000). Ford Fessenden & John M. Broder, *Study of Disputed Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1; Dan Keating & Dan Balz, *Election 2000: Closer Than Close*, WASH. POST, Nov. 11, 2000, available at <http://stacks.msnbc.com/news/656172.asp#BODY>. These overvotes included: (1) the result of the confusing butterfly ballot in Palm Beach County, which may have cost Gore approximately 8,000 votes; and (2) the two-page presidential ballot used in Duval County in which 20% of the presidential votes in predominately African-American precincts were thrown out as overvotes, thereby possibly costing Gore approximately 7,000 votes. *Id.* Other ballots treated as overvotes resulted from erasures or from voters apparently trying to be extra-clear in their choice by both voting for a candidate and writing in the name of the same candidate. *Id.* These latter categories of overvotes should have been counted under Florida's voter intent standard, but some counties, such as Lake and Escambia, did not check ballots rejected by the voting machines. The net gain by Gore from counting such ballots in these two counties alone would have been 329 votes. *Id.*

69. DEADLOCK, *supra* note 53, at xiv.

70. *Id.* at 159.

71. *Id.* at 158.

72. See David Barstow & Dan van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, at A1 (describing how Republican lawyers, in coordination with Florida Secretary of State Katherine Harris, ostensibly were successful in adding a net of 739 votes for Bush from absentee ballots received, often without postmarks, after November 7).

73. DEADLOCK, *supra* note 53, at 116-17; see Ford Fessenden, *Ballots Cast by Blacks and Older Voters Were Tossed in Far Greater Numbers*, N.Y. TIMES, Nov. 12, 2001, at A17. Alleged racial discrimination during the election has been the focus of an investigation by

7. Ballots uncast because of the alleged intimidation of voters, primarily in African-American or Caribbean-American neighborhoods;<sup>74</sup> and
8. Registered voters who remained ineligible on election day because they had not corrected an erroneous finding by state election officials that they had out-of-state felony convictions.<sup>75</sup>

Numerous state or federal lawsuits were filed challenging these different categories of potential votes or alleged voting irregularities. I will focus, however, on the legal actions that largely deal only with the issues surrounding ballots that were recorded by the counting equipment as having no vote for any candidate for President (undervote) or as having a vote for more than one candidate for President (overvote).

Gore attorneys timely petitioned under state law for manual recounts of undervotes in only four of Florida's sixty-seven counties. These requests were styled "protests" and were filed with the respective county canvassing boards as required by state law.<sup>76</sup> These counties included Miami-Dade, Broward, Palm Beach, and Volusia. It soon became clear, however, that the manual recounts in three of these counties<sup>77</sup> would not be completed by the statutory deadline of November 14 for reporting returns to the Secretary of State for canvassing and certification of a winner of the election. Several of

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the United States Commission on Civil Rights. The Commission's Report indicates that African-American voters in Florida were more likely than white voters to have their ballots discarded. *See generally* UNITED STATES COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLA. DURING THE 2000 PRESIDENTIAL ELECTION (2001) [hereinafter VOTING IRREGULARITIES IN FLA.], available at [www.usccr.gov/](http://www.usccr.gov/). The disparity was greatest in Duval County where over 20% of the ballots in predominately African-American precincts were disqualified because they contained votes for more than one presidential candidate. *Id.* ch. I, at 20-32; *see also id.* app. VII, at 10 (report by Allan J. Lichtman, *The Racial Impact of the Rejection of Ballots in the 2000 Presidential Election in the State of Florida*). The dissenting members of the Commission urge that this apparent disparity in the "spoilage rate" for ballots in predominately African-American precincts was not based on race but on factors such as a lower literacy rate and higher number of first time voters among the African-American voters. *Id.* app. IX, at 3, 15-16 (report entitled *The Florida Election Report: Dissenting Statement by Commissioner Abigail Thernstrom and Commissioner Russell G. Redenbaugh*). The dissenting statement further suggests that if any "blame" is to be assigned, it should more appropriately go to the local election officials who designed the ballots and purchased the voting machines rather than to Governor Bush or Secretary of State Harris. *Id.* app. IX, at 20-21. A "sample ballot" in Duval County urged voters to "vote all pages." *Id.* ch. 8, at 7. It is likely that this instruction caused many of the first time voters in the African-American precincts of Duval County to cast a vote for Gore on page one of the ballot and another presidential candidate on page two.

74. DEADLOCK, *supra* note 53, at 158-59; *see also* VOTING IRREGULARITIES IN FLA., *supra* note 73, chs. 2, 7.

75. DEADLOCK, *supra* note 53, at 158; *see also* VOTING IRREGULARITIES IN FLA., *supra* note 73, ch. 1, at 33-35; *id.* ch. 5.

76. *See* FLA. STAT. § 102.166(2) (2000) (amended 2001).

77. Volusia County completed its manual recount in time to meet the November 14 deadline. The recount added a net of 98 votes for Gore. By the evening of November 14, Bush's lead was down to 300 votes, with the overseas absentee ballots yet to be added.

these counties sought authority to later file amended returns that would include the results of the manual recounts. On November 15, Secretary of State Katherine Harris rejected the counties' reasons for submitting amended returns after the statutory deadline and announced that she would certify the outcome in the presidential election based only on the returns that had earlier been submitted to her by the counties on or before November 14 and the returns of overseas absentee ballots.<sup>78</sup>

The Florida Democratic Party and Al Gore filed actions in Leon County seeking to compel the Secretary of State to accept the amended returns.<sup>79</sup> This action was consolidated with an earlier action brought on behalf of Volusia County (in which Palm Beach County had intervened).<sup>80</sup> The cases were certified by the District Court of Appeal to the Florida Supreme Court.<sup>81</sup> The Florida Supreme Court, by order on Friday, November 17, enjoined the Secretary of State from certifying the election results until further order of the court.<sup>82</sup> After hearing oral argument, the court on November 21 rejected any "hyper-technical reliance upon statutory provisions" and ordered the Florida Secretary of State to accept amended returns received by 5 p.m. on Sunday, November 26.<sup>83</sup> George Bush appealed this decision. On December 5, a unanimous United States Supreme Court agreed to vacate the order of the Florida Supreme Court and to remand the case for the Florida Supreme Court to clarify questions that could determine whether the case presented any federal questions within the jurisdiction of the nation's highest Court.<sup>84</sup>

In the meantime, Bush's lead had increased to 930 counted votes after inclusion of the absentee overseas ballots on November 18.<sup>85</sup> The deadline of November 26 set by the Florida Supreme Court for amended returns to be received by the Florida Secretary of State passed with only two of the four counties (Broward and Volusia) having completed manual recounts.<sup>86</sup> On the evening of November 26, George W. Bush was certified the winner of the Florida election. The

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78. Even Professor Epstein acknowledges that the Secretary of State "made the wrong choice in cutting off the recount so precipitously" but concludes that the decision was nevertheless within the limits of her statutory power. Epstein, *supra* note 6, at 626.

79. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1227, 1240 (Fla. 2000), *vacated sub nom. Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (per curiam).

80. *Id.* at 1227.

81. *Id.*

82. *Id.*

83. *Id.* at 1227, 1240.

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

85. DEADLOCK, *supra* note 53, at x.

86. Palm Beach County completed its recount on November 26, but after the 5 p.m. deadline. Secretary of State Harris refused to accept either the partial recount or the late-filed complete recounted returns.

certified result showed that he had won by 537 votes out of a total of approximately 6 million.<sup>87</sup> Gore's attorneys were now left with only the option of pursuing an election contest to challenge this certified result. An election contest was promptly filed in Leon County Circuit Court<sup>88</sup> and was tried on December 3 and 4.<sup>89</sup> Circuit Judge N. Sanders Sauls denied Gore's claims in the election contest.<sup>90</sup>

The stage was now set for the final battles before the Florida Supreme Court and the United States Supreme Court. Gore's attorneys quickly appealed Judge Sauls' ruling, and on December 8 the majority opinion of a sharply divided Florida Supreme Court reversed Judge Sauls' decision.<sup>91</sup> The court ordered that the amended returns from Palm Beach County and the partially recounted returns from Miami-Dade County be added to the candidates' totals.<sup>92</sup> The addition of these amended returns reduced Bush's lead to less than 193 votes.<sup>93</sup> The majority opinion further directed the circuit court on remand to "tabulate by hand the approximate 9000 Miami-Dade ballots, which the counting machine registered as non-votes, but which have never been manually reviewed," and "to enter such orders as are necessary to add any legal votes to the total statewide certifications."<sup>94</sup> Gore supporters understandably were optimistic that a continuation of the recount would quickly produce additional votes sufficient to overcome Bush's miniscule lead.

Local election officials and political party representatives mobilized throughout Florida. Attorneys for both candidates gathered before Leon County Circuit Court Judge Terry P. Lewis on the evening of December 8 to argue over how best to tabulate the ballots in Miami-Dade County and to count any uncounted legal votes elsewhere in the state. This count began on the morning of December 9 but ended soon thereafter when the United States Supreme Court stayed the order of the Florida Supreme Court.<sup>95</sup> On December 12, a divided United States Supreme Court reversed the decision of the Florida Supreme Court and effectively brought the legal battle to an end,

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87. The final tallies were 2,912,790 votes for Bush and 2,912,253 for Gore. Barstow & van Natta, *supra* note 72.

88. See Complaint to Contest Election, Gore v. Harris (Fla. 2d Cir. Ct. Nov. 27, 2000) (No. 00-2808), available at [http://199.44.225.4/courtDockets/pdf/election\\_cases/CV-00-2808a.pdf](http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2808a.pdf).

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

90. *Id.* at \*1.

91. Gore v. Harris, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom.* Bush v. Gore, 531 U.S. 98 (2000).

92. *Id.* at 1262.

93. Whether this difference was 193 or 154 votes depended on the outcome of a separate dispute over the number of audited votes received by each candidate as a result of the recount in Palm Beach County. See *id.* at 1248 n.6.

94. *Id.* at 1262 (emphasis added).

95. Bush v. Gore, 531 U.S. 1046 (2000).

making George W. Bush the certified winner of Florida's twenty-five electoral votes and the winner of the Presidency.<sup>96</sup>

### III. IN PARTIAL DEFENSE OF THE FLORIDA SUPREME COURT OPINIONS

#### A. Palm Beach County Canvassing Board v. Katherine Harris (*Round One*)

The Florida Supreme Court's unanimous decision on November 21 to extend the statutory deadline to allow amended election returns to be included in the final certified vote total was based on Florida law.<sup>97</sup> The court found that the applicable state statutes conflicted insofar as they set a timeframe for conducting a manual recount that was unworkable for the state's most populous counties under the timeframe set for submitting county returns to the Secretary of State.<sup>98</sup>

The court determined that state law<sup>99</sup> authorized local canvassing boards under certain circumstances to conduct a manual recount.<sup>100</sup> "[L]ogic dictates that the period of time required to complete a full manual recount may be substantial, particularly in a populous county, and may require several days."<sup>101</sup> Thus, the court reasoned, construing state law to require the results of these recounts to be filed with the Secretary of State within as little as one day after a timely request may be filed would create a conflict and effectively make manual recounts impossible, particularly in the largest counties. The court found that such a conflict was avoided because state

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

97. See 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000).

98. See FLA. STAT., §§ 102.111, 102.112(1) (2000) (amended 2001) (providing that returns are to be filed with the Secretary of State by 5 p.m. on the seventh day following the election).

99. See *id.* § 102.166(4) (2000) (amended 2001) (authorizing a written request for a manual recount to be filed within seventy-two hours after midnight of the day the election was held).

100. The first issue resolved by the Court was whether local canvassing boards had authority under state law to conduct a manual recount countywide in circumstances where a discrepancy of votes found in a sample manual recount of selected precincts exists for some reason other than incorrect election parameters in the vote tabulation software. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1229; see also FLA. STAT. § 102.166(5) (2000) (amended 2001). Secretary of State Harris had indicated to Florida counties that a manual recount was allowed only if made necessary by fraud or substantial noncompliance with the state's election procedures. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1238-39 (quoting a November 21, 2000, letter from Katherine Harris to the Palm Beach County Canvassing Board). The court concluded that an "error in vote tabulation" allowing a county canvassing board to conduct a countywide recount also included circumstances in which the discrepancy between the original machine return and the sample manual recount is due to the manner in which the ballot has been marked or punched. *Id.* at 1228.

101. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1232.

law was ambiguous concerning the Secretary of State's authority to reject late-filed returns. The applicable provisions setting the deadline for submitting returns had both mandatory and permissive language.

Applying traditional rules of statutory construction<sup>102</sup> and guided by the principle that the will of the people is the paramount consideration,<sup>103</sup> the court concluded that the Secretary of State's authority to ignore amended county returns after the statutory deadline of November 14 was limited to circumstances that would compromise the integrity of the electoral process.<sup>104</sup> The court then proceeded to define those circumstances for the present situation and to set a new deadline of November 27.<sup>105</sup>

Although controversial when issued, the supreme court's opinion is consistent with Florida law and with the treatment of deadlines in other states where similar state statutory deadlines or requirements often are considered "directory" instead of "mandatory" when the statute itself does not clearly indicate a contrary legislative intent.<sup>106</sup> As the Florida Supreme Court recognized, disallowing a county's more accurate amended election returns because of the possibly dilatory actions of a local canvassing board is a drastic penalty that "misses the constitutional mark."<sup>107</sup>

Professor Richard Epstein faults the "sorry performance" of the Florida Supreme Court as justifying what he also acknowledges is a less than perfect performance by the United States Supreme Court.<sup>108</sup> He concludes that "there is ample reason to believe . . . that the Florida Supreme Court adopted, under the guise of interpretation, a scheme . . . that deviates markedly from that which the Florida legislature had set out in its statutes."<sup>109</sup> Professor Epstein is particularly critical of the Florida Supreme Court's attempt to impose its will on the state's chief election officer, Secretary of State Katherine Harris.<sup>110</sup>

According to Professor Epstein, the events leading to the decision in *Bush v. Gore* could have been avoided if the Florida Supreme

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102. *Id.* at 1234. The rules of statutory construction cited by the court include that (1) a specific statute controls over a general statute, (2) a more recently enacted statute controls an older statute, (3) a statutory provision should never be interpreted so as to render it meaningless, and (4) related statutory provisions must be read as a cohesive whole. *Id.*

103. *Id.* at 1236.

104. *Id.* at 1239.

105. *Id.* at 1240.

106. *See, e.g.*, *Wilks v. Mouton*, 722 P.2d 187 (Cal. 1986). Even mandatory provisions of state law should be liberally construed to avoid thwarting the fair expression of the peoples' will. *Id.* at 190; *see also* *Timm v. Schoenwald*, 400 N.W.2d 260, 263 (N.D. 1987).

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

108. Epstein, *supra* note 6, at 635.

109. *Id.* at 634.

110. *Id.* at 634.

Court had properly followed the law as interpreted by Harris.<sup>111</sup> Specifically, Professor Epstein urges that Harris was properly exercising her statutory authority by concluding that: (1) the county canvassing boards could not conduct manual recounts where a discrepancy between the original machine return and a sample manual recount is due to the manner in which a ballot has been marked or punched, and (2) Harris could refuse to accept amended returns after November 14 unless persuaded that the recounted numbers were corrections of mathematical errors or the result of an election official's substantial noncompliance with state law.<sup>112</sup>

Professor Epstein argues that manual recounts of ballots county-wide in Florida were inappropriate because "[t]he reason we have machine counts is to guard against the risk of human error and bias."<sup>113</sup> He offers no authority for this position. It is correct that levered voting machines were first utilized at least partly in response to the fraud that accompanied the use of paper ballots in the nineteenth century.<sup>114</sup> Also, hand counting of large numbers of paper ballots is generally considered to be less accurate than counting with machine-readable ballots.<sup>115</sup> Nevertheless, all electronic counting systems are vulnerable and susceptible to significant error.<sup>116</sup> Usually this margin of error is not relevant for determining the outcome of an election because the recorded difference in votes among the candidates makes the will of the voters clear, even if the recorded number of votes for each candidate is somewhat imprecise.

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111. *Id.* Professor Epstein urges that the Florida Supreme Court erred because it was bound to defer to the legal interpretation given by Secretary of State Harris to the Florida statutes. Court deference to a government agency on issues of statutory interpretation is understandably less absolute than on issues of fact or matters of policy. Harris relied on essentially legal interpretations of state statutes as a basis for refusing to accept amended county tallies. This tactic left her decisions susceptible to court challenge on the basis that her interpretations were contrary to the law. The Florida Supreme Court agreed with this challenge. *See Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1228.

112. Epstein, *supra* note 6, at 622. Professor Epstein's description of the Secretary of State's position is somewhat more thoughtfully worded than the actual position taken by Katherine Harris for rejecting amended returns. In her November 15 letter to the canvassing board in Palm Beach County, Harris essentially adopted the state's case law applicable to a court's review of certified results in an election contest and used it to create a burden of proof for county canvassing boards. She concluded that she was justified in rejecting amended returns unless the county canvassing boards alleged fraud or substantial noncompliance with state law and could show more than a mere "possibility" that the amended returns could affect the outcome of the election. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d at 1226 n.5 (quoting the November 15 letter from Katherine Harris to the Palm Beach County Canvassing Board). Although, as discussed elsewhere, such a burden of proof exists for a contestant in an election contest and would affect Gore's success before Judge Sauls, the Florida Supreme Court was correct in finding that such reasons were inapposite for rejecting amended returns from government canvassing boards.

113. Epstein, *supra* note 6, at 625.

114. SALTMAN, *supra* note 10.

115. *Id.* at 26.

116. *Id.* at 25-51.

Virtually all states provide by law for some means of manually recounting ballots in circumstances in which the candidate vote totals from the electronic counting machines are near equal.<sup>117</sup> An attempt on election night to manually count and to record votes in multiple races from thousands of ballots could result in substantial human error. A manual recount of machine-counted ballots, however, generally is limited to only one race and takes place in a strictly regulated process designed to ensure that the interests of all candidates are protected and that the most accurate count possible is achieved. The Florida Supreme Court was almost certainly correct that, as in most other states, manual recounts are an available means by which a local canvassing board can attempt to identify and to correct errors in the machine counting of ballots.

Professor Epstein also argues that if manual recounts of ballots countywide were possible under Florida law, “the sole function of the hand recount is to examine ballots to see whether they meet the standards for a ballot that is machine-readable.”<sup>118</sup> This position greatly oversimplifies a complex legal issue. If a ballot is machine-readable, the votes on the ballot will have been recorded by the machine. Any variation in a manual count tabulation from that of a machine count necessarily results from the human decisionmaker concluding that a ballot contains a legal vote even when the electronic counting machine failed to record the vote. In each of the four counties in Florida in which a manual recount was conducted, the members of the recount committees found at least some ballots that they agreed had clearly ascertainable but unrecorded votes. This is likely to be true in any manual recount of punch card or optical scan paper ballots. Therefore, the controlling issue in Florida and other states during a manual recount is not whether such ballots are machine-readable. Instead, the issue is whether the ballot contains a legal vote under state law.<sup>119</sup> If the vote is legal, it should be counted. Any failure to include such ballots is subject to challenge in an election contest.

The issue of what constitutes a legal vote differs according to the laws of the various states. In virtually all states, a legally cast bal-

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117. See 2001 ELECTION ADMIN. SURVEY, *supra* note 9; see, e.g., FLA. STAT. § 102.166 (2000) (amended 2001); TEX. ELEC. CODE § 214.042 (2000).

118. Epstein, *supra* note 6, at 623.

119. Professor Epstein correctly points out that it is the Florida Secretary of State who by law is responsible for at least initially providing guidance on what constitutes a valid vote under Florida law. *Id.* at 624. In many states, the state’s chief elections officer has promulgated rules to provide guidance for discerning a legal vote during a manual recount. See, e.g., TEX. ELEC. CODE § 214.042 (2000). Florida in 2000 had no such guidelines. Instead of furnishing such guidelines after the 2000 election, Secretary of State Harris took official positions that at the time appeared designed to prevent a manual recount altogether.

lot<sup>120</sup> is to be counted according to the “intent of the voter” even if a vote has not been recorded for the ballot by the voting machine.<sup>121</sup> If a ballot has been legally cast, courts have been reluctant to leave it uncounted when the ballot reflects the voter’s intent to cast a vote for a particular candidate and that specific vote has later become crucial to the election or defeat of that candidate.<sup>122</sup> The Supreme Court of Florida cited the decision of the Illinois Supreme Court in *Pullen v. Mulligan* for the explanation that “[t]o invalidate a ballot which clearly reflects the voter’s intent, simply because a machine cannot read it, would subordinate substance to form and promote the means at the expense of the end.”<sup>123</sup> The Florida Court’s decision to permit the manual counting of ballots by local canvassing boards to discern voter intent when such votes may affect the outcome of an election is consistent with Florida law and with the approach adopted by state courts nationwide.

In his concurring opinion in *Bush v. Gore*, Chief Justice Rehnquist urged that ballots that cannot be read by a counting machine because of the manner in which the ballots have been marked or punched are a result of “voter error” and are “improperly marked ballots” that the Florida Secretary of State could appropriately refuse to include in the state’s certification of results.<sup>124</sup> In regard to punch card ballots, the asserted voter error generally is seen as a failure by the voter to fully or effectively comply with the instruction<sup>125</sup> to check her ballot after voting and to clear any “chips” hanging from the back

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120. State courts will disallow votes that are cast illegally even though the ballot is machine-readable. This issue occurs in many contexts, such as a voter’s nonresidency, ineligibility to vote in the primary of another party, or failure to comply with requirements for voting absentee. Even in the case of ballots cast in violation of a state’s absentee voting laws, however, some courts have permitted the votes to be counted on the basis that the error was not attributable to the voter and that to disallow the vote would unfairly disenfranchise the voter.

121. See, e.g., *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass. 1996) (indicating that “if the intent of the voter can be determined with reasonable certainty from an inspection of the ballot . . . [then] effect must be given to that intent”) (citing *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990); *McIntyre v. Wick*, 558 N.W.2d 347, 359 (S.D. 1996) (indicating that when marks on a ballot are sufficiently plain to gather therefrom a part of the voter’s intent, there is a duty to count the ballot); see also *Partido Nuevo Progresista v. Perez*, 639 F.2d 825 (1st Cir. 1980) (permitting courts of Puerto Rico to count ballots containing marks outside the designated spaces on the ballot); *Duffy v. Mortenson*, 497 N.W.2d 437 (S.D. 1993) (finding chad sufficiently dislodged on one ballot after subjecting disputed ballots to examination by “stereoscope”).

122. See, e.g., *Duffy*, 497 N.W.2d at 439.

123. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220, 1238 (Fla. 2000), vacated sub nom. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (citing *Pullen*, 561 N.E.2d at 611).

124. *Bush v. Gore*, 531 U.S. 98, 118-119 (2000) (Rehnquist, C.J., concurring).

125. This instruction does not amount to a legal requirement sufficient to disqualify a ballot.

of the card.<sup>126</sup> Chief Justice Rehnquist cautioned that “[n]o reasonable person would call it ‘an error in the vote tabulation’ or a ‘rejection of legal votes’ when electronic or electromechanical equipment performs precisely in the manner designed, and fails to count those ballots that are not marked in the manner that these voting instructions explicitly . . . specify.”<sup>127</sup>

The real world operates somewhat differently than seemingly envisioned by Chief Justice Rehnquist. Voters, in the rush of casting their vote, routinely fail to check their ballots afterward and fail to completely knock out any chips or chad that may remain attached to a punch card ballot. Does the disqualifying “voter error” occur at this moment, when a voter fails to adequately comply with the instructions, or later when the machine fails to record the vote? This distinction is important because loosened chad remaining on the ballots after the vote is cast routinely are cleared purposely or knocked inadvertently from punch card ballots throughout the counting process by election workers during handling of the punch cards. The counting machines themselves dislodge significant quantities of loosened chad during the machine count. In fact, experts concede that it is generally not possible to duplicate a machine count obtained on prescored punch cards because chad continues to become detached on each occasion that the punch cards are machine-counted.<sup>128</sup> Apparently, no state tries to disqualify voters because they fail to clear chad from their ballot. Nor do states attempt to discriminate between voters based on whether the chad on a punch card ballot is removed by the voter, or is later knocked off during the counting process, or remains by chance attached after the machine count. It is very unlikely that the Florida Legislature intended such discrimination or would apply the same standard differently to the same ballot.

Concern over the possibility that participants in an administrative recount might apply different standards or apply the same standard differently to the same ballot is justified. The events in Florida clearly demonstrate how different canvassing boards or members of the same canvassing board may reach different conclusions regarding voter intent. The Florida Supreme Court decision in *Palm Beach*

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126. *Bush v. Gore*, 531 U.S. at 119 (Rehnquist, C.J., concurring) (quoting Florida Instruction); see Epstein, *supra* note 6, at 632.

127. *Bush v. Gore*, 531 U.S. at 119 (Rehnquist, C.J., concurring) (statutory citations omitted). At least one state court (Massachusetts) has expressly rejected this argument on the basis that while voters sometimes could perhaps do a better job of expressing themselves, ballots should not automatically be disqualified because of a failure to comply strictly with announced procedures. See *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass. 1996).

128. See SALTMAN, *supra* note 10, at 35. In Florida, the automatic machine recount or retabulation statewide immediately following the election resulted in 3,583 additional votes, with Gore gaining a net of 1,784 votes.

*County Canvassing Board v. Harris* does not purport to decide how voter intent should be discerned; nor, however, does it find that variations in how local canvassing boards determine legal votes are immune from challenge in an election contest. It is during an election contest that irregularities in counting “legal votes” can be challenged and corrected. This issue is discussed further below. In sum, however, I believe the Florida Supreme Court correctly decided *Palm Beach County Canvassing Board v. Harris*.

#### B. Albert Gore v. Katherine Harris (*Round Two*)

The Florida Supreme Court’s *Gore v. Harris* decision on December 8 is much more problematic than its earlier decision in *Palm Beach County Canvassing Board v. Harris*. *Gore v. Harris* reached the court by appeal from Leon County Circuit Judge Sanders Sauls’ decision to reject Al Gore’s election contest complaint.<sup>129</sup> Three opinions by different members of the Florida Supreme Court reflect a sharp division over the applicable law and the appropriate role of a court in fashioning relief under the circumstances that existed on December 8. A majority of four justices reversed the circuit court and ordered it to include the votes for Gore from the recounts in Palm Beach and Miami-Dade counties and enter such orders as necessary to add any legal votes statewide to the candidates’ totals.<sup>130</sup> Three justices dissented generally on the basis that Gore had failed to carry his burden at trial as a plaintiff in the election contest and that no adequate remedy could be fashioned in the time remaining if Florida’s presidential electors were to be selected by December 12, as contemplated by 3 U.S.C. § 5.<sup>131</sup>

On December 12, in *Bush v. Gore*, the United States Supreme Court reversed the Florida court’s ruling. *Bush v. Gore* also reflects a sharply divided Court. The Court’s per curiam opinion found four problems with the Florida Supreme Court order under the Fourteenth Amendment requirement of equal protection. These were as follows:

1. The Florida court’s order permitted inconsistent treatment, both among counties and within counties, in the determination of which ballots would count as legal votes in a manual recount;<sup>132</sup>

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

130. *Gore v. Harris*, 772 So. 2d 1243, 1248 (Fla. 2000), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

131. *Id.* at 1268-70 (Wells, C.J., dissenting); see also *id.* at 1270-72 (Harding, J., dissenting).

132. *Bush v. Gore*, 531 U.S. at 106. The concern in the per curiam opinion that standards for accepting or rejecting ballots during a recount might vary “not only from county to county but indeed within a single county from one recount team to another,” *id.* at 106,

2. The Florida court's order permitted the inclusion of overvotes in some counties while not providing for a recounting of these ballots in other counties;<sup>133</sup>
3. The Florida court's order permitted inclusion of a partial recount from Miami-Dade County and failed to guarantee that recounts must be complete in order to be included in any final certified result;<sup>134</sup> and
4. The Florida court's order failed to provide a satisfactory process for counting the votes, or even providing who would recount the ballots.<sup>135</sup>

At least six of the Justices of the United States Supreme Court joined in finding that the Florida court's remedial order violated equal protection.<sup>136</sup>

The United States Supreme Court's per curiam opinion in *Bush v. Gore* correctly identified very significant problems that could have arisen under the Florida Supreme Court's remedial plan for counting votes in the presidential election. Even those Justices who most vigorously dissented from the United States Supreme Court's decision expressed understandable concern over the degree of unequal treatment of votes and voters *possible* under the Florida court's remedial

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is misplaced. Disputes over how ballots are counted within specific manual recount teams are resolved by the canvassing board. In turn, differences among counties are subject to challenge through an election contest.

133. *Id.* at 107-08.

134. *Id.* at 108.

135. *Id.* at 109.

136. The per curiam opinion indicated that "[s]even Justices of the Court agree that there are constitutional problems with the recount ordered by the Florida Supreme Court that demand a remedy." *Id.* at 111. In a separate concurring opinion, Chief Justice Rehnquist was joined by Justices Scalia and Thomas in challenging both the November 21 and December 8 decisions of the Florida court as infringing on the power of and the statutory scheme prescribed by the Florida Legislature. *Id.* at 122 (Rehnquist, C.J., concurring). Justice Stevens, in a dissenting opinion joined by Justices Ginsburg and Breyer, found no substantial federal question that would entitle the Court to reverse the Florida court's decision. *Id.* at 123-29 (Stevens, J., dissenting). Writing separately in a dissenting opinion in which she was joined by Justices Stevens and Breyer, Justice Ginsburg agreed that the Court lacked jurisdiction and further disputed the conclusion that a constitutionally adequate recount is impractical. *Id.* at 135-44 (Ginsburg, J., dissenting). In a separate dissenting opinion, Justice Souter agreed with the per curiam that the Florida Supreme Court order violated equal protection, but he concluded that the state courts should be afforded an opportunity to establish uniform standards for counting ballots and should be given an opportunity to try to manually recount all disputed undervotes before the applicable federal deadlines. *Id.* at 129-35 (Souter, J., dissenting). Justice Breyer's separate dissenting opinion is less clear about whether he believes the Fourteenth Amendment had been violated, as he explained his agreement with the per curiam's concerns in terms of how the disparities in the recount "implicate principles of fundamental fairness." *Id.* at 145 (Breyer, J., dissenting). Justice Breyer would have permitted the Florida recount to continue under uniform standards. *Id.* at 158 (Breyer, J., dissenting).

order.<sup>137</sup> Importantly, however, the Florida Supreme Court's majority opinion did not expressly condone unfair or unequal treatment. The opinion directed the circuit judge to "enter such orders as are necessary to add *any* legal votes to the total statewide certifications."<sup>138</sup>

The problems raised by the Justices of the United States Supreme Court in the context of the Fourteenth Amendment are precisely the type of legal and procedural questions that customarily are resolved through the adversarial process present in any state election contest. As suggested by Justice Souter, the Florida courts might well have eventually dealt with the use of differing substandards for determining voter intent in different counties employing similar systems if given the opportunity to do so.<sup>139</sup>

Rather than a holding that unequal treatment in an election contest is acceptable under the state or federal constitutions, the majority opinion of the Florida Supreme Court is a product of the extraordinary circumstances in which the court found itself on December 8. Some of the difficulties faced by the court were apparent at the time,<sup>140</sup> including the brief period of time it had to decide complex legal issues. The majority opinion further recognized that "practical difficulties may well end up controlling the outcome of the election."<sup>141</sup> Despite these difficulties, a majority of the Florida court resolved to "do the best we can."<sup>142</sup> The court's majority opinion reflects that ambitious, but mistaken, effort.

One frequent criticism of the majority opinion is misplaced. Several commentators have urged that an election contest is in the na-

137. *Id.* at 126 (Stevens, J., dissenting) (admitting that "the use of differing substandards for determining voter intent in different counties employing similar voting systems may raise serious concerns").

138. *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla. 2000), *rev'd sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000) (emphasis added).

139. In the view of Justice Stevens, the traditional safeguard for election contests nationwide existed even under the Florida court's remedial order—i.e., "a single impartial magistrate [that] will ultimately adjudicate all objections arising from the recount process." *Bush v. Gore*, 531 U.S. at 126 (Stevens, J., dissenting).

140. The court, however, also faced less obvious difficulties created by the attorneys for the opposing parties. Secretary of State Harris opposed any manual count of votes and therefore offered no expert suggestions as to how the Court might proceed to manually count all legal votes in the state. The attorneys for Gore were so focused on obtaining an immediate addition of the votes from Palm Beach and Miami-Dade Counties and a count of the remaining 9,000 uncounted votes in Miami-Dade that they prosecuted the election contest on flawed legal theories before the circuit court and failed to provide either an adequate trial record or a legally sound remedial plan. On the other hand, the attorneys for Bush were essentially uninterested in aiding the Florida court in finding a remedy for the various disparities in treatment that the attorneys had identified. Bush was best served on appeal to the United States Supreme Court by an incomplete and insufficient opinion from the Florida Supreme Court.

141. *Gore v. Harris*, 772 So. 2d at 1261 n.21.

142. *Id.*

ture of a judicial review of an administrative decision.<sup>143</sup> If this were true, the standard of review would be abuse of discretion.<sup>144</sup> State law nationwide, however, treats an election contest as an independent judicial action specially authorized by statute. Circuit Judge Sauls applied an abuse of discretion standard to find that the Miami-Dade County board had not abused its discretion by deciding not to count the remaining 9,000 undervotes.<sup>145</sup> The majority opinion of the Florida Supreme Court in *Gore v. Harris* rejected this holding.<sup>146</sup> While dissenting from the remainder of the majority opinion, Justices Harding and Shaw also expressly rejected Circuit Judge Sauls' finding on the standard of judicial review because he "improperly intertwined [the recount protest and election contest] and the standards applicable to each."<sup>147</sup> The commentators have made the same mistake. Once a judicial election contest is commenced, it is the court that is charged with deciding if legal votes have been excluded or illegal votes included.<sup>148</sup> Cases challenging proceedings before a canvassing board, such as attempts to compel a board to conduct a recount,<sup>149</sup> are inapposite to an election contest.

Nevertheless, the majority decision in *Gore v. Harris* is wrongly decided. The majority correctly identified the conflicting principles—"the necessity for counting all legal votes" to effect the will of the electorate and the ultimate need for finality.<sup>150</sup> The majority, however, weighed these principles incorrectly when it concluded that "we must do everything required by law to ensure that legal votes that have not been counted are included in the final election results."<sup>151</sup> This decision was inconsistent with election law in Florida and elsewhere for four reasons.

First, the decision is mistaken because it essentially put the court in the position of trying to fashion a remedy despite Gore's failed legal strategy. It was Circuit Judge Sauls who first found that the bur-

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143. See Epstein, *supra* note 6, at 630-31; McConnell, *supra* note 6, at 668-69.

144. Epstein, *supra* note 6, at 630-31.

145. Transcript: Judge N. Sanders Sauls Rules Against Gore's Contest, at 3 (Dec. 4, 2000) (copy on file with the *Florida State University Law Review*) [hereinafter, Transcript].

146. *Gore v. Harris*, 772 So. 2d at 1252.

147. *Id.* at 1270 (Harding, J., dissenting).

148. See *id.* at 1271 (Harding, J., dissenting) (indicating that the issue of whether a canvassing board has rejected a number of legal votes sufficient to change or to place in doubt the election by virtue of cutting short a manual recount is to be determined de novo, not under an abuse of discretion standard); see also McIntyre v. Wick, 558 N.W.2d 347, 358 (S.D. 1996) (describing the scope of review in an election contest as de novo). But see *id.* at 1265. (Wells, C.J., dissenting) (concluding that the contest and protest statutes must be read together).

149. See, e.g., Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000); Broward County Canvassing Bd. v. Hogan, 697 So. 2d 508, 510 (Fla. 1992).

150. *Gore v. Harris*, 772 So. 2d at 1261.

151. *Id.*

den on Gore in the election contest was “to place in issue and seek as a remedy with the attendant burden of proof a review and recount of all ballots in all counties in this state *with respect to the particular alleged irregularity or inaccuracy in the balloting or counting processes alleged to have occurred.*”<sup>152</sup> Gore’s failure to meet this burden should have been determinative of the outcome in the election contest regardless of any policy favoring the counting of all votes or effecting the will of the voters. While not upholding Sauls’ dismissal of the election contest, the majority agreed “that it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes . . . in all Florida counties where there was an undervote and, hence a concern that not every citizen’s vote was counted” and that the election should not be decided “by strategies extraneous to the voting process.”<sup>153</sup> By remanding the election contest for a count of uncounted legal votes statewide, the majority was effectively attempting to save Gore from his own losing strategy. This was not justified.

The court’s second mistake was its finding that a number of nonvotes exceeding the difference between two candidates was sufficient under section 102.168, *Florida Statutes*, to obtain a count of those ballots in an election contest. Significant numbers of nonvotes exist in every election. Only a fraction of such nonvotes are legal votes under even the most liberal standard for discerning voter intent. Moreover, net votes gained by a losing candidate from a manual counting of nonvote ballots in one county or precinct may be offset by votes gained by her opponent from a manual counting of nonvote ballots in other counties or precincts. Manually counting ballots throughout the county, district, or state in question is time-consuming, costly, and potentially chaotic. It is necessary to make a threshold showing that rejected legal votes exist sufficient to change or to place in doubt the outcome of an election. This threshold is not met by a mere showing that there are more nonvotes in one county or precinct than there are votes separating the two candidates.<sup>154</sup>

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152. Transcript, *supra* note 145 (emphasis added).

153. *Gore v. Harris*, 772 So. 2d at 1253.

154. The presence of 9,000 uncounted ballots in Miami-Dade County does not meet the burden of showing that sufficient rejected legal votes existed to change the outcome or to place in doubt the outcome of the presidential election in Florida. Testimony offered by Gore at trial was inadequate even to show that the 9,000 ballots remaining to be manually counted in Miami-Dade County contained sufficient net votes for Gore to overcome Bush’s lead. Gore’s expert witness, Professor Nicolas Hengartner, on direct examination testified only as to the “recovery rate” of valid votes that could occur with a manual recount of the uncounted ballots. Contest Hearing R. at 176-92, *Gore v. Harris*, CV No. 00-2808 (Fla. 2d DCA Dec. 6-7, 2000). Gore’s petition alleged that, if a manual count of the 9,000 votes resulted in the same proportional increase in net votes as the ballots already counted by the Miami-Dade Canvassing Board, Gore would gain a net of 600 votes. *Id.* (R. at 326). Professor Hengartner, however, offered no testimony directly supporting this projection. The Re-

A third fundamental mistake by the majority was its failure to realize that the desire to count every vote had been eclipsed by the need for finality. The Illinois Supreme Court faced a very similar dilemma in 1983 when the certified results of a statewide race for Governor and Lieutenant Governor showed a difference of 5,074 votes out of 3,627,128 cast for the Democratic and Republican candidates for these state offices.<sup>155</sup> The Democratic candidates, Adlai E. Stevenson, Jr., and Grace Mary Stern, filed an election contest. In their petition, they claimed that after reviewing designated precincts in 70 out of 102 counties they had discovered alleged irregularities that would increase their net vote by 4,664 votes.<sup>156</sup> Moreover, they pointed to thousands of ballots allegedly lacking the requisite initials of the election judge or bearing identifying marks made by the voter that would render those ballots illegal. In rejecting the petition, the Illinois Supreme Court pointed to the insufficiency of the pleadings and to the expense and burden of conducting the election contest. The court further explained:

Until such an election contest is resolved, the political turmoil surrounding it and the fact that it will be unknown in this case whether the incumbent governor will continue to hold that office could effectively prevent the legislative and executive branches of government from dealing with the urgent problems facing this State. *The State of Illinois should not be forced to endure these consequences on the mere suspicion of defeated candidates or on their belief or hope that an election contest would change the results.*<sup>157</sup>

This decision brought an abrupt end to an important statewide election contest without resolving precisely which candidates received the greatest number of legal votes.<sup>158</sup> Sometimes the desire to

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publican expert witness, Dr. Laurentius Marais, countered that the projection of a gain in Gore votes from the uncounted votes in Miami-Dade County was “unreliable and inaccurate” because it was based on the false premise that the proportion of votes for Gore would be the same for the ballots that remained to be manually counted. *Id.* (R. at 326-27). Dr. Marais pointed out that the precincts that had been manually recounted in Miami-Dade had voted greater than 75% for Gore while the remaining precincts had voted 52% for Bush. *Id.* (R. at 327). He concluded that there was no basis for projecting from the heavily Democratic precincts to the remaining precincts. *Id.* Subsequent manual counts by the media of all undervote ballots in Miami-Dade County have shown that Bush would have gained net votes from a manual recount of the 9,000 uncounted undervotes. Fessenden & Broder, *supra* note 68.

155. *In re* Contest of the Election for the Offices of Governor and Lieutenant Governor Held at the General Election on Nov. 2, 1982, 444 N.E.2d 170, 172 (Ill. 1983).

156. *Id.* at 179-80.

157. *Id.* at 178 (emphasis added).

158. Predictably, three judges dissented from this ruling. *Id.* at 183 (Ward, J., dissenting). These justices claimed that the majority’s requirement for specificity in pleading in an election contest means “the candidate must do, in practical terms, the impossible” because she must accumulate sufficient evidence in fifteen days from 102 counties to show that she will win the election. *Id.* at 189 (Ward, J., dissenting). The dissenting judges further challenged the majority’s practical arguments by indicating that “[o]ur society does not fix af-

count every vote and to be absolutely certain of the will of the voters must, in the absence of fraud, ultimately yield to the essential need for finality.<sup>159</sup> This point was reached in Florida in the presidential election.<sup>160</sup> By December 8 there was no reasonable possibility that a continuation of the election contest could result in a fair, credible result within a reasonable time. Four justices of the Florida Supreme Court were unwilling to accept this reality.

Finally, in its effort to achieve a count of undervotes statewide in the inadequate time available, the majority of the Florida Supreme Court abandoned the principles that are fundamental to a fair recount and election process and to an accurate outcome—that is, an adequate opportunity for candidates to identify alleged voting irregularities during the counting process and, in a contested proceeding, to have any disputed issues resolved before a single impartial arbiter. The most egregious example is the majority's direction that the circuit court must include the additional votes for Gore from the manual counts in Miami-Dade and Palm Beach Counties. It was clear from the record that these ballots had been counted using differing standards for determining voter intent and that these standards in turn might very well be different from the standards used elsewhere in the state during the court-supervised manual review and counting of undervotes. Issues of arbitrary and disparate treatment of ballots in the other counties in the statewide count of nonvotes might theoretically have been resolved in time through court supervision in a contested judicial proceeding. However, the order that the circuit court include the Palm Beach and Miami-Dade votes for Gore in the

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fordable expense as a standard for doing justice or, in particular, for insuring the integrity of the electoral process." *Id.* at 191 (Ward, J., dissenting).

159. An important aspect of our democracy is that power in government can readily transfer in confidence that, at the end of the term of office, it will again transfer if the election outcome is different. No outcome of any single primary or general election is sufficiently important to warrant significant disruption of the governing process, even in the interest of assuring the accuracy of the election outcome. There must be finality. The candidates, but more importantly the government and the people, must move on. *See McIntyre v. Fallahay*, 766 F.2d 1078, 1088 (7th Cir. 1985) (Swygert, J., dissenting) (indicating that our government is a representative democracy and that the people cannot be properly represented unless the legitimacy and authority of the elected official to represent them is finally determined).

160. Federal courts long have recognized an analogous principle of withholding a remedy when "exigent circumstances" justify conducting an election under an unlawful election system, or allowing the results of an election under an unlawful system to remain unchanged. Even as it gave federal courts the task of remedying unconstitutional state apportionment of legislative districts, the U.S. Supreme Court in *Reynolds v. Sims*, 377 U.S. 533, 585-87 (1964), explained that federal courts may be bound to award or to withhold relief based on the mechanics and complexities of state election laws. This principle has been applied many times since 1964. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982); *Ely v. Klahr*, 403 U.S. 108 (1971); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *Terrazas v. Clements*, 537 F. Supp. 514, 537 (N.D. Tex. 1982) (three-judge panel), *stay denied*, 456 U.S. 902 (1982).

candidate's vote total despite a lack of uniform counting substandards essentially mandated a disparity in the treatment of ballots. Moreover, this determination suggested to the circuit court that fairness and accuracy in other vote counts could have been sacrificed for the sake of expediency.<sup>161</sup> While I do not believe that the Florida Supreme Court intended any unfairness, its December 8 order both directly and implicitly created the possibility for a result inconsistent with the law of Florida and with the fundamental principles of fairness followed in election contests nationwide.

The United States Supreme Court assessed that the recount process underway in Florida in the wake of *Gore v. Harris* "was probably being conducted in an unconstitutional manner."<sup>162</sup> As a result, the Court stayed the order of the Florida Supreme Court directing the recount.<sup>163</sup> In its subsequent opinion in *Bush v. Gore*, the Court concluded that "upon due consideration of the difficulties identified to this point, it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work."<sup>164</sup>

Those who urge that the recount process should have been allowed to proceed under the Florida Supreme Court's remedial order, or under a new order providing uniform rules for the recount, underestimate the legal task faced on December 9 and both the number and complexity of the legal disputes that remained to be resolved. The many parties to the Gore election contest already had filed numerous motions pending ruling by the circuit court and were certain

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161. As the Gore attorneys on remand before Judge Lewis pushed for an expedited recount, the already questionable legal status of the election contest deteriorated rapidly. In the interest of time, (1) the ballots manually counted in Broward and Palm Beach Counties were to be included in the vote total without any further review, (2) the partial recount that had already been completed by the Miami-Dade County Board of approximately 20 percent of the county's undervote ballots would be left unchanged while the remaining ballots from the county would be counted by a new group of examiners, and (3) the undervotes in the remaining counties would be counted by the officials of those counties. No rules were established for use by these different counting groups. Also in the interest of time, Judge Lewis barred party observers from objecting during the manual counting process, although the observers could keep a list of disputed ballots that might serve as a basis for objections later. In effect, these procedures created a certainty that ballots would be counted according to the subjective judgment of many different persons without adequate provision for an adjudication of disputed ballots or issues by a single impartial arbiter. This publicized and broadcast proceeding suggested that a rush existed to count ballots in a seemingly arbitrary or haphazard fashion. This impression available through the media probably contributed to concerns at the United States Supreme Court that the situation was out of hand.

162. *Bush v. Gore*, 531 U.S. 98, 109 (2000).

163. *Bush v. Gore*, 531 U.S. 1046 (2000).

164. *Bush v. Gore*, 531 U.S. at 110.

to file many more.<sup>165</sup> The Florida Supreme Court decision left the circuit court the task of initially determining at least the following:

1. The mechanics of the expedited statewide recount (for example, whether ballots should be manually reviewed and votes counted by local canvassing boards or all ballots should be shipped to Leon County and reviewed and counted by the circuit judge or under his supervision);
2. The logistics of the recount process (for example, the qualifications of the counters, the possible lack of personnel to conduct the count, the fatigue of the counters, and intracounty personnel issues among the state's sixty-seven counties);
3. The procedures to be utilized to assure the opportunity of the candidates' representatives to observe the recount process and to obtain a judicial resolution of disputes;
4. The categories of ballots to be reviewed to discern voter intent (for example, only ballots with undervotes, or also ballots with overvotes as challenged by the Bush attorneys);
5. The counties to be included in the recount (for example, only uncounted votes in counties using punch cards or also nonvote ballots in counties using other voting equipment);
6. The standards, if any, required to be used by the counters in manually reviewing ballots for voter intent;
7. Whether to manually review federal write-in ballots and to include them in the statewide tabulation even though not fully compliant with state law;
8. The merit of any challenges to the manually counted votes from Broward, Miami-Dade and Palm Beach Counties based on the use in those recounts of different standards than might be used for the remainder of Miami-Dade County and the state;
9. The number of the 9,000 undervote ballots from Miami-Dade County that constituted uncounted legal votes and the candidate for whom the voter intended to cast her ballot;
10. The resolution of disputes concerning the approximately 175,600 nonvotes statewide that could contain a legal vote; and
11. Whether it would be necessary to manually count all 6 million votes cast statewide in the presidential race to determine if any machine-counted votes should be disallowed because the presence of "hanging chad" or "dimpled chad" for a second candidate indicates that the ballot is in fact an overvote.

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165. See Docket Sheet, *Gore v. Harris*, CV No. 00-2808 (Fla. 2d Cir. Ct. 2000), available at [http://www.clerk.leon.fl.us/election\\_cases.html](http://www.clerk.leon.fl.us/election_cases.html). Opposing parties in election contest litigation frequently dispute everything from the jurisdiction of the court and the standing of the contestant, to the admission of evidence, to every alleged irregularity in voting and every disputed vote that potentially can be included or excluded from the final tally. The parties in *Gore v. Harris* were different only in the greater number and magnitude of such disputes.

All such determinations were disputed<sup>166</sup> and necessarily raised substantial questions of fairness and legality in the context of a judicial proceeding that could effectively declare a winner of the Presidency of the United States.<sup>167</sup> Judge Lewis attempted to initially address some of these issues in an expedited fashion without proper opportunity for briefing, oral argument, or the submission of evidence.<sup>168</sup> Fairly counting nonvotes in an election contest could come only in a protracted proceeding.<sup>169</sup> The presidential electors from Florida could not have been timely determined<sup>170</sup> through a legally sufficient election contest even if the Florida Supreme Court's December 8 remedial order had been left undisturbed by the United States Supreme Court.<sup>171</sup>

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166. Transcript of Motions Hearing, *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000) (No. SC00-2431), available at [http://www.clerk.leon.fl.us/election\\_cases](http://www.clerk.leon.fl.us/election_cases) [hereinafter Transcript of Motions Hearing]. The motions hearing commenced at 8:35 p.m. and concluded at 11:39 p.m.

167. Technical problems, such as the ability to identify uncounted ballots, remained unsolved. See *Bush v. Gore*, 531 U.S. at 108 (indicating that any manual recount of only a portion of the ballots would require a reprogramming of the voting tabulation equipment to screen out undervotes; the distinct possibility existed under the Florida Supreme Court's order that a statewide recount would be impossible to accomplish and that the circuit court could be asked to declare a winner on the basis of an admittedly incomplete recount).

168. See Transcript of Motions Hearing, *supra* note 166, at 59-65 (ruling of the Court). The ruling set in place procedures designed to begin the counting of "nonvotes or undervotes" immediately in all counties that had not previously conducted a manual review of such ballots. Legal issues, such as what constituted a legal vote, remained unsettled.

169. Historically, even relatively simple local election contests have taken months to resolve, sometimes requiring numerous hearings, appeals, and recounts of the same ballots. For example, appellate courts have been called upon to physically examine each contested ballot in an election contest to determine if the lower court has applied a correct standard. See, e.g., *McIntyre v. Wick*, 558 N.W.2d 347 (S.D. 1996). The prospect of the Florida Supreme Court or the United States Supreme Court possibly being asked to manually examine and to count thousands of disputed ballots on appeal is mind-boggling but not unlikely in a circumstance in which the inclusion or exclusion of only a few hundred votes could have determined the Presidency of the United States.

170. Merely manually examining the more than 170,000 nonvote ballots in a manner designed to assure fair and uniform treatment would have taken significant time and might not have yielded a convincing result. The ballot review project commissioned by eight media organizations began to organize its review of uncounted ballots in January 2001. Ford Fessenden, *How the Consortium of News Organizations Conducted the Ballot Review*, N. Y. TIMES, Nov. 12, 2001, at A17. The counting of ballots began in February and was completed in May. The results were available by September but were not released until November. The consortium utilized 153 ballot examiners. The consortium also benefited by avoiding the possibility of distractions caused by contesting attorneys and parties. Nevertheless, the review of ballots by the consortium took months and reached only inconclusive results given the various possible definitions of voter intent. *Id.*

171. The per curiam opinion of the United States Supreme Court indicated:

it is obvious that the recount cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work. It would require not only the adoption (after opportunity for argument) of adequate statewide standards for determining what is a legal vote, and practicable procedures to implement them, but also orderly judicial review of any disputed matters that might arise.

*Bush v. Gore*, 531 U.S. at 110 (emphasis added).

The United States Supreme Court effectively brought the Gore election contest to a close in a manner similar to which other much less monumental contests have been ended by state courts on the practical effects of upcoming elections.<sup>172</sup> The perceived need for finality came to outweigh any need for absolute accuracy in the election outcome. Time, if it was ever sufficient, simply ran out. Three justices of the Florida Supreme Court would have ended the contest for these same reasons on December 8.<sup>173</sup> It became the justifiable burden of a majority of the United States Supreme Court to do so three days later.<sup>174</sup>

#### IV. THE PRECEDENTIAL SIGNIFICANCE OF *BUSH V. GORE*

##### A. *Requirements for Equal Protection*

Although several writers have suggested that the decision in *Bush v. Gore* provides an advancement in voting rights,<sup>175</sup> other contributors to this symposium have correctly questioned this conclusion, pointing out that the per curiam opinion itself indicates that “consideration is limited to the present circumstances.”<sup>176</sup> One writer has cautioned that the decision will be of little precedential value because the Court itself did not take its holding seriously or engage in serious legal analysis.<sup>177</sup> Moreover, this same writer notes that the holding in *Bush v. Gore* constitutes a strong break from the conservative majority’s usual approach to equal protection issues.<sup>178</sup>

The per curiam opinion in *Bush v. Gore* explains the scope of its holding as follows:

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172. For example, as a practical matter it often is impossible to fully adjudicate recounts or election contests in party primary or runoff elections because candidates must be determined in adequate time to be placed on the runoff or general election ballot and to campaign for election.

173. Chief Justice Wells of the Florida Supreme Court explained in his dissenting opinion on December 8 that “it is inescapable that there is no practical way for the contest to continue for the good of this country and state.” *Gore v. Harris*, 772 So. 2d 1243, 1269 (Fla. 2000) (Wells, J., dissenting), *rev’d sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000). Justice Harding, joined by Justice Shaw, similarly concluded in his dissent that the majority of the Florida Supreme Court was attempting to provide a remedy which would be “impossible to achieve” and which would “ultimately lead to chaos.” *Id.* at 1273 (Harding, J., dissenting).

174. Constitutional scholars correctly point out that there is a dearth of precedent for the application of the Fourteenth Amendment to the Florida Supreme Court’s remedial order interpreting and applying Florida state law. My experience as a practitioner, however, gave me a different perspective. I was not surprised that a majority of the U.S. Supreme Court was unwilling to permit the Presidency of the United States to potentially be determined by a fundamentally flawed state remedial order. A lack of precedent for federal court intervention in such a circumstance is no insurmountable barrier.

175. *See, e.g.*, Issacharoff, *supra* note 3; Sunstein, *supra* note 6, at 769 (“On its face, the Court appears to have created the most expansive voting right in many decades.”).

176. *Bush v. Gore*, 531 U.S. at 109.

177. *See, e.g.*, Hasen, *supra* note 5, at 387-90.

178. *Id.* at 390.

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter *in the special instance of a statewide recount under the authority of a single state judicial officer*. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, 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.<sup>179</sup>

Importantly, the Supreme Court's per curiam opinion limits its scope to a remedial order of a judicial officer having authority to ensure uniformity in a statewide recount. By doing so, the opinion expressly limits itself to election contest types of proceedings. There is nothing in the opinion to suggest that it establishes a new equal protection requirement for statutes governing the recount structure, procedure, or standards of a state's election process. In fact, the express wording of the opinion as quoted above appears to be intended to avoid implicating state and local control of elections.

Read literally, the per curiam opinion holds only that a remedial order in a judicial election contest proceeding must assure "rudimentary requirements of equal treatment and fundamental fairness"<sup>180</sup> for resolving disputes over the counting of votes throughout the election jurisdiction in question. Nothing is novel in this declaration. A contrary concept would have been shocking. The function of an election contest before a single judicial officer or court is to consider alleged irregularities that might affect the outcome of the election and to resolve disputes regarding the alleged inclusion of illegal votes or exclusion of legal votes in a uniform manner.

State courts historically have insisted on fairness and equal treatment of voters and ballots in an election contest without needing to rely on the Fourteenth Amendment or even explicitly on comparable provisions of state constitutions.<sup>181</sup> These state law princi-

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179. *Bush v. Gore*, 531 U.S. at 109 (emphasis added).

180. *Id.*

181. *See, e.g., In re Issue 27 Election of Nov. 4, 1997*, 693 N.E.2d 1190 (Ohio 1998) (disallowing recount where manual counts by board of only the votes "for" a municipal proposition produced an increase in votes sufficient to change the outcome). The court reasoned that if irregularities (i.e., "hanging chad") affected votes for the proposition, it was incumbent on the canvassing board to inspect the "no" votes as well. *Id.* The canvassing authority has the duty to ensure a fair and accurate recount. *Id.* at 1192-93; *Greenwood Township Election Case*, 25 A.2d 330, 332 (Pa. 1942) (revoking certification of recount on finding that erasures had caused invalidation of ballots in one precinct and ordering a check for similar tampering in fifteen other precincts); *McIntyre v. Wick*, 558 N.W.2d 347 (S.D.

ples of fairness have the same implications in the context of an election contest as those that arise from requirements of equal protection under *Bush v. Gore*.<sup>182</sup> It was the majority of the Florida Supreme Court that strayed from these principles.

### B. Discerning Voter Intent

The per curiam opinion in *Bush v. Gore* indicates:

Florida's basic command for the count of legally cast votes is to consider the "intent of the voter." This is unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application. The formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary.<sup>183</sup>

This statement is made in the context of the recount of punch card ballots and a per curiam opinion limited to an election contest type of proceeding.

Significantly, the per curiam opinion does not suggest that the guiding principle in vote counting—discerning voter intent—is inappropriate.<sup>184</sup> Therefore, the voter intent principle prescribed by law in virtually all states is not directly threatened by the *Bush v. Gore* decision. The per curiam opinion does indicate, however, that "[t]he formulation of uniform rules to determine intent based on these recurring circumstances is practicable and, we conclude, necessary"<sup>185</sup> and that the "search for [the voters'] intent can be confined by specific rules designed to ensure uniform treatment."<sup>186</sup> It is unclear whether the Court meant these conclusions to apply beyond the context of a judicial election contest type of proceeding. Nevertheless, whether required or not, rules or guidelines for discerning voter intent with punch card and other electronic counting systems are advisable in any circumstance in which ballots may be manually

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1996) (challenging the inconsistent methods by which certain types of ballots (straight party ballots) were counted in different counties within a state legislative district).

182. Federal courts also have relied on fundamental fairness. *See, e.g., Griffin v. Burns*, 570 F.2d 1065 (1st Cir. 1978) (overturning Rhode Island Supreme Court decision as fundamentally unfair in interpreting state law to not allow counting of absentee ballots in a primary election).

183. *Bush v. Gore*, 531 U.S. at 105-06 (citation omitted).

184. Several of the contests in Congress have involved an effort by a house of that body to discern voter intent on ballots. For example, in 1925, the U.S. Senate ordered 900,000 ballots transported to Washington, D.C., in a dispute over the election of a senator from Iowa; the dispute centered on ballots allegedly counted or thrown out based on "extraneous" marks on the ballots. *See H.R. REP. No. 99-58* (1985) (providing in disputed congressional election for the counting of all ballots from which the intent of the voter may be discerned without regard to technicalities).

185. *Bush v. Gore*, 531 U.S. at 106.

186. *Id.*

reviewed either before<sup>187</sup> or after being machine-counted. Many states have been operating under such rules existing either in statute or through regulations or guidelines promulgated by the state's election officer.<sup>188</sup>

Even when rules or guidelines are present, the ultimate standard often remains the intent of the voter. For example, section 127.130 of the Texas Election Code was suggested in Florida as an example of an instance in which state law established specific rules for determining what constitutes a vote without relying on the standard of "voter intent" as used by the Florida courts. Subsection (d) of section 127.130 indicates that a vote on a punch card ballot "may not be counted unless: (1) at least two corners of the chad are detached, (2) light is visible through the hole, [or] (3) an indentation on the chad from the stylus or other object is present and *indicates a clearly ascertainable intent of the voter to vote.*"<sup>189</sup> The subsection goes on, however, to qualify these rules by allowing an exception when "the chad reflects by other means a clearly ascertainable intent of the voter to vote."<sup>190</sup> The section further subsumes all of these more specific substandards within the "intent of the voter" standard by expressly indicating that nothing in subsection (d) supersedes "any clearly ascertainable intent of the voter."<sup>191</sup>

This Texas statute reflects the practical reality that it is not possible to fully prescribe rules for controlling a determination of voter intent because the difficulties in ascertaining voter intent are not limited to only punch card systems or to certain identifiable circum-

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187. Some states review ballots before machine processing to determine if ballots have been mismarked and may not be read accurately by the counting machine. *See, e.g.*, N.D. CENT. CODE § 16.1-15-09 (2001). Machine-readable duplicate ballots are prepared according to the voter's intent shown on the original ballot. The original ballots are maintained so that they can be examined if necessary in a later manual recount or contest.

188. *See* 2001 ELECTION ADMIN. SURVEY, *supra* note 9. The National Commission of Election Standards and Reform adopted a series of preliminary recommendations on April 22, 2001. Essentially, the Commission recommended that elections remain under state and local control with federal regulatory control. *See* National Association of Counties, COUNTY NEWS, May 7, 2001, at 1-3. The Commission indicates that the federal government can best address the weakness of the system by funding improvements in equipment and administration, sponsoring research, and disseminating information. *Id.* The Commission had been created in January, 2001, by the National Association of County Officials (NACO). *Id.* In addition to recommendations for funding, the Commission recommended that states: (1) determine what constitutes a vote for each type of equipment; (2) establish clear recount procedures; (3) work to remove partisanship by election officials; and (4) provide adequate time to complete a canvas of an election prior to any recount or contest. *Id.* Most state legislation efforts at reform in 2001 failed. *Id.* at 2.

189. TEX. ELEC. CODE ANN. § 127.130(d)(1)-(3) (Vernon 2000) (emphasis added).

190. *Id.* § 127.130(d)(4).

191. *Id.* § 127.130(e).

stances.<sup>192</sup> For example, reports from Florida have contrasted the apparent accuracy of an optical scanner for discerning a voter's intent to vote as compared to the equipment counting punch card ballots. Nevertheless, federal government reports warn that ballots can be unreadable in optical scanners even when the voter's intent is clearly ascertainable from the ballot by manual examination.<sup>193</sup> It appears likely that many of the ballots treated as nonvotes in Florida's optical scan counties would have been recognized as votes through a manual recount.<sup>194</sup>

Even when rules exist for discerning voter intent, objective and reasonable counters may disagree on the application of those standards to particular ballots. For example, in *Delahunt v. Johnston*<sup>195</sup> the Supreme Court of Massachusetts found that the judge of the trial court had applied the correct standard for discerning voter intent but that "[o]n balance, we are slightly more willing to find an intention expressed on [the] ballots where the trial judge ruled there was none."<sup>196</sup>

Just as different umpires in baseball call balls and strikes differently at the extremes of the prescribed strike zone, different judicial and administrative officials may include or exclude votes from ballots left uncounted by counting equipment even when such decisions are subject to controlling rules. Statutory or administrative rules are desirable for discerning the intent of voters with a manual review of ballots. The decision in *Bush v. Gore* properly places an emphasis on the utility of such rules. Nevertheless, even with such rules, subjective judgments are unavoidable. The safeguard under election circumstances is that any irregularities in how votes are counted ulti-

192. The potential for failing to accurately record voter intent exists under any voting system. The potential for error varies according to many factors, including the type and condition of the counting equipment.

193. See SALTMAN, *supra* note 10, at 37.

194. For example, the *Orlando Sentinel* reported that Gore would have picked up a net increase of 203 votes in Orange County if the undervote ballots left uncounted by the county's optical scanning equipment had been manually counted. Roger Roy & Mike Griffin, *Orange Tally Nets 203 Votes for Gore*, ORLANDO SENTINEL, Feb. 10, 2001, at A1. This undercount problem with optical scanners in Florida is consistent with the experience of other states such as Texas, where 0.63 percent of the ballots in counties using optical scanners for the 2000 election were found to have nonvotes for President. See Texas Secretary of State Henry Cuellar, Report to the Texas Legislature (January 2001) (on file with the *Florida State University Law Review*). By comparison, the new Direct Record Electronic (DRE) systems in Texas had an even higher percentage of 0.89 percent of undervotes. *Id.*

195. 671 N.E.2d 1241, 1243 n.2 (Mass. 1996); see also *Duffy v. Mortenson*, 497 N.W.2d 437, 439-40 (S.D. 1993) (concluding that a ballot with indented chad not counted by the trial court provides evidence of clear voter intent and, when counted, results in a tie between the candidates).

196. *Delahunt*, 671 N.E.2d at 1243 n.2.

mately are reviewable by a single impartial arbiter through an election contest.

### C. *The Single Impartial Arbiter*

The essential requirement for equal and fair treatment is the presence of a fair adversarial process before a single, impartial arbiter with responsibility for adjudicating contested issues and determining whether the election result reflects the will of the voters. As Justice Stevens recognized, the Supreme Court's concerns in *Bush v. Gore* that different county canvassing boards used differing standards for determining voter intent should have been alleviated, if not eliminated, "by the fact that a single impartial magistrate will ultimately adjudicate all objections arising from the recount process."<sup>197</sup> If time had permitted a prosecution of the Gore election contest in Florida courts on a normal time frame, it is likely that those adversarial proceedings would have eventually prevented the disparities identified by the United States Supreme Court. It is because of the extraordinary circumstances that existed on December 8 that the Florida Supreme Court's majority opinion strayed so far from assuring the fairness required in an election contest.

State laws generally provide that recounts, including manual recounts, in state and federal elections are ultimately subject to resolution before a single magistrate, appellate court, state officer, or institution with authority to resolve disputes or to adjudicate contested issues. Recount disputes in an election for a subcounty or county office are initially resolved by the local canvassing board or recount committee with authority to determine what ballots should lawfully be included or excluded for precincts within the entire jurisdiction. The judicial election contest provides a check on the exercise of this authority by making the outcome of the election subject to de novo challenge before a single impartial arbiter subject to appellate review.

State or federal laws also provide such an arbiter for multicounty and statewide elections. The specific officer, court, or institution varies among the states and according to the elective office in question. For example, federal elections for Congress are initially subject to potentially disparate local recount procedures or practices, but it is Congress itself that ultimately has authority to resolve any contested issues, including the inclusion or exclusion of disputed ballots from throughout the election jurisdiction. Congress has exercised this authority on several occasions in the past through an adversarial process in which committees conduct hearings, consider evidence, and

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197. *Bush v. Gore*, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting).

recommend a ruling by the affected legislative body.<sup>198</sup> State legislative elections similarly are often subject to local recounts, but it is the state legislative bodies that ultimately act to resolve contested issues. These state institutions also generally act through adversarial proceedings with an opportunity for briefs, hearings, and the presentation of evidence. As in Congress, this process occurs before a committee that then makes recommendations to the affected legislative body.<sup>199</sup>

For nonlegislative, multicounty, or statewide elections, the states have created numerous differing alternatives for adjudicating contested issues affecting the outcome of a general election. For example, in Texas an election contest over a state office, such as Governor, is resolved by the state legislature.<sup>200</sup> Curiously, an election contest over presidential electors in Texas is decided after an evidentiary hearing by the Governor.<sup>201</sup> In other words, if Texas law had been applicable in Florida in 2000, it would have been Jeb Bush who would have been designated by statute to hear the Gore election contest.

Primary elections present a particular problem because they are intraparty affairs and because there is limited time available between a primary election and a general election to resolve disputes in time to assure that the winning person in the primary appears as the party's candidate on the general election ballot.<sup>202</sup> Since local government election officials generally are responsible for conducting such primary elections, recounts occur in a similar although sometimes expedited basis. Contests, on the other hand, may end up in state court or before local or state political party officials or committees.

State and federal laws effectively provide a single arbiter with authority to adjudicate disputes over the counting of ballots. Combined with the opportunity for candidates and their partisan representatives to observe recounts, the availability of a single arbiter provides a means for achieving fairness and uniformity in the counting of ballots despite the possibility of some initial disparity among county governments.

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198. ANNE M. BUTLER & WENDY WOLFF, U.S. HISTORICAL OFFICE, UNITED STATES SENATE: ELECTION, EXPULSION AND CENSURE CASES 1793-1990 (1995). On several occasions the U.S. Senate has subpoenaed all ballots for manual review in Washington, D.C. As might be expected in such circumstances, a determination regarding the inclusion or exclusion of particular ballots or categories of ballots became a partisan fight. *Id.*

199. Junnell, *supra* note 50, at 1095.

200. TEX. ELEC. CODE ch. 242 (2000).

201. *Id.* ch. 243.

202. Often the issue in a general primary is a determination of whether a runoff election may be required and which candidates qualified for the runoff. The need for a runoff further shortens the time for resolution of recounts and election contests.

There is not, however, any universally accepted means for assuring that this final arbiter is impartial. Decisions left to state or federal legislative bodies, or possibly to the Governor of a state, may, as shown by the events in Florida, become viewed as partisan rather than impartial decisions. The recent experience in Florida also shows, however, that circumstances can occur under which not even the highest courts of a state or of the nation are above suspicion by some as acting for partisan reasons in an election dispute.

#### V. GORE'S LOSING LEGAL STRATEGY

It is very possible that there is nothing that Albert Gore could have done after November 7 to prevail as the certified winner of Florida's presidential electors. Bush might have prevailed under any recount or election contest scenario simply because he had the most votes. Or, Bush might have prevailed because the combination of a Republican Governor, a Republican-controlled state legislature, a Republican chief state election officer, and ultimately a U.S. Supreme Court dominated by persons identified with the Republican Party may ultimately have been too much for Gore to overcome regardless of whether he received the most votes. Nevertheless, the legal strategy followed by the Gore attorneys significantly lessened Gore's opportunity to prevail.<sup>203</sup>

The fundamental flaw in Gore's legal strategy beginning November 8 was its failure to appreciate the difference in law and dynamics between an administrative recount of votes and an election contest. If the necessary uncounted votes were there, an appropriate recount could find them. If the campaign was left to pursuing an election contest, however, the chances of success were essentially nonexistent in the time available before the deadlines set by federal law for the selection of presidential electors.

This difference between a vote recount and an election contest was not readily apparent on examination of the relevant Florida statutes. The election contest provisions of section 102.168, *Florida Statutes*, appeared seductively simple. They expressly acknowledged the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election"<sup>204</sup> as a ground for an election contest

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203. I admit as a trial attorney that I am reluctant to offer these critical comments about the legal strategy followed by the Gore legal team in Florida. The Gore legal team was outstanding. Nevertheless, if the strategies of Lee at Gettysburg and Napoleon at Waterloo are susceptible to reevaluation in light of the outcome in those battles, then it would also seem appropriate to subject Gore's strategy in Florida to reevaluation. Despite my admiration for the attorneys in question, I believe that the flaws in the Gore strategy existed at least in part because those outstanding attorneys lacked experience in the world of election administration, recounts, and the litigation of election contests.

204. FLA. STAT. § 102.168(3)(c), (2000).

and authorized the circuit court judge to “fashion such orders as he or she deems necessary.”<sup>205</sup> It is reasonable on the face of this statute to expect that a showing by Gore of almost any number of potentially uncounted votes (much less the 9,000 or more undervotes in Miami-Dade County) would have led to a counting of enough undervotes to erase the miniscule Bush lead. Based on this assumption about section 102.168, success in the administrative recount process before the local canvassing boards, while desirable, was not essential to Gore’s eventual triumph.

The apparent promise of section 102.168, however, was illusory. As in other states, Florida courts historically have been reluctant to interfere in elections, particularly to overturn a certified election outcome.<sup>206</sup> Therefore, as in other states, the Florida courts have created a presumption in favor of the validity of the certified results and evidentiary burdens for a contestant to overcome that do not necessarily appear on the face of the contest statute.<sup>207</sup> At a minimum, Gore had to prove that legal votes had been excluded and that, if included, these legal votes would change or place in doubt the outcome of the election itself, based on the inclusion or exclusion of votes statewide, not just in selected counties. Moreover, even simple local election contests generally are marked by intense legal battles. Given the im-

205. *Id.* § 102.168(8) (amended 2001).

206. This reluctance was evident even in 2000 in the Florida Supreme Court’s rejection of challenges to the outcome of the presidential election based on the Palm Beach County butterfly ballot and the absentee balloting in Seminole and Martin Counties. *See infra* note 207.

207. In his dissent in *Gore v. Harris*, Chief Justice Wells explained that “Historically, this Court has only been involved in elections when there have been substantial allegations of fraud and then only upon a high threshold because of the chill that a hovering judicial involvement can put on elections.” 772 So. 2d 1243, 1263 (Fla. 2000) (Wells, C.J., dissenting); *see, e.g.*, *Smith v. Tynes*, 412 So. 2d 925 (Fla. 1st DCA 1982) (indicating that it is not enough for a contestant to show a reasonable possibility that election results could be altered by irregularities, rather a *reasonable probability* that the results would have been changed must be shown). This threshold of “reasonable probability” was created by the Florida courts and did not appear explicitly in the election statutes. *See also Boardman v. Esteva*, 323 So. 2d 259, 268 (Fla. 1975) (indicating that where the record does not show that votes were illegal “the presumption of the correctness of the election officials’ returns stands”); *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844-45 (Fla. 1993) (quoting *Boardman v. Esteva, supra*, for the proposition that “[i]t is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law”). In *Gore v. Harris*, the majority of the Florida Supreme Court concluded that the “reasonable probability” standard was no longer applicable under section 102.168 as amended in 1999. 772 So. 2d at 1255. Dissenting Justices Harding and Shaw agreed with the majority that the reasonable probability requirement had not survived the 1999 amendments. *Id.* at 1271 (Harding, J., dissenting). Nevertheless, these two justices concluded that section 102.168 still required a contestant to show “that the number of legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of this *statewide* election” and that Gore had failed to carry this burden. *Id.* (emphasis in original).

portance of this particular election, it was safe to assume on November 8 that any election contest would be a monstrous, complex, and chaotic affair with multiple parties and myriad legal issues. Realistically, no candidate was likely to win such a contest in the time available.

Therefore, success in the recount was Gore's only opportunity after November 7 to prevail in the election. The automatic statewide recount produced 1,753 additional net votes for Gore. State law provided a means of obtaining a further recount, including a manual recount of the nonvote ballots, through the protest process. Although this process was certain to be vigorously contested, it was an established procedure bound by a deadline that would expire before presidential electors were to be selected or would cast their ballots. As a winner of that recount, Gore would have been entitled to certification as the winner of Florida's electors and would have enjoyed both the legal and political benefit of having finality on his side. Such a scenario would have forced Bush to rely on an election contest of disputed ballots, a challenge in federal court, or an appeal to the state legislature, with the considerable legal and public relations burden of overturning the official outcome of the election. The dynamic of finality would have been on Gore's side.

Despite the critical nature of the recount, Gore's strategy toward the recount started half-heartedly, with requests for manual recounts planned only for Palm Beach and Volusia counties.<sup>208</sup> Experienced recount attorneys urged that manual recounts be sought throughout Florida. After all, as explained by *The Recount Primer*:

If a candidate is behind, the scope should be as broad as possible, and the rules for the recount should be different from those used election night. A recount should be an audit of the election to insure the accuracy and honesty of the results.<sup>209</sup>

In other words, the trailing candidate is advised to look for voting or tabulation errors wherever they might exist. Eventually Gore's attorneys also requested manual recounts in Broward and Miami-Dade Counties,<sup>210</sup> but no timely request was filed in the other sixty-three counties.<sup>211</sup>

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208. DEADLOCK, *supra* note 53, at 71, 78. Gore's selective requests for recount were characterized by some as "cherry-picking," "mining for votes," or "gamesmanship." *Touchston v. McDermott*, 234 F.3d 1133, 1143, 1150, 1152 (11th Cir. 2000) (Tjoflat, J., dissenting).

209. DOWNS, *supra* note 28, at 5.

210. Attorneys for Gore were successful in obtaining a manual recount in at least one other county. See DEADLOCK, *supra* note 53, at 158.

211. One reason for not requesting a manual recount except in these four counties was that the attorneys for Gore foresaw a difficulty in timely requesting manual recounts statewide since a written protest would have to be filed in each county. Such a county-by-

Gore found the Florida Supreme Court receptive to a manual counting of ballots to discern voter intent on ballots on which no vote previously had been recorded by the counting machines. On November 16, the court ordered that the manual recounts could continue<sup>212</sup> despite the statutory deadline for the receipt of county election results by the Secretary of State. The next day, the court *sua sponte* enjoined the Secretary of State from certifying the election results.<sup>213</sup> At oral argument on November 20, the members of the court evidenced their desire for counting all votes and asked the Gore attorneys how long it would take to complete the manual recounts. Tellingly, Gore's attorneys had no answer. The Florida Supreme Court extended the deadline to November 26.<sup>214</sup> Nevertheless, only one county, Broward, was able to complete its recount within the period of this extension. Therefore, on November 26 the Gore attorneys confronted the worst possible situation. The extension essentially had been wasted, and Bush had been certified as the official winner. Gore's attorneys now had ten fewer days to prepare and successfully prosecute an election contest.

Gore's failure to appreciate the difference in law and dynamics between a recount and an election contest also pervaded the candidate's strategy in the election contest. Relying on the position that section 102.168, *Florida Statutes*, required only that Gore show that there were enough uncounted votes in Miami-Dade to "place in doubt the [outcome] of the election,"<sup>215</sup> the apparent strategy was to treat the election contest as essentially a continuation of the aborted recounts and to push the case through Judge Sauls to the Florida Supreme Court as quickly as possible. As a result, Gore presented only two witnesses and made no apparent effort to place the election itself in doubt beyond the potential of added votes from a few selected counties. This lack of a winning election contest theory or a compelling evidentiary record ultimately sealed Gore's fate.

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county process is manageable. This author in 1978 oversaw the first statewide recount in the history of Texas. State law at the time provided for four to six different methods for obtaining a recount based on the type of balloting or voting equipment used within each county. To obtain recounts statewide in the gubernatorial general election, we simply prepared a generic form for each type of county voting system and sent the appropriate form to a party representative within each county with written instructions for how to particularize the form to the specific county and how to proceed. The logistical problems of timely filing recount requests in most of Texas's 254 counties in 1978 were great but not overwhelming. In an age of e-mail, fax, and cell phones, the logistical problems of filing such requests in Florida surely are more manageable.

212. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1225 (Fla. 2000), *vacated sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

213. *Id.* at 1227.

214. *Id.* at 1240.

215. FLA. STAT. § 102.168(3)(c) (2000).

If any bona fide opportunity existed for Al Gore to prevail in Florida after November 7, it was through the manual recount of ballots by the local government canvassing boards. It was in the interest of Bush and Republican Party officials to delay and to confuse those recounts. Nevertheless, the chance of success for Gore was greater at the recount stage than in an election contest. Gore's legal strategy failed to recognize the necessity of winning the recount battle.

## VI. CONCLUSION

The events following the November 7, 2000, presidential election were extraordinary. The legal opinions resulting from those events, however, are of limited precedential value in part because they were written without time for a full development of the facts or the law.

The decision of the United States Supreme Court in *Bush v. Gore* is not novel for its notion of fairness and equal treatment in the context of an election contest. State election contests before a single impartial arbiter historically have been the means by which disputes over the outcome of an election have been resolved and meaningful irregularities in an election have been corrected. Fairness in the treatment of candidates and voters is an essential principle of such contests. Any contrary holding would have been shocking and unacceptable. In *Gore v. Harris*, the majority of the Florida Supreme Court lost sight of these fundamental principles.

Although the intervention of the United States Supreme Court in the Florida election controversy may be unprecedented, its decision to bring an end to the recount ordered by the Florida Supreme Court was consistent with the historic need for finality in state election contest proceedings and was justified under the existing circumstances. It was Gore's flawed legal strategy that reduced his opportunity for winning the election in Florida and that ultimately brought his legal battle to an unsuccessful end.