

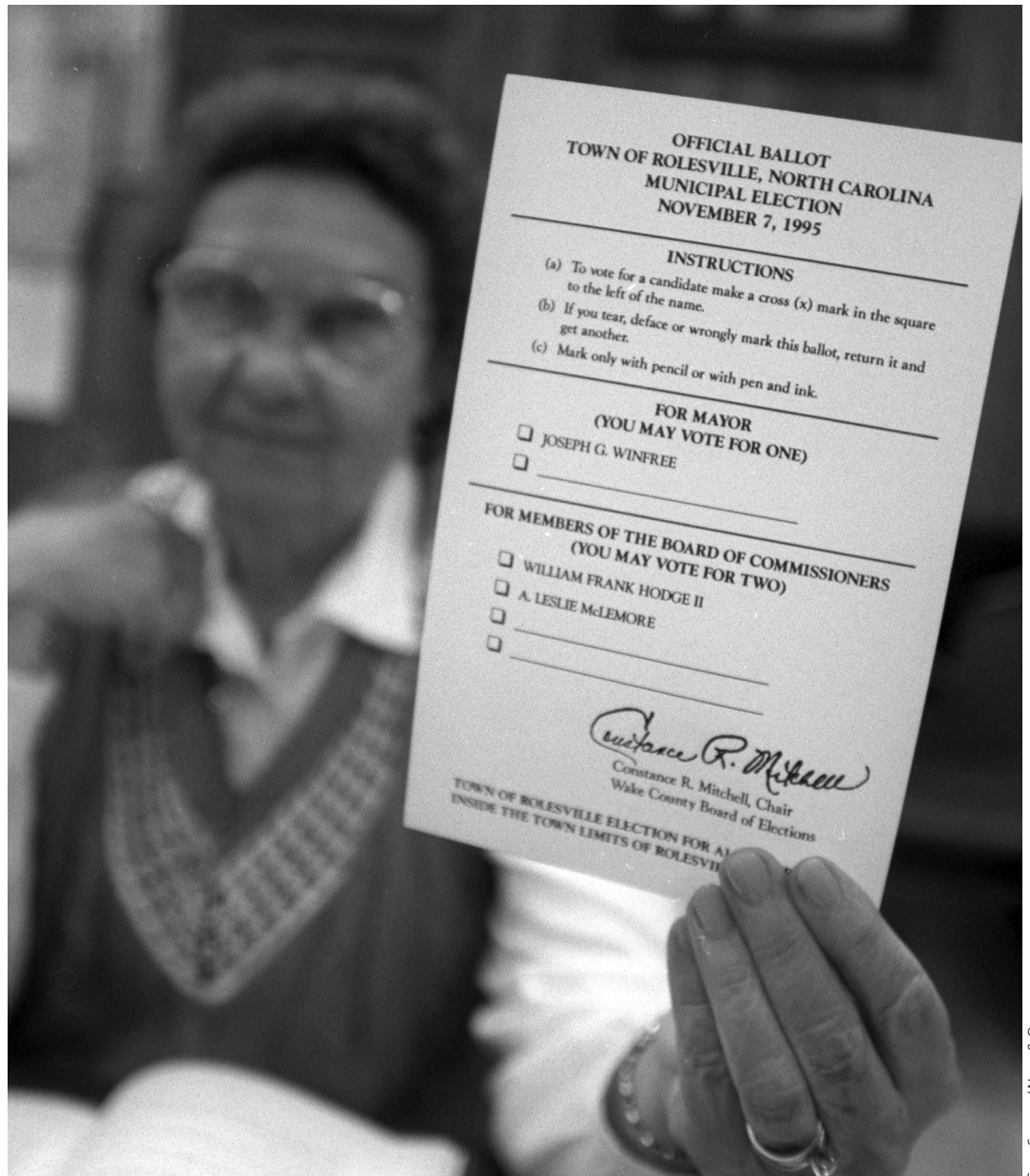
North Carolina in 2000 was way ahead of Florida in administrative structure of elections, in recount and protest practices, in procedures for ballot design and approval, in maintenance of voter lists and allowing of access to the polls, in handling of absentee ballots, and in the capacity to provide the immediate guidance that election officials needed.



NEWS & OBSERVER

Above right: The validity of absentee ballots became an issue in the 2000 election in Florida.

Right: To cut costs in the primary election, a North Carolina polling place used old-fashioned paper ballots.



CHRIS SEWARD / NEWS & OBSERVER

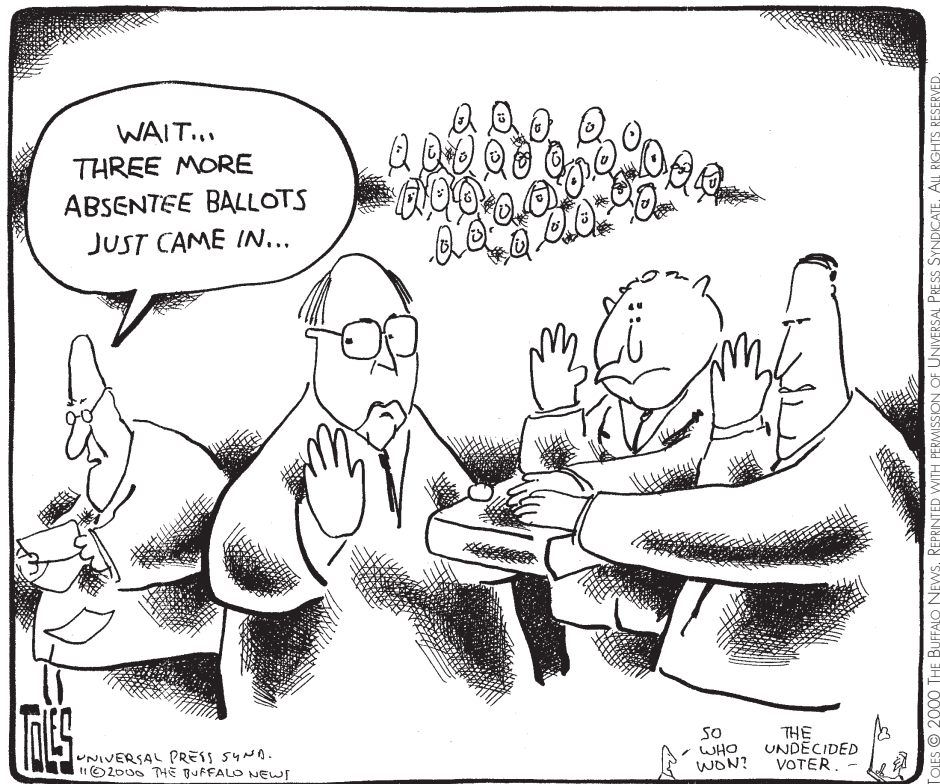
Would North Carolina Have Looked as Bad as Florida on Election Night 2000?

Gary O. Bartlett and Robert P. Joyce

Florida looked bad on presidential election night 2000 and in the weeks that followed. Voter after voter told of finding the ballots inscrutable or of being turned away from the polls altogether. Elections officials held punch-card ballots up to the light, counting them one way in this county, another way in that county. Lawyers argued in the state trial courts, in the state appellate courts, in the federal trial courts, in the federal appellate courts—indeed, all the way to the U.S. Supreme Court. Overseas absentee ballots poured in for days after the election, counted by one standard here and another standard there. Through it all, the minuscule gap between George W. Bush and Albert Gore survived.

The whole world watched. Elections officials in every jurisdiction outside Florida counted their lucky stars. They recalled their bedtime prayer on the night before each election: “Whoever wins, let it not be close.” If the election had been as close in North Carolina as it was in Florida, would we have looked as bad? We have many of the same practices and problems, and we would have faced enormous challenges. We would have made mistakes. Our hodgepodge of voting equipment of varying ages and states of maintenance was much like Florida’s. Our difficulties in determining voter intent would have rivaled theirs.

But no, we would not have looked as bad. North Carolina in 2000 was way ahead of Florida in administrative structure of elections, in recount and



protest practices, in procedures for ballot design and approval, in maintenance of voter lists and allowing of access to the polls, in handling of absentee ballots, and in the capacity to provide the immediate guidance that election officials needed. This article summarizes what happened in Florida and why it could not have happened in North Carolina.

What Happened in Florida

The election of the president is not a national election. Because of the

Electoral College, there are actually fifty-one separate elections, one in each state and the District of Columbia. As the world watched on election night 2000, it slowly became clear that whoever won the Florida electoral vote—Bush or Gore—would become president.

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As the night grew late, the television networks called the election for Bush, then withdrew the call. Gore telephoned Bush to concede, then telephoned back to withdraw the concession.

Protests and Lawsuits under the Florida System

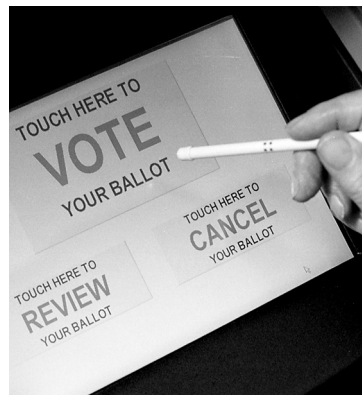
The first official tally showed that Bush led by 1,784 votes out of 6,000,000 cast. That is a margin of three-hundredths of one percent—far, far closer than the one-half of one percent margin that, under Florida law, triggers an automatic machine recount. On November 8, a machine recount was carried out, with each county using its own techniques; there was no uniform guidance from the Elections Division of the Florida Secretary of State's Office. As the counties reported the figures, the margin between Bush and Gore, already unimaginably small, shrank, reaching a mere 375 votes.¹

Then the legal proceedings began. The sight was not pretty.

Florida law set up a bifurcated scheme for challenging election results. *Before certification* of the statewide count, a candidate or a voter could file a “protest” with the county canvassing board. The county canvassing board (composed of the supervisor of elections—an elected official—a county court judge, and the chair of the county commissioners) then could conduct a sample manual recount of one percent of the ballots (from at least three precincts) and determine whether a manual recount of the entire county was called for. *After certification* of the statewide count, a candidate or a voter could file a “contest,” which was not an administrative proceeding in the county but a lawsuit in the courts.

On November 9, acting under the *protest* provisions, the state Democratic

party requested a manual recount of the votes in four counties. The canvassing boards in those counties conducted the sample manual recounts. In Broward County the count showed a net increase of 4 votes for Gore; in Palm Beach County, it showed a net increase of 19 for Bush. With results like these, all four county canvassing boards, acting individually, voted to conduct countywide manual recounts.



HARRY LUNGHY/NEWS & OBSERVER

With the latest innovation, direct-record electronic machines, voters must touch the proper places on the screen (as they do on a bank's automatic teller machine) and then touch the closeout indicator.

Soon the Palm Beach County Canvassing Board became concerned that it could not complete its full manual recount and report the results by the one-week vote-reporting deadline set in Florida law, so it asked the secretary of state for guidance. Acting on a legal opinion from her Elections Division, the secretary of state announced that the one-week deadline was firm and that she would not accept any returns of the manual recounts received after 5:00 P.M. on November 14.

The Volusia County Canvassing Board then brought a lawsuit (in which other county canvassing boards joined) in Florida state court seeking a judgment declaring that it was not bound by the November 14 deadline and directing the secretary of state to accept late returns. On the day of the deadline, the judge in this case ruled that the canvassing boards of the state could submit their manual returns after the deadline and that the secretary of state should exercise her judgment in whether to accept them. “Just as the County Canvassing Boards have the authority to exercise discretion in determining whether a manual recount should be done,” the judge said, “the Secretary of State has the authority to exercise her discretion in reviewing that decision, considering all attendant facts and circumstances, and decide whether

to include or to ignore the late filed returns in certifying the election results and declaring the winner.”²

On receiving this opinion, the secretary of state instructed the Florida supervisors of elections to submit to her by 2:00 P.M. the next day, November 15, a written statement justifying any belief on their part that they should be allowed to submit returns after the November 14 deadline. Four counties submitted such statements; the secretary of state rejected all four. She then said that she would rely on the totals submitted by the November 14 deadline (that is, the totals that did not include the manual recounts) and would certify the election results as soon as she had received the certified returns of the overseas absentee ballots from each county (an issue also about to explode into a legal battle—discussed later).

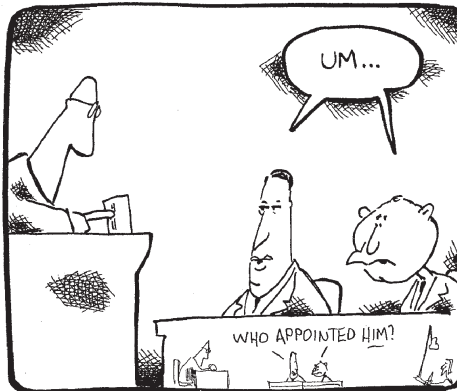
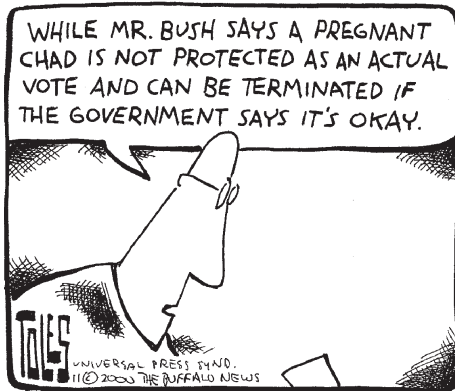
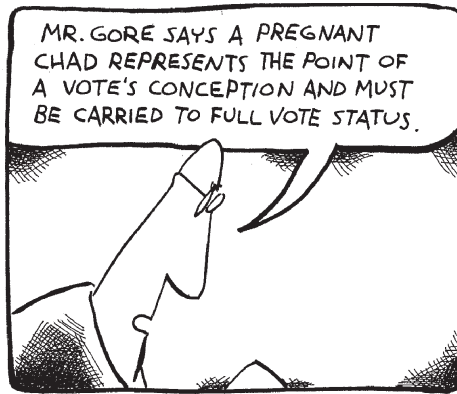
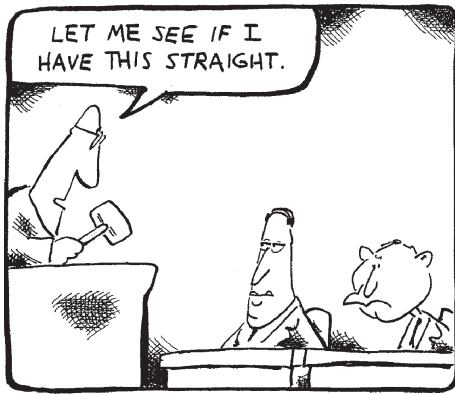
Gore and the Florida Democratic Party then went back to Florida state court asking for an order compelling the secretary of state to accept the returns reflecting the manual recount. The judge refused, and the Democratic forces appealed. The appeal was passed directly to the Florida Supreme Court, where it was combined with an appeal that the Volusia County Canvassing Board had made from its lawsuit. The Florida Supreme Court directed the secretary of state not to certify the election results until it had heard the appeal.

That is where matters stood one week after the election. The legal wrangling had just begun. This was only the election protest. There remained an election contest.

Voters Turned Away at the Polls

Meanwhile, a separate problem was brewing, also not pretty. All across Florida, but especially in counties with large African-American populations, large numbers of potential voters were saying that they had shown up at the polls to vote but been unlawfully turned away.

In 1997 the Florida state courts overturned the victory of a candidate for mayor in Miami, finding that voter fraud—in the form of ballots cast in the name of dead people—contributed significantly to his election. The Florida legislature responded by directing the



Elections Division of the Secretary of State's Office to contract with a private company to purge the voting rolls of ineligible voters, including deceased people, people adjudged mentally incompetent, and convicted felons, who, under Florida law, permanently lose their right to vote. The company that was awarded the contract combined information from several state databases—including those from law enforcement, the Bureau of Vital Statistics, and the Executive Board of Clemency—to create a list of ineligible people. The resulting list included more than 40,000 possible felons.³ After discussions of how to trim that number, the decision was made to go with a list that included too many names rather than too few.⁴

Two versions of this overinclusive list were then sent to the county elections supervisors, one in 1999, and one in summer 2000. Under Florida law, supervisors were to attempt to verify the accuracy of the lists. The statute provided that “[if] the supervisor does not determine that the information provided by the division is incorrect, the supervisor must remove [the voter’s name] from the registration books by the next subsequent election.”⁵ State officials

issued no guidelines to supervisors on how to go about this statutory duty. As a result, each supervisor established his or her own policy.⁶ Most supervisors sent letters to possible felons on the list. Some checked with clerks of court. In at least two populous counties (Broward and Palm Beach), the supervisors ignored the list altogether.

In the months before the 2000 election, thousands of people who were not dead or mentally incompetent or not convicted felons were removed from voter rolls.⁷ Many of them first learned of their exclusion when they went to the polls on election day. The burden fell disproportionately on African-Americans, who represented more than 65 percent of the names on the 1999 and 2000 lists. In Miami-Dade County, for example, white people account for 77.6 percent of the population but made up only 17.6 percent of the 1999 felons list.⁸

Given the traditional tendency of African-American voters to cast votes for Democratic candidates in higher proportions than voters generally do, Democratic forces saw the adverse impact on African-American voters from this purge as a direct threat to Gore's chance to prevail in the extremely close election.

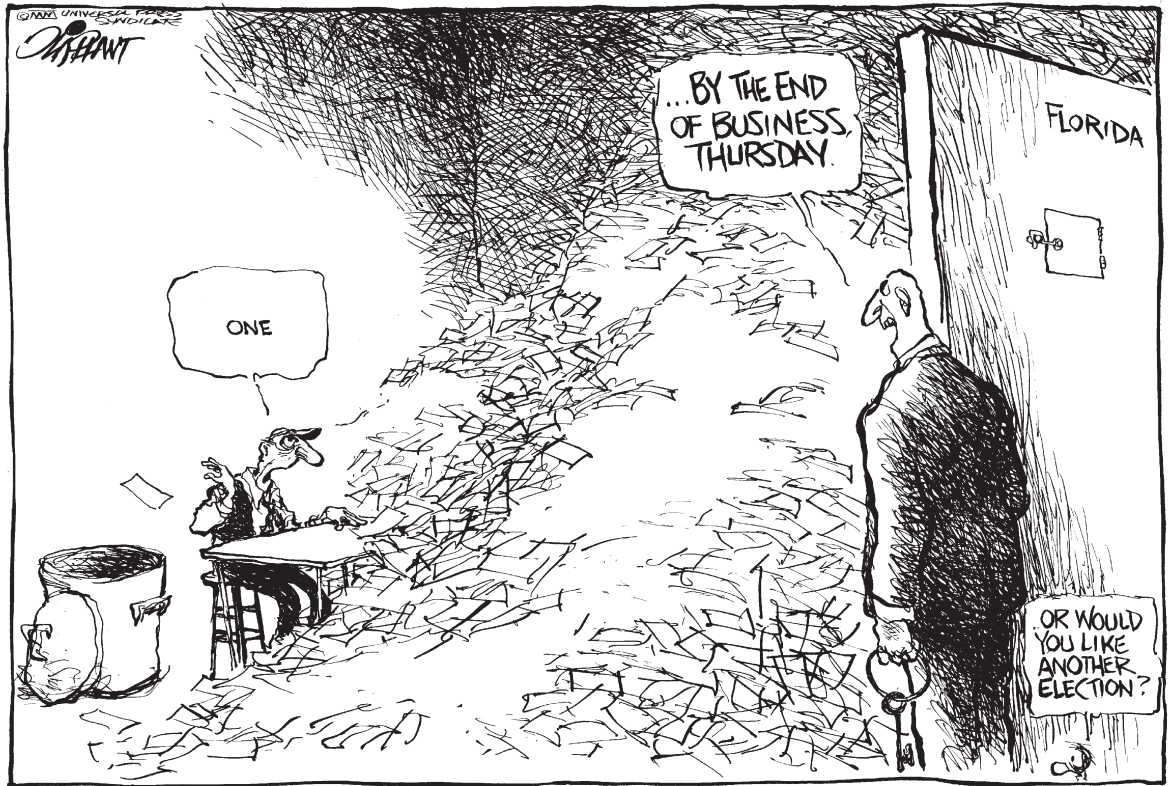
Voters Confused by Ballot Layouts

The rules that govern the ability of a candidate to get on the ballot vary from state to state. For the 2000 election, twelve candidates were on the presidential ballot in Florida. Each supervisor of elections was responsible for designing a ballot that would work on the kind of voting equipment used in his or her county and fit all the candidates' names in limited space. There was no review by anyone at the state level; each supervisor worked alone.⁹

In Palm Beach County, where punch-card voting machines were used, the supervisor of elections decided against using a small typeface to solve the space problem; too many of the voters in her county were elderly. Instead, she designed what came to be known notoriously as the “butterfly ballot.” The names of some of the candidates for president were printed down the left side of the ballot, the names of others down the right side. The punch holes where voters were to mark their choice ran in a single row down the center. The first name on the left side was Bush. The first punch hole in the middle row was for Bush. The second name on the left side was Gore. But the second punch hole in the middle row was not for Gore; it was for the Reform Party candidate Pat Buchanan, whose name was listed first on the right side. The punch hole for Gore was the third one in the middle row.

In the days after the election, many voters said that they had punched the second hole, meaning to vote for Gore but instead voting for Buchanan. With only 337 registered Reform Party members in the county, Buchanan received 3,407 votes, four times higher than his total in his next-best county in Florida. An additional 5,310 people punched the holes for both Gore and Buchanan, invalidating their ballots as “overvotes.”¹⁰ Further, more than 19,000 ballots in Palm Beach County contained two punched holes for president. All 19,000 were disallowed.¹¹

In Duval County the supervisor designed a multipage ballot in which presidential candidates' names appeared on both the first and the second page, with an instruction to “vote all pages.” More than 21,000 voters apparently



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took that instruction literally and voted for presidential candidates on both the first and the second page, invalidating their ballots as overvotes.¹² In sixty-two Duval County precincts with African-American majorities, nearly 3,000 people voted for Gore *and* a candidate whose name appeared on the second page of the ballot.¹³

In those two counties alone, 40,000 potential votes for president were not counted. It seems certain that at least some of those overvotes were caused by voter confusion based on ballot design.

The Torturous Arrival of Absentee Votes after Election Day

The main legal wrangling began on November 8, when the Gore forces began protests in four counties, seeking manual recounts of ballots cast at the polls on election day. That battle eventually went to the U.S. Supreme Court.

At the same time, a separate legal battle was swirling. This one involved absentee ballots cast by civilians and military personnel overseas. It was to constitute another example of county canvassing boards setting their own standards with no guidance from the state, unequal application of the rules, and nearly endless confusion.

Florida conducts its primary elections in September (followed by a runoff primary, when necessary) and its general elections in November. That schedule provides a very short turnaround time for elections officials to tally the votes and certify the results of the primary and then start the procedures for the general election. Especially tight is the time for mailing absentee ballots and receiving them back. Florida law used to require that, to be counted, absentee ballots be received by the supervisor by 7:00 P.M. on election day. In the early 1980s, the federal government sued the state, saying that the short time between the primary and the general election did not allow enough time for overseas civilian and military voters to receive, mark, and return their absentee ballots.¹⁴ To settle the suit, the state agreed to accept and count an absentee ballot cast for a federal office by an overseas voter if it was post-marked, *or* signed and dated, no later than election day and received no later than ten days after the election. That is, valid ballots could continue to come in for ten days after the election. Those rules were incorporated into regulations in the Florida Administrative Code.¹⁵ Absentee ballots from Floridians in the

state or elsewhere in the United States were not affected; they still had to be received by election day.

On their face the requirements were straightforward: (1) the voter had to be overseas, (2) the ballot had to carry a postmark or a dated signature no later than election day, and (3) the ballot had to be received by the tenth day after the elections.

In practice, though, the counting was anything but straightforward. Immediately after the election, as explained earlier, the Bush and Gore camps focused their efforts on the legal battles over manual recounts of ballots in the four counties where Gore had initiated his protest. Recognizing the incredible closeness of the vote totals, however, both camps also turned attention to the incoming and not-yet-counted overseas absentee ballots.

In general, both candidates figured that Gore would get a higher percentage of overseas civilian absentee votes, Bush a higher percentage of the much more numerous military ones.¹⁶ As ballots began arriving, it became clear that many did not bear postmarks, so it was not possible to determine whether they were mailed before or after election day. Further, even though the administrative



During recounts, witnesses for the involved candidates often are present to ensure that officials follow appropriate procedures.

ROGER WINSTEAD / NEWS & OBSERVER

code provision said to count ballots that were postmarked or signed and dated before election day, only one of Florida's sixty-seven county election supervisors had provided a date line on the ballots, so that provision was useless. Many ballots were even found to be unsigned. Gore developed the strategy of challenging absentee votes, recognizing that Bush would probably get a higher percentage of those that were counted. By contrast, Bush pushed for a looser interpretation of the absentee rules, arguing that supervisors should not insist on technical compliance in ways that would disenfranchise voters. To some extent in these arguments, both candidates were taking positions inconsistent with their positions in the main argument regarding manual recounts—in which Gore was arguing for a more inclusive count, and Bush was arguing, in effect, to cut off the recount process.

The Bush and the Gore campaigns dispatched representatives to the county elections offices on November 17 (the tenth day after the election), when the canvassing boards began counting the absentee votes. In many cases there were ballot-by-ballot arguments over legitimacy. In some counties the canvassing boards stuck to the literal wording

of the regulation (and to past practice) and counted no ballots that lacked postmarks or were postmarked late. In other counties the boards counted some or all of such ballots. In some counties the boards counted ballots that had domestic postmarks, on the (erroneous) belief that some mail from overseas military people ended up with domestic postmarks. In other counties those ballots were not counted. Fourteen counties reopened their counts after lawsuits were filed; the others did not.¹⁷

Through it all, there was no guidance from the state.

A Democratic lawsuit challenging the acceptance of any absentee ballots after election day was decided December 9 in federal district court,¹⁸ December 11 in the federal court of appeals.¹⁹ The court of appeals upheld the ten-day practice.

The next day, the U.S. Supreme Court, ruling in the main, manual-recount lawsuit, issued the final ruling that brought all the matters to a close.

The Trouble with Voter Intent

“Pregnant chad,” “hanging chad,” and “dimpled chad”: those terms entered the American consciousness in the days following the 2000 election. They relate specifically to the use of punch-card

voting machines and generally to the concept of “voter intent.”

With any kind of voting system, voters must follow instructions in order to have their votes properly counted. On old-fashioned paper ballots counted by hand, voters must make marks with a pen or a pencil in the right places beside candidates' names and then place the ballots in the ballot box. With mechanical-lever machines (antiquated devices not even manufactured anymore), voters must pull the levers beside the desired candidates' names in all the different races and then pull the final locking lever to record the votes. With punch-card machines, voters must use a special implement to punch small holes in the ballots along perforated lines to indicate their choices (creating small chads), and then feed the ballots into the tabulator. With modern optical-scan machines, voters must fill in the proper spaces on the ballots beside candidates' names, using a marker supplied by precinct officials, and then feed the ballots into the tabulator. With the latest innovation, direct-record electronic machines, voters must touch the proper places on the screen (as they do on a bank's automatic teller machine) and then touch the closeout indicator.

ELECTION SAFEGUARDS AND VOTER CONFIDENCE

No election is perfect. Mistakes always haunt the process, and on rare occasions, fraud taints it. But North Carolina has built-in safeguards that should give voters confidence.

The news media try to report the names of winning candidates on the night of the election, but elections workers know that the election isn't over till it's over—when the results are “canvassed” (closely examined) on the Friday after the election and the winners are certified. Holding the canvass three days after the election provides time to count provisional ballots and to audit all ballots. It also allows time for anyone concerned about possible errors to protest the election or request a recount.

Protests, Hand-to-Eye Counts, and the Power to Order New Elections: Lee County

Take the case of the 1994 election for District 15 in the North Carolina Senate. The election night total showed that one candidate had won by only eight votes. A mandatory machine recount added 200 votes to the total count in one county in District 15—Lee County. How could that be?

At this point the trailing candidate took advantage of North Carolina's election protest procedures, initiating a protest. The county board of elections heard the matter and voted to conduct a “hand-to-eye” (manual) count, in which humans recount all ballots, even those the machines initially read. The candidate who had been leading after the initial count appealed that decision to the State Board of Elections. The state board ordered that the hand-to-eye count go forward in Lee County.

The hand-to-eye count is available as a safeguard because voting machines can, under certain circumstances, count incorrectly. When optical-scan voting machines run across a ballot that they cannot read, they reject it, kicking it into a special repository—called the “outstack” or the “center bin”—to be hand-counted later. This safeguard is intended to ensure that voters who mark the ballot wrong still can have their votes counted. (Other types of voting equipment have similar built-in safeguards.)

The outstack safeguard does not always work. Sometimes an irregular marking by a voter will not cause the machine to kick the ballot to the outstack but will “fool” the machine into counting or not counting the ballot in a particular way—perhaps not the way the voter intended. Maybe the voter did not use the marker that the precinct official provided. Maybe the voter properly marked the ballot in some of the races and improperly marked it in other races. Maybe the voter used some kind of indicator other than filling in the proper place on the ballot. In addition, many voting machines are suspect because of age or poor maintenance.

In Lee County it turned out that the problem with the 200 extra votes was not a problem of improper marking of ballots or malfunctioning machines. In the initial machine recount, officials had accidentally counted one outstack *twice*—even in a machine recount, the outstack must be counted by hand—and that explained the extra 200 votes. The error was immediately corrected.

With the 200-vote discrepancy cleared up, a surprising new problem emerged. The Lee County hand-to-eye recount of all the machine-counted ballots and all the outstack ballots yielded this result: across District 15 as a whole, the candidates were tied, and there were two ballots on which the voter's intent could not be clearly determined. The county board reported these results back to the state board.

The state board has the authority to determine the outcome of elections. It also has an authority unique in the United States: if justice demands, it can call for the people to settle the matter in a new election. That is what the state board did in the District 15 situation. In other states the final appeal is to a court, which can determine the proper outcome. A decision rendered by the people brings finality to the outcome, whereas a judge's decision can leave doubt.

Self-Policing: Gaston County

Inherent in election laws is the assumption that all facets of the process will be conducted honestly. To preserve the integrity of elections, there are processes and procedures to remedy potential problems. Voters can be challenged on their qualifications any

In Florida's sixty-seven counties, all five kinds of systems were represented. (Only one county used the old-fashioned paper ballots, however.)

Every state has a choice in how to count ballots: to insist that voters mark the ballots correctly, or not to require strict technical compliance with instructions. States that make the latter choice are said to be governed by a desire to honor a voter's intent. Florida was a “voter intent” state. The relevant statute provided that “[n]o vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board.”²⁰ As the state supreme court expressed it,

“[S]o long as the voter's intent may be discerned from the ballot, the vote constitutes a ‘legal vote’ that should be counted.”²¹

As described earlier, on the first day after the election, Gore forces started an election protest in four counties, seeking a manual recount of the ballots. In effect, they asserted that the machines in those counties had failed to count votes that voters had intended to cast.

At the end of the first week after the election—that is, by November 14—the protests begun by the Gore campaign had succeeded in getting several counties to begin manual recounts, but the secretary of state had said that she

would not accept any returns after the statutory seven-day deadline, November 14. The matter quickly made its way to the Florida Supreme Court, which on November 17 directed the state Elections Canvassing Commission not to certify the final results of the election until further order of the court.

On November 21, two weeks after election day, the Florida Supreme Court ruled that the secretary of state had abused her discretion in refusing to accept returns from counties conducting manual recounts, and ordered her to accept any such returns that came to her by 5:00 P.M. on Sunday, November 26. Manual recounts then continued in Broward,

time the registration books are open and even on election day. Precinct judges hear challenges on voters and can summon local law enforcement officers if problems arise. Laws on campaign finance disclosure ensure that the public has access to information regarding money received and money spent. Most information in election offices is subject to public records laws and available for public inspection. Additionally, the intense interest with which the candidates, the political parties, and the electorate watch the electoral process amounts to a safeguard.

In 1998, Gaston County was using direct-record electronic voting machines for the first time. Before the election, officials discovered some problems with the machines, and an upgrade was necessary. The machines were run through basic testing, but the upgrades cut into time for additional testing for known “bugs.”

Suddenly it was election night. The first sign of a bug appeared when the time came to report the totals. Nearly one-third of Gaston County’s precincts reported no votes because the cartridges that read the totals from the machines were not functioning. Another facet of this bug was evident for the county at large: when the vote totals reached 32,000, the tabulators would not tally any higher.

The chair of the county board of elections opened the process up to all who wished to observe, as the computer experts opened the machines and retrieved the source code that showed the proper vote totals. The internal drives that showed how each voter had voted were intact and retrievable. Two statewide court of appeals races, one state House of Representatives race, and one local race were close enough that they were determined by the data retrieved from the machines. Because of the safeguard of public scrutiny, confidence in the way the matter was handled was high, and there were no election protests.

The Provisional Ballot: Rowan County

A long-time practice of county boards was to purge voter rolls to clean out deadwood. In Rowan County a voter was removed from the roll for not voting in any elections over a cycle that included two presidential elections. This practice was later made unlawful under the National Voter Registration Act of 1993. When the voter arrived at the polls in a 1995 election in the town of China Grove, she was told that she was not on the roll. In other states she might have been turned away. In North Carolina, however, she was allowed to vote a “provisional ballot”—a ballot that is put aside on election day and not counted unless it can be determined that the voter should have been on the roll. In this voter’s case, the board of elections had access to records that showed she had been registered to vote in the county, had been removed under the old purge law, but had maintained continuous residence in the county. The board determined that her provisional ballot should be counted. Without her vote the election would have ended in a tie; with her vote, the winner’s margin was one.

Conclusion

These safeguards and others are part of an electoral process in which all elements must work together. When one of the safeguards is overlooked, ignored, or circumvented, problems may follow. The weakest links can be threatened by stresses on the system:

- Funding cuts that overburden county election staffs
- Shortened cycles for absentee ballots
- Shortened cycles for ballot preparation and equipment testing
- Shortened cycles for recounts and for administrative hearings of election protests
- The challenge of finding experienced and skilled precinct workers

North Carolina’s election process is strong. With these safeguards and the participation of the citizenry, it should withstand the challenges.

Miami-Dade, and Palm Beach counties (Volusia having finished), all counties using punch-card voting machines.

No state guidelines existed on how to conduct the manual recounts or how to determine voter intent. If a voter punched a clean hole in the proper place in the ballot beside a candidate’s name (knocking the chad completely out), the machine counted that vote. But what if the voter pushed the chad so that it hung by one or more corners (a hanging chad), or pushed the chad out to a certain extent but did not push it loose (a pregnant or dimpled chad, depending on how far out it stuck)? Which of those, if any, counted as a vote?

Broward County got its returns to the secretary of state by the November 26 deadline. Palm Beach County missed by a few hours. In Miami-Dade the canvassing board concluded that meeting the deadline was impossible and stopped counting altogether. All other counties with outstanding returns reported them to the secretary of state, and on the evening of November 26, the Elections Canvassing Commission certified the results and declared Bush the winner by a margin of 537 votes.²²

The next day, Gore moved from protest to *contest*, filing a new lawsuit in Florida state court challenging how the votes had been counted and seeking

a new round of recounting, this time by state court judges. On December 4, the trial judge ruled that Gore had failed to make the showing necessary to sustain a contest. Gore appealed to the Florida Supreme Court.

That same day, in the *protest* case, the U.S. Supreme Court overturned the November 21 decision of the Florida Supreme Court and sent the case back, saying that the court had not dealt sufficiently with issues of federal law. So now both the protest and the contest were in the hands of the Florida high court.

On December 8, the Florida Supreme Court ruled on Gore’s *contest*. It held

that the Elections Canvassing Commission should have counted 215 net votes for Gore identified by the Palm Beach County Canvassing Board and 168 net votes for Gore identified in the partial recount by the Miami-Dade County Canvassing Board. Those two together reduced the 537-vote Bush lead to 154 votes. Further, the Florida court ruled, there were 9,000 ballots in Miami-Dade County that had never been reviewed manually because that county's canvassing board had stopped counting when it realized it could not finish by the November 26 deadline. Those ballots should be manually recounted immediately, the state supreme court said (along with a statewide manual recount, if the trial court so decided). It ordered the trial court to make that happen.

The world once again held its breath. Were there 154 net Gore votes in those 9,000 ballots? If so, the entire election would change.

The trial court judge immediately got the recounts going. To avoid some of the confusion and the chaos of the earlier rounds of manual recounting, he ruled that no one could object to how particular ballots were counted. He directed county canvassing boards across the state to develop their own protocols for going about the recounts. He explicitly acknowledged that there would be no specific, uniform standards to guide the recounts.

On December 9, the U.S. Supreme Court brought the whole process to a stop. It stayed the December 8 decision of the Florida Supreme Court. Explaining the stay, Justice Antonin Scalia said, "Count first, and rule upon legality [of votes] afterwards, is not a recipe for producing election results that have the public acceptance democratic stability requires."²³

Three days later, on December 12, the U.S. Supreme Court closed this chapter in American election history when it ruled that the manual recounts must not go forward because they were being conducted under such uneven conditions as to violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution: "[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but

indeed within a single county from one recount team to another."²⁴ The Court also objected to the Florida Supreme Court's ordering a recount of "under-votes" (ballots on which the voter's intent may not be clear) but not overvotes.

That very day was the federal statutory deadline (the importance and the impact of which was under debate) for the states to report their selection of electors to the Electoral College. That deadline having arrived, the U.S. Supreme Court said, there was no time to develop uniform guidelines for conducting the manual recounts. Therefore they must be stopped.

The recounts were over. Bush was the winner.

Why North Carolina Would Not Have Looked as Bad

Florida looked bad for many reasons:

- It lacked a state elections structure that could quickly give accurate, controlling guidance to the counties on such matters as manual recounts, and could effectively and efficiently handle election challenges.
- When Gore started election protests in four counties, elections officials were unsure of their responsibilities and powers and had nowhere to turn for definitive guidance except the courts.
- At the polls, voters in county after county were perplexed by inscrutable ballots.
- Officials turned people away at the polls, affecting African-Americans disproportionately.
- Overseas absentee ballots were pouring in through the first week and a half after the election, and no one seemed sure just how to treat them.
- The state's hodgepodge of election machinery failed to count some votes that voters meant to cast.

If the election had been as close in North Carolina as it was in Florida, we would have done much better.

Our State Elections Structure

At the core of our state elections structure is a central administrative authority—the State Board of Elections—that Florida completely lacked. Our state

board is composed of three Democrats and two Republicans (or vice versa, when a Republican is governor), appointed by the governor from lists of nominees provided by the two parties. The state board appoints an executive director as the state's chief elections officer.

At the local level, North Carolina has administrative arms—county boards of elections—that Florida also completely lacked. Each county board is composed of two Democrats and one Republican (or vice versa, when a Republican is governor). The state board appoints the members of the county boards, again from lists supplied by the parties. Each county board then selects a county director of elections, who, to be protected from the winds of political influence, can be dismissed only by the state board.

By state statute, "The State Board of Elections shall have general supervision over the primaries and elections in the State, and it shall have authority to make such reasonable rules and regulations with respect to the conduct of primaries and elections as it may deem advisable."²⁵ County boards are directed by statute to carry out the instructions of the state board.²⁶

So at the state level, North Carolina has a bipartisan board whose members are appointed from lists of names supplied by the parties. The closest structure in Florida was the Elections Canvassing Commission (composed of the governor, the secretary of state, and the head of the Elections Division of the secretary's office), but its only job was to certify election results. Florida's chief elections official was the secretary of state, an official elected in a partisan election. North Carolina's chief official is an appointee of the bipartisan board.

At the county level too, North Carolina has a bipartisan board appointed from lists supplied by the parties. The closest structures in Florida were the precinct-level election board (appointed by the supervisor before each election), which conducted the elections and reported results to the supervisor but had no authority over him or her; and the county canvassing board (composed of the county elections supervisor, the chair of the

FIXING WEAKNESSES IN THE SYSTEM

North Carolina's fundamentally sound elections system has some notable weaknesses. To continue to ensure fair and efficient elections, we must do the following:

- Find money for counties to replace aged voting equipment with up-to-date, fully accessible technology
- Recruit precinct workers from all age groups and races, reflecting the makeup of the community
- Involve universities, community colleges, and public school systems in supplementing the training of precinct workers and in providing civics education for all citizens
- Improve voters' education on the importance of voting and on the basics: where to vote, how to vote, and in what districts they reside
- Guarantee fair market salaries for county elections directors and their staffs
- Ensure that county elections offices are adequately staffed
- Find money for the State Board of Elections to assist county boards with the heavy burdens imposed by law in maintaining the accuracy of voter registration lists
- Keep the statewide elections computer system up-to-date, and expand its capacity to bring to reality instant, paperless, electronic entry of voter registrations, through the acceptance of digitized signatures when voters register at the Division of Motor Vehicles, the Employment Security Commission, and other public agencies
- Support a legitimate test case for the U.S. Supreme Court to revisit *Buckley v. Valeo*, a 26-year-old decision that effectively constrains state regulation of campaign contributions¹
- Provide a computer terminal in every county board of elections office, for the public and news media to review campaign finance reports and for candidates and parties to file campaign finance reports electronically

Note

1. *Buckley v. Valeo*, 424 U.S. 1 (1976).

county commissioners, and a judge), which was not a regularly convening board with full authority to conduct elections. In North Carolina the chief county elections official, the director, is selected by the bipartisan county board and can be dismissed only by the bipartisan state board. In Florida the county elections supervisors were elected in partisan elections, so some earned their offices as Democrats, others as Republicans.

Without the guidance of a central state board, the Florida elections supervisors and canvassing boards were on their own and went adrift at some very critical junctures and over some

very basic issues. For instance, on the day after the election, when Gore began his election protest, the Palm Beach County Canvassing Board was uncertain whether it had the authority to conduct a manual recount of all the ballots. It asked Florida's secretary of state and attorney general for opinions and got conflicting answers. Unsure what else to do, it went to court to get a ruling and ended up as a party to a lawsuit that went all the way to the U.S. Supreme Court. In North Carolina a county board similarly unsure of such a basic question could have gotten an immediate, direct, and definitive answer from the office of the State Board of

Elections, binding on the county board. There would have been no need for a lawsuit.

Our Election Protest Procedure

A main contributor to Florida's woes was its awkward procedure for pursuing an election challenge. As explained earlier, it used a bifurcated system: protests before certification of results, contests after. Gore initiated both kinds of challenges. So legal actions were going on simultaneously in the highest courts of the state and the highest court of the nation on the protest and on the contest. For the American public, keeping matters straight was difficult.

In North Carolina the procedure would have been much simpler and much easier to understand.²⁷ We do not have a bifurcated scheme. We have one proceeding, called a protest. The election results are not certified until this protest proceeding is completed. It may be begun by any voter or candidate, with the filing of a complaint with the county board of elections. If the county board determines that there is reasonable cause to believe that a violation or an irregularity has occurred, it conducts a hearing, to which it may subpoena witnesses, who testify under oath. The county board then makes findings of fact and conclusions of law and issues an order. The decision by the county board may be appealed to the State Board of Elections. The state board may then make its decision on the basis of the record of the hearing by the county board, or it may hold its own hearing.

In its decision it may order votes recounted or order totals adjusted to correct for mistakes. In the most serious circumstances, it may order new elections. Only after the state board has issued its decision may the matter be appealed to a court. By statute the appeal goes to just one superior court—Wake County.

The North Carolina procedure has many advantages over the Florida one. First, since there is one proceeding instead of two, there cannot be duplicative activities going on at the same time.

Second, since the state board cannot certify the election results until the protest has been decided, the Florida

situation of already-certified results being tried in court cannot happen.

Third, all county boards conducting protest hearings work under the same rules and get the same directions from the state board. If the elections board in Forsyth County (to use an arbitrary example) were faced with a protest filed by Gore and were for any reason unsure of its powers and obligations, it would simply seek guidance from the state board and be bound by the guidance that it received. By contrast, when the Palm Beach County Canvassing Board needed advice, it asked both the secretary of state and the attorney general, and when it received conflicting advice, it went to court. That simply would not happen in North Carolina.

Fourth, if the same issue were presented to several county boards at the same time (say, to those of Buncombe, Cumberland, Mecklenburg, and New Hanover), just as Gore started protests simultaneously in Broward, Miami-Dade, Palm Beach, and Volusia counties, the state board could give consistent instructions to all the boards and could, if circumstances required, simply consolidate the hearings from the county boards and conduct one unified hearing itself.

Our Ballot Review Procedure

In Palm Beach County, acting in good faith and with the best of intentions, the elections supervisor designed a ballot that led 19,000 voters in her county alone to punch two holes in the presidential section, completely invalidating their presidential votes. To her credit, the supervisor had shown the ballot design to local leaders of both parties beforehand, and they had expressed no reservations. But she did not show it to anyone with elections expertise. Why not? Because there was no requirement that she do so, and no one to respond if she had asked.

The situation in North Carolina is completely different and vastly better. Before every election, all 100 county directors of elections send their ballot designs to the State Board of Elections office.²⁸ There the designs are reviewed for fairness and ease of use. Would the butterfly ballot have been rejected? That cannot be answered with certainty; no one now in the state board office

remembers a butterfly ballot ever being submitted. But if one had been, there is an excellent chance that an experienced hand at the office would have said, “This looks confusing to me.”

Our Procedures at the Polls

What about all the potential voters who were turned away at the polls on election day in Florida? Could the North Carolina situation have been just as bad?

No, for three reasons.

First, the bipartisan State Board of Elections would never have approved the use of a computer matching system for purging the voter rolls that was so grossly overinclusive, leading to the removal of names of people who were clearly alive, sane, and nonfelonious.

Second, in North Carolina, the counties remove names from the voter rolls only according to precise and detailed instructions from the state board. In Florida each county supervisor was on his or her own to figure out what to do with the computer lists. Some directly used the lists to wipe voters off the rolls; others held individual hearings on names listed; still others just threw the lists away. North Carolina’s counties would all have been given the same instructions and would have been answerable to the state board for any deviation.

Third, and most important, we just do not turn people away at the polls as they did in Florida. There, if a person’s name did not appear on the voter roll (because it had been removed according to the computer lists or otherwise) and the poll worker could not get in touch with the election supervisor’s office to clear the problem up, the person was turned away. His or her vote was simply lost. In North Carolina, if a voter asserts that he or she is properly registered in that precinct but his or her name is not on the voter roll, the precinct worker will try to clear the matter up. If it cannot be resolved, however, the voter is *not* turned away. Instead, the voter may cast a “provisional ballot”—that is, a ballot that is secretly marked like all other ballots but is then stored apart from regular ballots with the other provisional ballots. At a later time, after the polls have closed, the voting status of all those who have cast provisional ballots is reviewed by the county board.

The ballots of those who were properly registered are then counted.

A voter previously on the roll who has somehow been erroneously removed would not be turned away.

Our Absentee Ballot Situation

Florida’s procedures, growing out of a twenty-year-old lawsuit settlement, required county canvassing boards to count overseas absentee ballots for *ten days after the election*, as long as they had been postmarked or signed and dated by election day. With the margin so extraordinarily close, both sides realized that these hundreds of votes could make the difference in the election, and both sides pressured the county boards to be more (or less) insistent on the postmark and signature requirements in accepting individual ballots. The county boards across the state responded with inconsistent and uncertain practices.

The problem stemmed from the fact that Florida’s September primary is so close to its November general election that there is not time to get the overseas ballot applications in, the ballots out, and the returned ballots back before election day. In North Carolina, there is time between the May primary and the November election to process overseas absentee ballots.²⁹ The deadline is the close of polls on election day, the deadline set in general federal law.

Our Guidelines on Voter Intent

In January 2001 the Georgia secretary of state (that state’s chief elections officer) wrote,

Could Florida’s problems just as easily have been Georgia’s problems? The answer is unquestionably yes. Like Florida, we have several different voting technologies. Like Florida, counties in Georgia have different methods of counting votes, with differing levels of accuracy. Like Florida, tens of thousands of voters cast ballots that did not register a choice in the presidential race.³⁰

The Georgia secretary of state was focusing on the Florida problem that ultimately led the U.S. Supreme Court to stop the recount procedure; methods of counting votes that varied from county

to county, without definitive guidelines and standard practices. This problem was tied to the state's election equipment.

As noted earlier, in 66 of Florida's 67 counties, four voting-machine systems were in use: mechanical-lever machines, punch-card ballots, modern optical-scan machines, and touch-screen machines. Each system has its problems, but punch-card ballots caused the greatest hue and cry in Florida.

Under any of these systems, voters may intend to vote but mark their ballots in ways that the machine cannot read: they may not pull the mechanical lever all the way down, not punch the chad completely out, not use the special marker to fill in the right blank, or not touch the screen in the right place. If this happens, the voter has not voted in that race, and the ballot is considered an undervote. Or the voter may mark two candidates in the same race, thus casting an overvote. The machine will not count a vote for that voter in that race.

It is generally accepted that in the overwhelming majority of cases, overvotes are accidental, but the situation with undervotes is more complicated.³¹ Voters may intentionally decide not to cast a vote in a particular race, but this effect is usually found in races for offices lower on the ballot, not a phenomenon expected in a presidential race. One study of the 2000 election in California (covering 46 of the state's 58 counties) found the overvote rate in the presidential election to be 0.35 percent and the undervote rate to be 1.34 percent, for a combined total of 1.69 percent.³² That means that 98.31 percent of voters cast valid, countable votes in the presidential race.

Some studies undertaken since the 2000 election have indicated that these problems are spread across several types of voting machines.³³ Other studies have indicated that punch-card voting machines have a measurably higher rate of these kinds of errors.³⁴ As a result, a number of jurisdictions, including Florida and Georgia, have decided to do away with punch-card voting.³⁵ In 2001 the North Carolina General Assembly passed legislation prohibiting counties from adopting punch-card machines, and directing counties that now have them to replace them by 2006.³⁶ It also

specifically outlawed the use of butterfly ballots.³⁷

In the 2000 election, North Carolina used all the same voting systems that Florida—and Georgia—did. We continue to use them all today.

However, in its December 12 decision stopping the recount process, the U.S. Supreme Court focused on the fact that the recounts that were under way varied from county to county in their guidelines and procedures. The Court was careful to note that it was not immediately concerned about counties using different kinds of machines: "The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections."³⁸ Rather, the Court was concerned that the counties were counting without uniform guidelines: "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."³⁹

The Georgia secretary of state clearly thinks that the problem could have been just as bad in Georgia. The problem did arise in North Carolina on election night in 2000, but we handled it in the regular course of business. Watauga County uses the same punch-card voting machines that proved so problematic in Florida. In the November 2000 election, five seats on the county board of commissioners, all elected at large, were on the ballot. The five-highest vote getters would be elected. Two Republicans and two Democrats were clearly the top four, but for the fifth seat, just eight votes separated two candidates, one of each party. The one who trailed requested a machine recount, to which he was automatically entitled by the narrow mar-

gin. The machine recount resulted in a different outcome: the candidate who had initially trailed by eight votes led by two. The now-trailing candidate requested a manual recount.

The Watauga County director of elections, aware of the difficulties of the circumstance, contacted the State Board of Elections office—a luxury that the supervisors in Florida did not enjoy. The state board staff went over the appropriate procedures with her.⁴⁰ Those procedures contain guidelines for counting punch-card ballots—just what the U.S. Supreme Court said Florida lacked.

First, the guidelines provide that the voter's intent be the determining factor. We as a state have chosen not to disenfranchise voters because of a lack of technical compliance with voting instructions.

Second, the guidelines provide that overvotes for a particular office not be counted for that office. Third, the guidelines provide detailed instructions on how the counting teams are to be assembled and how they are to handle the ballots.

Most important, the guidelines contain specific directions on undervotes: how to determine the voter's intent when the chad has not been cleanly punched out in a way that the machine can count. They require the counters to consider the entire ballot and the way in which the voter has punched it in the different races. If there is a consistent pattern—if, throughout the ballot, there are pregnant and dimpled chads, for example—then pregnant and dimpled chads are to be counted. The pattern indicates that is simply the way this voter marked his or her ballot. On the other hand, if the chads are cleanly punched in all races but one, and there is a dimple for that one, it is not to be counted. The



We as a state have chosen not to disenfranchise voters because of a lack of technical compliance with voting instructions.

voter clearly knew how to mark the ballot. It should not be inferred that he or she meant to indicate a vote where the dimple is.

These are just the kinds of instructions that Florida lacked and that led the U.S. Supreme Court to its conclusion that equal protection was being violated in that state.

An Adaptable System in an Imperfect World

In any election, machines may malfunction, voters may make mistakes, elections officials may slip up. When the vote is as close as it was in Florida in 2000—and when the stakes are as high as they were then—such problems are magnified.

Florida suffered from an elections structure that could not quickly give accurate and controlling guidance to local officials who desperately needed it, from an awkward election protest scheme, from ballot designs that were not reviewed by anyone with expertise and experience, from a voter-list system that turned people away at the polls, from an absentee ballot system that unmercifully stretched out a confused situation, and from election machinery vulnerable to undervoting.

On every point the North Carolina structure and practice are superior. We have an administrative structure with the necessary authority and flexibility, more streamlined and understandable election protest and absentee ballot procedures, a system for review of ballot designs for fairness and ease of use, a provisional ballot system that protects people from being turned away at the polls, and state guidelines on determining voter intent.

On election night in 2000, we made mistakes. We have done so in every election in the past, and we probably will do so in every election to come. But North Carolina will never look as bad as Florida did that dreadful November.

Notes

1. John Mintz & Peter Slevin, *The Florida Fiasco*, WASHINGTON POST, June 1, 2001, at A1.
2. Palm Beach County Canvassing Bd. v. Harris, 772 So. 2d 1220, 1226 n.4 (Fla. 2000).
3. VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION,

Report of the United States Commission on Civil Rights, ch. 5, p. 5 (Washington, D.C.: June 2001).

4. STEVEN DONZIGER, AMERICA'S MODERN POLL TAX: HOW STRUCTURAL DISENFRANCHISEMENT ERODES DEMOCRACY, Report of the Advancement Project, 30 (Washington, D.C.: the Project, Nov. 7, 2001).

5. FLA. STAT. ch. 98.0975(4) (1999).

6. VOTING IRREGULARITIES, at ch. 5, p. 11.

7. DONZIGER, AMERICA'S MODERN POLL TAX, at 30.

8. VOTING IRREGULARITIES, at ch. 1, p. 20.

9. REVITALIZING DEMOCRACY IN FLORIDA, Report of the Governor's Select Task Force on Election Procedures, Standards and Technology, 55 (Tallahassee, Fla.: Mar. 1, 2001); VOTING IRREGULARITIES, at ch. 8, p. 5 n.44.

10. Ford Fressenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, NEW YORK TIMES, Nov. 12, 2001, at A1.

11. VOTING IRREGULARITIES, at ch. 8, p. 5.

12. *Id.* at 7.

13. Fressenden & Broder, *Study of Disputed Florida Ballots*, at A1.

14. The suit was brought under the predecessor to the current Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff through 1973ff-6.

15. FLA. ADMIN. CODE r. 1S-2.013.

16. Fressenden & Broder, *Study of Disputed Florida Ballots*, at A1.

17. *Id.*

18. Harris v. Florida Elections Canvassing Comm'n, 122 F. Supp. 2d 1317 (N.D. Fla. 2000).

19. Harris v. Florida Elections Canvassing Comm'n, 235 F.3d 578 (11th Cir. 2000).

20. FLA. STAT. ch. 101.5614(5) (2000).

21. Gore v. Harris, 772 So. 2d 1243, 1256 (2000).

22. Bush received 2,912,790 votes, Gore 2,912,253. *See id.* at 1247 n.4.

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

24. Bush v. Gore, 531 U.S. 98, 106 (2000).

The court cited examples:

A monitor in Miami-Dade County testified at trial that he observed that three members of the county canvassing board applied different standards in defining a legal vote. And testimony at trial also revealed that at least one county changed its evaluative standards during the counting process. Palm Beach County, for example, began the process with a 1990 guideline which precluded counting completely attached chads, switched to a rule that considered a vote to be legal if any light could be seen through a chad, changed back to the 1990 rule, and then abandoned any pretense of a *per se* rule, only to have a court order that the county consider dimpled chads legal. This is not a process with sufficient guarantees of equal treatment. *Id.* at 106–07.

25. Section 163-22(a) of the NORTH CAROLINA GENERAL STATUTES (hereinafter G.S.). For a general discussion, *see* ROBERT P. JOYCE, THE PRECINCT MANUAL 2002 (Chapel Hill, N.C.: Institute of Gov't, The Univ. of N.C. at Chapel Hill, 2002).

26. G.S. 163-33(12).

27. At the time of the 2000 elections, North Carolina's protest provisions were found in the state Administrative Code at 8 NCAC 2.0001 through .0009. They have since been codified in the General Statutes in substantially the same form at G.S. 163-182.9 through -182.14.

28. G.S. 163-165.3.

29. Of course, 2002 has been an unusual year. For reasons unrelated to the 2000 presidential election, North Carolina's May primary was delayed until September.

30. CATHY COX, THE 2000 ELECTION: A WAKE-UP CALL FOR REFORM AND CHANGE, Report to the Governor and Members of the General Assembly, Executive Summary, 1 (Atlanta, Ga.: Jan. 2, 2001).

31. HENRY E. BRADY ET AL., COUNTING ALL THE VOTES: THE PERFORMANCE OF VOTING TECHNOLOGY IN THE UNITED STATES 8 (Berkeley: University of Cal., Berkeley, Sept. 2001).

32. *Id.*

33. CALIFORNIA INST. OF TECHNOLOGY AND MASSACHUSETTS INST. OF TECHNOLOGY CORP., VOTING: WHAT IS AND WHAT COULD BE 21 (Pasadena, Cal.; Cambridge, Mass.: CalTech/MIT Voting Technology Project, July 2001). In Presidential elections over the past decade, counties using optical-scan and mechanical-lever equipment each had a combined over-vote and undervote total of 1.5 percent, counties with optical-scan machines 2.3 percent, and counties with punch-card machines 2.5 percent.

34. *Id.* at 29—for example, finding that the punch-card rate of combined overvotes and undervotes was significantly higher than the rates of other systems.

35. The U.S. Supreme Court gave states a push in this direction in its December 12 decision:

This case has shown that punch card balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter. After the current counting, it is likely that legislative bodies nationwide will examine ways to improve mechanisms and machinery for voting. Bush v. Gore, 531 U.S. 98, 104 (2000).

36. G.S. 163-165.4A.

37. G.S. 163-165.4B.

38. *Bush*, 531 U.S. at 109.

39. *Id.*

40. They now are codified at 8 NCAC 09.0006. Before the Florida experience, they were not codified.