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Grasping at Straws, Rushing to Judgment: Election Reforms in Florida, 2001

Richard K. Scher

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GRASPING AT STRAWS, RUSHING TO JUDGMENT: ELECTION REFORMS IN FLORIDA, 2001

*Richard K. Scher**

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I. INTRODUCTION

In the wake of the "Florida fiasco" presidential contest of November 2000, numerous electoral reforms were proposed, presumably with the goal of ensuring that something like this never happens again, at least in the Sunshine State. Editorial, Op-Ed, and "voice of the people" pages in newspapers large and small were stuffed with ideas, as well as expressions of outrage, about what happened and how to correct "the problem(s)." Roundtables, conferences, seminars, and speeches took place in forums ranging from academia to neighborhood civic and political groups to "analyze" and "explore" how we in Florida managed to create such a mess, and become the laughingstock of the nation. Governor Jeb Bush appointed a blue-ribbon commission on the election to study alternatives for voting reform and to make reform-oriented recommendations for the Spring 2001, session of the State legislature. Indeed, the Governor made election reform one of his top legislative priorities.

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All of these effects are undoubtedly well-intentioned, and in some measure might prove worthwhile. At a minimum, the "Florida fiasco" has forced us to rethink what elections are for, how voters are expected to cast ballots, and how votes are to be counted (and recounted). This is all to the good, because the health of a democracy depends heavily on how free elections are carried out.

II. THE SYSTEM WORKED

It is the author's firm view that it was not Florida's electoral system that was fundamentally flawed. In fact, the system did what it should have done: record and count votes, even under conditions of extreme duress.¹ There was no rioting in the streets.² Political institutions were not undermined. Society's stability was not compromised. Democracy was not threatened, at least not seriously. Had the U.S. Supreme Court not intervened, it is likely that the system would have worked well enough to produce a victor, instead of one who was imposed. Florida statutes provide mechanisms for designing ballots, casting and counting votes, and providing redress when the outcome is in doubt or in dispute. These remedies include mandatory recounts by local canvassing boards (composed of the county supervisor of elections, chair of the county commission, and a county judge) when the difference between candidate totals is at or less than one-half percent, and legal remedies for contesting and protesting elections.³

Rather, the author contends that the so-called "problems" developed when the system, specifically the local canvassing boards, were not allowed to work. Instead, lawyers and courts preempted these canvassing boards, even as they had barely begun the recount process, to the extent that they could not carry out their legally-assigned tasks. In addition, both candidates and their surrogates waged massive public relations campaigns

1. "System" in the sense meant here refers to Florida's constitutionally defined, decentralized structure of elections, in which supervisors of elections in individual counties are responsible for designing ballots, establishing polling places and the method of voting, counting, and (if necessary) recounting votes, and convening local election canvassing boards to review questionable ballots.

2. The author held numerous conversations and interviews with domestic and foreign media over what was happening in Florida after November 7, 2000. The most interesting was a discussion with a radio station in Singapore. The first question was "Why isn't there rioting?" My answer evidently was not satisfactory — it was to the effect that there was no reason to riot, as the process of determining the Florida outcome (at least at that juncture) appeared to be working, albeit not smoothly — and the interviewer returned to the matter of non-riots several times in the hour-long conversation.

3. In its Spring 2001, session, the Florida Legislature lowered the mandatory recount level to 0.25% difference in vote totals between candidates. Florida Election Reform Act of 2001, 2001 Fla. Laws ch. 2001-40 (2001).

that often distorted what the process should have been doing. The purpose of these efforts, of course, was to win the hearts and minds of the public, and through the pressure of public opinion, force an end to what everyone recognized as a long and tedious process. Also, the electronic and print media, because of their compulsive desire and need to declare a "victor," failed to support the key democratic idea that the process of finding the winner (albeit awkward and slow), is as important to determining a legitimate winner as declaring one.

In sum, Florida had in place a legal and political process that would have legitimately elected a President of the United States. But lawyers, courts, the two major candidates, and the media chose instead to embark on strategies which undercut and truncated that process. Of course there were problems with the Florida vote, but they were not systemic. The problems were administrative and mechanical, and we shall examine the major ones shortly. To emphasize the point, even if Florida had the only perfect voting system in the history of democracy, it would not have mattered because the two candidates, their lawyers, the media, and the U.S. Supreme Court removed the process from the people. The system itself could not determine the winner, because it was not permitted to do so.

This is obviously not a popular view, and it is surely one which flies in the face of current conventional wisdom and political correctness. The more common interpretation is that Florida's election system was fatally flawed; it could not produce a "winner," and the State became the laughingstock of the nation and the world.⁴ The result has been undeserved statewide embarrassment, *mea culpas*, general chest-beating and renting of sackcloth, and calls for reform from the highest levels of State government down to neighborhood barbershops and community centers.

One must wonder, however, whether some of this activity, including proposed and implemented reforms, is off the mark. It could even be argued that many are reforms in search of a problem. What, after all, is the problem? The truth is, even though there were numerous difficulties with the election in Florida this fall and in its aftermath, the system actually worked. Candidates campaigned and voters listened, went to the polls, cast votes in record numbers, and waited to find out who won as counting proceeded on election night. The voting mechanism did not cause Florida's inability to determine a winner from the ballots, nor did they cause the U.S. Supreme Court to stop recounts and determine the winner. Rather, these problems resulted from the fact that six million Floridians

4. There were reports, not all substantiated, that some other democratic nations were willing to send "observers" to Florida to assist in determining the outcome. Whether or not these were serious proposals or expressions of sarcasm at U.S. efforts to export its style of democratic elections to other nations is not clear.

were so closely divided in their voter preference for the two major candidates that a mere handful of ballots of voters with indiscernible intents determined the outcome. Indeed, the election was a statistical and actual dead heat. But, the counting process, legally in the hands of local canvassing boards, was so invaded and pressured by outside forces that there was no way for the members in some crucial counties to make calm, rational, considered decisions as to the intent of the voters in the flawed ballots. As a result, many ballots were ignored, passed over as indecipherable, or simply thrown away.

Indeed, it is this last point which points out how democracy was dented, if not damaged, in Florida during the election "fiasco." The constitutional and legal jurisdiction for conducting elections in Florida is the county, not the State.⁵ This is the level where local officials decide how to count uncertain or unclear ballots.⁶ Yet it was in the county institution of the canvassing boards that statewide and national forces pressured the canvassing board members about whether to and how to count and recount the ballots. These invasions of the legally constituted canvassing boards' prerogatives are at the root of the "Florida fiasco," for these invasions caused all of the difficulties. More fundamentally, these invasions showed a clear disregard for Florida's Constitution, laws, and state-local relations in conducting of elections. This embarrassment to Florida's democracy must be understood, as well as, the fact that many, perhaps thousands, of African-Americans were denied their right to vote on election day.⁷

Normally, elections are decided by more than a few percentage points. Thus, "spoiled" ballots, "under-voted," or "over-voted" ballots,⁸ and indecipherable ballots (all of which are present in every election) do not usually influence the outcome. In this case they did; according to the official data of the Division of Elections, there were only 537 votes out of more than 6 million cast separating Mr. Bush and Mr. Gore. Expressed mathematically, that is a difference of slightly more than 8/100,000ths, or 0.008%. Physicists have difficulty measuring the behavior of elemental particles at this nano-level, so it is not surprising that, because supervisors of elections and local election canvassing boards had trouble deciphering

5. FLA. STAT. § 101.166 (2001).

6. FLA. STAT., tit. IX, §§ 101-102 (2001).

7. *Voting Irregularities in Florida During the 2000 Presidential Election: Before the U.S. Comm'n on Civil Rights*, available at <http://www.usccr.gov/vote2000/stdraft1/main.htm>. This Article will not explore this important issue due to lack of space.

8. Spoiled — a ballot that has been so mismarked, injured, mutilated, or otherwise damaged as to be indecipherable. Under-vote — a ballot in which the voter failed to indicate a choice for a candidate in a competitive race; for example, failure to vote for one of the presidential candidates constitutes an "under-voted" ballot. Over-vote — a ballot in which a voter marks a choice for more than one candidate in a given competitive race. If for example, the voter marks their ballot with two choices for president, that would be an "over-voted" ballot.

some ballots, a winner could not readily be determined. Thus, recounting legible ballots, and attempting to decipher and interpret questionable ballots as to the voter's intent, reached paramount importance. Literally every single ballot affected the outcome, because the vote totals were virtually identical.

These facts are unrelated to our voting system. The system actually worked, insofar as it is designed to record voters' wishes and record the results. It recognizes that some voters will make mistakes or otherwise screw up. No one ever claimed it was perfect, and indeed more cynical observers might have noted that Florida's election machinery always had some "give and take" so that it could be manipulated if it were necessary to do so.⁹ As Josef Stalin shrewdly noted years ago, voters do not count; it is the people who count the votes, who count. Manipulation of electoral outcomes has happened, and not just in Chicago or New York or Kansas City. Only the most naive or ill-informed would fail to recognize that elections right here in Florida have been rigged, or jiggered, or stolen, long before November 2000.

Thus, nothing happened that November in Florida that had not happened before. Previously no one noticed these imperfections, and few cared, because it did not matter; the election outcome was clear enough that voter mistakes and jiggering of election machinery did not significantly influence it. In those cases where they might have cared about these imperfections, the offices involved were relatively minor. In the present instance, the Presidency of the United States was at stake and the whole election depended upon a few determinable or indecipherable votes; therefore, Florida's imperfections received more attention than they had in the past. Thus, the extraordinary amount of excitement and activity that took place following the election.

Even months after the conclusion of the election, recounts, and court proceedings, and the avalanche of commentary accompanying them, we are still unable to define "the problem." Assuredly, efforts to create an error-free electoral system are doomed to failure. The perfect, flawless electoral system has not been designed, and cannot be, for two reasons: statistical probabilities can never be reduced to zero; and whenever

9. Perhaps the most prominent recent example came in the mayoral election in the City of Miami, the results of which were thrown out because of electoral fraud. Dan Keating, *Miami Disproves an Election: Herald Combines Public and Non-Public Resources to Show Illegal Voting in Mayoral Race*, *QUILL*, Sept. 1998, at 7; see also David Barstow & Don Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, *N.Y. TIMES*, July 15, 2001, available at <http://www.nytimes.com/2001/07/15/politics/15BALL.html>. A study by the *N.Y. TIMES* indicated that overseas ballots were definitely manipulated and jiggered, mainly by Republicans, during the 10 days following November 7, as Florida law permitted those ballots to be considered. *Id.* Ultimately, of course, those ballots made up the 537 vote differential between Bush and Gore. *Id.*

massive numbers of human beings are involved in an often-complicated activity such as voting, there will be mistakes, errors, and sheer boneheadedness, if not outright stupidity. Each of these requires a brief comment.

Floridians, probably like the vast majority of Americans, like to think of elections as producing absolute results. The vote totals tallied on election night become reified, as though they were an objective reality. They were accepted as gospel, solemnly ratified and declared official, and treated as though their veracity was beyond dispute. This was not the right way to look at the results. Because we know voters make mistakes, the manner of recording and counting ballots introduces possible errors, and there are ways in which both ballots and results can be manipulated, the final tallies need to be viewed as probability statements.¹⁰ In an ideal voting system, this probability approaches zero, and presumably it is the goal of our present system, as well as the reforms put forward, to try to get as close to zero probability of error as possible. But for statistical reasons that cannot be developed here, it is never possible to get to zero; all we can do is come close to it. There will always be errors — bias, if you will — built into the system of voting, vote recording, and vote counting.

Matters get additionally complicated by introducing the “human factor.” There is little need to develop this point, because anyone not a hermit knows that even the most careful, thoughtful, circumspect person can and will blunder, at least on occasion. When the tasks at hand are complex, such as choosing candidates and issues on the ballot, the possibility of error increases. Fatigue, distraction, haste, indecisiveness, lack of concentration, misreading names or words, for example, can cause the most conscientious voters to vote in a manner they did not intend, and can even invalidate their ballot. For the careless, thoughtless, ill-informed individual, the likelihood of error increases exponentially. Unfortunately, political scientists have been able to document unequivocally that among the universe of voters, there are far more of the latter than of the former.

Thus, the voting system free from either statistical or human error is beyond our ability to design. But there is an additional difficulty: unintended consequences. Too often solutions imposed on ill-defined or misunderstood problems simply substitute one set of problems for another. For example, the reform of choice to correct Florida’s voting ills is an electronic system using optical scanning techniques. As the *Orlando*

10. An inexact but illustrative analogy would be electronic scanning machines that print receipts for our purchases in stores. While we assume the total given is correct, sometimes we find that we have been incorrectly charged. Thus the receipt is merely a probability statement of how much the purchases cost. Similarly, balancing one’s checkbook is an exercise in probability. Even the most assiduously done accounting can contain errors, and we ruefully find that the probability of the accuracy of the balance calculated is not as high as it needed to be!

Sentinel documented in its superb series on the Florida election,¹¹ use of these mechanisms in a number of Florida counties has created a whole new set of hurdles for voters to overcome if their votes are to be accurately recorded and counted. At the moment, there exists no effort to lower or eliminate these hurdles. Unless and until this happens, widespread adoption of optical scanning voting methods could result in future election difficulties similar to those from past November. We shall return to this point shortly.

III. WHY SO CLOSE? WHY COULDN'T WE FIND A "WINNER?"

So what was the matter? Why did it appear that Florida's election went horribly wrong? If it was not the system which was so fundamentally flawed that it cataclysmically broke down under the pressures of a tie vote, what did happen? Were other forces in play which created the nightmare?

There are numerous ways to discuss these questions, but space limits us to just three major ones. We will first examine some political factors which caused such an extraordinary political outcome. Then we will turn to common criticism, that too many Florida voters simply did not do it right. Finally, we shall look more closely at the mechanical and administrative aspects of the act of voting and the counting (and recounting) of ballots which gave rise to the uncertainty of the outcome.

IV. MULTIPLICITY OF CANDIDATES/POLITICAL FORCES DURING THE ELECTION

In 1998, Florida voters revised their State constitution to make it much easier for minor party candidates to be placed on the general election ballot.¹² For the 2000 Florida presidential ballot, there was in fact a multiplicity of candidates, twelve in all.¹³ Among the Republican and Democratic party candidates, there were three other parties represented — the Libertarian, the Green, and the Reform — that were not minor candidates, but were assuredly of second rank. Seven more were truly unknown, minor party candidates.

11. Roger Roy & David Damron, *Small Counties Wasted More than 1,700 Votes*, ORLANDO SENTINEL, Jan. 28, 2001; Jeff Kunerth & Jim Leusner, *Some Had 1 From 'Column A,' 1 From 'Column B,'* ORLANDO SENTINEL, Jan. 28, 2001. David Damron & Gwyneth K. Shaw, *Lake Erred by Tossing Write-Ins*, ORLANDO SENTINEL, Jan. 28, 2001; Jeff Kunerth, *Ballots Still Present Literacy Test*, ORLANDO SENTINEL, Jan. 29, 2001; see also *The Winner Is: Review Validates Court's Decision*, MIAMI HERALD, May 14, 2001, available at <http://www.miami.com/herald/special/news/flacount/dors/040258.htm>.

12. FLA. CONST. art. IV., § 1 (amended 1998).

13. In fact, Federal Elections Commission records indicate that there were 16 candidates for the presidency, but in Florida only 12 qualified for the ballot.

In normal elections, second-rank, and minor party candidates have little effect on the outcome. In November 2000, these candidates may well have determined the next occupant of the White House. Harry Browne (Libertarian), Ralph Nader (Green), and Pat Buchanan (Reform) received a total of 131,387 votes in Florida. Did they influence the outcome of the election?

Had these candidates not been on the ballot, it cannot be assured that their votes would have been distributed to the two major candidates. There is some evidence that, at least in some counties, many votes for them came from new voters, that is, voters who might not otherwise have gone to the polls. On the other hand, it is a reasonable assumption that if one or more of the second-rank candidates had not been on the ballot, at least some of their votes would have gone to Bush or Gore. For example, Alachua County has a voter registration that is three-fifths Democratic, and that county nearly always votes for the Democratic presidential candidate.¹⁴ In November 2000, Ralph Nader received 3,226 of his 97,488 statewide votes in Alachua County.¹⁵ It is entirely possible, even likely, that if he had not been on the ballot, Gore would have picked up many of these votes, from those who would have come to the polls because they felt the need or duty to vote. Likewise, in Palm Beach County, Pat Buchanan received 3,407 votes.¹⁶ Statisticians have noted that this is an absurd number, an outlier, relative to other counties, including large metropolitan counties.¹⁷

14. The most recent instance to the contrary came in 1988, when Alachua County voted for George H.W. Bush.

15. As of Apr. 20, 2001, Green Party registration in Alachua County numbered 247. This is not sufficient to account for Nader's total. While 19,000 Alachua County voters listed no party affiliation, and some may have voted for Nader, it is also highly likely that some Democrats defected from Gore to vote for Nader. Indeed, the author knows personally of more than a dozen registered Democrats who claim to have done so, and undoubtedly there were others.

16. See Alan Agresti, *Florida Election 2000: Insiders at the Intersection of Law, Politics, and the Media*, Symposium Before Levin College of Law (Feb. 26, 2001).

17. *Id.* Buchanan's totals in the ten most metropolitan counties of Florida are as follows:

Brevard — 570
Broward — 795
Duval — 652
Hillsborough — 847
Miami-Dade — 560
Orange — 446
Palm Beach — 3411
Pinellas — 1013
Polk — 533
Volusia — 498
Id.

Whatever the cause of Buchanan's preposterous number in Palm Beach County — the butterfly ballot, inattentive or confused voters (especially among elders), punchcard voting machines that did not work very well, or something else — had Buchanan not been on the ballot it is entirely likely that Gore might have indeed picked up additional votes there as well. At least that is the reasonable conclusion based on extensive media interviews with voters in Palm Beach County who believed that the ballot they marked did not reflect their intent. Finally, the truly minor candidates gained a total of 6,680 votes statewide.¹⁸ While it is possible that each of these voters intended to vote for one of these minor candidates, it is also possible that Bush or Gore would have received the lion's share of these other votes if these minor candidates were not on the ballot. Assuming this is true, either Bush or Gore would likely have profited to the extent that the difference between them would have been much greater than the microscopic 537 officially reported.¹⁹

Thus, the presence of a multiplicity of candidates on the Florida ballot muddled the political waters considerably because they undoubtedly squeezed the vote totals of the two major candidates. The result was that second-rate candidates made the determination of the victor more difficult than if they had not been on the ballot.

V. PROBLEMS IN VOTING

While Florida's basic system for voting did what it was designed to do, there were mechanical and administrative problems with the way voting took place. Let us now turn to these problems to examine the extent to which they influenced the outcome of the election.

One of the major criticisms brought forward during the "Florida fiasco" and its aftermath was that too many voters did not do it right. Florida voters made hash of the ballot. They did not mark it correctly or push the punchcard lever hard enough, resulting in the infamous chads. In Palm Beach County, they were confused by the now-discredited butterfly ballot, and claim that they supposedly voted for the wrong candidate. The list of voter failures and mistakes and careless markings is virtually endless. According to this line of criticism, so many Florida voters made errors in reading and understanding directions or marking their ballots that they either obfuscated their intentions or invalidated their own ballots. As a result, many ballots were simply thrown away, or not counted for other reasons. Since post-election analysis indicated that many, if not most, of

18. State Division of Elections *available at* <http://www.election.dos.state.fl.us/elections/resultsarchive/Index.asp?ElectionDate=11/7/00&DATAMODE=>.

19. *Id.*

the voters who allegedly made errors intended to vote for Gore,²⁰ it is possible that their failure to do it right cost Gore thousands of votes by making the election closer than it should have been.

In truth, voters do have responsibilities in Democratic elections. Ideally, they read about candidates and issues, inform themselves, and reach judgments as to their candidate of choice. They then go to the polling station on election day and clearly and correctly mark their ballots. Alternatively, they vote by absentee ballot, following the directions explicitly, and returning it to the voting supervisor in time to be accurately counted.

We all know this model does not always work in practice. But even if it does not, it is nonetheless true that voters have some obligation to “do it right.” That is, even if they choose not to inform themselves about candidates and issues but they choose to vote, they need to follow directions for marking the ballot. Otherwise, they risk having their votes invalidated.

The problem with this otherwise reasonable point is that the directions are often unclear, ambiguous, even incomprehensible.²¹ There are a number of difficulties that may occur: voter illiteracy, both total or functional; unclear ballot language that uses words and phrases with different meanings across subcultures; poor ballot designs, such as the two column listings and butterfly ballot; and phrases likely to result in extra markings on the ballot, such as “write-in candidate.”

The result, as the *Sentinel* as well as other observers have noted, is that we have functionally reimposed literacy tests on voters, even though they have been outlawed since 1965.²² Matters do not end there, however. If Florida, or an individual county, moves toward voting systems involving mandatory electronic equipment, such as optical scanning technologies or touch- screens, adequate and comprehensible instructions for proper voting of ballots will become more critical, not less. Otherwise, still more ballots will be wasted, mismarked, or invalidated than in November 2000.

But what constitutes “adequate” instructions? The obvious answer is adequate instructions that any voter can fully understand and implement correctly. In a sense, however, this desirable goal will probably never be realized for an obvious reason: language, it has often been observed, is a necessary, but imperfect means of communication, and it will always be misinterpreted, somewhere, somehow, by some people.

20. See Agresti, *supra* note 16.

21. Jeff Kurerth, *Ballots Still Present Literacy Test*, ORLANDO SENTINEL, Jan. 29, 2001, available at <http://www.orlando.sentinel.com/>; RICHARD K. SCHER, *POLITICS IN THE NEW SOUTH*, ch. 8 (2d ed. 1997).

22. SCHER, *supra* note 21, ch. 8.

The matter goes further. Critics of the counts and recounts focused almost exclusively on either mechanical problems of voting or failures of voters to “do it right.” While the 1965 Voting Rights Act and its amendments have ensured that any person eligible may register to vote and show up at the polls, this problem was merely the beginning of the challenge.²³ Difficulties arise with the actual mechanics of voting, that is, the casting of votes, and their tallying. In other words, merely registering to vote ensures the voter of absolutely nothing. Voters showing up at the polls have to be approved as legitimate. If they get over this hurdle, they must be given a ballot. They then must make sense of the ballot by reading the instructions, get help if necessary, and most importantly, somehow translate their intent onto the ballots to record their votes. Every one of these steps is fraught with pitfalls. Assuming they are negotiated and the voters succeed in placing the ballots in the appropriate receptacles, the voters then leave, assuming that their ballots will be accurately counted. But the experience of November 2000 suggests that their votes may not be counted at all.²⁴

Post-election analysis thoroughly documented other major difficulties (some of which resulted from poor ballot instructions and design), such as:

- Lack of clarity of candidate position on the ballot relative to the space where a mark was to be made/punched;
- Use of double columns for listing candidates, instead of single column for listing candidates;
- Duval County ballot instructions stated “Vote all pages.” Because presidential candidate names sprawled over two pages, the result was thousands of over-votes;²⁵

23. In November 2000, according to the U.S. Civil Rights Comm’n, African-American voters in a number of Florida counties were not permitted to vote; subsequent research and analysis revealed that most of those denied their voting rights were in fact eligible to vote. See The Commission Report *available at* <http://www.usccr.gov/vote2000/stdraft1/main.htm>. According to the Commission, a disproportionate number of those denied the right to vote were African-American. *Id.*

24. Making matters worse is the very real possibility that voters may mark the ballot and have it counted, but for whatever reason voted for someone other than their candidate of choice (*i.e.*, they punched or marked the ballot for a candidate other than their preferred one). This of course happened frequently in Palm Beach County, allegedly because of the use of the “butterfly ballot” there, where many voters supposedly thought they were voting for Gore but actually voted for Buchanan. Such a ballot is “valid” insofar as tallying machines will read and count it, but it is an incorrect ballot because it does not accurately reflect the wishes and preferences of the voter.

25. Dana Canedy, *Florida Leaders Sign Overhaul of Election System*, N.Y. TIMES, Late Ed. Final, May 4, 2001, at A1; Lucy Morgan & Thomas C. Tubin, *Session Overhauls Elections/Education*, ST. PETERSBURG TIMES, South Pinellas Ed., May 5, 2001, at Nat’l, 1A; *Florida’s Ballot Reform*, N.Y. TIMES, Late-Ed.-Final, May 5, 2001, at A12; Josh Politlove, *Election Reform Task Force Backs Scanness for Now*, TAMPA TRIBUNE, Final Ed., Feb. 7, 2001, at

- In counties using optical scanning techniques, many voters used pens instead of pencils, or wrote in red or blue ink, instead of black, none of which the scanners could read;
- Punching machines which could not cleanly punch-out vote cards, creating the infamous number of hanging, pregnant, or bulging chads;
- Scores, perhaps hundreds, of voters misaligned their cards in the punching machines, resulting in holes where none should have been registered. In some instances, voters managed to put their cards in upside-down, which apparently resulted in more votes for the Natural Law candidate than statistical analysis would have projected;²⁶
- There were numerous reports of unavailable helpful, courteous, knowledgeable, and bi- or multilingual poll workers to offer assistance to voters needing help.

Obviously, then, many voters could not successfully negotiate the ballot or fill it out correctly. But even among those who appeared to figure it out and more or less do it accurately, odd things happened. For them, the journey of having their votes correctly counted and recorded was still only half complete. This seemingly simple mechanical process in fact was fraught with pitfalls. The most notorious of course were hanging and other variants of chads; how were they to be counted, if at all? What about odd or accidental markings on an optical scanning sheet, such as spilled coffee or the occasional pencil or ink smudge? Should voting officials invalidate an entire ballot when, in spite of the random marks, the voter's intent was nonetheless clear? What about the voter who circled the space on the ballot to indicate his or her preference instead of filling it in? Again, the intent was clear, even if it was not done correctly. Or what if the voter marked outside the lines, or made an X over the space, or wrote in the name of his candidate of choice?²⁷ In any number of cases, voters who saw that they had made errors attempted to fix them, sometimes ingeniously: they restuffed the errant chad back into its little hole, or used tape or nail polish to "glue" it back in place. Sometimes they mangled them, punched holes big enough for a screwdriver in them, or wrote instructional notes (on both punchcards and optical scanning sheets). Indeed, the *Tampa Tribune* found

Fla./Metro, 2; Sue Anne Pressley & Thomas B. Edsall, *Florida Lawmakers Approve Election System Overhaul*, WASH. POST, Final Ed., May 5, 2001, at A1; Brad Smith, *Ballot Blunders Abundant In Florida*, TAMPA TRIB., Final Ed., May 11, 2001, at Nation/World, 1; Thomas C. Tobin, *Election Chiefs Embrace Reform*, ST. PETERSBURG TIMES, Late Tampa Ed., Jan. 24, 2001, at Tampa & State, 1B; *Voting Irregularities in Florida During the 2000 Presidential Election*, (June 2001), available at <http://www.usccr.gov/vote2000/stdraft1/main.htm>.

26. See *supra* note 24.

27. *Id.* As the GAINESVILLE SUN, ORLANDO SENTINEL, and MIAMI HERALD series on difficulties in the election each noted, these and similar errors were very common.

that 175,894 Florida voters, or about 3% of the total casting ballots on November 7th, somehow managed to make a mess of their ballots.²⁸

Therefore, counting and recounting ballots became problematic. As noted before, in an election as extremely close as this one, individual votes became critical to a determination of which candidate won. Too often, the voting machinery failed and ballots were discarded. As subsequent investigations by newspapers showed,²⁹ if the lawyers, courts, candidates, and the media had allowed the canvassing boards to do their work, the boards could have determined a voter's intent from the ballot in many cases.³⁰

Matters simply became worse during the various recounts. Lawyers and courts stepped in to hinder the process of determining voter intent, instead of allowing legally constituted election canvassing commissions to do their work. The media also worsened the situation by focusing on the partisan background, behavioral idiosyncrasies, and personal appearances of the players, rather than the difficulties of counting and recounting.

These considerations lead us to a very central point: what are the obligations of the State in facilitating the access of voters to and the proper use of a ballot? Virtually all of the criticisms of the election missed this very critical matter. Just as the voter has an obligation to "do it right," the State has a prior obligation to design a voting system and offer clear instructions to ensure that the voter has the opportunity to "do it right." Placing the blame heavily or even solely on the voter ignores the very critical issue that the State has an obligation to ensure that all voters have an equal opportunity to cast their vote correctly and accurately. The U.S. Supreme Court once stated — "where the state has undertaken to provide it, [education] is a right which must be made available to all on equal terms."³¹ One may also apply this principle about opportunities in public education to voting rights; once voting rights are extended to anyone, they have to be extended to all who are eligible on an equal basis.

The State has three obligations in order to meet this mandate:

- to provide a ballot, and means of marking that ballot, which clearly and unambiguously records the intent and preference of the voter;
- to count the ballots accurately;
- to provide a mechanism for recounts, if the outcome of the initial count is unclear or challenged, that is fair and consistent.

28. Brad Smith, *Ballot Blunders Abundant in Florida*, TAMPA TRIB., May 11, 2001, final ed., (Nation/World) at 1.

29. See *supra* note 11.

30. *Id.*

31. *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

The State faces a host of challenges in meeting these obligations. They presume, for example, that the State offers ballots that the voters can read with directions that they can readily understand, and that the State offers capable assistance to those experiencing difficulties. It further presumes that the State minimizes the chance of error in the mechanical (or electronic) act of casting a vote, so that the voter's intent and preference can correctly be recorded. It means additionally that ballots be collected, accurately counted, and safely preserved in case of recounts. In particular, the State has to ensure that in the instance of ambiguous ballots, mechanisms are in place which allow for a thorough, even exhaustive, search for the voter's intent. Too often in November 2000, ballots were discarded merely because the counting mechanisms could not read them, even though in many instances the voter's intent could be discerned by visual inspection. Ballots should be discounted and discarded only when there is a general agreement among the canvassing board that they are absolutely indecipherable. Finally, explicit and agreed-upon standards for recounting ballots must be established and promulgated, so that canvassing boards can conduct their business in a timely and efficient fashion free from interference by lawyers and the media.

Thus, many criticisms of Florida's election fiasco failed to recognize that a substantial portion of the problems associated with voting and vote counting were actually created by state or county officials. Undoubtedly many voters deserve criticism for making silly and stupid errors. But state and county officials deserve at least as much blame, because in too many instances they did not meet the obligation to ensure that voters had an equal chance to "do it right."

But these relatively straightforward considerations raise a deeper issue: if these are the obligations of the State in conducting the election, does it therefore follow that the State needs to impose uniform procedures and standards throughout its territory? Are counties therefore out of the elections business? The answer, at least in the case of Florida, needs to be a resounding "no" to both questions.

First, county supervisors of elections are constitutionally established and protected in Florida.³² It does not follow that the supervisors of county elections would be abolished if the State imposed statewide procedures for voting, counting ballots, and recounting ballots. Only a constitutional amendment could abolish those positions, and the likelihood of such an amendment is at best remote.

However, if the State did indeed impose the sort of standardized procedures mentioned, the duties of county supervisors would vastly change. Rather than near-complete autonomy over elections in their

32. FLA. CONST. art. VIII, § 1(d).

counties, the functions of the county supervisors would be reduced to clerical or ministerial status. It is not clear that county supervisors would accept this change. Although they did recommend more standardized voting procedures, they assuredly did not ask to be put out of business, or have the importance of their role diminished. County supervisors of elections tend to be visible and popular political figures in their local jurisdictions, and it is likely that any attempt to emasculate their powers and authority would be sharply, and probably successfully, resisted. Certainly such change would require a massive shift in the political tradition and culture of Florida elections to bring about a restructuring of the county supervisor's role, and it is not clear that public opinion is ready for such a transformation.³³

Finally, although both the Florida Supreme Court and the U.S. Supreme Court wanted greater consistency of standards for voting, especially in conducting recounts,³⁴ it is not at all clear that consistency necessarily means statewide uniformity. As votes are counted and recounted, it is important that officials use consistent procedures and standards within a jurisdiction to carry out the election. Counties in Florida are the constitutionally and legally-assigned jurisdictions for performing these tasks.³⁵

Accordingly, unless the State allows its Division of Elections to run all elections, including local, then counties will still retain authority over elections. One of the most serious difficulties of November 2000 was that the standards within the individual counties for recounting were unclear or even unknown. For example, during recounts in Miami-Dade, Broward, and Palm Beach Counties — scenes of some of the most vigorous disputes, including a near-riot in Miami-Dade — there was enormous uncertainty within canvassing boards as to which standards to use, and how to implement them. Indeed, there and in other counties, members of canvassing boards seemed to spend about as much time arguing over standards as recounting chads and optical scanning sheets. Had the boards known ahead of time which standards to employ, recounts could have proceeded much more expeditiously. And if those standards were implemented consistently as the canvassing boards met, the legal

33. See Susan Macmanus, Public Opinion Survey 2001. In the spring of 2001, Professor Susan MacManus conducted a public opinion survey sponsored by the Florida Legislature on public opinion concerning electoral reform. The results of this survey indicate that while Floridians want "something" to be done about elections, there was no consensus as to what that "something" should be, nor was there any indication they wanted a change in how supervisors of elections did their job (with the possible exception that there was some support for making the job non-partisan, which even if it were to happen would have no impact on the degree of autonomy they can exercise). *Id.*

34. Barry Richard, *In Defense of Two Supreme Courts*, see 13 U. FLA. J.L. & PUB. POL'Y 1 (2001).

35. FLA. STAT. §§ 101-102 (2001).

requirement of consistency would have been met. Even though the counties did not use one uniform state standard, the only consistency required was one within the jurisdiction responsible for elections.

VI. RUSH TO JUDGMENT

Once the U.S. Supreme Court stopped the recounts, in effect handing the White House over to George W. Bush, a virtual torrent of proposed election reforms poured forth in the media and through other forums. Virtually everyone seemed to have an opinion on how to make sure this fiasco would never happen again, at least not in Florida. Perhaps the most visible of the reform efforts was the twenty-one-member, bi-partisan "Select Task Force on Election Procedures, Standards and Technology" appointed by Governor Jeb Bush in December 2000, to suggest changes that could be made in the way the State conducts elections. It reported its findings to the Governor on March 1, 2001, just in time for the legislative session.³⁶

The Task Force recommended that Florida abandon all use of punchcard voting systems, and replace them with optical scanning devices.³⁷ It also suggested the State establish standards for invoking and conducting manual recounts and for contesting elections, making the supervisor of elections a non-partisan office, and forbidding members of state and county canvassing boards from participating in election-related campaign activities.³⁸

In retrospect, the recommendations of the Task Force seem modest, but in its defense it had very little time to meet, establish an agenda, explore alternatives, and reach consensus. Under the circumstances, it probably did as good a job as it had time for. None of the recommendations were controversial or even far-reaching. By mid-winter it would have been hard to find anyone in Florida who wanted to retain punchcard voting, and optical scanning devices appeared to have become the politically-correct voting reform of choice, at least if comments by public officials and newspaper editorials are any indication of popular views on the topic. There is no indication that the Task Force spent time or energy exploring the implications of its recommendations, or even examining whether they were appropriate to the task of improving Florida's election system. Indeed, the Task Force seemed determined to propose solutions even before it fully identified and understood what problems it was trying to

36. Josh Poltilove, *Election Reform Task Force Backs Scanners for Now*, TAMPA TRIB., Feb. 7, 2001, final ed. (Fla/Metro), at 2.

37. *Id.*

38. *Id.* This latter recommendation was clearly aimed at Governor Jeb Bush and Secretary of State Kathryn Harris, both of whom held prominent positions in George W. Bush's campaign in Florida.

solve. It is painful, but justifiable, to conclude that the Task Force was grasping for straws, and rushing to judgment.

This point is even more true in the case of the Florida Legislature's handling of election reform during its Spring 2001, regular session. Governor Bush made election reform one of the centerpieces of his legislative agenda, but in fact the legislature was slow to act. Part of the reason for this was mentioned earlier: in a public opinion survey conducted by Professor Susan MacManus of the University of South Florida and paid for by the legislature, no clear consensus of public opinion on how to proceed emerged. But another reason is that as legislators (especially Republicans who held uncontested majorities in both chambers), considered various reforms, they realized that some might actually work to their disadvantage. After all, they had won with existing machinery, so why change it?

It was also clear that the conventional, politically correct reforms seriously considered — especially optical scanning and touch-screen technology — would be very expensive. According to some estimates, the cost of this new equipment would run into scores of millions of dollars. In an increasingly lean budget year, it was not clear whether the State was willing to, or even could, undertake such an expense. Yet the alternative, foisting the cost back onto counties, was not politically realistic; not only because many counties (especially small, rural ones) clearly could not afford the reforms, but more crucially, public opinion was heavily running in the direction that the reforms were a state obligation, not a local one. In the end, legislators realized they had to do something, pass some kind of reform-oriented bill, or be brutalized by editorialists and outspoken critics of the Florida election system. They also realized that if they did not pass a bill, the State would again become the laughingstock of the nation, and no one in the legislature, or outside of it, wanted to bear that burden again!

The bill which eventually emerged from the legislature and was signed by the governor was widely hailed. "This is certainly the most comprehensive bill that has been passed in any state this year," said a spokesperson for the National Conference of State Legislatures.³⁹ Governor Bush called it "the envy of the country" before signing it into law.⁴⁰

In fact, the bill was little more than a watered-down version of the Task Force recommendations, and in important ways did not go even as far as they did. Given the considerable number of compromises the bill elicited during the final, very hectic days of the session, it is entirely appropriate to describe it as grasping at straws, and rushing to judgment. It took the

39. Sue Anne Pressley & Thomas Edsall, *Florida Lawmakers Approve Election System Overhaul*, THE WASH. POST, May 5, 2001, at A1.

40. *Id.*

safe course of outlawing punchcard ballots, and prohibited the use of paper ballots and old-fashioned, but reliable, mechanical lever voting machines.⁴¹ It recommended the use of optical scanning devices for voting in 2002, but gave counties the option to adopt touch-screen technology.⁴² This is important, because the legislature did not mandate the use of uniform voting technology across the State.⁴³ The failure to adopt state-mandated technology means that the gulf between poor and rich counties, in terms of the type, and thus accuracy, of the election machinery they could buy, would remain.

There were some positive features in the State's reform effort. It did appropriate thirty-two million dollars to help defray the cost of buying new election technology.⁴⁴ But there never was any real consideration of the State paying the total cost of new technology purchases; the Supervisor of Elections in Pasco County estimated the cost of buying touch-screen equipment for the State of Florida at seventy-six million dollars, and for optical-scanning machinery, five million dollars.⁴⁵ Palm Beach County, which rapidly moved towards touch-screen technology after the butterfly-ballot debacle, spent fourteen million dollars on its equipment.⁴⁶ Under the terms of the legislation, counties will get twenty-four million dollars to buy new machinery.⁴⁷ Counties with 75,000 or fewer residents will receive \$7,500 per precinct for optical scanners; more populated counties get \$3,500 per precinct.⁴⁸ Counties wanting to spend more on their own for touch-screen technology may do so.⁴⁹ Obviously the twenty-four million dollars provided by the State is but a modest contribution to what the counties themselves will pay. In addition, the \$32 million includes \$6 million for voter education,⁵⁰ presumably so voters can be taught to do it right in 2002.

In addition, the new state law provided for hand recounts in the case of close results, which it defined as those in which the margin of victory is

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

42. *Id.*

43. *Florida's Ballot Reform*, N.Y. TIMES, Late Ed.-Final, May 5, 2001, at A12.

44. 2001 Fla. Laws 2001-40.

45. Poltilove; *supra* note 36.

46. 2001 Fla. Laws ch. 2001-40.

47. *Id.* (codified at FLA. STAT. § 98.0979 (2001)).

48. *Id.*

49. Dana Canedy, *Florida Leaders Sign Agreement for Overhaul of Election System*, N.Y. TIMES, Late Ed.-Final, May 4, 2001, at A1.

50. 2001 Fla. Laws ch. 2001-40.

one-fourth of one percent or less.⁵¹ This recount provision may well be the most remarkable feature of the legislation, given that during the immediate aftermath of the November election Republicans in Florida fought furiously to prevent the use of hand recounts, which they felt would damage the chances of George W. Bush. In addition, two million dollars was provided to create a centralized voter database which local supervisors of elections will be required to use and which would be regarded as the touchstone for voter eligibility.⁵² Finally, an allowance for provisional voting was included, whereby voters showing up at the polls would be allowed to vote, with their ballots considered later for eligibility.⁵³ The legislature did not adopt another of the Task Force's major proposals — forbidding political activity by state or county campaign officials. In a sense, Governor Bush and Secretary of State Harris got off scot-free, and the possibility of future mischief by state or county election officials in the outcome of close, statewide races remain intact.

Only a cynic or a grouch would argue that these latter reforms are pointless or trivial. In truth, they are neither, and will undoubtedly prove helpful beginning with the 2002 elections. But it is also true that these provisions are not very far-reaching, but, appear to be minimalist given the political pressures on the legislature to do something about the election mess. Only against the backdrop of the main thrust of the reform effort — movement to optical scanning systems, with an option for touch-screen technology — do these provisions loom particularly significant.

VII. CONCLUSION — BACK TO THE FUTURE?

What is especially significant about the major thrust of the Florida reforms is that they do not in any way move towards centralization of the State's voting system. As noted earlier, to do so would have been difficult politically, and probably constitutionally impossible. But it is noteworthy that in spite of the calls early on in the State, and outside of it, to create a more uniform system, with statewide standards of what constitutes a legitimate vote, this was not done. Florida's system of elections remains firmly in the hands of county officials, especially Supervisors of Elections and local canvassing boards. For those critics who insisted on statewide standards for counting and recounting votes, and who wanted the discretion of local canvassing boards severely limited or even eliminated,

51. *Id.* This of course is a more stringent requirement than the previous 0.5% difference. The consequence is that automatic recounts, while rare in the past, will become even less common. This means that candidates contesting an election and wanting a recount will have to pay for them.

52. *Id.* (codified at FLA. STAT. § 98.0977 (2001)).

53. *Id.* (codified at FLA. STAT. § 101.048 (2001)).

the failure of the legislation even to make a bow in that direction must be sour milk indeed.

But what is equally important is that Florida, in spite of a good faith effort to make improvements, may not have solved some of the key problems in voting. Granted, no one in the State will ever need to hear the word "chad" again, except possibly in a game of historical trivial pursuit. By adopting optical scanning devices, or the optional touch-screen technology, Florida has chosen to substitute one set of problems for another. These problems are mainly twofold: educating and instructing voters to use the machines correctly, and ensuring that the technology records and counts their votes accurately.

Florida did appropriate six million dollars for voter education,⁵⁴ but its success depends upon how the money is spent. If the voter education is merely a series of newspaper inserts, it will do no good at all; newspaper readers tend to be informed, knowledgeable voters who are less in need of education than those who are not. If the money is used for voluntary classes, in visitations to the offices of elections supervisors or even more community-based locations, for the purpose of demonstrating the new equipment to voters and instructing them on its use, these well-intentioned efforts will also miss the voters most in need of education, for obvious reasons. The voters most likely to attend will already be the most dedicated and knowledgeable. If television and radio spots are used for voter education, marketing and media specialists must determine exactly how to reach the voters who need instruction most, or else the funds spent will be wasted.

Both the critical importance and yet very sensitive nature of educating voters appropriately can be seen by legal action launched in the summer of 2001. On August 15th, the Florida Equal Voting Rights Project filed suit in federal court against Florida elections officials and the Supervisor of Elections in Monroe County.⁵⁵ The action alleges that the recent reforms enacted by the State legislature discriminate against poor, uninformed, and semiliterate voters, because it contains a listing of ten so-called voter responsibilities, one of which states that voters should "study and know candidates and issues."⁵⁶ The law requires the list to be posted in all polling places.⁵⁷ Plaintiffs, who include the American Civil Liberties Union, Florida Justice Institute, and Florida Legal Services, brought the suit under the 1965 Voting Rights Act, which outlaws any requirement that voters possess the "ability to read, write, understand, or interpret any

54. *Id.* (codified at FLA. STAT. § 98.255 (2001)).

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

56. 2001 Fla. Stat. ch. 2001-40 (codified at FLA. STAT. § 101.031 (2001)).

57. *Id.*

matter.”⁵⁸ In effect, the suit argues that in placing these voter requirements in polling stations, the State has once again reinstituted a literacy test.⁵⁹

Passing hortatory lists of directives to voters in the polling station does not, of course, constitute the sum total of what voter education involves. And it is by no means clear that the lawsuit will be successful; undoubtedly the resolution of the case will take years. It must be noted, however, that the initial foray of the State into the voter education business does not look either impressive or promising. It smacks of elitism, and might very well have the effect of intimidating or putting off new or unsophisticated voters. Most importantly, it gives voters the impression that the burden of proof for their right to vote rests on their shoulders, and ignores completely the State’s obligation to facilitate the process, make it fair, and ensure that it is open to all eligible voters on an equal basis.

The technical problems presented by optical scanners and touch-screen technology are just as daunting as the question of how best to educate voters. It is of interest that politicians and laypersons have placed far more confidence in these devices than specialists do. Edward Tenner, a well-respected professional and author on the unintended consequences of technology, recently wrote a powerful Op-Ed piece in the *New York Times*, pointing out that both optical scanning and touch-screen machines still retain significant problems of errors in recording, and in ensuring security of the vote.⁶⁰ Touch-screen technology presents the additional problem of guaranteeing ballot secrecy in the event of recounts.⁶¹ The widely-publicized and prestigious Caltech-MIT Voting Technology Project concluded that while optical scanning devices are vastly superior to punchcard technology, their error rate is not better than paper ballots.⁶² The widespread use in Florida of both optical scanning machines and touch-screen technology raises new concerns in providing voters with readily understandable instructions for their use and ensuring the availability of capable assistance if a voter became confused or made errors. And of course optically scanned ballots are still subject to the problems of coffee spills, the odd mark, pens used instead of pencils, ballots marked with Xs instead of being colored in, and all the other

58. Brinkly-Rogers, *supra* note 55.

59. *Id.*

60. Edward Tenner, *The Perils of High-Tech Voting*, N.Y. TIMES, Late Ed.-Final, Feb. 5, 2001, at A21.

61. *Id.*

62. Caltech-MIT Voting Technology Project, *Voting: What It Is, What It Could Be*, project funded by the Carnegie Corp. of N.Y. July, 2001. See also Katharine Q. Seelye, *Study Says 2000 Election Missed Millions of Votes*, N.Y. TIMES, July 17, 2000, available at <http://www.nytimes.com/2001/07/15/politics/15BALL.html>.

injuries detailed earlier which well-intentioned voters can inflict on their ballots.⁶³

In a very real sense, by opting for the technological reforms, Florida did not meet its obligations to voters: to provide a mechanism for voting with clear instructions as to its proper use, to ensure that the method of casting the ballot would accurately reflect the voter's wishes and intent, and to make certain that the ballot would be accurately counted, and if necessary, recounted. While the likelihood that another presidential or other statewide vote will be as close as it was in 2000 is very remote, if the same scenario reoccurs, the same difficulties from November and December 2000, will reappear.

There was of course another way. Florida could have gone back to the future, and opted for paper ballots or even lever-based voting machines. These of course were made illegal by Florida's recent reforms. Both are no more prone to error than optical scanning devices and touch-screens. Both ensure the secrecy of the ballot. Paper ballots in particular continue to be used in other democracies, and whatever the problems associated with them, they assuredly are not those associated with optical scanning or touch-screen technologies. Paper ballots⁶⁴ are not glamorous, nor high tech, and will not produce the instant results demanded by television networks on election nights. But they will work within the context of a still-decentralized voting system, and save the State or any jurisdiction using them the embarrassment of another election fiasco.

63. Other parts of the listing of voter responsibilities to be posted in polling places alluded to earlier include such stipulations as making sure the voter has brought proper identification with them (ignoring another part of the law which permits an affidavit to be signed in the event the voter fails to do so, and yet another portion which permits a provisional ballot to be cast), following directions for voting carefully, using the right marking device for optically scanned ballots, etc. 2001 Fla. Laws ch. 2001-40. No doubt the intent of the list is honorable. But it clearly misses the whole point, because if provision is not made for adequately educating voters on how to use the machines to cast their vote as they intend, the list is worse than a sham, it is insulting.

64. The paper ballot system envisioned here is not the one in which the voter folds his/her paper, stuffs it in a box, and leaves. It is rather one used in conjunction with laser printers which will not accept extraneous marks, but which voters can review before leaving the booth to ensure that what is recorded is what was intended. According to Tenner, this system of voting may not be the cheapest, but it is the most accurate. *See Tenner, supra* note 60.