The Florida Election Canvassing System

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TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 851
II. HISTORICAL DEVELOPMENT ............................................ 852
   A. Territorial Days .................................................... 852
   B. Early Statehood .................................................... 855
   C. Post-Civil War Era ................................................ 857
   D. The Early Twentieth Century ................................. 864
   E. Post-World War II Era ........................................... 874
III. LEGISLATIVE SCHEME ON EVE OF 2000 ELECTION ............... 882
IV. ELECTION REFORM ACT OF 2001 ..................................... 883
   A. Tabulation Testing ............................................... 884
   B. Provisional Ballots .............................................. 885
   C. Early Release of Returns ..................................... 886
   D. Canvassing Procedure ......................................... 886
   E. Canvassing Deadlines ......................................... 886
   F. Machine Recounts ............................................... 888
   G. Manual Recounts ............................................... 888
   H. Standard of Ballot Review .................................... 889
   I. Other Matters .................................................... 890
V. CURRENT CHRONOLOGICAL PROCEDURE ............................ 890
   A. Before Election Day ............................................. 891
   B. On Election Day, Before Polls Close ....................... 892
   C. On Election Day, After Polls Close ......................... 894
   D. After Election Day ............................................ 896
VI. CONCLUSION ................................................................. 902

I. INTRODUCTION

The Presidential Election of 2000 brought international attention to the means by which votes in Florida are counted in each election. Florida is comprised of sixty-seven counties, each of which has a canvassing board having the responsibility to certify the election results for its own county.
Although subject to much reviling\(^1\) during the Florida Recount\(^2\) process, the canvassing board system has been around in some form since the Florida territorial era more than 170 years ago.

During the 2001 legislative session, the Florida Legislature passed substantial legislation in an attempt to remedy the problems that came to light during the Florida Recount. Notwithstanding the scorn earlier heaped on the heads of the canvassers, the legislature did not touch the existing county canvassing board structure. The purpose of this article is to set forth the historical development of the Florida canvassing system; to summarize the pertinent law as it existed on the eve of the Presidential Election of 2000; to explain changes made to this law by the Florida Election Reform Act of 2001; and to provide a summary of the current chronological procedure for the canvassing of returns by a county canvassing board.

II. HISTORICAL DEVELOPMENT

The state’s election canvassing system was not put into place at one time or by one piece of legislation. Rather, the system has grown and changed as experience revealed the need to address a particular area or dispute. Legislative in nature, the canvassing scheme has also been subject in much part to the political winds prevailing in the various Florida legislative bodies, including: the Territorial Legislative Council, the early statehood General Assembly, and the current State Legislature.

A. Territorial Days

The beginnings of the canvassing board system are seen in the earliest laws of territorial Florida. Florida became a United States territory in 1821.\(^3\) Several months thereafter, the United States Congress authorized the

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2. For ease of reference, the term "Florida Recount" shall be used in this article to refer to the process by which presidential ballots in Florida were subject to review and recount in the aftermath of the 2000 presidential election.

3. THE NEW HISTORY OF FLORIDA 207 (Michael Gannon, ed., 1996) [hereinafter GANNON].
territory to send a nonvoting delegate to Washington. As part of the legislation providing for the election of the delegate, Congress further provided a judicial process for the fledgling territory to handle any dispute concerning this election. Thus began the historical involvement of the Florida judiciary in election disputes.

In 1822, Florida justices of the peace were given the jurisdiction to investigate any election contest concerning Florida’s territorial delegate to Congress. The justices of the peace would gather testimony to be compiled and then transmitted directly to the Speaker of the United States House of Representatives for Washington’s disposition. One year later, the Legislative Council, as the Florida Legislative body was called at that time, provided that county judges were required to appoint “judges of the election” who would review the ballots and certify the winner of the territory-wide election of the Congressional delegate. These persons were later referred to as “inspectors of election.”

When the members of the Legislative Council became subject to election, county judges saw their involvement increase as they were the parties who decided where polling places would be located for the elections of both the Council Members as well as the United States Delegate. However, justices of the peace, rather than county judges, presided over any contest involving the election of a member of the Legislative Council, with the testimony transmitted to the President of the Legislative Council for action.

In 1831, the Florida Legislative Council passed three relevant laws regarding municipal elections: An Act to Incorporate the Town of [References]

4. Id. at 211.
5. Id.
9. Act of Jan. 11, 1827, 1826-27 Fla. Territory Laws 88 (dividing the Territory of Florida into thirteen election districts and providing for the election of members to the legislative council); Act of Jan. 16, 1827, 1826-27 Fla. Territory Laws 109 (amending the Act of Jan. 11, 1827 that divided the Territory of Florida into thirteen election districts and provided for the election of members to the legislative council).
10. Act of Jan. 11, 1827, 1826-27 Fla. Territory Laws 88 (dividing the Territory of Florida into thirteen election districts and providing for the election of members of the legislative council).
Monticello, in Jefferson County;\textsuperscript{11} An Act to Amend an Act Entitled, "An Act to Incorporate the Town of Quincy;"\textsuperscript{12} and An Act to Incorporate the City of Fernandina.\textsuperscript{13} The Council gave the mayor of each town the duty to appoint three "inspectors"\textsuperscript{14} who had the job of supervising local elections and

whose duty it shall be to receive the votes, and to cause the name of every voter to be taken down and kept in a book for that purpose, and to cause the poll to be opened . . . and the names of the several persons . . . having the greatest number of votes shall be declared and notice of their election given to each of them.\textsuperscript{15}

At this point in Florida history, there was no requirement that the mayor appoint a judge or other person trained in the law to these positions. Rather, the mayor was merely directed to appoint discreet persons to perform this responsibility.\textsuperscript{16} Thus, while justices of the peace would compile evidence in an election contest, the process of canvassing during early territorial days generally directly involved persons other than members of the judiciary.

Two years later, the Legislative Council amended legislation providing for the territory-wide election of a delegate to Congress, as well as other territory officers.\textsuperscript{17} Under this legislation, the inspectors of election for all territory offices were to be uniformly appointed by "the presiding justices or judges of the county courts."\textsuperscript{18}

\begin{footnotes}
\item[14] 1831 Fla. Territory Laws 43; 1831 Fla. Territory Laws 66. The word "intendant," used in these particular laws in lieu of the word "mayor," was frequently used in early territorial laws and connoted the same position as mayor. Its use likely derives from the territory's Spanish legal heritage. See BLACK'S LAW DICTIONARY 727 (5th ed. 1979) (referring to Spanish term intendente); BANTAM NEW COLLEGE SPANISH AND ENGLISH DICTIONARY 196 (rev. ed. 1987) (defining intendente as "mayor").
\item[15] 1831 Fla. Territory Laws 43.
\item[16] 1831 Fla. Territory Laws 44.
\item[17] Act of Feb. 17, 1833, ch. 675, 1833 Fla. Territory Laws 35–41 (providing for holding an election for delegate to Congress from this Territory, members to the legislative council, and certain other officers).
\item[18] \textit{Id.} at 35.
\end{footnotes}
The function of county courts to certify results of elections can be seen from an early example in Florida's history. For the election of the members of the 1835 Legislative Council, the Council amended territorial law to require that the election be held in October rather than May.\textsuperscript{19} The County Judge in Mosquito County,\textsuperscript{20} however, did not receive notice that the law had changed.\textsuperscript{21} Accordingly, in May he called the election and certified the results to Tallahassee. The territorial government in turn notified the Judge that the law had changed, "which fact it is presumed was not known in [Mosquito] County."\textsuperscript{22} The winner of the Mosquito County election was not recognized, and the Judge was directed to hold another election in October.\textsuperscript{23}

B. Early Statehood

In furtherance of the goal of Florida statehood, first expressed in the Adams-De Onís Treaty,\textsuperscript{24} a group of Territory leaders and other prominent citizens met in the gulf coast town of St. Joseph in 1838 to propose a constitution and obtain congressional approval for statehood.\textsuperscript{25} The Legislative Council required that the county judges call an election for delegates to the convention according to the number of delegates designated for each county.\textsuperscript{26} The delegates proposed a constitution, which would become Florida's first state constitution in 1845.

In 1843, the Legislative Council approved an Election Code proposed by a "reviser" of territorial laws.\textsuperscript{27} Two years later, the year Florida became

\textsuperscript{19.} Act of Feb. 7, 1835, ch. 845, 1835 Fla. Territory Laws 308 (changing the time of holding the election for members of the legislative council).
\textsuperscript{20.} Later, at statehood, the name of Mosquito County was changed to Orange County. Act of Jan. 30, 1845, 1845 Fla. Territory Laws 56 (altering and changing the name of Mosquito County to that of Orange).
\textsuperscript{21.} Mosquito County in Central Florida was quite remote from Tallahassee during this era of poor transportation and communication links.
\textsuperscript{22.} Letter from George W. Walker to Judge of the County Court Mosquitoe [sic] County (June 8, 1835) in 25 THE TERRITORIAL PAPERS OF THE UNITED STATES at 162 (C.E. Carter ed., 1960).
\textsuperscript{23.} \textit{Id.}
\textsuperscript{24.} Treaty of Amity, Feb. 22, 1819, U.S.-Spain, art. 6, 1822 Fla. Territory Laws IV.
\textsuperscript{25.} STUART B. McIVER, DREAMERS, SCHEMERS AND SCALAWAGS 95-99 (1994); Florida History Internet Center, Florida History Internet Center Home Page, at http://www.floridahistory.org (visited Feb. 2, 2002).
\textsuperscript{26.} Act of Jan. 30, 1838, 1838 Fla. Territory Laws 16 (calling a convention for the purpose of organising [sic] a state government).
\textsuperscript{27.} Act of Mar. 15, 1843, 1843 Fla. Territory Laws 34 (concerning the revised statutes).
a state, a new Elections Code was adopted which was patterned after the
previous territorial laws on the same subject.\textsuperscript{28} Inspectors of elections,
formerly appointed by mayors and county judges, were now uniformly
appointed by probate judges.\textsuperscript{29} If a person contested an election for a seat in
the General Assembly, the local probate judge was required to collect the
evidence on the subject and transmit it to either the Speaker of the House for
a seat in the State House of Representatives, or the President of the Senate
for a seat in the State Senate.\textsuperscript{30}

For local offices, a contest of the election was presented to a circuit
judge who was required to "proceed in a summary way, to hear and
determine the matters in issue, and to give judgment upon the rights of the
parties."\textsuperscript{31} The remedy available in a successful contest was ouster of the
contested winner, with seating of the petitioning candidate.\textsuperscript{32} Notwithstanding
the establishment of a uniform Election Code at statehood, just five years
later the General Assembly once again began to allow mayors and city
councils to appoint the inspectors of elections of their own municipalities.\textsuperscript{33}

Upon statehood, the position of county judge was abolished.\textsuperscript{34} The
state judicial system was then comprised of circuit and probate courts.\textsuperscript{35}
Each county had a probate judge, who served as the head of the local
election system.\textsuperscript{36} The operation of the canvassing board can be seen by
considering an illustrative vignette from Florida's secession movement. In
November 1860, the Florida General Assembly called a state convention for
the purpose of considering an act of secession from the United States.\textsuperscript{37}
Governor Madison S. Perry was concerned that elected delegates from Key

\begin{itemize}
\item \textsuperscript{28} An Act Relative to Elections in this State, art. IV, § 1, 1845 Fla. Laws at 79. From
1845 to 1868, counties were served by circuit judges and probate judges. County judges did
not again exist in name until 1868. \textit{See} Fla. Const. of 1868, art. VI, §§ 16–18.
\item \textsuperscript{29} An Act Relative to Elections in this State, \textit{supra} note 29.
\item \textsuperscript{30} \textit{Id.}
\item \textsuperscript{31} Fla. Const. of 1868, art. IX, §§ 1–5, 7–10.
\item \textsuperscript{32} Ch. \underline{____}, § 3, 1850–51 Fla. Laws 92 (amending an act incorporating the City of
St. Augustine).
\item \textsuperscript{33} \textit{Id.} Ch. \underline{____}, § 5, 1850–51 Fla. Laws 90 (amending an act incorporating the City of
Apalachicola).
\item \textsuperscript{34} \textit{Compare} Act of Sept. 18, 1822, 1822 Fla. Territory Laws 93 (authorising [sic] the
appointment of Justices of the Peace and defining their powers, and establishing county
\item \textsuperscript{35} Fla. Const. of 1838, art. V, §§ 1–3, 9 (1845).
\item \textsuperscript{36} Act of Jan. 5, 1847, Ch. 72—(No. 2), §§ 1–2, 1846–47 Fla. Laws 10–11
(amending the Act relative to elections in this state).
\item \textsuperscript{37} John Edwin Johns, \textit{Florida in the Confederacy} 27 (photo. reprint 1983)
\end{itemize}
West, thought necessary to the success of the convention, would not arrive on time. Governor Perry called upon the Monroe County Probate Judge to promptly canvass and certify the election delegates so that the delegates could be placed on a steamer waiting to sail for the Florida Panhandle. As one historian noted, "[t]he Probate Judge and three other citizens of good repute were to canvass the vote and issue certificates of election to the winners in time for delegates to board the steamer." The Monroe County Canvassing Board successfully performed the task requested by the Governor.

At this time, canvassing laws began to more closely resemble those of modern times. New election laws provided that the canvassing boards, headed by the local probate judges, had a ten-day period to review and certify election results. The canvassing boards further had the legal obligation "to ascertain the whole number of votes cast, and who had received the highest number of . . . votes."

C. Post-Civil War Era

As the Civil War and Reconstruction years passed, judges continued to play a role in the certifying of elections as they had done in Florida for decades. A new law made it a criminal offense for anyone, whether or not on the canvassing board, to change a voter's ballot thereby not voting "as he intended." In the general election of 1870, however, the judiciary was involved in a much different capacity in a heavily disputed statewide election. For this election, the statewide canvassing board was controlled by the Republicans. The Democrats believed that the canvassing board was up to some type of mischief, and they sought an injunction in the Leon County circuit court to prevent the canvassing board from canvassing the returns and certifying any winners. Circuit Judge Pleasant W. White was

38. Id.
39. Id.
40. Id.
41. Id.
44. FLA. REV. STAT. § 5875 (1920). This particular law was adopted in 1868.
45. MANLEY, supra note 43, at 244–45.
46. Id.
47. Id.
persuaded by the Democrat argument and accordingly issued the injunction.48 He presided over a grand jury investigation into whether “reports of impending violence against the governor or other state officials” were substantiated.49

The Republicans in turn approached a federal judge in Jacksonville, claiming that Judge White’s suspension of the count was in contravention of federal voting rights laws.50 Rather than simply seeking to overturn Judge White’s order, however, the federal authorities indicted the judge and had a federal court issue a warrant for his arrest, upon which he “was escorted to Jacksonville by a U.S. Marshall.”51 With Judge White “resting in a Jacksonville jail,” the canvassing board resumed its count and announced the results of the election.52

At the same time, to avoid further delays, the Republicans appealed Judge White’s issuance of the injunction to the Supreme Court of Florida.53 Before the tribunal could reach a decision, the state legislature enacted a law abolishing the state canvassing board.54 The action had its desired effect when the supreme court ruled that no action could be taken concerning a board which no longer existed.55 Soon thereafter, the federal prosecution of Judge White was dropped after the federal court determined the indictment had been issued in error.56 Nevertheless, the Supreme Court of Florida decision established the principle that a court “could compel [canvassing boards] to count all the ballots,” so long as a canvassing board in fact existed.57

Prominent election disputes involving the Florida judiciary continued just a few years later in the general election of 1876. The statewide vote for

48. Id. at 244.
50. Id.
51. Id.
52. MANLEY, supra note 43, at 244.
53. Id.
54. Id. at 245.
55. Id.
56. MANLEY, supra note 43, at 245, citing State v. Gibbs, 13 Fla. 55, 72–73 (1869). In Gibbs, the court noted how the Legislature repealed the law creating the state canvassing board prior to the conclusion of this case.
both the presidential and gubernatorial races ended up before the Supreme Court of Florida. Early results had revealed a razor-thin Democratic victory in all state and national races. In Florida, the Democratic presidential candidate led the Republican candidate by a margin of fewer than one hundred votes. State law mandated the state canvassing board to "ratify the tallies" for the election returns to be certified. Rather than simply ratifying the tallies, however, the state canvassing board actually passed on the validity of many of the ballots, resulting in a win for the Republicans.

The Democrats sought and were granted injunctive relief from the Leon County circuit court requiring the canvassing board to merely tally the election precinct returns without determining the legitimacy of any votes. Notwithstanding the court's action, the state canvassing board disregarded the court order. The matter made its way to the Supreme Court of Florida, which was controlled by Republicans, and which "ordered state officials to recount ballots and award the governor's chair to Democrat George F. Drew, even though many of the same officials were [the Chief Justice's] political and personal friends." The state's presidential electoral votes were, however, awarded to the Republican candidate, Rutherford B. Hayes.

Notwithstanding the potential for chicanery, one Florida court historian has noted that "[n]umerous Floridians credited [Chief Justice] Randall and his court colleagues with rising above party and politics to resolve the dispute." The Court further ruled that the duties of the canvassing board were "strictly 'ministerial,' meaning that the state canvassers could only tally the votes submitted by the county canvassers." As a result, the supreme court concluded that the state canvassing board did not have judicial power,

58. Id. at 252.
59. Id. at 251.
60. Id.
61. Id. at 251–52.
63. Id.
64. Id. at 251–52.
65. Id. at 219.
67. MANLEY, supra note 43, at 252.
and therefore, a canvassing board could not "determin[e] ... the legality of a particular vote or election." 68

In 1877, the Florida Legislature amended the State’s Election Code to more clearly provide for a canvassing procedure. Each precinct within a county was required to have three "inspectors of election," appointed by the County Commission, who were required to be "intelligent and discreet electors of such county, who can read and write." 69 They were also required to be residents of the precinct for which they were appointed, and they could not all belong to the same political party. 70

On the day of each election, the inspectors at each precinct opened the polls, confirmed that the ballot box was empty at the opening of the polls, resolved any challenges to any voter qualifications, "maintain[ed] good order" at the polls, closed the polls, canvassed the ballots at the precinct, and completed a certificate of results to be forwarded to the county canvassing board. 71 In canvassing the ballots, the inspectors had the discretion to refuse to count particular ballots if they did not appear to evidence the intention of the person casting it to vote for a particular candidate, 72 a discretionary duty later provided to the county canvassers. 73 In exercising their discretion, the decision of a majority of the inspectors would not be overturned, even if the decision were erroneous, unless the ballots were rejected fraudulently, or unless the rejected ballots would have changed the result of the election. 74

Each county canvassing board was comprised of the county judge, 75 the clerk of the circuit court, and a justice of the peace. 76 The county judge and the clerk collectively chose the justice of the peace who would serve on the board. 77 If either the county judge or the clerk failed or refused to act, the

68. Id. at 253 (citing State v. McLin, 16 Fla. 17, 43–45, 49, 52 (1876)).
69. Ch. 97, § 19, 1881 Fla. Laws 481, 489.
70. Ch. 97, § 19, 1881 Fla. Laws 481, 487.
72. State ex rel. Lilienthan v. Deane, 1 So. 698, 699 (Fla. 1887). In Deane, a canvassing board refused to count a single ballot for a municipal election in the city of Sanford. The board’s exercise of discretion was upheld by the Supreme Court of Florida. Id.
73. See infra text accompanying notes 274–76.
75. At this time in the State’s history, each county had only a single county judge, but at least two justices of the peace. FLA. REV. STAT. § 3357 (1920); FLA. CONST. art. V, §§ 16–17 (1885).
76. Ch. 97, § 36, 1881 Fla. Laws 481, 496.
77. Id.
Within six days of the election, the county canvassing board was required to meet to "compile the result of the election as shown by [the] inspectors' returns." The county canvassing board could not, however, reevaluate the propriety of any decision by the precinct inspectors as to the casting of any individual vote.

For any election involving more than a county or local race, within thirty-five days of the election, the county canvassing board would in turn forward its canvassing results to the state canvassing board. The state board was comprised of the Secretary of State, the Attorney General, and the State Comptroller. As with the county canvassing boards, the state canvassing board likewise had no discretion to evaluate the propriety of any tallies forwarded by the counties. The canvassing by the state board was merely a "ministerial act." If a candidate for a state legislative seat was dissatisfied with the results of a canvassing decision, the candidate was required to file its election contest within twenty days for the General Assembly and twenty-five days for the State Senate, "after the canvass by the Board of State Canvassers." Notwithstanding the implementation of a new uniform election code, the County Canvassing Boards were not authorized to canvass the returns of all elections. For instance, results from elections to authorize bonds for county improvements were to be canvassed by the board of county commissioners.

During the years after the Civil War, the canvassing board officials, such as the county judges and justices of the peace, were all appointed by the governor, which soon led to the white establishment "ha[ving] complete control of the election machinery." In some counties, canvassing boards "shamelessly manipulated voting and counting processes on election day." In particular, in the years following Reconstruction, county judges often

78. Ch. 97, § 36, 1881 Fla. Laws 481, 496. For an example of the appointment procedure, see State ex rel. Bisbee v. Bd. of County Canvassers of Alachua County, 17 Fla. 9, 19 (1878).
79. Ch. 97, § 36, 1881 Fla. Laws 481, 496.
80. Id.
81. Ch. 97, § 40, 1881 Fla. Laws 481, 497.
82. Id. at 498.
83. State ex rel. Drew v. McLin, 16 Fla. 17, 43–44 (1876).
86. MANLEY, supra note 43, at 299.
ignored clearly fraudulent activity designed to disenfranchise black citizens.\textsuperscript{88} The misconduct was somewhat ameliorated in 1870 and 1871 by the enactment of a series of federal legislation\textsuperscript{89} which held state officials, including judges, criminally liable for violations of voting rights.\textsuperscript{90} Nevertheless, not all corruption was eliminated, as was indicated in the elections of 1878.

The congressional elections of 1878 saw Democrat Noble Hull run against the Republican incumbent Horatio Bisbee, Jr., for the Second Congressional District.\textsuperscript{91} As the election returns came into Tallahassee, they indicated a narrow lead for the Republican.\textsuperscript{92} The South Florida returns had not yet been received, and Hull sent to Brevard County “an Orange County lawyer, armed with $200 and the information that Hull must have over [a] 200 [vote] majority in Brevard” to win the race.\textsuperscript{93} Upon arrival in Brevard County, however, the attorney discovered that the returns had already been tallied and that Hull had won only by seventy-nine votes.\textsuperscript{94} The court clerk, who possessed the returns, initially refused to alter them.\textsuperscript{95} However, upon receiving the amount of $140, the clerk “turned his office over to [the Hull representatives] who raised Hull’s vote” to a majority of 270 votes.\textsuperscript{96} The altered returns were provided to the Brevard County canvassing board, who certified them as the official Brevard returns.\textsuperscript{97} The canvassing board members were subsequently arrested for election fraud and found guilty in federal court in Jacksonville.\textsuperscript{98} They each served more than a year in prison.\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{88} See id.; Hildreth, supra note 86, at 81; PEEK, supra note 49, at 40.
\item \textsuperscript{90} PEEK, supra note 49, at 204–08.
\item \textsuperscript{91} WILLIAMSON, supra note 66, at 74–75. Hull was the current lieutenant governor. At that time, Florida was divided into only two congressional districts. \textit{Id}.
\item \textsuperscript{92} \textit{Id}.
\item \textsuperscript{93} \textit{Id} at 81.
\item \textsuperscript{94} \textit{Id}.
\item \textsuperscript{95} WILLIAMSON, supra note 66, at 81.
\item \textsuperscript{96} \textit{Id}.
\item \textsuperscript{97} \textit{Id} at 81, 83.
\item \textsuperscript{98} \textit{Id} at 84.
\item \textsuperscript{99} \textit{Id} at 81, 84. Hull was seated as Congressman from the Florida Second Congressional District. WILLIAMSON, supra note 66 at 75. Legal proceedings to determine the propriety of his election took almost his entire term, with his being unseated just a few days before the end of his term and Bisbee taking the seat in his place. \textit{Id} at 83.
\end{itemize}
Continuing corruption with the canvassing of votes was one of the reasons for the emergence of a strong Independent party in the 1884 statewide elections. The Independents campaigned on a platform that included the slogan "a free ballot, a full vote and a fair count." The Independent candidate for Lieutenant Governor, Jonathan C. Greeley, accepted the group's nomination with a speech that echoed the slogan, calling for "a free ballot, a full vote and a fair count." Although Greeley gave the Democrats a strong challenge, he did not win.

The slogan of the Independents appeared to fall on deaf ears. Rather than assure that election laws operated fairly, the legislature took steps to further thwart a fair vote. In 1889, new laws implemented a confusing multi-box system of balloting, along with a poll tax. Only a single legislator spoke out against the new laws. State Senator Will Coulter of Levy County argued that the State's "[e]lection laws should be plain and simple." By 1892, the growth of the Farmers Alliance as a statewide political force again led to calls for election reform. However, the Alliance was not able to gain sufficient power to usurp the dominance of the Democratic Party, who were firmly entrenched in their antireform position.

In 1895, James Bryan Whitfield, future justice of the Supreme Court of Florida, drafted a new general election law for the state. The composition of the county canvassing boards was changed. Rather than the clerk of the court and a justice of the peace serving with the county judge, the county canvassing board was thereafter composed of the supervisor of voter registration, the chair of the county commission, and the county judge.

100. Id. at 183.
101. Id. at 182–84. The gubernatorial candidate was Frank W. Pope, who "had given up [a] promising career within the Democratic Party to protest against the white supremacy extremists of the Black Belt." Id. at 182. Greeley, on the other hand, was a former Republican with reform leanings, who was president of a railroad and served as state senator from Jacksonville. WILLIAMSON, supra note 66, at 182. Although the Independents lost the election, they lost by less than 5000 votes and carried nine of the thirty-nine Florida counties: Washington, Leon, Jefferson, Madison, Hamilton, Nassau, Duval, Alachua, and Marion. Id. at 207–08. Notwithstanding its strong showing, the Independent Party was not able to survive its defeat. Id. at 210.
102. Id. at 207.
103. Id. at 270.
104. WILLIAMSON, supra note 66, at 271.
105. Id. at 270–71.
106. Id. at 318; GANNON, supra note 3, at 287.
107. MANLEY, supra note 43, at 349.
108. Now called the supervisor of elections. See infra text accompanying note 150.
Once again, however, the county canvassing board possessed no discretionary authority to alter any decision of the precinct inspectors of election.\textsuperscript{110} This was true even if ballots were found by the county canvassing board which were clearly not counted by the inspectors.\textsuperscript{111} As for precinct inspectors, a requirement was added that they be "fair minded" in addition to the existing requirement that they be "intelligent" and "discreet."\textsuperscript{112} Finally, the election inspectors were made subject to a fine if they revealed "how any elector may have voted,"\textsuperscript{113} while county canvassing board members were subject to fine or imprisonment if they "wilfully violate[d] any of the provisions of law relating to canvassing the result of any election."\textsuperscript{114}

D. The Early Twentieth Century

Notwithstanding efforts to provide for a statewide uniform system of canvassing elections, the Florida Legislature soon began once again to create other types of canvassing mechanisms for specific types of elections. In 1899, the legislature provided a new canvassing procedure for elections to consider taxes for school districts.\textsuperscript{115} In such an election, the local board of public instruction served in the place of the county canvassing board.\textsuperscript{116} A subsequent challenge to the school boards' authority as canvassing entities was unsuccessful.\textsuperscript{118}

Thereafter, in 1903, the legislature authorized the boards of county commissioners to canvass the results of any election involving the creation of any special tax road districts;\textsuperscript{117} in 1911, to canvass the results of any election involving the creation of any special road and bridge districts;\textsuperscript{118} in 1917, to canvass the returns of any elections involving the levying of a county tax for the creation of a tuberculosis hospital;\textsuperscript{119} in 1919, reauthorized to canvass the results of any election involving the relocation of a county seat;\textsuperscript{120} and in 1925, to canvass the results of an election involving a local

\begin{thebibliography}{99}
\bibitem{110} Fla. Rev. Stat. § 287 (1920).
\bibitem{111} Bisbee, 17 Fla. at 18–19 (uncounted ballots found in a ballot box).
\bibitem{112} Fla. Rev. Stat. § 249 (1920).
\bibitem{113} Id. § 5876.
\bibitem{114} Id. § 5880.
\bibitem{115} Id. § 564.
\bibitem{116} Pickett v. Russell, 28 So. 764, 770 (1900).
\bibitem{117} Fla. Rev. Stat. § 1638 (1920).
\bibitem{118} Id. § 1649.
\bibitem{119} Id. § 1818.
\bibitem{120} Id. § 1583.
\end{thebibliography}
referendum to determine whether to permit livestock to "roam at large."\textsuperscript{121} On occasion, elections were held in which the county canvassing board, rather than the board of county commissioners, erroneously presided as canvassers of a particular election.

One particular set of challenges took place in Polk County in the early 1900s in which a local prohibition option had been approved by the electorate in a county referendum.\textsuperscript{122} State law had required the results of the referendum to be canvassed by the board of county commissioners.\textsuperscript{123} In a series of criminal cases brought against those violating the prohibition law, local judges declared the local prohibition laws to be "null and void" because the "wet and dry election... had been canvassed by the county canvassing board, instead of by the county commissioners."\textsuperscript{124}

Notwithstanding Supreme Court of Florida rulings that the canvassing boards did not at that time possess any authority to alter the returns as tallied by the precinct boards of election, such a law did not prevent the canvassing board from asking for recounts on occasion. One such incident occurred in 1913 during the Fort Lauderdale local elections in which the city council served as canvassing entity after the election board had tallied the votes.\textsuperscript{125} At the close of the polls, the election board had certified the results for all city council seats, one of which involved a tally of ninety-two votes to eighty-nine votes.\textsuperscript{126} One of the sitting council members, E.T. King, requested a recount which was granted.\textsuperscript{127} However, the result was the same.\textsuperscript{128}

At this time, no statutory provision existed for the counting of ballots that were improperly marked. As a result, improperly marked ballots were generally not counted. In his first message to the Florida Legislature in 1913, Governor Park Trammell acknowledged the frequently resulting unfairness and stated this problem as one he wanted to address during his

\begin{itemize}
  \item \textsuperscript{121} Ch. 10316--(No. 294), § 2, 1925 Fla. Laws 64, 64. \textit{See also} Ch. 14715--(No. 77), § 12, 1931 Fla. Laws 187, 190–91. (authorizing the same procedure for a special election in Marion County).
  \item \textsuperscript{122} M. F. Hetherington, \textit{History of Polk County, Florida} 30 (Arthur H. Cawston ed., 1928).
  \item \textsuperscript{123} \textit{Id.} at 30–31.
  \item \textsuperscript{124} \textit{Id.}
  \item \textsuperscript{125} \textit{Matthews Elected Mayor of City, \textit{Fort Lauderdale Sentinel},} Apr. 4, 1913, at 1.
  \item \textsuperscript{126} \textit{Id.}
  \item \textsuperscript{127} \textit{Id.}
  \item \textsuperscript{128} \textit{Id.}
\end{itemize}
In one of the first calls for election boards to determine the voter's intent, the Governor stated:

[M]ere irregularities in marking the ballot, if the intention of the voter is clearly indicated, should not be cause for throwing out the ballot. The primary law should be so amended as to provide that where a voter's intention is clear on the ballot, the vote should be counted, though technically there might be an error in the marking of the ticket.

Such a call for reform did not, however, result in immediate legislation. The Florida Legislature more clearly provided a right of inspection in 1915, by which up to three persons were permitted "to be sufficiently near" the ballots being counted so that the observers could determine "whether or not the ballots are being correctly read and called, and the count of the votes correctly tallied."

Beginning in 1917, absentee ballots were authorized by Florida law. Such ballots were required to be filed directly with the county judge of the county for which the absent elector was voting. These ballots were not opened until the canvassing board met to canvass the results of an election. The canvassing board had the responsibility to open and tally these ballots. A decade later, the ballots were separated by precinct and delivered to the appropriate poll election board. If the inspectors of election determined that an absentee voter was not eligible to vote, the ballot cast "shall not be deposited in said ballot box, but shall be left in the outer envelope and by them delivered to the canvassing board... and also with a notation on said envelope of their reasons for not depositing said ballot in the ballot box." No provision was made, however, for a canvassing board to overrule the decision of the inspectors.

In 1921, the legislature enacted a law requiring the county commissioners to publish in a local newspaper the names of the designated inspectors of

129. Park Trammell, First Message of the Governor to the Florida Legislature, Apr. 8, 1913, reprinted in FORT LAUDERDALE SENTINEL Apr. 18, 1913, at 7.
130. Id.
131. FLA. REV. STAT. § 5877 (1920).
132. Id. § 370–72.
133. Id. § 370.
134. Id. § 371.
135. Id. § 371.
136. Ch. 11824—(No. 17), § 2, 1927 Fla. Laws 116, 118.
137. Id.
election at least fifteen days prior to the election. In 1927, an unusual law was enacted which transferred all the powers and duties of a supervisor of elections from the supervisor to the county tax collector in any county which had, "according to the State census of 1925, a population of not less than 13,600 and not more than 13,800." The only county meeting this requirement under the 1925 census was Walton County, located in the central western Florida Panhandle. As a result, the tax collector of Walton County had a seat on the county's canvassing board.

Municipal elections generally did not involve the county canvassing boards. Rather, the Florida Legislature, in creating or modifying municipalities, typically designated the city council or commission as the canvassing board for any municipal election. In 1927, such legislation was adopted, for instance, for the city of DeLand, and in 1929 for the town of Ormond.

Voting equipment changes taking advantage of the latest technological advances took place in 1929 when the Florida Legislature authorized counties to "provide for the experimental use" of new voting machines. The enacting legislation authorized those voting machines which contained a counter indicating how many persons have voted and which could "permit the voter to vote for as many persons for an office as he is lawfully entitled to vote for, but no more." Upon closing of the polls, the board of elections of each precinct prepared a "statement of canvass" which was prepared by one member reading from each counter the total votes for each candidate or proposition, and the other two members recording the figure on the statement. This procedure was to be done "in the presence of persons who

138. Id. at 116–20.
139. Ch. 12317—(No. 512), § 1, 1927 Fla. Laws 1254.
140. FLA. STATE CENSUS (1925) (on file in the Florida Collection at the Jacksonville Public Library); telephone interview with Marty Sugden, Research Librarian in the Florida Collection at the Jacksonville Public Library (Sept. 5, 2001) [both hereinafter collectively referred to as 1925 CENSUS].
141. See, e.g., supra text accompanying note 125–28 (describing local Fort Lauderdale election).
142. Ch. 12669—(No. 864), § 4, 1927 Fla. Laws 744, 748; Ch. 14278—(No. 714), § 4, 1929 Fla. Laws 1530, 1533. The role of the city council or commission as canvassing board continued into the 1930s and 1940s. See, e.g., Ch. 19960—(No. 965), § 2, 1939 Fla. Laws 982 (pertaining to the canvassing of local elections in the city of Ocala).
143. Ch. 13893—(No. 329), § 4, 1929 Fla. Laws 715, 718.
144. Ch. 13893—(No. 329), § 2, 1929 Fla. Laws 715, 716.
145. Ch. 13893—(No. 329), § 23, 1929 Fla. Laws 715, 726.
may be lawfully present at that time, giving full view of the counters.” At
the end of the procedure, the figures were to be “compared with the numbers
on the counters of the machine.” If reconciled, the results were announced
by the board chair, and then certified by the election board. The observers
were to be given “ample opportunity” to compare the results to assure no
corrections were necessary. The first six counties receiving specific
legislative authorization to use the voting machines, with county commission
approval, were Marion, Palm Beach, Pinellas, Nassau, Polk, and Volusia
Counties.

At the same time, the canvassing board structure was affected by a
legislative amendment. While the local canvassing boards were still
comprised of the county judge, the supervisor of elections, and the chair of
the board of county commissioners, the new law clarified that the chair of
the county commission was the person responsible for designating
replacements for the county judge and the supervisor of elections if either or
both of them were absent, sick, refused to act, or otherwise suffered a
disability preventing them from serving on the canvassing board.

In 1931, the Florida Legislature promulgated a new law implementing
procedures for elections to approve the issuance of bonds for “Counties,
Districts and Municipalities.” The new law provided a unique duty for the
canvassing board: to determine the number of “free-holders who are
qualified electors who are residing in such County, District or Municipal-
ity.” Under the law, only freeholders could vote in bond referenda. Moreover,
as a threshold to the validity of the election, a majority of the
freeholders had to cast a vote. Accordingly, before the results of a bond
referendum could be canvassed, the canvassing board had to first determine

146. Id.
147. Id.
148. Id.
149. Ch. 13894—(No. 330), 1929 Fla. Laws 728. For the counties of Pinellas, Nassau,
Polk, and Volusia, the session law did not refer to the county by name. Rather, the law
referred to the county's population figure as it existed under the 1925 Florida census. Only
one county fit each population figure: 51,700 to 51,714 (Pinellas); 9600 to 9643 (Nassau);
63,900 to 63,925 (Polk); and 40,160 to 40,165 (Volusia). See 1925 CENSUS, supra note 140.
150. Ch. 13761—(No. 197) § 11, 1929 Fla. Laws 480, 486.
152. Id.
154. Id.
that a sufficient number of votes had been cast using lists that were to be supplied by the pertinent governing authority.\(^{155}\)

The Florida Legislature of 1933 further adopted legislation providing for the election of delegates to any convention that might be called by Congress to propose amendments to the United States Constitution.\(^{156}\) The returns of such elections were to be canvassed by the board of county commissioners, rather than the county canvassing board.\(^{157}\)

The next year, the Supreme Court of Florida issued a decision which seemed to echo back to Governor Trammell's plea to consider the intent of the voter. In *State ex rel. Hutchins v. Tucker*,\(^{158}\) the high court ruled that "substantial compliance" with ballot marking requirements was sufficient to warrant the counting of a ballot.\(^{159}\) In this case, the court considered three types of mis-marked ballots: 1) those in which a voter had pasted to the ballot another sheet of paper which indicated the voter's choices; 2) those in which a voter paper-clipped a similar sheet of paper to the ballot; and 3) those in which a voter had merely enclosed an unattached sheet of paper in the envelope with the ballot.\(^{160}\) The court determined that the first instance was "substantial compliance," while the latter two were not.\(^{161}\)

The legislative session of 1935 spawned the creation of more laws creating special canvassing mechanisms for particular elections. Although the town or city councils of some municipalities were already authorized to canvass the returns of local elections for the members of the council, such enabling laws did not refer to anything other than these types of elections.\(^{162}\) As a result, new legislation provided that a municipal election for the creation of a local civil service board was to be canvassed by the local municipality's "governing authority."\(^{163}\) Further, the executive committees of political parties conducting primary elections in certain municipalities had the "optional" authority to appoint the members of the boards of elections, rather than their appointment by the board of county commissioners.\(^{164}\) At

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155. *Id.* §§ 6, 12.
156. Ch. 16180—(No. 323), § 1, 1933 Fla. Laws 740.
157. *Id.* This particular law continues in effect as of the 2001 Florida legislative session. See infra text accompanying note 316.
158. 143 So. 754 (Fla. 1932).
159. *Id.* at 757.
160. *Id.*
161. *Id.*
162. See, e.g., Ch. 16433—(No. 576), § 9, 1933 Fla. Laws 481, 484 (authorizing the town council of the town of Frostproof to canvass the returns of its own elections).
164. Ch. 16989—(No. 218), § 5, 1935 Fla. Laws 477, 479.
the same time, the authority of the county commissioners to appoint the members of the election boards in municipalities was removed, and this power vested in the voters for each "city and town." The members were to be elected for four-year terms. The statutory provisions concerning absentee ballots were also amended to provide that any absentee ballots received “after midnight of such Election Day shall be voided, and such ballots destroyed by [the] Canvassing Board of the County in which received.”

The 1935 Florida Legislature implemented another piece of legislation which altered the canvassing system in one of the state’s most populous counties, Duval. The new law abolished the Board of County Commissioners and extended the jurisdiction of the Jacksonville City Council throughout the entire county. The result was that all duties previously performed by the Board of County Commissioners fell to the City Commission, including having a member sit on the local canvassing board. Six years later, the legislature further affected the Jacksonville area by providing that no one in Duval County could serve as an inspector of election if that person were also a government employee or official.

The 1937 Florida legislative session saw substantial change to the election system in Florida. The City of Jacksonville became the first Florida jurisdiction to have state-mandated voting machines for all city elections. For all jurisdictions using voting machines, including those voluntarily adopting the voting machine method, a new law required that the voter produce identification and a signature as proof that the person was in fact the person registered as the voter. The local clerk or inspector of election was required to make a “fair and just comparison of the signatures.” If the inspector doubted the veracity of the signature, the voter was required to

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165. Ch. 16983—(No. 212), § 1, 1935 Fla. Laws 468.
166. Id. § 2.
168. See generally Ch. 17566—(No. 795), § 1, 1935 Fla. Laws 156, 157.
169. Id.
171. Ch. 21200—(No. 992), § 1, 1941 Fla. Laws 370.
172. Ch. 18618—(No. 912), § 1, 1937 Fla. Laws 778.
174. Id. § 2.
complete an affidavit attesting to the voter's registration before the vote would be accepted.\footnote{175}

No provision was made in the law for any further review so long as the person executed the requisite affidavit.\footnote{176} Upon the closing of the polls for a general or special election, if the inspectors of election discovered that more ballots had been cast than voters casting ballots, the inspectors were required to "publicly draw out and destroy unopened and unexamined as many of such ballots as shall be equal to the excess."\footnote{177} The legislature also definitively provided that the inspectors of election possessed "such police powers as may be necessary to carry out" some specified duties of their position.\footnote{178}

Until 1937,\footnote{179} a "protest" was not a legally cognizable challenge to an election result.\footnote{180} In 1937, the Florida Legislature provided the right to file a protest of the canvass of returns if any voter believed the returns were "erroneous or fraudulent."\footnote{181} The protest had to be filed with the canvassing board, not the precinct inspectors of election.\footnote{182} If a protest was filed, the first action required was for the "Canvassing Board to examine the counters on the voting machines," which were the subject of the dispute.\footnote{183} The votes appearing on the counters were "presumptively correct."\footnote{184} The new statute was silent on how the challenging voters might rebut the presumption, but the statute retained the right to seek court intervention.\footnote{185}

Notwithstanding earlier legislation that local inspectors of election be subject to popular vote, the 1939 Florida Legislature authorized the Auburndale City Council to appoint its own inspectors of election for municipal elections, with the City Council serving as the canvassing board.\footnote{186} A truly broad provision in the law also gave the right to any defeated candidate to demand a recount.\footnote{187} The law did not require that the

\begin{footnotes}
\item 175. \textit{Id.}
\item 176. \textit{See id.} §§ 1–2.
\item 177. Ch. 17898–(No. 192), § 9, 1937 Fla. Laws 359, 362.
\item 178. Ch. 17901–(No. 195), § 3, 1937 Fla. Laws 366, 368–69.
\item 179. Ch. 18405–(No. 699), § 9, 1937 Fla. Laws 1327, 1334.
\item 180. \textit{Compare} Ch. 18405–(No. 699), § 9, 1937 Fla. Laws 1327, 1334 \textit{with} State ex rel. Drew v. McLin, 16 Fla. 17, 49 (1876).
\item 181. Ch. 18405–(No. 699), § 9, 1937 Fla. Laws 1327, 1334.
\item 182. \textit{Id.}
\item 183. \textit{Id.}
\item 184. \textit{Id.}
\item 185. \textit{Id.}
\item 186. Ch. 19689–(No. 694), § 7, 1939 Fla. Laws 33, 33–34.
\item 187. \textit{Id.} § 12.
\end{footnotes}
defeated candidate set forth a reason for the demand, nor did it provide
discretion to the City Council to deny the recount. 188 If requested, the
recount was mandatory. 189

The same legislative session saw the enactment of a statewide school
code which provided for the election of school board members in each
school district. 190 The County School Board was given the power to appoint
its own inspectors of elections. 191 It was also designated the canvassing
board for purposes of these elections. 192 A further enactment required that
the inspectors of election for all types of elections post the results of their
canvass at their polling place after concluding the tally. 193 The posting must
be done conspicuously, so that "it will be subject to public inspection even
though the polling place be closed." 194

By the 1940s, local municipal councils or commissions typically
continued to serve as the canvassing boards for municipal elections. 195 In
Jacksonville, the city lost the right to have absentee voting in any municipal
election. 196 However, as the nation faced the challenge of the Second World
War, this legislative aberration raised concerns of the need to facilitate the
ability of those serving in the military to more easily cast votes throughout
the state. 197 The Florida Legislature responded by adopting a specific law
providing for the casting of absentee ballots by those in the armed forces. 198
All absentee ballots returned from the military were to be forwarded to the
appropriate county judge for holding. 199 No later than the time of the closing
of the polls on election day, the county judge was required to deliver these
ballots to the canvassing board. 200 The canvassing board then determined if
the ballots met the requirements imposed by the Florida Legislature, which
included a determination of whether the voter had also voted in person. 201 If

188. See id.
189. Id.
190. Ch. 19355—(No. 360), art. V, § 1032(1)(e), 1939 Fla. Laws 910, 912.
191. Id. §§ 119(6), 1032(1)(e).
192. Id. § 1032(1)(g).
193. Ch. 19663—(No. 668), § 5, 1939 Fla. Laws 1612, 1618.
194. Id.
195. See, e.g., Ch. 21224—(No. 1016), § 1, 1941 Fla. Laws 450, 450–51 (referring to
the canvassing of municipal elections in the city of Fernandina).
196. Ch. 21314—(No. 1106), § 1, 1941 Fla. Laws 911.
197. Ch. 22014—(No. 380), § 1, 1943 Fla. Laws 729.
198. Ch. 22014—(No. 380), 1943 Fla. Laws 729.
199. Id. § 6.
200. Id.
201. Id.
the canvassing board determined that the member of the military was not registered to vote, the absentee vote could be counted, but only for the federal elections of President and Vice President, Senators, and United States Representatives.202

In 1941, the Supreme Court of Florida, in State ex rel. Carpenter v. Barber, again considered how election boards and canvassing boards should handle mismarked ballots.203 In Barber, the questioned ballot contained an "X" for a candidate which was not contained within the space designated for the "X" to be placed.204 The tribunal ruled that the canvassing board was required to determine the "intention of the voter...from a study of the ballot..."205 Upon review, "[i]f the will and intention of the voter can be determined..." the vote should be counted although the mark was misplaced.206 Three years later, the same court considered a challenge to ballots in which voters had used characters other than an "X" as instructed on the ballot.207 For instance, some voters used a check mark (✓).208 In a decision which appeared to retreat somewhat from the voter's intent standard expressed in Barber and earlier in Tucker,209 the Supreme Court of Florida in McAlpin v. State ex rel. Avriett ruled that "all ballots marked with other characters should not be counted."210

During the 1943 legislative session, the Florida Legislature modified the canvassing board structure for those counties having a population between 105,000 and 205,000 persons under the 1940 census.211 The only county meeting these parameters was Hillsborough.212 Under the new law, the legislature created a new County Election Board consisting of five resident registered voters213 who had the responsibility to select the local inspectors of election214 and to inspect the county's voting machines.215

202. Id. § 7.
203. State ex rel. Carpenter v. Barber, 198 So. 49 (Fla. 1940).
204. Id. at 50.
205. Id. at 51.
206. Id.
207. McAlpin v. State ex rel. Avriett, 19 So. 2d 420 (Fla. 1944).
208. Id.
210. McAlpin, 19 So. 2d at 421.
211. Ch. 22195—(No. 561), 1943 Fla. Laws 1070.
213. Ch. 22195—(No. 561), § 2, 1943 Fla. Laws 1070, 1071.
214. Id. § 6(3).
215. Id. § 6(5).
These members were appointed by the Governor for staggered terms.\textsuperscript{216} The County Canvassing Board was restructured to include the County Election Board, as well as the County Judge and the Supervisor of Elections.\textsuperscript{217} The duties of the canvassing board did not change, however, as it still had no authority to alter the tallies submitted by the local inspectors of election.\textsuperscript{218} Six years later, the jurisdictional limit of this legislation was amended to apply only to those counties with populations between 135,000 and 270,000 under the 1945 state census.\textsuperscript{219} The only county meeting this requirement was Hillsborough.\textsuperscript{220}

E. \textit{Post-World War II Era}

Absentee ballots were considered once again by the 1949 Florida Legislature.\textsuperscript{221} The duty of some canvassing boards to destroy illegal absentee ballots\textsuperscript{222} was eliminated with a law requiring that the “election inspection board” mark rejected absentee ballots by the notation “rejected as illegal” across the face of the ballot.\textsuperscript{223} These ballots then had to be retained as part of the election records for that election.\textsuperscript{224} The canvassing board’s duties for including absentee ballots differed depending on the type of voting system used by the jurisdiction.\textsuperscript{225} If voting machines were used, the canvassing board added the absentee ballot calculation results to the tallies submitted by the precinct inspectors of election.\textsuperscript{226} For those counties using paper ballots, the absentee ballots were required to actually be placed in the appropriate ballot box before counting.\textsuperscript{227} The legislature also expanded the number of election inspectors statewide.\textsuperscript{228} Each polling place was thereafter required to have two “election inspection boards” comprised each of three inspectors and a clerk, each of whom must be able to read and write

\begin{itemize}
  \item \textsuperscript{216} \textit{Id.} § 2.
  \item \textsuperscript{217} At that time, the various Florida supervisors of election were referred to as “Supervisor[s] of Registration.” \textit{Id.} § 3.
  \item \textsuperscript{218} Ch. 22195—(No. 561), §§ 2, 6(3), 6(5), 7, 1943 Fla. Laws 1070, 1070–77.
  \item \textsuperscript{219} Ch. 25522—(No. 526), § 2, 1949 Fla. Laws 1211, 1212.
  \item \textsuperscript{220} \textbf{THE FLORIDA HANDBOOK 1947-48}, at 165–71 (1946).
  \item \textsuperscript{221} Ch. 25385—(No. 389), 1949 Fla. Laws 921.
  \item \textsuperscript{222} \textit{See supra} text accompanying note 167.
  \item \textsuperscript{223} Ch. 25385—(No. 389), § 1, 1949 Fla. Laws 921, 926–27.
  \item \textsuperscript{224} \textit{Id.}
  \item \textsuperscript{225} \textit{Id.}
  \item \textsuperscript{226} \textit{Id.}
  \item \textsuperscript{227} \textit{Id.}
  \item \textsuperscript{228} Ch. 25384—(No. 388), § 2, 1949 Fla. Laws 915, 916.
\end{itemize}
the English language.\textsuperscript{229} One board had to be at the polls during voting, and the other tallied the votes when the polls closed.\textsuperscript{230} Each board could not consist of members all of whom belonged to the same political party.\textsuperscript{231} The names of the appointed inspectors were further required to be published in a local newspaper.\textsuperscript{232} For counties with populations of more than 100,000, the counties could provide for even more inspection boards to assist in the operation of the election.\textsuperscript{233}

A major review of Florida’s election laws took place in 1951, when the legislature adopted significant additions to existing law.\textsuperscript{234} While the law recognized the continued use of a board of elections comprised of a clerk and inspectors,\textsuperscript{235} the enactments specified a clear procedure for the tallying of votes at the precincts, particularly for those precincts using voting machines.\textsuperscript{236} The inspectors would tabulate the votes upon the closing of the polls by one inspector reading aloud each machine total and another writing down the result.\textsuperscript{237} Each of these inspectors had another inspector standing nearby to confirm the accuracy of the designated vote total.\textsuperscript{238} When the tabulation was complete for each machine, the inspector teams would then switch places with each team performing the opposite task.\textsuperscript{239} Each inspection team was to be comprised of “two inspectors of opposite political faith, whenever practicable.”\textsuperscript{240} Inspectors of election were uniformly appointed by the board of county commissioners, rather than have some subject to popular election.\textsuperscript{241} Each precinct continued to be required to have two election boards, with each being comprised of “three inspectors and a clerk.”\textsuperscript{242} No election board could be comprised of persons all belonging to the same political party.\textsuperscript{243} For some counties, the number of

\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{233} Ch. 25384—(No. 388), § 2.
\textsuperscript{234} Ch. 26870—(No. 391), 1951 Fla. Laws 816.
\textsuperscript{235} Ch. 26870—(No. 391), § 4, 1951 Fla. Laws 845, 900; Id. § 6 at 906, 907.
\textsuperscript{236} Id. § 5.
\textsuperscript{237} Id.
\textsuperscript{238} Id.
\textsuperscript{239} Ch. 26870—(No. 391), § 5, 1951 Fla. Laws 860, 897.
\textsuperscript{240} Id.
\textsuperscript{241} Id. § 6.
\textsuperscript{242} Id.
\textsuperscript{243} Id. at 907.
election boards could be more or less, depending on the population of the county or the number of voting machines used in the county.244

The 1951 legislation further detailed a protest procedure by which any voter was entitled to file a written protest with the canvassing board if the voter believed the results were "erroneous and fraudulent."245 The canvassing board would handle the protest, however, by merely double-checking the accuracy of the election boards’ tallies.246 The new law provided for no recount procedure.247 At the same time, the canvassing board was delegated more duties concerning absentee ballots. After determining the legality of each absentee ballot, the canvassing board was responsible for adding the additional votes to the tallies on each precinct poll book, and then adding the total of all these votes to the total for the county.248 Canvassing boards were required to convene “on the third day after any election, or sooner if the returns are received.”249 Any returns not received by the third day were required to be ignored.250

Finally responding to the call of Governor Trammell,251 and following the lead set years earlier by the Supreme Court of Florida in Tucker252 and Barber,253 the 1953 Florida legislative session saw the initial development of a statutory “standard” for use in determining the propriety of particular ballots.254 At that time, the law continued to provide for hand-marked ballots for elections in certain counties.255 The legislation required the voter to use an “X” to indicate the voter's choice.256 Ballots were often submitted, however, in which the voter disregarded the requirement of an “X” and instead indicated the choice by some other means.257 The new law provided

244. *Id.* See also Ch. 26690—(No. 211), § 2, 1951 Fla. Laws 386, 387 (involving counties with populations between 3000 and 3200); Ch. 27134—(No. 655), § 1, 1951 Fla. Laws 1499 (involving counties with populations between 200,000 and 300,000).
245. Ch. 26870—(No. 391), § 5, 1951 Fla. Laws 860, 899.
246. *Id.*
247. *Id.*
248. *Id.* § 5.
249. *Id.* § 6.
250. Ch. 26870—(No. 391), § 6, 1951 Fla. Laws 906, 911–12. This provision foreshadowed a similar change in law made during the 2001 Florida legislative session. See infra text accompanying notes 353–56, 391–95.
251. See *supra* text accompanying note 129–30.
253. State *ex rel.* Carpenter v. Barber, 198 So. 49, 50–51 (Fla. 1940).
255. *Id.*
256. *Id.*
257. *Id.*
that the ballot should not be disregarded "so long as there is a clear indication thereon to the election officials that the person marking such ballot has made a definite choice." 258

Beginning in 1955, county judges were no longer required to be the repositors of absentee ballots pending election day. This task fell more appropriately to the supervisor of elections. 259. Two years later, the canvassing board was again addressed, with the legislature providing that the chair of each county commission would appoint a substitute commissioner to sit on the canvassing board if either or both the county judge or supervisor of elections could not sit. 260 However, for those counties with a population between 200,000 and 300,000 persons, a circuit judge would sit in place of the absent county judge. 261 Again, the only county meeting this requirement was Hillsborough. 262 An amendment to the election code in 1959 provided more specifically that each election board "possess[ed] full authority to maintain order at the polls and enforce obedience to their lawful commands during an election, and during the canvass and estimate of the votes." 263

The 1960s saw several additional revisions to the state's election code. Voting machines became mandated in all Florida counties, as well as all municipalities in counties in which the population exceeded 260,000 residents. 264 The number of election boards for each precinct remained at two, with the board of county commissioners entitled to reduce the number to one if determined "necessary" by the commissioner in the exercise of their discretion. 265 Additionally, if the number of voters at the precinct exceeded 1000, the supervisor of elections must appoint an additional board. 266 The legislature also mandated training classes for all election inspectors and clerks. 267 Acknowledging the increasing number of voters in

258. Id. The language of this provision foreshadowed the standard which would be adopted by the Florida Legislature again almost five decades later arising out of the Florida Recount. See infra text accompanying notes 340-42, 374-78.
260. Ch. 57-104, § 1, 1957 Fla. Laws 162.
261. Ch. 57-463, § 1, 1957 Fla. Laws 41.
263. Ch. 59-212, § 1, 1959 Fla. Laws 844. This provision had its genesis in legislation adopted eight decades earlier that gave precinct inspectors the duty to maintain order at the polls. See supra text accompanying note 71.
266. Id. at 1489.
267. Id. at 1488–90.
the state, the legislature authorized canvassing boards to employ "clerical help" to assist in the performance of the canvassing board tasks.\textsuperscript{268}

The following decade saw two relevant pieces of legislation pass the Florida Legislature. In 1973, the Electronic Voting Systems Act was enacted to prescribe detailed procedures for the canvassing of returns from automatic tabulating equipment.\textsuperscript{269} In particular, the use of punchcard ballots came into being, with the use of a punch legislatively intended to "clearly indicate the intent of the voter."\textsuperscript{270} While the election board of each precinct was delegated the responsibility to set up for use all voting devices at the polls,\textsuperscript{271} the county canvassing board was required to confirm that the total number of votes from each precinct was in fact an accurate count.\textsuperscript{272} If a punchcard ballot was damaged to the point where it could not be read by the automatic tabulating machine, the canvassing board was mandated to manually count the ballot.\textsuperscript{273} The legislature failed to provide a specific standard for the canvassing board to determine how to count the vote.

Four years later, a second major piece of election legislation was enacted.\textsuperscript{274} This provision mandated that the canvassing board could not disregard a damaged or defective ballot "if there is a clear indication of the intent of the voter."\textsuperscript{275} The Legislature left this decision to the canvassing boards' discretion.\textsuperscript{276} This same piece of legislation eliminated the right of local governing bodies to canvass the results of bond referenda when other matters were on the ballot, giving this duty to the county canvassing boards.\textsuperscript{277} A clear provision was included which specified who would sit on the canvassing board if a particular member could not or was not eligible to sit.\textsuperscript{278} In particular, the chief judge appointed the replacement for the county judge.\textsuperscript{279} The chair of the board of county commissioners appointed the substitute for the supervisor, who was required to be another member of the board of county commissioners.\textsuperscript{280} The commissioners in turn would select a

\begin{thebibliography}{99}
\bibitem{268} Ch. 65-129, § 6, 1965 Fla. Laws 234, 237.
\bibitem{269} Ch. 73-156, § 3, 1973 Fla. Laws 248, 298.
\bibitem{270} \textit{Id.} at 299.
\bibitem{271} \textit{Id.} § 10.
\bibitem{272} \textit{Id.} § 14(1).
\bibitem{273} \textit{Id.} § 14(5)(b).
\bibitem{274} Ch. 77-175, § 20, 1977 Fla. Laws 903.
\bibitem{275} \textit{Id.} § 20.
\bibitem{276} \textit{Id.}.
\bibitem{277} \textit{Id.} § 12.
\bibitem{278} \textit{Id.} § 26.
\bibitem{279} Ch. 77-175, § 26, 1977 Fla. Laws 903.
\bibitem{280} \textit{Id.}
\end{thebibliography}
substitute if the chair of the county commission could not sit, who again was required to be one of its own members. Finally, if no county commissioner was able or willing to serve on the canvassing board as a substitute, the chief judge could appoint any "qualified elector of the county" to sit. This legislative act also included a mandatory machine recount by the canvassing board for situations in which there were "obvious errors" on any precinct returns, as well as any situation in which the results of the tabulation reflected that a candidate or measure was eliminated by "one-half of a percent less."

The Florida Legislature of the 1970s adopted a smattering of additional legislation pertaining to the canvassing of elections. An early law required the Division of Elections to "adopt uniform rules for the... use... of voting machines." Later, the legislature designated the Secretary of State as the chief election officer who was given the duty to "obtain and maintain uniformity in the application, operation and interpretation of the election laws." In 1976, the legislature authorized the Division of Elections to provide advisory opinions in the application of the State's election laws, which opinion was "binding on any person or organization who sought the opinion or with reference to whom the opinion was sought."

A special act further chipped away at the authority of municipalities to serve as canvassing entities for local elections. The legislature mandated that all municipal elections in Broward County be canvassed by the county canvassing board, and not the municipalities' governing bodies.

The early 1980s saw little legislative activity which affected the role of the canvassing board. The 1984 Florida Legislature adopted legislation which specified that the tallying duties of a precinct election board must be performed open to the public. The same act required all canvassing boards to file with the Division of Elections after any election a report which specifies any problems, "difficulties or unusual circumstances encountered...

281. Id.
282. Id.
283. Id.
284. See Ch. 72-303, § 1, 1972 Fla. Laws 1135, 1136.
285. Id.
286. Ch. 75-98, § 1, 1975 Fla. Laws 196.
288. Ch. 75-350, § 8, 1975 Fla. Laws 74, 75.
289. Id.
by the election board or canvassing board" during an election. Two years later, the Legislature added a proviso that all canvassing board meetings must be held "in a building accessible to the public." By the end of the 1980s, the Florida Legislature enacted major legislation which would have a primary role in the Florida Recount, the act which authorized a manual recount. The new law made a manual recount discretionary, but required that any request for a manual recount be filed with the canvassing board "prior to the time the canvassing board adjourns or within [seventy-two] hours after midnight of the date the election was held, whichever occurs later." If a manual recount were authorized, the person requesting the recount had the right to "choose three precincts to be recounted." If this partial recount revealed "an error in the vote tabulation which could affect the outcome of the election," the canvassing board was required to conduct a manual recount of all the ballots. The statute did not, however, define what "an error in the vote tabulation" meant. To proceed with a manual recount, the canvassing board was required to appoint counting teams who had the task of trying to determine how votes were cast. If a counting team was unable to determine how a particular ballot was cast, the ballot was to "be presented to the county canvassing board for it to determine the voter's intent." Again, the statute did not provide any standards for a canvassing board to use in determining the voter's intent.

291. *Id.* § 18. This statutory provision was one of the laws cited by Secretary of State Katherine Harris as supporting her refusal to extend certification deadlines during the Florida Recount. Because the county canvassing boards did not detail any problems in these reports to the Division of Elections, Harris argued that the counties could not later allege that special circumstances during the election authorized an extended certification deadline. *See Letter from Katherine Harris, Florida Secretary of State, to Broward County Canvassing Commission [sic] (Nov. 15, 2000) (on file with author) [hereinafter Harris Letter].


294. *Id.* § 15.

295. *Id.*

296. *Id.*

297. *See id.*

298. *Id.*

299. *Id.*

300. Ch. 89-348, § 15, 1989 Fla. Laws 2226, 2230. Almost all portions of this section became controversial during the Florida Recount. For the most part, Republicans accused the Democrats of being up to "some type of mischief" by resorting to the various procedures set forth in this section. Ironically, however, it was Florida Governor Bob Martinez, a Republican, who signed this legislation into law on July 5, 1989. *Id. See also THE FLORIDA HANDBOOK 1999–2000, at 32 (A. Morris & J. Perry Morris, eds., 27th ed. 1999).
The same year, the Florida Legislature also specified that members of canvassing boards could personally be fined $200 per day for each day election returns were submitted late.\footnote{301}

The canvassing board’s discretionary authority to decide when to grant a protest was clarified in an appellate decision arising out of a 1991 election for the City Commission of Oakland Park.\footnote{302} In this race for a commission seat, the challenging candidate lost by three votes, with the results reflecting fifty-eight overvotes and forty-two undervotes out of a total of 2609 votes cast.\footnote{303} The candidate filed a protest with the county canvassing board, who the appellate court noted “may, but is not obligated to, grant the request” for a manual recount.\footnote{304} The canvassing board denied the request.\footnote{305} The defeated candidate brought a lawsuit, and the circuit court issued a writ of mandamus requiring the canvassing board to conduct a manual recount.\footnote{306} The appellate court quashed the issuance of the writ, holding that “the decision whether or not to hold a manual recount of the votes [is] a matter to be decided within the discretion of the canvassing board.”\footnote{307}

A final piece of legislation impacting the role of a canvassing board was enacted in 1999. This act changed the deadline to request a manual recount from the time the canvassing board adjourns, to “prior to the time the canvassing board certifies the results for the office being protested or within [seventy-two] hours after midnight of the date the election was held, whichever occurs later.”\footnote{308}
III. LEGISLATIVE SCHEME ON EVE OF 2000 ELECTION.

As the general election of 2000 arrived, the various county canvassing boards of the state were guided generally by chapters 101 and 102 of the Florida Statutes which set forth their duties for canvassing the returns and handling any protests concerning the results. Although the canvassing process does involve some consideration of voting systems, the Florida Legislature has made it clear that the custodian of the voting equipment is the supervisor of elections, not the canvassing board. With a couple of exceptions, the composition of current canvassing boards continues to be as it has been since 1895: the chair of the county commission, the supervisor of elections, and a county judge. The county judge serves as chair.

However, three special types of elections exist which are canvassed by the entire board of county commissioners rather than the county canvassing board. The first type is a referendum to consider relocating the county seat. The second is a referendum to determine whether to establish a water and sewer district within the county. The third is an election for delegates to any convention that might be called by Congress to propose amendments to the United States Constitution.

One further type of election has an unusual canvassing method. For any bond referendum that is on the ballot alone, without any other measure or election on the ballot, the canvassing is conducted by “the governing authority which called the referendum.” For instance, if the election involves solely a county bond referendum, the board of county commissioners is the

310. § 101.34.
311. See supra text accompanying notes 107-08; Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720, 722 n.2 (Fla. 1998); State v. Sarasota County, 197 So. 2d 521, 522 (Fla. 1967).
313. The existence of different types of canvassing entities was held to be constitutional under the 1885 Florida Constitution. Lasseter v. Bryan, 65 So. 590, 591 (Fla. 1914) (board of county commissioners may serve as canvassing entity for referendum involving local option to sell alcoholic beverages).
314. FLA. STAT. §§ 138.06--09 (2001). This chapter of the Florida Statutes also provides a different means to challenge the results of this type of election instead of the "protest-contest" means provided for other types of elections. § 138.06.
315. FLA. STAT. § 153.08 (2001). This statute likewise contains a separate means to contest the results of the election. §§ 153.58(1)(a), 153.59.
316. FLA. STAT. § 107.07 (2001). This law had its inception in 1933. See supra text accompanying note 157.
317. FLA. STAT. § 100.271 (2001).
canvassing authority, while a local bond referendum would be canvassed by the city council or commission.318

IV. ELECTION REFORM ACT OF 2001

The controversy of the 2000 presidential election led to an outcry to revamp the election laws of Florida to address the difficulties experienced during the “Recount.”319 In response,320 the state conducted a series of statewide hearings which culminated in the Florida Legislature’s adoption of the Florida Election Reform Act of 2001.321 The act was approved by Governor Jeb Bush on May 10, 2001, with an effective date of January 2, 2002.322 The primary focus of the act concerns voting systems and recount procedures.323

In the Election Reform Act, notwithstanding the complaints by some of the partisan nature of canvassing boards,324 the legislature left untouched the local canvassing board structure.325 The legislature did, however, prescribe new duties for canvassing boards, as well as redefining prior responsibilities.326 The changes can be categorized as follows:

318. Id. In 1945, the Florida Legislature had provided that bond elections could not be held at the same time as any other election. Ch. 22545–(No. 31), § 1, 1945 Fla. Laws 60.
320. Mark Silva, Harris: There Was No Crisis, Just Close Vote, SUN-SENTINEL (Ft. Lauderdale), July 30, 2001, at 6B; TAPPER, supra note 319, at 469.
322. Id.
323. Id. at 129.
324. See, e.g., Collins, supra note 1, at C6 (quoting party official who “scoffs at the . . . assertion that Broward’s speedy recount was not politically motivated.”).
325. However, the state canvassing board and the Elections Canvassing Commission were changed. Prior to the 2001 law, the state commission was comprised of the Governor, the Secretary of State, and the Director of the Division of Elections. The new law modified the membership to “the Governor and two members of the Cabinet selected by the Governor.” FLA. STAT. § 102.111(1) (2001).
A. Tabulation Testing

Although the canvassing boards had previously been required to test the accuracy of the county's voting system, the new law requires that the board execute a written statement setting forth the tabulation devices tested [for the newly required voting systems], the results of the testing, the protective counter numbers, if applicable, of each tabulation device, the number of the seal securing such tabulation device at the conclusion of testing, any problems reported to the board as a result of the testing, and whether each device tested is satisfactory or unsatisfactory.

As with the previous law, the test must be conducted “[o]n any day not more than [ten] days prior to the election day.” The new law, however, more clearly emphasizes that the tabulation testing is a public event, which must be properly noticed. Because the new law permits voting systems to have a tabulating mechanism that is either determined at a central site or at each precinct, new sections of the law, discussed in more detail hereinafter, further provide procedures for testing tabulation equipment, whether it be central or precinct on-site tabulating in nature. Under the Election Reform Act of 2001, the resetting of the voting tabulating device, as well as its sealing, must be witnessed by the canvassing board or its representative, as well as the representatives of the political parties, and the candidates or their representatives who attended the test.

327. The actual testing of the tabulation system may be called something other than “tabulation testing” in the counties. For instance, in Broward County, the tabulation testing is referred to as the “logic and accuracy test.”


330. Id.

331. Id.

332. See generally id.
B. Provisional Ballots

A new task falling to canvassing boards is to determine whether a provisional ballot should be counted. Under the new law, a "provisional ballot" is to be given to a voter at a poll if a question exists as to the right of the voter to cast a ballot in the election or at that particular precinct. The canvassing board must determine if the elector casting the provisional ballot was eligible to vote at the precinct, and further determine if the voter had cast no other ballot in the election. In determining the propriety of a provisional ballot, the canvassing board must also "compare the signature on the provisional ballot envelope with the signature on the voter's registration." If the signature does not match, the canvassing board cannot count the ballot even if the voter is in the proper precinct. Any provisional ballot not accepted cannot be opened and must be marked "rejected as illegal." The canvassing board also retained the right to determine the propriety of questionable ballots, including undervotes and overvotes, but has a new standard to make this decision, with language borrowed from legislation enacted almost fifty years earlier: "if there is a clear indication on the ballot that the voter has made a definite choice as determined by the canvassing board." If the board can make such a determination, the ballot cannot be "declared invalid or void."

333. As of August 20, 2001, the statutory sections involving provisional ballots have been placed on hold by the United States Department of Justice as possibly being a violation of the Federal Voting Rights Act of 1965. Under the federal law, all changes to Florida's election laws must be approved by the federal government before taking effect. Brent Kallestad, Voting Reform Faces a Hurdle, SUN-SENTINEL (Ft. Lauderdale), Aug. 21, 2001, at 6B [hereinafter Kallestad].

335. Id. See also ABSTRACTS, supra note 328, at 28.
337. § 101.048(2)(b)(2).
338. Id.
339. An overvote on a ballot reflects that the voter has selected more than one candidate for a particular office. An undervote reflects that the voter has not selected any candidate for a particular office. FLA. STAT. § 97.021 (2001). See also Martin Merzer, 'Overvotes' Leaned to Gore, HERALD (Miami), May 11, 2001, at 1A & 34A.
340. See Ch. 28030—(No. 10), 1953 Fla. Laws 164, amending FLA. STAT. § 101.011 (1951) (referring to the standard for determination of questionable hand-marked ballots). For a discussion of this earlier legislation, see supra text accompanying notes 251–58.
342. ABSTRACTS, supra note 328, at 28.
C. Early Release of Returns

Although a canvassing board may begin to canvass ballots before the closing of the polls, as in the case of absentee ballots, no results of the canvass can be released by anyone, including a canvassing board member, until all polls are closed. To do so is a third degree felony.\textsuperscript{343}

D. Canvassing Procedure

Prior to the new law, ballots could be tabulated and reconciled at either the precinct or at a central location. Effective September 2, 2002, the new law permits ballots to be tabulated and reconciled at the precinct only.\textsuperscript{344} Any discrepancies coming to light at the precincts are to be reported to the canvassing board on forms to be provided.\textsuperscript{345} The results of the on-site precinct tabulation “may be transmitted via dedicated teleprocessing lines to the main computer system for the purpose of compilation of complete returns.”\textsuperscript{346} The Department of State was mandated to adopt administrative rules to assure safe procedures for the on-site precinct reconciliation of the ballots and the transmission of returns.\textsuperscript{347} When the canvassing board prepares the unofficial returns, which are to include the precinct returns, absentee ballots, and provisional ballots, the board must consider whether the unofficial returns contain a “counting error in which the vote tabulation system failed to count votes that were properly marked in accordance with the instructions on the ballot.”\textsuperscript{348} If a counting error is discovered, the canvassing board has only two options: 1) correct the error and recount the ballots with the vote tabulation system; or 2) request that the Department of State verify the tabulation software affected.\textsuperscript{349}

E. Canvassing Deadlines

For a primary election, a canvassing board has seven days to certify the results of an election, but, for a general election, a canvassing board has

\begin{footnotesize}
\begin{enumerate}
\item Id. § 101.5614(9).
\item See generally FLA. STAT. § 101.5614 (2001).
\item Id.
\item § 101.5614(3).
\item § 101.5614.
\item FLA. STAT. § 102.141(5) (2001).
\item Id. at (5)(a) & (b).
\end{enumerate}
\end{footnotesize}
eleven days. However, no later than noon of the day following any election, a canvassing board must provide unofficial returns to the office of the Secretary of State. These deadlines can only be extended in the case of an emergency as defined by the Election Reform Act. If the deadline is not met, and no emergency exists, the statewide Elections Canvassing Commission must ignore the missing results. This is quite a change from the prior law, which gave the Elections Canvassing Commission the discretion to consider the late filed results even if no emergency existed. If an emergency does exist, the Election Canvassing Commission must set a deadline for receipt of returns that will be filed late.

A possible problem could develop if a significant absentee ballot response were generated in an election. The new Election Code permits anyone to vote by absentee ballot; a requirement no longer exists that the voter demonstrate “good cause” for voting absentee. Further, up to four days prior to the election may begin the canvassing board to process all absentee ballots through the tabulating equipment, but must still have the

351. ABSTRACTS, supra note 328, at 28.
352. FLA. STAT. § 102.112 (2001).
353. See also id. The issue of whether this particular provision violates the equal protection clause is beyond the scope of this paper. Because each county is comprised of a canvassing board of the same size (three members), it is quite possible that a canvassing board in a large county will have a more difficult time meeting a canvassing deadline than a smaller county. Florida counties currently range in population from 7021 residents to 2,253,362. THE WORLD ALMANAC AND BOOK OF FACTS 2002, at 425 (2002). The Florida Secretary of State Katherine Harris has, however, opined that the difference in size of counties should not be a factor to consider when determining whether to extend a canvassing deadline. See Harris Letter, supra note 291 (refusing to extend certification deadline for Broward County). The effect of the legal principle announced in Bush v. Gore, 531 U.S. 98, 104–07 (2000) to this new statute is at this point left to legal conjecture (“the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise”). Id. at 105 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)); see also Moore v. Ogilvie, 394 U.S. 814, 817 (1969) (“When a State makes classifications of voters which favor residents of some counties over residents of other counties, a justiciable controversy [under the equal protection clause] is presented.”); J. LIEBERMAN, THE EVOLVING CONSTITUTION 29 (1992) (access to ballot typically analyzed under equal protection clause).
354. FLA. STAT. § 102.112 (2000).
356. ABSTRACTS, supra note 328.
357. Id.
358. Id. at 29.
certified returns to Tallahassee in either seven or eleven days, as the case may be.\footnote{359}

F. Machine Recounts

A machine recount is mandatory “if the margin of victory is one-half of a percent or less” for any election or judicial retention, unless the losing party waives the recount in writing.\footnote{360} If a recount is authorized, it must be conducted in “each affected jurisdiction.”\footnote{361} For instance, in an election crossing county lines, “all counties comprising the district of the candidacy or ballot measure are required to recount.”\footnote{362} As for procedures used by a canvassing board during a recount, the Secretary of State is required to

adopt detailed rules prescribing additional recount procedures for each certified vote system which shall be uniform to the extent practicable, and at a minimum address the following areas: security of ballots during the recount process; time and place of recounts; public observance of recounts; objections to ballot determinations; record of recount proceedings; and procedures relating to candidate and petitioner representatives.\footnote{363}

G. Manual Recounts

The right to bring a protest before the canvassing board has been largely repealed and replaced by a manual recount procedure which is triggered only under certain specific sets of circumstances.\footnote{364} If a machine recount indicates a margin of victory of one-quarter of one percent or less, the canvassing board must conduct a manual recount of overvotes and undervotes, regardless of whether any candidate asks for the recount.\footnote{365} A manual recount of only the overvotes and undervotes is mandatory if the election was decided by a margin of victory between one-quarter and one-half of one percent of the vote.\footnote{366} A manual recount of the overvotes and undervotes is mandatory so long as the losing party requests a manual

\footnotesize{\begin{itemize}
\item[359.] Fla. Stat. § 102.112 (2001).
\item[360.] ABSTRACTS, supra note 328, at 29.
\item[361.] Id.
\item[362.] Id.
\item[363.] Id. at 28.
\item[364.] FLA. STAT. § 102.166(1) (2001).
\item[365.] ABSTRACTS, supra note 328, at 28.
\item[366.] FLA. STAT. § 102.166(2)(a) (2001).
\end{itemize}}
recount "in writing no later than the second day after the election." In September 2001, the Division of Elections proposed rules governing the conduct of a manual recount, which were subsequently amended. In addition to following the standards set forth by the Division of Elections for determining the propriety of a questioned ballot, the proposed rule requires that the canvassing board "set aside" each challenged ballot, "with a notation of the precinct number, the unique identifier number, how the ballot was counted, the reasoning behind the challenge, and the name of the person bringing the challenge." The canvassing board is required to have "copies of the record" of the manual recount available to the public "within two weeks of the recount."

H. Standard of Ballot Review

For the review of any damaged ballot, or if a situation arises when a manual recount is authorized, the canvassing board must count a ballot "if there is a clear indication on the ballot that the voter has made a definite choice...." However, the Secretary of State is mandated "to adopt specific rules" which set forth "what constitutes a clear indication." If the ballot does not clearly indicate that "the voter has made a definite choice" for an office or ballot measure, the vote cannot be counted for any office or ballot measure for which there is no clear definite choice. Specific rules required under this provision were proposed by the Division of Elections in

367. Id.
368. ABSTRACTS, supra note 328, at 29.
370. See infra text accompanying notes 372-76, 458-62.
372. Id.
373. Id. rule 1S-2.031(1)(l) & (2)(m).
375. Id.
376. ABSTRACTS, supra note 328, at 28. This standard, similar to the prior standard, was specifically upheld by the United States Supreme Court so long as adequate specific guidelines were in place to make this decision. Bush v. Gore, 531 U.S. 98, 105-06 (2000).
378. § 101.5614(6).
September 2001 and subsequently amended. At least one critic has charged that although most of the proposed rules in this area are “reasonable and fair,” some of the proposals are “way too lenient.”

I. Other Matters

The Election Reform Act also addresses the requirement that voting systems in Florida be fairly uniform and be limited to “electromechanical, or electronic apparatus,” thus outlawing punchcard ballots, lever machines, and hand-counted paper ballots. This new requirement has little significance on the direct role of the canvassing board. Nevertheless, the Florida Legislature continues to provide that “substitute ballots” may be used if “the required official ballots for a precinct are not delivered in time to be used on election day.”

V. CURRENT CHRONOLOGICAL PROCEDURE

To better understand the overall effect of the statutory and rule changes to the canvassing process, one should consider the current step-by-step process in which a canvassing board engages. The responsibility of a canvassing board for a particular election begins well before election day.


380. See Uniform, supra note 369, at 30A.

381. FLA. STAT. § 97.021(36) (2001). An “electronic or electromechanical voting system” is defined as “a system of casting votes by use of voting devices or marking devices and counting ballots by employing automatic tabulating equipment of data processing equipment,” and the term includes touchscreen systems. Id.

382. Other statutory changes enacted to address issues arising during the Florida Recount, but not directly impacting upon the canvassing board’s duties, include a requirement that all voting systems use a feature which “reject[s] a ballot and provide[s] the elector an opportunity to correct the ballot where the number of votes for an office or measure exceeds the number which the voter is entitled to cast or where the tabulating equipment reads the ballot as a ballot with no votes cast.” FLA. STAT. § 101.5606 (2001). In other words, it provides a feature that advises the voter that the cast ballot contains an overvote or an undervote. Id. After being advised that the ballot contains an undervote or overvote, the voter is free, however, to cast an uncorrected ballot. FLA. STAT. § 101.5608 (2001). If a voting machine rejects a ballot, the poll worker “without examining the ballot, shall state the possible reasons for the rejection and direct the voter to the instruction model . . . .” § 101.5608(b).

A. Before Election Day

In facing a new election the canvassing board must conduct the "public preelection test" by which the automatic tabulating equipment of the local voting system is tested by use of a "preaudited group of ballots." The responsibility for providing notice of the test to candidates, party officials, and the public falls upon the supervisor of elections. The test must be conducted no more than ten days prior to the election. The testing procedure differs depending on the type of tabulation equipment available in the county, a central tabulation system, or a precinct on-site tabulation system. Although the statute requires that "each member of the canvassing board shall certify the accuracy of the test," it further provides in apparent contradiction that "the canvassing board may designate one member to represent it" at the test.

For a central tabulation system, preaudited ballots must be run through the voting equipment until "an errorless count shall be made." If the test reveals an error, the canvassing board is responsible for ensuring that "the cause therefore shall be corrected." For a precinct on-site tabulation system, the canvassing board is required to test a random sample of all devices to be used in the election to consist of "at least 5 percent or 10 of the devices, whichever is greater." If the canvassing board discovers an error in any tested tabulating device, the board must "take steps to determine the cause of the error, shall attempt to identify and test other devices that could reasonably be expected to have the same error, and shall test a number of additional devices sufficient to determine that all devices are satisfactory." If the canvassing board is unable to find a device satisfactory, it "may require that all devices to be tested or may declare that all devices are unsatisfactory."
Upon completion of the tabulation testing, each tested device must be reset and resealed. This must be done in the presence of the "canvassing board or its representative, the representatives of the political parties, and the candidates or their representatives who attended the test." Records of all testing procedures and results must be maintained "as part of the official records of the election."

B. On Election Day, Before Polls Close

Upon convening on election day, the canvassing board needs to promptly evaluate whether any emergency has arisen which may result in the inability of the canvassing board to timely certify the returns. If so, the canvassing board must determine whether such an occurrence meets the definition of emergency as set forth in the Election Reform Act. This analysis is of critical importance, because under the new law, late returns may be accepted only in the instance of an emergency. Any returns submitted late without a statutory emergency arising must be ignored by the statewide Elections Canvassing Commission. If the local canvassing board believes an emergency exists that justifies the late filing of returns, the canvassing board must request a new deadline from the Elections Canvassing Commission.

394. § 101.5612(4)(b).
395. Id.
396. § 101.5612(4)(e).
397. By this time, the local supervisor of elections is required to have already given at least forty-eight hours prior notice of the convening of the canvassing meeting. FLA. STAT. § 102.141(2) (2001). Such notice must be given "by publication once in one or more newspapers of general circulation in the county ...." Id.
398. Id.
400. FLA. STAT. § 102.112(4) (2001).
401. This type of provision is not foreign to Florida election law. In 1951, the Florida Legislature enacted statutes which barred the local canvassing boards from including any precinct returns which were not timely submitted. See discussion supra text accompanying note 250.
402. FLA. STAT. § 102.112 (4) (2001). Under earlier case law, the returns were deemed timely submitted even if they were submitted by telephone to the Secretary of State. State ex rel. Chappell v. Martinez, 536 So. 2d 1007 (Fla. 1988). The continuing viability of this holding is in doubt because the earlier statute merely required that the returns be forwarded to Tallahassee, whereas the current version of the statute requires that they be filed, and received. The rationale of Chappell appears to continue to exist, however, because in neither the old statute nor the new does the language explicitly require that the returns be in writing.
The law requires that absentee and provisional ballots be canvassed before other returns are canvassed. Under existing case law, the canvassing board is not required to canvass ballots for those candidates who are no longer eligible for office. The canvassing of absentee ballots may begin "at 7 a.m. on the fourth day before the election, but not later than noon on the day following the election." If the canvassing board decides to canvass absentee ballots before polls close on election day, no one must release any results until the closing of the polls. The supervisor of elections shall deliver to the board all absentee ballots received and kept by the supervisor's office prior to election day. The supervisor could have already confirmed that the signature on each ballot matches the signature on file for that voter, although this procedure may also be done at the time of canvassing. However, none of the absentee ballots may be opened until the canvassing board convenes its session, whenever that may be.

If a review of the ballots indicates more than one absentee ballot has been received from a voter, the canvassing board must determine "which ballot, if any, is to be counted." To accept an absentee ballot, the canvassing board must determine that: a) the ballot has been signed by the voter; b) the ballot includes a postmark, or if an overseas voter, the date signed, which must be a date before the election; and c) the voter's ballot has also been signed by a witness who is eighteen years of age of older. Any absentee ballot not meeting these requirements must be marked "rejected as illegal."

Additionally, by administrative rule, the Division of Elections has authorized overseas voters to submit their ballots to the supervisor of elections by fax, so long as they contain the voter's signature, the date of signature, and the statement, "I understand that by faxing my voted ballot I..."
am voluntarily waiving my right to a secret ballot." The canvassing board should also consider whether the Elections Canvassing Commission has declared an emergency, which would authorize the waiver for overseas voters of some of the stringent requirements of absentee ballots. In such a case, the state commission would have provided the necessary emergency rules for the county canvassing board to consider. Court decisions have established that "compliance with statutory requirements for absentee voting [is] mandatory," with any deficiency "fatal to the ballot cast." The absentee ballots themselves are "open for public inspection... while in the custody of the... county canvassing board at any reasonable time." A member of the public, however, is not permitted to handle any ballot. If a person wants to inspect the absentee ballots, the supervisor is required to "make a reasonable effort to notify all candidates whose names appear on such ballots or ballot cards by telephone or otherwise of the time and place of the inspection." The inspection is a public proceeding. If any voter believes an absentee ballot is illegal due to failure to meet statutory requirements discussed above, that voter may "file with the canvassing board a protest against the canvass of that ballot." The protest must specify "the precinct, the ballot, and the reason [the voter] believes the ballot to be illegal." This must be done before the ballot is removed from the envelope or the right to protest the ballot will be lost.

C. On Election Day, After Polls Close

Upon the closing of the polls, the canvassing board will begin to receive the returns from the precincts. The canvassing board must consider any discrepancies concerning the total number of ballots assigned to the precinct

419. Id.
420. Id.
421. Id.
422. § 101.68 (2)(c)(2).
423. Id.
424. Id.
as noted by the precinct workers on the transfer form.\textsuperscript{425} The canvassing board must further evaluate any provisional ballot received to determine whether the voter was entitled to vote in the precinct forwarding the ballot, and further whether the voter’s signature on the ballot envelope matches the voter’s registration.\textsuperscript{426} Ballots not meeting these two criteria must be marked \textit{rejected as illegal}.\textsuperscript{427} Further, the canvassing board must consider any damaged ballots which could not be read by the tabulation equipment and were not corrected by duplicate ballot to determine whether they contain a “clear indication... that the voter has made a definite choice for an office or ballot measure.”\textsuperscript{428} However, other than these areas, the canvassing board cannot review the propriety of any returns submitted by the precinct elections boards.\textsuperscript{429} The compilation of the precinct returns is merely a ministerial act to be performed by the canvassing board.\textsuperscript{430} The bifurcation of duties between the precinct election boards and the county canvassing board continues as it has for decades, as clearly expressed by the Supreme Court of Florida in \textit{State ex rel. Barrs v. Pritchard}:

\begin{quote}
Election [precinct] inspectors, as such, have no power to declare the result of an election, even in or for the particular precinct for which they act. Their sole duty is to count, tally, tabulate, and return the votes as they find them to have been cast. The declaration of the result is a duty confided to the canvassing board to which the
\end{quote}

\textsuperscript{425} § 101.5614 (2001). In the new law, the precinct workers responsible for the reconciliation and tabulation are referred to as the election board of each precinct, appointed by the supervisor of elections. \textit{Id. See also Fla. Laws ch. 2001-40, § 26.} The election board for each precinct is responsible to open and close the polls at the precinct. The statute permits a second election board for each precinct, so long as the first election board arrives at the precinct not later than 6:00 a.m. on election day and stays until the closing of the polls. The second election board would then be responsible to “count the votes cast.” \textit{Fla. Stat. § 102.012(4) (2001).} An election board is comprised of a clerk and additional inspectors. \textit{§ 97.021(8) (2001).}

\textsuperscript{426} § 101.048(2)(a).

\textsuperscript{427} \textit{Fla. Stat. § 101.048(2)(b)(2) (2001).}

\textsuperscript{428} § 101.5614(5) (2001). As with the law in effect prior to the Election Reform Act, damaged ballots can be corrected by election personnel so long as the duplicate ballot is made “in the presence of witnesses.” In lieu of a duplicate ballot, however, the damaged ballot may be presented to the canvassing board for its determination. \textit{Id.}

\textsuperscript{429} § 101.5614.

\textsuperscript{430} Gough v. State ex rel. Sauls, 55 So. 2d 111, 116 (Fla. 1951).
election returns are required to be sent for the purpose of being canvassed and there having the result declared and announced. 431

During the canvassing process, the canvassing board has the "full authority to . . . enforce obedience to its lawful commands during . . . the canvass of the votes." 432 The Division of Elections has proposed rules which further provide that public observers of any manual recount may not "interfere or disturb the recount in any way." 433 Under the previous law, all returns must have been transmitted from the precincts to the canvassing board by noon of the next day. 434 Under the new law, however, the returns must be transmitted no later than 2:00 a.m. the next day, a much shorter deadline which may pose some difficulty particularly in geographically large counties with heavy voter turnout. 435

Once the canvassing board has completed the canvass, it is required to issue unofficial returns to the Department of State no later than noon the day after the election. 436 Thereafter, before issuing official returns, the canvassing board must determine whether: a) a counting error exists; 437 b) whether a machine recount is required; 438 or c) whether a manual recount is required. 439

D. After Election Day

If the unofficial returns reveal to the canvassing board that a counting error exists in the manner in which properly marked ballots have been counted, the board’s options are limited only to correcting the error and then conducting a machine recount, or requesting that the Department of State verify the county’s tabulation software. 440

431. State ex rel. Barrs v. Pritchard, 149 So. 58, 59 (Fla. 1933).
432. FLA. STAT. § 102.031(1) (2001).
433. Proposed Rule 1S-2.031(1)(a), (2)(g), supra note 369.
435. § 102.141(3).
436. Ch. 2001-40, § 41, 2001 Fla. Laws 131,147 (to be codified at FLA. STAT. § 102.141 (2001)).
437. Id.
438. Id.
439. Ch. 2001-40, § 42, 2001 Fla. Laws 137, 149 (to be codified at FLA. STAT. § 102.166 (2001)).
440. Ch. 2001-40, § 41, 2001 Fla. Laws 131, 147 (to be codified at FLA. STAT. § 102.141 (2001)).
If the unofficial results reveal that any candidate or ballot measure was “defeated or eliminated by one-half of a percent or less of the votes cast for such office” or ballot measure, then the canvassing board must conduct a machine recount unless the losing candidate requests in writing that the recount not be done. The operation of this provision can be viewed by looking at a couple of examples. Assume in a particular race only 199 votes are cast with a breakdown of 100 to 99. A single vote is not “one-half of a percent or less of the votes” cast. Apparently then, no machine recount could ever be required for a race involving this number of ballots cast or less. Under the new law, it appears that a minimum of 201 votes must be cast in a race before a machine recount could ever be required under the new statutory provision. A breakdown of 101 to 100 would be within the requisite “one-half of a percent or less of the votes:” one-half of a percent of 200 votes being one vote, and the difference between the closest breakdown of 201 votes being a single vote.

If a machine recount is necessitated, the board must then test the tabulating equipment as previously provided if the county has voting equipment that utilizes ballots. If the tabulation test indicates no error, then the ballots are to be run back through the automatic tabulating equipment. If the test indicates no tabulating error, then the recount is presumed to be the correct tally. If an error in the tabulating equipment is detected, then the procedure to be handled is the same as that for tabulating the equipment at the beginning of canvass.

441. Fla. Stat. § 102.141(4) (2000), amended by Fla. Laws ch. 2001-40, § 41. For smaller elections, machine and manual recounts may be able to take place on the day of election after polls close, although the detailed procedures now required make a manual recount less likely to occur on the same day as the election. Id.

442. The question remains whether a court will construe this law as applying to all numbers of votes cast, in order to pass constitutional muster. Florida courts recognize the principle that “the Legislature in its enactments is always presumed to have intended to enact constitutional acts.” Gough v. State, 55 So. 2d 111, 116 (Fla. 1951). Additionally, in construing the meaning of a new statute, Florida courts look primarily to the plain meaning of the words used by the Legislature. Sieniarecki v. State, 756 So. 2d 68, 75 (Fla. 2000). By using the plain meaning of the words in the statute, however, the new statute arguably runs afoul of the legal principle at issue in Bush v. Gore, 531 U.S. 98, 105-06 (2000) (“The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.”). See also supra note 254 and discussion contained therein.

444. Id.
445. Id.
446. Id.
does not use actual ballots, such as a touch-screen system, the canvassing board conducting a machine recount must “examine the counters on the precinct tabulators to ensure that the total of the returns on the precinct tabulators equals the overall election return.” If they do, the results are presumed to be correct.

The second set of unofficial returns must be submitted “no later than noon on the second day after any election.” If the canvassing board cannot complete the machine recount within this deadline, then the canvassing board must submit the initial returns again as second unofficial returns, together with “a detailed explanation of why it was unable to timely complete the recount.” In conducting the machine recount, the canvassing board must remember that it will be required to make reports of its proceedings available to the general public.

If a machine recount is conducted, and the second set of unofficial returns indicates any candidate or ballot measure “was defeated or eliminated by one-quarter of a percent or less,” then a manual recount of the entire undervotes and overvotes is mandated. If, however, the amended returns indicate a defeat of “between one-quarter and one-half of a percent of the votes cast,” a manual recount of the entire undervotes and overvotes is not required unless requested in writing by the “candidate, the political party of such candidate, or any political committee that supports or opposes such ballot measure.” The written request is to be directed to the county canvassing board for races within county boundaries, and to the State Elections Canvassing Commission for races crossing county lines. This procedure takes the place of the “protest” which was previously provided under Florida law.

When conducting a manual recount, the canvassing board shall use “counting teams of at least two electors,” which are required to be “when

448. Id.
449. Id. § 102.141(6)(c) (2001).
450. Id.
452. FLA. STAT. § 102.166 (2001).
453. Id. FLA. STAT. § 102.166(2)(a) (2001).
454. FLA. STAT. § 102.166(2)(b) (2001). In order to cull overvotes and undervotes, all approved voting equipment must include the ability to sort while “simultaneously counting votes” using hardware or software approved by the Department of State. Id. § 102.166(3)(a).
455. § 102.166. The word “protest” now no longer appears in the Florida election lexicon except concerning a challenge to an absentee ballot. See supra text accompanying note 316–18.
possible, members of at least two political parties. If the counting team cannot reach a decision on any particular ballot, the ballot is to be presented to the county canvassing board for a determination. The standard to be used by the canvassing board in counting undervotes and overvotes in a manual recount is if there is "a clear indication [on the ballot] that the voter has made a definite choice."

The Department of State was mandated to adopt rules specifying what constitutes a clear indication. These rules were proposed in September 2001 and subsequently amended. As they affect the responsibility of a county canvassing board, the rules appear to require the canvassing board to answer a primary question in determining the propriety of a questioned ballot: Is the ballot clear? For instance, if the voter does not substantially fill in the oval on an optiscan sheet, the vote should still be counted if the voter placed "any other mark... within the blank space... that clearly indicates the voter intended the oval or arrow to be marked." Moreover, if the voter attempts to change his or her mind by marking out an original choice and choosing another candidate, the ballot should be counted so long as the correction "is clearly evident in the space where the voter could indicate a ballot choice" or that the correction is "indicated in a clear fashion.” Additionally, the proposed rules provide that the canvassing board should ignore any stray marks on the ballot if they are "clearly unrelated to the voter’s intent.”

For those counties adopting a direct recording voting system, rather than the optical scan voting system, the task facing the canvassing board is not quite as onerous because the absence of printed ballots shifts the focus

456. Id. § 102.166(6)(a) (2001).
457. Id. § 102.166(6)(b).
458. Id.
460. Proposed Rule IS-2.027, supra note 369; see Uniform, supra note 369, at 30A. Although the proposed rule purports to set forth standards for determining a voter’s choice “in a manual recount,” the standards would appear, for uniformity sake, to be equally applicable to those ballots reviewed by a canvassing board as part of the election itself: absentee ballots, provisional ballots and damaged ballots. Legal counsel with the Division of Elections concurs with this conclusion, acknowledging that the Division was not given the statutory authority to address standards for any ballots other than those involving a manual recount. Telephone Interview with Amy K. Tuck, Assistant General Counsel, Florida Division of Elections (Oct. 22, 2001) (Ms. Tuck is the attorney who drafted the proposed rule).
462. Id. rule IS-2.027(1)(i) & (j).
463. Id. rule IS-2.027(1)(k) & (l).
primarily to any write-in candidates, absentee ballots, and provisional ballots. In either case, in determining the propriety of any ballot, the canvassing board must set aside each challenged ballot “with a notation of the precinct number, the unique identifier number, how the ballot was counted, the reasoning behind the challenge, and the name of the person bringing the challenge.”

Under existing case law, canvassing boards are given some “latitude of judgment” in making decisions. Moreover, a canvassing board’s decision on the validity of a ballot is “presumptively correct.” If the board’s decision is “rational and not clearly outside legal requirements, [it] should be upheld rather than substituted by the impression a particular judge or panel of judges might deem appropriate.” Finally, a determination by a canvassing board should not be overturned by a court unless “there are clear, substantial departures from essential requirements of law.”

If a recount is conducted pursuant to the new law, the county canvassing board must follow procedures that are to be promulgated by the Department of State addressing several issues, including: 1) the security of ballots during the recount; 2) the time and place of any recounts; 3) the public observance of the recount; 4) any objections to ballot determinations; 5) any record of the recount proceedings; and 6) procedures concerning candidate or other representatives. In conducting the manual recount, the canvassing board must remember that it will be required to make transcripts of its proceedings available to the general public.

Thereafter, when the returns are finally certified, the canvassing board must issue a certified return of election. The official return is comprised of “the return printed by the automatic tabulating equipment, to which has been added the return of write in, absentee and manually counted votes and votes from provisional ballots.” The certificate is required to contain “the total number of votes for each person nominated or elected, the

464. *Id.* rule 1S-2.027(2).
467. *Id.* at 269 n. 5.
468. *Id.*
471. § 102.141(8).
472. § 102.151.
473. § 101.5614(8).
names of persons for whom such votes were cast, and the number of votes cast for each candidate or nominee.\textsuperscript{474} One copy of the certificate is to be filed with the local supervisor of elections.\textsuperscript{475} The other copy goes to the local government entity involved in the election, or to the Secretary of State if the election crosses county lines.\textsuperscript{476} For those elections crossing county lines, the state Elections Canvassing Commission provides the statewide ministerial act of compiling cumulative results.\textsuperscript{477}

If challenged beyond the recount stage in an election contest, the canvassing board may be involved as a "proper party defendant" in the circuit court.\textsuperscript{478} The canvassing board is not, however, an indispensable party to such a lawsuit.\textsuperscript{479} Nor is it a proper party to a lawsuit if the election dispute does not involve claims of improper balloting or counting.\textsuperscript{480} The canvassing board itself has no standing to challenge the results of an election.\textsuperscript{481} Its responsibilities involve the certifying of election results, with any challenge left to other parties.\textsuperscript{482} Even if a canvassing board is grossly negligent in the manner in which it handles its responsibilities, the election results as certified by the board will nonetheless be upheld so long as they "reflect the will of the voters."\textsuperscript{483} However, if a canvassing board willfully refuses to perform its duties, its members can be charged criminally.\textsuperscript{484}

Another responsibility of the canvassing board that may occur after an election is concluded is to retest any tabulating device that has previously been determined to be unsatisfactory, and that has thereafter been "reprogrammed, repaired, or replaced."\textsuperscript{485} As with pre-election testing, the

\textsuperscript{474} § 102.151.
\textsuperscript{475} Id.
\textsuperscript{476} Id.
\textsuperscript{477} § 102.111(1). The duties of the statewide board are beyond the scope of this article. For a brief discussion of the composition of the Elections Canvassing Commission, see supra note 235.
\textsuperscript{478} FLA. STAT. § 102.168(4) (2001).
\textsuperscript{479} See FLA. STAT. § 102.168 (2002). See also FLA. STAT. § 102.171 (2001) (mandating that contests involving general elections of members of the State Legislature shall be determined according to the rules of each legislative body); Farmer v. Carson, 148 So. 557, 560 (Fla. 1933).
\textsuperscript{480} People Against Tax Revenue Mismgmt., Inc. v. Leon County Canvassing Bd., 573 So. 2d 31, 32–33 (Fla. 1st Dist. Ct. App. 1990).
\textsuperscript{481} Morse v. Dade County Canvassing Bd., 456 So. 2d 1314, 1316 (Fla. 3d Dist. Ct. App. 1984).
\textsuperscript{482} Id.
\textsuperscript{483} Beckstrom v. Volusia County Canvassing Bd., 707 So. 2d 720, 725 (Fla. 1998).
\textsuperscript{484} Overstreet v. Whiddon, 177 So. 701, 703–05 (Fla. 1938).
\textsuperscript{485} § 101.5612(4)(d).
subsequent testing may be attended by only a single authorized member of the canvassing board.\textsuperscript{486} Before this subsequent testing, however, the canvassing board must provide notice to all parties who were present at the original testing.\textsuperscript{487} This may be done orally at the "close of the first testing," or may be subsequently done via telephone.\textsuperscript{488}

VI. CONCLUSION

The Florida election canvassing system has developed gradually throughout the State's history. The presidential election of 2000 provided an impetus for vast changes to the canvassing system, although the structure of the county canvassing boards remains intact. The Election Reform Act of 2001, designed to resolve controversy arising out of the presidential election, is not, however, without criticism.\textsuperscript{489} An analysis of various provisions in the new law, including the new proposed administrative rules, indicates several unanswered questions, assuring future tweaking of the canvassing system and continued development of the historical role of judges in the process.

\textsuperscript{486} Id.
\textsuperscript{487} Id.
\textsuperscript{488} Id.
\textsuperscript{489} Within two months of the effective date of the Election Reform Act, litigation had already been filed challenging the constitutionality of several of its provisions. Thus far, however, the challenge has had little to do with provisions involving the responsibilities of the county canvassing board. Ellis Berger, \textit{Group Sues over Legislature's Reforms}, SUN-SENTINEL (Ft. Lauderdale), Aug. 16, 2001, at 11A. Moreover, as of August 20, 2001, the federal government temporarily halted the new statutory sections dealing with voter education, voter registration lists, and provisional ballots. Kallestad, \textit{supra} note 333, at 6B; \textit{Election Reform: Answer Uncle Sam's Questions}, SUN-SENTINEL (Ft. Lauderdale), Aug. 25, 2001, at 14A.