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The Unambiguous Ballot: Adjudication, Enfranchisement, and the Machine

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Introduction: The Politics of Ambiguity and Intent

You cannot "find 11,780 votes" when an election jurisdiction relies on ballot-marking devices (BMDs). There are no votes to find because voter intent is unambiguous. There are no stray marks. No Xs or slashes to cross out mistaken or unwanted choices. No checkmarks instead of filled bubbles. And if appropriately configured, there are no overvotes, and undervotes are more readily assumed to be intentional. In short, a BMD ballot displays only the voter's intent. When every ballot reflects clear voter intent, there is no need for mind-reading that accompanies double-blind, bipartisan adjudications or costly court interventions. No Florida 2000 or Minnesota 2008. All that remains are unambiguous ballots—clearly marked paper records printed at the voter's direction.

Understandably, much of the public discourse around voting technology focuses on security, accessibility, and auditability. Far less attention is paid to the need for clear and unambiguous ballots and the benefits they produce. This article spotlights the role BMDs play in reducing the downstream burden of ballot adjudication as well as the relatively well-documented successes BMDs have at mitigating residual votes—lost votes due to over- or undervoting. This issue is not trivial. Ballot adjudication and residual vote disenfranchisement take a toll administratively, financially, and democratically. BMDs deserve greater consideration for their ability to produce unambiguous ballots that minimize such challenges and instill greater voter confidence in election results.

Part I of this article revisits the context and purpose behind the Help America Vote Act (HAVA) of 2002, which passed in response to the ballot ambiguity nightmare of *Bush* v. *Gore*. Part II outlines how BMDs reduce the percentage of ballots ripe for adjudication while simultaneously enfranchising voters to head off another *Bush* v. *Gore*-style crisis. Part III addresses the persistent myth that *Bush* v. *Gore* and HAVA were somehow a scheme to push electronic voting machines or the idea that if states had "stuck with pen and paper" the controversy over voter intent would never have arisen.

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Part I: From Hanging Chads to HAVA

Twenty-five years is a short time for collective amnesia to set in about the precipitating events of *Bush* v. *Gore* and the congressional response. The 2000 presidential election hinged on ambiguous voter intent. In Florida thousands of ballots were not counted because of unclear markings on punch-card ballots, which were functionally akin to hand-marked paper ballots in their reliance on the voter to produce a clean mark. The Florida Supreme Court ordered a statewide manual recount of undervotes, noting that "there could be no question that there were uncounted 'legal votes'—*i.e.*, those in which there was a clear indication of the voter's intent—sufficient to place the results of the election in doubt."[1] Without uniform rules for determining intent, counties diverged widely in their interpretations of hanging, dimpled, or pregnant chads. The result was a constitutional crisis resolved by judicial intervention at the highest levels.

Then-Governor George W. Bush petitioned the U.S. Supreme Court for review. On December 9, 2000, the Court stayed the Florida recount. Ultimately, it was the lack of uniform standards for interpreting ambiguous ballots that led the majority to halt the recount on equal protection grounds.[2] The chaos and controversy following Florida's recount underscored how dangerous ambiguous ballots can be to public trust in election outcomes.

In 2002, Congress responded by passing HAVA. At its core, HAVA sought to prevent another 2000-style recount debacle by modernizing election infrastructure and establishing minimum standards for federal elections. Among its provisions, HAVA created the U.S. Election Assistance Commission (EAC), required the availability of provisional ballots for voters whose registration is in question, and set performance standards for voting systems (HAVA 2002, 116 Stat. 1666). The EAC was charged with developing guidance, distributing funds, and serving as a national clearinghouse for information on election administration. Critically, HAVA also provided federal funding to replace outdated punch-card and lever voting machines. Crucially, it left open the question of how to replace those systems, leaving states free to choose any voting or counting method so long as it met HAVA's new requirements (HAVA 2002).

Part II: The Costs of Ambiguity

Burdens of Adjudication

Ambiguous ballots have irregular marks like lightly shaded ovals, cross-outs, corrections, stains, tears, or stray marks. Overvotes—where a voter marked too many choices in a contest—and undervotes—not marking any choice in a particular contest via abstention or mistake—also fall into this category. Ballot adjudication is the process by which election officials manually review ballots in which voter intent is not immediately clear to the person or machine that tabulates each vote.

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1 *Bush v. Gore*, 531 U.S. 98.

2 *Bush v. Gore*, 531 U.S. at 105.

State statutes and local regulations provide guidance on interpreting such markings, but, in practice, adjudication requires bipartisan teams of human judges to examine each problematic ballot during the canvass and again if there is a recount. The work is slow, methodical, and subject to intense public and political scrutiny. In a close contest, every adjudicated ballot is a potential court exhibit. This has played out in high-stakes recounts before. Minnesota's 2008 U.S. Senate race, for example, was decided by just 312 votes and involved about 1,500 challenged hand-marked ballots. The process dragged on for eight months before a winner was seated, reinforcing how adjudication can devolve into a war of attrition that costs jurisdictions dearly. Adjudication also introduces the possibility of disenfranchisement. When intent cannot be discerned because of an over- or undervote, the voter's voice is effectively lost. In short, every ambiguous ballot is a tiny crisis to be managed with precious little time and resources.

By contrast, a BMD produces an unambiguous ballot. BMDs significantly reduce the toll of deciphering voter intent, saving the jurisdiction effort and expense in the long run. Consider three categories of benefits. First, time and labor are saved. Fewer ballots sent to adjudication means fewer hours of meticulous bipartisan review and faster tabulation of final results. Second, litigation risk is mitigated. When the number of ambiguous ballots declines, so does the arsenal of contestable votes that candidates or ballot measure advocates can haul into court. Third, public confidence is raised. When canvasses and recounts consistently reproduce the same results without subjective interpretations, trust in the procedures, voting methods, and outcomes also increase. In short, by minimizing any "squishy" ballots, BMDs streamline the canvassing process and reduce opportunities for dispute.

Enfranchisement through Residual Vote Reduction

Enfranchisement is typically framed in terms of access to the ballot. Typical access questions might include: can a person register to vote, or can a voter independently vote? Yet enfranchisement also hinges on whether the cast, voter-verified ballot is counted. One key metric for assessing this is the residual vote rate. The residual vote rate is simply the total number of over- and undervotes divided by the number of people who turned out to vote (Stewart 2014).

High residual rates often signal problems such as poor ballot design or confusing instructions. Most frequently, though, residual vote rates are cited as a measure of a voting system's performance. Punch cards in 2000 had the highest residual rates, contributing to millions of uncounted presidential votes nationwide (Ansolabehere and Stewart 2005). By contrast, systems introduced immediately after 2000 dramatically lowered residual rates (Stewart et al. 2019).

With BMDs residual votes are reduced even further. By design, a BMD prevents overvotes entirely. The system will not allow a voter to select two candidates in a single-choice race. Undervotes are not prohibited, but—because the interface typically prompts the voter with a reminder—it is reasonable to conclude that an undervote on a BMD is more likely deliberate than accidental.

To illustrate the point, consider two jurisdictions in the 2020 general election: Georgia and Colorado. Both states used the Dominion ImageCast X BMD as a core voting device. Georgia deployed BMDs statewide for all in-person voters. Each voter's choices were machine-printed on a paper ballot, which was then reviewed and verified by the voter and then scanned. Colorado primarily used hand-marked paper ballots returned by mail or drop box, and these were centrally counted.[3] The polling place BMDs were used only by a small number of voters who needed an accessible device. In effect, Georgia's electorate in 2020 was marking ballots by machine while Colorado's was marking them by hand. The difference in outcomes is striking. According to data from the MIT Election Data and Science Lab, Georgia's residual vote rate for the 2020 presidential contest was approximately 0.56 percent, half of Colorado's estimated 1.17 percent (MEDSL n.d.). Many factors can contribute to residual vote rates, including ballot length and voter interest in the top-of-the-ticket races. While not wholly conclusive, the simplicity and consistency of the BMD-produced ballot likely played a key role in the stark difference seen between those states.

Part III: Choice, not Mandate: HAVA and Voting Technology

Some critics have argued HAVA forced electronic voting and tabulation onto the states. They contend that if states had only maintained hand-marked paper ballots and hand counts then our elections would be simpler and clearer. These assertions are specious at best.

HAVA did not outlaw hand-marked paper ballots, prohibit hand counts, or mandate touchscreen voting or mechanical tabulation. It encouraged change by conditioning federal funds on replacing punch-card and lever machine systems while leaving it to states to decide how best to meet compliance needs. Jurisdictions were free to adopt hand-marked paper ballots, hand-counting ballots, optical scan, direct-recording electronic (DRE) voting machines, BMDs, or any other compliant system (HAVA 2002, Secs. 102 and 301).[4] The law's goal was not to pick winners and losers but to ensure that whichever system was used would yield clear, auditable results.

Jurisdictions that wanted to keep hand-marked ballots and hand counting could do so, and some did. But most of the more than 8,800 election jurisdictions nationwide opted for systems that automated part of the process. Election administrators saw modern machines as tools to prevent the very problems that caused the 2000 fiasco—uncounted votes, voter errors, endless post-election adjudication, and legal fights. Critically, those jurisdictions that continued with hand-marked, hand-counted ballots were not penalized. They received HAVA funding alongside everyone else to improve their processes.

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3 By contrast, in jurisdictions that use hand-marked ballots at polling places, the ballot is inserted into a precinct optical scanner, which immediately notifies the voter of an overvote or other marking mistake.

4 Section 301 requires that the system gives the voter a chance to verify and correct errors, notify them of overvotes, and produce an auditable record.

Conclusion: Toward a Policy of Ballot Clarity

Election administrators are burdened not just by the logistics of running elections but also by the ambiguity that lurks in every pile of hand-marked paper ballots. Every ambiguous mark becomes a potential lawsuit subject to interpretation in both the courtroom and the counting room. Every unclear vote is a risk to public confidence.

BMDs cannot eliminate all ambiguity, but they can substantially reduce it. BMDs nearly eradicate indecipherable marks, prevent overvotes at the source, clarify whether undervotes are intentional, and produce uniform ballots that streamline tabulation and recounting. For jurisdictions seeking to reduce their adjudication burden and further enfranchise their voters, BMDs are a compelling option.

Going forward, policymakers and election administrators should pursue a "policy of unambiguous ballots." The goal is not perfection from voters or machines but systems that capture and preserve intent without inviting burdensome interpretation. That means tracking and publicly reporting adjudication rates, selecting systems that reduce residual votes, and educating voters to review their ballots before casting and scanning the document. By focusing on ballot clarity, jurisdictions can cut administrative strain, minimize disenfranchisement, and strengthen public confidence in the accuracy of election results.

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