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*The James Madison Institute is a Florida-based nonpartisan, nonprofit research and educational organization dedicated to advancing such timeless ideals as economic freedom, limited government, federalism, traditional values, the rule of law, and individual liberty coupled with responsibility.*

The *Journal* is a quarterly magazine provided to members and supporters of The James Madison Institute, to members of the Florida Legislature, and to others who share the Institute's conservative philosophy. The *Journal* is intended to keep Floridians informed about their government, to help advance practical public policy solutions, and to recognize individuals who exemplify civic responsibility, character, and service to others in their lives.

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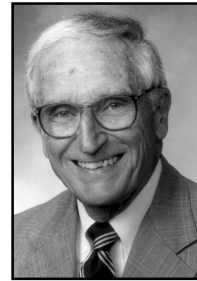
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# Message from the publisher

j. stanley marshall



**P**eter Jennings, in the April 3rd edition of ABC-TV's *World News Tonight*, reported on the shortage of substitute teachers in our public schools. On any given day, he reported, five million students require a substitute—that's because 10 percent of the teachers have taken the day off, which is almost three times the rate of absenteeism for any other profession. Pay for substitute teachers is notoriously low in Florida, as in most other states, and there are no fringe benefits. Jennings told of Ellen Watkins, a 19-year-old high-school graduate in Fort Myers who had been hired as a substitute. The report went on to say that Ms. Watkins was reported to be a good teacher despite the fact that she had no formal professional qualifications and was not, of course, state certified. We are all familiar with classes taught by students—sometimes students in the same classes as the other children they are teaching, and doing an excellent job. Instructions in computer technology come to mind, an area in which 12-year-olds may know more about the subject than any of the teachers in the school and who, despite no certification, are good teachers.

While ABC-TV's focus was on substitute teachers, the report brought to mind the extent to which the schools are denied the services of well-qualified teachers because those people lack state certification. While there has been some loosening of certification requirements in a few states, the education establishment, overall, has steadfastly kept a tight rein on the formal requirements, and the teacher unions are the

core of the problem, as they are with most other education reforms.

The lead article in this issue of *The Journal* reports on a just-concluded study of collective bargaining in Florida's school districts. The study dealt with 12 issues that the study's author, a widely respected authority on collective bargaining in America's public schools, recommends the Florida legislature address. Teacher certification was not one of those and it didn't make the cut only because there are other issues directly tied to union intransigence. Substitute teachers and their place in our children's schooling deserve more attention from the education establishment than they have received. Try asking students of your acquaintance about the people who substitute in their classrooms, as I have done. That can be a sobering experience.


The future of the teacher unions is a topic of great interest in much of the country. Internal union dissent in many states is strong and union leaders in several states have begun to reexamine the role of the unions. The central question in Florida is whether the Florida Education Association (FEA) will become more of a professional organization or will remain a labor union, much like its sister unions in the AFL-CIO. Last

year's merger of the two teacher unions—the state affiliates of the NEA and the AFT—means that any Florida teacher who joins the FEA automatically becomes an affiliate of the AFL/CIO. And that may not set well with many teachers who still think of themselves as professionals.


Public education in Georgia has made great strides in recent years. Tax support for the schools has surpassed Florida's, and teachers' salaries are higher. Georgia does not permit public sector bargaining and, while the teacher unions exist, their membership is about half that of the nonunion professional teacher organization, and the unions play a minor role with the Georgia legislature.

The role of the newly merged teacher union in Florida is yet to be determined and the state legislature is justified in examining closely its influence on the extent to which it affects the quality of teaching and learning in our schools. The issue is one that merits the attention of all Floridians. ☞

*NOTE: A complimentary copy of the Collective Bargaining in Florida Public Schools report can be obtained by calling or writing the Institute.*



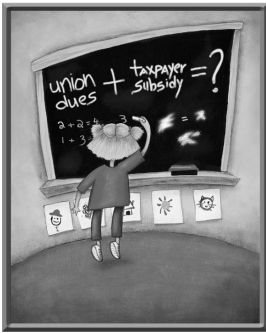
***The teacher unions are the core of the problem, as they are with most other education reforms.***



COVER STORY

# Rhetoric and Reality in the Teacher Unions

by j. stanley marshall



**Twelve concerns about collective bargaining with state school boards along with recommendations for legislative correction of abuses.**

**T**he teacher unions have been prominent in the national news lately. In Hawaii, the unions have settled a bitter and costly strike that included professors in Hawaii's state university system. Many Americans believe teachers—like firefighters and police—should not go out on strike, and the fallout from this one may cost the unions dearly. It has been described as the most extensive action of its kind in the history of American public education. The policies and practices of the teacher unions have been under increased scrutiny and their role in setting public policy in education is being more closely examined.

Here in Florida, the newly merged union (the state affiliates of the National Education Association [NEA] and the American Federation of Teachers [AFT] combined last year) has resisted several attempts by legislators to curb its power and require of it some measure of accountability to its members. But the bullet it has managed to dodge so far may come around again in state legislatures in Florida and elsewhere. It's a safe bet that the truth will catch up with the union, and when it does, the Florida legislature will very likely demand of the union leaders at least two changes: that they open their financial records to their members, and that school districts—meaning the taxpayers—stop withholding from teachers' paychecks dues and special assessments used by

the union for political purposes.

Mr. Harlan Hermele, a teacher in Palm Beach County, wanted to resign from the union and join PEN of Florida.<sup>1</sup> So, in September 2000, Hermele sent his letter of resignation to the union as required by the union contract and received the following reply from the president of the Palm Beach Classroom Teachers Association (CTA):

Per contract, the District's payroll office will deduct the entire balance of your annual dues (\$493.58 minus what you've had deducted already) from your next paycheck. Per CTA policies, when CTA receives this deduction (usually about a month after it is deducted) we will reimburse you one-half of the dues amount you would have paid for the full year (\$246.79).

Yes, that's what the letter says: Hermele's union dues for the full year, less what he had already paid, would be withheld from his next (October) paycheck. He would get half of it back in a month or so and the other half would remain in the union's coffers.

The contract provision cited by Shelley Vana, the Palm Beach union president, is so draconian as to insult the Palm Beach County School Board that agreed to the contract and indeed to the union negotiators who proposed it. But as Hermele can attest, it's in the contract and Palm Beach County teachers are indentured by it.

### **A Review of Union Contracts**


Many advocates for reform have

come to believe that the teacher unions are the major impediment to school reform and we at the Institute have, therefore, attempted to learn more about the unions and how they operate. Teachers and school administrators have called our attention to


policies and practices of the unions that are clearly detrimental to the improvement of our schools. School board members have expressed frustration over their attempts to persuade union leaders to consider the welfare of students in contract negotiations and, indeed, to bring the interests of teachers more prominently into collective

bargaining. (Of course the standard union response is that teachers are active participants in union decisions, but the more truthful statement is that teacher participation is limited to a relatively small number of union leaders.) Most teachers do not know how their dues and special assessments are spent, what political candidates and causes the union supports, the amount of compensation union officers receive, or the amount of their dues that is sent to the union's national headquarters.

As a result of our concerns for these and related questions, the Institute has recently undertaken a review of teacher union contracts in Florida school districts in an effort to learn more of the details of collective bargaining and the effects of the contracts on the quality of education



***Most teachers do not know how their dues and special assessments are spent.***



in our public schools. The Institute contracted with Dr. Myron Lieberman, chairman of the Education Policy Institute in Washington, D. C., to conduct the study. Lieberman is the country's foremost expert on teacher unions, having published several books on the subject along with service as contract negotiator for over 200 school boards across the country. He is a life member of the NEA and, as a high-school teacher during the time the teacher unions emerged, he was a leader in the union movement. All of that changed, however, as the nature of the movement changed and the methods and tactics of union leaders were revealed. Lieberman has, for the past 30 years, done scholarly research on teacher unions and has been a leading critic. His views on the subject are widely sought throughout the country.

The study lists 12 separate concerns about collective bargaining with school boards and identifies, in each case, practices that we have called to the attention of Florida legislators, school board members and school administrators and the general public. Each of the concerns is described below, along with our recommendations for legislation to correct the abuse.

### **1. Payroll deduction of political action committee (PAC) contributions by Florida school boards.**

**Problem:** Many Florida teachers make PAC contributions by payroll deduction to teacher union political

action committees. This service is provided to the union at no cost.

**Remedy:** Raising or collecting funds for political purposes is an inappropriate function of government. Florida's statutes should prohibit school board participation in political fundraising. School boards should be prevented by law from collecting and/or distributing political contributions by payroll deduction or participating in any way in political fundraising. The unions would, of course, be free to do their own fundraising for political purposes.

### **2. Taxpayer subsidies to teacher unions.**

**Problem:** Most Florida school boards provide substantial subsidies to the teacher unions by absorbing the costs of various union operations, especially the cost of paid leave for the conduct of union business.

**Remedy:** School employers—the school boards—should not directly or indirectly provide released time with pay for service as union representatives to conduct union business. School boards should be prohibited from releasing employees from regular duties to serve the unions for more than one school year; and, during that time, the union should be responsible for the full cost of the salary and benefits of the employees.

### **3. Access to school district facilities.**

**Problem:** Florida teacher union contracts render it virtually impossible for teachers with an interest in

being represented by a different labor organization to communicate with other teachers to consider that possibility. Most union contracts provide for exclusive use by the union of the use of district facilities, services, and communications, including use of the district mail system, the right to meet in schools, and access to bulletin boards.

**Remedy:** Access to district facilities, services, and communications should be available on equal terms to any organization that is supported by at least 10 percent of the teachers in the bargaining unit. (See Item 4 below.)

#### 4. Choosing an exclusive representative.

**Problem:** Incumbent unions in Florida have a monopoly over access to school district facilities and services. As a result, teachers have been deprived of their statutory right to choose a different representative.

**Remedy:** Because of the difficulties faced by teachers who want to consider a different representative, the percentage of teachers required to call a representation election should be reduced from the present 30 percent to 10 percent of the teachers in the bargaining unit.

#### 5. The dual system of teacher union benefits.

**Problem:** Florida bargaining statutes permit the unions to pursue the same objectives through legislation and

collective bargaining simultaneously. This provision has no counterpart in private-sector collective bargaining and provides major union advantages over private-sector workers who do not have access to political as well as bargaining means of achieving their objectives.

**Remedy:** If the terms and conditions of teacher employment are to be resolved locally, it is only fair that the state statutes not be used as the floor for collective bargaining proposals. Any provision in the statute covering wage, hour, or other benefits of employment provided by statute should be a prohibited subject of bargaining

at the school board level. Likewise, if the matter is to be the subject of bargaining, it should be prohibited as a subject of legislation.

#### 6. Final and binding arbitration of grievances.

**Problem:** Florida statutes require “final and binding arbitration of grievances.” Thus, when grievances cannot be resolved by the parties involved, the matter is turned over to an arbitrator chosen jointly by the two parties. The reality is that the arbitrators often act like judges who make the law while claiming they are only interpreting it. The findings of the arbitrators, who are not accountable to the electorate, may establish policies that are opposed by elected representatives, and their decisions have the force of law for the duration

*There are many issues on which the unions' agenda differs greatly from the concerns of teachers.*

of the contract. This, in turn, gives them greater force than statutes, for statutes can be changed at the next legislative session but decisions by arbitrators cannot.

**Remedy:** Florida legislature should prohibit rather than mandate final and binding arbitration of grievances. Grievance procedures should be developed by the school board and the union, and must not include binding arbitration by a mutually selected agent.

### 7. Public input before ratification of the contract.

**Problem:** School boards do not normally release information about their tentative labor agreements until agreements are ratified by the union; then the agreements are ratified by school boards before the public has had adequate opportunity to understand and react to what the contract stipulates. Once ratified by the school board, the contract is policy for its duration.

**Remedy:** School boards should provide at least seven working days for public assessment and input after the contract has been ratified by the union. School boards should develop a procedure to receive public input at least three working days before ratification by the board.

### 8. A professional approach to negotiations.

**Problem:** Negotiations between the union and school boards often consume excessive amounts of time and school district resources because they take place over a period of

several months. This often results in year-around conflict. School districts pay a heavy price in the quality of classroom instruction by the absence of teachers who are union negotiators over a period of weeks or months.

**Remedy:** Negotiations between school boards and unions shall commence no earlier than 60 days before the end of the contract and shall be completed no later than 30 days after the expiration of the contract.

### 9. Teaching positions in areas of scarcity.

**Problem:** School boards cannot recruit an adequate number of teachers in certain fields (science and mathematics) because the boards ignore supply and demand in teacher compensation. Unions demand that teacher compensation be determined by length of service and academic degrees and that teacher shortage in certain fields must not be taken into account in compensation.

**Remedy:** Because it is an unfair labor practice for school boards to bargain with anyone except the teacher unions on terms and conditions of employment, so local school boards may not pay teachers in scarce fields more than others. But the Florida State Department of Education could pay stipends to teachers in scarce fields apart from the salaries they are paid by the school district.

### 10. Parent Involvement.

**Problem:** In many school districts,

parents are treated as complainants to be avoided, not as consumers who should be encouraged to express their views on school district policies and practices. Typically, the parent is required to put the complaint in writing and the teacher affected may be present at the first meeting between the district staff and the complainant. Most union contracts in Florida are clearly intended to protect the teacher, not give due consideration to the complainant.

**Remedy:** Each school district should adopt a grievance procedure for parents. There should be no requirement that the complaint be submitted in writing or that the affected person be present at the first meeting between school officials and the complainant.

### 11. Payroll deductions for out-of-state labor organizations.

**Problem:** Florida school boards routinely collect and transmit dues to out-of-state labor organizations that cannot be monitored or regulated by Florida authorities.

**Remedy:** Out-of-state labor organizations that serve as exclusive representatives in Florida school districts should provide the following to their members: a list of all contributors over a certain amount—say \$99; a list of all candidates for federal office by party affiliation endorsed or supported by the organization's PAC; the amount spent for issue and/or policy advertisements in support of political candidates; and access to the dues and PAC contribution authorization cards signed by teach-

ers and filed with the Public Employees Relations Commissions.

### 12. Legislative oversight of Florida's bargaining statutes.

**Problem:** No organization, public or private, has assembled a reliable body of information on the problems and outcomes of collective bargaining in Florida school districts.

**Remedy:** The Florida legislature should engage in continuing oversight of collective bargaining in the state's school districts.

### Teacher Unions, Not Teachers

The study reported here is about collective bargaining and teacher union contracts, not teachers. No opinions are expressed or implied about Florida's teachers.

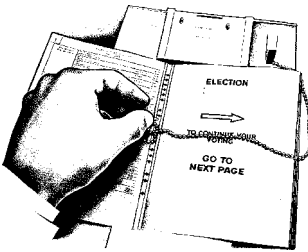
The unions pretend that the interests of teacher unions and teachers are the same; hence to criticize one is to criticize the other. There are many issues on which the union leaders seem indifferent to their members. The dues of union members in Miami/Dade County, for example, are \$820 per year. There is widespread sentiment among teachers that the amount is excessive and some teachers have left the union over this issue.

The dues structure in Florida school districts is surely a factor in union membership. Union leaders maintain secrecy over the union's finances and even the membership. The *NEA Handbook for 2000-2001* reports 57,700 members in Florida.

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# floridians look back at election 2000 and look forward to major reforms

by susan a. macmanus



**Election 2000:  
Where do  
Floridians go  
from here?**

**N**o more jokes about chads—hanging, dangling, or otherwise, please! No more caricatures of ballots with butterfly wings! No more accusations of poorly trained and insensitive poll workers or intimidating election officials. And let’s have no more teasing from Aunt Winnie in Kalamazoo about our state’s oversupply of inept voters.

Florida has taken a giant step toward redeeming itself in the eyes of the world with passage of the Florida Election Reform Act of 2001. The sweeping reform package has already been described as the envy of the nation. For Floridians, it was “must pass” legislation.

## **Public Opinion Survey Played Major Role in Airing Voice of the People**

A survey jointly sponsored by the Collins Center For Public Policy and The James Madison Institute played a major role in getting the will of the people before the legislature. Four prominent political scientists from state universities were tapped to design and analyze the survey.<sup>1</sup> Schroth and Associ-

*Some of this article is drawn from the report written by the team of political scientists who designed the April survey, but the interpretations reported here are those of the author.*

ates in Washington, D.C., conducted the telephone survey of 600 adult Floridians April 3-8, 2001. The margin of error is  $\pm 4$  percent.<sup>2</sup>

Floridians were somewhat split in their assessments of what caused all the presidential election-related problems. But they were in agreement (81 percent) that Florida's election system needed revamping to make it fairer and more accurate—and the sooner the better (no excuses, no delays—just do it!). Three-fourths said it was “very important” for the state legislature to tackle reform of our voting methods before Election 2002.

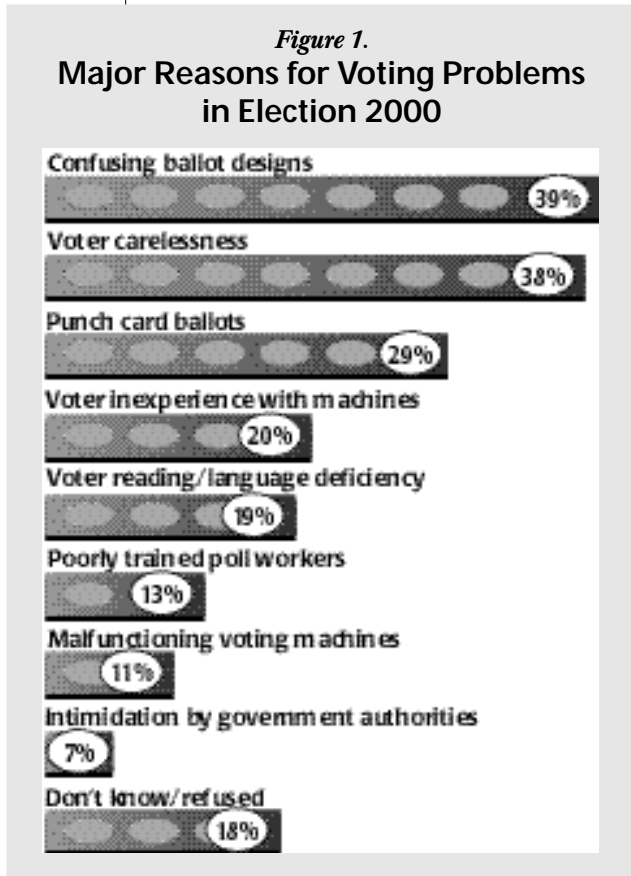
### Looking Back on Election 2000

Was Florida unique with its problems or did similar problems exist in other states but they just weren't uncovered? Similar problems existed elsewhere, said 79 percent of those surveyed.

But what were the major reasons for the problems some Floridians experienced when they voted last fall? As shown in Figure 1, confusing ballot designs (39 percent), voter carelessness (38 percent), and punch card ballots (29 percent) were the most often cited reasons for “the amount of problems that many Floridians experienced when they voted last November in Florida.”

There was far less consensus on the causes of problems than on the urgency of reform. And opinions varied considerably across groups of voters.

Generally, African Americans, non-Cuban Hispanics, and Democrats cited government-related reasons (ballot design, voting



machine inaccuracies and malfunctions, poll workers, and government officials) whereas white, Cuban-Americans, and Republican residents more often pointed to individual voter-based reasons (carelessness, lack of experience using voting equipment, reading and language deficiencies).

### Citizen Priorities for Election Reform<sup>3</sup>

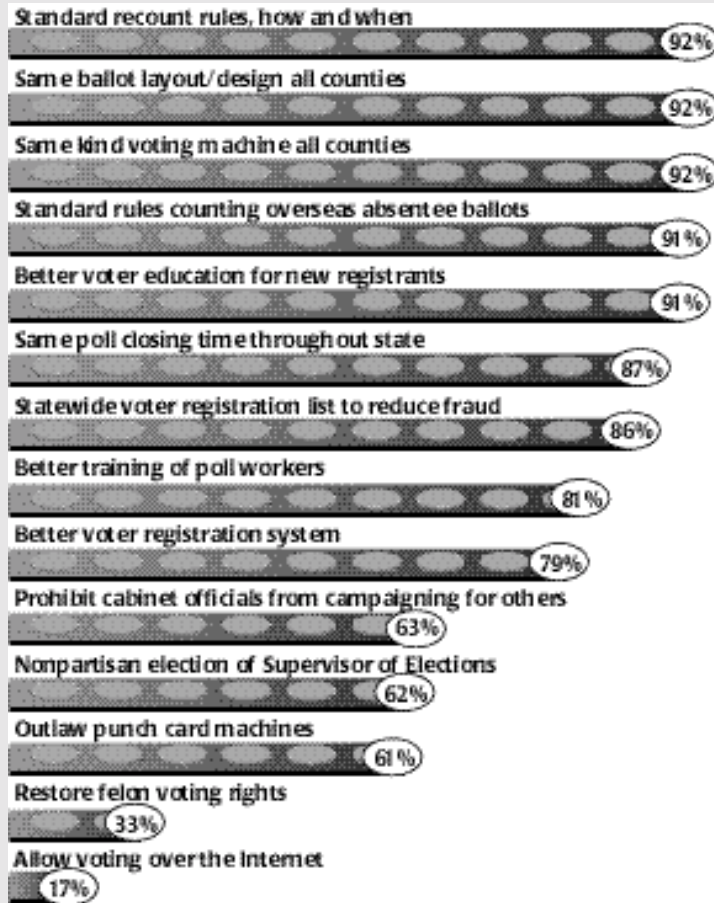
Floridians first and foremost want *standardization* and *uniformity*—of voting machines, ballot layout and design, recounting rules (for close elections and for absentee ballots), and poll closing times.<sup>4</sup> (See Figure 2.) There is also significant support for the creation of a statewide voter registration list to help reduce fraudulent voting by ineligible persons, better voter education, better training of poll workers, and an improved voter registration system. Well over half of those surveyed favor prohibiting Florida cabinet officials from being actively involved in campaigns other than their own, nonpartisan election of county supervisors of election, and outlawing punch card voting machines.

But only one-third support restoring the voting rights of felons<sup>5</sup> and fewer than one in five favor voting via the Internet.<sup>6</sup>

### The Florida Legislature Closely Follows Citizen Priorities

Florida's elected officials had their

*Figure 2.*  
**Support for Election Reforms**  
(Percent Strongly and Somewhat Favor)



ears tuned to public opinion regarding the urgency of election reform. Gov. Jeb Bush (R) acknowledged that “The citizens of Florida spoke loud and clear on this issue, and we have responded with this historic election reform legislation.”<sup>7</sup>

The legislation restructures the roles and responsibilities of the voters, county supervisors of elections, poll workers, the Florida Department of State and its Division of Elections, other state agencies,


and canvassing board members at the local and state levels, among others.

Some of the major requirements of the new law are to:<sup>8</sup>


- Require the use of voting technology that is precinct-based and allows the voter to correct mistakes made while voting.
- Prohibit punch card and other antiquated voting systems in Florida.
- Provide Florida counties with \$24 million over the next two years to modernize their voting equipment.
- Provide for the development of a standardized and unambiguous ballot design to be used in Florida's primary and general elections.
- Provide \$6 million in funding for the development of voter education programs and the recruitment and training of poll workers.
- Provide \$2 million for the development and implementation of a state-wide centralized voter registration database by June 2002.
- Allow a voter whose name does not appear on the voter registration roll to vote a provisional ballot that will be counted if the voter is subsequently found to be property registered to vote.
- Clarify and provide standards for the procedures to be followed when recounting votes.
- Facilitate absentee ballot voting by Florida's military and over-

seas voters.

- Clarify that vote totals are to be certified no later than seven days following a primary election and 11 days following a general election.
- Eliminate the second (or runoff) primary for the 2002 election cycle; gives the legislature the option of deciding whether to permanently enact the second primary elimination.
- Remove justification requirements for absentee ballot voting to increase the convenience of the voting process.
- Require the posting of a Voter's Bill of Rights and Responsibilities in each polling place in Florida.



***Election 2000  
has convinced  
nearly two-  
thirds of all  
Floridians that  
their vote "really  
does count."***



These reforms tracked closely with those recommended by the Governor's Select Task Force and with opinions expressed in the Collins Center/James Madison Institute public opinion poll of April 2001.<sup>9</sup> (See the table for more information on the implementation of key proposals.)

### **Not Now, but Maybe Later**

Among the recommendations that were not adopted were two that a majority of the population favored: nonpartisan election of county supervisors of election and prohibiting members of county and statewide canvassing boards from being active

in partisan political activity while serving as members of these boards. The legislature also failed to require the automatic restoration of felons' voting rights, but this reform was not as high a priority among the population at-large as the other two. It is highly likely that several of these reforms will be revisited during next year's legislative session.

### **Looking Ahead: Voters Acknowledge Individual Responsibility**

Now that Floridians have been put "through the wringer" and been exposed to extensive media coverage of balloting problems, how much responsibility do they place on themselves to "make sure their ballot is properly cast"?

A majority of all demographic groups believes correctly casting a ballot is the complete responsibility of the individual voter. Republicans (70 percent), Cubans (80 percent), and those not registered to vote (72 percent) believe this most fervently. Those least prone to are African Americans (50 percent), Democrats (51 percent), and Independents (51 percent).

### **Does My Vote Count More Now or Less, and Will I Vote in Election 2002?**

One of the most intriguing questions for political scientists across the U.S. is whether the closely contested and contentious presidential election 2000 will increase voter participation

in the next election cycle.<sup>10</sup> Naturally, Florida is the best place to ask this question first.

We asked the survey respondents, "Has the outcome of last November's presidential election increased your belief that your vote really does count or has it raised doubts in your mind about the importance of your vote?"

Election 2000 has convinced nearly two-thirds of all Floridians that their vote "really does count."<sup>11</sup> Cuban-Americans (83 percent), Republicans (81 percent), central Florida residents (71 percent), white (70 percent), and college educated (70 percent) residents are the most likely to feel

more strongly that their vote matters.

But 30 percent have had their faith in voting shaken by last fall's presidential election. Those most likely to express this view are non-Cuban Hispanics (65 percent), African Americans (59 percent), Democrats (43 percent), and those who have lived in the state fewer than five years (43 percent).<sup>12</sup>

What is the best news of all? More than 90 percent of those surveyed in April say they will vote in Election 2002.


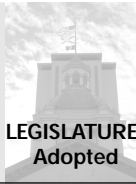
Judgment day will come rather quickly. All eyes will be on Florida next year as the nation and Floridians themselves judge the effectiveness of this major election system overhaul. ∞



***A majority of  
all demographic  
groups believes  
correctly casting  
a ballot is the  
complete  
responsibility  
of the individual  
voter.***



**Table. Elected Officials Adopt Reforms Preferred by Many Citizens**

 <b>MAJOR ELECTION REFORM PROPOSALS</b>	<b>GOVERNOR'S TASK FORCE Recommendation</b>	<b>CITIZEN RANKINGS</b> from survey; 1=highest (% is strongly favor + somewhat favor)	 <b>LEGISLATURE Adopted</b>
<b>Standard recount rules how and when</b> <i>Dept. of State must adopt detailed rules prescribing recount procedures for each certified voting system;<sup>1</sup> an automatic machine recount is required if the margin of victory in any race is one-half of 1 percent or less; a manual recount of the overvotes and undervotes is required if the margin of victory is one-fourth of 1 percent or less.</i>	Yes	1 (92%)	Yes
<b>Same ballot layout/design—all counties</b> <i>Dept. of State responsible for rules prescribing ballot format<sup>2</sup> for each certified voting system; postelection reports of voter errors due to problems with ballot design or instructions are due from county supervisors of elections to the Dept. of State no later than Dec. 15 of each general election year.</i>	Yes	1 (92%)	Yes
<b>Same kind of voting machine—all counties</b> *...requires all counties to use a system certified by the Division of Elections <i>Electronic or electromechanical precinct-count tabulation voting system (optical scan-precinct based; touch screens);<sup>3</sup> Div. of Elections to play continuous role in certifying new voter technologies; calls for public preelection testing of equipment by county supervisors of elections; postelection reports of voter errors are due to the Dept. of State no later than Dec. 15 of each general election year.</i>	Yes	1 (92%)	No, but...*
<b>Standard rules for counting overseas absentee ballots</b> <i>Defines overseas voter;<sup>4</sup> instructs supervisor of elections to e-mail list of candidates to overseas voter when possible at least 30 days prior to an election; presumes date ballot mailed back from voter is the date stated and witnessed on the outside of the return envelope (not the postmark).</i>	Yes	2 (91%)	Yes

<sup>1</sup>At a minimum, the rules must address: a) security of ballots during the recount process; b) time and place of recounts; c) public observance of recounts; d) objections to ballot determinations; e) record of recount proceedings; and f) procedures relating to candidate and petitioner representatives.

<sup>2</sup>The rules must include: a) clear and unambiguous ballot instructions and directions; b) individual race layout; and c) overall ballot layout. The department must also graphically depict a sample uniform primary and general election ballot form for each certified voting system.

<sup>3</sup>Local governments have discretion as to the type of electronic or electromechanical precinct-count tabulation voting system to be purchased, provided that the system has been certified by the Division of Election. As of May, 2001, only the optical scan precinct based voting machine had been certified. But certification is pending for some touch-screen (DRE) systems is expected before the 2002 election cycle. The automatic tabulating equipment must provide the voter an opportunity to correct the ballot when the number of votes for an office or measure exceeds the number which the voter is entitled to cast (overvote) or where the tabulating equipment reads the ballot as a ballot with no votes cast (undervote).

<sup>4</sup>Overseas voter means: a) members of the uniformed services while in the active service who are permanent residents of the state and are temporarily residing outside the territorial limits of the U.S. and the District of Columbia; (uniformed services means the Army, Navy, Air Force, Marine Corps, and Coast Guard, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration); b) members of the Merchant Marine of the United States who are permanent residents of the state and are temporarily residing outside the territorial limits of the U.S. and the District of Columbia; and c) other citizens of the U.S. who are permanent residents of the state and are temporarily residing outside the territorial limits of the U.S. and the District of Columbia.

MAJOR ELECTION REFORM PROPOSALS	GOVERNOR'S TASK FORCE Recommendation	CITIZEN RANKINGS from survey; 1=highest (% is strongly favor + somewhat favor)	LEGISLATURE Adopted
<b>Better voter education for new registrants</b>	Yes	2 (91%)	Yes
<i>Not just for new registrants; \$6 million; by March 1, 2002, Dept. of State must adopt rules prescribing minimum standards for nonpartisan voter education;<sup>5</sup> each county supervisor of elections must implement the minimum voter education standards and by Dec. 15 of each general election year, shall send a report of the voter education programs that have been implemented to the Dept. of State; the Dept. of State must prepare a public report on the effectiveness of voter education programs and reexamine rules.</i>			
<b>Same poll closing time throughout the state</b>	Yes, but...*	3 (87%)	No
<i>*...throughout the nation; send resolution to Congress Div. of Elections and the Florida State Assoc. of Supervisors of Elections must study the benefits and drawbacks of having uniform poll opening and closing times throughout the state; a written report must be presented to the legislative leaders no later than January 1, 2002.<sup>6</sup></i>			
<b>Statewide voter registration list to reduce fraud</b>	Yes	4 (86%)	Yes
<i>Dept. of State can contract with Florida Association of Court Clerks to analyze, design, develop, operate, and maintain a statewide online voter registration database and associated web site to be fully operational statewide by June 1, 2002;<sup>7</sup> Div. of Elections must provide quarterly progress reports to legislative leadership beginning July 1, 2001.</i>			
<b>Better training of poll workers</b>	Yes	5 (81%)	Yes
<i>Better training and recruitment must be done by county supervisors of elections;<sup>8</sup> Dept. of State must create a uniform polling place procedures manual to be placed in each precinct on election day;<sup>9</sup> supervisors of elections must work with business/local community to recruit skilled inspectors and clerks.</i>			


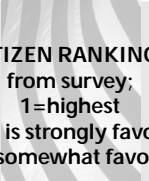
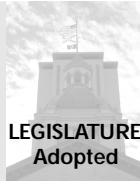
<sup>5</sup>The standards must address, but are not limited to... these subjects: a) voter registration; b) balloting procedures, absentee and polling place; c) voter rights and responsibilities; d) distribution of sample ballots; and e) public service announcements.

<sup>6</sup>This report must at a minimum include a discussion of the circumstances surrounding the 2000 Presidential election; changing the state to one time zone; changing polling times to coincide in both time zones; and having the Central Time Zone not recognize Daylight Saving Time.

<sup>7</sup>The database will be updated daily and will be used to determine if a registered voter is ineligible to vote and whether the voter's registration is duplicated. If the county supervisor of elections determines a voter is ineligible, the voter must be notified by certified U.S. mail. The voter has an opportunity to respond. If the supervisor then finds the voter is indeed ineligible, the voter must again be notified of the reason by certified U.S. mail.

<sup>8</sup>Supervisors are responsible for conducting training for inspectors, clerks, and deputy sheriffs prior to each primary, general, and special election. No person shall serve as an inspector, clerk, or deputy sheriff for an election unless such person has completed the training as required. The minimum training requirements for clerks are: a minimum of six hours of training during a general election year, at least two hours of which must occur after June 1 of that year. Inspectors must have a minimum of three hours of training during a general election year, at least one hour of which must occur after June 1 of that year.

<sup>9</sup>At a minimum, the manual must include: a) regulations governing solicitation by individuals and groups at the polling place; b) procedures to be followed with respect to voters whose names are not on the precinct register; c) proper operation of the voting system; d) ballot handling procedures; e) procedures governing spoiled ballots; f) procedures to be followed after the polls close; g) rights of voters at the polls; h) procedures for handling emergency situations; i) procedures for dealing with irate voters; j) handling and processing of provisional ballots; and k) security procedures.

 <b>MAJOR ELECTION REFORM PROPOSALS</b>	<b>GOVERNOR'S TASK FORCE Recommendation</b>	 <b>CITIZEN RANKINGS from survey; 1=highest (% is strongly favor + somewhat favor)</b>	 <b>LEGISLATURE Adopted</b>
<b>Better voter registration system</b> <i>Notes: Revised procedures to be followed when a voter registration application is incomplete; required up-to-date statewide voter registration list.</i>		<b>6 (79%)</b>	<b>Yes</b>
<b>Prohibit cabinet officials from campaigning for others</b>	<b>Yes</b>	<b>7 (63%)</b>	<b>No</b>
<b>Nonpartisan election of Supervisors of Election</b>	<b>Yes</b>	<b>8 (62%)</b>	<b>No</b>
<b>Outlaw/decertify punch card machines</b> <i>Effective September 2, 2002</i>	<b>Yes</b>	<b>9 (61%)</b>	<b>Yes</b>
<b>Restore felon voting rights</b> <i>Governor and attorney general are studying the issue.</i>	<b>Further study needed</b>	<b>10 (33%)</b>	<b>No<sup>10</sup></b>
<b>Allow voting over the Internet</b> <i>*...only under unusual circumstances)</i> <i>Dept. of State must adopt rules to authorize supervisors of elections to accept a voted absentee ballot by facsimile machine or other electronic means from overseas voters.<sup>11</sup></i>	<b>Further study needed</b>	<b>11 (17%)</b>	<b>Yes (but...*</b>
<b>Voters Bill of Rights and Responsibilities</b> <i>Must be posted at each polling place.<sup>12</sup></i>	<b>Yes</b>		<b>Yes</b>
<b>State funding (match or loan) to upgrade equipment</b> <i>*...favored both state and counties paying †(matching grant) \$24 million.<sup>13</sup></i>	<b>Yes</b>	<b>52%...*</b>	<b>Yes<sup>†</sup></b>

<sup>10</sup>Such legislation was introduced in the 2001 session, but it was withdrawn to allow the governor and attorney general to further study how to resolve the issue.

<sup>11</sup>The rules must provide that in order to accept a voted ballot, the verification of the voter must be established, the security of the transmission must be established, and each ballot received must be recorded.

<sup>12</sup>The Voter's Bill of Rights and Responsibilities informs each registered voter of his/her right to: a) vote and have his or her vote accurately counted; b) cast a vote if he or she is in line when the polls are closing; c) ask for and receive assistance in voting; d) receive up to two replacement ballots if he or she makes a mistake prior to the ballot being cast; e) an explanation if his or her registration is in question; f) if his or her registration is in question, cast a provisional ballot; g) prove his or her identity by signing an affidavit if election officials doubt the voter's identity; h) be given written instructions to use when voting, and, upon request, oral instructions in voting from elections officers; i) vote free from coercion or intimidation by elections officers or any other person; and j) vote on a voting system that is in working condition and that will allow votes to be accurately cast. The individual voter's responsibilities are to: (1) study and know candidates and issues; (2) keep his or her voter address current; (3) know his or her precinct and its hours of operation; (4) bring proper identification to the polling station; (5) know how to operate voting equipment properly; (6) treat precinct workers with courtesy; (7) respect the privacy of other voters; (8) report problems or violations of election law; (9) ask questions when confused; and (10) check his or her completed ballot for accuracy.

<sup>13</sup>Counties having a population of 75,000 or fewer based on the 2000 Census will receive a total of \$7,750 per precinct based on the number of precincts certified by the Dept. of State for the 2000 General Election; all other counties will receive a total of \$3,750 per precinct based on the same criteria. Payments will be made in two equal installments, on July 1, 2001 and July 1, 2002.

MAJOR ELECTION REFORM PROPOSALS	GOVERNOR'S TASK FORCE Recommendation	CITIZEN RANKINGS from survey; 1=highest (% is strongly favor + somewhat favor)	LEGISLATURE Adopted
County election supervisors appeal of budgets to state cabinet	Yes		No
Design a statewide online voter registration database	Yes		Yes
Change dates for primary elections; but don't eliminate runoff or second primary	Yes		
<i>Eliminated runoff primary until January 1, 2004. The candidate receiving the highest number of votes cast for an office in the September primary will be declared nominated for that office.</i>			
Repeal current restrictions on voting absentee	Yes		Yes
<i>Removes language requiring justification for voting absentee; recognizes absentee balloting as a form of voter convenience; extends the certification deadline to seven days after the primary election and 11 days after the general election. All returns that are filed late must be rejected.</i>			
Allow for provisional ballots; to be counted if voter is found to be properly registered	Yes		Yes
<i>Defines a provisional ballot; lays out steps to follow when voting and counting provisional ballots.<sup>14</sup></i>			

Sources: The Governor's Select Task Force on Election Procedures, Standards, and Technology, Revitalizing Democracy in Florida (March 1, 2001); Collins Center/James Madison Institute Survey of Florida Voters, April 3-8, 2001; Florida Election Reform Act of 2001 (S1118).

<sup>14</sup>A provisional ballot is a ballot issued to a voter by the election board at the polling place on election day for one of two reasons: a) the voter's name does not appear on the precinct register and verification of the voter's eligibility cannot be determined; or b) there is an indication on the precinct register that the voter has requested an absentee ballot and there is no indication whether the voter has returned the absentee ballot. Once voted, the provisional ballot must be placed in a secrecy envelope and sealed in a provisional ballot envelope and deposited in a ballot box. The county canvassing board will examine each provisional ballot to determine if the person voting that ballot was entitled to vote at the precinct in the election and that the person had not already cast a ballot in the election (via absentee).

*Susan A. MacManus is Distinguished University Professor of Public Administration and Political Science at the University of South Florida and chair of the Florida Elections Commission.*

### Endnotes

<sup>1</sup>Dr. Susan A. MacManus, Distinguished University Professor, from the University of South Florida, headed the team. Other team members were: Dr. Dario Moreno, Florida International University, Dr. Richard Scher, Robin and Jean Gibson Professor, University of Florida, and Dr. Henry Thomas, University of North Florida. The team

held a press conference at the Florida Press Center on April 23, 2001 and released their report titled "Floridians Want Reform of the Election System...Now!" The full report is available from the James Madison Institute.

<sup>2</sup>The respondents were selected via a random sample of Florida's adult population (18 and over) taken from listed telephone numbers. Over samples (n=125) of both the African American and Hispanic populations were taken to afford a more representative view of these two sizable minority communities. These figures were then weighted to reflect overall composition in the adult population. The margin of error for each of these groups is ±9 percent. The average survey lasted 14 minutes.

<sup>3</sup>Survey respondents were presented with a list of

suggested reforms, emanating from reforms recommended by The Governor's Select Task Force on Election Procedures, Standards, and Technology, and from hearings held by other groups like the U.S. Civil Rights Commission. They were then asked whether they strongly favor, somewhat favor, somewhat oppose, or strongly oppose each reform.

<sup>4</sup>County election supervisors as well as many in the general public have called for eliminating inconsistencies in Florida's key state laws. See David Wasson, "Retiring Punch Cards One Focus of Task Force," *The Tampa Tribune*, January 9, 2001; Debbie Salamone Wickham and Harry Wessel, "What's a Vote? It Varies by County," *Orlando Sentinel*, January 28, 2001.

<sup>5</sup>By far the strongest support for restoring the voting rights of felons comes from the African American community (75 percent). Blacks feel that have been unfairly impacted by our state's rather difficult process for having one's voting rights restored. Other breakdowns show less than a majority support for this reform. However, higher than average percentages of Democrats (48 percent), 18-34 year olds (47 percent), non-Cuban Hispanics (46 percent), those who did not vote in the presidential election last fall (45 percent), and persons who are undecided about whether they will vote in

the 2002 elections in Florida (57 percent) favor restoring felon voting rights. Republicans are the least likely to favor this reform (17 percent).

<sup>6</sup>Opposition to this reform is heavy across all demographic categories. But support is slightly higher among younger cohorts (29 percent of 18-34 year olds) and among those with some college education (24 percent). The differences of opinion on this reform are generationally and educationally driven, rather than by partisanship.

<sup>7</sup>Jeb.bush@myflorida.com; May 4, 2001.

<sup>8</sup>List taken from Jeb.Bush@myflorida.com.

<sup>9</sup>The law also changed public financing of campaigns in Florida but that is not the major focus of this article.

<sup>10</sup>This question was already surfacing in early December, 2000. See Matthew I. Pinzur, "Faith in Democracy Faltered in Election," *The Florida Times-Union*, December 27, 2000.

<sup>11</sup>There is some early evidence to complement this finding, namely noticeable increases in the number of registered voters in some counties. See David Damron, "More Voters Spring Into Action," *Orlando Sentinel*, February 19, 2001.

<sup>12</sup>It is likely that some of the frustration came from the Electoral College dictating the presidential winner rather than the popular vote.

## teacher unions *(Continued from page 9)*

Union leaders in Florida often claim to speak for 120,000 teachers but they have resisted requests for a breakdown of membership or to explain why the report in the *Handbook* is wrong.

Our study reveals many instances that support the claim that the teacher unions stand in the way of progress in school reform. Union influence on education policy and on the quality of teaching and learning in our schools will diminish as the truth about union goals and methods

becomes more widely known by the people of Florida. ❧

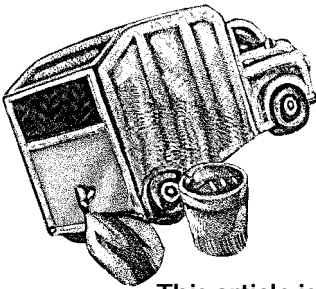
*J. Stanley Marshall is founding chairman of The James Madison Institute and publisher of this magazine.*

### Endnote

<sup>1</sup>PEN, the Professional Educators Network of Florida, is an association of educators—teachers mostly—that represents an alternative to the union. Among other benefits, PEN provides the liability insurance protection many teachers feel they must have and which is the reason many join the union.

# the revolution in privatization

by Lawrence W. Reed



This article is adapted from remarks made by Lawrence W. Reed at the Legislative Orientation program of the Florida House of Representatives on January 9, 2001.

Privatization has become an important tool in the way we govern ourselves at the local level, and to some degree at the state level, but less so at the federal level. Twenty years ago the word “privatization” wasn’t even in the dictionary. But let there be no mistake about this fact: privatization in its various forms has now become nothing less than a revolution in governance all over the world. It is happening at a feverish pace, and the more it is done, the more we are learning about how to do it right.

The broadest definition of privatization is the transfer of services or assets from the tax-supported and politicized public sector to the entrepreneurial initiative and competitive markets of the private sector. The superiority of the latter is now approaching the status of undisputed conventional wisdom. The private sector exacts a toll from the inefficient for their poor performance, compels the service provider or asset owner to concern himself with the wishes of customers, and spurs a dynamic, never-ending pursuit of excellence—all without any of the political baggage that haunts the public sector as elements of its very nature.

In an interdependent world getting smaller through the speed of transportation and communications, no community of people can compete successfully without ridding itself of costly public enterprises and

liberating the entrepreneurial spirit.

The theory is simple, but grounded in profound truths about the nature of humans and their response to incentives and disincentives. Tie up the performance of a task with red tape, bureaucracy, and politics within a system that is guaranteed to exist regardless of outcome, and the result is usually mediocrity at great expense. Infuse competition, accountability, and the fear of losing valued customers into the task, and mediocrity becomes the exception, excellence the rule.

When it is handled properly and with care, privatization harnesses the powerful market forces of competition, accountability, and incentive. It means that government officials don't have to be hemmed in by an indifferent bureaucracy; instead, they can take advantage of the best available buys. State and local governments have routinely experienced costs savings of 10 to 40 percent through privatization, often with significant improvements in the way an asset is managed or a service is delivered. When assets and services are left entirely in private hands from the very start and the government "middleman" is eliminated, even greater efficiencies are possible.

Although I am in favor of privatization and a promoter of it, I'm not a knee jerk "privatize anything and everything for the sake of doing it" kind of person. In fact, I


would argue that you should only do it when you've done your homework and all the necessary research to determine that it is the best option to make sure that the needed services are provided. Rarely should you

privatize just for the sake of doing it or without much homework. A few years ago Dayton, Ohio, seriously entertained the notion of getting into the pizza parlor business. They were going to have city-owned pizza parlors in Dayton. It never did come to pass but if it had, it would have been a good example of something to immediately privatize.


Delivering pizza is simply not a legitimate function of local government. There is plenty of provision for that in the private marketplace. To the extent that governments go beyond the core functions that they are supposed to perform and get into these other areas, then over time these functions and services begin to suffer. But by and large, do it after you've spent some time looking into the alternatives and see what might work best, and then you can see whether it makes sense to keep things as they are in-house with government.

### **Contracting Out**

By far the most common form and the one every government at every level is doing to some degree is contracting out to private firms. That's when government says, "We



***Privatization harnesses the powerful market forces of competition, accountability, and incentive.***



used to do this as a city function with a monopoly of city workers but we're not going to do it that way anymore. We're going to put it up for bid and award a contract to one or more private firms or even to a nonprofit agency."

With decades of experience, contracting government services out has become something of a science at the local level in America. We now know what it takes to make this work, including: open, competitive bidding for contracts that are subject to periodic renewal; careful writing of the contract terms to incorporate clear language and appropriate safeguards; and effective monitoring of performance to ensure the contract is being carried out as expected.

### **Commercialization**

The second form of privatization is one that I think is actually the best. The term we give it is commercialization. This is where government says, "We're no longer going to do this work with our own workforce. We're not going to contract it out either. We're simply going to get out of this business altogether. The customers we used to serve can take care of the job themselves by contracting with the private provider of their individual choice."

This is how a number of cities across America have pulled out of the garbage business. The citizens themselves shop amongst several private, competitive firms that specialize in picking up and properly disposing of garbage. No middleman, no taxes, no boring city council

meetings to sweat through in order to register a complaint. *You* hire the service and if *you're* not happy, *you* fire it and hire a different one. This form of privatization tends to enhance both our liberties and our pocketbooks if it's done right. So where you've got the multiplicity of good providers, strong track records, and responsible people in the community who can be trusted to take care of these responsibilities, this is an option. It can be the best because it cuts out the middleman of government altogether and gives the consumer the ultimate power of choice in competition. This form of privatization tends to enhance citizens' liberties and spare their pocketbooks if it is done right.

### **Asset Sales**

Another form is asset sales. It is the outright gift or sale by government of a physical asset (a piece of equipment or a building, perhaps) to a private entity. This involves a service or a building or a piece of equipment that government no longer needs or puts up for bid to sell.

### **Vouchers**

A fourth form is the issuance of vouchers that can be redeemed in the marketplace. Instead of direct public provision of a service, it gives recipients choices where they had none before. That's most often thought of with regard to education, but vouchers are cropping up more and more and are often implemented with regard to public housing. The idea here is that instead of

the government providing it or even contracting on your behalf, it will simply give you a receipt or a form—whatever you want to call it—to get things from the provider of your choice and that provider then re-gains his money. Think of it this way—we decided some years ago the federal government wanted to do something to help poor people to get food. One of the options could have been to have government farms and government sources selling food or providing it directly in some fashion to poor people. We didn't go that route; we didn't Sovietize it. We simply gave people a voucher and said, "You can take this to the food seller of your choice" and that's a kind of privatization.

### Other Methods

Two other forms of privatization include: 1) the sale of stock in a newly privatized company that was formerly state-owned, and 2) the end of subsidies and all the red tape and onerous regulations that come with them, which then liberates an industry to produce "for the market" and not for the government. New Zealand accomplished this with agriculture a decade ago; farmers there are no longer wards of the state and are doing quite well.


### Choice and Competition

These forms comprise the overwhelming share of all the


privatizations taking place in the country, but there are other forms and there are combinations of these on which assets and services have been privatized. Why is this happening at such a great pace at the local level in this country and in many countries across the world? I think for a couple of reasons. One is ideological. In some places where government has been all over the place with a sorry track record, leaders in government now say, "We just want to get out of this." But by and large most privatizations happening aren't for ideological reasons but

rather because of tax limitations. Governments are finding that they are up against the tax wall. They realize in this modern globalized economy that they are in competition with other governments near and far for people and for business. They also realize there is a limit to how far they can raise taxes so as to raise revenues to provide services before people and businesses leave. Or they are running into tax limitations in most of their state constitutions or locally passed bond measures. So they're looking for ways to get a job done more efficiently and they're turning increasingly to privatization because of the forces of choice and competition to get a job done better.

At the local level of government, if you gave me a little bit of time, I could provide you with examples of where somebody has privatized



***Privatization in its various forms has now become nothing less than a revolution in governance all over the world.***



almost any service you can think of that any local government provides. That's even true for two of the most important public safety functions of local government—police and fire protection. There are some limited examples where those areas are privatized.

### Objections

Examples of privatization are everywhere and studies by the dozens verify its effectiveness. Articles and monographs are proliferating, advising officials of the pitfalls to avoid and the strategies that work. There is simply no denying that privatization is a major trend now and that each new experience teaches us even more about how to maximize its benefits. But there are plenty of objections to privatization. I don't want to suggest to you that it is problem free. Here are the most common ones, along with a brief response:

- ***It is antipublic employee.*** Strategies can be devised that actually involve public employees in a positive way. But ultimately, we must remember that government does not exist for the benefit of those who work for it; it exists for the benefit of those who pay its bills or need its services. Governments that employ more people than necessary, or that pay their employees more than their market will bear, are not doing any favors for the citizens—including the poor—who are picking up the tab.
- ***It is a backdoor way to hobble or destroy government.*** Mayor

Goldsmith of Indianapolis said that before he privatized city services, it was extremely difficult to resolve citizen complaints or get the bureaucracy to move on anything. Once a service is privatized, accountability is almost instantaneous. If performance suffers, the city can quickly cancel the contract. Because of that, the mayor said, government officials like him are actually empowered, not hobbled. (See “Innovations in Government” by Stephen Goldsmith, *The Journal of The James Madison Institute*, Spring 2001.)

- ***It didn't work in some instances so we shouldn't do it anywhere.*** I have yet to see a case where a failure was really an indictment of privatization itself. Failures are almost always arguments for avoiding poor practices, such as noncompetitive bidding in smoke-filled backrooms, sloppy contract writing, or nonexistent monitoring of performance.
- ***It can breed special interests who will lobby for more contracts and services from government, even when that's not warranted.*** Public bureaucracies lobby for more government, too. This is an argument for taxpayers and the press to be vigilant, not an argument against privatization.
- ***Government officials may not do the right thing with the savings.*** It's true  
*To page 32 >*

# dodging the bullet: florida nursing homes get eleventh-hour litigation relief

by peter doherty



Regulatory changes will put Florida in the forefront of improved standards for long-term care facilities.

**F**or more than three years—since the massive rewrite of the state’s civil litigation statutes in 1999 that failed to include it within its reforms—the nursing home industry in Florida has been in trouble. By the opening of the 2001 session of the Florida legislature in March, it was clear that if legislators did nothing or did the wrong thing, we would have a problem as unsolvable and as eternal as that of worker’s compensation insurance<sup>1</sup>—one that hurts the state and its people, and one that might occasionally destroy the careers of unlucky public servants. Had we continued to burden the long-term care industry in the state, we would have crushed it out of existence or priced what remained of it beyond the reach of all but the very wealthy. Indeed, by early 2001, 21 percent of the companies who operate nursing homes in Florida were already seeking protection in bankruptcy court.<sup>2</sup>

Governor Jeb Bush summed up the situation in his State of the State message:

Nursing homes teeter on the verge of bankruptcy in Florida, and many will go under if we do not take decisive action to stabilize their insurance premiums by providing lawsuit relief. If nursing homes close their doors, seniors could be left without the services they vitally require at this vulnerable time in their lives.

*Figure.*  
**Florida Nursing Homes Loss Cost\* per Bed**

Year	National Average	Florida
1995 .....	\$345 .....	\$2,096
1999 .....	\$806 .....	\$6,283

*\*The estimated average amount paid annually in claims by bed.*

Even if nursing homes survive but are financially weakened, the quality of care they provide could decline and harm our elders. Nursing homes in Florida are three times more likely to be sued than in other states, putting the costs of liability insurance at eight times the national average. We should preserve the right to litigate, but wouldn't it be better for nursing homes to spend money on improving quality of care rather than paying for insurance premiums and litigation costs?<sup>3</sup>

The governor offered no specific proposal to accompany his remarks. He might have hoped he could. But in mid-February, the Task Force on Availability and Affordability of Long-term Care created by the 2000 legislature to find a consensus solution released its final report. The report was of little help. The task force had been charged with studying the entire long-term care industry and preparing recommendations for legislative consideration. It collected information and developed options, but in the end could not reach agreement. Its members were unable to endorse any course and elected to submit a nearly 1,000-page *Informational Report* that contained little direction for policymakers.

The inconclusive report, the impasse of the task force, and the

situation outlined by the governor were indisputable signs that the issue had passed beyond one of concern to a certifiable crisis.

The word "crisis" is overused, so much so that in some situations it has lost its impact. It has become debased and when a potentially devastating situation arises that deserves the label "crisis," the overworked word is simply inadequate. But the long-term care crisis in Florida was *real*, it was persistent, and it was getting worse.

The figure above shows that by 1999, the loss cost per bed in Florida was almost eight times the national average,<sup>4</sup> and the trend did not stop there. By 2000, the loss cost had zoomed to \$12,700 per bed, a nearly unbelievable 1,200 percent higher than the rest of the country.<sup>5</sup> Worse, lawsuits and judgments rendered against nursing homes were rising fast. Long-term care facilities were in bankruptcy and were closing. Liability insurance for those still in operation was harder to get and increasingly expensive. If the trend had continued, liability insurance for the institutions would have become unavailable. Some underwriters had already chosen to withdraw from the Florida market: others were preparing to follow. In

the wake of this, the premiums charged by those that remained were increasing to the point they were very nearly prohibitive.<sup>6</sup> And since insurance coverage is a de facto requirement of nursing home operation, facilities that could not obtain it or that could not afford it would be forced to close, and—given the hostile atmosphere—no new facilities would be likely to take their places. It was a scenario leading to a bleak and unhappy end.

### Some Facts

How bad was it for nursing homes in Florida? In addition to the above, consider these facts as reported by actuarial analyses released in 2000 and updated in early 2001 by Aon Worldwide Actuarial Solutions:

- Florida, with approximately 10 percent of the licensed long-term care beds in the country, accounted for 44 percent of the national losses. And these beds accounted for 50 percent of all losses nationwide over the past five years.
- The average long-term care claim paid in Florida in 2000 was \$455,000. This was almost 300 percent higher than the \$156,000 average claim paid during the same year in the rest of the nation.
- Florida long-term care operators incurred four claims for every one incurred in the rest of the country. In 1999, the ratio was three claims in the state to every one claim elsewhere.
- Long-term care loss costs in the state increased 45 percent annually

over the five years preceding 2000, while the rest of the nation has seen annual increases of 22 percent during that period.

- Approximately half (49 percent) of the amount paid in long-term care claims in Florida was going directly to attorneys who prosecuted the claims or defended the facilities.
- The cost of insuring a Florida nursing home bed was at least twice the cost of an acute care bed in a hospital because of insurance losses. Florida long-term care facilities were suffering per-bed losses that were double the size of those suffered by hospital beds. This represented a significant turnaround from less than a decade earlier when the losses for long-term beds were approximately one-third of that for hospital beds.
- Insurance companies were leaving the Florida market or severely restricting their issuance of policies. Through 1999, at least 10 companies that had historically operated in Florida had stopped selling new policies altogether. Others had reduced the coverage their policies provided and all companies still operating in the state had raised their premiums dramatically.
- Liability insurance for Florida long-term care facilities was at least 600 percent more expensive than that available in other states.<sup>7</sup>

These facts pointed to something else other than looming disaster. They clearly showed that something was terribly wrong in Florida. Our

long-term care facilities could not possibly be so bad that they were responsible for 44 percent of all the harms done by similar facilities nationwide, or that the degree of harms done in our state was 300 percent worse than elsewhere.

Common sense told us we could not be that bad, and facts backed that up. In September 2000, the General Accounting Office of the United States Congress reported these facts about Florida:

- It was the second most improved state with regard to long-term care during the year 1999–2000.
- It ranked among the best 20 states in terms of quality of care, accident prevention, and the use of protective restraints.
- It ranked in the middle of all states in the occurrence of pressure-sore injuries.
- Its staffing ratios in long-term care facilities were (and had been) consistently above the national average.
- Its nursing homes ranked eighth nationally in the average number of licensed nurse hours worked.
- Its citation rate for inadequate nursing home staffing dropped during 1999–2000 from 12.5 percent to 9 percent, and the homes added a total of \$31 million to their budgets during this period for increased staffing.
- Its nursing home citation rate for all violations dropped to an average 6.1 deficiencies per facility inspection in 1999–2000, while the national average increased from 5.7 to 6.0 per inspection.<sup>8</sup>

## What To Do?

No one seriously suggested that long-term care facilities drop their liability insurance. While the suggestion was made,<sup>9</sup> the reality that such insurance is necessary to compensate for real damages militated against doing so.

Therefore if liability insurance remained a de facto requirement for doing business, the question became how to reduce the exposure of insurers and, by doing so, keep coverage affordable and available. As the legislative session opened, two primary ways of doing this were under discussion. One would be effective. The other would have created a situation giving rise to what might be called “elder comp,” a close, grotesquely frightening cousin of the venerable worker’s comp—the legal and political equivalent of the brother-in-law who takes up residence on your sofa, eats you out of house and home, wrecks your car, ruins your finances, and who will not leave and cannot be driven out.

## Elder Comp

The preferred solution of the trial bar and some Florida officials was to create a system of joint underwriting that would have placed nursing home insurance into a pool arrangement so as to spread the exposure for loss over a number of participating insurers, thus theoretically lowering any individual insurance company’s exposure. On the surface, this sounded reasonable enough. Those facilities that could find individual insurers would still

be free to do so. But facilities that could not find or could not afford coverage from a single company would have been protected by a policy provided by the pool and jointly underwritten by participating insurers, each of which would face exposure for only a portion of any loss incurred. The government would have regulated rates charged and the exposure levels incurred by underwriters. This, it was said, would introduce an element of predictability and stability into the long-term care facility insurance market. The facilities would have been covered, the insurers would have been protected, and patients would have remained able to collect. A crisis, said the proponents of the scheme, would be avoided.<sup>10</sup>


It was a compelling argument. Unfortunately it was also an incorrect one. While a joint underwriting system might, in fact, have lowered rates in the short run, it would not have done so permanently. If claims and awards continued to be unregulated—as advocated by the proponents of joint underwriting—the size of judgments would have continued to increase as they had been doing. (Given the past, no reasonable argument could be made they would not). As a result, the costs to those underwriters in the pool would have increased along with them, as would have the cost for facilities to pur-

chase pool insurance. Additionally, as costs continued to rise, participating companies might have left or restricted their participation in the pool, and this would have driven costs even higher as the spread of exposure contracted. The government would then have attempted to regulate this. It might have tried administratively to place limits on claims, impose mandatory arbitration, or threaten insurers who attempted to leave the pool or who refused to join. The result would have been the creation of “elder comp” and its attendant ever-upward spiral of governmental attempts to predict and cover losses,

to find insurers willing to write policies, and to produce equity for claimants.

### **Solving The Problem**

As the 2001 legislature continued, it began to become clear to many legislators that any truly effective method of addressing the problem must deal with the increasing litigation, with the increasing awards, and with attorney fees. In 1999, when debate raged in the Florida legislature over tort reform (a process that would result in the passage of provisions placing limitations on some types of recovery and fees), most “abuses against the elderly” were specifically excluded and declared to remain



***Early in 2001, 21 percent of companies who operate nursing homes in the state were seeking protection in bankruptcy court.***



under the existing provisions of Chapter 400. (Chapter 400 is the portion of the *Florida Statutes* that in part deals with nursing homes.<sup>11</sup>) Within this section is a statutory declaration of “resident’s rights.” The rights enumerated were, to say the least, flexible vehicles for initiating causes of action against long-term care facilities. Among the provisions were a number of common sense “rights” that lend themselves to objective definition. These relate directly to appropriate and timely notices of services, fees, rules, accommodations, informed consent, and with personal belongings, including money. However, side by side with them were some slippery provisions, “rights” expressed so vaguely that they easily lent themselves to all manner and shades of interpretation. Among these were the following:

- “The right to be treated courteously, fairly, and with the fullest measure of dignity.”
- “The right to receive adequate and appropriate health care and protective and support services.”
- “The right to prompt efforts by the facility to resolve resident grievances, including grievances with respect to the behavior of other residents.”


It is difficult to tell exactly what the obligation or liability of the facility might be in any of these cases, and those given above are just

three examples.<sup>12</sup>


Because all of these were styled as “rights,” they gave rise to potential legal action. And because they were civilly enforceable and initiated at the option of the aggrieved party, the causes they anticipated might arise at any time, with or without warning. It is axiomatic in America that anyone may sue anyone about anything at any time, and the rights granted in Chapter 400 provided generous pegs upon which to hang such actions.

This was not all bad. Our elders need protections that they can

choose to invoke. However, the remedies under Chapter 400 placed the state’s nursing homes in a no-win situation. Unlike other areas of health care that since 1999 had some measure of predictability in terms of permissible award levels and attorney fee arrangements as a result of tort reform, the nursing homes were without such safeguards. And without them, they had become fat targets for litigation. The numbers proved that this was true, and all the joint underwriting in the world could not and would not change this central fact. Nor could any new insurance arrangements prevent the ultimate destruction of the industry or prevent such long-term care services as might survive from being priced beyond the means of all but the richest elders in our state.



***What good would “residents’ rights” if there were no place to reside?***



It would, Florida's legislators ultimately realized, be the far better choice to place Florida's nursing homes on a footing similar to that provided in 1999 for other medical facilities. The crisis would end by including the long-term care industry under a reasonable plan similar to that contained in the tort reform act, one that featured generous but nevertheless limited award ranges and attorney fee calculation parameters. Insurers would obtain the loss predictability they must have. Facilities would again be able to obtain insurance and to anticipate the cost of that insurance. And patients would retain the full range of rights of redress. Moreover, Floridians would be able to find high quality, long-term care facilities to serve them at a price they could afford. And wasn't that the point? For, after all, what good would "residents' rights" be if there were no place to reside?

Florida chose to end its nursing home crisis by taking these simple steps. In addition to providing funding under Medicaid that will help Florida's long-term care facilities increase staffing and offer better pay, both of which will increase the quality of care, the legislature addressed the litigation issue. In the section of the bill dealing with this, the legislature capped the amount of punitive damages at \$1 million for unintentional harms with an increased penalty of up to \$4 million for harm done intentionally. They also put reasonable caps on the amounts attorneys may collect as

fees in such cases.<sup>13</sup>

The bill passed on the very last evening of the 2001 legislative session, and when it did, Florida successfully dodged the bullet that would have killed our nursing home industry. Though successful, it was a very close call. For instead of fixing the problem, we might easily have worsened it by doing nothing or by establishing a joint underwriting system without award and attorney fee controls that would have created for us more problems for more years than we can imagine. ❧

#### **Author's Note:**

*A three-year struggle to provide lawsuit relief for Florida's long-term care providers reached a climax during the 2001 Florida legislative session. In research published for distribution to members of the legislature in March as part of our Perspective series, JMI urged legislators to address the nursing home issue promptly and to adopt a reasonable and responsible course of action. Such action was a necessity, we said, if Florida's long-term care industry was to be spared virtual extinction. Debate raged over the issue until the last day of the session when both houses agreed on a bill (SB 1202) that embodied the key lawsuit reforms JMI advocated including a limitation on awards and attorney fees. JMI is proud to have had a role in fashioning this landmark action of the Florida legislature.*

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## Endnotes

- <sup>1</sup>For more years than nearly anyone in the Florida Capitol can remember, worker's compensation has been a perennial issue. Beginning from the sensible notion that workers ought to be compensated for job-related injuries, a regulatory nightmare has grown. Repeated legislative and administrative attempts to gain some sort of handle on what does and does not constitute an injury, on how to equitably determine severity and fault, on awards and fees, on the relationship of awards to the injuries sustained, on the premiums charged to business and industry for coverage, on the legal avenues available to plaintiffs, and on the defenses available to employers have had limited success.
- <sup>2</sup>Florida House of Representatives. Final Bill Analysis on HB 1993 (2000).
- <sup>3</sup>*Journal of the Florida House of Representatives*. March 6, 2001.
- <sup>4</sup>Aon Worldwide Actuarial Solutions. "Florida Long-term Care General Liability and Professional Liability Actuarial Analysis." January 17, 2000.
- <sup>5</sup>Aon Worldwide Actuarial Solutions, "Florida Long-

term Care General Liability and Professional Liability Actuarial Analysis." February 12, 2001.

<sup>6</sup>Ibid.

<sup>7</sup>Ibid.

<sup>8</sup>General Accounting Office of the United States Congress. "Report of the General Accounting Office on Nursing Homes." September 28, 2000.

<sup>9</sup>Task Force on Availability and Affordability of Long-Term Care. "Informational Report of the Task Force on Availability and Affordability of Long-Term Care for the Florida legislature in response to HB 1993." February 16, 2001.

<sup>10</sup>According to the Texas Senate Research Service, Texas, which has experienced some problems with nursing home liability and insurance, formed a joint underwriting association in the hope it would ease the burden on the facilities. However, even though the problems in Texas are far less severe than those in Florida, the policy restrictions and premium levels of the pool insurance has made the option unattractive for facilities.

<sup>11</sup>Chapter 400 *Florida Statutes*.

<sup>12</sup>Ibid.

<sup>13</sup>See SB 1202, 2001 Florida Legislature.

## privatization *(Continued from page 24)*

that when privatization generates lower costs, officials may have multiple options for realizing the gain. They may choose to avoid raising taxes or actually cut them, passing the savings on to taxpayers. Or they may simply take the savings and squander them on some other dubious enterprise of government. This is, again, an argument for vigilance, not against privatization.

### Conclusion

All citizens who value freedom and

the free markets that give life to that freedom should be encouraged by the privatization revolution. A better and leaner public sector is much more than a bipartisan, good government issue. It is an imperative that, when accomplished, will leave us a freer, more responsible, and better served people. ☞

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