WHY THE HELP AMERICA VOTE ACT FAILS TO HELP DISABLED AMERICANS VOTE

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INTRODUCTION

The 2000 Presidential Election turned the world's attention to the shortcomings of the American electoral system. The well-publicized disenfranchisement of voters in the state of Florida, where the final disposition of the election was determined by 547 highly contested votes,[1] raised public concern about voting rights. During a Senate hearing five months later, Senator Ernest F. Hollings (D–SC) stated that "the right to vote is the most fundamental right bestowed upon Americans by the U.S. Constitution. Sadly, there are millions of Americans who lost faith in the guarantee and exercise of this fundamental right due to the circumstances of the last election."[2] These developments were shocking to many Americans. However, for the disabled community, the many obstacles they face in the voting process have amounted to the constructive disenfranchisement of many qualified voters in every federal election.

The administration of a federal election occurs at the local level, resulting in great variation in the methods of voting between, and even within states. However, the electoral system is almost uniformly inadequate in allowing the disabled access to voting locations and in assuring the ability to vote in a manner equally private and independent as

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1. *See* FED. ELECTION COMM'N, FEDERAL ELECTIONS 2000: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (2000), http://www.fec.gov/pubrec/fe2000/2000presge.htm#FL.

2. *S. 368 and Election Reform: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 107th Cong. 3 (2001) [hereinafter *Senate Commerce Hearing*] (statement of Sen. Ernest F. Hollings), *avaliable at* http://commerce.senate.gov/hearings/0307hol.pdf.

that available to the average citizen. Although every state had some provision addressing voter access for the disabled prior to the passage of the Help America Vote Act of 2002 (HAVA)[3] in October 2002, these measures varied widely.[4] Reports of limited access to the polls or an inability to utilize voting equipment privately were commonplace.[5]

Over the past two decades, several pieces of legislation have addressed the problem of limited access.[6] However, concerned with the lack of progress toward accessibility in the wake of these bills, the disabled community and civil rights organizations have raised the profile of the issue and garnered the attention of the legislature in the last few years. The disabled community has actively engaged in the legislative process: during the 106th Congress, a bill introduced in the Senate[7] would have expanded the coverage of the Voting Accessibility for the Elderly and Handicapped Act of 1984 (VAEHA).[8] Although the bill never made it out of the Committee on Rules and Administration, it served as a wake-up call to Congress concerning the failure of previous federal legislation to remedy the problem adequately. Thus, when Congress began addressing the inadequacies of the electoral system following the 2000 election, the legislature included the disabled community in the dialogue.[9]

In the wake of that election, reform legislation came to the forefront in both chambers of Congress. In the hearings that followed, representatives from numerous organizations for the disabled had the opportunity to testify. These representatives testified to the limited access many disabled voters still experienced while attempting to vote, in spite of several major federal statutes aimed at remedying this

3. Pub. L. No. 107-252, 116 Stat. 166 (codified at 42 U.S.C.A. §§ 15301–15545 (West Supp. 2004)).

4. *See* U.S. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-02-107, VOTERS WITH DISABILITIES: ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS 20–22 (2001) [hereinafter GAO VOTER DISABILITY REPORT], http://www.gao.gov/new.items/d02107.pdf.

5. *See id*. at 22, 26–32 (describing variety of impediments for disabled at polling places).

6. *See infra* Part II.A.

7. S. 511, 106th Cong. (1999).

8. 42 U.S.C. § 1973ee-1 to 6 (2000).

9. *See*, *e.g.*, *Election Reform: Hearings Before the S. Comm. on Rules and Admin.*, 107th Cong. 8–10 (2001) [hereinafter *Senate Rules Hearing*] (statement of James Gashel, Director of Government Affairs, National Federation of the Blind, Baltimore, MD).

problem.[10] Ultimately, the HAVA passed by wide margins, and included measures requiring that states receiving federal funds allocated to election reform achieve specific degrees of accessibility by prescribed dates.[11] Title I offers federal funds for general election improvement and replacement of archaic voting equipment.[12] Title II provides grants to states to make polling places accessible.[13] Title III offers funds to each state to implement uniform and nondiscriminatory voting systems standards.[14]

As a prerequisite to receipt of the federal funds provided for in the HAVA for general election administration, each state has issued a HAVA implementation plan for public comment and ultimate publication in the Federal Register.[15] Additionally, many states have issued applications for receipt of funds specifically earmarked for accessibility improvements.[16] State legislatures have acted pursuant to the HAVA to develop administrative or statutory reform plans, though some of these adopt the exact language of the HAVA and fail to provide an adequately broad definition of disability or details of access plans.[17]

Despite these states' efforts, the HAVA fails to sufficiently ensure that each state will take the full measures necessary to realize the goals the HAVA set out to accomplish. Although past federal legislation sought to remedy the same problems addressed in the HAVA, there has been little progress toward remedying the problem. Consequently, the broad provisions and undefined terms of the HAVA do not go far enough to require delinquent states to adopt specific, stringent accessibility standards or broad definitions of disability designed to provide access for the largest percentage of voters with disabilities. While the HAVA requires that states adopt certain non-specific standards for federal elections in order to receive federal monetary assis-

10. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000); Voting Accessibility for the Elderly and Handicapped Act of 1984, 42 U.S.C. § 1973ee to ee-6 (2000).

11. 42 U.S.C.A. §§ 15301–15545 (West Supp. 2004).

12. *Id.* §§ 15301–15302.

13. *Id.* § 15421.

14. *Id.* § 15481.

15. *See id.* § 15404.

16. *See id.* § 15421.

17. *See*, *e.g.*, WASH. REV. CODE ANN. § 29A.04.037 (West Supp. 2005) (adopting, for purposes of election law, definition of "disability" used to determine qualification for disabled parking permit, and supplementing definition to include blind individuals and individuals with "sensory" and "physical" impairments, but leaving out mentally disabled voters).

tance,[18] these standards are vague and do not provide guidance to the states about the extent of the necessary reforms.[19] Given that the past federal statutes bearing on the voting rights of the disabled have failed to make a significant impact on access, the lack of minimum standards coupled with the vague definition of "disability" provided in the HAVA will ultimately fail to remedy the problem they are intended to address.

I.
BEFORE THE HAVA

A. The Scope of the Problem

In the "findings" chapter of the Americans with Disabilities Act (ADA), Congress recognized that "the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous . . . ."[20] In order to remedy this, Congress enumerated several goals for the ADA, including:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; [and] (3) to ensure that the Federal Government plays a central role in enforcing the standards established [by the ADA] on behalf of individuals with disabilities . . . .[21]

However, almost fifteen years after the passage of this bill, discrimination remains pervasive in the voting arena.[22] This problem affects more people every election cycle: the number of citizens with disabilities increases as the American population ages.[23] Following the 2000 Census, the U.S. Census Bureau reported that 49.7 million Americans suffered from at least one "long lasting condition or disability."[24] Yet despite efforts undertaken before 2002 to remedy the

18. 42 U.S.C.A. § 15403 (West Supp. 2004).
19. *See generally id*. § 15481 (listing voting system standards).
20. 42 U.S.C. § 12101(a)(9).
21. *Id.* § 12101(b)(1)–(3).
22. *See generally* GAO VOTER DISABILITY REPORT, *supra* note 4, at 22, 26–32 (describing variety of impediments for disabled persons at polling places).
23. Congressional findings accompanying the ADA state that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. § 12101(a)(1).
24. U.S. CENSUS BUREAU, DISABILITY STATUS: 2000 (Mar. 2003), http://www.census.gov/prod/2003pubs/c2kbr-17.pdf. A disability does not necessarily qualify some-

problem of limited voting access for the disabled, this group voted in substantially lower numbers than the general population.[25] According to a 2001 General Accounting Office (GAO) report on voting within the disabled community, eighty-four percent of polling places surveyed had some barrier preventing a person with a disability from voting.[26]

B. The State of the Law Prior to the HAVA

1. Federal Statutes and Case Law

a. Introduction

Before 2002, three major federal statutes touched specifically upon the issue of voting access for the disabled,[27] and a fourth statute generally addressed public discrimination against the disabled.[28] Of these four laws, two of them—the Voting Rights Act of 1965 (VRA), as amended in 1982, and the VAEHA—were vague and under-inclusive, in both their provisions for accessibility and their definitions of "disability." The third, the ADA, codifies the broadest congressional intent of the three statutes but lacks minimum federal standards with respect to voting access. It also fails to ensure that the process (from voting registration through accessing the polling place and casting a ballot) is viable for individuals with disabilities. The Rehabilitation Act of 1973 (RA) provides a broad definition of "disabled," but offers no relief for the disabled against state election officials.[29]

In the last decade, under these federal laws, disabled voters and state officials acting on behalf of the disabled community have sued to force county and municipal governments to achieve accessibility in polling locations. Most commonly these cases have been brought under the ADA, as well as the VAEHA, the VRA, and applicable state

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one as impaired to vote, but the lack of meaningful statistics about such designation makes it useful to consider the widest possible reach of this problem, given the importance of the franchise in a democratic society. Regardless, this note assumes that any systematic disenfranchisement is corrosive to the quality of a democracy.

25. GAO VOTER DISABILITY REPORT, *supra* note 4, at 14.

26. *Id.* at 26.

27. *See* Voting Rights Act of 1965, 42 U.S.C. § 1973 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213 (2000); Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C. §§ 1973ee–1973ee-6 (2000).

28. Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796l (2000). Additionally, the National Voter Registration Act of 1993 (NVRA) provides that every state agency shall designate their offices as a voter registration agency and that those agencies that also provide at-home services to the disabled will provide voter registration to those individuals through their offices as well. 42 U.S.C. §§ 1973gg-5(a)(2)(B), (4)(B) (2000).

29. *See* discussion *infra* Part VI.D.

laws. Each of these laws, and the suits they have engendered, is discussed below.

b. The Voting Rights Act of 1965

The first major piece of legislation addressing the constructive disenfranchisement of disabled voters was the VRA,[30] which provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice" except that person's employer or union representative.[31] The VRA enumerates blindness as a specific disability, but fails to clearly define what other conditions (apart from illiteracy) would qualify a voter for relief under the Act.[32]

c. The Voting Accessibility for the Elderly and Handicapped Act of 1984

The VAEHA was enacted with the intention "to promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections."[33] However, the statute fails to provide a federal definition of "access," leaving the formulation of guidelines to the chief election officer of each state.[34] The Act also limits the term "handicapped" to those "having a temporary or permanent *physical* disability" (emphasis added).[35] The statute provides that "[w]ithin each State . . . each political subdivision responsible for conducting elections shall assure that all polling places for Federal elections are accessible to handicapped and elderly voters," but allows exceptions in certain cases to be determined by the State's highest ranking election officer.[36] The statute also enumerates more specific accessibility requirements for deaf voters, requiring that "telecommunication devices" be provided to these individuals.[37] Notably, the VAEHA does provide for a private cause of action against the state or political subdivision for declaratory or injunctive relief, provided that the elderly or disabled plaintiff gives notice to the state's chief election officer of the noncompliance and waits forty-five days after providing notice to bring

30. 42 U.S.C. §§ 1973–1973bb-1 (2000).
31. *Id.* § 1973aa-6.
32. *Id*.
33. 42 U.S.C. § 1973ee (2000).
34. *Id.* § 1973ee-6(1).
35. *Id.* § 1973ee-6(4).
36. *Id.* § 1973ee-1(a)–(b).
37. *Id.* § 1973ee-3(a).

suit.[38] Thus, the statute places the onus on the disabled voter to assure accessibility well in advance of the election. The duty to comply is placed on a state's political subdivisions, and every other year until 1994 each state's chief election officer was to report to Congress how many polling places were accessible, and explain any failures to achieve accessibility.[39]

d. The Rehabilitation Act of 1974 and the Americans with Disabilities Act of 1990

The RA and the ADA prohibit discrimination against the disabled in state activities and programs,[40] while the ADA additionally prohibits discrimination in public accommodations.[41] Both define disability as "a physical or mental impairment . . . substantially limit[ing] one or more of [an individual's] major life activities; . . . a record of such an impairment; or . . . [an individual] regarded as having such an impairment."[42] Disabled plaintiffs have sued numerous state election officers under section 504 of the RA, which prohibits discrimination against the disabled in programs or activities receiving federal financial aid.[43] However, federal courts have held that a plaintiff may not predicate a section 504 claim against a state actor on the mere fact that the state obtains federal money.[44] Rather, a plaintiff must allege that the specific election official receives federal funding.[45] For example, in *Lightbourn v. County of El Paso*, the Fifth Circuit Court of Appeals rejected an argument that the general receipt of federal funds by a state is enough to implicate every state official for purposes of section 504 of the RA.[46] The plaintiffs must allege specific receipt by the individual defendant, or that the "specific program or activity with which he or she was involved receives or directly benefits from federal financial assistance."[47]

38. *Id.* § 1973ee-4(a)–(b).
39. *Id.* § 1973ee-1(c)(1)–(3).
40. *See* 29 U.S.C. § 794(a) (2000); 42 U.S.C. § 12132 (2000).
41. 42 U.S.C. § 12182 (2000).
42. 29 U.S.C. § 705(20)(B) (2000); 42 U.S.C. § 12102(2) (2000).
43. Rehabilitation Act of 1973, Pub. L. No. 93-112, Title V, § 504, 87 Stat. 394 (1973) (codified at 29 U.S.C. § 794 (2000)).
44. *See, e.g.*, Brown v. Sibley, 650 F.2d 760, 767 (5th Cir. 1981).
45. Am. Ass'n of People with Disabilities v. Smith, 227 F. Supp. 2d 1276, 1293–94 n. 22 (M.D. Fla. 2002) ("[A] plaintiff must allege that the specific program or activity with which he or she was involved receives or directly benefits from federal financial assistance." (quoting Lightbourn v. County of El Paso, 118 F.3d 421, 427 (5th Cir. 1997))).
46. 118 F.3d at 427 (5th Cir. 1997).
47. *Id.*

The ADA similarly ensures that all levels of government and public entities, as well as public accommodations, make reasonable modifications in order to prevent discrimination against the disabled.[48] This applies even in the absence of federal funding. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[49]

The ADA should protect voters against inaccessibility of both polling locations and voting machines.[50] However, the protections of the ADA are tempered by the qualification that compliance need not be complete if it would impose undue financial and administrative burdens on the public entities.[51] This may explain why, in the fifteen years since the ADA was enacted, there has been little improvement in the accessibility of polling locations.

The ADA and the RA also protect the voting rights of the mentally disabled. In *Doe v. Rowe*,[52] the District Court of Maine addressed the scope of this protection. The court, discussing the ADA and the RA claims together, found that the plaintiffs were qualified individuals with disabilities who had been subjected to discriminatory treatment with regard to public elections based on their disabled status.[53] The court granted relief to the plaintiffs in this case but declined to facially analyze the relevant state provisions with respect to the ADA and the RA claims, stating that the court would not consider "what level of mental capacity may be considered an 'essential eligibility criteria'" with respect to the federal law allowing disen-

48. 42 U.S.C. § 12182(b)(2)(A)(ii) (2000).

49. 42 U.S.C. § 12132 (2000). A "qualified individual with a disability" under this Title is defined as:

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Id. § 12131.

50. 42 U.S.C. § 12182(2)(A) (2000).

51. *Id.* § 12182(b)(2)(A)(iii).

52. 156 F. Supp. 2d 35 (D.Me. 2001). The NVRA permits each state to statutorily disenfranchise the mentally incompetent. 42 U.S.C. § 1973gg-6(a)(3)(B) (2000). For the most part, this Act is outside the scope of this note except inasmuch as it gives rise to litigation under the ADA and the RA as noted in this section. See Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and the Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000), for additional information on the disenfranchisement of the mentally ill.

53. *Rowe*, 156 F. Supp. 2d at 58–59.

franchisement based on mental incapacity.[54] The court expressly left open the legality under the ADA of statutes that allow an affirmative determination that any given individual may be disenfranchised based on mental illness.[55]

Courts have found that special procedures developed to enable disabled voters to register and vote are appropriate under the VRA and the ADA. Specifically, in *DiPietrae v. City of Philadelphia*,[56] several disabled voters and election judges sought declaratory and injunctive relief in state court to keep the municipality from interfering with a third party picking up and dropping off an absentee ballot for the plaintiff, arguing that "[the ADA] imposes an affirmative duty upon state and local governmental agencies to assure that all persons with disabilities are effectively able to exercise their constitutionally guaranteed rights" and that, under the VRA, this includes the right to assistance in voting by a person of the plaintiff's choice.[57] The appellate court upheld the trial court's finding that, according to federal statute, a third party could assist in every step of the absentee voting process, from applying for an absentee ballot to casting that ballot by mail or delivery to the election office.[58]

Additionally, federal courts have imposed an affirmative duty on election officials to work toward full accessibility. For example, in 2000, New York Attorney General Eliot Spitzer sought injunctions against two New York counties that had failed to comply with the ADA or the VAEHA and had "prevented individuals with physical disabilities . . . from participating in the American tradition of voting at their public places, in an integrated setting, along with their friends, neighbors, and colleagues."[59] The court held that, given the significant number of disabled individuals in Delaware County and the likelihood of an inaccessible polling place, issuing an injunction mandating compliance with the ADA and the VAEHA by the forthcoming primary election date "to the degree it [was] 'feasible' to do so" was appropriate.[60]

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54. *Id.* at 59.
55. *Id*.
56. 666 A.2d 1132 (Pa. Commw. 1995).
57. *Id.* at 1135.
58. *Id*.
59. New York *ex rel.* Spitzer v. County of Delaware, 82 F. Supp. 2d 12, 14 (N.D.N.Y. 2000) (quoting Plaintiff's Memorandum of Law at 3); New York *ex rel.* Spitzer v. County of Schoharie, 82 F. Supp. 2d 19, 21 (N.D.N.Y. 2000) (quoting Plaintiff's Memorandum of Law at 3).
60. *County of Schoharie*, 82 F. Supp. 2d at 25.

Federal courts have also limited the extent of relief that can be sought against state election officials under the ADA. In some cases, courts have found that the duty of compliance with the ADA falls upon local actors rather than state election officials. For example, in *Lightbourn v. County of El Paso* a group of visually- and mobility-impaired voters brought suit against the Secretary of State of Texas, alleging that the Secretary of State had failed to take necessary affirmative steps to bring local election officials into compliance with the ADA.[61] On appeal, the court reversed the district court ruling in favor of the plaintiffs,[62] and ultimately held that neither the ADA nor its implementing regulations placed an affirmative duty upon a Secretary of State to "evaluate the practices of every electoral subdivision" in the state.[63]

The relief sought by voters bringing cases under the ADA can also be limited by the wording of the VRA. In *American Association of People with Disabilities v. Shelley*, a group of blind voters sought relief to prevent the withdrawal of touch-screen voting machines, which would allow blind voters to vote privately and independently for the first time.[64] The court held that, although "casting a vote independently and secretly would be preferred over casting a vote with the assistance of a family member or other aide," the ADA does not require state election officials to provide disabled persons with accommodations "comparable in every way with the voting rights enjoyed by persons without disabilities."[65]

2. *State Constitutions, Statutes, Regulations, Policies, and Case Law*

The VAEHA bestowed the primary responsibility for assuring accessibility for the disabled upon the states and localities charged with administering federal elections.[66] According to a 2001 GAO survey, as of early 2001, all states and the District of Columbia had taken measures to address voting accessibility for the disabled, as required by the VAEHA.[67] However, these measures vary as to whether they carry the force and effect of law, address voting rights for the disabled

61. 118 F.3d 421 (5th Cir. 1997).
62. Lightbourn v. Garza, 928 F. Supp. 711 (W.D. Tex. 1996).
63. *Lightbourn v. County of El Paso*, 118 F. 3d at 432.
64. 324 F. Supp. 2d 1120, 1123–24 (C.D.Ca. 2004).
65. *Id.* at 1126.
66. 42 U.S.C. § 1973ee-1(a) (stating that "within each State . . . each political subdivision responsible for conducting elections shall assure that all polling places for Federal elections are accessible to handicapped and elderly voters").
67. GAO VOTER DISABILITY REPORT, *supra* note 4, at 16.

generally, or are limited in scope as to certain accessibility requirements or voting technology options.[68] As of 2001, eighteen states lacked statutes or regulations requiring, or even policies suggesting, that voting booths accommodate wheelchairs.[69] Similarly, twenty-seven states had no more general provisions requiring or suggesting that voting booths and equipment should accommodate people with disabilities.[70] As for provisions dealing specifically with the difficulties of blind voters, twenty-nine statutes failed to call for magnifying instruments, forty-seven failed to require provision of a large type ballot, and forty-five did not require or suggest Braille ballots.[71] Polling location accessibility was equally undefined; eight states lacked provisions stating polling places must or even should be accessible to the disabled.[72]

At the local level, the 2001 GAO report estimated that on Election Day 2000 twenty-eight percent of polling places still provided neither unfettered access nor curbside voting.[73] Additionally, the GAO report found that local governments retained the primary responsibility for assuring accessibility to polling places.[74] Nevertheless, as many as twenty-seven percent of counties failed to include accessibility for the disabled among the criteria used in making their polling place selections.[75] The Department of Justice (DOJ) promulgated regulations implementing Title II of the ADA in 1991,[76] creating guidelines for preventing discrimination against the disabled in any state programs or activities, including voting. In 1994, DOJ additionally implemented Title III of the ADA,[77] which prohibits discrimination against the disabled in public accommodations and commercial facilities. More than ten years later, still only sixteen percent of polling places had no obstacles "from the parking area to the voting room."[78]

68. *Id.* at 16–17.
69. *Id.* at 17.
70. *Id*.
71. *Id*.
72. *Id*.
73. *Id.* at 23. Curbside voting is a method in which a ballot is provided to a voter outside of an inaccessible voting place. This is one of the methods described in the Senate Report accompanying the VAEHA as an acceptable alternative to full accessibility. *See* S. REP. NO. 98-590, at 2–3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2801 ("[O]ther means for casting a ballot could include, but would not be limited to, curbside voting or voting with an absentee ballot on the day of the election.").
74. GAO VOTER DISABILITY REPORT, *supra* note 4, at 18.
75. *Id*.
76. 28 C.F.R. § 35 (1991).
77. *Id.* § 36.
78. GAO VOTER DISABILITY REPORT, *supra* note 4, at 23.

II.
THE BUILD-UP TO PASSAGE OF THE HAVA

Following the 2000 presidential election, members of the general public were confronted with the reality that many impediments lay in a voter's path on election day. There seemed little guarantee that any individual vote actually counted. Members of both the House and the Senate introduced bills aimed at improving the administration of federal elections; the result of these efforts, the Help America Vote Act (HAVA), emerges primarily from House Bill 3295.[79]

In the months following the 2000 election, during the lame-duck 106th Congressional session, several election reform bills were introduced.[80] Several more proposals were made early in the first session of the 107th Congress,[81] and four members of the Senate requested an examination of electoral procedures by the GAO.[82] Hearings on election reform began when the 107th Congress convened in 2001, and it was clear that the House and the Senate faced major disagreement over the level of control the federal legislature wished to exercise over state-level federal election reforms. The various proposals offered solutions ranging from federally mandated minimum standards to no-strings-attached grants.[83] A pervasive theme among the hearings on election reform was the tension between the development of unified standards for federal elections and the traditional local nature of election administration. Testimony of representatives from the disabled community calling for national standards was counterbalanced with testimony from local officials, who called for continued administration of elections solely at the state and local levels, yet failed to mention the pervasive lack of access for the disabled.

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79. Help America Vote Act of 2001, H.R. 3295, 107th Cong. (2001).

80. *See* ELECTION REFORM INFORMATION PROJECT, WHAT'S CHANGED, WHAT HASN'T, AND WHY: ELECTION REFORM SINCE NOVEMBER 2000 2–7 (2001) (on file with the New York University Journal of Legislation and Public Policy).

81. *See, e.g.*, Daniel Seligson, *GAO Says Congress Has Primacy in Election Reform*, STATELINE.ORG, Mar. 16, 2001, *at* http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=14296.

82. *See* GAO VOTER DISABILITY REPORT, *supra* note 4 (summarizing findings of GAO examination of electoral procedures).

83. *Compare, e.g.*, S. 565, 107th Cong. §§ 301–04 (2001) (prescribing federal minimum guidelines), *with* H.R. 3295, 107th Cong. §§ 241–43 (2001) (providing grants to states based on compliance with general standards).

A. The House of Representatives

1. Hearings and Legislative Proposals in the House

a. Civil Rights Groups and Advocates for the Disabled Urge Federal Oversight of the Federal Election Process

The consistent message of the disabled community testifying at the hearings preceding the passage of House Bill 3295 was that it did not provide meaningful provisions to accomplish accessibility. For example, Jim Dickson, Vice President of Governmental Affairs for the American Association of People with Disabilities, responded to the claims of state officials that federal mandates would be inappropriate, stating that:

> [Seventeen] years ago the Congress passed legislation essentially saying, as [House Bill 3295] does, it's up to the States to make polling places accessible. The States and local counties have not done that. . . . This piece of legislation would perpetuate th[e] irresponsible behavior of local and State election officials. . . . The notion that we should have local standards for voting diminishes the importance of voting and will allow continued discrimination against thirty-five million voters with disabilities. . . . A voluntary accessibility standard will absolutely ensure that thousands of polling places remain inaccessible and that more than eleven million disenfranchised voters will not be able to cast a secret and verified ballot.[84]

The wider civil rights community also weighed in on the HAVA, emphasizing the demonstrated need for remedial legislation. For example, the Legislative Director of the League of Women Voters stated in his testimony that:

> [w]hile H.R. 3295 reaffirms that the Americans with Disabilities Act applies in the voting context, it fails to take into account that more than half of all polling places remain inaccessible to voters in wheelchairs despite provisions of the ADA. . . . [T]he bill needs to be amended to set national standards for accessible voting, with reasonable time frames for compliance.[85]

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84. *Help America Vote Act of 2001: Hearing on H.R. 3295 Before the House Comm. on the Judiciary,* 107th Cong. 13–15 (2001) [hereinafter *House Judiciary Hearing*] (testimony of James C. Dickson, Vice President, Governmental Affairs for the American Association of People with Disabilities), *available at* http://judiciary.house.gov/media/pdfs/printers/107th/76555.pdf.

85. *Id.* at 48–49 (testimony of Lloyd J. Leonard, Legislative Director, League of Women Voters of the United States).

Members of the disabled and civil rights communities repeatedly expressed support for Representative John Conyers's bill[86] and Senator Christopher Dodd's bill,[87] as well as the McConnell-Schumer Senate Bill,[88] all of which prescribed federal standards.[89] Statements of several representatives revealed support for minimum standards—for example, Representative Barney Frank agreed with Mr. Dickson that, although House Bill 3295 did not *weaken* the ADA, perhaps the ADA on its own creates an insufficient standard.[90] Representative Sheila Jackson Lee stated that she would prefer legislation that mandates federal standards,[91] and Representative Conyers, who had introduced the farther reaching Equal Protection of Voting Rights Act, continued to express his dissatisfaction with the HAVA.[92]

b. State Officials Plead for Federal Funds While Cautioning Against Federal Interference with Election Administration and Failing to Acknowledge the Plight of the Disabled Voter

During the election reform hearings, testimony of state officials—from legislators and secretaries of state to local precinct administrators—illustrated the states' countervailing interest in not having to adhere to federal minimum standards. The consistent theme of their testimony was that election administration was historically local and should remain so, and that the financial pressures placed on municipalities charged with funding elections were too great to make any significant improvements without federal funding. For example, several secretaries of state testified about the intrinsically local nature of

86. Rep. John Conyers, Jr. (D-MI) introduced the Equal Protection of Voting Rights Act of 2001, H.R. 1170, 107th Cong. (2001) in the House of Representatives. His bill sought to establish mandatory federal minimum standards for voting administration and systems.

87. Sen. Christopher Dodd (D-CT) introduced the Equal Protection of Voting Rights Act, S. 565, 107th Cong. (2001). His bill sought to establish federal minimum required standards for voting administration and systems.

88. Bipartisan Federal Election Reform Act of 2001, S. 953, 107th Cong. (2001).

89. *See, e.g.*, *House Judiciary Hearing*, *supra* note 84, at 77 (statement of Joan Claybrook, President, Public Citizen); *id.* at 75 (statement of Barbara R. Arnwine, Lawyer's Committee for Civil Rights Under Law).

90. *Id*. at 62 (statement of Rep. Barney Frank).

91. *Id*. at 65 (statement of Rep. Sheila Jackson Lee).

92. Rep. Conyers questioned the findings of the private non-partisan National Commission on Federal Election Reform during the question-and-answer period of the House Judiciary Committee hearing. In response to endorsement of the HAVA by the Executive Director of the Commission, Philip Zelikow, Rep. Conyers skeptically inquired as to whether the Commission actively considered all bills, including H.R. 1170, in reaching an agreement on which bill to introduce. *Id*. at 37–41, 52–54.

the election administration process; Ohio Secretary of State J. Kenneth Blackwell emphasized that election administration was and should remain state-controlled.[93] At the same hearing, representatives of the National Conference of State Legislatures and the National Association of Secretaries of State urged the committee to limit congressional action with respect to mandatory election reform.[94] The former group specifically opposed federal funds tied to mandating specific standards which would ignore the varying capabilities of different states.[95] One former state legislator urged that "[e]lection [a]dministration is a state and local responsibility, *not* a federal one and Congress should *not* do anything that replaces that historic responsibility with a federally mandated system . . . [such as to] attach strings on such funds" provided by Congress to assist states in acquiring new voting machines.[96]

State and local election administrators emphasized that modernizing voting systems was a tremendously expensive endeavor, the cost of which had fallen on state and local governments for the entire history of the United States. One witness estimated that updating all of the nation's voting machines would cost 3.2 billion dollars.[97] One election commissioner explained that:

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93. *See Federal Election Reform: Hearing Before the Comm. on House Admin.*, 107th Cong. 165 (2001) [hereinafter *House Admin. Hearing 1*] (testimony of J. Kenneth Blackwell, Secretary of State, Ohio).

94. *See, e.g., id.* (testimony of Sharon Priest, President, National Association of Secretaries of State and Arkansas Secretary of State); *id.* (statement of Martin R. Stephens, Speaker of the House for the State of Utah and Co-Chair, National Conference of State Legislatures (NCSL) Special Task Force on Election Reform and John A. Hurson, Majority Leader, Maryland House of Delegates and Chair, NCSL Assembly on Federal Issues). Additionally, Secretary Ron Thornburgh testified that:

> [s]tate and local governments must continue to be in charge of the election process. . . . What works for Los Angeles, California certainly won't work for Leoti, Kansas. This is not a plea to place new technology in every polling place in America. As Senator Nancy Kassebaum Baker told me recently, 'The pencil on a string works very well in Burdick, Kansas, Ron. Don't change it.'

Id. (testimony of Ron Thornburgh, Secretary of State, Kansas, and President-elect, National Association of Secretaries of State).

95. *Id.* (statement of Martin R. Stephens, Speaker of the House for the State of Utah and Co-Chair, NCSL Special Task Force on Election Reform and John A. Hurson, Majority Leader, Maryland House of Delegates and Chair, NCSL Assembly on Federal Issues).

96. *See House Judiciary Hearing*, *supra* note 84, at 7–8 (statement of Cleta Mitchell, former member of the Oklahoma State Legislature and Chairman, Oklahoma House Appropriations and Budget Committee).

97. *See Federal Election Reform: Hearing Before the Comm. on House Admin.*, 107th Cong. 6 (2001) [hereinafter *House Admin. Hearing 2*] (prepared statement of R. Doug Lewis, Director, Election Center, Houston, Texas) 2001 WL 508319 (F.D.C.H.). He based his estimation on the number of polling locations nationally, the

> To local government, elections are an unfunded mandate. This means that election administrators are always vying for funding against libraries, roads and bridges, Meals on Wheels, and park and recreation activities, all items that impact residents on a daily basis.
>
> Elections are at the bottom of the funding list . . . . Any effort to replace aging voting equipment is a very, very hard sell.[98]

The testimony of state officials rarely mentioned the limited access for the disabled community, and when it did it tended to trivialize the issue. One state official compared the plight of voters who "because of any barrier, physical or otherwise, cannot negotiate the procedure" with voters who choose not to vote because they are given "bad predictions or apparent results before the election is over."[99] Comments such as this reflect a lack of awareness or acknowledgement on the part of state officials that many potential disabled voters are not making a choice—they literally *cannot* vote due to various physical obstacles.

c. Scientists and Representatives of the Technology Industry Testify That Accessibility Is Possible and That Accessible Voting Machines Are Available but That States Are Reluctant to Expend the Resources to Acquire Technology and Retrofit Polling Locations for Accessibility

Numerous experts on voting machines testified that the technology existed to provide all states with accessible voting machines.[100] The chairman of one technology company confirmed the existence of devices designed to aid disabled voters, "including audio ballot readers, specialized 'tones and clicks' that confirm votes, and flexible switches that can allow even the most seriously physically challenged

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average number of voting machines per polling location, and the cost per unit if each was made to include disability and language minority access features.

98. *Id*. at 14 (statement of Connie Schmidt, Election Commissioner, Johnson County, Kansas).

99. *See House Admin. Hearing 1*, *supra* note 93 (statement of Ron Thornburgh, Secretary of State, Kansas and President-elect, National Association of Secretaries of State).

100. *See, e.g.*, *Voting Technology Hearing: Hearing Before the Comm. on House Admin.*, 107th Cong. 6–7 (2001) (statement of David E. Hart, Chairman, Hart InterCivic, Inc.); *id*. at 7–8 (testimony of Richard E. Caruso, CEO, Shoup Voting Solutions); *id*. at 23–24 (testimony of Scott Fairbairn, Regional Sales Manager, Envox U.S., Ltd.); *id*. at 27 (testimony of Ralph Munro, former Secretary of State, Wash. and former President, National Association of Secretaries of State).

to vote independently and in private."[101] The testimony of another individual illuminated a disturbing trend among state- and municipal-level election officials. Specifically, Christopher Baum of Gartner, Inc. cited a survey of the United States' largest voting districts following the 2000 election.[102] Among those in opposition to federal intervention in the election process, one quarter of those surveyed specifically cited implementation problems with the ADA as a reason to fear federal standards.[103]

2. *House Passage of House Bill 3295*

Following the election reform hearings, the House Administration Committee reported House Bill 3295, the Help America Vote Act.[104] The HAVA ultimately passed in the House, though even one of its co-sponsors expressed his dissatisfaction with the end result. Representative Steny Hoyer emphasized that additional steps beyond House Bill 3295 and the ADA would be required to ensure complete voter accessibility for the disabled.[105] He pleaded for the Senate to "go beyond the achievements of this bill to provide a guarantee of full accessibility that is not dependent upon a state's acceptance of federal funds and that is not limited by any significant cost restraints."[106] Regardless of the trepidation of some members of Congress, House Bill 3295 passed in the House by a vote of 362 to 63 on December 12, 2001.[107]

This version of House Bill 3295 would have required that any machines bought with funds provided by the federal government "continue to . . . [fulfill requirements] under the Voting Accessibility for the Elderly and Handicapped Act and the Americans with Disabilities Act[.]"[108] This bill also would have established a board of advisors with two members out of the twenty-five appointed by the Architectural and Transportation Barrier Compliance Board.[109] The board would advise election officials "regarding compliance with the

101. *Id*. at 7 (testimony of David E. Hart, Chairman, Hart InterCivic, Inc.), *available at* http://www.house.gov/cha/business/051701testimony/hart.pdf.
102. *Hearing on Technology and the Voting Process: Hearing before the Comm. on House Admin.*, 107th Cong. at 5 (2001) (testimony of Christopher Baum, Vice-President and Research Area Director, Gartner, Inc.).
103. *Id*.
104. H.R. REP. NO. 107-329 (2001).
105. *Id*. at 79 (additional views of Rep. Steny H. Hoyer).
106. *Id*. at 80.
107. *See* 147 CONG. REC. H9308 (daily ed. Dec. 12, 2001).
108. *Id*. at H9265 (citations omitted).
109. *Id*. at H9267. The Compliance Board was established pursuant to § 502 of the RA.

requirements of the Voting Accessibility for the Elderly and Handicapped Act and compliance with other Federal laws regarding accessibility of registration facilities and polling places."[110] Additionally, in order to receive federal funds, the bill would have required that the chief election official of the state certify that each polling location have "at least one voting system available which is fully accessible to individuals with physical disabilities" and that the state is in compliance with the disability-access-related federal statutes.[111] The bill included "minimum standards" to the degree that the states had an obligation to comply with previous federal statutes and certify that they require "new voting systems to provide a practical and effective means for voters with physical disabilities to cast a secret ballot."[112] As the states were already obligated to comply with the prior federal statutes, the only further accessibility standard enumerated by the bill was the secret ballot requirement for new systems. Finally, the bill required that the state appropriate at least twenty-five percent of the total funds needed for accessibility improvements before receiving any federal funds.[113]

B. The Senate

1. Hearings and Legislative Proposals in the Senate

a. Disability Rights Advocates Plead for a Greater Role in Federal Elections

Echoing the testimony presented in hearings before the House, the disabled community emphasized the importance of minimum guidelines in the Senate as well. A representative from the Paralyzed Veterans of America testified that any reform legislation needed to include accessibility guidelines that would provide private and independent voting as well as the designation of a single state election official responsible for compliance with the legislation.[114] Another

110. *Id*. at H9268 (citations omitted).
111. *Id*. at H9270.
112. *Id*. at H9272–73.
113. *Id*. at H9270.
114. *Senate Commerce Hearing*, *supra* note 2 (statement of John C. Bollinger, Deputy Executive Director, Paralyzed Veterans of America), *available at* http://commerce.senate.gov/hearings/0307bol.pdf. The impact of testimony from and on behalf of disabled veterans was especially effective in gaining inclusion of the accessibility issue in the ultimate bill; this sentiment is well-captured in Senator McConnell's opening statement before the Senate Rules and Administration Committee Election Reform Hearings:

> As we continue to examine the shortcomings of election administration in America, attention is also turning to the unintentional but nevertheless

member of the disabled community called upon the Senate to recognize the continuing lack of accessibility in fundamentally rural and urban areas.[115] To that end, he encouraged the legislature to provide funds and require that states and municipalities use them to assure universal access to voting places.[116] One advocate for the blind called for federal standards, pointing out that even fifteen years after passage of the VAEHA "the needs of blind voters are [still] rarely understood or considered by the states in establishing criteria for certification of new voting systems."[117]

The larger civil rights community rallied around disabled voters in Senate testimony on the issue of election reform.[118] Calling upon Congress to guard the fundamental right to vote, the President of the League of Women Voters observed that:

> Citizens with disabilities clearly need better protections to assure their access to the polls. Physical barriers still block access for many, including for those whose disabilities resulted from their service in our armed forces. Citizens who have trouble seeing do not have a full opportunity to vote independently and with a secret ballot.[119]

> disturbing disregard of the challenges disabled and elderly voters face in going to the polls. Many seniors and disabled voters are unable to access polling places. Among them are the last members of the "greatest generation" and other disabled veterans who have shed their blood on battlefields across the world to protect our country.

See Senate Rules Hearing, *supra* note 9, at 2 (opening statement of Sen. Mitch McConnell, Chairman, Senate Committee on Rules and Admin.). The latter hearings and debates occurred relatively soon after September 11th when the renewed nationalist rhetoric often invoked the importance of the armed forces in "preserving democracy" and the sense that a constructive disenfranchisement of past or current soldiers was unacceptable. *See, e.g.*, *id.* at 1. HAVA also includes measures designed to ensure that currently-serving military personnel be guaranteed access to voting while serving abroad. 42 U.S.C.A. § 15382 (2000) (describing study to be conducted assessing best practices to ensure and enable absentee voting by uniformed officers).

115. *Senate Rules Hearing, supra* note 9, at 85 (statement of Robert R. Williams, United Cerebral Palsy Associations).

116. *Id*. at 86.

117. *Id*. at 11 (statement of James Gashel, Director of Governmental Affairs, the National Federation of the Blind).

118. *See, e.g.*, *id*. at 48 (testimony of Juan A. Figueroa, President and General Counsel, Puerto Rican Legal Defense and Education Fund); *id*. at 174 (prepared statement of Hilary O. Shelton, Director, Washington Bureau of the NAACP); *id*. at 178, 183 (prepared statement of Raul Yzaguirre, President, National Council of La Raza).

119. *Senate Rules Hearing*, *supra* note 9, at 198 (statement of Carolyn Jefferson-Jenkins, President, League of Women Voters).

The Democratic Senate leadership acknowledged the importance of minimum required standards, which Senator Christopher Dodd incorporated into S. 565.[120]

b. State Officials Emphasize That They Cannot Meet Accessibility Standards Without Funding While Cautioning Against Congress Taking a Heavy Hand in Federal Election Administration

The testimony of state officials echoed those of the House hearings; although they acknowledged that the current system had evident shortcomings, they emphasized that the federal government should not mandate election reforms or performance standards which would be dependent upon the availability of federal funds. Ohio's Secretary of State J. Kenneth Blackwell stated it concisely:

> With financial assistance from the Federal Government, States will be able to make these changes and improvements. But Federal funds should not come with Federal mandates . . . . [E]lections are state business, managed at the local level, and should remain so. . . . [A] federally mandated voting method or process would not only be unwise, it would be an invitation for widespread fraud and disaster.[121]

Georgia Secretary of State Cathy Cox was perhaps the election official most sympathetic toward unified standards. She warned the Committee that states would be subject to increasing and potentially costly litigation, until they upgraded election systems to provide voting equipment with lower error rates and better accessibility.[122] Though not endorsing federally mandated standards, Secretary Cox strongly urged Congress to further study voting technologies and "help provide the resources" needed to upgrade to electronic voting equipment.[123]

2. Senate Passage of S. 565

While the House maintained consistent leadership throughout the effort to pass election reform legislation, control of the Senate shifted from the Republicans to the Democrats on June 5, 2001. Prior to Sen-

120. *See* S. 565, 107th Cong. §§ 301–03 (2001). *See also Senate Rules Hearing*, *supra* note 9, at 398 (statement of Sen. Christopher J. Dodd, Chairman, Committee on Rules and Administration) (discussing need for minimum federal standards).

121. *Senate Rules Hearing*, *supra* note 9, at 162–63 (statement of J. Kenneth Blackwell, Ohio Secretary of State).

122. *See Senate Commerce Hearing*, *supra* note 2 (statement of Cathy Cox, Georgia Secretary of State).

123. *Id*.

ator Jim Jeffords's switch from the Republican Party to Independent, the legislation in the Senate resembled the House bills, proposing voluntary—but not minimum—voting standards. After the shift in leadership, the Equal Protection of Voting Rights Act (S. 565), which had been introduced by Senator Christopher Dodd on March 19, 2001,[124] became the center of focus. This bill sought to bestow grants to states for compliance with federally proscribed minimum standards. The Senate Rules and Administration Committee reached a compromise between S. 565 and the Bipartisan Federal Election Reform Act[125] on December 13, 2001. The Senate passed a revised version of S. 565, the Martin Luther King Jr. Equal Protection of Voting Rights Act of 2002,[126] by a vote of ninety-nine to one on April 11, 2002. The bill established minimum federal requirements for the administration of federal elections, and provided federal funds to implement those standards. The voting system standards established in Section 101 of the bill required every polling place to have a voting machine accessible to individuals with disabilities.[127] The final version of S. 565 amended the original version to require states to not only acquire accessible machines, but also to work toward better poll site accessibility, allowing curbside voting only as a last resort.[128] Senator Dodd emphasized that accessibility was necessary in *every* precinct, even those with no known disabled voters, stating that "[i]t is simply not acceptable that the disabled should have to hide in their homes and not participate with other Americans on election day simply because no one knows that they exist."[129] Section 221 of the bill established a Federal Election Accessibility Grant Program, administered by the Attorney General, to assist in this process.[130]

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124. S. 565, 107th Cong. (2001).

125. S. 953, 107th Cong. (2001).

126. 148 CONG. REC. S2544 (daily ed. Apr. 11, 2002).

127. Help America Vote Act of 2002, Pub. L. No. 107-252, § 101(b)(1)(G), 116 Stat. 1666, 1669 (2002).

128. S. 565, 107th Cong. §§ 510(a)(5), (b), as amended by Senate Amendment 2913, providing that:

> Curbside voting does not allow the voter the right to vote in privacy. . . . It is the sense of Congress that the right to vote in a private and independent manner is a right that should be afforded to all eligible citizens, including citizens with disabilities, and that curbside voting should only be an alternative of the last resort in providing equal voting access to all eligible American citizens.

Ultimately, the final bill passed by both the House and the Senate makes no mention of curbside voting. *See* Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

129. 148 CONG. REC. S2533 (daily ed. Apr. 11, 2002).

130. *Id*. at S2549.

III.
THE FINAL BILL

The House and Senate conferees for the HAVA were named in May of 2002.[131] The conference report was offered in the House on October 8, 2002,[132] and passed by a vote of 357 to 48 on October 10.[133] It passed the Senate on October 16 by a vote of ninety-two to two.[134] On October 23, the Martin Luther King Jr. Help America Vote Act of 2002 was presented to President George W. Bush.[135] Public Law 107-252 was approved on October 29, 2002.[136]

The most significant improvement to the bill's access provisions occurred when Congressman Jim Langevin,[137] himself wheelchair-bound, offered an amendment incorporating the Senate Bill 565 section 101(a)(3)(A)–(C) language into the final bill.[138] With respect to a state's eligibility to receive federal funds, the statute now reads:

> (3) Accessibility for individuals with disabilities
> The voting system[139] shall—
> (A) be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters;
> (B) satisfy the requirement of subparagraph (A) through the use of at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place; and

131. Conferees from the Senate were Senators Dodd, Schumer, Durbin, McConnell, and Bond. *See* 148 CONG. REC. S3789 (daily ed. May 1, 2002). Conferees from the House were Reps. Ney, Ehlers, Doolittle, Reynolds, Hoyer, Fattah, Davis (FL), Stump, McHugh, Skelton, Sensenbrenner, Chabot, Conyers, Boehlert, Barcia, Morella, Jackson-Lee, Thomas, Shaw, Rangel, and Blunt. *See* 148 CONG. REC. H2599 (daily ed. May 16, 2002).

132. 148 CONG. REC. H7247 (daily ed. Oct. 8, 2002).

133. 148 CONG. REC. H7854 (daily ed. Oct. 10, 2002).

134. 148 CONG. REC. S10,515 (daily ed. Oct. 16, 2002). The only two dissenting votes were the two senators from New York, as HAVA directly contradicts existing New York election law. *See* 148 CONG. REC. S10,499 (daily ed. Oct. 16, 2002) (statement of Sen. Hillary Rodham Clinton).

135. 148 CONG. REC. H8039 (daily ed. Oct. 24, 2002).

136. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301–15545 (2004)).

137. In his prior office as Rhode Island Secretary of State, Rep. Langevin oversaw the process of making the Rhode Island voting system accessible to disabled voters. *See* 148 CONG. REC. H4388 (daily ed. July 9, 2002) (statement of Rep. Langevin).

138. *See* 42 U.S.C.A. § 15481(a)(3) (2000).

139. The definition of "voting system" includes the equipment used to define ballots, cast and count votes, report or display election results, and maintain and produce audit trail information. *See id.* § 15481(b).

> (C) if purchased with funds made available [by the bill] on or after January 1, 2007, meet the voting system standards for disability access (as outlined in this paragraph).[140]

The Senate's push for minimum national requirements was met with fierce resistance from the House, and the Senate was forced to abandon required federal standards. Instead, the two chambers compromised on suggested national standards that must be met to receive the first-ever federal monies allocated to election administration. Aside from these prerequisites to receiving federal funds, the HAVA leaves methods of implementation of section 301 to the discretion of the states under section 305. However, the HAVA does require that each polling place have a direct recording electronic device (DRE) or an alternative device equally accessible for disabled voters, and that any machines bought with federal funds meet the statute's accessibility standards.[141]

The HAVA addresses accessibility three separate times: Title I provides grants to upgrade voting machines;[142] Title II requires that federal payments to states be used to ensure that polling places provide individuals with disabilities access and participation equal to that of other voters;[143] and Title III sets general standards for voting technologies.[144] The HAVA establishes the Election Assistance Commission to serve as a resource for the states implementing the voluntary voting system guidelines promulgated pursuant to the HAVA.[145] The guidelines developed by the Election Assistance Commission are voluntary, and states that adopt procedures to come within the standards receive federal funds provided that they certify that their plan will allow the required accessibility. Under section 261 of Title II, the HAVA leaves to the Department of Health and Human Services (HHS) the task of allocating monies to the states for the purpose of assuring access to the polls for individuals with disabilities.[146] In furtherance of this task, HHS published notices of the requirements for receipt of federal funds in both 2003[147] and 2004.[148] The provision of the HAVA that sets access standards for states receiving federal funds

140. *Id.* § 15481(a)(3).
141. *Id*. §§ 15481(a)(3)(B)–(C).
142. *Id*. § 15301(b)(1)(F).
143. *Id.* § 15421(b)(1).
144. *Id*. § 15481(a)(3).
145. *Id*. §§ 15321–22.
146. *Id*. § 15421(a)–(c).
147. State Grants for Election Assistance for Individuals with Disabilities (EAID), 68 Fed. Reg. 32,059 (May 29, 2003) [hereinafter 2003 HHS Notice]. This notification informs states of the requirements to receive Title II funds; however, it fails to provide any additional guidelines for accessibility.

provides that the voting system shall "be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters."[149] The HAVA further specifies that federal funds paid to the states may be used to make polling places accessible, including "the path of travel, entrances, exits, and voting areas of each polling facility," and used for "outreach programs to inform the individuals [with disabilities] about the availability of accessible polling places and training election officials, poll workers, and election volunteers on how best to promote the access and participation of individuals with disabilities in elections for Federal office."[150]

The HAVA explicitly preserves the applicability of the previous federal statutes governing access of the disabled to voting, including the VRA, VAEHA, NVRA, ADA, and RA.[151] Thus, concerns of the disabled community regarding the inadequacy of those statutes were left unanswered. The HAVA, which requires that states submit an application for approval by the HHS Secretary in order to be eligible for payments,[152] was met with mixed reactions by the disabled and civil rights communities, though some groups saw the bill as a major piece of civil rights legislation.[153] State election officials saw the bill as a victory.[154]

148. State Grants for Election Assistance for Individuals With Disabilities (EAID), 69 Fed. Reg. 20,896 (Apr. 19, 2004) [hereinafter 2004 HHS Notice]. This notification informs states of the requirements to receive Title II funds; however, it fails to provide any additional guidelines for accessibility.

149. 42 U.S.C.A. § 15481(a)(3)(A) (2000).

150. *Id*. § 15421(b).

151. *Id*. § 15545(a).

152. *See id*. § 15423.

153. *See, e.g.*, 148 CONG. REC. S10,415–16 (daily ed. Oct. 15, 2002) (letters from the National Federation of the Blind, Paralyzed Veterans of America, American Foundation for the Blind, NAACP, and National Association of Protection & Advocacy Systems, in support of H.R. 3295). *But see id.* at S10,416 (letters from the United Cerebral Palsy Associations and the American Association of Retired Persons, expressing some skepticism towards bill).

154. *See, e.g.*, 148 CONG. REC. S10,417 (daily ed. Oct. 15, 2002) (letters from the National Association of Secretaries of State, the National Association of State Election Directors, and the National Association of Counties, supporting H.R. 3295).

IV.
THE HAVA IN ACTION: WHAT HAS HAPPENED SINCE 2002?

A. Have States Effectively Implemented the HAVA?

The process of holding a federal election is logistically daunting, requiring 1.4 million poll workers and over 700,000 voting machines.[155] Additionally, federal elections are far from centralized and uniform—laws and processes vary by state, county, and precinct, and the federal role in election administration has historically been limited. Given these facts, undertaking election reform in a way that is both timely and consistent is an enormous and expensive task. It is therefore unsurprising that implementation of the HAVA has been slow. Thus far, federal rather than state actors have primarily caused the delay in implementation. In fact, the Election Assistance Commission failed to meet its January 1, 2004 deadline for adopting voluntary technology recommendations, so a state trying to comply with the voluntary guidelines would have had trouble doing so before the 2004 election.[156] Thus, at this point it is impossible to judge the success of the Act with respect to poll access. As required by section 253(b) of the HAVA, by March 2004 every state had submitted its compliance plan for publication in the Federal Register.[157] However, the plans were often vague and lacked any detailed descriptions of the type of actual standards that would be used to ensure accessibility. States have adopted different procedures for bringing their standards into compliance; some have chosen to pass legislation, some will use administrative regulations promulgated by the state election agency, others will rely on their secretaries of state to develop and certify standards, and still others listed multiple procedures they may employ to develop compliant standards.[158]

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155. *See* NAT'L ASS'N OF SEC'YS OF STATE, ELECTION REFORM RESOLUTION (Feb. 2001), *at* http://www.nass.org/pubs/pubs_electionres.html (last visited Feb. 26, 2005).

156. U.S. ELECTION ASSISTANCE COMM'N, ANNUAL REPORT, FISCAL YEAR 2003 15 (2004), http://www.eac.gov/docs/2003%20Annual%20Report.pdf?format=none.

157. Publication of State Plans Pursuant to the Help America Vote Act, 69 Fed. Reg. 14,002 (Mar. 24, 2004).

158. *See, e.g.*, ALA. CODE § 17-4-250 (Supp. 2004) (implementing HAVA); 25 PA. CONS. STAT. § 3031.5 (2002) (incorporating federal requirements for electronic voting systems); ARIZ. REV. STAT. § 16-442.01 (2004) (requiring that voting systems provide blind and visually impaired individuals access to voting equal to that provided to persons who are not blind or visually impaired); Rhode Island State Plan, Help America Vote Act of 2002 (HAVA), 69 Fed. Reg. 15,011 (Mar. 24, 2004) (adopting HAVA).

Many states have specified that they would spend a significant portion of their HAVA budgets on new voting machines.[159] However, most states are primarily purchasing the inaccessible optical-scan machines—and planned to purchase only the absolute minimum of accessible machines, such as DRE devices, which are accessible only to the blind and sometimes the wheelchair-bound.[160] Accessibility for a wider range of disabilities has been largely ignored, although a few government actors have encouraged a broader range be considered when choosing equipment.[161] Another obstacle impeding updated technology has been the controversy that has arisen over whether DREs that leave no paper trail offer the kind of verifiability necessary to ensure a secure election. It remains to be seen how this problem will be resolved through legislation or improved technologies.[162]

B. Election Day 2004: Has Accessibility Improved Since the Passage of the HAVA?

Well before the 2004 federal election, it was clear that poll access would remain limited in many states in 2004.[163] Anecdotal reports from election day illustrate that, despite the claims of many state and local officials, compliance with the HAVA has not been readily forthcoming and access remains limited. Although the Chicago Board of Election Commissioners did set aside two parking spaces at each of the 1,865 polling locations within the city and installed ramps at 125 polling places, seventeen percent of the city's polling sites remained inaccessible.[164] In Hernando County, Florida, there are still no ma-

159. *See* ELECTION REFORM INFO. PROJECT, ROADS TO REFORM: PLANNING FOR THE HELP AMERICA VOTE ACT 10 (Sept. 2003), *at* http://www.electionline.org/site/docs/pdf/ERIPbrief903.finalrevised.pdf.

160. *Id*. at 9.

161. *See generally* MANHATTAN BOROUGH PRESIDENT C. VIRGINIA FIELDS, CTR. FOR INDEPENDENCE OF THE DISABLED IN NEW YORK, INC., VOTING TECHNOLOGY FOR PEOPLE WITH DISABILITIES (Mar. 2003) [hereinafter MANHATTAN REPORT], http://www.cvfieldsmbp.org/Voting Technology for People With Disabilities.pdf (offering list of recommendations regarding development and implementation of plan to make voting machines accessible to disabled New Yorkers).

162. Legislation has been introduced that would require a verifiable paper trail for all election systems. *See, e.g.*, Voter Confidence and Increased Accessibility Act, H.R. 2239, 108th Cong. (2003).

163. *See* LEADERSHIP CONFERENCE ON CIVIL RIGHTS, U.S. COMM'N ON CIVIL RIGHTS, HEARING ON ELECTION 2004: IS AMERICA READY (Apr. 9, 2004) (statement of Wade Henderson, Executive Director, Leadership Conference on Civil Rights) [hereinafter LCCR REPORT], *at* http://www.civilrights.org/issues/voting/wade_usccr_testimony.pdf.

164. Trine Tsouderos, *Barriers Still Confront Some Disabled Voters*, CHI. TRIB., Nov. 5, 2004, § 2, at 1.

chines that are accessible to the blind.[165] Since the first major HAVA deadline relating to accessibility is January of 2006, the upcoming midterm elections will be the best opportunity to judge the success of the bill.

V.
Criticisms and Proposals

A. Introduction

Historically, federal elections were unfunded mandates imposed on municipalities and state governments. Unquestionably, the HAVA is an unprecedented piece of legislation—for the first time, federal funds have been devoted to federal elections. The HAVA authorizes $3.86 billion to be paid to the states for election administration improvement.[166] Although several elements in the HAVA offer the promise of progress toward accessibility, it will ultimately fall short of ensuring the disabled community the full ability to vote in federal elections.

B. The Failure to Create a Federal Definition of "Disability" May Lead to Under-Inclusive State Protections

The HAVA contains no description of the "disabled voter" it aims to protect, other than its specific mention of the blind and visually impaired. As the history of implementation and enforcement of prior disabled voting rights statutes has illustrated, in the absence of a broad and specifically enumerated definition many classes of disabled voters will routinely be overlooked.[167] The HAVA should have enumerated an inclusive and specific definition of disability so that any voter who, due to a physical or mental limitation, finds it difficult or impossible to enter a polling place or use voting equipment, could still exercise his or her fundamental right to vote.

The problem of developing a clear definition of "disabled" that encompasses the entire spectrum of physical disabilities, as well as

165. Jennifer Liberto, *Two Blind Voters Say Privacy was Violated*, St. Petersburg Times (Fla.), Nov. 9, 2004, at 6.

166. *See* Election Reform Info. Project, Ready for Reform? 4 (Mar. 2003), *at* http://www.electionline.org/site/dav/pdf/eripbrief32003.pdf.

167. *See House Judiciary Hearing*, *supra* note 84, at 14 (statement of James C. Dickson, Vice President of Governmental Affairs, American Association of People with Disabilities) (explaining that using language "physical disability" would "allow state and local election officials to claim that blindness is a sensory disability, as many already do, thereby being exempt from the legislation" and would also exclude mentally disabled).

mental disabilities not impeding the ability to competently vote, is an ongoing struggle in federal law. Federal legislation governing voting access for the disabled[168] falls short in this regard. The VRA definition is limited in a fashion similar to the HAVA.[169] The VAEHA addresses only "physical disability"[170] and thus ignores a wide range of sensory and mental disabilities that can limit a person's ability to use voting equipment. Though the RA provides the broad definition of disability also codified in the ADA,[171] the statute itself is limited to remedying intentional discrimination,[172] and thus fails to adequately address the specific issues raised in the voting situation where discrimination is not of an affirmative nature. For example, the definition covers individuals who have a "physical or mental impairment which substantially limits one or more of such person's major life activities . . . [or are] regarded as having such an impairment."[173] While that is important in remedying affirmative discrimination, it is unnecessary in a setting where inaccessibility is a result incidental to a failure to take measures to remedy it.

The ADA definition is identical to the RA definition and thus subject to the same limitations.[174] When coupled with the congressional findings codified in the ADA, the shortcomings of this conception of "disability" become clearer. In the "Findings and Purposes" section of the ADA, Congress identifies people with disabilities, similar to other minority statuses, as:

> a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society.[175]

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168. *See supra* Part II.B.1.

169. 42 U.S.C. § 1973aa-6 (2000) (protecting any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write).

170. 42 U.S.C. § 1973ee-6 (2000).

171. *See infra* note 174.

172. *See* Sch. Bd. of Nassau County, Fla. v. Arline, 480 U.S. 273, 278 n.3 (1987).

173. 29 U.S.C. § 705(20)(B) (2000).

174. The ADA defines "disability" as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2) (2000).

175. *Id.* § 12101(a)(7) (2000). Congress invokes the language of the famous footnote 4 of *United States v. Carolene Products*, 304 U.S. 144, 152–53, n.4 (1938).

There are three critical differences between the disabled and other groups that have come within the umbrella of protection offered by various civil rights statutes; these differences require an innovative approach to disability rights legislation. First, the unequal treatment of the disabled cannot be remedied simply with equal treatment—the reality is that further accommodations are often necessary to allow the disabled to fully participate in society.[176] Thus, a "civil rights statute based solely on equal treatment [of the disabled] . . . fall[s] short of achieving the goals of inclusion and participation."[177] Except in the case of some classes of the mentally disabled,[178] it is through oversight rather than intentional exclusion that the disabled have been kept from the polls. Election officials must be proactive in their efforts to enfranchise disabled voters.

Second, the disabled are themselves a hugely diverse group; in order to effectively provide for their full inclusion, a policy must recognize that a one-size-fits-all solution will not accommodate their varied needs.[179] Though it is possible to draft legislation with a comprehensive definition, bringing relief to individuals across the entire spectrum of disabilities, it is critical that such a statute recognize this internal diversity and address the different needs of different classes of the disabled. Lastly, a community that is being constructively disenfranchised, or at least having their voting rights curtailed in some substantive way, is faced with a daunting "catch-22": the local and state elected officials who have failed to adequately remedy the problem of disenfranchisement are the same elected officials against which the wronged group has not had the ability to exercise their voting power. It is easy to see how the incentives for quick and effective action would be limited in such a situation, especially when resources are limited and the voters who do have access to the polls may be more concerned about issues that affect their daily lives, such as school funding and transportation. Precisely because of this potential

176. *See* Mary Crossley, *The Disability Kaleidoscope*, 74 NOTRE DAME L. REV. 621, 664 (1999) ("framing [the] political demands [of the disabled] as purely a claim to equal treatment on a level playing field" is inadequate to achieve equality); Laura L. Rovner, *Disability, Equality, and Identity*, 55 ALA. L. REV. 1043, 1062 (2004) ("treating people with disabilities in the same manner as people without disabilities serves to exclude people with disabilities from mainstream society, rather than include them.").

177. Arlene B. Mayerson & Silvia Yee, *The ADA and Models of Equality*, 62 OHIO ST. L.J. 535, 537 (2001).

178. *See, e.g.*, Doe v. Rowe, 156 F. Supp. 2d 35 (D.Me. 2001).

179. *See* MANHATTAN REPORT, *supra* note 161, at 36 (encouraging adoption of broad definition of disability under HAVA "to include individuals with visual, auditory, physical and cognitive challenges and to address the different levels of disability that individuals face" as well as individual voters with multiple disabilities).

failure of the democratic process, it is especially important that a policy consider all affected disabled individuals who may be experiencing constructive exclusion from the democratic process.

Given these concerns, Congress should adopt a uniform and mandatory definition of "disabled" that covers the spectrum of difficulties that have been found to fit within the term. Unlike the technology standards issue, which offers legitimate justifications for some variation in voting machines,[180] aside from the need for adequate federal funding, there are no practical problems with adopting a highly inclusive, nationwide definition of "disabled." The disabled community is in the best place to understand and identify the types of disabilities that cause access problems, and thus must be actively included in the formation of this definition. Furthermore, the standards adopted by the federal government with respect to accessibility of locations and technology must pay close attention to this definition and make sure each problem is addressed in the standards.

C. The Failure to Create Required Minimum Federal Standards, and Then Fully Fund the Implementation of Those Standards, May Allow States Already Delinquent in Their Enforcement of Federal Statutes to Cut Corners

The HAVA should have provided federally mandated standards specific enough to ensure equal access to the polls for all voters. State and local election officials fear that a one-size-fits-all approach to election reform will fail to take into consideration the fiscal burden such a system would place on counties, as well as the logistical shortcomings of assuming that there is a uniform system well-suited for every county's needs.[181] On the other hand, Jim Dickson of the National Association of People with Disabilities warned that House Bill 3295 would allow "fifty different standards defining access to voting systems and polling places. . . . [but the] manufacturers of voting systems need one clear set of standards to design and build to."[182]

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180. *See infra* Part VI.C.

181. For example, the county clerk of Los Angeles, the largest electoral jurisdiction in the country, testified that California cannot adopt a uniform system due to the variation between jurisdictions, stating that "one size does not fit all." More ballots were cast in Los Angeles County "than were cast statewide in 41 of the 50 states." *Federal Election Practices and Procedures: Hearing Before the S. Comm. on Governmental Affairs*, 107th Cong. (2001) (testimony of Conny B. McCormack, Registrar/Recorder of Voters, Los Angeles).

182. *See House Judiciary Hearing*, *supra* note 84, at 14 (testimony of James C. Dickson, Vice President of Governmental Affairs, American Association of People with Disabilities).

By providing minimum standards rather than explicit commands to acquire one type of voting system, the HAVA could have struck a compromise between the need for consistent accessibility and the advantages of leaving some flexibility in the system. It is true that there are several compelling reasons for not setting standards so rigid that they dictate a single type of equipment for all locations. Some polling sites are already accessible to at least some of the disabled population, and asking these locations to replace their equipment would be expensive and wasteful. Instead, they should be allowed to bring their current machines into compliance, if possible, through the use of modifications or modular attachments. DRE source code is currently protected as proprietary information. Until it is publicly available and every vote is verifiable in an audit, the universal use of one technology could be especially susceptible to large-scale fraud or unintentional error.[183] Also, the use of multiple vendors and diverse equipment fosters innovation that will ultimately increase the access to the voting process and the reliability of the results.[184]

The closest the HAVA comes to setting meaningful standards are its mandate that those states accepting federal grants must grant disabled voters the same opportunity for access and participation as nondisabled voters. The HAVA makes reference to this mandate three times: in Title I, the grant program offers money to upgrade machines and specifies that the federal payment must be used to fulfill this man-

183. *See generally* Tadayoshi Kohno et al., *Analysis of an Electronic Voting System*, IEEE SYMP. SECURITY & PRIVACY 2004 (Feb. 27, 2004) (identifying several security problems regarding paperless electronic voting, and concluding that such system should not be used in general election), http://avirubin.com/vote.pdf; Michael Carrier, *Can You Spare 5 Minutes for Democracy?*, SEATTLE POST-INTELLIGENCER, Sept. 22, 2004 (noting flaws and mishaps of electronic voting systems, as well as potential for fraud that could compromise our democracy), http://seattlepi.nwsource.com/opinion/191790_voting22.html; Tom Zeller Jr., *Ready or Not (and Maybe Not), Electronic Voting Goes National*, N.Y. TIMES, Sept. 19, 2004, at A1, A34 (discussing flaws in electronic voting systems that could permit tampering and lead to skewed election results); THE CALTECH/MIT VOTING TECH. PROJECT, RESIDUAL VOTES ATTRIBUTABLE TO TECHNOLOGY: AN ASSESSMENT OF THE RELIABILITY OF EXISTING VOTING EQUIPMENT 2 (Version 2: Mar. 30, 2001) (stating that DRE systems have higher average rates of "spoiled, uncounted, and unmarked ballots" than manually counted paper ballots, lever machines, and optically scanned ballots), http://www.hss.caltech.edu/~voting/CalTech_MIT_Report_Version2.pdf.

184. *See generally* Douglas W. Jones, Counting Votes with Computers, Address to the League of Woman Voters of Johnson County, Iowa City, Iowa (May 16, 2001) (suggesting that today's voting technologies should be interconnected via network technology, allowing individuals to vote from personal computers rather than publicly owned machines at polling places), *at* http://www.cs.uiowa.edu/~jones/voting/lwv.html (last visited Feb.26, 2005).

date;[185] in Title II, the grant program offers money to make polling places accessible and refers to privacy and independence;[186] and in Title III, the minimum standards specify that a voter must be able to cast their ballot under these conditions.[187] However, in the absence of a meaningful definition of "disability,"[188] these provisions do not reach far enough to ensure the right to all voters.

Through the use of federally mandated and funded standards, the HAVA could have served as remedial legislation, targeting the continuing failure of most states to comply with multiple pre-existing federal statutes calling for accessibility. States were obliged to meet accessibility standards for public sites and programs long before the passage of the HAVA, yet the HAVA fails to recognize and address their delinquency. Ideally, the HAVA would have codified broad standards and delegated the authority to promulgate more specific *required* minimum regulations, which could have been revised as technology evolved to assure that voting access remained abreast with technological improvements.

Senator John McCain's proposed bill—amending the VAEHA in an attempt to ensure equal voting rights for disabled individuals—offered an example of the type of broad principles that would have given the agency charged with developing standards adequate guidance.[189] The text of this bill represents a better—if not ideal—effort to enumerate the types of measures a state should take to ensure accessibility. Specifically, the bill required that:

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185. 42 U.S.C.A. § 15301 (2000). "A State shall use the funds provided under a payment made under this section to carry out one or more of the following activities: . . . (G) Improving the accessibility and quantity of polling places, including providing physical access for individuals with disabilities, providing nonvisual access for individuals with visual impairments . . . ." *Id.* § 1530(b)(1)(G).

186. 42 U.S.C.A. § 15421 (2000).

> An eligible State and eligible unit of local government shall use the payment received under this subpart for . . . (1) making polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities, including the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters.

Id. § 15421(b)(1).

187. 42 U.S.C.A. § 15481(a)(3)(A) (2000). "The voting system shall— . . . be accessible for individuals with disabilities, including nonvisual accessibility for the blind and visually impaired, in a manner that provides the same opportunity for access and participation (including privacy and independence) as for other voters." *Id.*

188. *See supra* Part V.B.

189. *See* S. 511, 106th Cong. (1999).

> The chief election officer of a State shall ensure that all polling methods selected and used for Federal elections are accessible to disabled and elderly voters, including—
> (1) the provision of ballots in a variety of accessible media;
> (2) the provision of instructions that are printed in large type, conspicuously displayed at each polling place;
> (3) the provision of printed information that is generally available to other voters using a variety of accessible media; and
> (4) ensuring that all polling methods used enable disabled and elderly voters to cast votes at polling places during times and under conditions of privacy available to other voters.[190]

Existing performance standards also serve as a good starting place for the development of effective accessibility regulations. The Federal Election Commission enumerates "electronic and information technology accessibility standards" based on regulations developed under section 508 of the RA.[191] The DOJ has already developed detailed guidelines for polling place compliance with the ADA, which cover accessibility from the parking lot to the voting area.[192] The HAVA should require that every jurisdiction have polling places that are accessible to disabled voters as prescribed by the DOJ under the ADA, though some municipalities would be required to change polling locations qualifying under the ADA as public buildings and public accommodations.

The way in which "disability" is defined necessarily affects what minimum standards would be necessary to achieve accessibility. Adopting a broad and enumerated definition would necessitate a variety of user interfaces; for example, the needs of the blind voter and the needs of the wheelchair-confined voter differ from the needs of a learning-disabled voter. The technologies do exist to make accessibility possible for each of these groups, and DREs represent the best step forward in achieving it. The newer generations of DREs can be designed with modular attachments to serve various needs; sip and puff technology[193] can be utilized by the severely mobility-impaired, while earphones and voice-command response or Braille can allow private and independent voting by the blind. Displays that limit the amount of

190. *Id*.
191. *See* 36 C.F.R. § 1194.1 (2003). The Voting System Standards are available online at http://www.eac.gov/election_resources/vss.html.
192. U.S. DEP'T. OF JUSTICE, ADA CHECKLIST FOR POLLING PLACES (Feb. 2004), http://www.usdoj.gov/crt/ada/votingscrn.pdf.
193. *See, e.g.*, SHERYL BURGSTAHLER, WORKING TOGETHER: PEOPLE WITH DISABILITIES AND COMPUTER TECHNOLOGY (explaining particulars of sip and puff technology), *at* http://www.washington.edu/doit/Brochures/PDF/atpwld.pdf.

information that is on-screen at any given time will assist individuals with learning disabilities. Furthermore, if every jurisdiction is required to possess and/or acquire fully accessible technology, competition among the DRE makers should allow for even better innovations to assist the disabled.[194]

It is critical that Congress fully fund the HAVA so that it is possible for cash-strapped municipalities to acquire accessible equipment and improve polling site accessibility. States and municipalities can only be expected to implement these standards if the federal government provides the resources for them to do so. Congress has not yet provided the type of funding under the HAVA that will lead to full accessibility; during Fiscal Years 2003 and 2004, funds for grants under section 261 of Title II were appropriated to states but not to local governments.[195] Since election administration remains localized in many states, this is a disservice to local governments trying to reach full accessibility. Finally, in spite of the VAEHA (passed twenty years ago, which includes state certification requirements) and the ADA (passed fourteen years ago, which requires compliance with accessibility standards), compliance by states simply has not been forthcoming. Thus, the HAVA should have required close federal oversight of the process of bringing polling places and technologies into compliance rather than allowing state self-certification to guarantee that the HAVA brings real accessibility.

D. The HAVA Should Have Allowed a Private Right of Action for Declaratory or Injunctive Relief Against the Chief Election Official of Each State

The HAVA failed to guarantee that one state actor would be responsible for compliance, or that a voter could seek relief against officials delinquent in their responsibilities under the law. Senator McCain's bill, S. 511, as it would have amended the VAEHA, also serves as a model for centralization of compliance authority and creation of causes of action against that authority. The bill would have shifted the responsibility for the VAEHA compliance from "each political subdivision" within a state to a single state election official.[196] This type of centralization would ensure uniformity within a state, and

194. *See, e.g.*, Ted Selker, *Fixing the Vote*, SCI. AM., Oct. 2004, at 90–97 (suggesting improvements to current voting machines and systems).

195. *See* 2003 HHS Notice, *supra* note 147, at 32,059 (citing Miscellaneous Appropriations Act of 2003, Pub. L. 108-7); 2004 HHS Notice, *supra* note 148, at 20,896 (citing Consolidated Appropriations Act of 2004, Pub. L. 108-199).

196. *See* S. 511, 106th Cong. § 1(b)(1) (1999).

make it easy to identify the state official affirmatively responsible for compliance for the purposes of seeking injunctive or declaratory relief.

Currently, a cause of action is available under the VAEHA against delinquent states or political subdivisions; however, since the biennial reporting procedures under the VAEHA expired in 1994[197] and courts have found no such affirmative duty under the RA or the ADA,[198] which both create private rights of action, there has been confusion on the part of aggrieved voters as to the appropriate target against whom to seek relief.[199] However, this provision of S. 511 was not included in the HAVA, which neither centralizes authority over voting standards in one state actor nor creates a private right of action,[200] and leaves to the Attorney General the choice of whether to seek relief against states or localities.[201] In fact, state election officials considered the HAVA's lack of a private right of action a victory for the states.[202]

By providing federal funds for elections for the first time, one result of the HAVA should be the allowance of suits under section 504 of the RA, which requires the plaintiff to show that the program or activity with which he or she was involved, or from which he or she was excluded, received or was directly benefited by federal financial assistance.[203] Once the official designated by the state has received funds for election reforms under Title II or III of the HAVA, election administration will clearly fall within an RA section 504 "program or activity receiving Federal financial assistance,"[204] and thus violations of the RA will give rise to a private cause of action against the state election official.

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197. *See* 42 U.S.C. § 1973ee-1(c)(3) (2000).

198. *See Lightbourn v. County of El Paso*, 118 F.3d at 432 (stating that "the Secretary has no duty under . . . ADA to take steps to ensure that local election officials comply with the ADA"). *See also* Nelson v. Miller, 170 F.3d 641, 649 (6th Cir. 1999) (indicating that court shall analyze claims under ADA and RA in similar fashion).

199. *See, e.g.*, *Lightbourn v. County of El Paso*, 118 F.3d at 432.

200. Under 42 U.S.C.A. § 15512, HAVA requires states to establish administrative complaint procedures to remedy grievances. *See* 42 U.S.C. § 15512(a)(1) (2000). However, there is no federal remedy available to the aggrieved voter.

201. *Id.* § 15511.

202. *See, e.g.*, 148 CONG. REC. S.10,412 (daily ed. Oct. 15, 2002) (letter dated Oct. 7, 2002 from the National Conference of State Legislatures to Senators Byrd and Young, stating that the NCSL is "satisfied that [HAVA] keeps election administration at the state and local level, limits the role of the U.S. Justice Department to enforcement, [and] does not create a federal private right of action").

203. 29 U.S.C. § 794(a) (2000).

204. *See id.*

CONCLUSION

There is no right more fundamental to democracy than the right to vote, yet the disabled community has never been able to participate in the electoral process in a manner equal to non-disabled voters. In the wake of the 2000 election, Congress had an opportunity to pass meaningful legislation to remedy this deprivation of the fundamental right to vote. However, the bill that resulted from this opportunity will not achieve full accessibility. Instead, the HAVA is a compromise bill that fails to account for the failure of past legislation aimed at improving access. Given the ongoing failure of the VAEHA, ADA, and other relevant federal laws,[205] the best approach would have been to create a detailed and inclusive federal definition of disability and mandate specific minimum standards for accessible polling sites and voting technology. Instead, the HAVA left to the states the task of defining the scope of "disability" and requires only that states comply with broad technology standards, allowing the states, who will self-certify that they are in compliance, to choose whether to follow the guidelines promulgated by the Election Assistance Commission. Due to the fact that, like prior federal statutes, the HAVA will fail to ensure that states reach a level of full accessibility, the problem is compounded by the lack of a private cause of action to allow disabled voters to seek relief in the federal courts against a delinquent state. The Attorney General will have to be especially vigilant in his or her efforts to oversee the HAVA implementation process, and seek forced compliance through the court system. In short, the HAVA will not provide the full measure of accessibility that the disabled community hopes for and the fundamental right to vote demands. In the future, stronger federal leadership will be required to ensure the extension of the franchise to all qualified individuals suffering from disabilities.

205. *See supra* Part II.B.1.