

INSIDE THE VOTING BOOTH: ENSURING THE INTENT OF THE ELDERLY VOTER

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In a timely response to the events of Election 2000, Brian LaFratta and Jamie Lake address the voting process as it relates to the elderly. By exploring the procedural problems that ensued throughout Florida's election, Mr. LaFratta and Ms. Lake highlight voting issues that have a particularly adverse effect upon the elderly voter. Specifically, the authors provide a comprehensive analysis of both federal and state laws that address the provision of assistance to the elderly voter, accessibility to polling places, and ballot design. The authors' thorough analysis of current law, and discussion of proposed bills to improve the system, clearly reflects the plight of the elderly voter. Therefore, Mr. LaFratta and Ms. Lake recommend the improvement of antiquated voting procedures so that the intent of the elderly voter is ensured throughout the election process.

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At the bottom of all the tributes paid to democracy is the little man, walking into the little booth, with a little pencil, making a little cross on a little bit of paper—no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of the point.

Sir Winston Churchill¹

The man who can right himself by a vote will seldom resort to a musket.

James Fenimore Cooper, *The American Democrat*, 1838.²

I. Introduction

The 2000 presidential election will be remembered for many reasons. Between confusing ballots,³ a razor-thin margin of victory,⁴ recounts,⁵ litigation,⁶ and ultimately the intervention of the Supreme Court of the United States,⁷ the election

1. John Victor Berry, *Take the Money and Run: Lame Ducks "Quack" and Pass Voter*, 74 U. DET. MERCY L. REV. 291, 303 (1997) (quoting INTERNATIONAL THESAURUS OF QUOTATIONS 731 (rev. ed. 1996)).

2. AMERICAN QUOTATIONS 211 (Gorton Carruth & Eugene Ehrlich eds., 1988).

3. See generally Glen R. Simpson et al., *Ballot Botch: With All the Glitches, The Wonder Is Why the System Survives*, WALL ST. J., Nov. 11, 2000, at A1; Sue Anne Pressley & George Lardner, Jr., *In a Confused Palm Beach County, Complaints Came Early and Often*, WASH. POST, Nov. 11, 2000, at A1.

4. The importance of the single vote was yet again confirmed. Consider the following:

[O]ne vote per precinct gave John F. Kennedy the presidency in 1960, and one vote per precinct in California made Harry Truman the president in 1948. The Selective Service Act passed in Congress by one vote in 1939, and one vote gave Adolf Hitler the leadership of the Nazi party in 1923. One vote saved Andrew Johnson from impeachment in 1868; one vote brought Texas into the Union in 1845; and one vote gave the United States the English Language instead of German.

Pauline Schneider, *Social Barriers to Voting*, SOC. EDUC., Oct. 1996, at 356.

5. See generally Joel Engelhardt & Scott McCabe, *Election 2000: Over-votes Cost Gore the Election in FL*, PALM BEACH POST, at http://www.gopbi.com/partners/pbpost/news/election2000_overvote_gore.html.

6. See generally Find Law Legal News, *Election 2000*, at <http://news.findlaw.com/legalnews/us/election/election2000.html> (visited Mar. 31, 2001) (providing a comprehensive list of decisions, briefs, and other documents from the numerous lawsuits that arose out of the election).

7. See *Bush v. Gore*, 121 S. Ct. 525 (2000). The nature and impact of the Court's intervention is an essay in and of itself:

Time will one day heal the wound to that confidence that will be inflicted by today's decision. One thing, however, is certain. Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law.

and its consequences have provided Americans with a clear warning: the election process needs to be fixed.⁸ One of the more notorious issues arising out of the election was the use of the infamous “butterfly ballot” in Palm Beach County, Florida.⁹ The construction of the ballot confused many voters and may have cost Democratic candidate Al Gore the presidency.¹⁰ Among these confused voters were large numbers of elderly individuals.¹¹

This essay uses the 2000 election as a starting point to examine the voting process as it relates to the elderly. Part II discusses the problems in the process evinced by the 2000 election. Part III discusses federal statutes that relate to the elderly in the voting process. Part IV covers state laws on the same subject matter, with an emphasis on laws providing assistance to voters, accessibility, and ballot design. Part V discusses recent bills and proposals to fix the system and recommends changes to the voting process.

II. The Florida Fiasco

The presidential election, occurring once in four years, throws the country for several months into a state of turmoil, for which there may be no occasion. Perhaps there are no serious party issues to be decided, perhaps the best thing would be that the existing Administration should pursue the even tenor of its way. The Constitution, however, requires an election to be held, so the whole costly and complicated machinery of agitation is put in motion; and if issues do not exist, they have to be created.

James Bryce, *The American Commonwealth*, 1888.¹²

Mr. Bryce’s comments, written more than one hundred years ago, could have been written with the 2000 presidential election in mind. The issues that had “to be created,” however, were not ones of politics, but rather of voting and the nature of the election process. The end result of the 2000 election was a mass call for change and re-

Id. at 542 (Stevens, J., dissenting). See generally Jeffrey Ghannam, *Election Fallout*, A.B.A. J., Apr. 2001, at 93 (regarding the legal implications of the election and the *Bush v. Gore* case).

8. See David S. Broder, *In Need of an Overhaul*, WASH. POST, Dec. 6, 2000, at A35.

9. See Engelhardt & McCabe, *supra* note 5.

10. See *id.*

11. See *Siegel v. Lepore*, 234 F.3d 1163, 1212 chart D (11th Cir. 2000) (over 24% of Palm Beach County is elderly); see also Pressley & Lardner, *supra* note 3, at A1.

12. AMERICAN QUOTATIONS, *supra* note 2, at 211.

form.¹³ Chief among the complaints was the construction and confusion of the Palm Beach County “butterfly ballot.”

The Palm Beach ballot was one-of-a-kind among the ballots used in Florida’s sixty-seven counties.¹⁴ First, although Florida law provides that the Republican candidate be listed first, followed by the Democratic candidate, and then minor party candidates, the Palm Beach ballot appeared to list Republican candidate George W. Bush first, Reform Party candidate Pat Buchanan second, and *then* Democratic candidate Al Gore.¹⁵ Palm Beach was the only Florida county to deviate from the statutorily provided order.¹⁶ Second, the ballot was constructed in “butterfly” form: candidates were listed on both pages of the booklet, with punch holes to the left of some candidates and to the right of others.¹⁷ This “butterfly” format was not used in any other Florida county during the 2000 election and, in fact, had never been used in Palm Beach County prior to the 2000 election.¹⁸

The use of this unique butterfly ballot resulted in massive voter confusion.¹⁹ Many voters complained that they mistakenly voted for Pat Buchanan instead of Al Gore or that they mistakenly believed they had to punch holes for both Al Gore and Vice-Presidential candidate Joseph Lieberman.²⁰ The confusion resulted in approximately 3400 votes being cast for Pat Buchanan, 2400 more than any other Florida county,²¹ although Palm Beach County had “fewer than 400 registered

13. See Broder, *supra* note 8, at A35; *infra* Part IV.

14. See Brief Amicus Curiae of People for the American Way in Support of Appellants at 9, *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (No. SC00-2373); *The Edge* at www.sun-sentinel.com/graphics/news/ballot.htm (May 10, 2001) (providing a virtual interactive ballot, which allows visitors to actually try to cast a vote on the Palm Beach County ballot).

15. See FLA. STAT. ANN. § 101.151 (West 2000); Brief Amicus Curiae at 9, *Fladell* (No. SC00-2373).

16. See Brief Amicus Curiae at 9, *Fladell* (No. SC00-2373).

17. See *id.* at 10. Additionally, the instructions curiously stated that the voter should “[p]unch straight down through the hole to the right of the arrow by the candidate or issue of your choice.” *Id.*; accord FLA. STAT. ANN. § 101.191 (West 2000).

18. See Brief Amicus Curiae at 10, *Fladell* (No. SC00-2373).

19. See *id.*

20. See *id.* at 11. Other voters voted for Buchanan, and then tried to correct the mistake by voting for Gore. See Engelhardt & McCabe, *supra* note 5.

21. See Brief Amicus Curiae of People for the American Way in Support of Appellants at 9, *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (No. SC00-2373). Socialist Party candidate David McReynolds, whose punch-hole appeared directly below Gore’s, received 308 votes in Palm Beach County, nearly half of his statewide total. Overvotes consisting of votes for Gore and McReynolds totaled 2908 in number. See Engelhardt & McCabe, *supra* note 5.

Reform Party voters.”²² Many of those votes were cast in “predominantly Jewish and African American precincts, where voters were unlikely to support a reform party candidate.”²³ In addition to the unusually high number of Buchanan votes, more than 19,000 ballots were thrown out due to overvotes, that is, voting for more than one candidate.²⁴ This number is approximately six times the overvote rate of Palm Beach County in 1996²⁵ and five times the rate of other 2000 statewide elections.²⁶

The significance and severity of the Palm Beach ballot confusion is evident from the numerous media accounts of angry and bewildered voters.²⁷ Fifty-eight-year-old realtor Tony Jordan was unable to figure out the ballot, resigning himself to guessing at which punch hole went with Al Gore.²⁸ Seventy-two-year-old Jack Heifitz had the same problem, concluding, “I think I pushed the right button, but I can’t promise you I did.”²⁹ Some voters requested help from poll workers, “only to find the workers as confused and harried as they were.”³⁰ Irving Slosberg, a state representative stationed outside of a precinct within a retirement community, reported that he saw “voters streaming out of the polls, many confused, some in tears thinking they

22. Brief Amicus Curiae at 11, *Fladell* (No. SC00-2373).

23. *Id.* Ironically, many Jewish voters who were “thrilled by the chance to vote for a Jewish Vice Presidential candidate . . . voted for the right-leaning Buchanan, whom many Jewish voters consider to be anti-Semitic.” Engelhardt & McCabe, *supra* note 5.

24. See Brief Amicus Curiae at 11, *Fladell* (No. SC00-2373). Ten thousand votes were tossed out due to undervotes. See Pressley & Lardner, *supra* note 3, at A1. Proof that the butterfly ballot was the source of the confusion is demonstrated by the fact that “92 percent of the voters who cast two votes for president did not cast an over-vote in the seven-candidate Senate race, where the candidates were all on one page.” Engelhardt & McCabe, *supra* note 5.

25. There were 3073 overvotes in 1996, which made up less than 1% of all ballots. The 19,235 overvotes in 2000 constituted 4.2% of all ballots. See Engelhardt & McCabe, *supra* note 5.

26. See Brief Amicus Curiae at 11, *Fladell* (No. SC00-2373).

27. Palm Beach County voters were not the only ones who were angry. Lance Block, a Palm Beach attorney for the Democratic Party, lamented, “Even though in our hearts we knew we won the election based on the over-vote combinations, there wasn’t anything legally we could do about it, and that was very frustrating.” Joel Engelhardt, *Election 2000: Gore Team Decided Butterfly Ballot Lawsuits Wouldn’t Fly*, PALM BEACH POST, at http://www.gopbi.com/partners/pbpost/news/election2000_lawsuit.html.

28. See Pressley & Lardner, *supra* note 3, at A1. Realizing that others would have the same problem, Mr. Jordan “vowed to warn everyone he could.” *Id.*

29. *Id.*

30. *Id.*

had voted for Buchanan.”³¹ Another state representative, Lois Frankel, stated, “I truthfully didn’t notice the [presidential] ballot was two pages. . . . I hope I voted right, I don’t know. When I looked at the ballot later, I was in shock.”³² Thirty-one-year-old Jennifer Mariano, upon hearing reports of overvotes, remarked, “Oh no, I think I did the same thing. It was not just an elderly problem.”³³ Just hours after the polls opened, angry voters began calling county commissioners to lodge complaints.³⁴ Later in the day, county election supervisor Therese Lepore, the individual who designed the ballot, sent out a memorandum urging poll workers to advise voters to be careful.³⁵ Meanwhile, calls to her office for guidance “were met with a constant busy signal.”³⁶

The confusion hit the elderly especially hard. Most of Palm Beach County’s elderly, who constitute twenty-five percent of the population and thirty-eight percent of the people who voted,³⁷ voted early in the day, before the problems with the ballot were well-documented.³⁸ As a result, “many elderly voters who thought they were voting for Mr. Gore punched out the hole that cast their vote for the Reform Party’s Mr. Buchanan.”³⁹ The statistics bear this out:

31. *Id.* State Representative Lois Frankel had a similar report: “everybody was in an uproar and people were mistakenly voting for Buchanan.” *Id.* “Some voters were absolutely inconsolable.” *Id.*

32. *Id.*

33. *Id.*

34. *See id.*

35. *See id.* The memo was printed in bold, underlined letters and stated, “ATTENTION ALL POLL WORKERS: Please remind ALL voters coming in that they are to vote only for one (1) presidential candidate and that they are to punch the hole next to the arrow next to the number next to the candidate they wish to vote for.” *Id.*

36. *Id.*

37. *See* Engelhardt & McCabe, *supra* note 5; *see also* Siegel v. Lepore, 234 F.3d 1163, 1212 (11th Cir. 2000) (providing more detailed and extensive Palm Beach County voting statistics).

38. *See* Pressley & Lardner, *supra* note 3, at A1. Ironically, the butterfly ballot was designed to make the ballot easier to read for elderly voters. By enlarging the print on the ballots, officials caused the original one page list of candidates to spill over onto the right side of the page. The resulting middle row of punch marks, however, created the confusion that the large print was supposed to prevent. *See* Simpson et al., *supra* note 3, at A1.

39. *See* Simpson et al., *supra* note 3, at A1; *see also* Tim McDonald, *End Election Confusion with E-voting* (Nov. 30, 2000), at <http://www.newsfactor.com/perl/story/5556.html> (Nov. 30, 2000) (“it’s easy to see how elderly Palm Beach residents, some of whom may be easily confused, could make such an egregious error”).

Forty-six percent of the Gore-Buchanan overvotes came from precincts where the majority of voters were Democrats and 65 or older. Included in those numbers: In nine of the 10 precincts with the most Gore-Buchanan over-votes, the majority of voters were both Democratic and 65 or older. Eight of the 10 precincts were in south Palm Beach County.⁴⁰

Inherent in the elderly's problems with the butterfly ballot are the difficulties the elderly experience with "punch card" ballots generally.⁴¹ Punch card ballots are simply harder for elderly voters to use,⁴² due in part to such ailments as arthritis and poor vision.⁴³ But poorly designed ballots are not the only obstacle facing elderly voters.⁴⁴ Polling places are not "senior-friendly," due to various barriers:

[P]unch card ballots that can be difficult for arthritic fingers, and polling places with high staircases, long lines and few handicapped parking places. Pulling a slightly balky voting lever can be a problem when you lack the vigor of youth. Not to mention the difficulty of having less than 20-20 eyesight.⁴⁵

Furthermore, sensitivity to stereotypes of the elderly⁴⁶ may influence elderly voters not to seek assistance by "asking for guidance or even a second ballot."⁴⁷

40. Engelhardt & McCabe, *supra* note 5. Does this mean we should blame the elderly voters for these errors? Not according to Henry Brady, a professor at the University of California-Berkeley: "These are people who knew how to vote. Typically they do it right. But the butterfly ballot discombobulated them. . . . Are these stupid voters? Or is it a stupid voting system? There's certainly evidence here that these were not stupid voters." *Id.*

41. Punch cards are the most common type of ballot, used by about thirty-seven percent of voters. The voter manually punches a hole in the ballot that is later read by a computer. This technology was developed in 1890 and was abandoned by the computer industry decades ago. Punch cards are known for resulting in erroneous results. See Simpson et al., *supra* note 3, at A1.

42. See Broder, *supra* note 8, at A35.

43. See Jill Vejnaska, *Elderly Voters: Seniors Have Elected to Object to Being Target of Ballot Jokes*, ATLANTA J.-CONST., Nov. 19, 2000, at G7.

44. See *id.*

45. *Id.* (quoting Alexis Abramson, chairman and CEO of Mature Smart, which markets products for seniors).

46. Among the jokes elderly voters have had to endure: "Election officials became concerned old folks were punching too many holes in the ballots when they heard people shout, 'Bingo!'" *Id.* (quoting Craig Kilborn, host of CBS's Late Late Show).

47. *Id.* Another problem facing the elderly, that is beyond the scope of this essay, is voter fraud. The elderly are regarded as "prime targets" for fraudulent voter schemes because they are "viewed as easier to manipulate." Glenn R. Simpson & Evan Perez, *America's Dysfunctional Voting System*, WALL ST. J., Dec. 19, 2000, at A1. One of the most notorious cases occurred in Florida. See generally *id.* See also *United States v. Olinger*, 759 F.2d 1293 (7th Cir. 1985) (voter fraud case in which judge remarked "there is nothing funny about stealing votes from the elderly").

Yet, in spite of these difficulties and pervasive insensitivity, elderly voters represent the “largest, most reliable voting bloc.”⁴⁸ In 1996, the last presidential election year, seventy-eight percent of voters age sixty-five to seventy-four were registered to vote, and a full seventy percent of that age group did vote.⁴⁹ Voters in younger age groups were not nearly as well represented.⁵⁰ This discrepancy is due in large part to the fact that many elderly are retired and, thus, have the time to watch television and read up on the candidates and their positions on the issues, enabling them to cast an informed vote.⁵¹ The issue that arises is “whether we should urge Congress to modernize the ballot system, not only for older voters, but also to avoid this sort of spectacle in the future.”⁵²

What is the legacy of this “spectacle?” According to a recent newspaper article, the confusion associated with Palm Beach County’s butterfly ballot cost Al Gore approximately 6600 votes, a margin ten times that which would have allowed Gore to pull out a victory over George W. Bush in Florida and, thus, win the presidency.⁵³

III. Federal Laws

Three federal laws include provisions that govern the voting process as it pertains to the elderly:⁵⁴ the Voting Rights Act,⁵⁵ the Vot-

48. Vejnaska, *supra* note 43, at G7.

49. See Census Bureau, U.S. Dep’t of Commerce, *Voting and Registration in the Election of November 1996*, at <http://www.aarp.org/election2000/graphics/votecht11.gif> (May 10, 2001). The numbers for voters age seventy-five and older were seventy-five percent and sixty-three percent, respectively.

50. For instance, voter turnout for ages eighteen through forty-four ranged from thirty percent to fifty-five percent. See *id.*

51. See Vejnaska, *supra* note 43, at G7 (quoting Alexis Abramson).

52. *Id.* (quoting John Rother, Director of Legislation and Public Policy for the AARP).

53. See Engelhardt & Mc Cabe, *supra* note 5. The Palm Beach Post arrived at this conclusion after reviewing the county’s overvotes. The results were 5330 overvotes for Gore and Buchanan, 2908 overvotes for Gore and McReynolds, and 1631 overvotes for Bush and Buchanan. Adding these numbers leaves 6607 votes “lost for Gore.” *Id.* “Even allowing that 1 percent of the 6,607 votes were intended for Buchanan or McReynolds—which is more than their combined portion of Palm Beach County’s total vote—that would still leave Gore with 6,541 additional votes, more than enough to overcome Bush’s statewide victory margin of 537 votes.” *Id.*

54. This essay will discuss the disabled in addition to the elderly for two reasons. First, many of the laws enacted for the benefit of the elderly target both the disabled and the elderly. Second, many laws enacted to aid the disabled obviously apply to elderly disabled individuals, a group which comprises approximately 52.5% of the elderly, with 33.4% of the elderly being severely disabled. See U.S. Admin. on Aging, *Profile on Aging: 2000*, at <http://www.aoa.dhhs.gov/aoa/stats/>

ing Accessibility for the Elderly and Handicapped Act,⁵⁶ and the Americans with Disabilities Act.⁵⁷

A. The Voting Rights Act

The Voting Rights Act was enacted in 1965 for the purpose of ensuring that the right to vote is not abridged on account of race or color, thereby effectuating the guarantees of the Fifteenth Amendment.⁵⁸ The Act was amended in 1982 to include a provision allowing voting assistance for blind, disabled, or illiterate persons.⁵⁹ The amendment states:

Any 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, other than the voter's employer or agent of that employer or officer or agent of the voter's union.⁶⁰

Thus, any voter may receive assistance if that voter is blind or disabled; groups that include large numbers of the elderly.⁶¹ State laws based on this provision include definitions of assistance, and several do not restrict assistance to the disabled.⁶²

This provision has been at issue in only one case. In *Nelson v. Miller*,⁶³ a group of blind voters brought suit against the Secretary of State of Michigan, alleging that the state's failure to provide them with secret ballots⁶⁴ violated 42 U.S.C. § 1973aa-6.⁶⁵ The state had been allowing blind voters to bring a person of their choice into the booth

profile/profile2000.html (visited Apr. 12, 2001); cf. NAACP v. Philadelphia Bd. of Elections, No. 97-7085, 1998 U.S. Dist. LEXIS 8861, at *12 (E.D. Pa. June 15, 1998) (“[b]eing over the age of 65 is not in and of itself an impairment, although medical conditions associated with age, such as osteoporosis, can be”).

55. 42 U.S.C. § 1973a-p (1994).

56. *Id.* § 1973ee to ee-6.

57. *Id.* §§ 12131–12150 (1994). (Title II specifically.)

58. See Voting Section, Civil Rights Div., U.S. Dep’t of Justice, *Introduction to Federal Voting Rights Laws*, at <http://www.usdoj.gov/crt/voting/intro/intro.htm> (May 10, 2001) (providing a concise history of federal voting laws).

59. See Pub. L. No. 97-205, 96 Stat. 134 (codified as amended at 42 U.S.C. § 1973aa-6 (1994)).

60. 42 U.S.C. § 1973aa-6.

61. See U.S. Admin. on Aging, *supra* note 54.

62. See *infra* Part III.

63. 950 F. Supp. 201 (W.D. Mich. 1996), *aff’d*, 170 F.3d 641 (6th Cir. 1999) [hereinafter *Nelson I*].

64. Plaintiffs used the term “secret” ballots to mean “privacy in casting a ballot, without assistance from a third party, even a third party chosen by the blind voter.” *Nelson I*, 950 F. Supp. at 204 n.2.

65. See *id.* at 202.

with them to assist them in casting a ballot.⁶⁶ The court held that failing to provide the voters secrecy did not violate the Act.⁶⁷ In so holding, the court referenced the Senate Report accompanying the Act, which stated, “the only kind of assistance that will make fully ‘meaningful’ the vote of the blind . . . is to permit them to bring into the voting booth a person whom the voter trusts and who cannot intimidate him.”⁶⁸ The court further reasoned that “the loss of privacy . . . is the type which Congress believed was offset by the expanded opportunity to vote.”⁶⁹ Thus, elderly voters who are disabled may be entitled to assistance in casting a ballot, but cannot expect a guarantee of secrecy in casting that ballot.⁷⁰

B. The Voting Accessibility for the Elderly and Handicapped Act

Congress enacted the Voting Accessibility for the Elderly and Handicapped Act (VAEHA) in order to “promote the fundamental right to vote by improving access for handicapped and elderly individuals to registration facilities and polling places for Federal elections.”⁷¹ The VAEHA achieves this goal through four general requirements. First, states must “assure that all polling places for Federal elections are accessible to handicapped and elderly voters.”⁷²

66. See *Nelson v. Miller*, 170 F.3d 641, 645 (6th Cir. 1999) [hereinafter *Nelson II*].

67. See *Nelson I*, 950 F. Supp. at 204.

68. *Id.* at 203 (quoting S. REP. NO. 97-417, at 62 (1982), reprinted in 1982 U.S.C.C.A.N 177, 241).

69. *Id.* at 204.

70. Enforcement of the Act is governed by 42 U.S.C. § 1973l(e), which allows for the recovery of attorney’s fees. Thus, the Act envisions its enforcement through private citizens serving as “private attorneys general.” 25 AM. JUR. 2D *Elections* § 143 (1996).

71. 42 U.S.C. § 1973ee (1994).

72. *Id.* § 1973ee-1(a). The Act provides the following definitions:

- (1) “accessible” means accessible to handicapped and elderly individuals for the purpose of voting or registration, as determined under guidelines established by the chief election officer of the State involved;
- (2) “elderly” means 65 years of age or older;
- (3) “Federal election” means a general, special, primary, or runoff election for the office of President or Vice President, or of Senator or Representative in, or Delegate or Resident Commissioner to, the Congress;
- (4) “handicapped” means having a temporary or permanent physical disability;
- and (5) “State” means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

Id. § 1973ee-6. The Act includes several exceptions, set out below:

Second, the VAEHA requires that each state “provide a reasonable number of accessible permanent registration facilities.”⁷³ Third,

Each State shall make available registration and voting aids for Federal elections for handicapped and elderly individuals, including—

- (1) instructions, printed in large type, conspicuously displayed at each permanent registration facility and each polling place; and
- (2) information by telecommunications devices for the deaf.⁷⁴

In regard to these aids, “each State shall provide public notice, calculated to reach the elderly and handicapped voters, of the[ir] availability.”⁷⁵ Fourth, the VAEHA “limits the circumstances under which handicapped voters may be required to furnish notarization or medical certification to receive absentee ballots.”⁷⁶

In terms of enforcement, if a state does not comply with the VAEHA, “the United States Attorney General or a person who is personally aggrieved by the noncompliance may bring an action for declaratory or injunctive relief in the appropriate district court.”⁷⁷ However, an action may be brought “only if the plaintiff notifies the chief election officer of the State of the noncompliance and a period of 45 days has elapsed since the date of notification.”⁷⁸ Furthermore, attor-

Subsection (a) . . . shall not apply to a polling place—(1) in the case of an emergency, as determined by the chief election officer of the State; or (2) if the chief election officer of the State—

(A) determines that all potential polling places have been surveyed and no such accessible place is available, nor is the political subdivision able to make one temporarily accessible, in the area involved; and

(B) assures that any handicapped or elderly voter assigned to an inaccessible polling place, upon advance request of such voter (pursuant to procedures established by the chief election officer of the State)—

(i) will be assigned to an accessible polling place, or (ii) will be provided with an alternative means for casting a ballot on the day of the election.

Id. § 1973ee-1(b).

73. *Id.* § 1973ee-2(a).

74. *Id.* § 1973ee-3(a).

75. *Id.* § 1973ee-3(c).

76. 25 AM. JUR. 2D *Elections* § 159 (1996). The statute provides:

No notarization or medical certification shall be required of a handicapped voter with respect to an absentee ballot or an application for such ballot, except that medical certification may be required when the certification establishes eligibility, under State law—to automatically receive an application or a ballot on a continuing basis; or to apply for an absentee ballot after the deadline has passed.

42 U.S.C. § 1973ee-3(b).

77. 42 U.S.C. § 1973ee-4(a).

78. *Id.* § 1973ee-4(b).

ney's fees are not available unless the action is to enforce a court's original judgment.⁷⁹

Several courts have addressed the application of the VAEHA. In *Nelson v. Miller*,⁸⁰ discussed *supra*, the blind plaintiffs also claimed that the failure to provide secret ballots violated the VAEHA.⁸¹ The court disagreed.⁸² The court reasoned that the "Senate Report accompanying the VAEH[A] explicitly dealt with the possibility of loss of privacy at the voting booth,"⁸³ stating, "any minimal effect on the privacy of those who are elderly or handicapped is more than offset by the expanded opportunities for participation in the political process."⁸⁴

In *NAACP v. Philadelphia Board of Elections*,⁸⁵ a state employed alternative ballot procedures in a state election in order to comply with the Americans with Disabilities Act (ADA).⁸⁶ The procedures the state used were those specified by the VAEHA for federal elections.⁸⁷ Plaintiff sought a declaratory judgment that the VAEHA does not apply to state elections, and sought to enjoin the state from using the alternative ballot procedures.⁸⁸ The court agreed that the VAEHA does not apply to state elections,⁸⁹ but found the implementation of the VAEHA alternative ballot procedures to be a reasonable modification required under the ADA.⁹⁰ Therefore, the court denied Plaintiff's request for an injunction.⁹¹

Clearly, the VAEHA includes a number of provisions that greatly benefit the elderly. Though it does not include any requirement regarding ballot design, the VAEHA, along with the Voting

79. *Id.* § 1973ee-4(c).

80. 950 F. Supp. 201 (W.D. Mich. 1996), *aff'd*, 170 F.3d 641 (6th Cir. 1999).

81. *See id.* at 202.

82. *See id.* at 204.

83. *Id.* at 203.

84. *Id.* (quoting S. REP. NO. 98-590, at 7 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2801, 2807).

85. No. 97-7085, 1998 U.S. Dist. LEXIS 8861 (E.D. Pa. June 15, 1998).

86. *See id.* at *9.

87. *See id.* at *1.

88. *See id.*

89. The plain language of the statute provides that the Act applies to federal elections: "assure that all polling places for Federal elections are accessible to handicapped and elderly voters." 42 U.S.C. § 1973ee-1(a) (1994).

90. *See NAACP v. Philadelphia Bd. of Elections*, 1998 U.S. Dist. LEXIS 8861, at *1, *6, *12; *infra* notes 115-18 and accompanying text (expanded discussion of this case).

91. *See Philadelphia Bd. of Elections*, 1998 U.S. Dist. Lexis at *1, *16.

Rights Act, does touch upon three major areas of concern to elderly voters: access, assistance, and instruction.⁹²

C. The Americans with Disabilities Act

Congress passed the Americans with Disabilities Act (ADA) in order to eradicate discrimination on the basis of disability in many areas of society. Title II⁹³ of the ADA prohibits discrimination by public entities in the provision of “services, programs, or activities.”⁹⁴ In enacting the ADA, Congress emphasized that “discrimination against individuals with disabilities persists in such critical areas as . . . voting, and access to public services.”⁹⁵ Title II specifically provides:

[N]o 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.⁹⁶

“Public entities” include state and local governments, as well as any department, agency, or other instrumentality of a state or local government.⁹⁷ Lastly, regulations issued by the Attorney General⁹⁸ provide:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.⁹⁹

92. See Voting Accessibility for Elderly and Individuals with Disabilities, at <http://www.sos.state.or.us/elections/nov596/voters.guide/MISCPGS/VA.HTM> (May 10, 2001) (providing an outline of one state’s implementation of the VAEHA); *supra* Part I (discussing these concerns).

93. 42 U.S.C. §§ 12131–12150 (1994).

94. *Id.* § 12132.

95. *Id.* § 12101(a)(3). Perhaps this means that Congress did not believe the VAEHA to be sufficient, “as it revisited and specifically addressed the same issue six years later in the ADA.” *Lightbourn v. County of El Paso*, 904 F. Supp. 1429, 1432 (W.D. Tex. 1995) [hereinafter *Lightbourn I*].

96. 42 U.S.C. § 12132. “[Q]ualified individual with a disability” is defined as “an individual with a disability who, with or without reasonable modifications . . . meets the essential eligibility requirements for . . . the participation in programs or activities provided by a public entity.” *Id.* § 12131(2).

97. See *id.* § 12131(1).

98. The ADA empowers the Attorney General to issue regulations designed to implement Title II. See *id.* § 12134.

99. 28 C.F.R. § 35.130(b)(7) (2000).

Therefore, a state or local government, or any instrumentality thereof, is “required to make reasonable modifications to avoid discrimination to any voter meeting the ADA definition of disabled.”¹⁰⁰

The first case to address the application of the ADA to state elections was *Lightbourn v. County of El Paso*.¹⁰¹ A class of blind voters brought suit against the Secretary of State of Texas, alleging that conditions at election places violated the ADA.¹⁰² The plaintiffs asserted that they were only permitted to vote with the assistance of others, as opposed to voting in total secrecy.¹⁰³ The defendant argued that to permit the blind to vote in secret would “work a fundamental change in the voting system in the State of Texas” and “raise the specter of fraud.”¹⁰⁴ The state also argued that the cost of changing the system would be prohibitive.¹⁰⁵ The court rejected these arguments and found that the state’s system of voting violated the ADA.¹⁰⁶ The court first decided that the plaintiffs were “otherwise qualified to participate in the activity of voting in federal elections.”¹⁰⁷ The court then held that the Secretary of State is a “public entity subject to Title II of

100. NAACP v. Philadelphia Bd. of Elections, No. 97-7085, 1998 U.S. Dist. LEXIS 8861, at *9 (E.D. Pa. June 15, 1998). Given this, the prima facie case consists of three elements: (1) that the plaintiff is a qualified individual with a disability (2) who, by reason of that disability, was “excluded from participation in or denied the benefits of (3) a service, program, or activity of a public entity.” *State v. County of Delaware*, 82 F. Supp. 2d 12, 17 (N.D.N.Y. 2000).

101. 904 F. Supp. 1429 (W.D. Tex. 1995); see also James C. Harrington, *Pencils Within Reach and a Walkman or Two: Making the Secret Ballot Available to Voters Who Are Blind or Have Other Physical Disabilities*, 4 TEX. F. ON C.L. & C.R. 87 (1999) (discussing *Lightbourn* extensively).

102. See *Lightbourn I*, 904 F. Supp. at 1430–31. Blind and disabled voters were not permitted to vote. See *id.* at 1433–34.

103. See *Lightbourn v. County of El Paso*, 118 F.3d 421, 423 (5th Cir. 1997) [hereinafter *Lightbourn II*].

104. *Lightbourn I*, 904 F. Supp. at 1431.

105. See *id.* 1432. The Court pointed out the irony in this defense:

The Court notes that the State of Texas has expended considerable resources in seeking to avoid affording its handicapped citizens equal treatment in their right to vote under the law. Had these same resources gone to development of a system for the disabled or to enforce already existing laws, a lawsuit may not have been necessary. The state could also have spent the time to come to an agreement with Plaintiffs and saved a great deal of time and money for this Court and the state.

Id. at 1432 n.4.

106. See *id.* at 1433. As for the defendant’s position: “Although on its face, the argument seems ludicrous, Defendant’s contention seems to be that Texas law affords a secret ballot only if it is not too much trouble.” *Id.* The court gave the parties thirty days to fashion a remedy before intervening with one of its own. See *id.* at 1434.

107. *Id.* at 1432.

the ADA.”¹⁰⁸ Given that the Secretary of State is the chief elections officer of the state, the court held the Secretary responsible for providing a system that does not discriminate against the disabled.¹⁰⁹

In *Nelson v. Miller*,¹¹⁰ discussed *supra*, the blind plaintiffs also claimed that the failure of the state to provide them with secret ballots was a violation of the ADA.¹¹¹ The *Nelson* court disagreed with the *Lightbourn* court and found that the ADA does not require states to provide secret ballots for the blind.¹¹² The court reasoned that the plain language of the statute and the legislative history do not provide any support for the blind to be entitled to secret ballots.¹¹³ Rather, the court found that “Congress intended that blind voters have access to the voting booth and freedom from coercion within the voting booth, not complete secrecy in casting a ballot.”¹¹⁴

The nature of reasonable modifications of voting procedures was addressed in *NAACP v. Philadelphia Board of Elections*,¹¹⁵ discussed *supra*. In that case, the state, in an effort to comply with the ADA, “chose to modify non-federal election procedures by applying the VAEH[A] alternative ballot procedures authorized in federal elections.”¹¹⁶ The plaintiff claimed that this action violated federal law.¹¹⁷ The court held that “[d]efendants are not required to provide the specific procedures authorized under the VAEH[A], but the decision to do so is a reasonable modification to comply with the ADA.”¹¹⁸

The most typical type of ADA case is illustrated by *State v. County of Delaware*.¹¹⁹ There, the State of New York brought suit against one of its counties, alleging that the county’s polling places were not accessible to the disabled and, therefore, violated the re-

108. *Id.* The court was reversed on this point. See *Lightbourn II*, 118 F.3d at 421. The appellate court held that the ADA is not an election law, and therefore, the Secretary has no duties in regard to the application of the ADA to elections. See *id.* at 429–31. But see Harrington, *supra* note 101, at 101–02 (questioning this reasoning).

109. See *Lightbourn I*, 904 F. Supp. 1429, 1432–34 (W.D. Tex. 1995).

110. 950 F. Supp. 201 (W.D. Mich. 1996), *aff’d*, 170 F.3d 641 (6th Cir. 1999).

111. See *id.* at 202.

112. See *id.* at 204–05. The court also disputed the *Lightbourn* court’s assertion that passage of the ADA indicated that the VAEHA was an insufficient protection. See *id.* at 205.

113. See *id.* at 204.

114. *Id.* at 205.

115. No. 97-7085, 1998 U.S. Dist. LEXIS 8861, at *9 (E.D. Pa. June 15, 1998).

116. *Id.* at *12.

117. See *id.* at *13.

118. *Id.* at *12.

119. 82 F. Supp. 2d 12 (N.D. N.Y. 2000).

quirements of the ADA.¹²⁰ The polling places were in fact inaccessible to those with mobility impairments.¹²¹ Therefore, the court found for the state, and ordered that the county comply with the requirements of the ADA.¹²²

The ADA, though a complicated statute, is clearly a powerful device for obtaining access and assistance in voting. The one drawback in terms of the elderly, however, is that the individual seeking the modifications of the voting process must be disabled within the meaning of the statute. While many elderly individuals can make this showing,¹²³ many more elderly individuals who are in need of better access and assistance will not be entitled to relief under the ADA.

IV. State Laws

All states have provisions within their election codes that pertain, directly or indirectly, to the elderly voter.¹²⁴ These provisions can be broken into two categories: assistance and accessibility. Assistance provisions allow some level of assistance in the actual casting of the ballot. Access provisions provide for special design, construction, and procedural requirements for polling places. Additionally, ballot design provisions are relevant to the ability of the elderly voter to cast the intended vote.¹²⁵

Underscoring all of these laws are the logistics of their operation in practice. First, these laws apply to state elections. Yet, state and federal elections often occur at the same time and in the same place. Therefore, application of these laws necessarily affects federal election procedures as well. Second, many of these laws overlap relevant federal laws. Therefore, there are three application scenarios: (1) if there is no state law, then the federal laws apply, but only to federal elections; (2) if there is state law identical to federal law, then the same procedures must be followed for both types of elections; or (3) if the state laws exceed the protections of the federal laws, then the state laws, though applying only to state elections, will likely be applied to federal elections as well.

120. *See id.* at 13.

121. *See id.* at 14.

122. *See id.* at 19.

123. *See* U.S. Admin. on Aging, *supra* note 54.

124. *See infra* Appendix for a summary of the relevant state election laws.

125. The problems associated with ballot design are aptly demonstrated by the Palm Beach County ballot. *See supra* Part I.

A. Accessibility Provisions

Forty-four states have enacted laws relating to accessibility of polling places. All of these laws apply to the disabled, and twenty-four of them apply to the nondisabled elderly. The provisions impose various duties upon the polling places and state election boards.¹²⁶ Five states specifically require that the polling place be accessible by wheelchair.¹²⁷ Thirteen states provide for the availability of absentee ballots for those who are unable to travel to the polling place due to age or disability.¹²⁸ Four states provide for the availability of paper ballots to those who are unable to operate voting machines.¹²⁹ Twenty states require that the polling place be accessible to the elderly and handicapped, with most of these states specifying certain design and construction requirements.¹³⁰ Fourteen states provide either unspecified alternative voting procedures or alternative voting places in lieu of inaccessible polling locations.¹³¹ Seventeen states allow elderly and disabled individuals to cast their votes outside of the voting place.¹³² Two states have special provisions for handicapped parking.¹³³ Three states have provisions allowing elderly or disabled voters to advance to the front of the polling place line.¹³⁴ Lastly, four states require only that the polling places conform to the VAEHA.¹³⁵

126. In addition to statutory duties, states may have common law duties vis-à-vis voters. See, e.g., *Burgess v. City of Shreveport*, 471 So. 2d 690 (La. 1985) (holding that the city had the duty to inspect the polling place to “see if it was reasonably safe for use by all classes of voters” in a case involving an eighty-six-year-old woman who fell and died at a polling place. *Id.* at 693).

127. Alabama, Florida, Kansas, Minnesota, and New Hampshire. See *infra* Appendix.

128. Alabama, California, Kentucky, Louisiana, Maryland, Nevada, New Jersey, New York (only to residents of nursing homes), Pennsylvania, Rhode Island, Tennessee, Vermont, and West Virginia. See *infra* Appendix.

129. Alabama, Connecticut, Iowa, and Wisconsin. See *infra* Appendix.

130. Alabama, Arkansas, Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Rhode Island, Tennessee, Texas, Vermont, Washington. See *infra* Appendix.

131. Arizona, Arkansas, Colorado, Indiana, Louisiana, Maryland, Missouri, Montana, North Carolina, Tennessee, Vermont, Washington, West Virginia, Wisconsin. See *infra* Appendix.

132. Usually, this is done by casting the vote in their cars. California, Hawaii, Idaho, Illinois, Iowa, Kansas, Minnesota, Missouri, Montana, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Vermont, Virginia, West Virginia. See *infra* Appendix.

133. Connecticut and New Hampshire. See *infra* Appendix.

134. Georgia, Louisiana, and Tennessee. See *infra* Appendix.

135. Idaho, Indiana, Michigan, New Mexico, and Virginia. See *infra* Appendix.

B. Assistance Provisions

Forty-nine states have enacted laws allowing assistance for the disabled in actually casting the ballot. Nine of these states also allow assistance to the nondisabled elderly.¹³⁶ In forty-eight states, voters are entitled to bring a person of their choice into the voting booth with them.¹³⁷ In twenty-nine states, the voter may opt to bring one or two election officials into the booth.¹³⁸ Three states provide for election officials only.¹³⁹

There are other forms of assistance that some states make available to elderly and disabled voters that do not involve assistance in casting the ballot. Of these, the most common is a demonstration on how to operate the voting machine, which is provided by nine states.¹⁴⁰

C. Ballot Design Provisions¹⁴¹

All states have statutory provisions regarding ballot design and construction. These provisions, however, vary considerably, in both scope and content. Many of these provisions bear directly on the issues raised by the Palm Beach County butterfly ballot; namely, the or-

136. Alabama, Alaska, Arizona, California, District of Columbia, Kansas, Kentucky, Michigan, and West Virginia. *See infra* Appendix. Provisions that limit assistance to the disabled are typically strictly construed to prohibit assistance to the nondisabled elderly. *See, e.g.*, *Fanara v. Candella*, 640 So. 2d 406, 410 (La. Ct. App. 1994); *NAACP v. Philadelphia Bd. of Elections*, No. 97-7085, 1998 U.S. Dist. LEXIS 8861, at *1, *12 (E.D. Pa. June 15, 1998); *cf. State ex rel Melvin v. Sweeney*, 94 N.E.2d 785, 790 (Ohio 1950) (statute that provides for assistance to the physically disabled cannot be interpreted to provide for assistance to the illiterate).

137. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. *See infra* Appendix.

138. Alabama, Alaska, Arizona, Arkansas, Colorado, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Montana, Nebraska, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Tennessee, Texas, Vermont, Virginia, Washington, and West Virginia. *See infra* Appendix.

139. District of Columbia, Michigan, and Minnesota. *See infra* Appendix.

140. Alabama, Arizona, California, Connecticut, Delaware, New York, Pennsylvania, Rhode Island, and Wyoming. *See infra* Appendix.

141. Every state has numerous ballot design provisions. This section will comment only on those provisions that may be relevant to elderly voters and the controversial Palm Beach County ballot.

der of the candidates' names on the ballot, the number of columns in which candidates' names may appear, and the placement of the punch hole or checkbox.¹⁴² Most states specify the exact order of the candidates' names, usually in terms of party affiliation.¹⁴³ With respect to the number of columns permitted, many states either strictly or conditionally require that the candidates for any given office be listed in only one column.¹⁴⁴ Several states require a specific location for the punch hole or checkbox, for instance, only to the right of the candidate's name.¹⁴⁵ Lastly, most states have specific requirements for font attributes, most commonly for the size of the font.¹⁴⁶

142. See Engelhardt & McCabe, *supra* note 5.

143. See, e.g., DEL. CODE ANN. tit. 15, § 4502(a) (1974) (Democrat followed by Republican); D.C. CODE ANN. § 1-1312(e) (1981) (determined by lot); FLA. STAT. ch. 101.151(3)-(5) (2000) (party which received highest vote for governor in last election, then other major party, then minor parties); GA. CODE ANN. § 21-2-285(c) (1998) (descending order of total votes cast for parties in last gubernatorial election); HAW. REV. STAT. ANN. § 11-115(a) (Michie Supp. 2000) (alphabetical by candidate name); MD. ANN. CODE art. 33, § 9-210(j)(2) (Supp. 2000) (majority major party, then minority major party, then others in descending order of registered voters); NEV. REV. STAT. 293.267(1), (2) (2000) (alphabetical by candidate name); N.H. REV. STAT. ANN. § 656:5(I), (II) (2000) (party which received largest number of votes, then others alphabetically by name); VT. STAT. ANN. tit. 17, § 2472(b) (2000) (alphabetically by name). Some states leave the determination of the order to the discretion of the individual in charge of state elections. See, e.g., IOWA CODE ANN. § 49.31(1) (West 2000); MISS. CODE ANN. § 23-15-367 (1999).

144. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 602(A) (West 1999) (one column); MO. REV. STAT. § 115.237(1) (1997) (one page if possible); N.H. REV. STAT. ANN. § 656:5(I), (II) (2000) (one column); N.Y. ELEC. LAW § 7-106(9) (McKinney 1998) (as many columns as necessary); OHIO REV. CODE ANN. § 3505.10 (Anderson 2000) (one column); OR. REV. STAT. § 254.145(2) (1992) (one column if possible); UTAH CODE ANN. § 20A-6-303(8) (1998) (one column if possible). Some states leave this to the discretion of the individual in charge of state elections. See, e.g., MISS. CODE ANN. § 23-15-367.

145. See, e.g., ME. REV. STAT. ANN. tit. 21-A, § 602(A) (one column); MO. REV. STAT. § 115.237(1) (one page if possible); N.H. REV. STAT. ANN. § 656:5(I), (II) (one column); N.Y. ELEC. LAW § 7-106(9) (as many columns as necessary); OHIO REV. CODE ANN. § 3505.10 (one column); OR. REV. STAT. § 254.145(2) (one column if possible); UTAH CODE ANN. § 20A-6-303(8) (one column if possible). Some states leave this to the discretion of the individual in charge of state elections. See, e.g., MISS. CODE ANN. § 23-15-367.

146. See, e.g., CAL. ELEC. CODE § 13211 (West 1999) (boldface; not smaller than eight point); LA. REV. STAT. ANN. § 18:1259 (B)(1) (West 1989) (fourteen point); NEB. REV. STAT. ANN. § 32-817 (Michie 1998) (boldface); N.C. GEN. STAT. § 163-140(a) (1999) (no larger than ten point); UTAH CODE ANN. § 20A-6-301(1)(j) (1998) (not smaller than ten point); VT. STAT. ANN. tit. 17, § 2472(e)(5) (1982) (ten point); VA. CODE ANN. § 24.2-613 (Michie 2000) (not smaller than twelve point); WIS. STAT. ANN. § 5.51(1) (West Supp. 2001) (not smaller than eight point). Not all states are as specific. See, e.g., ARK. CODE ANN. § 7-5-208(a) (Michie 2000) (plain type); COLO. REV. STAT. ANN. § 1-5-407(1) (West 2000) (same); KY. REV. STAT. ANN. § 117.145(1) (Michie 1993) (same); MINN. STAT. § 204B.36(1) (2000) (capital letters, "easily readable type"); S.D. CODIFIED LAWS § 12-16-2 (Michie Supp. 2000) ("large

V. “To Avoid This Sort of Spectacle in the Future”

Can anything be done to prevent the problems in Palm Beach County from occurring in the future? Should anything be done? Clearly there exists an extensive amount of law aimed at improving the voting process for the elderly and handicapped. But, is it enough?

The three major areas of concern regarding the elderly are accessibility, assistance, and ballot design. The VAEHA and the multitudinous state laws addressing these issues appear to be more than adequate to address the concerns of accessibility that have plagued the disabled and elderly.¹⁴⁷ Yet, more can still be done to achieve complete equal access to the electoral process.¹⁴⁸ First, the mere existence of these laws is no guarantee that they are being enforced.¹⁴⁹ Second, it is unclear whether many of the elderly and disabled are aware of these laws. Third, there may be reluctance on the part of many of these individuals to take advantage of these provisions, due to the attention it brings.

There has been some effort to address these concerns. Senator John McCain, R-Arizona, introduced a bill into the Senate which would amend the VAEHA in several ways.¹⁵⁰ First, the bill provides that “every voter has the right to vote independently in a Federal election.”¹⁵¹ Second, the bill would make the state, as opposed to the local government, the party responsible for the conduct of the elections.¹⁵² Third, it would provide for ballots in a “variety of accessible media,” and for “large type, conspicuously displayed” instructions.¹⁵³ Passage of this bill would certainly go a long way toward increasing access for the elderly and disabled.

type”). Some states leave font attribute determination to the discretion of the Secretary of State. See, e.g., MISS. CODE ANN. § 23-15-367; N.D. CENT. CODE § 16.1-06-05(2)-(5) (1997).

147. See *Report of the National Voter Independence Project*, at <http://www.protectionandadvocacy.com/nation.htm>. This organization conducted a nationwide poll on the access to polling places by the disabled. Included within the report are many accounts of inaccessible polling places.

148. See *id.* The results indicated that “while some progress has been made . . . much work remains to be done before persons with disabilities can be considered to have equal access to the electoral process.” *Id.*

149. See, e.g., *State v. County of Delaware*, 82 F. Supp. 2d 12 (N.D. N.Y. 2000), discussed *supra* text accompanying notes 119–22.

150. See S. 511, 106th Congress (1999).

151. *Id.*

152. See *id.*

153. *Id.*

Similarly, the laws on assistance to voters are sufficient. Virtually every state allows for some sort of assistance in casting a ballot in state elections, and the Voting Rights Act provides the same for federal elections. The one major problem with these laws is that the federal statute does not apply to the nondisabled elderly, and neither do the provisions of forty-one states. Therefore, for the most part, the nondisabled elderly may not receive assistance in casting a ballot. Given the experience with the Palm Beach County ballot, Congress and the states should extend the assistance already provided to the disabled to cover the elderly as well.

Unlike the issues of assistance and accessibility, there are no federal statutes that address ballot design. Accordingly, there is no consistency among states regarding ballot design elements such as number of columns, order of candidates, location of checkboxes, and font attributes. Consistency is further thwarted due to the states having delegated the running of elections to the 3067 counties of the nation.¹⁵⁴ Even to the extent that state statutes do address one or all of these elements, counties are still forced to improvise on many aspects of ballot design.¹⁵⁵ The result is that every county's ballots are different, with some being clear and others being confusing. Additionally, as demonstrated by the Palm Beach ballot, some counties are not even complying with their state's ballot laws. Though Florida requires that the Republican candidate be listed first, followed by the Democratic candidate, and then other parties, the Palm Beach County ballot placed the punch hole for Pat Buchanan ahead of Al Gore.¹⁵⁶ It is clear from the high degree of variation of ballots across the country, the limited state laws on ballot design, and the questionable compliance with state laws by counties, that action needs to be taken to increase the clarity of ballot design, and, thus, the consequential accuracy and reliability of ballot results. This may be accomplished by revision or

154. See Bryan Gruley & Chip Cummins, *America's Dysfunctional Voting System*, WALL ST. J., Dec. 15, 2000, at A1.

155. Clearly, if there is no statutory provision on the order of candidates, for instance, then each county within the state can determine its own order. Even if a state did address all three elements, the counties would still bear the responsibility of determining spacing, layout, font, use of capitals, placement of instructions, size of checkboxes, etc.

156. See FLA. STAT. ANN. §§ 103.021(2), 101.5609(2), 101.191, 101.151 (West 1982); Brief Amicus Curiae of People for the American Way in Support of Appellants at 9, *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (No. SC00-2373).

amendment to state statutes, as well as enactment of federal laws on the subject.

Less than one month after the 2000 election, members of Congress began introducing bills aimed at overhauling “the nation’s antiquated voting system and prevent[ing] a recurrence of the voting count mayhem in Florida.”¹⁵⁷ Stating that “[w]hat occurred in this election must simply never happen again,”¹⁵⁸ Senator Robert Toricelli, D-New Jersey, introduced a bill¹⁵⁹ along with Senator Mitch McConnell, R-Kentucky, providing for a commission to study voting systems and make recommendations to states.¹⁶⁰ Two similar bills were also introduced in the House, one by Representative James Clyburn, D-South Carolina,¹⁶¹ and the other by Representative Thomas Davis, R-Virginia.¹⁶² Representative Peter DeFazio, D-Oregon, introduced yet another bill that was similar but made specific reference to ballot design issues.¹⁶³ Representative Sheila Jackson-Lee, D-Texas, introduced a similar bill in the House, entitled the “Secure Democracy for All Americans Act.”¹⁶⁴ This bill would establish a commission to create uniform standards for polling places that would apply to all states. If passed, the effect that these bills would have is questionable, because they only provide for commissions to discuss the problems, as opposed to any real action. It remains to be seen whether they will be passed, and if so, the extent of their effect on the voting process.¹⁶⁵

Lastly, in recent years, much has been written about alternative voting systems. Currently, there are a variety of voting systems in

157. Associated Press, *Lawmakers Introduce Voting System Reform Bills* (Dec. 5, 2000), at <http://www.fyi.cnn.com/2000/ALLPOLITICS/stories/12/05/voting.reform.ap>.

158. *Id.*

159. The Election Reform Act of 2001, S. 218, 107th Cong. (2001).

160. The bill would also provide up to \$100 million in grants to states that would implement these regulations. See Associated Press, *supra* note 157.

161. H.R. 49, 107th Cong. (2001).

162. H.R. 263, 107th Cong. (2001).

163. See H.R. 57, 107th Cong. (2001). The statutorily created commission would be charged with examining “[b]allot design . . . issues, including the impact of physical design, . . . the feasibility and advisability of setting uniform national ballot design . . . standards, the impact of the language used on ballots, the simplicity of the language, and the use of foreign language ballots.” *Id.* § 3(b)(4).

164. H.R. 60, 107th Cong. (2001).

165. There has been much other related congressional activity in response to the 2000 election. Several joint resolutions have been introduced in the House seeking, by constitutional amendment, to eliminate the electoral college and make election of the President determined by the popular vote. See, e.g., H.R. J. Res. 1, 107th Cong. (2001); H.R. J. Res. 3, 107th Cong. (2001); H.R. J. Res. 5, 107th Cong. (2001).

place. This is due to the fact that states have delegated the “responsibility for running elections to the nation’s 3,067 individual counties.”¹⁶⁶ Because of this, “[t]he result is a jumble of different technologies and methodologies—an invitation to disaster.”¹⁶⁷ The systems in place are as follows: 39% of counties have optical scanners, 20% have punch cards, 15% have lever machines, 13% use paper ballots, and 13% use other methods.¹⁶⁸ All of these methods have some advantages, but they all have major disadvantages.¹⁶⁹ A number of alternative voting technologies have been proposed to improve the current state of voting.¹⁷⁰ The most promising appears to be voting via the Internet.¹⁷¹

Internet voting has already been used to a minor extent.¹⁷² The advantages include: the absence of the need for paper, which should lead to a decrease in ballot problems; lower cost; higher voter turnout; easier voting for the elderly and disabled; and faster election results.¹⁷³ The disadvantages include: lack of voter access to the internet, increased participation of less well-informed individuals due to ease of access, and potential breaches of security or fraud.¹⁷⁴ Despite these disadvantages, the technology seems promising and will continue to be developed and improved.¹⁷⁵

166. Gruley & Cummins, *supra* note 154, at A1.

167. *Id.* See generally Ctr. for Voting & Democracy, *Citizens’ Guide to Voting Equipment* (Nov. 22, 2000), at <http://www.fairvote.org/administration/index.html>.

168. See Gruley & Cummins, *supra* note 154, at A1.

169. See *id.*

170. The electorate is highly supportive of such new technologies. See Information Technology Association of America, *Americans Vote for Election Systems Reform*, at [http://www.ita.org/\(69% say using new technologies for voting would produce more accurate results\)](http://www.ita.org/(69%+say+using+new+technologies+for+voting+would+produce+more+accurate+results)).

171. Others include voting by mail, increased use of absentee ballots, and voting by telephone. See Burck Smith, *Opportunities with New Methods of Voting* (Aug. 23, 2000), at <http://www.fairvote.org/reports/1995/chp6/smith.html>. See generally Pamela A. Stone, *Electronic Ballot Boxes: Legal Obstacles to Voting over the Internet*, 29 MCGEORGE L. REV. 953 (1998) (providing a detailed discussion of internet voting and other alternative voting systems).

172. See Ctr. for the Study of Tech. & Soc’y, *Special Focus on Internet Voting* (Jan. 23, 2001), at <http://www.tecsoc.org/govpol/focusnetvote.htm>.

173. See *id.*

174. See *id.*

175. See *id.*

VI. Conclusion

While the future of voting is uncertain, one thing is clear: the 2000 election has served as an alarm to the electorate. The events in Palm Beach County and the subsequent outcome of the election have unequivocally demonstrated the need for improvement and change. The American electorate cannot, and should not, tolerate a system of voting that is uncertain, unreliable, and capable of twisting the intent of elderly voters.

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