Unfulfilled Promise: Voting Rights for People with Mental Disabilities and the Halving of HAVA's Potential

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I. INTRODUCTION

On October 29, 2002, President George W. Bush signed into law the Help America Vote Act of 2002—an unprecedented and sweeping piece of federal legislation meant to aid the states in their administration of federal elections.[1] The Help America Vote Act of 2002 ("HAVA") was a reaction to the uncertainty of the state administration of the 2000 presidential election and the subsequent *Bush v. Gore* challenges in the judiciary.[2] In the fog of voter distrust during and following the 2000 election, a spotlight was cast on the unexplored and uneven application of state administration of federal elections. After the election, distrust of the proper administration of elections was at an all-time high, various academic studies speculated about the causes of the problems, and the United State Congress inquired into the myriad of issues that were inherent in the state administration of federal elections.[3] The resulting legislation, HAVA, implemented a series of federal guidelines,

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[1] Brandon Fail, HAVA's Unintended Consequences: A Lesson for Next Time, 116 YALE L.J. 493, 493 (2006).

[2] *See generally* Gabrielle B. Ruda, Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act, 31 FORDHAM URB. L. J. 235 (2003).

[3] Daniel P. Tokaji, Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act, 73 GEO. WASH. L. REV. 1206, 1210 (2005) [hereinafter Early Returns].

incentives, and requirements, all under the broad umbrella of improving electoral access and integrity.[4]

In spite of HAVA's goals, HAVA has been subject to widespread criticism.[5] One of the primary pillars of HAVA's framework, which provided federal money to state governments that replaced the outdated voting technologies with newer technologies, has been surprisingly contentious.[6] Initially, the technology spending provision was two-pronged: it intended to solve many of the inaccuracies and uncertainties that were raised by voting methods of the 2000 election, but it also was intended to increase the voting accessibility of certain marginalized communities, especially the physically disabled.[7] Although this provision was a seemingly straightforward application of congressional discretionary federal spending, the voting technology incentives have received criticisms that equal the seemingly more contentious Voter ID and provisional ballot provisions of HAVA.[8] Some commentators have even asserted that the provision has failed to address one of the major the problems that motivated the law's enactment—the accuracy of the new technologies.[9] Yet, authors have not limited their critiques to inaccuracy of the new technology's vote recording and have additionally condemned HAVA for failing to definitively address the formal and practical barriers for physically disabled voters at the polling place.[10]

While many voters with mental disabilities retain their right to vote, their accessibility concerns have been fundamentally ignored under the HAVA system.[11] This Note considers the issues surrounding HAVA's enactment and effectiveness, ultimately illuminating its failure to address the voting rights of people with mental disabilities in a manner that parallels its support of the physically disabled.

Given that the rights of people with mental disabilities are the

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[4] See 52 U.S.C.A. §§ 20901–20906 (West 2014), for HAVA's text. HAVA was codified at 42 U.S.C. §§ 15301–15545 until it was moved to the newly created "Title 52. Voting and Elections" on September 1, 2014. Office of the Law Revision Counsel, *Editorial Reclassification: Title 52, United States Code*, UNITED STATES CODE, http:// http://uscode.house.gov/editorialreclassification/t52/index.html, <http://perma.cc/9PVG-MULH>.

[5] *See* Christina J. Weis, Why the Help America Vote Act Fails to Help Disabled Americans Vote, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 447–55 (2004) (asserting general criticisms of HAVA). *See generally* Fail, supra note 1 (describing HAVA's negative outcomes).

[6] Daniel P. Tokaji, The Paperless Chase: Electronic Voting and Democratic Values, 73 FORDHAM L. REV. 1711, 1734 (2005).

[7] Arlene Kanter & Rebecca Russo, The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852, 852 (2006).

[8] *See* Early Returns, *supra* note 3, at 1215.

[9] *Id.*

[10] Weis, *supra* note 5, at 456.

[11] *Id.* at 446.

central concern of this Note, it is worth briefly defining the contours of the group at the outset of the Note. The term "mental disability" encompasses both cognitive disabilities and mental illness.[12] While cognitive disabilities include any condition that affects mental processes, such as genetic disorders, traumatic brain injuries, or neurological impairments,[13] mental illness and psychiatric disabilities are characterized by changes in thinking, mood, or behavior; people with mental illnesses are generally of normal intelligence.[14] These categories are difficult to use because disabilities are often a swirl of attributes that cannot be cleanly defined.[15] Even intellectual disability, which is considered one of the most significant cognitive disabilities and replaces the term "mental retardation," has a definition that encompasses a spectrum of severity, ranging from mild to profound, with mild individuals often going undiagnosed in society.[16] For the purposes of this Note, the phrase "people with mental disabilities" will cover individuals with intellectual and cognitive disorders as defined by the criteria of the Diagnostic and Statistical Manual of Mental Disorders (DSM-V).[17]

This Note is divided into four sections. Part I has served as an introduction. Part II of the Note explores the pre-HAVA voting framework, the basic issues of the 2000 election, the statutory layout of HAVA itself, and the primary critiques that have been levied against HAVA. Part III serves as the heart of the Note, highlighting the need for federal legislative support for people with mental disabilities as well as proffering several ideas for new legislation to amend HAVA to help it fulfill its potential. Finally, Part IV of the Note serves as a conclusion, summarizing the piece's findings as well as contextualizing the United States' options for the future.

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[12] JOHN PARRY, CIVIL MENTAL DISABILITY LAW, EVIDENCE AND TESTIMONY 55 (2010).

[13] Sally Balch Hurme & Paul S. Appelbaum, Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters, 38 MCGEORGE L. REV. 931, 932 n.4 (2007).

[14] Dep't of Legislative Servs., Office of Policy Analysis, Barriers to Voting: Individuals under Guardianship for Mental Disability (Nov. 2009), http://dls.state.md.us/data/polanasubare/polanasubare_intmatnpubadm/Barriers-to-Voting-Individuals-under-Guardianship-for-Mental-Disability.pdf, <http://perma.cc/Z9R4-V4LE> [hereinafter Barriers to Voting].

[15] Ryan Kelley, Toward an Unconditional Right to Vote for Persons with Mental Disabilities: Reconciling State Law with Constitutional Guarantees, 30 B.C. THIRD WORLD L.J. 359, 367 (2010) (arguing that mental-disability "categorizations, however, cannot be heavily relied upon because a particular impairment may not fit well within one or the other and, oftentimes, problems occur in tandem").

[16] H. CARL HAYWOOD, Broader Perspectives on Mental Retardation, in WHAT IS MENTAL RETARDATION?: IDEAS FOR AN EVOLVING DISABILITY IN THE 21ST CENTURY xvii (Harvey N. Switzky & Stephen Greenspan eds., 2006).

[17] *See generally* THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (Am. Psychiatric Ass'n 5th ed.) (2013).

II. BACKGROUND AND ENACTMENT OF THE HELP AMERICA VOTE ACT

A. Pre-HAVA Statutory Framework

Prior to HAVA's ratification in 2002, the United States Constitution and federal legislation were relatively silent on the state administration of federal elections.[18] The United States Constitution says very little about the administration of federal elections; the Constitution provides simply that:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.[19]

Over time, the Constitution has been interpreted to hand the states the majority of authority in determining their process of electing federal officials.[20]

The states' control of federal elections has not gone without challenge. In addition to the Reconstruction Acts, two significant pieces of federal legislation have imposed some minimal level of federal election uniformity on the states: the 1965 Voting Rights Act (VRA) and its Amendments,[21] which generally sought to combat overt racial discrimination in the voting process[22] and the 1993 enactment of the National Voting Registration Act, which sought to increase registration

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[18] Largely, state and local officials were in charge of running elections, and there was extremely little oversight or federal law to govern them. *See* Daniel P. Tokaji, Teaching Election Administration, 56 ST. LOUIS U. L.J. 675, 677 (2012) [hereinafter Teaching Election Administration].

[19] U.S. CONST. art. II, § 1.

[20] Cook v. Gralike, 531 U.S. 510, 523 (2001) ("To be sure, the Elections Clause grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections."); but see U.S. CONST. amend XII (stating in elections lacking majority, Congress retains the ability to decide the election "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice.").

[21] The Voting Rights Act, Pub. L. No. 89-110, 79 Stat. 437 (codified at 52 U.S.C.A. §§ 10101, 10301, 10501, 10701 (West 2014)).

[22] 52 U.S.C.A § 20501 (West 2014).

and participation among eligible citizens.[23] However, these federal regulations have not been enough.

B. The 2000 Election: Illustrating Gaps in State and Federal Election Law

Despite the varied impact of federal election legislation in the twentieth century, the presidential election of 2000 illuminated the problems that had never been addressed by previous congressional efforts. On the morning of November 8, 2000, the people of the United States awoke to an uncertain future. The outcome of the presidential election between George W. Bush and then-Vice President Al Gore was unclear. Bush was narrowly leading the machine vote tally but Gore was calling for manual recounts of the ballots in four counties.[24] Many eligible citizen-voters were not even certain that their votes had been validly recorded.[25] Eventually, Bush was declared the winner.[26] However, after a series of contested legal decisions in the United States Supreme Court, the legitimacy of that victory was far from unblemished.[27]

In the immediate aftermath, a number of reports scrutinized different aspects of the election's administration, including voting registration practices and the operations of polling places.[28] Nationally, the Census Bureau estimated that over one million voters in the 2000 election did not register votes because of "registration problems."[29] The United States Commission on Civil Rights ("the Commission") found

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[23] *See* Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 467–68 (2008) [hereinafter *Voter Registration*] (additionally, while the NVRA's provision regulated only congressional elections, it effectively changed the process of registration for all elections because it would be too impractical and inefficient to maintain separate voting lists for state and federal elections).

[24] Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 73–74 (2000).

[25] *See* Sun S. Choy & Peter L. Munk, Beyond Political Rhetoric: The Basics of Voter Identification Laws, FOR DEF., Dec. 2012, at 44 ("The election—in which the deciding state of Florida was decided by just 537 votes out of nearly six million cast—exposed the vulnerabilities of our electoral system and offered a sneak-peek into the possible consequences of a compromised election.").

[26] *See* Joseph Carroll, *Seven out of 10 Americans Accept Bush as Legitimate President*, GALLUP, (July 17, 2001), http://www.gallup.com/poll/4687/seven-americans-accept-bush-legitimate-president.aspx, <http://perma.cc/4ALN-R9YQ>.

[27] Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1069 (2007); *see also* Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70, 73–74 (2000); Bush v. Gore, 531 U.S. 98, 104–05 (2000).

[28] Commentators have additionally noted that voter registration was probably the largest source of lost votes in 2000—accounting, by their estimate, for some one and a half to three million of the four to six million lost votes. See Teaching Election Administration, *supra* note 18, at 678–79.

[29] Gerald M. Feige, *Refining the Vote: Suggested Amendments to the Help America Vote Act's Provisional Balloting Standards*, 110 PENN ST. L. REV. 449, 451 (2005).

that thousands of individuals in Florida, who were disproportionately African American, were excluded from voter registration lists.[30]

C. Congressional Response to the Problems of the 2000 Election: The Help America Vote Act of 2002

One of the largest consequences of the 2000 election was the blow to federal election legitimacy in the eyes of the public.[31] A Gallup poll conducted in the aftermath of the 2000 election "six in 10 Americans had little or no confidence in the nation's vote counting."[32] Another study conducted shortly after the 2000 election found that Americans' confidence in the fairness of elections had dropped by 25%.[33] Recognizing that the issues of the 2000 election created sweeping distrust of the electoral process, Congress was spurred to action.

In the years following *Bush v. Gore*, Congress sharply debated the contours of election reform.[34] Republicans and Democrats knew Congress would draft legislation that would enable an electoral partnership between the federal government and state and local election officials to "make it easier to vote and tougher to cheat";[35] however, there was a noticeable tension over the details of this access-versus-integrity debate.[36] To a large degree, these two themes reflected the competing public concerns: disenfranchisement of eligible voters and the necessity of guarding against fraudulent results.[37] On October 29, 2002, HAVA was enacted, incorporating provisions that addressed both concerns.

In its final form, HAVA contained three pillars of new federal

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[30] Early Returns, *supra* note 3, at 1209.

[31] *See* Andrew Kohut, *Public Concern About the Vote Count and Uncertainty About Electronic Voting Machines*, PEW RESEARCH CENTER (Nov. 6, 2006), http://pewresearch.org/pubs/87/public-concern-about-the-vote-count-and-uncertainty-about, <http://perma.cc/X5B8-HJHA>.

[32] *See* Jeffrey Zaino & Jeanne Zaino, *Election by Litigation: The Electoral Process Post*-Bush v. Gore, 62 DISP. RESOL. J. 72, 76 (2007).

[33] *Id.*

[34] *See* David Mark, *With Next Election Only a Year Away, Proponents of Ballot Overhaul Focus Their Hopes on 2004*, 59 CONG. Q. WKLY. 2532, 2532 (2001).

[35] *See* 148 CONG. REC. S10,488 (daily ed. Oct. 16, 2002) (statement of Sen. Bond) (discussing need for change in voting system). For a discussion of the steps Congress took in HAVA to inhibit voter fraud, see Ruda, *supra* note 2, at 246–55 (presenting arguments surrounding identification requirements).

[36] *See* Early Returns *supra* note 3, at 1207 (discussing problems with the 2004 presidential election in Ohio). *See also* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 695 (2006) [hereinafter *The New Vote Denial*] (describing additional concern about the how mandatory the congressional reform should be).

[37] *Id.* at 690.

electoral legislation. First, HAVA included a provision that would require certain first time voters to present an identification card.[38] While the topic of voter identification remains controversial, HAVA's requirements were fairly limited. HAVA restricted its application to citizens who registered to vote by mail on or after January 1, 2003, and had not previously voted in a federal election in a state or local jurisdiction.[39] The requirement did not apply to individuals who, at the time they mailed their registration forms, provided a copy of a photo identification, their driver's license number, Social Security Number, or other proof of name and address, such as a government document, utility bill, or bank statement.[40] The voter ID provision was linked to a requirement that all fifty states implement computerized statewide registration lists, which includes the name and registration of all voting citizens within the state.[41] HAVA regulated these state-based lists, and required that each state's chief election official create agreements with the state motor vehicle agency, through which a unique identification number could be "matched" to verify each voter's identity.[42]

HAVA's second major provision, which was tied to the registration list requirement, mandated that all states implement a provisional voting system allowing voters whose names did not appear on registration lists, to complete a ballot with the vote's validity being contingent upon the later determination of the voter's eligibility.[43] In light of the new identification requirements for first time voters, Congress implemented a measure of "fail-safe voting" that ensured that eligible citizens who failed to bring the proper documentation would still be able to cast their votes.[44] While select states had implemented provisional ballots measures before, HAVA required their availability in all states, even requiring that election officials notify individuals of their entitlement to the provisional ballot.[45]

The final major provision of HAVA provided financial incentives for states to implement new voting technologies.[46] After the 2000 election highlighted the difficulties of punch card ballots, butterfly ballots, and pull-lever ballots, HAVA authorized $325 million to be given to the states that swiftly replaced these antiquated technologies.[47]

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[38] 52 U.S.C.A. § 21083(b) (West 2014).
[39] *The New Vote Denial*, *supra* note 36, at 695.
[40] 52 U.S.C.A. § 21083(b)(2)(A), (d)(2)(B) (West 2014).
[41] *Id.* § 21083(a).
[42] *Id.* § 21083(a)(1)(A)(iii); Early Returns, supra note 3, at 1216.
[43] *Id.* § 21082(a) (West 2014).
[44] *Id.* § 21083(b)(2)(B)
[45] 52 U.S.C.A. § 21082(a)(1).
[46] *Id.* § 20901.
[47] *Id.* § 21041(a).

While HAVA did not prohibit the use of the old technologies, it did place general restrictions on the types of new technologies that had to be purchased to receive federal funds.[48]

Congress wanted to ensure that eligible disabled voters were provided with "the same opportunity for access and participation (including privacy and independence) as for other voters" by providing that funds be allocated to states for "making polling places, including the path of travel, entrances, exits, and voting areas of each polling facility, accessible to individuals with disabilities."[49] Congress also mandated that disabled voters were presented "with information about the accessibility of polling places, including outreach programs to inform the individuals 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" as well as those with "limited proficiency in the English language."[50]

HAVA created the Election Assistance Commission (EAC), the body responsible for overseeing the implementation of HAVA's provisions.[51] Generally, the EAC is not empowered with the "authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government."[52] Yet, aside from the EAC's voluntary guidelines and the basic requirements enumerated above, HAVA delegated most of the details of election reform to state and local officials.[53]

D. Criticisms of HAVA

When President George W. Bush signed HAVA into law on October 29, 2002, he remarked at the event that "[c]itizens of every political viewpoint can be proud of this important law. . . . These measures were carefully considered, and overwhelmingly adopted by the House and Senate. Congress has made a vital contribution to the

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[48] *Id.* § 21081(a).

[49] *Id.* § 21021.

[50] *Id.* Even before HAVA's enactment, several states took some steps toward election reform, mostly focusing on the promise of technological innovation. *See The New Vote Denial*, *supra* note 36, at 696.

[51] *See* 52 U.S.C.A. § 20921 (West 2014).

[52] *Id.* § 20929.

[53] Early Returns, *supra* note 3, at 1207–08.

democratic process."[54] HAVA was characterized during the congressional debate as "the most important voting rights bill since the passing of the Voting Rights Act in 1965" and as "the most important bill of the 107th Congress."[55] Yet, despite the early showering of accolades, in the years since the HAVA's enactment, one court labeled HAVA as a grouping of "clumsy subsections and clauses."[56] While the flurry of critiques has attacked the law from every conceivable angle, the majority of the critiques are reflective; therefore, the critiques can subsequently be categorized in terms of the failure of the legislation's major provisions.[57]

i. Voter Identification and Registration Lists

Some of the strongest critiques of HAVA have concerned the legislation's inclusion of voter identification and registration lists.[58] Initially, it should be noted that the voter identification requirement of HAVA was relatively limited, only imposing strict demands on first time voters who registered by mail.[59] Commentators have highlighted that this narrow federal demand propelled a wave of more stringent voter identification laws because HAVA was an "indication that Congress believes that photo ID is one method of establishing a voter's qualification to vote. . . ."[60] HAVA left many of the details of the implementation of the ID requirement to the states, which encouraged states to pursue their own identification initiatives.[61] A total of fifteen states required voters to present a government-issued photo ID at the polls to have their votes counted in the November 4, 2014 election.[62]

The strongest indictments of HAVA's ID requirement have honed in on the provision's vague wording, and some have stressed its pointlessness. These critiques have focused on the

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[54] President George W. Bush, Remarks by the President at Signing of H.R. 3295 (Oct. 29, 2002).

[55] Richard B. Saphire & Paul Moke, *Litigating* Bush v. Gore *in the States: Dual Voting Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229, 244 (2006) (quoting Members of Congress during floor debate).

[56] Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1171 (11th Cir. 2008).

[57] *See infra* Part II.D.

[58] *See infra* Part II.D.i.

[59] The limited impositions of HAVA reflected one of the legislation's most contentious provisions during the struggle for its passage. *See* Choy & Munk, *supra* note 25. These registration issues were raised largely by Republican lawmakers who were primarily focused on ensuring the integrity of the elections. *See The New Vote Denial*, *supra* note 36, at 695.

[60] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181,193 (2008).

[61] *See* Choy & Munk, *supra* note 25.

[62] Wendy Underhill, Voter Identification Requirements, NATIONAL CONFERENCE OF STATE LEGISLATURES (Oct. 31, 2014), http://www.ncsl.org/legislatures-elections/elections/voter-Id.aspx, http://perma.cc/ZPQ7-6QJ4 [hereinafter Voter Identification Requirements].

identification provision's failure to actually address the voting registration irregularities that were central to the public's legitimacy concerns of the 2000 election.[63] The matching requirement of HAVA's voter identification provision caused profound misunderstanding in the states. Some local officials denied new registrants' votes when they were not able to match the voter data with information in existing databases.[64]

The voter registration databases mandated by HAVA have also been problematic. Commentators have highlighted the "notoriously unreliable" nature of state databases, which are crucial for voter eligibility.[65] While states regularly purge ineligible voters from states databases, a review of the U.S. Department of Justice's data shows that the purging has actually overcorrected and "overwhelmingly focused on compelling states to prune their registration rolls, rather than on protecting eligible voters from wrongful exclusion."[66]

ii. Provisional Ballots

While the voter identification requirement was meant to buttress the integrity aspect of federal elections, the provisional ballot piece was intended to work as a safeguard against any problematic registration issues.[67] Therefore, individuals, who failed to satisfy the HAVA identification requirement or who were not recognized in the HAVA-mandated state registration database could still cast a vote.[68] For example, in the 2008 election, a study in Indiana found that 1.7% of all provisional ballots cast resulted from the lack of a HAVA-related identification, with only approximately one-third of those ballots

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[63] *See* Dan Balz, *Carter-Baker Panel to Call for Voting Fixes*, WASH. POST, Sept. 19, 2005, at A3. In the 2004 election, there were still outcries that the final result was blemished with "[d]isputes over the counting of provisional ballots, the accuracy of registration lists, long lines at some polling places, timely administration of absentee ballots and questions about the security of some electronic voting machines." *Id.*

[64] Estelle H. Rogers & Nicole K. Zeitler, *The Voter Registration Gap: Why it Exists and How to Narrow It*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 239, 261–62 (2012).

[65] *Id.* at 261.

[66] *See Voter Registration*, *supra* note 23, at 478. *See also* Cases Raising Claims Under National Voter Registration Act, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/litigation/recent_nvra.php, <http://perma.cc/3WJ8-KSRT> (listing the DOJ's docket during the Bush and Obama administrations and illustrating the impetus to purge registration lists).

[67] MIJIN CHA & LIZ KENNEDY, MILLIONS TO THE POLLS: PROVISIONAL BALLOTING (2014), http://www.demos.org/publication/millions-polls-provisional-balloting, <http://perma.cc/5YFE-EK8R>.

[68] Voter Identification Requirements, *supra* note 62.

counting as valid votes.[69]

iii. Federalism and the Authority of the EAC

Despite HAVA's minimal legislative impositions on the autonomy of the states, a number of federalism issues were raised as a result of the legislation's enactment.[70] The state-based administration of federal elections has often been touted as a necessary guard against federal actors, allowing for decentralized administration to avoid coordinated fraud, to increase flexibility, and to promote local accountability.[71] However, HAVA's federal requirements have led to an increased number of federal statutory claims in federal courts and,[72] as discussed above, a number of states adopted new voter identification, voter registration, and early voting statutes, to mixed results. Additionally, the federally mandated portions of HAVA have created preemption problems in states that have implemented their own voter identification statutes.[73] The United States Election Assistance Commission, created by HAVA and charged with the implementation of the federal election laws, has also been denigrated. Academics have highlighted that "[t]he EAC was designed to have as little regulatory power as possible."[74] Due to the EAC's limited authority to issue binding regulations, many of the disputes concerning voter registration were pushed into federal courts, cluttering already busy dockets.[75]

iv. Voting Technology

One of the most controversial aspects of HAVA was also the least

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[69] Michael J. Pitts, *Empirically Assessing the Impact of Photo Identification at the Polls Through an Examination of Provisional Balloting*, 24 J.L. & POL. 475, 495 (2008).

[70] Daniel Tokaji & Owen Wolfe, *Baker, Bush, and Ballot Boards: The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 977 (2012) [hereinafter *Baker, Bush, and Ballot Boards*].

[71] Note, *Toward A Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2330–33 (2005).

[72] *Baker, Bush, and Ballot Boards*, *supra* note 70, at 970–71 (noting HAVA has not been challenged on federal grounds, likely because the constitutional challenges to the NVRA concretized Congress' authority to regulate voter registration).

[73] Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1268 (W.D. Wash. 2006).

[74] Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 428 (2004); 52 U.S.C.A. §§ 20929, 20508(a)(2) (West 2014) (indicating the EAC lacks the power to issue binding regulations regarding HAVA's requirements, but can create rules concerning the NVRA's mail registration procedures, a relatively limited field).

[75] *See Voter Registration*, supra note 23, at 474.

intrusive into the federalism system.[76] The funds that the federal government offered through HAVA to state and local governments for abandoning problematic technology and voting methods that compromised the legitimacy of the 2000 election was plagued with issues of its own.[77] States were required to spend the funds by January 1, 2006, or they would have to repay the federal government.[78] While HAVA permitted the states to use the federal funds to acquire new machines through "purchase, lease, or other arrangement," HAVA's four-year timetable encouraged the practice of purchasing election equipment instead of leasing it.[79] This incentive ran counter to the ultimate objective of HAVA's technology provision, which promoted "low levels of investment and innovation in the market for voting machines" and ensured that "future upgrades occur[ed] only infrequently and at great cost to state and local election agencies."[80] More importantly, the adoption of new voting technology has not consistently mitigated the vote-recording errors that it was intended to stop;[81] elections conducted using HAVA-endorsed equipment have continued to experience inaccurate counts, unreliable performance, and other problems from 2005 through 2011.[82]

E. Accessibility as a Goal of Voting Technology

The technology incentives of HAVA were meant to improve the legitimacy of federal elections through a two-pronged approach: first, to increase the accuracy and reliability of the voting systems and second, to improve accessibility to marginalized voters, such as people with disabilities and people who are non-native English-speakers.[83] While commentators have attacked the technological accuracy and reliability of voter systems,[84] HAVA's mandate was well received.[85] However, HAVA did not explicitly specify that jurisdictions must adopt federal

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[76] *See* Fail, *supra* note 1, at 493.

[77] *See id.*

[78] *See* UNITED STATES ELECTION ASSISTANCE COMM'N, FREQUENTLY ASKED QUESTIONS REGARDING APPROPRIATE USE OF HAVA FUNDS 17 (2012), *available at*, http://www.eac.gov/assets/1/workflow_staging/Documents/4712.PDF, <http://perma.cc/9L98-J7S8>.

[79] *See* Fail, *supra* note 1, at 494.

[80] *Id.*

[81] *See* 52 U.S.C.A. § 21081 (West 2014).

[82] Candice Hoke, *Voting Technology and the Quest for Trustworthy Elections*, in AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS 321, 324–28 (2012).

[83] *See The New Vote Denial*, *supra* note 36, at 696.

[84] *See* Weis, *supra* note 5, at 422–23.

[85] *See id.*; Kanter & Russo, *supra* note 7, at 852–53 (stating that the HAVA mandate exceeds ADA minimum requirements for accessibility).

accessibility standards and, ultimately, there is some degree of consensus that even more could have been done.[86]

i. Physical Accessibility under HAVA

Following the 2000 presidential election, the United States public scrutinized the number of formal and informal impediments to casting an effective vote, including the sheer number of obstructions for eligible voters with physical disabilities.[87] At the time of the 2000 election, although almost every state government had enacted provisions that addressed disabled voter accessibility, each of the states' protections varied in their scope and efficacy.[88] HAVA included three separate sections that were meant to address these divergences in accessibility protection.[89] In Title I, discussed *infra* Part II.C, Congress provided federal grant money for states to upgrade their imperfect voting technology in an attempt to limit the use of punch-hole and pull lever machines that were especially problematic for disabled voters with physical disabilities. Title II demanded that federal payments to states be used to

> mak[e] 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.[90]

Title III created broad standards for new voting technologies.[91] HAVA additionally and explicitly maintained the previous federal statutory framework for voting accessibility under the Voting Rights Act, Voter Accessibility for the Elderly and Handicapped Act, National Voter

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[86] See generally Herbert E. Cihak, The Help America Vote Act: Unmet Expectations?, 29 U. ARK. LITTLE ROCK L. REV. 679 (2007).

[87] *See The New Vote Denial, supra* note 36, at 696.

[88] *See* Report No. GAO-02-107, Voters with Disabilities: Access to Polling Places and Alternative Voting Methods 20–22, U.S. GEN. ACCOUNTING OFFICE (Oct. 2001), http://www.gao.gov/new.items/d02107.pdf, <http://perma.cc/WUW3-E7K4>.

[89] *See* 52 U.S.C.A. §§ 21021(b), 21081(a)(3) (West 2014). *See also* Weis, *supra* note 5, at 443.

[90] 52 U.S.C.A. § 21021(b) (West 2014) (providing for informational access). *See also* Kanter & Russo, *supra* note 7, at 853; GAO Report-09-941, Voters with Disabilities: Additional Monitoring of Polling Places Could Further Improve Accessibility, U.S. GEN. ACCOUNTING OFFICE (September 2009), http://www.gao.gov/assets/300/296294.pdf, http://perma.cc/24HB-8CLU [hereinafter Additional Monitoring].

[91] *See* 52 U.S.C.A. § 21081(a)(3) (West 2014).

Registration Act, and Americans with Disabilities Act.[92] Due to these changes, institutional actors from the disabilities rights and civil rights communities as well as state election officials have praised the legislation as a major piece of civil rights legislation.[93]

Since the passage of HAVA, approximately $350 million combined has been disbursed to 50 states and the District of Columbia to improve equipment, technology, and overall accessibility.[94] A 2008 report by the Government Accountability Office recognized that the promise of HAVA for voters with disabilities had been fulfilled to an extent, citing the "increase in state provisions and reports of practices to improve the accessibility of the voting process" and "a number of reported efforts [have been] taken to improve voting access for people with disabilities," including provisions for voting room accommodations.[95] Moreover, the EAC has continued to support the accessibility of voters by providing guidelines for poll workers to aid voters with disabilities, "encourag[ing] [voters with physical disabilities] to use . . . assistive technology in addition to the accessible voting system" and hiring disabled individuals as poll workers.[96] The EAC has also held a roundtable with the conference's central consideration being how to remove the remaining Election Day impediments to voters with disabilities.[97] Additionally, in 2010, the EAC announced the Accessible Voting Technology Initiative, allotting $7 million to support research of transformative technologies and approaches to facilitating eligible voter accessibility.[98]

ii. Minor and Major Critiques of HAVA's Physical Accessibility Provisions

In spite of the various forms of electoral progress initiated by

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[92] *Id.* § 21145.

[93] *See, e.g.*, 148 CONG. REC. S10488-02 (daily ed. Oct. 15, 2002) (noting 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).

[94] GAO Report-08-442T, *Elderly Voters: Some Improvements in Voting Accessibility from 2000 to 2004 Elections, but Gaps in Policy Implementation Remain*, 18 U.S. GEN. ACCOUNTING OFFICE (July 31, 2008), http://www.gao.gov/new.items/d08442t.pdf, <http://perma.cc/L7EQ-K4US>.

[95] *Id.*

[96] Election Management Guidelines: Accessibility, UNITED STATES ELECTION ASSISTANCE COMM'N 191 (2010), http://www.eac.gov/assets/1/Documents/EMG%20chapt%2019%20august%2026%202010.pdf, <http://perma.cc/R6XV-64XT>.

[97] EAC Addresses Technology Challenges Facing Voters with Disabilities, UNITED STATES ELECTION ASSISTANCE COMM'N (2010), http://www.eac.gov/eac_addresses_technology_challenges_facing_voters_with_disabilities/, <http://perma.cc/GPM2-FWCU>.

[98] 2010 Accessible Voting Technology, UNITED STATES ELECTION ASSISTANCE COMM'N (2010), http://www.eac.gov/payments_and_grants/2009_accessible_voting_technology_initiative.aspx, <http://perma.cc/NRR7-V88W>.

HAVA, the disabilities rights and civil rights had mixed reactions.[99] The primary critique of HAVA's accessibility provisions has targeted the indefinite nature of some of the legislation's language and requirements, finding them to be unduly vague and, therefore, fundamentally unhelpful.[100] Although HAVA contained references to the blind and visually-impaired, one of HAVA's most obvious statutory omissions was its failure to define "disability" for federal purposes, leading to the possibility of overlooking people with disabilities.[101]

While some have noted that HAVA's language could look to the statutory definitions of the past, these "disability" definitions offer little guidance or support.[102] In HAVA's final provision, the legislation states that it is not intended to restrict or supersede the purposes of the federal legislation that has preceded it.[103] As Arlene Kanter and Rebecca Russo, professors at the Syracuse Center on Human Policy, Law, and Disability Studies, stated, "[I]t seems reasonable that if the plan meets the ADA's accessibility guidelines, it would also comply with HAVA's accessibility requirements."[104] Therefore, the question is raised: did HAVA's undefined terms of accessibility compliance actually change the law at all or was it merely a re-articulation of past standards?

As a result of this lack of clarity and apparent lack of a change in definition, commentators have advocated for a new nationwide definition of "disability" that sweepingly encompasses the spectrum of life differences and difficulties that disabled individuals face in the electoral context.[105] In its enactment, HAVA's vague language reflected a fear that a federally mandated accessibility standard would fail to take into the account the diversity of the fiscal burdens on state financial situations and the logistical impositions on local county administrations.[106] Yet, from the outset of HAVA's consideration, members of the disability rights community cautioned Congress that without minimum standards,

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[99] Weis, *supra* note 5, at 444. While this critique may be true, it misses the broader point of HAVA's legislative purpose.

[100] *Id.* at 424.

[101] *See* Help America Vote Act of 2001: Hearing on H.R. 3295 Before the H. Comm. on the Judiciary, 107th Cong. 13–15 (2001) (statement of James C. Dickson, Vice President of Governmental Affairs, American Association of People with Disabilities). [hereinafter House Judiciary Hearing]; Weis, *supra* note 5, at 447.

[102] *See* Weis, *supra* note 5, at 448.

[103] 52 § U.S.C.A. 21145 (West 2014).

[104] Kanter & Russo, *supra* note 7, at 854.

[105] *See* Weis, *supra* note 5, at 450 (advocating for the inclusion of the disability rights community in the process of addressing accessibility).

[106] For example, the Registrar of Los Angeles explained that California could not adopt a uniform system due to the variation of requirements between jurisdictions, stating, "one size does not fit all." He cited in his testimony the fact that in Los Angeles County more ballots were cast "than in 41 of the individual States of the United States." Federal Election Practices and Procedures: Hearing Before the S. Comm. on Governmental Affairs, 107th Cong. 97, 94 (2001) (testimony of Conny B. McCormack, Registrar/Recorder of Voters, Los Angeles).

states, lacking guidance, would create "fifty different standards defining access to voting systems and polling places . . . . [while the] manufacturers of voting systems need one clear set of standards to design and build to."[107] By providing minimum standards, HAVA could have maintained a balance between rigid accessibility requirements and some state flexibility, aiming for a low, but significant, bar so that no impossible burden for states was created.[108]

Despite these critiques, HAVA's provisions seem to have had an overall positive impact on the accessibility of elections to individuals with physical disabilities. Between the presidential elections in 2000 and 2008, forty-three states added polling place accessibility standards.[109] In 2010, there was no significant difference in voter turnout between employed people with and without disabilities,[110] there was almost no registration gap,[111] and the overall turnout rate of disabled individuals in the 2010 midterms was only three percent lower than non-disabled individuals.[112]

Yet, while HAVA emphasized physical accessibility and privacy and independence for voters with visual impairments, it contained one major omission: the statute fundamentally failed to address the accessibility concerns of the people with mental disabilities.[113] In limiting its provisions to the rights of the people with physical disabilities, the legislation reflected a long-standing tradition of failing to consider the voting rights of persons with mental disabilities. Academic literature "has traditionally paid little attention to the effect that cognitive disabilities have on citizens' abilities to exercise their voting rights, and efforts to make voting accessible to persons with disabilities have focused almost exclusively on issues of physical accessibility."[114] Below, this gap in the literature is addressed.

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[107] *See* House Judiciary Hearing, *supra* note 101 (testimony of James C. Dickson, Vice President of Governmental Affairs, American Association of People with Disabilities).

[108] Weis, *supra* note 5, at 451–52 (calling for HAVA funding that matches the original mandate, which would enable state compliance with the legislation's requirements).

[109] Additional Monitoring, *supra* note 90.

[110] Dr. Lisa Schur & Dr. Douglas Kruse, Disability, Voter Turnout, and Polling Place Accessibility, Presentation to the Board of Advisors of United States Election Assistance Commission, June 7, 2011, available at http://www.eac.gov/assets/1/Documents/Rutger's%20-%20Disability,%20Voter%20Turnout,%20and%20Polling%20Place%20Accessibility.pdf, <http://perma.cc/D6LR-9RBV>, slide 8: "Further Breakdowns of Voter Turnout."

[111] *Id.*, slide 10: "Disability Registration Gap."

[112] *Id.*, slide 5: "Estimated Turnout Based on Census Data."

[113] Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1457 (2007).

[114] Nina A. Kohn, *Cognitive Impairment and the Right to Vote: Rethinking the Meaning of Accessible Elections*, 1 CAN. J. OF ELDER L. 29, 30 (2008).

III. DEFINING THE VOTING RIGHTS OF PERSONS WITH MENTAL DISABILITIES: HAVA'S MISSED OPPORTUNITY

At the outset, HAVA's omission of mental disability provisions may seem like an innocuous shortcoming, but a closer inspection of demographic trends reveals that HAVA's failure to include accessibility provisions for persons with mental disabilities was a missed opportunity to anticipate and prevent the need for future legislation. Currently, approximately 30% of voters with mental disabilities actually show up at the polls, representing the lowest voter turnout of all of the major disability groups.[115] Moreover, according to the U.S. Census Bureau, between 2000 and 2030, the number of United States citizens that are sixty-five or older will approximately double from around 35 million to 70 million, when they will account for 20% of the population.[116] However, the effects of societal aging will be more immediate than that; by 2020, the U.S. Census approximates that there will be 54.6 million individuals in the United States that are sixty-five or older, accounting for approximately 16% of the population.[117] This increase in the median age will likely correlate with an increase in the number and percentage of individuals with mental restrictions and disabilities, as 7%–8% of individuals aged 65 and older have severe mental disabilities.[118] While addressing problems of voter eligibility and accessibility, the Legislature should have also addressed the problems associated with the aging of baby boomers years before it will inevitably demand a clearer solution from the federal legislature and judiciary.

A. Voting with a Mental Disability in America

To consider the manner in which HAVA could have addressed the gaps in voting rights for people with mental disabilities, it is crucial to understand the historical relationship between voting rights and citizens with mental disabilities. At the outset, it should be stated that individuals with intellectual and developmental disabilities have been disenfranchised through two distinct methods: first, disenfranchisement

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[115] Lisa Schur & Meera Adya, *Sidelined or Mainstreamed? Political Participation and Attitudes of People with Disabilities in the United States*, SOC. SCI. Q., July 2012, at 21 [hereinafter *Sidelined*].

[116] WAN HE ET AL., CURRENT POPULATION REPORTS: 65 + IN THE UNITED STATES 12 (2005), http://www.census.gov/prod/2006pubs/p23-209.pdf, <http://perma.cc/8V6V-T9Y7> [hereinafter CURRENT POPULATION REPORTS].

[117] *Id.* at 12–13

[118] *Id.* at 59.

occurs as a result of laws that explicitly deny individuals with mental disabilities the right to vote; second, as with individuals with physical disabilities, there are denials that are implicit in the demands of voting that result from unintended barriers, such as the lack of polling place accommodation.[119] Most historical perspectives of the disenfranchisement of voters with mental disabilities focus on the affirmative and explicit denial of the right to vote.[120]

i. Historical Treatment of Voters with Mental Disabilities in the United States

As with other voting qualifications, discrimination against people with mental disabilities has largely been the prerogative of the states.[121] Beginning in the nineteenth century, there was a wave of state-sponsored discrimination against voters with mental disabilities.[122] Prior to 1820, only two state constitutions included language that disenfranchised individuals with mental disabilities.[123] Yet, by 1880, eleven more states adopted constitutional provisions prohibiting those with some mental disability, however defined, to vote. Many of these were Southern states that wrote these provisions into their constitutions following the Civil War.[124] As new states entered the Union with constitutions that contained disenfranchising language, the existing states continued to amend their constitutions to exclude citizens with disabilities from voting.[125] By 1960, thirty-nine out of the fifty states had provisions in their constitutions that contained exclusionary language.[126]

The history of the disenfranchisement of people with mental disabilities in the United States until 2000 reflects the country's changing attitudes considering individuals with mental disabilities over time.[127] Historically, states seemed to adopt laws to disenfranchise those with mental disabilities for two main reasons.[128] First, those in power,

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[119] Colker, *supra* note 113, at 1449–51.

[120] *See infra* Section III.A.i.

[121] Kay Schriner et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 446 (2000).

[122] KAY SCHRINER & LISA OCHS, "NO RIGHT IS MORE PRECIOUS": VOTING RIGHTS AND PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 3 (2000), http://ici.umn.edu/products/prb/111/111.pdf, <http://perma.cc/3GFG-98XN> [hereinafter NO RIGHT].

[123] *Id.* (explaining that Maine disenfranchised those "under guardianship" and Vermont disenfranchised those that were not "quiet and peaceable").

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] NO RIGHT, *supra* note 122, at 3–4.

[128] *Id.* at 3.

concerned about the integrity of elections, believed that they needed to ensure that voters were morally and intellectually capable of voting.[129] However, while the debate around the intellectual and moral capacity of voters primarily centered around women and African-Americans, it is likely that the states' adoption of disability-centric exclusions was a political consequence of concerns about the persons with mental disabilities' capacity to intelligently, and thus legitimately, vote.[130]

Second, in the nineteenth century, "idiocy" and "insanity" began to be recognized as a social and political concern.[131] In the mid-to-late nineteenth century, United States society viewed "idiocy" and "insanity" with a swirl of contradictory feelings, combining pity, concern, and fear, with societal sympathy reflecting the mentally disabled community's growing visibility in society.[132]

However, since the 1960s, some states have amended their founding documents to abandon, or at least scale back, language that excluded individuals with mental disabilities from voting.[133] In 1974, Kansas amended its constitution, which then prohibited voting by "persons under guardianship, *non compos mentis*, or insane," to only exclude individuals who were diagnosed as mentally ill.[134] Also in 1974, the Louisiana legislature amended its constitution to permit, rather than require, disqualification of "idiots and insane persons" and those under guardianship.[135] Oklahoma removed a clause from its constitution in 1978 that prohibited "any idiot or lunatic" from voting, shifting to exclusively allow its legislature to demark the bounds of voting rights.[136] Finally, and most recently, Idaho dismantled legislation that disenfranchised voters that were "under guardianship, idiotic[,] or insane" in the late 1990s.[137]

While schools for individuals with mental disabilities were developed and legislatures created commissions to advise legislators on disability policy, there was also an increased stigmatization of the group.[138] It is likely that this view of individuals with mental disabilities as "others" affected the policymakers' perceptions as laws were crafted concerning the right to vote.[139] Laws that disenfranchised individuals

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[129] *Id.*
[130] *Id.*
[131] *Id.* at 4.
[132] NO RIGHT, *supra* note 122, at 4.
[133] *Id.* at 3.
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] NO RIGHT, *supra* note 122, at 3.
[138] *Id.*
[139] *Id.* at 4.

who were mentally disabled were justified on the grounds that mentally "incompetent" people could not retain information, weigh details, and make calculated decisions about the vote; the thought was that democracy was just too complicated for their "simple" minds.[140] People believed that individuals with diminished mental capacity did not possess the ability to consent; therefore, their participation in the formation of government was unnecessary.[141] Moreover, legislators likely reasoned that persons with mental disabilities often have guardians whose one vote would protect their own interests, and by proxy, protect the interests of their ward.[142] In this way, the lawmakers reasoned that they could maintain the integrity of elections while not abandoning the interests of those "unfortunate" disabled individuals in the political wilderness.[143]

ii. Statutory and Constitutional Protection of the Voting Rights of Persons with Mental Disabilities

As the twentieth century progressed, some states chose to abandon their constitutional disenfranchisement against individuals with mental disabilities.[144] In 1982, the United States government amended the 1965 Voting Rights Act to allow citizens with disabilities to bring a person of the voter's choice to vote, provided that the choice-individual is not "the voter's employer or agent of that employer or agent of the voter's union."[145] The Voting Accessibility for the Elderly and Handicapped Act of 1984 "guarantee[d] the right to vote in federal elections," but as discussed above, defines persons with disabilities narrowly as only those with a "temporary or permanent physical disability," which was little or no help to those with mental disabilities.[146] However, the ADA requires

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[140] *See id.* (indicating that there were also concerns about moral integrity of individuals with mental disabilities).

[141] Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87, 103 (2009). *See also* Kay Schriner, *The Competence Line in American Suffrage Law: A Political Analysis*, 22 DISABILITY STUD. Q. 61 (2002), *available at* http://www.dsq-sds.org/article/viewFile/345/438, <http://perma.cc/ARW8-WWVD> (Some legislators felt that they were sheltering individuals with mental disabilities from the difficulties of political participation, with one delegate at Louisiana's constitutional convention arguing, "[w]hat we seek to do is undertaken in a spirit, not of hostility to any particular men or set of men, but in the belief that the States should see to the protection of the weaker classes.").

[142] *See* NO RIGHT, *supra* note 122, at 4.

[143] *Id.*

[144] *See supra* Section III.A.i.

[145] 52 U.S.C.A. § 10508 (West 2014).

[146] *See* NO RIGHT, *supra* note 122, at 4.

all state and local public institutions make "reasonable modifications to rules, policies, or practices" to avoid disability discrimination in programs, services, and activities.[147]

While the federal laws primarily guard against physical barriers, as opposed to mental barriers, the laws are emblematic of a general federal-policy stance that attempts to include those with disabilities in the electoral process.[148] Yet, this federal trend of protecting people with disabilities runs counter to the overall system of state-based affirmative disenfranchisement of those with mental disabilities.[149] This tension has raised questions of the constitutionality of states excluding individuals with mental disabilities in their state constitutional and statutory provisions.[150]

Generally, courts have determined that the disenfranchisement of individuals with mental disabilities, like other state electoral laws, is an autonomous area for the states.[151] The Supreme Court recognized in *Bush v. Gore* that the right to vote is a fundamental right, albeit conditional, because "'[o]nce the franchise is granted to the electorate,'" a state cannot exclude qualified citizens from participating.[152] Yet, constitutional doctrine is somewhat complex when considering state-based exclusions. A series of Supreme Court cases has held that state statutes that restrict voting access are presumptively unconstitutional, subject to "exacting judicial scrutiny"[153] and only valid if "the exclusions are necessary to promote a compelling state interest."[154] Notably, the Supreme Court has refused to accept laws that restrict the franchise based upon *how* voters make their choices.[155] Therefore, the "mere fact that some citizens labor under cognitive impairments that preclude them from casting their ballots in optimally intelligent ways cannot by itself justify disenfranchisement."[156] Yet, the Court has also noticed that states have a compelling interest to preserve the integrity of its election process and "preserve the basic conception of a political community."[157] Consequently, states have been free to restrict voting rights based on

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[147] 42 U.S.C. § 12131(2) (2012).

[148] *See* NO RIGHT, *supra* note 122, at 4.

[149] *Id.*

[150] *Id.* at 5.

[151] *See* Hurme & Appelbaum, *supra* note 13, at 931–32.

[152] Bush v. Gore, 531 U.S. 98, 104–05 (2000) (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966)). *See also* Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 923–24 (2007).

[153] Kramer v. Union Free Sch. Dist., 395 U.S. 621, 628 (1969). *See also* Dunn v. Blumstein, 405 U.S. 330, 360 (1972); *Harper*, 383 U.S. at 666.

[154] *Kramer*, 395 U.S. at 627.

[155] Carrington v. Rash, 380 U.S. 89, 94 (1965) (citing Schneider v. State, 308 U.S. 147, 161 (1939)).

[156] Karlan, *supra* note 152, at 924.

[157] *Dunn*, 405 U.S. at 344.

other factors.[158] Ultimately, therefore, the constitutional analysis of restrictions on the voting rights of people with mental disabilities will likely consider whether the state restrictions are narrowly tailored to exclude only individuals who lack the capacity to cast a vote that is "meaningful" to them.[159]

While commentators have considered whether some groups of individuals with mental disabilities, namely older voters, could find voting refuge in the Twenty-Sixth Amendment, which expressly prohibits disenfranchisement "on account of age," it is unlikely that the amendment would offer true protection.[160] The Twenty-Sixth Amendment structurally mirrors the Fifteenth Amendment, which prohibits disenfranchisement on the basis of race.[161] Yet, courts have found that the Fifteenth Amendment does not reach facially neutral statutes that lack discriminatory intent but have an adverse impact on certain racial groups.[162] Consequently, because of the structural similarities between the Fifteenth and Twenty-Sixth Amendments, it is likely that courts would similarly interpret the Twenty-Sixth Amendment to only invalidate state statutes that expressly subject elderly citizens to tests that were not applied to younger voters but would not strike down statutes that had an adverse impact on elderly voters, without a finding of discriminatory intent.[163] Additionally, it should be noted that the constitutional right to vote is a negative right, protected only against state interference, and "[i]t provides no additional guarantee of assistance and imposes no duty to assist."[164] Consequently, "to the extent that private acts or omissions are the real barrier[s] to effective participation by cognitively impaired individuals, the Constitution offers little self-executing protection."[165]

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[158] Karlan, *supra* note 152, at 920.

[159] *See generally* Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644 (1979). *See also* Karlan, *supra* note 152, at 925–26 ("Once voting is understood to be not only a liberty interest but a fundamental one, courts are likely to insist that any deprivation of the right to vote be accomplished only through procedures that satisfy the three-part procedural due process calculus of Mathews v. Eldridge. Thus, rather than treating the category of mental disabilities as a unitary concept authorizing the disenfranchisement of all individuals who have any degree of disability, courts may well insist that states develop clear procedures for deciding which individuals can be prohibited from voting.").

[160] U.S. CONST. amend. XXVI. *See* Karlan, *supra* note 152, at 926–28.

[161] *See supra* note 160; U.S. CONST. amend. XV.

[162] *See, e.g.*, Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (concluding that changing city boundaries to eliminate minority voters is unconstitutional); Lane v. Wilson, 307 U.S. 268 (1939) (holding that an alternative to a "grandfather clause" is invalid under the Fifteenth Amendment because the alternative operated unfairly against the class that the amendment was meant to protect); Guinn v. United States, 238 U.S. 347 (1915) (holding that an Oklahoma grandfather clause was void because it violated the Fifteenth Amendment).

[163] Karlan, *supra* note 152, at 926–27.

[164] *Id.* at 928.

[165] *Id.* at 924.

iii. Barriers to Voters with Mental Disabilities in the Modern Era

The constitutional deference to state autonomy has yielded an awkward result; while federal laws have evolved to provide increasing levels of umbrella support to disabled groups,[166] states have remained relatively staunch in their disenfranchisement of persons with mental disabilities.[167] A limited number of states have mirrored the federal trend by removing constitutional disenfranchisement provisions entirely or making them permissible, rather than mandatory.[168] However, the states have been generally reticent to initiate change.[169] Currently, "[o]nly ten states permit citizens to vote" regardless of their diagnosed mental disability.[170] Comparatively, forty-four of the fifty states have either statutory or constitutional provisions that permit disenfranchisement for mental disability, using terminology such as "idiot," "insane," "lunatic," "mental incompetent," "mentally incapacitated," "unsound mind," and "not quiet and peaceable."[171] Moreover, a majority of states use these categories, which do not reflect the nuance of mental disability, to actively deny people voting rights.[172] As a result, the state-based definitions of mental incompetency are vague and unhelpful,[173] and therefore, are liable to arbitrary and inconsistent application.

Additionally, individuals with mental disabilities have received little federal protection despite the broader trend of protecting marginalized communities—such as individuals with physical disabilities—from state and local intolerance.[174] While the federal government has implemented the ADA, it has also allowed states to

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[166] *See* The Americans with Disabilities Act and Other Federal Laws Protecting the Rights of Voters with Disabilities, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV. (2014), http://www.ada.gov/ada_voting/ada_voting_ta.htm, <http://perma.cc/VDH8-G96J>.

[167] See State Laws Affecting the Voting Rights of People with Mental Disabilities, BAZELON CENTER FOR MENTAL HEALTH LAW (2012), http://www.bazelon.org/LinkClick.aspx?fileticket=szZrfSzI8U0%3d&tabid=543, http://perma.cc/92Q6-QJ2Z [hereinafter State Laws].

[168] *See id.*

[169] Colker, *supra* note 113, at 1453–57.

[170] *Id.* at 1451. *See also* Karlan, *supra* note 152, at 930 ("A number of states have enacted various provisions explicitly dealing with voting by individuals in nursing homes and other institutional settings.").

[171] *See* Schriner, *supra* note 121, at 439.

[172] *See also* Hurme & Appelbaum, *supra* note 13, at 957. *See generally* State Laws, *supra* note 167.

[173] *See* Hurme & Applebaum, *supra* note 13, at 941–43 (considering judicial interpretation of the phrases). *See also* FELICITY CALLARD, ET AL., MENTAL ILLNESS, DISCRIMINATION, AND THE LAW: FIGHTING FOR SOCIAL JUSTICE 63–64 (2012) [hereinafter CALLARD].

[174] *See* Schriner, *supra* note 121, at 438–39 (discussing how federal and state laws have been developed to aid access for voters with temporary and permanent disabilities but many state laws continue to restrict the vote for those with mental incapacities).

preserve some discriminatory and disenfranchising laws.[175] Therefore, the broad federal provisions that have included "disability" protections have not protected the voting rights of people with mental disabilities.[176] Seemingly, the federal government has categorized laws that disenfranchise people with mental disabilities as laws that "matter,"[177] with the NVRA even explicitly preserving the right of the states to disenfranchise voters "by reason of criminal conviction or mental incapacity."[178]

Some federal courts have protected the limited voting rights of individuals with mental disabilities. In 2001, prior to the enactment of HAVA, a federal district court in Maine found that a state law that categorically disenfranchised those under guardianship by reason of mental illness violated the Equal Protection Clause because this qualification was an inappropriate measure of the capacity to vote.[179] In *Doe and the Disability Rights Center of Maine v. Rowe*, three women with psychiatric disabilities argued that the probate court, which placed the women under guardianship orders, did not specifically consider their capacity to vote as a distinct part of the guardianship.[180] Although one woman received a modification to her guardianship order that allowed her to vote, another woman's motion to modify her guardianship was denied, and the third had reason to believe her motion would likewise be denied. Because of that, all three women challenged the state's interpretation of its Constitution's "prohibition on voting by persons under guardianship due to mental illness."[181] The federal court initially found that because the probate court failed to ensure "uniformly adequate notice regarding the potential disenfranchising effect of being placed under guardianship," it violated the women's procedural due process.[182] Additionally, the federal court noted that the guardianship order possibly violated the Equal Protection Clause because guardianship for reasons of mental illness "cannot serve as proxy for mental incapacity with regards to voting."[183] Yet, this substantive argument has yet to gain real traction

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[175] *See id.*

[176] *See id.* (listing federal voting protections—which primarily protect physical disabilities—and contrasting them with state voting qualifications, which frequently use terms like "mentally incapacitated," "unsound mind," and "not quiet and peaceable" to disqualify voters).

[177] *See id.* at 439 (listing state voter qualifications as a type of distinction that Americans tend to uphold in the face of "broad federal antidiscrimination protections such as the ADA").

[178] 52 U.S.C.A. § 20507(a)(3)(B) (West 2014); Schriner, *supra* note 121, at 446.

[179] Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001). *See also* Bindel, *supra* note 141, at 90 ("The status of the right to vote as 'fundamental' used to reliably trigger strict scrutiny for Equal Protection voting rights claims. But in recent years courts have substituted a 'flexible' standard that compares the burdens a law imposes on voters with the state's justifications for the law.").

[180] *Doe*, 156 F. Supp. 2d at 39–40.

[181] *Id.* at 45.

[182] *Id.* at 50.

[183] U.S. CONST. amend. XIV § 1; id. at 55.

because it solely illuminates the necessity of specifically addressing voting rights during guardianship proceedings.[184]

Currently, eighteen states "specifically provide for judicial determination" of an individual's capacity to vote.[185] In 2007, the Eighth Circuit Court of Appeals found that a Missouri law that categorically disenfranchised citizens under court-ordered guardianship due to mental incapacity did not violate the Equal Protection Clause.[186] The court highlighted that the state prohibition was not an absolute ban on people under guardianship because the "Missouri probate courts retained the authority to preserve a ward's right to vote."[187] Consequently, state laws that disenfranchise those under guardianship are allegedly constitutional so long as the guardianship proceedings actively consider these voting rights.

The greatest source of exclusion of voters with mental disabilities does not stem from formal state policies and procedures, but rather is the result of the informal barriers that are implicit in the voting process.[188] Voters with disabilities often require affirmative accommodations to overcome the registration and vote-casting impediments to effectively cast their votes. Stanford University law professor Pamela S. Karlan, writes:

> [Voters with cognitive impairments] may be unable to read or write, and thus may require assistance to understand the ballot and indicate their choices. . . . [T]hey may require additional assistance in getting to the polls or in obtaining and returning absentee ballots. The absence of sufficient affirmative accommodations may preclude their full participation. Therefore, it is quite plausible to hypothesize that more individuals with cognitive impairments are unable to vote because of governmental failures to act than because of explicit disenfranchising policies.[189]

The common problems of "undervoting" and "overvoting" illustrate the unduly complex nature of electoral ballots, and it is likely that these designs have a more significant impact on voters with mental disabilities.[190] Despite these practical barriers, researchers have noted

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[184] *Doe*, 156 F. Supp. 2d at 50.

[185] Jennifer K. Davis, *Competency and Voters with Psychiatric Disabilities: Considerations for Social Workers*, 39 J. OF SOC. & SOC. W., Sept. 2012, at 51 (2012) [hereinafter Davis].

[186] U.S. CONST. amend. XIV, § 1; Mo. Prot. & Advocacy Servs., Inc. v. Carnahan, 499 F.3d 803, 812 (8th Cir. 2007).

[187] *Carnahan*, 499 F.3d at 809.

[188] Karlan, *supra* note 152, at 923.

[189] *Id.*

[190] Kohn, *supra* note 114, at 42.

that the types of [assistive technology] that exist currently to address these impairments are somewhat limited."[191]

While researchers have noted that basic technological advancements such as phone-based applications to set reminders and to show when tasks have been completed are helpful, more advanced technology such as a "well-written mobile device app[lication that] might be used to guide [those with mental disabilities] through the process of voting," does not yet exist.[192] The participation of voters with mental disabilities may also depend on the translation of voting language into information that these voters can more readily process, which could be accomplished through technology that converts text to speech or complicated language to more "plain language."[193] As one author has pointed out, there are "no assistive technology products available to the consumers that make this kind of conversion."[194] Consequently, until these types of technological issues are addressed, voters with mental disabilities will continue to struggle to exercise their voting rights.

One of the most practical impediments to voting experienced by individuals with mental disabilities is the reliance on third parties to help them vote. Individuals with mental disabilities often depend upon third-party private actors to help them perform basic life activities; these individuals are often family members or professional caregivers who act as "gatekeepers" to the world.[195] For example, in the event that a progressive state expressly allows citizens with mental disabilities to vote—and provides registration materials, voting assistance, and a physically accessible polling place in which to do so—the voter must still have the ability to travel to the polling place.[196] For elderly individuals and others with mental disabilities, these processes still require the assistance of caregivers. Currently, a person with a disability can receive assistance from another person in the voting booth, but the person assisting the voter "must not mark the ballot if the voter cannot communicate his or her intent."[197] While federal regulations require that long-term care facilities, such as nursing homes, respect residents' voting rights, the federal guidelines provide no "clear guidance on how a facility

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[191] Greg McGrew, *Assistive Technology for the Voting Process*, THE INFORMATION TECHNOLOGY AND INNOVATION FOUNDATION 8 (2012), http://elections.itif.org/reports/AVTI-002-McGrew-2012.pdf, <http://perma.cc/47JM-N2VA>.

[192] *Id.*

[193] *Id.* at 32.

[194] *Id.*

[195] Karlan, *supra* note 152, at 923.

[196] *Id.*

[197] Cognitive Impairment and Voting, THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE, http://www.theconsumervoice.org/sites/default/files/nccnhr/cognitive-impairment-and-voting-fact-sheet.pdf, <http://perma.cc/4SNX-7XSK>.

can fulfill this requirement."[198] This means that if caregivers decline or fail to provide assistance in spite of an individual's request, there is no inviolable or invocable right that the individual with a mental disability can call upon to demand participation in the federal electoral process.[199] For example, surveys of long-term care facilities in Pennsylvania and Virginia suggest that these types of facilities utilize informal screening to decide who has the capacity to vote and who needs help.[200] These informal screenings include quizzing residents on current political office holders or performing informal assessments of mental statuses.[201]

Additionally, research has highlighted the possibility that election officials or others may deny citizens with mental disabilities voting access despite their qualification under state law.[202] A symposium at University of the Pacific McGeorge School of Law, as well as research by the Bazelon Center for Mental Health, have highlighted that election officials can create two possible roadblocks to voting for those with mental disabilities.[203] First, election officials can deny registration or absentee ballots to voters with mental disabilities in a manner not aligned with state law.[204] Second, election officials can turn away individuals with mental disabilities who physically go to the polling place.[205] While neither concern was supported with anecdotal evidence, an article written for the McGeorge Symposium by an election administrator emphasized that administrators may have concerns about whether they should provide an absentee ballot to a family member of a person with mental disabilities, fearing that the individual is not capable of making voting choices and that the family will make the choices for them.[206] The article underscored that without training and preparing election officials for these situations, inappropriate denials of persons with mental disabilities will continue.[207]

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[198] *Id.*

[199] Karlan, *supra* note 152, at 923. Some researchers have highlighted that in addition to the formal barriers of voting, such as state laws, and the informal barriers, there are additionally "internal" barriers, which include persons with mental disabilities so severe that they may not understand the nature and consequences of the voting process or even have a desire to vote. *See* Kohn, *supra* note 114, at 34–35.

[200] *See* Kohn, *supra* note 114, at 39–40.

[201] *Id.*

[202] Barriers to Voting, *supra* note 14, at 10–11.

[203] *Id.* at 12–13.

[204] Barriers to Voting, *supra* note 14, at 12.

[205] *See* Kohn, *supra* note 114, at 39–40.

[206] *Id.* at 12.

[207] *See id.* at 13.

B. HAVA as a Missed Opportunity and the Future of Voting Rights for Individuals with Mental Disabilities

After examining both the formal and informal barriers that voters with mental disabilities must confront, it appears that HAVA represents a missed opportunity to address the impediments of the present and anticipate the challenges of the future. In 2002, HAVA erected statutory supports for voters with physical disabilities, but this response was purely reactionary. In HAVA, Congress looked backwards at the presidential election of 2000, recognized the accidental disenfranchisement of the physically disabled, and attempted to address this accessibility issue through positive statutory protections. Yet, in the heat of this major policy overhaul, Congress failed to consider the future. In 2011, the American Community Survey sampled approximately 2.9 million citizens and found that 4.9% of non-institutionalized respondents, which included all genders, ages, races, and education levels, reported a mental disability.[208] Data from the National Alliance on Mental Illness found that one in seventeen people live with a serious mental illness.[209] With voters aged sixty-five and older nearly doubling between 2000 and 2030, elderly voters will make up a sizeable demographic of the eligible voter bloc, and the number of individuals with mental disabilities will likely increase as well.[210]

Despite the need for an answer, the mental disability voting rights question remains essentially unaddressed. The heated 2012 presidential election between President Barack Obama and Governor Mitt Romney reanimated the debate as a variety of news sources spotlighted the uncertain status of individuals with mental disabilities.[211] These stories

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[208] W. Erickson, et al., Disability Statistics from the 2011 American Community Survey, CORNELL UNIVERSITY EMPLOYMENT AND DISABILITY INSTITUTE (Apr. 20, 2013), http://www.disabilitystatistics.org, <http://perma.cc/2MZN-Z2AU> (search "Disability Type" for "Cognitive Disability") (2013).

[209] Kimberly Leonard, *Keeping the 'Mentally Incompetent' From Voting*, THE ATLANTIC, (Oct. 17, 2012, 11:52 AM) http://www.theatlantic.com/health/archive/2012/10/keeping-the-mentally-incompetent-from-voting/263748/, <http://perma.cc/P7VZ-5SF5> [hereinafter Leonard].

[210] *See* CURRENT POPULATION REPORTS, *supra* note 116, at 1.

[211] *See* Shaun Heasley, *Voting Rights Denied to People With Disabilities*, DISABILITY SCOOP (October 23, 2012), http://www.disabilityscoop.com/2012/10/23/voting-denied-disabilities/16712/, <http://perma.cc/HUT3-4AEU>; Jim Grasdale & Jennier Brooks, *Next dispute: Should all the disabled have voting rights?* STARTRIBUNE (July 28, 2012, 7:17 AM), http://www.startribune.com/politics/164098296.html?refer=y, <http://perma.cc/8HJJ-4UWB>; David Scharfengberg, *On Mental Illness and Voting*, THE PROVIDENCE PHOENIX (Oct. 22, 2012, 6:00 PM), http://blog.thephoenix.com/BLOGS/notfornothing/archive/2012/10/22/on-mental-illness-and-voting.aspx, <http://perma.cc/6AAG-YFKH>; Deanna Pan, *Protecting the Voting Rights Of People With Mental Disabilities*, MOTHER JONES (Nov. 5, 2012, 3:01 PM) http://www.motherjones.com/politics/2012/11/voting-rights-mental-disabilities, <http://perma.cc/HEZ8-D8DM>. *See also* Rebecca Schleifer, *Disabled and Disenfranchised*, HUFFINGTON POST (Sept. 5, 2012, 9:00 AM), http://www.huffingtonpost.com/rebecca-schleifer/disabled-voting-

appropriately echoed the polarity of concerns that traditionally have been voiced in the debate about voting rights for individuals with mental disabilities, with some stressing access for individuals with mental disabilities and others emphasizing concerns about integrity and exploitation.[212] For example, an October 2012 article from *The Atlantic* described the concerns of a man diagnosed with fetal alcohol spectrum disorder. The man had skipped voting in the past due to the stigma placed on his condition, but he planned on voting in 2012, resolutely stating, "I do have a voice and I want it to be heard."[213] Also, a video posted to YouTube featured some New Hampshire residents with mental disabilities affirming that they were, in fact, voters.[214]

However, during the election, reports also arose of persons with mental disabilities being "coaxed" into voting. In an account from the 2010 midterms that was redistributed widely before the 2012 election, a voter described seeing "a group of [individuals with mental disabilities] ushered through the voting process by mental health staff, who told some of the group who they should vote for and, in some cases, filled out ballots on their behalf."[215] The onlooker, after watching an election official struggle to take the ballot from one of the individuals with mental disabilities, stated to a news source that "[the individual with mental disabilities] had no idea where he was, let alone that he was voting for future elected offices."[216] A more personal account of the 2012 election described the frustration of two parents, who had taken guardianship of their daughter, Darlene, only to learn that her group home had taken her to vote in the election despite the fact that Darlene had a cognitive-functioning level of a 7-year-old.[217] Her parents stated, "[s]he has never voted. My wife and I became her legal guardians in 1996 to prevent exploitation like this. We were not consulted. She is not capable of making an informed choice, and as her guardians [sic] we would not have approved it."[218]

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rights_b_1853234.html, <http://perma.cc/9HKW-GXK8>.

[212] *See supra* note 211.

[213] *See* Leonard, *supra* note 209.

[214] The Disabilities Rights Center, Voting and Civic Involvement: Access for People with Cognitive Disabilities (June 3, 2011), http://youtu.be/70Sp7Ul2d1U. Disabilities rights groups also asked all presidential candidates for their positions on a variety of issues, including "How will [you] ensure that people with disabilities have equal access to the vote?"; *See* Presidential Questionnaire, THE AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES, http://www.aapd.com/what-we-do/voting/presidential-questionnaire.html, <http://perma.cc/5BNY-D5M2>.

[215] Jana Winter, *Minnesota County Investigating Fraud Allegations Involving Mentally Disabled*, FOX NEWS (Nov. 2, 2010), http://www.foxnews.com/politics/2010/11/02/minn-county-investigating-voter-fraud-allegations-involving-mentally-disabled/, <http://perma.cc/K5UZ-RZZ8>.

[216] *Id.*

[217] Don Carrington, *Group Home Staff Helped Patients Vote*, CAROLINA J. ONLINE (Dec. 3, 2012), http://www.carolinajournal.com/exclusives/display_exclusive.html?id=9710, <http://perma.cc/8NAR-J6X9>.

[218] *Id.* One of the additional, yet rarely highlighted, aspects of the debate about voting rights for

These stories, in addition to the more formal uncertainty of the law, highlight the ongoing need for mental disability voting rights reform. They also highlight how the disability protections of HAVA have failed to crystallize the protection, or boundaries, of these voting rights. Recognizing that the voting rates of voters with disabilities in the 2008 and 2010 elections were, respectively, 16.4 and 18.4 percentage points lower than nondisabled individuals, commentators have constantly advocated for greater federal protection for citizens with mental disabilities.[219] Therefore, HAVA represents a missed opportunity to provide federal guidance or impose requirements on states that could guard against the challenges of the future, prior to the inevitable aging of the baby boomer generation. However, despite HAVA's failures of anticipation, it is not too late to create new legislation that mirrors HAVA's spirit while multiplying its impact, by offering clear protection to voters with mental disabilities and determinately solving many of the issues that could exacerbate the federal electoral process in 2016 and beyond.

i. Proposing New Methods to Ameliorate the Practical Barriers to Voters with Mental Disabilities

HAVA could have erected, or at least facilitated, new manners for disabled voters to cast ballots. Now, Congress should look to create an affirmative duty for states to accommodate voters with mental disabilities that retain the franchise. As explained above, many state activities, or lack thereof, act as barriers to voters with mental disabilities even though the measures were not intended as disenfranchising provisions.[220] The Supreme Court has struck down intentionally discriminatory laws but has never held that states are obligated to counteract the effects wealth and other social indicators have on an individual's ability to participate.[221] Therefore, "it is doubtful, at least as a constitutional matter, that a state's failure to modify its election

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people with mental disabilities is the political affiliation of individuals with mental disabilities. One study has found that 52% of disabled individuals identify as Democrats and 23% as Republicans, which stands in stark contrast to the study's findings from the general population, which identified as 43% Democrat and 39% Republican. At this time, it is unclear whether some of the roadblocks to voting rights for individuals with mental disabilities are simply partisan hesitancy to facilitate votes for the other side of the aisle. *See Study Shows People with Disabilities Less Likely to Vote*, THE CENTER FOR AN ACCESSIBLE SOCIETY, http://www.accessiblesociety.org/topics/voting/votestudy.htm, <http://perma.cc/3L3D-RBB3>.

[219] *Sidelined*, *supra* note 115, at 818. *See generally* NO RIGHT, *supra* note 122, at 5 (citing studies from 1998 and 1999 that found the deficit to be between 14–21 percentage points).

[220] *See supra* note 219; Karlan, *supra* note 152, at 926.

[221] Karlan, *supra* note 152, at 926.

procedures to facilitate voting by persons with cognitive impairments would raise serious constitutional difficulties."[222] If the informal disenfranchisement of voters with mental disabilities is not going to be rectified by the self-initiated actions of the states,[223] federal requirements would be necessary to propel these changes.[224] While some may argue that a version of HAVA that mandated affirmative help to eligible voters with mental disabilities would be an unfair intrusion into state autonomy, ultimately, this requirement would be no more burdensome than the HAVA provisions that have already created state-based help for physically disabled voters.

Additionally, rather than affirmatively imposing a duty on the states to assist voters with mental disabilities, new manners of circumnavigating the informal barriers of voting should be explored. Some academic considerations of these impediments to the mentally and physically disabled have focused on integrationist principles, attempting to remove the barriers to voting at the polling place so that all voters are together, side by side.[225] However, these provisions have proven difficult to implement, and if HAVA instead strove to achieve a form of independent and private voting for disabled individuals, many of the implementation issues could be solved. The promise of this idea is especially clear when we consider it in the context of elderly voters who live in nursing homes and elderly care facilities. Consequently, new legislation could require the states to initiate mobile voting to areas with high concentrations of individuals with mental disabilities.[226] This would be a simple solution, and one that anticipates the challenges of the immediate future.

Additional legislation should be offered to provide funds to investigate the promise of federally mandated requirement for absentee ballots. Currently, the fifty states impose a spectrum of requirements in order to be eligible for an absentee ballot.[227] A uniform standard for

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[222] *Id.*

[223] *Id.* (stating that "[i]f citizens with cognitive impairments are to receive affirmative assistance from the states, or if private actors are to face any obligation to help them to participate, those duties will have to be imposed by statute"). *See also* Model Letter to State Election Officials, BAZELON CENTER FOR MENTAL HEALTH LAW (Aug. 30, 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=KiJrXve39k4%3d&tabid=543, <http://perma.cc/S2J6-PT4P>; *State Laws*, *supra* note 167 (showing that some advocates have supported this by providing form letters to send to institutional actors as well as providing the grounds of legally challenge a state's mental health disenfranchising laws).

[224] Karlan, *supra* note 152, at 926.

[225] Colker, *supra* note 113, at 1415–16.

[226] Daniel P. Tokaji & Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 MCGEORGE L. REV. 1015, 1042 (2007) [hereinafter *Absentee Voting*].

[227] *See* Absentee Ballot Requirements by State, BAZELON CENTER FOR MENTAL HEALTH LAW (Aug. 29, 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=83FqwVQSDLM%3d&tabid=543, <http://perma.cc/H8XV-HPBB>.

accessing the absentee ballot, which recognizes and responds to the challenges voters with mental disabilities face, would facilitate the access of those eligible to vote.[228] For example, currently, ten states do not allow voters to obtain absentee ballot applications by telephone and a federal mandate would facilitate access to persons with mental disabilities who simply do not have the capacity to fulfill the mail-request requirements.[229] Similarly, the federal government could revise the manner of absentee ballot casting. Oregon has already begun experimenting with the constraints of submitting absentee ballots to accommodate disabled voters.[230] One of these methods, the "Accessible Ballot Marking System," utilizes a phone-based system for absentee voting while an alternative method is Internet based.[231] The McGeorge School of Law Symposium's formal recommendations advocated for future research on the promise of Internet voting.[232] The recommendation stated:

> [i]n particular the research should consider the specific needs of voters with disabilities, including those with cognitive impairments. The feasibility and cost effectiveness of the following types of programs should be explored: on-site voting assistance, mobile voting assistance (group and individual), HTML and other computer assisted ballot formats, portable voting machines, and ballots with pictures and/or icons.[233]

Several foreign states have already considered the promise of web-based voting as an alternative to traditional voting methods.[234] For example, Norwegian authorities have conducted trials, called E-Vote, on electronic voting, stressing that by utilizing electronic-based solutions, they will increase the democracy of their system through accessibility and participation.[235] States could devise methods, which utilize telephone- and computer-based voting on Election Day[236] that are no more difficult than travelling to public polling places. While these methods may not be currently ready to be implemented in the United States, their promise

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[228] Additionally, absentee balloting was advocated by the McGeorge School of Symposium as one of its final recommendations. See *Recommendations of the Symposium*, 38 MCGEORGE L. REV. 861, 863–864 (2007) [hereinafter *Recommendations*].

[229] See *Absentee Voting*, *supra* note 226, at 1040.

[230] *Id.*

[231] *Id.* at 1041.

[232] *See Recommendations*, *supra* note 228, at 867.

[233] *Id.* at 863–868.

[234] Kristin Skeid Fuglerud & Till Halbach Rossvoll, *An Evaluation of Web-Based Voting Usability and Accessibility*, UNIVERSAL ACCESS IN THE INFORMATION SOCIETY 1 (Jan. 2011).

[235] *Id.*

[236] *See Absentee Voting*, *supra* note 226, at 1040.

should continue to be emphasized and legislation that specifies incentives for research on Internet voting systems, as opposed to vague technological grants, likely offers the best way forward. Each of the state and foreign-based experiments illustrates a useful way that the federal government could motivate the states, either mandating or incentivizing them to accommodate the disabled through technological advancements aligned with the physical disability considerations of the past.

Although bringing the vote to those with disabilities could increase the overall accessibility, and thus legitimacy, of elections,[237] most opportunities for expanding mental disability access also compromise electoral integrity. For example, while mobile voting may possibly increase overall voter participation, it comes at a cost: the potential for undue influence, ballot tampering, or a reduction in the sense of community or the public visibility of individuals with mental disabilities.[238] More specifically, Internet voting has been attacked as a fantasy:

> [W]ith Internet voting, virtually any reasonably competent and determined hacker (or government or crime syndicate) anywhere in the world can successfully attack the election server. Competent server attacks, such as that on the Board of Elections and Ethics of Washington DC, perpetrated remotely from the University of Michigan during a public test in October 2010, can take complete control of the server and its voted ballots, and quite possibly without detection.[239]

Others have suggested that even the more rudimentary methods of facilitating voting for individuals with mental disabilities are flawed, because even simple methods, such as using candidate photos to assist voters with mental disabilities, may also encourage race-based voting.[240] Despite these risks and concerns of evolving voter accessibility, the promise of responsibly amending HAVA to promote the access of those with mental disabilities outweighs the possible pitfalls. Therefore, so long as practical barriers continue to exist for voters with mental disabilities, federal legislation that incentivizes or mandates progress to ameliorate these concerns is an appropriate federal exercise.

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[237] Colker, *supra* note 113, at 1478 ("If we bring voting technology to the nursing home rather than expect the residents of the nursing home to travel to the polling place, we might see a significant increase in voting participation rates by some individuals with disabilities.").

[238] Kohn, *supra* note 114, at 50.

[239] Hoke, *supra* note 82, at 349–56.

[240] *Id.*

ii. Proxy Voters: Federal Legislation Suggestions

The simplest solution to the problem of defining the voting capacity of those with mental disabilities would involve new legislation that provides all disenfranchised voters with mental disabilities with surrogates to cast their vote. Previously, states justified the disenfranchisement of individuals with mental disabilities on the grounds that often, a guardian or other person who acts as a caretaker represents their interests.[241] However, this view ultimately obliterates the vote of a person with mental disabilities by simply reducing two votes to one, meaning "[those with mental disabilities] do not count."[242] Martha Nussbaum, a mental disability rights activist, has argued that the logical solution to this problem is that "showing equal respect for the dignity of fellow citizens with cognitive disabilities requires giving them an equal right to vote" through surrogate voters.[243] Nussbaum's approach maintains that a "person's guardian be empowered to exercise the [vote] on that person's behalf and in her interests; just as guardians currently represent people with cognitive disabilities in areas such as property rights and contracts."[244] For Nussbaum, there would be no level of mental disability that would disqualify the eligibility of the surrogacy.[245] Nussbaum's approach has not come without criticism,[246] and ultimately, it would likely represent too large of a legislative leap. However, a federally guaranteed right to guardianship-franchise surrogacy would be a simple solution to a complex problem.

iii. Education About Voter Rights

Other commentators have suggested that new legislation should require the states to implement certain education measures for citizens about voter rights.[247] This measure would be politically feasible because

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[241] *See* Lisa Montoni Garvin, Guardianship and Caregiver Liability, GPSOLO (Jul.–Aug. 2008), *available at* http://www.americanbar.org/content/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/2008_jul_aug_index.html.

[242] David Wasserman & Jeff McMahan, *Cognitive Surrogacy, Assisted Participation, and Moral Status*, in MEDICINE AND SOCIAL JUSTICE: ESSAYS ON THE DISTRIBUTION OF HEALTH CARE 325, 326 (Rosamond Rhodes, Margaret Battin, Anita Silvers eds., 2012).

[243] *Id.* at 325–26 (quoting Martha Nussbaum).

[244] *Id.*

[245] *See id.*

[246] *Id.* (noting the two main objections highlighted concerns over "consistency" and "coherence").

[247] *See generally* Haley Pero et al., *Voting Laws, Education, and Youth Civic Engagement: A Literature Review* (Ctr. for Info. & Research on Civic Learning & Engagement, Working Paper No. 75, 2012).

it would not limit state autonomy. The United States Elections Assistance Commission (EAC) has already emphasized the importance of outreach strategies in elderly communities that contain especially large proportions of persons with mental disabilities and their caretakers.[248] While some academics have expressed concern that educating caregivers may lead to informal screening of eligible voters and thus disenfranchisement, ultimately a proper education of these individuals would acknowledge the legal reality that the caregiver's role does not include the screening of their wards.[249] Moreover, the information should be uncomplicated in nature, reflecting the needs of voters of all legal cognition levels. Additionally, the education should be two-fold. Not only should local election officials be required to make information both physically and cognitively accessible to those with mental disabilities, local poll workers should also be mandated to review the local laws regarding voting rights for individuals with mental disabilities. In this way, the risk of improper disenfranchisement on election day would be mitigated.[250] While well-intentioned, the institution of a federal education program would have a questionable impact.[251] Therefore, if efforts are going to be utilized, a federal voting rights education program should be low priority, especially if it is considered in the alternative with other legislative solutions.

iv. A Promising Future: Implementation of a Federal of Competency Definition

a. The Contours of a Federal Competency Definition

Ultimately, Congress should enact voting legislation that would create a federal definition of voter competency. This definition would preempt all state disenfranchisement definitions that are inconsistent with its provisions. Commentators and courts have acknowledged that an overly expansive definition would permit individuals with severe mental disabilities to vote, even though they could be fundamentally unaware of

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[248] U.S. ELECTION ASSISTANCE COMMISSION, QUICK START MANAGEMENT GUIDE ON ELDERLY AND DISABLED VOTERS IN LONG TERM CARE FACILITIES 1, 4–6 (2008), http://www.americanbar.org/content/dam/aba/migrated/aging/voting/pdfs/election_assitance.authcheckdam.pdf, <http://perma.cc/5VGJ-JM4M>.

[249] Kohn, *supra* note 114, at 47.

[250] *Recommendations*, *supra* note 228, at 869 (advocating for electoral education for both voters and poll workers).

[251] Kohn, *supra* note 114.

the electoral process in which they are participating, undermining the legitimacy of the vote.[252] Yet, an under-inclusive definition would exclude individuals with psychiatric conditions who possess average levels of cognition. Consequently, the goal of a new legislation would be to strike a careful balance that is respectful of states' desires for integrity while imposing a degree of federal blanket protection to individuals that should have their access to the vote persevered. Initially, it should be noted that the past solutions to this issue are of two distinct types: one categorical and the other functional. Categorical solutions have generally disenfranchised individuals based upon a formal legal label of their circumstance, such as being under a status of guardianship.[253] Comparatively, functional solutions would disenfranchise or, more generally, affirmatively grant the franchise, based upon some type of assessment of the capacity to vote.

Thus far, there have been three primary competency standards proffered. In 1982, the American Bar Association concluded that state-based disenfranchisement laws of the persons with mental disabilities were likely unconstitutional and, instead, advocated for a state-based system that imposed an objective competency test on voters.[254] The text of the ABA's proposal would require that "[a]ny person who is able to provide the information, whether orally, in writing, through an interpreter or interpretive device or otherwise, which is reasonably required of all persons seeking to register to vote . . . shall be considered a qualified voter of this state."[255] This standard has been utilized by California to determine voter competency and represents the lowest threshold of the major definitions, only requiring the rote memorization of demographic information.[256] This minimal requirement mirrors the definition adopted by other countries, such as the United Kingdom, which simply asks the question: "Are you the person whose name appears on the register of electors[?]"[257] However, the ABA competency test has been criticized because the rigor of its requirement is unaligned with the rigor of the process of voting, namely illustrating a capacity for decision-making.[258]

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[252] Karlan, *supra* note 152, at 925 (arguing "a practical matter, including within the electorate individuals who do not understand the nature of voting creates a pool of potential votes that might be cast by anyone with the ability to gain access to those individuals' ballots—a species of vote fraud").

[253] Davis, *supra* note 185, at 52–53.

[254] *See generally* Schriner, *supra* note 121. Generally, the constitutional argument against state provisions is rooted in equal protections concerns of the XIV Amendment. The argument maintains that if the laws are subject to strict scrutiny, as restricting a right is a fundamental right, these laws would either fail to meet a compelling state interest or not be narrowly tailored to the interest. *See id.* at 451.

[255] *See* Davis, *supra* note 185, at 57.

[256] *Id.*

[257] *See* CALLARD, *supra* note 173, at 64.

[258] *Id.*

The second primary competency test has responded to this critique, honing in on the alignment between the assessment and the level of cognition required for a meaningful vote. In the past, courts have considered four factors when assessing an individual's capacity for decision-making, two of which are relevant to voting: (1) understanding the process and (2) understanding the effect of the vote.[259] These requirements mirror the considerations of the court in *Doe v. Rowe*, where the court acknowledged that these forms of processes relate to the level of cognition necessary for decision-making.[260] The *Doe v. Rowe* standard has been operationalized through the administration of a verbal test and has been found to be both reliable and quick.[261] Consequently, some commentators, citing the alignment between the level of rigor of the test and the vote itself, have advocated for an adapted test that considers these criteria as the "sensible" solution to the voter competency conundrum.[262] Yet, the operationalization of the test has also been criticized because there is no clear standard for defining what constitutes capacity;[263] although the test is administered and a score is given, there remains vagueness as to what constitutes a "passing"—or the capacity to vote.[264] Additionally, the advocates of this process have not identified the class of individuals who would necessarily have to take the test.[265] Therefore, while the test has been deemed both reliable and quick, administering the test to all eligible voters raises the possibility of high transaction costs when considered in the societal aggregate.

In 2007, a symposium at the University of the Pacific's McGeorge School of Law offered a third possibility, recommending a less burdensome competency definition.[266] The resolution begins by affirming that all states should institute a presumption of capacity to vote to promote the democratic process.[267] State constitutions and statutes that permit exclusion of a person from voting on the basis of mental incapacity, "including guardianship and election laws, should explicitly state that the right to vote is retained" except for the individuals who then do not pass the proposed competency standard.[268] The symposium's recommendation then offers a plan that would require an affirmative finding of disenfranchisement through formal process, requiring:

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[259] *See* Davis, *supra* note 185, at 56.
[260] Doe v. Rowe, 156 F. Supp. 2d 35, 51 (D. Me. 2001).
[261] *See* Hurme & Applebaum, *supra* note 13, at 966–69 (acknowledging the promise of the machine in a small scale test of thirty-three Alzheimer's patients).
[262] *Id.* at 970.
[263] *Id.*
[264] *Id.*
[265] *Id.* at 970–72.
[266] *Recommendations*, *supra* note 228, at 863–64.
[267] *Id.* at 861.
[268] *Id.* at 863.

> (1) The exclusion is based on a determination by a court of competent jurisdiction; (2) Appropriate due process protections have been afforded; (3) The court finds that the person cannot communicate, with or without accommodations, a specific desire to participate in the voting process; and (4) the findings are established by clear and convincing evidence.[269]

Under the symposium's competency standard, the burden on the individual with mental disabilities is minimal, only requiring that he or she illustrates a desire to participate in the voting process.[270] Yet, as with the ABA's standard, this requirement represents a relatively low bar for voting right eligibility because it does not mirror the level of cognition necessary to understand the effect of the vote.

b. A New Federal Competency Definition

While these three standards are manageable and objective, they have been largely ignored by both the federal government and the states. This inactivity could be the result of many different factors: apathy toward mental disabilities rights; reticence to move away from past standards; or the simple belief that the standards that have been produced thus far for voters with mental disabilities have been fundamentally too relaxed. A new competency standard that addresses some of these concerns, while simultaneously offering some of the advantages of the past competency tests, is the best way to attract attention to the issue and break through the gridlock of state and federal inaction. Therefore, representing an amalgamation of the strengths of past standards, Congress should look to effectuate a standard, which presumes the voting capacity of all individuals, crystallizing the right to vote as a fundamental right and would inextricably incorporate a mix of functional and categorical disenfranchisement tests.

This standard would categorically disqualify all individuals who are under a judicially determined guardianship order. However, it would require the court in all state guardianship proceedings to affirmatively acknowledge to the parties that the guardianship order would mandate the loss of voting rights and, then, the court would inquire whether the parties wanted to preserve the voting rights of an individual who is to be

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[269] Recommendation Adopted by the House of Delegates, American Bar Association (Aug. 13–14, 2007), http://www.americanbar.org/content/dam/aba/directories/policy/2007_am_121.authcheckdam.pdf, <http://perma.cc/2VDY-SQVJ>.

[270] *Id.*

placed under guardianship, addressing the procedural due process concerns raised in *Doe v. Rowe*.[271] If the parties opt to preserve the voting rights of the individual with mental disabilities, to effectively retain the right, the individual would then have to pass court-administered functional test that mirrors the level of cognitive rigor of voting, namely (1) understanding the process and (2) understanding the effect of the vote.

This standard is advantageous in many ways. Initially, the law would grant all citizens in the United States the right to vote, illuminating the fundamental nature of the right, which the Supreme Court has emphasized.[272] Second, the broad categorical nature of the disenfranchisement removes the fog of uncertainty around many of the state's indefinite requirements of voting incompetency.[273] Third, the standard's recognition of the voting rights of those "under guardianship" who expressly carve out their right to vote is consistent with some of the states' present treatment of disenfranchisement law of the persons with mental disabilities.[274]

The advantage of this is two-fold: if this standard were imposed through a federal law, it would be a minimal imposition because many of the states have already created their own exceptions, and the standard places a large degree of onus of capacity-assessment on the families. Initially, a family-based assessment, at least presumably, addresses the obvious concerns of third-party exploitation of individuals with mental disabilities where guardians are not omnipresent in a disabled individual's life.[275] Yet, by granting the power of the franchise to the guardians, additional fears are raised. Superficially, it appears that caretakers, rather than the states, will be empowered with the decision to grant or restrict the franchise of those put under guardianship. If the standard were to stop here, it would reflect the disadvantage of many states' current laws—which allow a family member's discretion to call into question an individual's voting rights—and fail to safeguard against the level of cognitive integrity that other institutional actors (*i.e.*, the state) demand. Simply put, the love of the guardians for a ward with mental disabilities may cloud a family's judgment, and they may attempt to retain the voting rights of an individual who may not have the level of

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[271] *Doe*, 156 F. Supp. 2d at 50.

[272] Bush v. Gore, 531 U.S. 98, 104–05 (2000).

[273] However, the phrase "under guardianship" has been interpreted in different ways and, therefore, the standard would additionally need to include a strict definition that includes a court-determined finding of guardianship. *See* Hurme & Applebaum, *supra* note 13, at 943–45.

[274] *See Chart of State Laws on Voter Challenges*, BAZELON CENTER FOR MENTAL HEALTH LAW (Aug. 29, 2012), http://www.bazelon.org/LinkClick.aspx?fileticket=cPAQ9Co3ahk%3d&tabid=543, <http://perma.cc/X8RE-3T9U> [hereinafter *State Disenfranchisement Laws*].

[275] *See, e.g.*, Carrington, *supra* note 217.

cognition necessary to vote.

However, in the standard advocated for here, the power of the franchise is not exclusively granted to the families. Once an individual is placed under guardianship, those looking to retain the right to vote would then have to pass a functional test, abating the worries of an overly-inclusive voter competency test; in this way, an individual with a mental or psychiatric disability, who is judicially placed under guardianship but wants to retain the right to vote, can simply pass the functional test and, as a result, retain the right.[276]

Ultimately, new legislation that would guarantee the right to vote and only disqualify individuals as a result of their guardianship status would bring much needed uniformity to the states to combat the country's history of uncertainty about mental disabilities. To a large degree, this standard reflects the Eighth Circuit Court of Appeals' findings in *Missouri Protection and Advocacy Services*, where it acknowledged that categorical disenfranchisement of those under guardianship status was not a unconstitutional infringement on rights so long as there was an initial finding by a court that the individual could—or could not—retain their right to vote.[277] Some have gone further to state that a standard such as the one proffered here is admirable in the manner of assessment and would likely survive a strict scrutiny analysis if utilized by state actors because it solely targets those who do not understand "the nature and effect of voting" and are "incapable of expressing their own electoral preference."[278] Ultimately, academics have highlighted that "separate adjudication of one's capacity to vote within limited guardianship proceedings is a significant advancement in protecting the rights of those with psychiatric disabilities."[279] The standard advocated here forges a middle ground, allowing for the federal government to be a leader in the protection of the voting rights of persons with mental disabilities, promoting their access and participation, while simultaneously protecting the integrity issues that have caused reservations and slowed the advancement of this important evolution.

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[276] Additionally, a passing score would need to be determined by researchers. However, ultimately, the main weakness of the proffered standard deals with individuals who are never placed under guardianship. While this test ensures that guardians are not granted too much power, by allowing them to place someone under guardianship because they are severely mentally disabled but then inappropriately attempting to retain the individual's right to vote, the question becomes: What happens to those individuals who are never put under guardianship at all, but clearly would not pass a functional test? An additional standard would be necessary for the rare individual, who is uncared for by a ward or guardian and yet is clearly incompetent. Consideration of these relatively rare individuals, who are unlikely to attempt to vote due to informal barriers, should still be considered in future legislation.

[277] *See Carnahan*, 499 F.3d at 808–09.

[278] Bindel, *supra* note 141, at 131.

[279] *See* Davis, *supra* note 185, at 52.

c. A Federal Definition of Mental Disability

Additionally, any new legislation that addresses the rights of individuals with mental disabilities should also offer a definition of "mental disability" with greater statutory clarity. The lacking federal statutory definition of disability impacts those with mental disabilities, perhaps even more so than with physical disabilities, because of the state-based disenfranchisement statutes, utilizing phrases such as "unsound mind," which is especially liable to be administered in an indiscriminate and inconsistent manners.[280] Consequently, the federal government could adopt a uniform definition of mental disability to provide guidance and some level of modernity and substance to the antiquated and vague phraseology utilized by the states. A federal definition of mental disability could utilize the minimum requirements of one of the proposed tests discussed above, or could utilize social science definitions of mental disability.[281] By setting clear demarcation lines, the federal government could compel states to update the electoral statutory definitions to mirror the federal definitions. Here, the new legislation should simply allow the states to utilize the federal definition without mandating state adoption. The attraction of this option is that it would preserve the traditional bounds of state autonomy in the electoral arena while creating a necessary definition to bring uniformity to the state definitions.

V. A HAVA PRIVATE RIGHT OF ACTION

Finally, new legislation should be enacted to explicitly provide disabled individuals who have been denied voting access a private right of action.[282] The enforcement of HAVA has already been scrutinized as

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[280] *See* Bindel, *supra* note 141, at 93; *see also* Hurme & Applebaum, *supra* note 13, at 940.

[281] *Infra* Section V.C.

[282] *Recommendations*, *supra* note 228, at 862 (stating as the symposium's second preliminary recommendation: "Persons with disabilities who have been denied access to the right to vote privately and independently should have a private right of action under [HAVA.]").

HAVA left undefined the one state actor that would be responsible for HAVA compliance and, subsequently, left unclear whether a voter could seek declaratory or injunctive relief against officers who inadequately carried out their responsibilities under the federal law. While under 52 U.S.C.A. § 21112 (West 2014), HAVA mandates that states create an administrative complaint procedure to remedy citizen grievances, the statute appears to provide no federal remedy and the states have generally considered the federal law's apparent omission of a federal private right of action a determinative victory for the states. *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

"[t]he most prominent area of election law in which the private-right-of-action question has arisen."[283] Currently, HAVA does not have any express statements that its requirements are privately enforceable and, therefore, it is dubious that Congress intended the private right of action to exist.[284] However, this has not prevented the issue from being litigated in court. The two main decisions that have considered the private enforceability of compliance with HAVA disability access, *Taylor v. Onorato*[285] and *Paralyzed Veterans of America v. McPherson*,[286] both found that the statute was not privately enforceable. By creating new legislation to secure a private right of action, the statute would provide a citizen check on potential partisanship of state and local election officials and the DOJ.[287] While this broad statute would not particularly provide individuals with mental disabilities increased access as compared to individuals with physical disabilities, it would provide an additional enforcement mechanism for all voters with disabilities, and in the instance of mental disabilities, new legislation, it would provide an additional layer of voting right protection.[288]

VI. CONCLUSION

In 2002, the United States Congress seized on the failures of the past to guide them in their plan for the future, passing one of the most sweeping pieces of federal electoral legislation in the country's history. The Help America Vote Act, in many ways, has lived up to its promise, addressing several of the issues illuminated by the struggle of the 2001 election and subsequent *Bush v. Gore* drama. Despite of the criticisms of HAVA, a decade after its enactment, physical accessibility remains at an all-time high, research forges forward, and the outdated voting methods

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Young, stating that the conference was "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"). *See* Daniel Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 150–51 (2010) (explaining the debate around HAVA"s private right of action) [hereinafter *Public Rights*]. Ultimately, the United States Attorney General has the choice of seeking relief against state or localities but without a private right of action, the citizens' voice in demanding local compliance is essentially muzzled.

[283] *See Public Rights*, *supra* note 237, at 147.

[284] *Id.* at 148.

[285] Taylor v. Onorato, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006).

[286] Paralyzed Veterans of Am. v. McPherson, C06-4670SBA, 2006 WL 3462780, at *6 (N.D. Cal. Nov. 28, 2006).

[287] *Public Rights*, *supra* note 237, at 157.

[288] *See* Weis, *supra* note 5, at 456 (stating 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").

of the past have largely been replaced with new voting technologies advocated by the legislation.

Yet, HAVA has failed in one fundamental respect. The legislation, by looking over its shoulder at the past, has failed to anticipate the follies and traps of the future, primarily the aging of the baby-boomer generation. As the proportion of the population that is 65 years or older incrementally increases, it is likely that proportion of individuals with mental disabilities will also increase. However, both the federal law and state laws have done little to protect this aging population's voting rights, neither erecting formal statutory support nor demanding the destruction of the multitude of informal barriers that inhibit the full exercise of their franchise. Recently, foreign countries have increasingly supported the protection of the individuals with mental disabilities. In 2011, Thomas Hammarberg, a member of the Council of Europe Commissioner for Human Rights, emphasized that people with disabilities, including people with mental health and cognitive disabilities, should have the right to vote regardless of their legal capacity.[289] The United States' neighbor, Canada, is one of four countries (out of the sixty-two countries that were studied) that does not impose any mental capacity requirement on the right to vote.[290] Additionally, Article 25 of the International Covenant on Civil and Political Rights and Article 29 of the Convention on Rights of Persons with Disabilities, signed in 2007, have both highlighted the fundamentality of the right to vote.[291] While many European nations still deny the franchise to citizens with mental disabilities, which is "indicative of the invisibility of people with disabilities within public life," several European nations have recognized the mentally disabled community's fundamental right to vote. Austria,[292] the Netherlands,[293] and the United Kingdom,[294] for example, all enfranchise individuals with mental disabilities.[295]

Foreign support of voting rights for individuals with mental disabilities does not mandate that the United States change its federal election law. However, the recent changes in the international sphere

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[289] *See* CALLARD, *supra* note 173, at 64–65.

[290] *See* Kohn, *supra* note 114, at 36.

[291] *See Article 29-Participation in political and public life*, UNITED NATIONS CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, *available at* http://www.un.org/disabilities/default.asp?id=289.

[292] *See* CALLARD, *supra* note 173, at 65 (highlighting that Article 26(5) of the Austrian Constitution specifies that a person can be deprived of the right to vote only as a result of a criminal conviction).

[293] *See id.* (highlighting that in 2008, the Netherlands amended their Constitution to affirmatively give people with mental health problems and intellectual disabilities the right to vote).

[294] *See id.* (explaining that "The Electoral Administration Act 2006 abolished the common law rule that a person lacks legal capacity to vote by reason of mental health problems" and that psychiatric inpatients have retained the right to vote).

[295] *Id.* ("Although this right has not always been well exercised, "only 10% of inpatients in Germany have used their right.").

further support the idea that the United States should abandon the past and consider adopting new voting standards that anticipate the challenges of the future. Over the course of the past forty years, mental disability law in the United States has undergone a "revolution," and "[t]his revolution continues today, and there is no reason to expect any abatement in case law, statutory amendments, or advocacy initiatives in the coming years.[296] Currently, another federal "revolution" specific to mental disability voting rights is an unnecessarily extreme move. Many states have already responded to the changing tides of disability considerations initiated by the disability rights movement and began to reflect a more progressive mindset in their mental disability disenfranchisement laws. Federal leadership, however, may be necessary to motivate the number of states that are more apathetic, or hesitant, to respond to the incremental evolution of mental disability voting rights, pushing the states to consider a new uniform standard for competency that abandons the antiquated, and over-wrought, definitions and considerations of the past. When HAVA was created, it was largely crafted as a backwards-looking piece of legislation, acting as a knee-jerk reaction to the problems raised by the controversy of 2000 presidential election. In doing so, the legislation limited the scope of its potential and capacity to initiate change. Now, over a decade after its enactment, the missed opportunities of HAVA represent the possibility of new legislation, which could anticipate and minimize the challenges of the future and fulfill the legislation's promise by finally bringing the rights of persons with mental disabilities into parity with voting rights protections of other marginalized groups.

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[296] MICHAEL L. PERLIN, INTERNATIONAL HUMAN RIGHTS AND MENTAL DISABILITY LAW: WHEN THE SILENCED ARE HEARD 45–46 (2012) (noting that there was the creation of a "patients' bar" for legal representation, among other state based changes).