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## Symposium

## Facilitating Voting as People Age: Implications of Cognitive Impairment

## Articles

**\*1015 ABSENTEE VOTING BY PEOPLE WITH DISABILITIES: PROMOTING ACCESS AND INTEGRITY**Daniel P. **Tokaji** [FN1]

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## I. Introduction

Two of the most dynamic areas within the field of election administration are absentee voting and accessible voting. In recent decades, absentee voting has **\*1016** become a central feature of our electoral landscape due to the liberalization of many states' laws and individual voters' decisions to vote in the comfort of their homes. [FN1] All states now allow at least some categories of voters to cast their votes before Election Day, most commonly by mail. Most states now permit “no excuse” absentee voting, under which ballots may be cast by mail regardless of whether the voter provides an excuse for not coming to the polls on Election Day. [FN2] Several states allow some classes of voters to obtain permanent absentee status, obviating the need to apply for an absentee ballot before every election. And one state, Oregon, has eliminated precinct-based voting entirely, going to an all-mail voting system in which everyone casts the functional equivalent of an absentee ballot.

The trend toward expanded absentee voting coincides with greater attention to accessible voting for people with disabilities. [FN3] Individuals with disabilities have long been excluded from voting, some by laws expressly disenfranchising them and others by persistent barriers at the polls. In recent decades, Congress has made some efforts to promote accessibility, most notably through the Voting Accessibility for the Elderly and Handicapped Act of 1984, [FN4] the Americans with Disabilities Act of 1990 (ADA), [FN5] and the Help America Vote Act of 2002 (HAVA). [FN6] The implementation of these statutes has emphasized the elimination of barriers to in-precinct voting by people with visual or mobility impairments. The paths to polling places are supposed to be accessible, and the available machinery is supposed to allow visually impaired voters to vote privately and independently. While these laws have helped improve the accessibility of polling places, they have not fulfilled their promise of ensuring accessible voting for all persons with disabilities. [FN7]

Unfortunately, the nexus between these two areas--absentee voting and accessible voting--has received far too little attention. Absentee voting is critical to many people with disabilities because it facilitates their participation in **\*1017**

elections even if they cannot secure transportation, enter the polling place, or use voting equipment without assistance. Disability advocates estimate that forty percent of voters with disabilities use absentee ballots. [FN8] Although some have pushed for greater access to the polls as a way of promoting integration, most everyone recognizes that absentee voting is essential in allowing many individuals with disabilities to exercise the franchise. Thus, even those states that require an “excuse” to vote absentee allow those who are too severely disabled to vote at the regular polling places to obtain and cast a paper ballot by mail. Absentee voting may also allow people with disabilities to receive help from a trusted third party--such as a relative or caregiver--in the privacy of their homes, without the embarrassment or difficulty entailed in getting help from a stranger at the polls.

States have greatly increased their use of absentee voting in recent years [FN9]--not necessarily to improve voting opportunities for individuals with disabilities but, instead, as a way to make voting more convenient for everyone. Ironically, this recent focus on absentee voting has largely ignored the problems faced by people with disabilities who want or need to vote absentee. It has also, for the most part, disregarded concerns regarding ballot integrity, which may have particularly troubling implications for some voters with disabilities. There have been occasional reports of third parties exerting pressure on residents of adult care facilities to vote a particular way and even voting the residents' ballots without their knowledge or against their wishes. [FN10] Such tactics could theoretically enable people working on behalf of a party or candidate to engage in “wholesale fraud,” effectively stealing the votes of people with disabilities under the guise of providing assistance. [FN11] Among those concerns is that caregivers, such as relatives or nursing home staff, will engage in “proxy” voting for people with severe cognitive disabilities, like advanced dementia, who are no longer capable of understanding the nature or effect of voting. [FN12] It is easy to exaggerate the prevalence of ballot manipulation, [FN13] which by its nature is difficult to quantify. Still, the threat of fraud, coercion, and proxy voting that is endemic to mail voting warrants special attention when it comes to people with some types of disabilities. That special attention, however, should not be used to create further **\*1018** barriers for individuals with disabilities who might benefit from the expansion of early voting opportunities.

The purpose of this article is to discuss how to promote accessible absentee voting while guarding against threats to electoral integrity. In referring to “access” in this context, we mean a system that allows voters with disabilities to obtain and cast absentee ballots privately, independently, and accurately. In speaking of “integrity,” we mean a system that allows people with disabilities themselves to choose what and for whom they vote and, conversely, that guards against third parties casting absentee ballots in their stead--whether through beneficent or dishonorable motives.

To be clear, increasing the accessibility of absentee voting should not excuse policymakers or election officials from their responsibility to make polling places more accessible. Voters with disabilities should have the same right as other voters to choose whether to vote on Election Day at a polling place or in advance of the election through some form of absentee voting. By the same token, policymakers or election officials should not impose unnecessary obstacles to participation by people with disabilities in the name of promoting integrity--in fact, this is something we affirmatively discourage. The challenge inherent in absentee voting is to make it easier for people with a broad spectrum of disabilities to vote accurately while curbing the risk that someone other than the voter with a disability will vote in her or his place.

Although some tension exists between the values of access and integrity in the context of absentee voting by people with disabilities, absentee voting can be made more accessible while curbing the risks of fraud and other forms of electoral manipulation. In this article, we suggest how policymakers, election officials, and the courts might promote accessible and secure absentee voting for people with disabilities. Rather than proposing “best practices,” something that is premature at this juncture, we put forward a menu of accessibility improvements, public education, and affirmative outreach that election officials and policy-makers should consider. Most significant among these suggested improvements is a different model of absentee voting. Under the present model, the burden lies with individuals with disabilities to obtain and

cast an absentee ballot by mail. We propose a new model that would place the burden on state and local authorities to bring accessible technology to voters where they live, allowing them to vote in person--secretly and independently-- with assurance that the choices made are their own, rather than those of a third party. These changes would be especially feasible, and could be particularly important, in institutional settings such as nursing homes. Many people likely to have trouble voting independently reside in such facilities. Moreover, these are the settings where voters are most vulnerable to fraud and coercion. This reform has the possibility of immediately improving accessibility while reducing the risk of fraud.

Part II surveys developments in absentee voting generally, including the growing reliance on mail ballots and the empirical evidence on this increasingly prevalent voting method. Part III discusses the obstacles to participation by **\*1019** people with disabilities and recent legislative efforts to eliminate those obstacles. Part IV focuses on the barriers that people with disabilities face in obtaining and casting absentee ballots and considers what should be done to bring absentee voting into compliance with federal disability access requirements. It then assesses the risks to electoral integrity, specifically the potential for fraud, coercion, and proxy voting that exists when third parties are involved in the casting of absentee ballots on behalf of people with disabilities. Part V concludes by suggesting how the accessibility of absentee voting might be enhanced while managing its risks.

## II. The Rise of Absentee Voting

Before addressing voting issues specific to people with disabilities, it is helpful to provide some general background on absentee voting, an area in which there has been rapid development and considerable debate in recent years. Although the term “absentee voting” has a variety of meanings, we shall use it to refer to voting that takes place somewhere other than at a polling place on Election Day. It includes two distinct forms of pre-election voting: (1) mail voting, in which a voter typically requests, receives, and returns a paper ballot through the mail; [FN14] and (2) in-person early voting, in which the voter goes to a central location, such as the local elections office or public library, prior to Election Day, and casts his or her vote on the equipment provided at that location. [FN15] For the most part, our discussion focuses on mail voting, because it is the most prevalent form of absentee voting. After briefly reviewing the history of absentee voting in the United States, we turn to current practices and assess the ongoing debate over whether voting by mail should be expanded. We discuss the empirical evidence regarding the impact of expanded absentee voting, focusing especially on Oregon, which has eliminated precinct voting entirely and effectively conducts all of its elections by mail.

### **\*1020** A. Origins and Expansion

Like many aspects of American election administration, the rise of the absentee ballot is tied to military service. [FN16] A number of states enacted absentee voting laws at the time of the Civil War, so soldiers could vote while away from home. [FN17] Even then, absentee voting was controversial, with some opponents--mainly Democrats in the Union states--raising the possibility that it could lead to “fraud, corruption, and [a] lack of privacy in voting.” [FN18] Although only one Union state allowed military absentee voting at the start of the Civil War, the practice proliferated quickly, with nineteen of the twenty-five Union states providing absentee ballots during the war. [FN19] Yet, according to a 1915 survey, absentee ballots disappeared after the Civil War, to the point that only six states retained military absentee voting statutes. [FN20]

The next period of rapid proliferation of absentee voting occurred during World War I. [FN21] Only three states permitted civilian absentee voting in 1914, but half of the forty-eight states had absentee ballot laws in place three years later. [FN22] By 1924, there were only three states without absentee voting laws. [FN23] At that time, P. Orman Ray, a

political scientist surveying state laws, found that several states had amended their laws “so as to permit absent-voting on account of illness or other physical disability.” [FN24] He also noted that some state courts had invalidated absentee voting laws on the ground that they violated state constitutional provisions requiring that ballots be marked at the polls. [FN25] This led to state constitutional amendments in a number of states, including California which amended its constitution to allow absentee voting by, among others, those who were unable to appear at the polls “because of injury or disability.” [FN26]

In the past four decades, the incidence of absentee voting has increased dramatically. In California, for example, absentee voting went from 2.6 percent of all votes cast in 1962 to 24.6 percent in 2000. [FN27] This increase stems in part \*1021 from the liberalization of absentee voting laws. One reform was the elimination of the requirement that absentee voters appear before a notary, something that no state requires today. [FN28] Another change that has been adopted in some states is permanent absentee voter registration status. As the name suggests, this rule allows a voter to vote absentee indefinitely, without the need to request an absentee ballot in each election. [FN29] The most significant reform, however, is a move toward “no excuse” absentee voting, that allows any registered voter to obtain an absentee ballot without having to provide a reason for not going to the polls on Election Day. In recent decades, an explosion has occurred in no-excuse absentee voting throughout the country. [FN30] As recently as 1985, only four states permitted all registered voters to vote absentee. [FN31] Today, however, a majority of states have no-excuse absentee laws. [FN32]

## B. The Debate Over Mail Voting

Given the changes that have occurred in recent decades, the debate is no longer over whether to have absentee voting but instead over how liberally to allow it. At the more restrictive end of the spectrum, some states still require voters to provide a sworn statement with their reasons for having to vote absentee. For example, in Kentucky, voters' applications for absentee ballots must be presented by mail or in person and must include a verified statement that the voter is unable to appear at the polls due to age, illness, or disability. [FN33] Arkansas limits absentee voting to those who are “unavoidably absent” or unable to go to the polls due to illness, physical disability, or residence in a long-term care or residential facility. Individuals applying for an absentee ballot must state under penalty of perjury that they meet one of those criteria. [FN34] Toward the more permissive end of the spectrum are states that take voters at their word as to their excuse for not appearing at the polls on Election Day. For example, Connecticut allows absentee voting for active service military, election officials, individuals who will be out of town during the election, physical illness or disability, and religious conflicts. [FN35] Further still along the spectrum are the majority of states that allow “no excuse” absentee voting. [FN36] At the far end of the spectrum is the State of \*1022 Oregon, which has abolished precinct-based voting entirely and gone to an all-mail voting system.

While there is an undeniable trend toward the liberalization of absentee voting, a vigorous debate also exists over its advantages and disadvantages. In this section, we consider arguments made by those on both sides of this debate.

### 1. Arguments for Mail Voting

**Reduced Costs.** One of the claimed benefits of mail voting is that it may reduce the costs associated with elections. Evidence supports the argument that the movement to an all-mail system in Oregon has saved money, compared to the “hybrid” system of polling place and mail voting that the state previously had (and that all other states still have). [FN37] This cost-savings arises from not having to have polling places open. It is not clear that expanded mail voting would decrease costs in a hybrid system, in which voters may still choose to vote at the polls.

**Better Information.** Another argument in favor of expanded absentee voting is that voters will make more informed

decisions if they are allowed to cast their ballots from their homes. The opportunity to review information about the candidates and issues upon which they will be voting, without the time pressure that exists at busy polling places on Election Day, might improve the decision-making process. Although this type of impact is difficult to measure, this aspect of mail voting is most likely to be important for voters with cognitive impairments and learning disabilities. Giving voters more time to understand the candidates and issues may allow them to make better decisions and cast their ballots more accurately.

**Increased Turnout.** Proponents of expanded mail voting argue that it will increase the number of people voting in elections. Some support exists for the proposition that liberalizing mail voting increases turnout. [FN38] One study found that Oregon's all-mail system has increased turnout by as much as ten percent. [FN39] A **\*1023** more recent analysis, however, found an increase of less than five percent in the state since the implementation of all-mail voting. [FN40] Most of the evidence indicates that the most substantial impact of mail voting is in local elections, in which it is usually most difficult to get voters to come to the polls. [FN41] Although there does not appear to be any research specific to people with disabilities, turnout might increase among voters with disabilities when it is easier to obtain an absentee ballot. On the other hand, an all-mail system could depress turnout for some categories of individuals with disabilities, if the rules surrounding mail-in ballots are complicated or if the process is insufficiently accessible for individuals with visual or motor impairments. [FN42]

**A Broader Electorate.** Proponents of mail voting have argued that it has the potential not only to increase the total number of people voting but also to make the electorate more representative of the population as a whole. According to this argument, mail voting may increase participation among groups that generally have lower rates of registration and participation. As with the question of turnout, Oregon's experiment with all-mail voting has provided particularly fertile ground for empirical research. In general, the evidence suggests that mail voting does not increase the representativeness of the electorate even though it may expand its size. Rather, mail voting increases participation by those who are already the most likely to vote, such as those of higher socioeconomic status. [FN43]

Some social scientists argue that mail voting has a perverse effect on the composition of the electorate, skewing the pool of active voters toward those who are already most likely to vote--namely, those of higher education levels and socioeconomic status. [FN44] Adam Berinsky argues the strongest version of this thesis, contending that reforms like permissive absentee voting and all-mail elections "reinforce the demographic compositional bias of the electorate and may even heighten that bias." [FN45] In general, the increase in turnout arising from mail voting appears to stem almost entirely "from the retention of existing voters and not from the recruitment of new voters into the system." [FN46] Although mail **\*1024** voting does not appear to result in a partisan skewing of the electorate, [FN47] the proliferation of mail voting may worsen the underrepresentation of those at the bottom end of the socioeconomic spectrum.

On the whole, the evidence suggests that expanded mail voting may increase turnout, but at the cost of making the electorate less representative of the population as a whole. At the same time, there is strong evidence that people with disabilities rely heavily on mail-in absentee ballots. In fact, one study found that "persons with disabilities are the only group that are less likely to vote in person but are more likely to vote absentee when compared with other groups." [FN48] Because people with disabilities were already allowed to vote by absentee ballot before this latest trend towards increased absentee voting, the movement towards "no excuse" absentee voting probably had little impact on their turnout. [FN49] Nonetheless, allowing voters to obtain permanent absentee status might ease the burden on voting by people with disabilities because they would no longer need to apply for an absentee ballot in each election, although we have not found any empirical research confirming this effect.

## 2. Arguments Against Mail Voting

The Civil Ritual. The proliferation of mail voting has its critics. Expanding mail voting arguably threatens the civic ritual of Americans going to the polls en masse on Election Day. [FN50] Given that many people already vote before Election Day, however, this argument may reflect more of a nostalgia for days past than a realistic assessment of our democracy's future.

Late-Breaking News. On a more practical level, information that becomes public close to Election Day might be unknown to voters who cast their ballots earlier. In a world where everyone voted at the polls on Election Day, all voters would theoretically have access to the same information. But when a substantial number of voters cast mail ballots prior to Election Day, they will necessarily be unaware of later developments that might otherwise have influenced their votes. [FN51]

**\*1025** Further, candidates and parties may have more difficulty targeting voters if they do not know when voters will cast their votes; television or radio ads run close to the election cannot affect the votes of those who have already mailed in their ballots. Early voters may feel ignored by politicians who do not know how to target them shortly before they vote. [FN52] On the other hand, some forms of pre-election voting may allow campaigners to target voters more specifically. To the extent that campaigns find out who has and has not voted--a matter of public record in some places-- they can focus attention on those who have not yet voted as Election Day approaches. [FN53]

Fraud. Perhaps the most commonly cited risk of voting by mail is that it poses a threat to the integrity of the ballot. [FN54] When a citizen votes at the polls on Election Day, we can be reasonably sure that the person is exercising his or her own independent choice. The privacy of the voting booth makes it practically impossible to pay someone to vote for a particular candidate, because the "buyer" of the vote can never be sure that the "seller" (i.e., the voter) actually cast his or her vote in the agreed-upon manner. Similarly, in-person early voting also occurs in the privacy of a voting booth.

The anonymity of the ballot may be compromised when someone votes by mail. Mail-in ballots make it possible for a would-be vote buyer to verify that the vote seller has voted in the agreed-upon manner. In fact, election officials cannot possibly verify that the registered voter is the one who actually cast the absentee ballot. The registered voter's ballot may be intercepted and voted without his or her knowledge. It is difficult to measure the prevalence of absentee voting fraud, given that most of the evidence is anecdotal. [FN55] Still, the available evidence suggests that mail-in ballots are the most common source of electoral fraud. [FN56] The Government Accountability Office (GAO) report on the 2004 election notes that some election officials suspected instances of fraud with mail-in absentee ballots. [FN57] One Colorado jurisdiction reportedly referred forty-four individuals to a local district attorney's office for investigation of apparently invalid signatures. [FN58] On the other hand, little evidence of fraud has been documented in Oregon, despite the fact that the state has had an all-mail system in place since 1998. [FN59]

**\*1026** Coercion. A related concern with expanded mail voting is that it may increase the risk of voters being pressured into voting a certain way. Such pressure may come from a spouse. While it is possible to resist such pressure in the privacy of the voting booth, that pressure may be impossible to resist when voting in one's home. Other family members may also exert such pressure. Young adults still dependent on their parents or elderly parents dependent upon their adult children may also be especially subject to such pressure. Individuals who reside in institutional settings, like nursing homes, may also be pressured to vote a particular way. Although one survey found little evidence of such coercion, [FN60] these practices are by their nature difficult to detect. The GAO report did document one instance in which third parties went door to door encouraging people to apply for absentee ballots and then went to voters' homes offering to "assist them in voting the ballots." [FN61] To the extent that such efforts may lead to voter intimidation, some people with disabilities may be especially vulnerable to them. [FN62]

Voter Mistakes. A less commonly recognized problem with mail voting is that it could increase the number of mistakes that voters make, either in requesting or casting their ballots. One problem is that voters sometimes make mistakes in applying for an absentee ballot. They may, for example, omit important information such as their signature or address on the application. The GAO found that, in 2004, twenty percent of local election jurisdictions reported problems with receiving absentee ballot applications with missing or illegible voter signatures. [FN63] These problems appear to be more pronounced in larger jurisdictions. [FN64] Voter difficulties in applying for absentee ballots may be mitigated in states that allow permanent absentee status, under which voters can automatically receive an absentee ballot without having to file a new application each time. In 2004, only seventeen states provided for permanent absentee status. [FN65]

Even if voters succeed in applying for and obtaining absentee ballots, they sometimes make mistakes in returning them to election authorities. The GAO estimates that sixty-one percent of all jurisdictions received absentee ballots without the required voter's signature on the return envelope. [FN66] These problems are exacerbated in those states which require a witness or notary with the voter's signature in order to count an absentee ballot. [FN67]

**\*1027** Voters can also make mistakes in marking their ballots. Since the enactment of HAVA, jurisdictions throughout the country have moved to technology, such as precinct-count optical scan and direct record electronic systems, [FN68] that provides voters with notice and the opportunity to correct errors when they vote in person at polling places. [FN69] Empirical research shows that such “notice” technology reduces inadvertent overvotes and undervotes. When an individual votes by mail, such technology is not available. There is, accordingly, a greater risk that mistaken overvotes and undervotes will go undetected. A countervailing factor is that the time pressure that may exist when voting at a crowded polling place is not present when voting at home. This reduced time pressure might conceivably reduce voters' mistakes in marking their ballots. At present, little empirical research demonstrates what, if any, effect the move to mail voting has on voter mistakes. [FN70] It is also difficult to determine whether voters with disabilities are more likely to make mistakes that result in their votes not being cast or counted, although it seems very likely that at least some disabilities might make it harder to comply with the sometimes complicated requirements for voting by mail.

In sum, voting by mail holds benefits and risks, both of which are likely to be more pronounced for many voters with disabilities. On one hand, mail voting may have a positive impact on turnout, but it comes at the risk of skewing the electorate toward those who are already most likely to participate. On the other hand, mail voting may greatly improve the convenience of voting for people with some disabilities, especially those whose ability to travel outside the home is limited. Because all states already allowed individuals with disabilities to vote by absentee ballot, it is doubtful that the trend towards “no excuse” early voting will have much effect on individuals with disabilities. Allowing permanent absentee voter status for those voters may well be sufficient. In addition, some of the problems associated with absentee voting--particularly coercion and voter mistakes--are likely to be more common among voters with disabilities. Even with the considerable empirical research that exists, it is hard to assess the overall impact of liberalized mail voting on voters with disabilities.

### **\*1028** III. The Struggle for Accessible Voting

People with disabilities have long faced impediments to the full exercise of their voting rights, both through laws that expressly disenfranchise them and through other persistent barriers to voting. In a September 2004 Harris Poll, approximately twenty percent of voters with disabilities reported that they were unable to vote in federal elections due to barriers in getting to or voting at the polls. [FN71] In this Part, we discuss state laws barring some people with disabilities from voting, many of which remain in place today. We then move to a discussion of barriers that people with various disabilities face in voting at the polls and Congress's efforts to deal with those problems.



## A. Formal and Informal Disenfranchisement

There is a long history of excluding certain classes of people with disabilities from voting. [FN72] In 1793, Vermont required voters to have “quiet and peaceable behavior,” [FN73] and, in 1819, Maine's constitution excluded “persons under guardianship” from voting. [FN74] Similar exclusions exist under many states' laws even today. Delaware excluded those who were “idiots” or “insane” from voting in 1831. [FN75] The practice of disenfranchising people with certain disabilities expanded substantially in the mid-nineteenth century, [FN76] and many states still have these provisions on their books today. In fact, people with certain cognitive impairments are, along with felons and minors, among the only citizens still disenfranchised as a matter of law today. [FN77] In various states, those restrictions apply to people who are “mentally incompetent,” “non compos mentis,” “of unsound mind,” “incapacitated,” “idiotic,” or “insane.” [FN78] Several states auto-matically disenfranchise those who are under guardianship without any specific assessment of their capacity to vote. [FN79]

**\*1029** Although the express disenfranchisement of people with disabilities is not our main focus, many of these state laws raise serious questions under the U.S. Constitution and federal disability rights statutes. In fact, one federal district court struck down a state law prohibiting people under guardianship from voting. [FN80] The court in *Doe v. Rowe* considered a Maine procedure, under which mentally ill citizens under guardianship could be disenfranchised without any specific consideration of whether the individuals lacked the capacity to vote. [FN81] The court found that Maine's law violated due process by failing to give “uniformly adequate notice regarding the potential disenfranchising effect of being placed under guardianship for a mental illness.” [FN82] The court also concluded that the law violated the Equal Protection Clause, both on its face and as applied. [FN83] Finally, the court held that Maine's restriction on voting violated both the ADA and Section 504 of the Rehabilitation Act by disenfranchising some people who have the capacity to vote. [FN84]

Critical to the court's ruling in *Doe v. Rowe* was that Maine's law would deny the right to vote to people who had the capacity to “understand the nature and effect of voting such that they can make an individual choice.” [FN85] To the extent that other states similarly allow people who meet this standard to be disenfranchised, those states' laws arguably violate federal law. [FN86]

More important for our purposes, practices that effectively impede people from participating in elections, despite their ability to “understand the nature and effect of voting,” may also violate the Constitution or ADA. These practices may include complex requirements that have the effect of making it difficult for people with cognitive impairments to register or cast their ballots. Also problematic are informal “gatekeeping” decisions--such as relatives' or caregivers' decisions not to assist a person with a disability who needs help in registering or voting, based on the belief that the person lacks the capacity to vote. Like formal legal exclusions, such informal gatekeeping is “likely incompatible with well-developed principles of contemporary mental health law and ethics.” [FN87] Only those people found to lack the capacity to understand the **\*1030** nature and effect of voting after a constitutionally adequate process should be prevented from voting.

## B. Barriers to Voting at the Polls

Laws that formally exclude people with disabilities are just one type of barrier to equal participation. The American Association of People with Disabilities estimates that over fourteen million people with disabilities voted in the 2000 election but that more than twenty-one million people of voting age with disabilities did not vote. [FN88] The issues faced by people with disabilities include difficulties in entering the building where voting takes place, reaching controls or reading ballots or displays, marking ballots due to lack of fine motor skills, communicating orally with poll workers,

obtaining auditory feedback, and reading printed ballots or visual displays. They may also find the act of voting at a polling place to be so physically exhausting that they decide not to expend their energy in that particular activity.

Of course, the broad category of voters with disabilities encompasses individuals with many different types of physical and mental impairments. Although it is common to refer to people with disabilities collectively, the types of accommodations required varies depending upon their disability. Without attempting to enumerate all the impairments that might require assistance in voting, affected voters include

- people with mobility impairments that prevent them from walking independently, who rely upon a wheelchair, walker, or other device to ambulate;
- people with visual impairments that make it difficult or impossible for them to read a printed ballot;
- people with auditory impairments, who are unable to hear instructions from poll workers;
- people with cognitive impairments that prevent them from reading the ballot without assistance;
- people with long-term illnesses or impairments that make routine travel exhausting; and
- people with manual dexterity impairments that prevent them from marking certain types of ballots without assistance. \*1031 Historically, the courts did not consider barriers to participation legally significant. When Connecticut required that all voting take place in person and prohibited absentee voting, Judge Newman ruled that an accommodation to permit absentee voting for individuals with mobility impairments was not required: “A physically incapacitated voter has no more basis to challenge a voting requirement of personal appearance than a blind voter can complain that the ballot is not printed in Braille.” [FN89] It was unthinkable in the 1970s that voters with physical impairments would seek equal access to the polls.

Prior to 2000, Congress passed some measures designed to improve accessibility to the polls for individuals with disabilities. Among them are (1) the Voting Rights Act of 1965, which gives people with disabilities a right to receive assistance in voting from someone of their choice; [FN90] (2) Section 504 of the Rehabilitation Act of 1973, which generally prohibits the exclusion of people with disabilities from activities receiving federal financial assistance; [FN91] (3) the Voting Accessibility for Elderly and Handicapped Act of 1984, which requires that polling places and registration facilities be accessible; [FN92] (4) Title II of the ADA, which forbids public entities from excluding people with disabilities from services, programs, and activities; [FN93] and (5) the National Voter Registration Act of 1993, which requires that state offices providing services to people with disabilities provide voter registration. [FN94]

Despite these laws, voting participation rates among people with disabilities have remained low and accessibility remains inadequate. [FN95] A variety of barriers face people with various disabilities. The most thorough study of voting access to date is a report published in 2001 by the GAO. [FN96] As a part of its study, the GAO randomly selected 100 counties and visited polling places in those counties on Election Day in 2000. [FN97] The GAO examined those polling places from the \*1032 parking lot to the voting booth, looking primarily at whether they provided access to people with mobility impairments. [FN98] Overall, the GAO found that eighty-four percent had at least one impediment, while only sixteen percent of all polling places had no potential impediments. [FN99] “Curbside voting,” in which the voting mechanism is brought outside the polling location to the voter when he or she cannot physically enter the polling place, provided the most common means of dealing with such impediments. [FN100] Still, twenty-eight percent of polling places nationwide had at least one impediment and did not offer curbside voting. [FN101]

Some voters are able to enter the polling place but have impairments that make it difficult to vote independently once inside without some form of accommodation. The 2001 GAO Report noted that “the types and arrangement of voting equipment used may . . . pose challenges for people with mobility, vision, or dexterity impairments.” [FN102] People with manual dexterity impairments may have difficulty using voting technology that requires them to mark a paper ballot with a pen or other writing device. People with cognitive impairments, as well as those with visual impairments, may

have difficulty reading certain ballot formats. Although polling places sometimes make alternative formats available, the alternative formats are not always effective or readily available. None of the polling places that the GAO visited had special ballots or voting equipment for voters with visual impairments, such as audio or Braille ballots. [FN103] The National Organization on Disability reported in 2001 that fewer than ten percent of polling places had technology with an audio output that would allow voters with visual impairments to vote privately and independently. [FN104] Jim Dickson of the American Association of People with Disabilities, who is blind, describes his own experience in a way that captures the practical difficulties that some voters with visual impairments face:

Once, after my wife cast my ballot, she said to me, “Jim I know you love me. Now I know that you trust me, because you think I'm marking this ballot for that idiot.” Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. I held firm, but to this day I really do not know if they cast my ballot according to \*1033 my wishes. To voters with disabilities, there is always some level of uncertainty when another person marks your ballot for you. [FN105]

In 2002, stories like this one prompted Congress to expand the requirements for accessible voting technology as part of HAVA. [FN106] In particular, HAVA requires that people with disabilities be provided “the same opportunity for access and participation (including privacy and independence)” as other voters. [FN107] Specifically included among those who must be accommodated are voters who are blind or visually impaired. [FN108] This requirement may be satisfied by providing at least “one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place . . . .” [FN109] HAVA also requires research to be conducted on accessible voting technology. [FN110] It calls for the Election Assistance Commission (EAC) to conduct periodic studies of accessible voting for people with disabilities, including those who are blind or visually impaired. [FN111] In addition, HAVA requires the EAC and the National Institute of Standards and Technology (NIST) to report to Congress on “human factor research,” including the usability of different types of voting equipment for individuals with disabilities and others. [FN112]

HAVA has undoubtedly resulted in some significant improvements, at least for those who are able to go to the polls. Still, evidence exists that our election system still falls far short of the ideal of secret and independent voting for all citizens with disabilities. [FN113] A post-2004 survey commissioned by the EAC found that, fourteen years after enactment of the ADA, only 70.9 percent of precincts from reporting states were wheelchair-accessible. [FN114] It also found many places did not have accessible voting technology in place. Only half of American precincts \*1034 were reported to have accessible voting systems in place in 2004, and fewer than a quarter of precincts allowed voters with visual impairments to cast a secret ballot. [FN115] Moreover, even where polling places and voting equipment are accessible, traveling to the polls on Election Day poses a major obstacle for many people with disabilities. For these people, some form of absentee voting may well present the least burdensome option. Yet HAVA does little or nothing to enhance the accessibility of absentee voting, at least in its most common forms.

#### IV. Toward Accessible and Secure Absentee Voting

Absentee voting is no panacea. It is not a substitute for accessible polling places and voting technology. For one thing, absentee voting--at least of the mail-in variety--typically occurs in one's home. In a jurisdiction where most voters go to the polls on Election Day, absentee voting effectively segregates voters with disabilities from the rest of the polity. Moreover, absentee voting often requires additional steps beyond going to a polling place on Election Day. A voter has to request the absentee ballot and then comply with various anti-fraud rules as part of casting the ballot. These directions can be more complicated than Election Day voting and therefore dissuade someone from voting who otherwise cannot readily travel to the polling place on Election Day. Perhaps most important, it may be difficult or impossible for some

people with disabilities to vote independently with an absentee ballot. HAVA requires that accessible technology be made available at the polls but does not require that it be provided to those people voting in their homes.

Absentee voting is, nevertheless, essential to many members of the disability community. To the extent that states rely on absentee voting, voters with disabilities should have the same opportunities as others to vote by this mechanism. In this Part, we consider the accessibility issues raised by current absentee voting practices against the backdrop of the ADA, which requires states to make all their programs and activities accessible to the maximum extent possible. We then address issues of ballot integrity surrounding absentee voting by people with disabilities, including the risks of coercion, intimidation, and proxy voting, which are especially significant for those with severe cognitive impairments.

#### **\*1035** A. Enhancing Access

##### 1. Absentee Voting and the ADA

Although HAVA focused on having accessible voting technology at the polling place, other federal civil rights laws require that accessible voting be provided to a wide range of people with disabilities. Of particular note are Title II of the ADA, which covers “public entities,” [FN116] and Section 504 of the Rehabilitation Act, [FN117] which imposes similar obligations on federally funded programs and activities. Because states create the rules governing both federal and state elections, state election officials are covered by ADA Title II. In fact, when Congress enacted the ADA, it listed “voting” as one of the areas in which individuals with disabilities had historically faced discrimination. [FN118] Congress also noted that individuals with disabilities have been “relegated to a position of political powerlessness in our society . . .” [FN119]

Title II is largely interpreted through regulations. Among those regulations are those governing new or altered facilities, which provide that

[e]ach facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992. [FN120]

At least one court has held that the technology used for voting falls within the regulation's broad definition of “facility.” [FN121] Absentee ballots are not technically a “facility,” but the subject matter of this regulation should apply to absentee voting procedures because absentee ballots are akin to a facility. Absentee balloting effectively replaces what would otherwise be a public facility for the purpose of voting. Rather than enter a polling place, a person opens an envelope and follows instructions that are intended to mimic what would happen at the polling place. In other words, absentee ballots are functionally a substitute for a physical facility.

**\*1036** This regulation is particularly useful in that it focuses attention on a state's obligations when it changes its practices. In 2006, dozens of states changed their absentee voting mechanisms and more are likely to do so in the future. This regulation reminds states that they need to make these new or altered mechanisms accessible to the maximum extent feasible.

Even if a court did not consider absentee voting to be a “facility,” the ADA Title II regulations also require that “services” be offered on a nondiscriminatory basis. The general rule against discrimination states that “[n]o qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services . . . of a public entity.” [FN122] The opportunity to vote by absentee ballot is a “service” offered as part of

its operation of elections. States cannot offer absentee voting in an inaccessible format and then insist that all voters with disabilities vote only at public polling places. If they choose to offer the “service” of absentee voting, then they need to offer that service in an accessible manner. As we shall explain, however, not all states have taken adequate steps to ensure that absentee voting is available in an accessible format.

## 2. Current Practices

With this legal backdrop in mind, we now consider how well current absentee voting practices comply with the letter and the spirit of the ADA's accessibility mandate. Making such an assessment is necessarily impressionistic, given the impracticability of knowing the accessibility practices of thousands of local electoral jurisdictions throughout the country. Moreover, people have numerous types of disabilities--and many people have a combination of disabilities--which will require different types of accommodations in the voting process. These disabilities include cognitive impairments that preclude understanding complicated directions, fine motor and cognitive impairments that impede an individual's ability to record his or her desired vote, and visual problems that make it difficult to read regular print. Hence, current absentee voting practices are likely to fall short of meeting the goal of secret and independent voting for all voters.

Successfully casting an absentee ballot typically requires the voter to do three things: (1) request an absentee ballot, (2) mark his or her choices on the ballot, and (3) comply with the electoral jurisdiction's rules regarding the return of the absentee ballot. Completing these three steps may pose a significant challenge for many voters with disabilities.

The State of Ohio's election process provides an example of the difficulties that people with different disabilities are likely to encounter when voting by mail-in absentee ballot. Ohio recently became a “no excuse” absentee voting **\*1037** state and, at the same time, imposed certain identification requirements on those individuals who vote by absentee ballot. [FN123] Under this law, absentee voters are required to provide certain identifying information, both when they request an absentee ballot and when they return their completed absentee ballot. [FN124]

In the November 2006 election, voters who requested an absentee ballot by mail or telephone received two pages of instructions on different colored paper, containing many paragraphs of instructions on each page. Some of these instructions related to compliance with Ohio's voter identification rules [FN125] and could be confusing for individuals with cognitive impairments. For example, voters were instructed that they could comply with the voter identification requirement by including: their driver's license number, the last four digits of their social security number, or a copy of various documents, such as a utility bill, that showed their name and current address. [FN126] One complication is that an Ohio driver's license includes two numbers. In the 2006 general election, many voters did not know which number should be recorded--something that proved especially tricky because the “correct” number, in the state's view, was not the one appearing at the top of the license, but instead the one appearing in a less prominent position beneath the driver's address. [FN127] In fact, this requirement was so confusing that the Secretary of State agreed to a consent order on the eve of the election governing those who used an incorrect form of identification. [FN128] Further, voters had to include identifying information in two places--one on a sheet of paper that accompanied the ballot and another on the outside of the sealed envelope.

Even if voters succeed in applying for an absentee ballot, completing and returning that ballot could pose serious challenges for some voters with disabilities. Ohio's 2006 absentee voting materials included an insert regarding a ballot measure that was included in the absentee ballot but not on the official ballot used by voters at the polling place. The absentee ballots had been printed before the Secretary of State ruled that one ballot measure could not properly be **\*1038** on the ballot. Additionally, the absentee ballot contained so many inserts that it required more than standard postage. Rather than clearly indicate the amount of required postage, or provide a postage-free envelope, the instructions simply instruc-

ted the voter to realize that more than standard postage may be required. This statement added to the confusion of the already-confusing ballot. Election officials tried to enhance the readability of these instructions by using a large typeface on different colored paper. In the end, however, there was little that election officials could do to enhance the ease of voting because the underlying rules and instructions were quite complicated, especially with regard to voter identification.

Absent a showing of compelling need, states should not implement requirements that voters produce identification in order to vote, particularly because many voters with disabilities are likely to lack a driver's license, the most common form of state-issued photo identification. [FN129] Alternatively, electoral jurisdictions might waive identification requirements as an accommodation for voters who mark a box indicating that they have a disability and do not have a driver's license.

Voters with visual impairments may also have difficulty obtaining and casting an absentee ballot without assistance. Although Ohio voters could request an application for an absentee ballot by telephone, Ohio law requires that the absentee ballot application itself must be completed in writing. [FN130] For voters with visual impairments, as well as voters with cognitive impairments, the absentee ballot application process could be a severe barrier to access.

Marking a paper ballot may also pose a significant challenge for voters with visual impairments. Recall that, under HAVA, every polling place must have at least one unit accessible to voters with disabilities, including voters with visual impairments. [FN131] States have met this requirement through voting equipment, such as direct record electronic (DRE) machines that have an audio capacity for voters with visual impairments. [FN132] (DRE machines are also helpful to voters with learning disabilities who may have trouble reading or lining up printed material). This technology allows these voters to vote secretly and independently. Because an electronic voting machine cannot be sent through the mail to each voter, they are required to use paper-based systems such as optical scan ballots, which have inherent limitations for voters with visual impairments. [FN133] There are “tactile ballots” that have been created to help voters with visual impairments read and \*1039 mark their ballots. These ballots utilize raised surfaces that a voter may feel with his or her hands, but many people with visual impairments still cannot review and verify their choices. [FN134] Large-print absentee ballots might accommodate a subset of voters with visual impairments but may create problems of their own. The optical scan ballots used for mail voting must typically be of a standard size to be fed through optical scan machines that “read” the ballot. Because a large-print ballot would necessarily have to be configured differently from the ballots used by other voters, it would likely be necessary for election officials to take the large-print ballots marked by the voters and then re-record their choices on standard-sized substitute ballots in order for them to be counted.

Voters with fine motor skill impairments may also have difficulty with mail-in ballots. Ohio's 2006 absentee ballot again serves as a good example. The instructions indicated that voters should fill in the “bubble” on the ballot, which would be read by an optical scanner once received by election officials. This requirement could prove difficult for many voters with limited use of their hands. By contrast, those voting at the polls might be provided with electronic voting systems with “sip and puff” technology, allowing voters to cast their ballots even if they cannot use their hands at all. [FN135]

It might be possible to develop accommodations that would allow individuals with some of these impairments to cast absentee ballots by mail. For example, some voters with dexterity impairments might be able to use a stamp next to their desired choice if it is too difficult to use a pen or pencil. To the extent that these voters are not able to mark their ballots in a conventional way, it might be necessary for election officials to ensure that they have been fully completed. For example, in a system where voters must darken a bubble, election workers should inspect those bubbles to make sure they are filled in properly. If a voter circles the bubble rather than filling it in, then election officials should be permitted to create a substitute ballot that can be read by the optical scanner while preserving the original. Similarly, if a voter does

not fill the bubble in darkly enough for the scanner to read the mark, then the election official should be permitted to create a substitute ballot with the appropriate circles darkened. These procedures will help ensure that all voters' ballots are counted. Although they may well involve considerable time and expense for election officials, they are especially important for people with manual dexterity impairments that prevent them from exerting sufficient pressure to make a machine-readable mark on the ballot. They are also important for people with cognitive impairments that may impede their ability to read complex instructions.

**\*1040** The preceding descriptions are meant to provide a sampling of the types of problems that voters with various disabilities are likely to experience in re-requesting, marking, and returning absentee ballots. Accessible voting technology now available at polling places has the potential to allow some of these voters to cast secret and independent ballots in a way that is difficult, if not impossible, with mail-in absentee ballots. As a practical matter, however, many voters with disabilities will find it less burdensome to vote from their homes than to go to the polls on Election Day. For these voters, it is necessary to consider other means to facilitate absentee voting.

### 3. Alternative Absentee Voting Methods

States could take several steps to make absentee voting more accessible for people with disabilities. At a minimum, state and local electoral jurisdictions' websites should meet all recommended guidelines for website design so that individuals with visual impairments can easily navigate the system and learn how to register to vote or request an absentee ballot. We have already discussed some other modest changes to mail voting that could improve its accessibility, such as providing Braille or large-print ballots for voters with visual impairments. More fundamentally, state and local election officials should consider providing methods for people with disabilities to vote absentee, other than traditional mail voting.

One possibility is to expand the ways in which voters can obtain and return absentee ballot applications. All states allow voters to accomplish these tasks in person or by mail, but, as of 2004, there were ten states that did not allow voters to obtain absentee ballot applications via telephone. [FN136] Allowing voters to file absentee voter applications by telephone would eliminate problems that can occur when these applications may only be made by mail. States might also allow voters to apply for absentee ballots by email, websites, or facsimile even though some voters with disabilities will not be able to use these methods. From an accessibility standpoint, an even better option would be to provide voters with disabilities the option of attaining permanent absentee voter status, so that they would not need to apply for an absentee ballot in every election.

State and local election officials should also consider expanding the ways in which absentee ballots may be cast, including phone and Internet-based methods. [FN137] The State of Oregon has experimented with two alternative methods to accommodate voters with disabilities in that state's otherwise all-mail system. [FN138]

**\*1041** The first method, the "Accessible Ballot Marking System" (ABMS), is a form of phone voting. Although phone voting has some serious limitations, in its present incarnation, it has the potential to enhance access for some voters with disabilities. [FN139] In Oregon's phone voting system, voters may use a special accessible telephone system, which is located at county offices. The system has a standard phone pad marked with a raised dot on the "5" key for easy navigation by people with visual impairments. Voters make their choices using a phone keypad and the results are then faxed from a remote location to the county office (face down, to protect voter privacy). Voters who are not able to read the ballot themselves may obtain assistance from a bipartisan team of election workers. Of course, voters who obtain such assistance must forfeit the privacy that is secured by polling place, accessible voting technology. This system also requires the voter to travel to the election office, so it is not a perfect substitute for regular absentee voting. Nonetheless,

this technology might be adapted to allow phone voting from voters' homes. Because voters who use this system likely lack the ability to drive their own automobile or readily obtain transportation, the requirement to travel to a county office obviates the convenience that other voters are able to obtain by voting from the privacy of their home. Hence, it is not surprising that few voters took advantage of this alternative in Oregon. It is an example of what one might be called technical rather than meaningful accessibility compliance. But if this system could be expanded to allow voters with visual impairments to vote from their homes, then it could provide both technical and meaningful accessibility.

The other alternative method used in Oregon is for voters to receive an HTML ballot by email. [FN140] To use an HTML ballot, voters must have a computer with email, a web browser, and a printer. And they must own whatever software is necessary for them to “read” computer text. Voters may “mark” their HTML ballot using their web browser and, when they have finished doing so, print it out and mail it. This option works with voice-activated software and text-enlargement programs, allowing voting in the privacy of one's home. But it can only be used if the voter has adequate assistive technology at home. Further, some voters may not be able to verify their choices independently or may need assistance in mailing the ballot through the regular mail system, undermining the privacy of the system.

Despite these apparent advantages to alternative methods of casting an absentee ballot, Oregon's alternative voting methods have been lightly used. Only eighteen voters used the ABMS system in Oregon's 2006 elections, while only eighty-three \*1042 voters used the HTML system. Moreover, not all of these voters were individuals with disabilities. For example, in Washington County-- the Oregon county that had the heaviest use of the HTML system--a total of thirty-two people voted through this method, only five of whom were people with disabilities. [FN141] Still, the ABMS and HTML systems provide useful examples of ways in which absentee voting could be made more accessible for at least some voters with disabilities.

Another possibility that state and local election officials should consider is to bring the polling place to the voter. Rather than making these voters go to a central location before Election Day, election officials could go to voters where they live. This option is especially promising for voters with disabilities who live in institutional settings like nursing homes, where large numbers of voters reside. In fact, some other countries actually have special stations set up in institutional settings through an election procedure sometimes referred to as “mobile polling.” [FN142] In addition, there are twenty-three states with absentee voting procedures specifically directed to people in nursing homes, senior citizen housing, mental health facilities, VA hospitals, or like facilities. [FN143] State procedures typically require election officials to bring absentee ballots to facilities, where they may supervise and provide assistance to voters. [FN144] Even where the law does not require it, election officials may engage in outreach to facilitate voting by individuals who reside at institutions with a significant number of residents who have disabilities. If that option is adopted, it is very important for election officials to provide special training to the workers at those facilities because they are likely to have many requests from voters who need assistance or desire to use assistive technology. For example, in Franklin County, Ohio, officials have established relationships with nursing homes and group homes and travel to these locations in order to help people with disabilities apply for and cast absentee ballots. [FN145] The Board of Elections works with the state's association of nursing homes to identify institutions in the county and sends them a letter offering assistance with absentee voting applications and ballots. [FN146] Nonetheless, we are not aware of any special training program for the poll workers at these facilities that prepares them to assist a population that may face challenges in casting their ballots.

A variant on this alternative that electoral jurisdictions should consider is bringing accessible technology to voters. As we have already explained, people voting at the polling place now have access to technology that can accommodate \*1043 many voters with visual, manual, and cognitive impairments. Yet some of these voters may find it difficult or tiring to come to the polls on Election Day and thus would be unable to use this technology. A potential means of dealing with this problem is to have election officials take accessible voting technology to nursing homes and other locations



with significant numbers of voters. [FN147] This would combine the stay-at-home advantages of absentee voting with the accessibility advantages of current technology that is now available only at public polling places.

Making absentee voting more accessible to people with disabilities demands thinking beyond the mail voting paradigm. While some people with disabilities will be able to vote through this method, there is a high risk of incomplete applications, improperly marked ballots, and other mistakes that can prevent one's vote from being counted. Just as important, paper ballots do not allow some voters with disabilities to vote secretly and independently, as is possible with technology available at the public polling place. Phone and Internet-based methods of voting may offer a partial solution to these barriers, although their present incarnations have some significant limitations that prevent many voters with disabilities from using them. Election officials need to engage in outreach by making contact with facilities in which significant numbers of voters with disabilities reside. [FN148] Bringing accessible technology to voters in their homes appears to be a promising solution.

## B. Protecting Ballot Integrity

Absentee voting facilitates voting by many voters with disabilities, but it also presents some risks. There is a general consensus that mail voting is more susceptible to fraud and other forms of manipulation than in-person voting. [FN149] In some respects, the risks posed by absentee voting for people with disabilities are comparable to those that exist when anyone votes by absentee ballot. But certain risks may be more pronounced, particularly for those in institutional settings like nursing homes. Voters with disabilities who live in these environments may not always be in a position to ensure that their votes are cast as intended, and they \*1044 may sometimes lack the capacity to understand the nature and effect of their votes.

A recent Journal of the American Medical Association article highlights the need for greater attention to the voting issues raised by persons with severe cognitive impairments like dementia. [FN150] The article confronts the possibility that election integrity may be threatened by providers or family members voting in place of persons of diminished capacity. [FN151] Of course, many people with cognitive disabilities still have the capacity to vote, and absentee voting is likely to be especially important for some of these voters, to the extent their ability or willingness to travel to a polling place is limited. At the same time, people with such impairments may also be at the greatest risk of having someone else cast ballots for them, compromising ballot integrity. [FN152] The paradox is that the voters who are most dependent on absentee voting may also be those for whom absentee voting presents the greatest threat to ballot integrity.

People with disabilities who are dependent on caregivers are especially vulnerable to ballot manipulation. One risk is that unscrupulous individuals or groups will pressure people with disabilities to vote a particular way or will intercept their absentee ballots and vote in their stead. Cognitive impairments, like advanced dementia, impede a voter's ability to make sure that his or her vote is being cast as intended. In extreme cases, where a large number of ballots are involved, such practices could possibly affect the results of smaller local elections. [FN153] A less insidious, but perhaps more common, possibility is for well-meaning caregivers to mark ballots for people who are not able to understand the nature and effect of their votes in a way that the caregiver supposes the voters would want to vote if they were competent.

Some commentators have expressed concern about such instances of ballot manipulation. Jessica Fay has written the most comprehensive account to date of cases in which elderly and infirm voters' ballots have allegedly been manipulated. [FN154] Among the incidents that Fay discusses are the following:

- An eighty-five-year old blind man at a care center for people who are elderly and disabled in Hartford, Connecticut said, he “just signed the paper” when a woman came to his room bearing an absentee ballot. [FN155]

- John Jackson, a Republican campaign worker in Cleveland, was indicted for tampering with ballots after an election official saw him **\*1045** marking the ballots of voters with physical disabilities “contrary to their expressed wishes.” [FN156]

- A man came to a home for seniors in Chicago and helped them apply for absentee ballots, but when he returned he had already punched their ballots. One resident said that the man told her “you’re voting Democratic” and instructed her to sign. [FN157]

- A New York grand jury found that, at some adult care facilities, persons from outside entered, met with residents, and advised them on how to vote, raising questions about whether their right to cast an independent ballot was respected. [FN158]

- In Arkansas, the state supreme court cited several instances in which family members improperly influenced the voting of people who were elderly or disabled, including people “voting and signing ballots for their ailing parents.” [FN159]

- A campaign worker in Mississippi marked as many as thirty ballots for voters who were elderly and disabled, resulting in a court order requiring that a new election take place. [FN160]

Such accounts must be taken with a grain of salt, as it is always hazardous to make policy by anecdote. This is particularly true in the field of election administration, where there has been an unfortunate tendency to recommend reforms based on stories rather than empirical research. [FN161] In debates over hot-button issues such as voting technology and voter identification, the policymaking-by-anecdote approach has sometimes resulted in the exaggeration of certain problems and the failure to appreciate the significance of others. It has also led some to propose “fool’s gold” solutions that are unlikely to solve the alleged problems. [FN162] In our view, it would be a mistake to adopt laws that might make it more difficult for individuals with disabilities to participate in elections based on anecdotes like the ones summarized above. An example would be stricter voter identification requirements, which are likely to impede participation by eligible voters while doing little or nothing to stem instances of fraud like those described above. [FN163]

**\*1046** Still, these reported incidents provide reason to take the potential for ballot manipulation seriously and to consider reforms that might reduce the risk of their recurrence without impeding eligible voters from participating in elections. Instances of ballot manipulation can be grouped into two categories: (1) cases in which third parties vote the ballots of voters with disabilities without the voters’ knowledge or contrary to their expressed wishes, and (2) cases in which third parties exert inappropriate pressure on voters with disabilities to vote a particular way. These cases might further be subdivided into ones in which the third party has some malicious intent, like affecting the results of elections, as opposed to ones in which the third party is making a good-faith, though misguided effort, to cast ballots in the way the voter would want. While there have been some headline-grabbing instances in which unscrupulous partisans have effectively “stolen” the votes of people with disabilities, well-meaning caregivers voting on behalf of individuals with disabilities may well present a more common problem. There is a thin line between providing people with the assistance they need to vote and engaging in impermissible coercion or proxy voting. Nevertheless, we believe that the most serious (though perhaps less widespread) threat to electoral integrity arises from partisan efforts to affect election results by manipulating a large number of ballots of voters with disabilities. This type of fraud has the greatest potential to actually affect election results.

The evidence does not support the conclusion that fraud is so widespread as to call for the curbing of absentee voting, but it does counsel in favor of some steps on the part of policymakers and election officials to ensure the integrity of the ballot. Where a larger number of absentee ballots are being cast, there is obviously a greater risk of widespread fraud that could affect election results. By contrast, an individual spouse voting for someone with dementia may be engaging in illegal proxy voting, but it is very unlikely to affect any election result.

One relatively simple step that policymakers and election officials can take is to implement procedures governing in-

stitutional settings in which large numbers of individuals are voting absentee. In fact, several states have statutory procedures in place that provide for election officials to be sent to such facilities. The State of New York requires that on-site absentee balloting be provided at facilities from which at least twenty-five applications are received. [FN164] This procedure serves a dual purpose. First, it allows election officials to provide assistance to voters who are very likely to need it. Second, it serves as a check upon widespread fraud that might otherwise occur from unscrupulous providers casting votes on behalf of those in their care without the voters' knowledge. The law also requires bipartisan teams to conduct voting in the facility, thus guarding against the possibility of large-scale fraud. In fact, election officials might even go further and conduct affirmative outreach to nursing homes and other facilities in which significant numbers of voters with disabilities reside. If a provider refuses to allow on-site assistance with absentee voting, that refusal may serve as a warning sign warranting further investigation.

**\*1047** Bringing the polling place to the voter may thus have the effects of protecting ballot integrity and promoting greater access to the ballot. Another possibility is to bring accessible technology to nursing homes and other institutional care settings. This could provide a further safeguard against fraud, to the extent that this technology can be used independently by voters with disabilities. Where a voter is able to cast a secret and independent ballot, the likelihood of undue influence is significantly diminished. Even for voters with disabilities who are not in institutional settings, living either by themselves or with relatives, it is worth exploring the feasibility of bringing accessible technology to voters where they live-- something that would likely increase both the accessibility and the integrity of the voting process.

## V. Conclusion

While there is some tension between the values of access and integrity when it comes to absentee voting by people with disabilities, we believe that these values are ultimately reconcilable. It is possible to make it easier for people with disabilities to cast accurate ballots in their own homes without unduly opening the door to fraud, coercion, and proxy voting. Doing so, however, will likely demand a multi-layered approach on the part of both policymakers and election officials.

It is tempting to advocate a set of "best practices," but we do not think that the existing research on the problem is sufficiently well-developed at this stage to provide a basis for recommendations of this sort. Instead, we suggest a menu of choices for policymakers and election officials to consider. Some combination of the following possible reforms should make it easier to obtain and cast an accurate ballot while safeguarding the absentee voting process from ballot manipulation:

- **Better Outreach.** The prevalent model requires voters to take the first step, by initiating contact with election officials to request and then return an application for absentee voter status. As a practical matter, this is likely to prove difficult for many voters with physical and cognitive disabilities, some of whom may not be aware of a forthcoming election. [FN165] We encourage election officials to take affirmative steps to make contact with nursing homes, group homes, and similar facilities well in advance of Election Day to make sure that residents can comply with deadlines for applying for absentee voter status. Such outreach is particularly vital for voters of lower socioeconomic status, who are already among the least likely to participate.

- **\*1048 • Easing the Application Process.** Existing processes for obtaining an absentee ballot can be confusing for many voters, especially those with cognitive disabilities. Relatively simple steps that could be taken include broadening the means through which absentee ballots can be requested. Applications should be permitted by phone and Internet-based means, as well as through the mail and in person. It is also critical to simplify the requirements for obtaining an absentee ballot. Ohio provides a prime example, where a highly complex voter identification law

effectively imposed a barrier to access. To the extent that people with cognitive impairments have trouble complying with such rules, resulting in their being denied an absentee ballot, there is a strong argument that these rules violate the ADA. We strongly encourage states with similar requirements for obtaining an absentee ballot to consider simplifying their laws.

- **Permanent Absentee Voter Status.** One way of easing the burden on voters with disabilities is to allow those with long-term disabilities to secure permanent absentee voter status, thus obviating the need for them to apply for an absentee ballot in every election. There are, of course, risks that come with allowing permanent absentee voter status, because it might make it easier for unscrupulous individuals to take advantage of people in their care and engage in fraud. For example, a nursing home provider could conceivably induce people with cognitive impairments to sign applications for permanent absentee voter status, enabling him or her to intercept, vote, and return all of their absentee ballots in subsequent elections. Such risks can be mitigated through procedural mechanisms, like sending election officials to locations where a significant number of people vote absentee.

- **More Accessible Ballots.** Easing the application process is only part of the battle. If voters cannot actually vote their absentee ballots secretly and independently, then their right to vote is compromised. While mail-in absentee ballots have some inherent limitations, there are steps that could make this means of voting more accessible to people with physical and cognitive disabilities. Tactile and large-print ballots could assist some voters with visual impairments. HTML ballots, which can be marked and printed with a home computer, may help others vote independently. The obvious limitation of such technology, however, is that it may exclude a significant segment of the polity--especially those of limited means who do not have ready access to such technology. Still, these mechanisms hold some promise for some voters, for whom traveling to the polls poses a significant burden. Policy-makers and electoral jurisdictions should give consideration to alternative methods of voting. One possibility is phone voting. In its present incarnation, **\*1049** phone voting requires voters to go to a central location, thus limiting its accessibility for those who have difficulty traveling outside their homes. Possibly, phone voting could be expanded in the future to allow more people with disabilities to vote independently.

- **Guidance for Caregivers.** Even with the best imaginable accommodations, some voters with disabilities are likely to require third-party assistance in applying for and voting an absentee ballot. For individuals assisting such voters, the line between providing appropriate assistance and engaging in impermissible coercion or proxy voting may be unclear. [FN166] These problems may be particularly significant for voters with cognitive impairments like dementia, who depend upon spouses, children, or institutional caregivers for support. There is a danger that such people, well-meaning though they may be, will “inject[] their own preferences into interactions with voters, such as suggesting how the ballot should be cast.” [FN167] Another problem is that such caregivers may provide an inappropriate “gatekeeping” role by failing to help someone obtain an absentee ballot--even though they still have the ability to understand the nature and effect of voting. [FN168] Such caregivers need to receive specific instructions on the legal requirements for voting and on the degree of assistance that is permissible. Caregivers should also be encouraged to seek assistance and advice from election officials if they are uncertain on whether they may be crossing an impermissible line.

- **Mobile Polling.** A final possibility is to bring the polling place to the voter by having election officials go to nursing homes and similar facilities prior to Election Day and assist people in casting their votes. If accompanied by appropriate procedures, this method of voting could enhance both the accessibility and the integrity of absentee voting. A related possibility is that accessible technology--which HAVA requires only at polling places-- could be brought to voters where they live. This option would be most feasible at facilities like nursing homes, where large numbers of people with disabilities live, but it is also possible that election officials could bring accessible voting equipment to voters in group homes or even private homes on request. This option could be especially important for the many voters with disabilities who live in poverty, for whom it is especially difficult to obtain transportation to a polling place where accessible equipment may be found. To the extent that local jurisdictions lack the re-

sources to accomplish this option, Congress **\*1050** or state legislatures should consider making funds available, as a means of ensuring that no person with a disability is left out of the democratic process.

This list is undoubtedly incomplete. We are confident that other means can be developed to promote the accessibility and integrity of absentee voting. Accordingly, our most important recommendation is for policymakers and election officials to devote greater attention to the needs of people with a wide range of disabilities who choose to vote absentee. Despite the intense scrutiny that has been given to election administration in the past several years, there remains a large and scarcely examined crack at the intersection between absentee voting and accessible voting. Absent further reform, many people with disabilities will continue to fall through that crack.

**\*1051** VI. Appendix A

State	Constitution / Statute	Availability of Absentee Voting	Requirements to Qualify for Assistance	Proof Required
Alabama	Ala. Code §§ 17-11-3 to -4, 17-11-7.	Qualified Absentee Voting	Out of county, state, or municipality on election day, physical infirmity preventing attendance at poll, 10 hour work shift on election day, out of county student, member of the armed forces, an appointed election official or poll worker, or an emergency.	Sworn Affidavit
Alaska	Alaska Const. art. 5, § 3; Alaska Stat. § 15.20.010.	No-excuse Absentee Voting	N/A	N/A
Arizona	Ariz. Rev. Stat. Ann. §§ 16-541 to -542.	No-excuse Absentee Voting	N/A	N/A
Arkansas	Ark. Code Ann. §§ 7-5-402, -405, -418.	No-excuse Absentee Voting (in person); Qualified Absentee Voting (by mail)	“[U]navoidably absent from his voting place” on election day, illness or physical infirmity, residence in a long-term care facility.	Application Subject to Perjury and Fine

California	Cal. Elec. Code § 3003.	No-excuse Absent- ee Voting	N/A	N/A
Colorado	Colo. Rev. Stat. Ann. §§ 1-8-102, -104, -202.	No-excuse		
Connecticut	Conn. Gen. Stat. Ann. §§ 9-135, -140.	Qualified Absentee Voting	Active military service, absent from town of voting reside- nce during voting, ill- ness or physical disab- ility, religious conflict, or election official.	Application Subject to Perjury
Delaware	Del. Const. art. 5, § 4A; Del. Code Ann. tit. 15, §§ 5502-03.	Qualified Absentee Voting	Must be unable to vote due to public ser- vice, military, busi- ness, vacation, sick- ness or physical disab- ility, religious conflict, or being a caregiver.	Sworn Affidavit
District of Columbia	D. C. Code §§ 1-1001.09, -.14; D.C. Mun. Regs. tit. 3, § 715.2.	Qualified Absentee Voting	Must be absent from the election dis- trict, an election em- ployee, have a physic- al condition preventing in person voting, be confined to a institu- tion for mental treat- ment, incarcerated for a non-felony, hospital- ization, or have reli- gious reasons.	Application Subject to Penalty
Florida	Fla. Stat. Ann. § 101.62.	No-excuse Absent- ee Voting	N/A	N/A
Georgia	Ga. Code Ann. §§ 21-2-380, -381.	No-excuse Absent- ee Voting	Qualifications lis- ted (including a re- quired absence from precinct, being an election official, being	Application State- ment; Administrative Adjudication

			in public service, 75+ age, having a religious conflict, physical disability, or being a caregiver), but no statement of reason is required.	
Hawaii	Haw. Rev. Stat. §§ 15-2, -4.	No-excuse Absentee Voting	N/A	N/A
Idaho	Idaho Code Ann. § 34-1001.	No-excuse Absentee Voting	N/A	N/A
Illinois	10 Ill. Comp. Stat. Ann. 5/19-1, -3.	No-excuse Absentee Voting (in person); Qualified Absentee Voting (by mail)	Qualifications include physical incapacity, having election duties, absence from county, jail detention, sequestered juror, religious holiday, or student attending institution of higher learning.	Application Subject to Penalty
Indiana	Ind. Code Ann. § 3-11-4-1.	No-excuse Absentee Voting	N/A	N/A
Iowa	Iowa Code Ann. §§ 53.1, 53.2.	No-excuse Absentee Voting	Qualifications include expected absence from precinct, illness or physical disability, or an inability to go to polls on election day, but no proof is required.	Application does not require a reason for absentee ballot.
Kansas	Kan. Stat. Ann. § 25-1119.	No-excuse Absentee Voting	N/A	N/A
Kentucky	Ky. Rev. Stat. Ann. § 117.075-85.	Qualified Absentee Voting	Qualifications include age, disability, illness, medical emergency, military ser-	Verified Statement

vice, students residing out of county of residence, voters temporarily residing out of state but eligible to vote, business, or incarceration without conviction.

Louisiana	La. Rev. Stat. Ann. §§ 18:1303, :1307.	No-excuse Absentee Voting (during early voting); Qualified Absentee Voting (by mail)	Any person qualified to vote may vote in person during the early voting period. To vote by mail, must be member of the U.S. Service or spouse/dependent, student, instructor, or professor in an institution of higher learning outside the parish and spouse, person expecting to be outside parish, moved to a new parish, involuntary confinement, person residing outside the U.S., sequestered juror, hospitalization, employed at sea or on state waters, handicapped according to statute, incarceration for a non-felonious conviction, person participating in State Address Confidentiality Program, or a religious leader posted outside the parish.	Application requires a reason for absentee ballot.
Maine	Me. Rev. Stat. Ann. tit. 21-A, § 751.	No-excuse Absentee Voting	N/A	N/A



Maryland	Md. Code Ann., Elec. Law §§ 9-304, - 305.	No-excuse Absentee Voting	N/A	N/A
Massachusetts	Mass. Gen. Laws Ann. ch. 54, § 86.	Qualified Absentee Voting	Qualifications include employment in another community, attendance at any institution of higher education, physical disability, “specially qualified voter” (under ch. 50, § 1) status, or a religious conflict.	An application filed with the town clerk is required to vote absentee. If a person has a permanent physical disability preventing voting in person, a certificate by a registered physician is required for permanent absentee status.
Michigan	Mich. Comp. Laws Ann.  §§ 168. 758, .759.	Qualified Absentee  Voting	Qualifications include physical disability  requiring assistance of another to attend polls on election day, religious conflict, election precinct inspector in another precinct, 60+ age, expected absence from town or city where voter resides, detained and awaiting arraignment or trial. These qualifications do not apply to a person who has moved out of state and no longer maintains residence in state.	Sworn Application
Minnesota	Minn. Stat. Ann. §§ 203B.02, .04.	Qualified Absentee Voting	Qualifications include reasonable expectation of inability to attend polls on election day due to absence from precinct, disability, religious	Application Statement

conflict, military service, permanent residence outside U.S. of citizen who is allowed to vote under federal law in federal elections, or “service as an election judge in another precinct.”

Mississippi	Miss. Code Ann. §§ 23-15-713, -715.	Qualified Absentee Voting	Qualifications include “qualified elector who is a bona fide student, teacher or administrator at any college, university, junior college, high, junior high, or elementary grade school whose studies or employment at such institution necessitates his absence from county of his voting residence” or such persons' spouse and dependent, a member and an “employee of a member of the Mississippi congressional delegation,” “any qualified elector who is away from his county of residence on election day for any reason,” person has a physical disability and the persons' parent, spouse or dependent, 65+ age, or business obligation preventing attendance at polls.	Sworn Affidavit or Application Statement
Missouri	Mo. Const. art. 8, § 7; Mo. Ann. Stat. §§ 115.277, .283.	Qualified Absentee Voting	Qualifications include expected absence from jurisdiction	Application Subject to Perjury

			on election day, “incapacity or confinement due to illness or physical disability,” caregiver, religious conflict, “employment as an election authority,” incarceration, “person in federal service,” “intrastate new resident,” or a “new resident.”	
Montana	Mont. Code Ann. § 13-13-201.	No-excuse Absentee Voting	N/A	Executed Affidavit
Nebraska	Neb. Rev. Stat. §§ 32-938, -941 to -942.	No-excuse Absentee Voting	N/A	N/A
Nevada	Nev. Rev. Stat. Ann. § 293.356.	No-excuse Absentee Voting	N/A	N/A
New Hampshire	N. H. Rev. Stat. Ann. §§ 657:1-4,;7.	Qualified Absentee Voting	Qualifications include absence from the location registered to vote, physical disability, religious observance, employment obligation, registration as an overseas voter, or member of the armed services.	Application Subject to Penalty
New Jersey	N. J. Stat. Ann. §§ 19:57-2, -3.	No-excuse Absentee Voting	N/A	N/A
New Mexico	N. M. Stat. Ann. § 1-6-3.	No-excuse Absentee Voting	N/A	N/A
New York	N. Y. Elec. Law § 8-400.	Qualified Absentee Voting	Qualifications include absence from county of residence or if New York City res-	Application Subject to Penalty

			ident, absence from city, due to “duties, occupation, business, or studies,” vacation, illness or physical disability, “qualified voter registered as an inmate or patient of a veteran's administration hospital,” accompanying a spouse, parent, or child otherwise entitled to apply for an absentee ballot, “detained in jail awaiting action by grand jury or awaiting trial,” or confined in prison after conviction for non-felony offense.	
North Carolina	N. C. Gen. Stat. Ann. § 163-226.	No-excuse Absentee Voting	N/A	N/A
North Dakota	N. D. Cent. Code § 16.1-07-01.	No-excuse Absentee Voting	N/A	N/A
Ohio	Ohio Rev. Code Ann. § 3509.02.	No-excuse Absentee Voting	N/A	N/A
Oklahoma	Okla. Stat. tit. 26, § 14-105.	No-excuse Absentee Voting	N/A	N/A
Oregon	Or. Rev. Stat. Ann. § 253.015.	No-excuse Absentee Voting (by mail)	N/A	N/A
Pennsylvania	25 Pa. Cons. Stat. Ann. § 3302.	Qualified Absentee Voting	Qualifications include illness or physical disability, “duties, occupation or business” require absence, assisting with the elections, or religious observance.	Letter or Signed Document

Rhode Island	R. I. Gen. Laws §§ 17-20-1, -2, -2.1, -8.	Qualified Absentee Voting (by mail)	Qualifications include absence from state while polls are open, student or spouse of student absence from city or town of voting residence because attending institution of higher learning in the state, “incapacitated to the extent that it would be an undue hardship to vote at the polls because of illness, or mental or physical disability, blindness, or serious impairment of mobility,” religious conflict, confinement in “any hospital, convalescent home, nursing home, rest home, or similar institution, public or private,” “detained while awaiting trial or being imprisoned for any cause, other than final conviction of a felony,” absence due to military service, employed to assist in election.	Application Subject to Penalty
South Carolina	S. C. Code Ann. §§ 7-15-320, -340; see S.B. 301, 116th Leg. (S.C. 2005).	Qualified Absentee Voting	Qualifications are numerous. Some include absence from county of residence on election day while polls are open for students and their spouses, members of the military and their spouses, “physically	Application with Sworn Oath

disabled persons,” caregivers, hospitalization for emergency, age 65+. Notably, many persons “may vote by absentee ballot whether or not absent.” Again, this list is extensive but some persons included are “physically disabled persons, certified poll watchers, poll managers. . . a person admitted to a hospital as an emergency patient on the day of the election or within a four-day period before an election . . . .”

South Dakota	S. D. Codified Laws § 12-19-1.	No-excuse Absentee Voting	N/A	N/A
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Tennessee	Tenn. Code Ann. §§ 2-6-102, -201, -202.	No-excuse Absentee Voting (in person); Qualified Absentee Voting (by mail)	Qualifications for absentee voting by mail include absence from the county where registered during hours that polls are open, students and spouses outside of county, jurors, age 65+, handicap, hospitalization, illness or physical disability, caretaker, candidates for office, election officials, religious observance, persons holding a valid commercial drivers license and works outside the county, residents of licensed nursing homes or similar licensed in-	Application with Reason for Absentee Ballot; Permanent Absentee Voter status requires a filed doctor's statement
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			stitutions. Permanent absentee status is available for those who “because of sickness, hospitalization or physical disability” are unable to visit a poll and those in licensed care facilities.	
Texas	Tex. Elec. Code Ann. §§ 81.001, 82.001 to .005, 82.007, 84.001, 84.0041.	No-excuse Absentee Voting (in person); Qualified Absentee Voting (by mail)	Qualifications for voting by mail include “absen[ce] from county of the voter's residence,” “sickness or physical condition,” age 65+, jail confinement, personal appearance, or participation in address confidentiality program.	Application Subject to Perjury
Utah	Utah Code Ann. § 20A-3-301.	No-excuse Absentee Voting	N/A	N/A
Vermont	Vt. Stat. Ann. tit.17, §§ 2531-32.	No-excuse Absentee Voting	N/A	N/A
Virginia	Va. Code Ann. §§ 24.2-700, -701.	Qualified Absentee Voting	Qualifications include absence from county and city where entitled to vote due to business, personal business, or vacation; member of uniformed service, merchant marine, resides outside the U.S. (or their spouse), and absent on election day; student or spouse absent from county or city on election day; physical disability or illness; confined in jail	Application Subject to Perjury

			while awaiting trial or misdemeanor conviction; election official; primary caregiver; religious obligation; or work commitments on election day.	
Washington	Wash. Rev. Code. Ann. § 29A.40.010.	No-excuse Absentee Voting	N/A	N/A
West Virginia	W. Va. Code Ann. §§ 3-3-1, 3-3-3, 3-3-5.	No-excuse Absentee Voting (in person); Qualified Absentee Voting (by mail)	Qualifications include “[p]hysical disability or immobility due to extreme advanced age,” “[i]llness, injury, or other medical reason,” non-felony incarceration or home detention, absence from county because of vacation or business travel, “attendance at a college, university or other place of education or training,” employment, “uniformed services voter or overseas voter,” elected or appointed federal/state official, inability to visit polling location due to physical disability, hospitalization, nursing home resident, or replacement poll worker.	Application Statement; Administrative Adjudication
Wisconsin	Wis. Stat. Ann. § 6.20.	No-excuse Absentee Voting	N/A	N/A
Wyoming	Wyo. Stat. Ann. § 22-9-102.	No-excuse Absentee Voting	N/A	N/A



\*1061 VII. Appendix B

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

[FNa1]. Associate Professor of Law, Michael E. Moritz College of Law, the Ohio State University. Professor **Tokaji** thanks Paul Gronke and Michael Waterstone for reviewing an earlier draft. In addition, Matt Damschroder of the Franklin County Board of Elections, Jim Dickson of the American Association of People with Disabilities, and Gene Newton of the Oregon Secretary of State's office generously shared their insights on the problems addressed in this article. Finally, the authors thank Chad Eggspuehler, Chris Tamms, and Amanda Dittmar for their outstanding research assistance, which went far beyond the call of duty.

[FNaa1]. Heck Faust Memorial Chair in Constitutional Law, Michael E. Moritz College of Law, the Ohio State University. Professor Colker wishes to thank Scott Lissner, the Americans with Disabilities Act Coordinator at the Ohio State University, for his helpful suggestions, as well as the participants at the Voting Rights Conference held at Columbus Community College in October 2006.

[FN1]. Terry Christensen, Absentee Balloting Has Changed Voting--and That's Good, San Jose Mercury News, Oct. 10, 2006, at A1 (noting an increase in the use of absentee ballots in California, from three percent in 1970 to forty-seven percent in June 2006).

[FN2]. See Appendix A (listing state-by-state absentee voting statutes). Thirty-five states have some form of no-excuse absentee voting. See *id.* This includes states that allow in-person early voting without an excuse. For a list of states that allow in-person early voting and state requirements for absentee voting by mail, see <http://electionline.org/Default.aspx?tabid=474> (last visited Aug. 31, 2007) (on file with the McGeorge Law Review).

[FN3]. This article uses the terms "individuals with disabilities," "people with disabilities," and "voters with disabilities" to include elderly people who have physical or mental disabilities.

[FN4]. 42 U.S.C.A. §§ 1973ee to 1973ee-6 (West 2003).

[FN5]. 42 U.S.C.A. §§ 12131-12134 (West 2005).

[FN6]. 42 U.S.C.A. §§ 15301-15545 (West 2005 & Supp. 2007).

[FN7]. See generally U.S. Gen. Accounting Office, Voters with Disabilities: Access to Polling Places and Alternative Voting Methods (2001), <http://www.gao.gov/new.items/d02107.pdf> [hereinafter GAO, Access to Polling] (on file with the McGeorge Law Review); U.S. Election Assistance Comm'n, A Summary of the 2004 Election Day Survey, Access to Voting for the Disabled 20 (2005).

[FN8]. Interview with Jim Dickson, Vice-President of Governmental Affairs, Am. Ass'n of People with Disabilities (Feb. 10, 2007) (notes on file with the McGeorge Law Review).

[FN9]. See *supra* note 2 & *infra* Appendix A.

[FN10]. Jessica A. Fay, Note, [Elderly Electors Go Postal: Ensuring Absentee Ballot Integrity for Older Voters](#), 13 Elder

[L.J. 453, 454-55 \(2005\)](#).

[FN11]. Denise Grady, [Changes Urged for Nursing-Home Voters](#), N.Y. Times, Sept. 15, 2004, at A23 (quoting Professor Pamela S. Karlan).

[FN12]. Jason H. Karlawish et al., [Addressing the Ethical, Legal, and Social Issues Raised by Voting by Persons with Dementia](#), 292 JAMA 1345, 1347 (2004).

[FN13]. This article uses the term “ballot manipulation” to refer collectively to fraud, coercion, and proxy voting. See discussion *infra* Part IV.B.

[FN14]. There are many ways in which voters may request an absentee ballot application, including through the mail, in person, and in some states by phone, email, fax, or the Internet. Voters may also return their absentee ballot application through the various means, including mail, in person, email, fax, or the Internet. See U.S. Gov't Accountability Office, [The Nation's Evolving Election System as Reflected in the November 2004 General Election 106 \(2006\)](#) [hereinafter GAO, [Evolving Election System](#)]. We nevertheless use the term “mail voting” as shorthand for this method of voting, given that absentee ballots are most commonly requested, received, and returned by mail.

[FN15]. There are some differences in nomenclature among jurisdictions, with some using the term “absentee voting” to refer only to voting by mail and others using it to include in-person absentee voting and mail voting. In addition, Internet voting might be considered a form of absentee voting, but we leave that to the side in this article because it has not yet garnered widespread use in American elections.

[FN16]. Pamela S. Karlan, [Ballots and Bullets: The Exceptional History of the Right to Vote](#), 71 U. Cin. L. Rev. 1345, 1350-52 (2003).

[FN17]. See John C. Fortier & Norman J. Ornstein, [The Absentee Ballot and the Secret Ballot: Challenges for Election Reform](#), 36 U. Mich. J.L. Reform 483, 493 (2003). Fortier and Ornstein offer a more detailed discussion of absentee voting's history than is possible here. See also John C. Fortier, [Absentee and Early Voting: Trends, Promises, and Perils 7-17 \(2006\)](#) (describing the history of absentee and early voting).

[FN18]. Fortier & Ornstein, *supra* note 17, at 493-94.

[FN19]. *Id.* at 493, 497.

[FN20]. *Id.* at 501.

[FN21]. Karlan, *supra* note 16, at 1351.

[FN22]. Fortier & Ornstein, *supra* note 17, at 504.

[FN23]. P. Orman Ray, [Absent-Voting Legislation, 1924-1925](#), 20 Am. Pol. Sci. Rev. 347, 347 (1926).

[FN24]. *Id.*

[FN25]. *Id.* at 348.

[FN26]. *Id.* See also Fortier & Ornstein, *supra* note 17, at 506.

[FN27]. Fortier & Ornstein, *supra* note 17, at 511. See also Edward B. Moreton, Jr., [Voting by Mail](#), 58 S. Cal. L. Rev. 1261, 1272 (1985).

[FN28]. Fortier & Ornstein, *supra* note 17, at 511.

[FN29]. Fay, *supra* note 10, at 484.

[FN30]. Paul Gronke, [Early Voting Reforms and American Elections 3](#) (Aug. 2004) (unpublished paper), <http://www.reed.edu/~gronkep/docs/Gronke-EarlyVoting-APSA2004.pdf> [hereinafter Gronke, [Early Voting Reforms](#)] (on file with the McGeorge Law Review).

[FN31]. Moreton, *supra* note 27, at 1263.

[FN32]. See *supra* note 2 & *infra* Appendix A.

[FN33]. [Ky. Rev. Stat. Ann. § 117.075](#) (West 2006).

[FN34]. See, e.g., [Ark Code Ann. § 7-5-405](#) (West 2007).

[FN35]. [Conn. Gen. Stat. Ann. § 9-135](#) (West 2007).

[FN36]. See Appendix A.

[FN37]. Paul Gronke, [Ballot Integrity and Voting by Mail: The Oregon Experience, A Report for the Commission on Federal Election Reform 2-3](#) (2005), [http://www.sos.state.or.us/executive/votbymail/pdf\\_files/CarterBaker.pdf](http://www.sos.state.or.us/executive/votbymail/pdf_files/CarterBaker.pdf) [hereinafter Gronke, [Ballot Integrity](#)] (on file with the McGeorge Law Review). See also Priscilla L. Southwell & Justin Burchett, [Vote-by-Mail in the State of Oregon](#), 34 *Willamette L. Rev.* 345, 347 (1998) (reporting that all-mail elections cost one-third to one-half less than polling place elections).

[FN38]. David B. Magleby, [Participation in Mail Ballot Elections](#), 40 *W. Pol. Q.* 79, 88 (1987) (finding that mail voting increased turnout in six of the seven cities that were examined).

[FN39]. Patricia L. Southwell & Justin I. Burchett, [The Effect of All-Mail Elections on Voter Turnout](#), 28 *Am. Pol. Q.* 72 (2000) (finding ten percent increase in turnout with all-mail elections). See also Jeffrey A. Karp & Susan A. Banducci, [Going Postal: How All-Mail Elections Influence Turnout](#), 22 *Pol. Behav.* 223, 234 (2000) [hereinafter Karp & Banducci, [Going Postal](#)] (finding that Oregon's all-mail voting increased turnout, especially in local elections); Priscilla L. Southwell, [Five Years Later: A Re-Assessment of Oregon's Vote by Mail Electoral Process](#), 37 *PS: Pol. Sci. & Pol.* 89, 91 (2004) (reporting that 29.3 percent of Oregon voters surveyed reported voting more often since the adoption of all-mail voting).

[FN40]. Paul Gronke et al., [Early Voting and Turnout](#), 40 *PS: Pol. Sci. & Pol.* (forthcoming 2007) (finding a 4.7 percent increase in presidential election years).

[FN41]. Karp & Banducci, [Going Postal](#), *supra* note 39, at 234.

[FN42]. In general, it is difficult to generalize for all individuals with disabilities because procedures that benefit one subgroup may disadvantage another subgroup of individuals with disabilities.

[FN43]. Karp & Banducci, [Going Postal](#), *supra* note 39, at 223, 234.

[FN44]. Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 *Am. Pol. Res.* 471, 478 (2005) [hereinafter Berinsky, *Perverse Consequences*]. See also Adam J. Berinsky et al., *Who Votes by Mail? A Dynamic Model of the Individual-Level Consequences of Voting-by-Mail Systems*, 65 *Pub. Opinion Q.* 178, 194 (2001) (finding that all-mail voting in Oregon “accentuated the stratification of the electorate”).

[FN45]. Berinsky, *Perverse Consequences*, supra note 44, at 478. This is consistent with evidence showing that higher income, older, and more conservative voters are more likely to vote absentee.

[FN46]. Gronke, *Ballot Integrity*, supra note 37, at 2. See also Jeffrey A. Karp & Susan A. Banducci, *Absentee Voting, Mobilization, and Participation*, 29 *Am. Pol. Res.* 183, 184 (2001) [hereinafter Karp & Banducci, *Absentee Voting*] (“Whether permissive absentee laws produce higher turnout or serve as a substitute for voting in person is not clear.”).

[FN47]. Samuel C. Patterson & Gregory A. Caldeira, *Mailing In the Vote: Correlates and Consequences of Absentee Voting*, 29 *Am. J. Pol. Sci.* 766, 785 (1985). But see J. Eric Oliver, *The Effects of Eligibility Restrictions and Party Activity on Absentee Voting and Overall Turnout*, 40 *Am. J. Pol. Sci.* 498, 498 (1996) (finding that levels of absentee voting depend largely on party's activity, not simply liberality of state's laws).

[FN48]. Karp & Banducci, *Absentee Voting*, supra note 46, at 190.

[FN49]. In theory, the movement towards “no excuse” voting might facilitate increased use of absentee voting by individuals with disabilities, by reducing the burden for those wishing to vote by mail. But, as we discuss infra Part IV.A.2, absentee voting has its own set of cumbersome obstacles, which can be expected to have a disproportionate impact against a subset of individuals with disabilities. Hence, it is hard to predict whether movement towards a “no excuse” system would, in general, facilitate or impede voting by individuals with disabilities.

[FN50]. See Fortier, supra note 17, at 60.

[FN51]. See id. at 61.

[FN52]. There is also some evidence that early voting mechanisms increase the cost of campaigning because “efforts and campaign communications have to be spread over a longer period of time.” Gronke, *Early Voting Reforms*, supra note 30, at 12.

[FN53]. Paul Gronke et al., *Early Voting in Florida, 2004*, at 2 (Sept. 1, 2005) (unpublished paper) (on file with the McGeorge Law Review).

[FN54]. Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 *Seattle U. L. Rev.* 353, 389 (2005) (“Absentee ballots, as opposed to ballots cast at a polling site, are generally more susceptible to fraud.”); see also Fortier, supra note 17, at 54-57.

[FN55]. See Wang, supra note 54, at 390.

[FN56]. See id.

[FN57]. GAO, *Evolving Election System*, supra note 14, at 127.

[FN58]. Id.

[FN59]. Gronke, *Ballot Integrity*, supra note 37, at 2.

[FN60]. Southwell & Burchett, *supra* note 37, at 351.

[FN61]. GAO, *Evolving Election System*, *supra* note 14, at 127.

[FN62]. See discussion *infra* Part IV.B.

[FN63]. GAO, *Evolving Election System*, *supra* note 14, at 119.

[FN64]. *Id.* at 121.

[FN65]. *Id.* at 113. This does not include Oregon, in which there is no need for permanent absentee status given that all elections are conducted by mail.

[FN66]. *Id.* at 121.

[FN67]. *Id.* at 112. The GAO reports that there were twelve such states in 2004. *Id.*

[FN68]. Precinct-count optical scan systems allow voters to mark paper ballots by hand and then to insert their ballots in a scanner located at the precinct, which can be programmed to notify voters if they have marked more choices than allowed. Direct record electronic (or DRE) machines allow voters to record their choices, typically using a touchscreen, and then record votes on the machines' internal memories. For more details, see Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *Fordham L. Rev.* 1711, 1721-22 (2005).

[FN69]. 42 U.S.C.A. § 15301 (West 2005).

[FN70]. See Michael J. Hanmer & Michael W. Traugott, *The Impact of Voting by Mail on Voter Behavior*, 32 *Am. Pol. Res.* 375, 396 (2004) (“[L]ittle changed with [Oregon’s] full-scale implementation of [all-mail voting].”).

[FN71]. Noel Runyan, *Improving Voter Access: A Report on the Technology for Accessible Voting Systems* 6 (Demos 2007).

[FN72]. Kay Schriener 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, 440-43 (2000).

[FN73]. *Vt. Const. of 1793*, ch. II, § 42.

[FN74]. *Me. Const. of 1819*, art. II, § 1.

[FN75]. *Del. Const. of 1831*, art. V, § 2.

[FN76]. Schriener et al., *supra* note 72, at 441-42.

[FN77]. All but nine of the states (Connecticut, Illinois, Indiana, Kansas, New Hampshire, North Carolina, Pennsylvania, Tennessee, and Vermont) have constitutional or statutory provisions disqualifying some categories of persons with disabilities from voting. See also Notes, *Mental Disability and the Right to Vote*, 88 *Yale L.J.* 1644, 1645-47 (1979) (“Only ten states permit citizens to vote irrespective of mental disability. Twenty-six states proscribe voting by persons labeled idiotic, insane, or non compos mentis.... Twenty-four states and the District of Columbia disfranchise persons adjudicated incompetent or placed under guardianship... Four states disqualify from voting persons committed to mental institutions,... but other laws in three of those states provide that commitment alone does not justify disfranchisement.”).

[FN78]. See Appendix A.

[FN79]. Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 *Elder L.J.* 109, 115-16 (2003).

[FN80]. *Doe v. Rowe*, 156 F. Supp. 2d 35, 59 (D. Me. 2001).

[FN81]. *Id.* at 43.

[FN82]. *Id.* at 50.

[FN83]. *Id.* at 56.

[FN84]. *Id.* at 59.

[FN85]. *Id.* at 51 n.31. See also Karlawish et al., *supra* note 12, at 1346. Under *Doe*, “a person has the capacity to vote if he or she understands the nature and effect of voting and has the capacity to choose among the candidates and questions on the ballot.” *Id.*

[FN86]. See Karlawish et al., *supra* note 12, at 1346 (recommending that states revise their voting capacity statutes to conform to the *Doe* standard); Paul S. Appelbaum et al., *The Capacity to Vote of Persons with Alzheimer's Disease*, 162 *Am. J. Psychiatry* 2094 (2005) (suggesting a means by which to determine whether citizens lack the capacity to understand the nature and effect of voting).

[FN87]. Karlawish et al., *supra* note 12, at 1346.

[FN88]. Disabilities Rights Educ. Def. Fund, *Guide to Voting Equipment Usability and Accessibility for People with Disabilities 2* (2003) (on file with the McGeorge Law Review). This amounts to a turnout rate of forty percent compared with over fifty percent among all voters in the 2000 election. Stephen E. Finkel & Paul Freedman, *The Half-Hearted Rise: Voter Turnout in the 2000 Election*, in *Models of Voting in Presidential Elections: The 2000 U.S. Election* 187-89 (2004).

[FN89]. *Whalen v. Heimann*, 373 F. Supp. 353, 357 (D. Conn. 1974) (adding that it is not “the province of courts to weigh the relative ease or difficulty with which the state could accommodate its voting procedures to meet the needs of various handicapped voters.”). See also *Selph v. Council of L.A.*, 390 F. Supp. 58, 61 (C.D. Cal. 1975) (holding that Equal Protection Clause does not require city to make polling places accessible to individuals with disabilities when absentee voting is available).

[FN90]. 42 U.S.C.A. § 1973aa-6 (West 2003).

[FN91]. 29 U.S.C.A. § 794 (West 1999 & Supp. 2007).

[FN92]. 42 U.S.C.A. § 1973ee (West 2003).

[FN93]. 42 U.S.C.A. § 12132 (West 2005).

[FN94]. 42 U.S.C.A. § 1973gg-5(2)(B) (West 2003).

[FN95]. See Michael E. Waterstone, Lane, Fundamental Rights, and Voting, 56 *Ala. L. Rev.* 793, 827 (2005) (“Social

science research demonstrates that the cumulative effect of these problems is decreased voting levels for people with disabilities. The 2000 National Organization on Disability/Harris Survey found that voter registration is lower for people with disabilities than for people without disabilities (sixty-two percent versus seventy-eight percent, respectively. A different survey in 1999 found that people with disabilities were on average about twenty percentage points less likely than those without disabilities to vote and ten points less likely to be registered to vote, even after adjusting for differences in demographic characteristics (age, sex, race, education, and marital status).”).

[FN96]. GAO, Access to Polling, *supra* note 7.

[FN97]. *Id.* at 4.

[FN98]. *Id.*

[FN99]. *Id.* at 7.

[FN100]. *Id.*

[FN101]. *Id.*

[FN102]. *Id.*

[FN103]. *Id.* However, “[a]lthough [the GAO] did not observe such aids on Election Day, some county officials told [the GAO] that, upon request, they try to provide specials aids so that blind individuals can vote independently.” *Id.* at 7 n.15.

[FN104]. Nat'l Org. on Disability, Alert: Most Voting Systems are Inaccessible for People with Disabilities, Aug. 2, 2001, <http://www.nod.org/index.cfm?fuseaction=page.viewPage&pageID=1430&nodeID=1&FeatureID=225&redirected=1&CFID=12258791&CF-TOKEN=86030427> (on file with the McGeorge Law Review).

[FN105]. James C. Dickson, Testimony Before the N.Y. City Council Comm. on Mental Health, Mental Retardation, Alcoholism, Drug Abuse & Disability Services (July 22, 2002), quoted in Michael Waterstone, *Civil Rights and the Administration of Elections-Toward Secret Ballots and Polling Place Access*, 8 *J. Gender Race & Just.* 101, 107 (2004).

[FN106]. 42 U.S.C.A. §§ 15301-15545 (West 2005 & Supp. 2007).

[FN107]. *Id.* § 15481(a)(3)(A).

[FN108]. *Id.*

[FN109]. *Id.* § 15481(a)(3)(B). Pursuant to HAVA, the Election Assistance Commission has issued Voluntary Voting System Guidelines that include specifications regarding accessibility, among other things. U.S. Election Assistance Comm'n, Voluntary Voting System Guidelines 54-57 (2005), [http://www.eac.gov/VVSG%20Volume\\_I.pdf](http://www.eac.gov/VVSG%20Volume_I.pdf) (on file with the McGeorge Law Review). These guidelines cover such criteria as font size, user interfaces, and audio capacity for technology provided at polling places. *Id.*

[FN110]. See 42 U.S.C.A. §§ 15381, 15383.

[FN111]. *Id.* § 15381(b)(5).

[FN112]. *Id.* § 15383.

[FN113]. See Michael Waterstone, [Constitutional and Statutory Voting Rights for People with Disabilities](#), 14 *Stan. L. & Pol'y Rev.* 353, 360 (2003) (arguing that disability rights statutes should be interpreted to require “accessible polling places and secret and independent ballots”).

[FN114]. U.S. Election Assistance Comm'n, *A Summary of the 2004 Election Day Survey: Access to Voting for the Disabled 20* (2005). The report noted that more than half of the states failed even to respond to the survey questions on accessibility. *Id.* While one cannot know for sure, it is certainly possible that non-reporting states' accessibility was even poorer than that of the states that did report.

[FN115]. Kimball W. Brace & Michael P. McDonald, *Final Report of the 2004 Election Day Survey 14-4* (2005), [http://www.eac.gov/election\\_survey\\_2004/pdf/EDS-Full\\_Report\\_wTables.pdf](http://www.eac.gov/election_survey_2004/pdf/EDS-Full_Report_wTables.pdf) (on file with the McGeorge Law Review).

[FN116]. 42 U.S.C.A. § 12131(1)(a) (West 2005).

[FN117]. 29 U.S.C.A. § 794 (West 1999 & Supp. 2007).

[FN118]. 42 U.S.C.A. § 12101(a)(3) (West 2005).

[FN119]. *Id.* § 12101(a)(7).

[FN120]. 28 C.F.R. § 35.151(b) (2006).

[FN121]. *Am. Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1235 (S.D. Fla. 2004). But see *Am. Ass'n of People with Disabilities v. Shelley*, 324 F. Supp. 2d 1120, 1126 (C.D. Cal. 2004) (applying ADA regulation regarding services, programs, and activities, 28 C.F.R. § 35.150, in a case involving voting technology).

[FN122]. 28 C.F.R. § 35.130(a) (2006).

[FN123]. See *Ohio Rev. Code Ann.* §§ 3509.03, 3509.04, 3509.05 (West 2006) (codifying the sub-committee on House Bill 234).

[FN124]. *Ohio Rev. Code Ann.* §§ 3509.03, 3509.04, 3509.05.

[FN125]. Ohio's rules regarding identification for absentee voters were challenged before the 2006 general election. *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006) (staying TRO against identification requirements for absentee voters). A few days before the election, parties ultimately agreed to and the district court entered a consent order clarifying the rules for that election. See Consent Order, *Ne. Ohio Coal. for the Homeless v. Blackwell*, 467 F.3d 999 (6th Cir. 2006) (No. C206-896), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/NEOCHConsentOrd.pdf> [hereinafter Consent Order] (on file with the McGeorge Law Review). Additional filings in this case are available at <http://moritzlaw.osu.edu/electionlaw/litigation/NEOCHv.Blackwell.php>.

[FN126]. See *Ohio Sec'y of State, Voter Information Guide*, <http://www.sos.state.oh.us/sos/PublicAffairs/VoterInfoGuide.aspx?Section=16> (last accessed May 31, 2007) (on file with the McGeorge Law Review).

[FN127]. J. Kenneth Blackwell, *Ohio Sec'y of State, Directive 2006-78*, at 3 (Oct. 26, 2006), <http://moritzlaw.osu.edu/electionlaw/litigation/documents/directive2006-78.pdf> (on file with the McGeorge Law Review).



[FN128]. See Consent Order, *supra* note 125.

[FN129]. See John Pawasarat, *The Driver License Status of the Voting Age Population in Wisconsin* (2005) (unpublished paper), <http://www.uwm.edu/Dept/ETI/barriers/DriversLicense.pdf> (on file with the McGeorge Law Review).

[FN130]. *Ohio Rev. Code Ann.* §§ 3509.03, 3509.08 (West 2006).

[FN131]. *42 U.S.C.A.* § 15481(a)(3) (West 2005).

[FN132]. **Tokaji**, *supra* note 68, at 1723-24.

[FN133]. See Brennan Ctr. for Just., *The Machinery of Democracy: Voting System Security, Accessibility, Usability, and Cost* 76 (2006), <http://ceimn.org/files/BrennanCenterVotingTechnologyAssessmentR> (on file with the McGeorge Law Review).

[FN134]. *Id.*

[FN135]. See **Tokaji**, *supra* note 68, at 1769-70.

[FN136]. GAO, *Evolving Election System*, *supra* note 14, at 106.

[FN137]. The United Kingdom has used telephone voting to accommodate some people with disabilities. See AT Network, *Accessible Voting Machines*, <http://www.atnet.org/index.php?page=accessible-voting-machines> (last visited Aug. 29, 2007) (on file with the McGeorge Law Review).

[FN138]. See Email from Chad Eggspuehler to Professor Daniel Tokaji (Nov. 14, 2006; 09:49 EST) (on file with the McGeorge Law Review) (recounting a conversation with Oregon's HAVA Director Gene Newton); Email from Gene A. Newton, HAVA Director, to Chad Eggspuehler (Nov. 15, 2006; 08:53 EST) (on file with the McGeorge Law Review). The descriptions of the Oregon system in the following paragraphs were derived from these emails.

[FN139]. See Brennan Ctr. for Just., *supra* note 133, at 77 (describing limitations of phone-voting systems for people with auditory and fine motor skill impairments).

[FN140]. See Appendix B (containing a sample HTML ballot).

[FN141]. The others using the HTML system were fifteen military voters, five people voting from out of state, and seven people voting from out of county. Email from Gene A. Newton to Chad Eggspuehler (Dec. 11, 2006) (on file with the McGeorge Law Review).

[FN142]. See Jason H. Karlawish & Richard Bonnie, *Voting by Elderly Persons with Cognitive Impairments: Lessons from Other Democratic Nations*, 38 *McGeorge L. Rev.* 879, 885, 891-94, 904-05 (2007).

[FN143]. Amy Smith & Charles P. Sabatino, *Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations*, 26 *Bifocal* 1, 1 (2004).

[FN144]. *Id.* at 4.

[FN145]. Interview by Daniel Tokaji with Matt Damschroder, Board of Elections, Franklin Co., Ohio (Dec. 19, 2006)

(notes on file with the McGeorge Law Review).

[FN146]. Id.

[FN147]. In order for this option to provide meaningful accessibility, it would be very important for poll workers stationed at a nursing home to have special training in working with individuals with disabilities and for a high percentage of the machines at such places to be accessible to people with a wide range of disabilities. Anecdotally, we have heard that nursing homes are sometimes chosen as polling places, but inexperienced poll workers can be overwhelmed with the challenges presented by the large number of voters needing assistance or extra time at such polling places.

[FN148]. See Smith & Sabatino, *supra* note 143, at 4 (noting that procedures which require local election authorities to “initiate contact with covered facilities” may help eliminate barriers to effective participation).

[FN149]. See, e.g., Fortier & Ornstein, *supra* note 17, at 512-13; Wang, *supra* note 54, at 389; William T. McCauley, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. Miami L. Rev. 625 (2000) (discussing the occurrence of voter fraud in Florida).

[FN150]. Karlawish et al., *supra* note 12.

[FN151]. Id. at 1345.

[FN152]. Id.

[FN153]. Id.

[FN154]. Fay, *supra* note 10.

[FN155]. Id. at 454.

[FN156]. Id. at 454-55.

[FN157]. Id. at 455.

[FN158]. Id.

[FN159]. Id. at 464 (citing *Womack v. Foster*, 340 Ark. 124 (2000)).

[FN160]. Id. at 465 (citing *Straughter v. Collins*, 819 So. 2d 1244 (Miss. 2002)).

[FN161]. Daniel P. Tokaji, *The Moneyball Approach to Election Reform* (Oct. 18, 2005), <http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php> (on file with the McGeorge Law Review).

[FN162]. Id.

[FN163]. Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 633 (2007) (cautioning against the passage of new voter identification laws without an adequate assessment of their costs and benefits).

[FN164]. Smith & Sabatino, *supra* note 143, at 4; N.Y. Elec. Law § 8-407 (West 2007).

[FN165]. See Smith & Sabatino, *supra* note 143, at 4.

[FN166]. See Karlawish et al., *supra* note 12, at 1347-48.

[FN167]. *Id.* at 1348.

[FN168]. *Id.* at 1346.  
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