

2003

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Recommended Citation

Gabrielle B. Ruda, *Picture Perfect: A Critical Analysis of the Debate on the 2002 Help America Vote Act*, 31 Fordham Urb. L.J. 235 (2003).
Available at: <https://ir.lawnet.fordham.edu/ulj/vol31/iss1/9>

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Cover Page Footnote

Gabrielle B. Ruda, J.D. Candidate, Fordham University School of Law, 2004; B.S. Human Development and Family Studies, Cornell University, Ithaca, New York, 1999. I would like to thank my parents for their love and support.

PICTURE PERFECT: A CRITICAL ANALYSIS OF THE DEBATE ON THE 2002 HELP AMERICA VOTE ACT

*Gabrielle B. Ruda**

“And all the while, the rising power of my vote, helping build democracy”¹

The notion that every citizen should have the unimpeded ability to cast a vote in the federal electoral process is an axiom embedded in America’s collective subconscious.² The Presidential Election of 2000, however, provided a stark illustration of how easy it is to disprove the principle of Americans’ inherent right to vote. Discrepancies and flaws in procedural policies for the administration of the election silenced thousands of voices in the State of Florida.³ The wide-scale disenfranchisement of numerous citizens highlighted the need for federal intervention into this long-neglected area of election law.⁴

The Help America Vote Act of 2002⁵ (“HAVA”), was designed to implement sweeping national election reform to remedy some of the ills that occurred in 2000.⁶ One major cause of the breakdown of the electoral process in 2000 was the lack of uniform procedural guidelines for various aspects of the voting process.⁷ Congress sought to provide such standards through the creation of HAVA, which was passed on October 16, 2002, by Congress and was signed into law by President Bush on October 29 of the same year.⁸

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1. LANGSTON HUGHES, *Prelude to Our Age*, in THE COLLECTED POEMS OF LANGSTON HUGHES 379 (Arnold Rampersad ed., 1994).

2. This idea is one of the most basic tenets emphasized by the U.S. Constitution. See *infra* notes 37-39 and accompanying text.

3. See, e.g., Josh Barbanell & Ford Fessenden, *Contesting the Vote: The Tools*, N.Y. TIMES, Nov. 29, 2000, at A25.

4. See *id.*

5. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002).

6. Robert Pear, *The 2002 Campaign: Ballot Overhaul*, N.Y. TIMES, Oct. 17, 2002, at A1.

7. See *id.*

8. Help America Vote Act of 2002, 116 Stat. 1666.

HAVA generally received a warm reception from the public because of the urgency of the need for legislative reform.⁹ There are several provisions however, that have not received universal acceptance, including Section 303,¹⁰ which deals with the identification requirements for voter registration, meant to reduce voter fraud.¹¹ Part of the Anti-Fraud provision requires that prospective voters provide valid photo identification, such as a driver's license, in order to register.¹² If potential voters do not possess a valid photo ID, they can use their Social Security number for identification instead.¹³ If the registrant has neither a photo ID nor a Social Security number, the anti-fraud provision provides that she will be assigned a voter registration number based on a state-authored computerized voter list.¹⁴ Further, first-time voters who register and cast a ballot by mail must submit with the ballot valid photo identification or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that verifies the name and address of the voter.¹⁵

This Anti-Fraud provision is highly contentious and was hotly debated during the months of Congressional negotiations over HAVA.¹⁶ The fallout of the debate took place on the floor of Congress along predominantly partisan lines.¹⁷ The House and Senate Republicans argued that the Anti-Fraud provision was necessary, including Senator Christopher Bond (R-MO), who said it was needed to "combat problems of votes being cast on behalf of dead people and dogs."¹⁸ Democrats vociferously opposed the provision because of the obstacles to voting that it creates for lower socio-economic groups and racial/ethnic minorities.¹⁹ Senator Christopher Dodd (D-CT) responded, "While its humorous to talk about

9. See Pear, *supra* note 6, at A1.

10. Help America Vote Act § 303(a)(5) (2000). States are required to comply with this section's requirements for first time voters who register by mail beginning January 1, 2004. See FEDERAL ELECTION COMMISSION, *Help America Vote Act Timeline*, at www.fec.gov/hava/timeline.htm (last visited Sept. 8, 2003).

11. Help America Vote Act § 303(a)(5).

12. Help America Vote Act § 303(a)(5)(i)(I).

13. Help America Vote Act § 303(a)(5)(i)(II). Applicants can use the last four digits of their Social Security number for identification. *Id.*

14. Help America Vote Act § 303(a)(5)(ii).

15. Help America Vote Act § 303(b)(2)(A)(ii).

16. Dana Bash, *Senate Approves Election Reform Bill: Bush Expected to Sign Legislation into Law* (Oct. 16, 2002), at <http://www.cnn.com/2002/ALLPOLITICS/10/16/election.reform/> (last visited Sept. 8, 2003).

17. *Id.*

18. *Id.*

19. See generally Bash, *supra* note 16.

dogs who voted, it's not funny to talk about people who showed up and didn't, and were denied to do so."²⁰ Despite the deep ideological divide that separates Democrats and Republicans on this issue, the bill passed overwhelmingly in both the House and the Senate,²¹ illustrating the Congressional consensus on urgency of the need for immediate reform of the electoral process.

After passage of the bill, the torch of opposition to the Anti-Fraud provision was passed to Civil Rights and Civic Participation Organizations. These groups propose that the implementation of the provision holds the potential to paralyze the strides made in voting rights legislation throughout the twentieth century, such as the establishment of voter equality for gender and racial minorities,²² and deprives racial and ethnic minority groups and lower socio-economic groups (two categories which often overlap) of having their voices heard in the political process because these groups are the most likely to be without the requisite forms of ID.²³ Because of this opposition, the controversy over the Help America Vote Act of 2002 still continues and goes beyond the halls of Congress into the streets of America.

This Comment examines whether the Anti-Fraud provision provides a fair scheme for the identification process during voter registration, or if it inherently violates certain fundamental rights and freedoms of American citizens who wish to cast their ballot. Part I of this Comment provides a historical assessment of the institution of voting and how it came to be one of the most coveted rights within the framework of American democracy. Part I also examines the standard of review used by courts to determine whether a law violates a citizen's constitutional right to vote. Part II analyzes perspectives on whether the Anti-Fraud provision is the appropriate means required to achieve its stated objective of decreasing voter fraud, or whether the provision places an undue burden on individual rights. Part III argues that discriminatory infringements on voting rights need to be eliminated because the right of the citizenry to cast their vote in a federal election serves as the basis for

20. *Id.*

21. See Pear, *supra* note 6, at A1.

22. See generally John Mark Hansen, *Report Issued by the Task Force on the Federal Election System*, July 2001, available at http://www.reformelections.org/data/task_t2/t2_reports/b_electionssystem.php, at 1; see also Michelle Waslin, *Safe Roads, Safe Communities: Immigrants and State Driver's License Requirements*, (May 2002), NATIONAL COUNCIL OF LA RAZA, available at <http://www.nclr.org/policy/briefs/IB6Drivers%20Licenses.pdf>.

23. See generally Hansen, *supra* note 22. See also Waslin, *supra* note 22.

all other rights. If this institution is handicapped in any way, the guiding principle that the United States government "[O]f the people, by the people, and for the people . . ." ²⁴ is jeopardized. Part III recognizes, however, that voter fraud is a pervasive problem that needs to be addressed. This section asserts that a compromise needs to be achieved between both sides of the debate in order to make it harder to cheat but not harder to vote.

I. BACKGROUND ON CONSTITUTIONAL AND LEGISLATIVE MECHANISMS TO CHALLENGE DISCRIMINATORY LEGISLATION

In the quest to achieve equality in the implementation of law in the United States, citizens are entitled to challenge the constitutionality of laws they feel are either facially discriminatory or that create an undue burden on the rights of certain groups of people in the course of their implementation.²⁵ There are several methods through which citizens can assert these challenges. One type of constitutional challenge can be brought if a statute wrongfully infringes on the fundamental rights of individuals.²⁶ Fundamental rights are derived from the Equal Protection Clause of the Fourteenth Amendment.²⁷ As part of the Equal Protection analysis, the United States Supreme Court interpreted the clause to encompass certain specific fundamental rights that belong to each citizen, which receive heightened protection from governmental interference.²⁸

A second constitutional basis for challenging a statute is to claim that the law imposes an undue burden on the rights of certain groups identified as "suspect classes."²⁹ The Court reads the Equal Protection Clause to mean that members of certain classes deserve special protection because their class has faced a history of discriminatory treatment.³⁰ If a court determines that a law imposes an undue burden on fundamental rights, or discriminates against a suspect class, that law will be subject to strict scrutiny review and

24. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), Library of Congress, available at www.loc.gov/exhibits/gadd/4403.html (last visited Sept. 9, 2003).

25. Stephanie L. Grauerholz, *Colorado's Amendment 2 Defeated: The Emergence of a Fundamental Right to Participate in the Political Process*, 44 DEPAUL L. REV. 841, 859-60 (1995). Citizens are given this ability pursuant to the Constitution. *Id.*

26. *Id.*

27. U.S. CONST. amend. XIV, §1.

28. Grauerholz, *supra* note 25.

29. See discussion *infra* Part I.A.2.

30. See Grauerholz, *supra* note 25, at 860.

will be struck down as unconstitutional if it does not meet the burden imposed by this standard.³¹ Within a strict scrutiny analysis, the Court reviews the legislation in question to determine whether it furthers a compelling state interest and if the means used are narrowly tailored to achieve that end.³²

A third basis for statutory challenge can be derived from the Voting Rights Act of 1965.³³ Individuals bringing this challenge can argue that a statute or one of its provisions violates the protections afforded minority groups through the passage of the Voting Rights Act, which codified equal voting rights for all citizens, in accordance with the Fifteenth Amendment.³⁴

There are several avenues, therefore, through which parties can challenge such legislation as the Help America Vote Act of 2002. This section describes the manner in which a citizen could use the Voting Rights Act or the Constitution as a framework for analysis of the anti-fraud provision of HAVA. This section also surveys the development of the general concept of fundamental rights and the development of voting as a fundamental right. In addition, this section examines the evolution of suspect classes and the standard of review set forth by the Court as a means by which to measure the constitutionality of laws that are called into question as violative of the Equal Protection Clause. Finally this section examines the Voting Rights Act of 1965, which represents the union of basic civil rights with the constitutional right to exercise the vote.

A. Constitutional Bases for the Assertion of Voting Rights

1. Fundamental Rights Defined

Certain rights that "have value so essential to individual liberty in our society"³⁵ permit the Court to review acts of other government branches that involve these rights.³⁶ These rights are referred to as fundamental rights, if they are "explicitly or implicitly guaranteed by the Constitution."³⁷

31. See Mark Strasser, *Suspect Classes and Suspect Classifications: On Discriminating, Unwittingly or Otherwise*, 64 TEMP. L. REV. 937, 939 (1991).

32. See *id.*

33. 42 U.S.C. §1973 (1965).

34. *Id.*; see also U.S. CONST. amend. XV, §1.

35. See Grauerholz, *supra* note 25, at 861 (quoting JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.7, at 388 (4th ed. 1991)).

36. *Id.*

37. *Id.* (quoting Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV 121, 148 (1989)).

a. *Voting as a Fundamental Right*

There are several amendments to the Constitution that establish voting as a fundamental right that can be claimed by all American citizens. The Fifteenth Amendment directly embodies this sentiment: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."³⁸ The Nineteenth Amendment prohibits voting discrimination based on gender, stating, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex."³⁹ The Twenty-Fourth Amendment outlaws the use of barriers such as poll taxes to impede voting, emphasizing the fact that a citizens' right to vote in any primary or election shall not be abridged or denied by failure to pay any poll or other tax.⁴⁰ The presence of these three amendments in the Constitution illustrates that voting is considered one of our most precious rights. As such, any barriers to the exercise of this right are subjected to the highest level of scrutiny.⁴¹

The Supreme Court has recognized voting as a fundamental right on numerous occasions. In *Reynolds v. Sims*,⁴² the Court stated, "As long as ours is a representative form of government . . . the right to elect legislators in a free and unimpaired fashion is a bed-rock of our political system."⁴³ The Court affirmed this principle by explaining the main thrust of their reasoning. According to the Court, "[T]he right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights. . . ."⁴⁴ These opinions embody one of the basic tenets of American society: that the right to vote is fundamental and there is a strong presumption against legislation that directly or indirectly deprives the citizenry of the franchise.⁴⁵

38. U.S. CONST. amend. XV, § 1.

39. U.S. CONST. amend. XIX.

40. See U.S. CONST. amend. XXIV.

41. See discussion *infra* Part I.A.3.

42. 377 U.S. 533 (1964). In *Reynolds*, Alabama voters brought suit challenging the apportionment scheme of the state legislature. *Id.* The claim was brought on the grounds that unequally populated state legislative districts were violative of the Equal Protection Clause. *Id.*

43. *Id.* at 562.

44. *Id.*; see also *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

45. See Grauerholz, *supra* note 25, at 899-902.

2. *Suspect Classes—Defined*

A second aspect of the equal protection analysis is the Supreme Court's determination as to whether a law discriminates against a suspect class.⁴⁶ A suspect class is composed of individuals deserving special protection from majoritarian political processes because historically these groups were subject to discrimination and, thereby, political impotence.⁴⁷

The Supreme Court has not specifically defined which classes are considered to be suspect. They have set forth guidelines, however, that enumerate the characteristics of a suspect class:

The group must be discrete and insular; individuals of the class must have a disability over which they do not have control; and the defining characteristic of the class must bear no rational relation to a legitimate state purpose. Further the group must have experienced a history of purposeful unequal treatment or have been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities. Finally, class membership must be stigmatized by society.⁴⁸

Some examples of suspect classes include classes based on race, nationality, and ethnicity.⁴⁹

The Supreme Court rationale behind the concept of enhanced protection of suspect classes is based on the idea that arbitrary and irrational classification may deprive people of basic rights to which they are entitled under the Constitution.⁵⁰ In *Carrington v. Rash*,⁵¹ the Court notes, however, "mere classification . . . does not itself deprive a group of equal protection" ⁵² The Court recognized that a second aspect of determining suspect classes must be for them to "[R]each and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose."⁵³

46. See Strasser, *supra* note 31, at 937; see also *San Antonio v. Rodriguez*, 411 U.S. 1, 28-29 (1973).

47. See Strasser, *supra* note 31, at 938. The increased scrutiny that the Court applies to laws that affect suspect classes is also applied to legislation that affects "quasi-suspect" classes; however the level of scrutiny in the latter cases does not reach the same exacting standard as for the former. *Id.*

48. *Id.* at 939.

49. *Id.*

50. See *Strauder v. West Virginia*, 100 U.S. 303, 310-11 (1879).

51. 380 U.S. 89, 92-93 (1965) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-89 (1955)).

52. *Id.*

53. *Id.* (citing *McLaughlin v. Florida*, 379 U.S. 184, 191 (1964)).

3. *The Standard of Review*

In cases where a statute violates the Constitution by infringing on a fundamental right or by wrongfully discriminating against a suspect class, the statute is subject to a highly exacting standard of review.⁵⁴

a. *The Standard of Review Used to Determine Whether a Statute Unfairly Infringes on a Fundamental Right*

The Supreme Court has continuously recognized and reaffirmed the importance of fundamental rights, especially the right to vote.⁵⁵ In order to preserve the people's right to vote, the Court set up a standard of strict scrutiny review to determine if a statute improperly abrogates a fundamental right through their assertion that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."⁵⁶ This standard of review is the highest level of scrutiny a court can apply to a statute.⁵⁷

The analysis is implemented in several parts. The court first examines the interest or fundamental right in question.⁵⁸ If the Court decides that a fundamental right is abridged, the law is subject to strict scrutiny and will be struck down as unconstitutional if the state cannot show "a compelling interest" for its enactment.⁵⁹ If a compelling state interest does exist, the Court will ask whether the means used in the statute are "narrowly tailored" to achieve the end.⁶⁰ This part of the inquiry looks at whether there is an alternative method of achieving the same goal, without burdening fundamental rights.⁶¹ If the court finds that an alternative method exists, the law will be invalidated.⁶²

b. *Standard of Review Used to Determine Whether There Has Been Discrimination against a Suspect Class*

The Court takes great pains to safeguard groups of people who have suffered abuse and discrimination at the hands of the legal

54. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 533 (1964) (noting that a statute which may infringe upon one's fundamental rights must be carefully scrutinized).

55. 42 U.S.C. § 1973 (1965).

56. *Reynolds*, 377 U.S. at 561-62; see also Grauerholz, *supra* note 25, at 863-64.

57. See generally Strasser, *supra* note 31, at 942-43.

58. *Id.* at 943.

59. See Grauerholz, *supra* note 25, at 863.

60. See Strasser, *supra* note 31, at 943.

61. *Id.*

62. *Id.*

system.⁶³ The Supreme Court, therefore, has applied the strict scrutiny standard of review to legislation that has an unequal and unfair effect on a predetermined suspect class.⁶⁴ Once a group is classified as "suspect", the Court will carefully scrutinize any legislation that targets this class and subjects them to adverse treatment.⁶⁵ This entails a strict scrutiny analysis that parallels the one used for legislation that abridges fundamental rights.⁶⁶

The rationale used by the Court for the protection of suspect classes was embodied by Justice Warren's opinion in *Brown v. Board of Education*,⁶⁷ when he stated, "To separate them [African-Americans] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."⁶⁸ This general principle was applied by the Court to suspect classes that are based on race or other characteristics.⁶⁹

There are two types of laws that affect suspect classes and can be subject to the strict scrutiny analysis.⁷⁰ The first is legislation that is facially discriminatory and the second is legislation that purports to achieve a legitimate state goal but places an undue burden on a suspect class to achieve that goal.⁷¹ If either type passes the first prong of strict scrutiny analysis, it will still be invalidated if it is not narrowly tailored to achieve its stated end.⁷² A law is not narrowly tailored if there is an alternative method to meet these ends and does not place an undue burden on a suspect class.⁷³

B. Legislative Basis for Assertion of Voting Rights

The Fifteenth Amendment struck down voting discrimination.⁷⁴ Racial discrimination however, prevailed during the first half of the

63. *Id.* at 938.

64. *Id.*

65. *See id.*

66. *See generally* Grauerholz, *supra* note 25, at 861-62 (noting that fundamental rights are those that have "a value so essential to individual liberty in our society that they permit the Court to review acts of other government branches".)

67. 347 U.S. 483 (1954).

68. *Id.* at 494.

69. Strasser, *supra* note 31, at 938-39.

70. *Id.* at 941.

71. *See id.*

72. *See Plyler v. Doe*, 457 U.S. 202, 216-17 (1982).

73. Strasser, *supra* note 31, at 941.

74. U.S. CONST. amend. XV, § 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.*

twentieth century, especially in the South, where the white majority pioneered creative avenues such as poll taxes and literacy tests, through which they could perpetrate the exclusion of African-Americans and minority groups from exercising the franchise.

The Civil Rights Movement was created to address the outcry for equality, and a new movement to re-enfranchise minority voters was born. As part of this movement, Congress passed the Voting Rights Act of 1965,⁷⁵ which recognized the need for equality in the franchise.⁷⁶ Instead of merely asserting the ideology of equality, the bill explicitly invalidates a variety of discriminatory ploys used to keep African-Americans outside the voting booth, including variations on the poll tax.⁷⁷ The Voting Rights Act also calls attention to minority groups other than African-Americans, by stating that the Act applies to anyone whose attempts to vote are hindered by white majoritarian ploys to discriminate based on race or color.⁷⁸

Section 2 of The Voting Rights Act provides a means by which to challenge any feature of a state or locality's electoral system.⁷⁹ It is an alternative to a Constitutional challenge, by which an injured party can pursue their electoral claim.⁸⁰ This mechanism was implemented several years after the passage of The Voting Rights Act, after key amendments were made to the bill in 1982.⁸¹ The 1982 Amendments transformed Section 2, which was essentially a reiteration of the Fifteenth Amendment, into a tool that has contributed greatly to modern voting rights law.⁸²

The 1982 Amendments were an outgrowth of the Supreme Court decision in *City of Mobile v. Bolden*,⁸³ which required plaintiffs bringing representational challenges under the Fifteenth Amendment or § 2 to show that the challenged system was intentionally discriminatory.⁸⁴ The Court invalidated the "intent" analysis

75. 42 U.S.C. § 1973 (1965).

76. See 42 U.S.C. § 1973; see also U.S. Const. amend. XV, § 1.

77. See 42 U.S.C. § 1973.

78. *Id.*

79. DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, ELECTION LAW CASES AND MATERIALS 228, (2d ed. 2001).

80. *Id.*

81. *Id.*

82. See *id.*

83. 446 U.S. 55 (1980). Black citizens of Mobile, Alabama brought class action challenging the constitutionality of the city's at-large method of electing commissioners. *Id.* at 58.

84. See *id.* at 80.

shortly thereafter,⁸⁵ and Congress amended §2 to prohibit any voting procedure that “results in a denial or abridgement” of the right to vote, regardless of intent.⁸⁶ This firmly established that electoral challenges, direct or implied, could be brought against discriminatory voting policies.⁸⁷ Racial and language minorities thus had a remedy for the past abridgement of their right to vote.⁸⁸ The amendments clearly note that these groups were traditionally given “less opportunity than other members of the electorate . . . to elect representatives of their choice.”⁸⁹

After the passage of the 1982 Amendments, the Court attempted to formulate a precise interpretation of Section 2 in *Thornburg v. Gingles*.⁹⁰ Justice Brennan’s opinion in *Gingles* discusses three factors that plaintiffs have to show in order to prove a Section 2 claim:

Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.⁹¹

This opinion therefore represented a breakthrough in the establishment of a viable framework of analysis for courts to evaluate legislative challenges to electoral procedures alleged to be in violation of the Voting Rights Act.

The development of both constitutional and legislative bases as mechanisms for citizens to challenge federal voting procedure may become relevant once HAVA measures are put in place. Challenges however, may not reach the judicial system for several years.⁹²

85. *Rogers v. Lodge*, 458 U.S. 613, 628 (1982).

86. LOWENSTEIN & HASEN, *supra* note 79, at 229 (quoting the 1982 amendment to the Voting Rights Act).

87. *Id.*

88. *Id.*

89. *Id.*

90. 478 U.S. 30 (1986). Black citizens challenged a North Carolina redistricting scheme, alleging that it impaired their ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments. *Id.* at 34-35.

91. *Id.* at 46 (citations omitted).

92. Letter from the Leadership Conference on Civil Rights, to the U.S. Senate on Election Reform (Oct. 9, 2002) (letter from Dr. Dorothy I. Height, Chairperson, and Wade Henderson, Executive Director), available at <http://www.civilrights.org/issues/voting/details.cfm?id=10337> (last visited Feb. 9, 2004).

II. THE DEBATE OVER HAVA'S POTENTIALLY DISCRIMINATORY EFFECTS ON SPECIFIC VOTING POPULATIONS

While crafting HAVA, most members of Congress agreed that the implementation of strong anti-fraud measures should be the cornerstone of the bill.⁹³ Traditionally, most state election regimes requested some form of identity verification upon registration as one way of preventing election fraud.⁹⁴ Prior to HAVA, the verification measures had three parts 1) states required voters to sign their names to an official registry or on a ballot application, 2) the signatures given at the polling place are compared to signatures provided at the time of registration, 3) voters show some form of identification, but only Florida seemed to specify that it had to be a photo ID.⁹⁵ The lack of uniformity in procedure used among states resulted in a push for the establishment of a uniform system of identity verification for voter registration during the creation of HAVA.⁹⁶

The Committee on House Administration reported on a preliminary draft of HAVA in late 2001.⁹⁷ From that point until the passage of the bill in late 2002, there was grave disagreement in both the Senate and the House of Representatives over which methodology would be the least cumbersome, yet most effective in achieving the anti-fraud objective.⁹⁸ Two approaches to the problem largely fell along partisan lines.⁹⁹ One group of Congressional leaders fought to retain the photo identification requirement, while the opposing group of legislators emphasized that the ID requirement could have a discriminatory impact on their constituencies due to the undue burden that it would create for certain minority voting blocs.¹⁰⁰ The leading proponents of the anti-fraud provision

93. See 148 CONG. REC. S1175 (daily ed., Feb. 26, 2002) (statement of Sen. Bond); see also 148 CONG. REC. S13,685 (daily ed., Dec. 19, 2001) (statement of Sen. Bond).

94. See Hansen, *supra* note 22, at 1.

95. *Id.*

96. See generally 148 CONG. REC. S1175 (quoting Sen. Bond's discussion of the need for uniform state imposed standards for voter registration in order to curb the outbreak of voter registration fraud).

97. H.R. 3295 Bill & Summary Status for the 107th Congress, available at <http://thomas.loc.gov/cgi-bin/bdquery/D?d107:2:/temp/~bdhv0e:@@L&summ2=M&—/bss/d107query.html>.

98. See generally e.g., 148 CONG. REC. S1175 (providing an example of the deep ideological divide in the Senate over this issue).

99. *Id.*

100. See *id.*

were members of the Republican Party, while the most outspoken critics were representatives from the Democratic Party.¹⁰¹

A. The Argument in Favor of Strengthening Anti-Fraud Measures in the Election Process Through the Use of Stricter ID Requirements

The proponents of the photo identification requirement generally put forth the proposition that photo identification is the most effective way to verify voter identity in order to curb voter fraud.¹⁰² This faction, however, also recognizes that not all citizens possess the requisite photo identification. This is reflected in § 303(a)(5), which allows people to use the last four digits of their social security number if they are unable to show photo ID, or use a voter identification number assigned to them by the state as an alternative to showing photo ID.¹⁰³

The Congressional anti-fraud camp put forth several rationales to bolster their argument that states should require the most stringent forms of identity verification. The first rationale for this policy was that voter registration fraud is a pervasive problem that reached a climax in recent years during state and federal elections, so that it must be dealt with immediately.¹⁰⁴ Another justification used was that voter fraud actually disenfranchises voters because it detracts from the strength of individual votes.¹⁰⁵ The proponents of § 303(a)(5) also claimed that the voters who cannot provide the requisite forms of identification will not be disenfranchised because they can cast a provisional vote that will later be counted once their eligibility is confirmed.¹⁰⁶ Finally, this school of thought asserted the proposition that those who want to vote badly enough will take it upon themselves to meet the standards required by HAVA.¹⁰⁷

The first rationale offered by those in favor of strengthening anti-fraud measures through HAVA is that the current process of election administration was corrupted as a result of the passage of

101. *Id.*

102. See discussion *infra* Part II.A.

103. Help America Vote Act of 2002, Pub. L. No. 107-252, §§ 303(a)(5)(i-ii), 116 Stat. 1666 (2002).

104. See Bash, *supra* note 16.

105. See 148 CONG. REC. S13685 (daily ed., Dec. 19, 2001) (statement of Sen. Bond).

106. 148 CONG. REC. S10489 (daily ed. Oct. 16, 2002) (statement of Sen. Bond).

107. 148 CONG. REC. S1175, S1179 (daily ed. Feb. 26, 2002) (statement of Sen. Bond).

the National Voter Registration Act of 1994, also known as "Motor Voter."¹⁰⁸ Some of the most egregious instances of corruption since its passage¹⁰⁹ occurred due to Motor Voter's creation of the mail-in registration card, which made it easier for people to register under fake, illegal, or duplicate names.¹¹⁰

This method of voter registration required less stringent ID verification, and created problems on a national level. It was the means by which various individuals perpetrated major voting scams on national, state, and local levels.¹¹¹ During his remarks to the Senate as part of the legislative debate over HAVA, Senator Christopher Bond (R-MO) highlighted some of the incidents of voter fraud that occurred in his state.¹¹² During one election in St. Louis County, Bond's office compiled statistics that revealed that 25,000 voters, or ten percent of the voting population in that county, registered twice, which allowed them to cast multiple ballots and taint the election results.¹¹³ Senator Bond also mentioned the 2000 mayoral election in St. Louis, when 3000 mail-in registration cards arrived at the City Election Board on the last day of registration, most of which were written in the same handwriting and the same ink, inviting strong suspicion that someone tampered with the forms and registered an unknown number of fake voter identities.¹¹⁴ He mentioned an ongoing investigation into "drop houses," or single-unit dwellings from which eight or more adults are registered to vote.¹¹⁵ Authorities investigating these "drop

108. See National Voter Registration Act, 42 U.S.C. § 1973gg-5 (1994). This provision of the Act made it possible for citizens to register to vote at state or local government offices, as part of an ongoing effort to make it easier for people to register and thus encourage more people to vote. *Id.*

109. See 148 CONG. REC. S1175 (daily ed. Feb. 26, 2002) (statement of Sen. Bond).

110. *Id.*

111. *Id.*

112. *Id.*

113. 148 CONG. REC. S13,685 (daily ed. Dec. 19, 2001) (statement of Sen. Bond). *But see* Jo Mannies, *City, County Say They Never Got Voter Data*, ST. LOUIS POST-DISPATCH, Apr. 10, 2001, at C1 (reporting that election officials in St. Louis and St. Louis County claimed they never received state records from Senator Bond's office that showed 24,000 voters in the city and 32,000 voters in St. Louis County held multiple registrations).

114. See 148 CONG. REC. S1175. According to Sen. Bond's statement to the Senate, election officials noticed that at least two of the individuals on the registration list were deceased. *Id.* As of Senator Bond's speech, a criminal investigation was ongoing. See *id.*

115. See 148 CONG. REC. S13,685. Senator Bond implied that people registered to vote from "drop houses" are likely registering illegal extra names. *Id.* He indicated that the Missouri Secretary of State conducted an investigation and discovered there were over 250 of these units in the state. *Id.*

houses” suspect that some or all of the names registered from the houses are fictitious because it is unlikely that eight adults live at these addresses.¹¹⁶ The concern raised by Senator Bond is that those people who take the time to register fraudulent names are likely to show up at the polls and vote under those names, since they went to the trouble of registering them in the first place.¹¹⁷ Senator Bond also cited numerous instances of voter registration fraud that occurred in other states.¹¹⁸

A second rationale for strengthening the Anti-Fraud provision is that voter fraud actually disenfranchises legitimate voters because it dilutes the power of their vote.¹¹⁹ The Missouri Court of Appeals reiterated this presumption in *Missouri, ex. rel. Bush-Cheney 2000 Inc. v. Baker*.¹²⁰

Courts should not hesitate to vigorously enforce the election laws so that every properly registered voter has the opportunity to vote. But equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.¹²¹

Voter fraud further undermines the integrity of the system by casting doubt on the confidence of the public that its vote counts.¹²²

Another justification offered in favor of the photo identification requirement is that voters who cannot meet the ID requirement can cast a provisional ballot that will be counted once their voting eligibility is confirmed.¹²³ The provisional voting system was intro-

116. *See id.*

117. *See id.*

118. *Id.*; see John H. Fund, *Voter Fraud Wanders Off the Reservation*, THE WALL ST. J., Oct. 16, 2002, at A20 (reporting an investigation of hundreds of possible cases of voter registration and absentee ballot fraud on or near Indian Reservations in South Dakota); David Kranz, *Vote Fraud Charges Dropped For Now*, ARGUS LEADER, Feb. 12, 2003, at A1 (discussing voting irregularities discovered in and near Native American reservations in South Dakota, including accusations of absentee ballot forgery at the Crow Creek Indian Reservation).

119. *See* 148 CONG. REC. S13,685.

120. 34 S.W.3d 410, 413 (2000). Suit was filed against St. Louis Board of Election Commissioners to keep polling places open later than the statutorily prescribed time. The trial court held that voting would be extended at all city polling places for three hours beyond the statutorily prescribed time. The Court of Appeals reversed on the grounds that the trial court lacked the jurisdiction to do so. *Id.* at 410.

121. *Id.* at 413.

122. 148 CONG. REC. S1226, S1229 (daily ed. Feb. 27, 2002) (statement of Sen. Bond). Excerpted from remarks made by Senator Christopher Bond during the Senate conference on the Equal Protection of Voting Rights Act of 2001.

123. Help America Vote Act of 2002, Pub. L. No. 107-252, § 303(b)(2)(B)(i)-(ii), 116 Stat. 1666, 1712 (2002).

duced as an anti-fraud measure in Motor Voter.¹²⁴ Congress recognized the potential for fraud that could be realized through the introduction of mail-in registration, so the bill required would-be mail-in registrants to vote in person the first time they voted.¹²⁵ The provisional voting system served as an alternative for those people who could not meet this requirement.¹²⁶ During the HAVA debate, Senator Bond commented that Motor Voter's anti-fraud measures did not go far enough. According to Senator Bond, "The anti-fraud provisions of this legislation strengthen the provisions from 1993 [Motor Voter]."¹²⁷ Using the provisional voting system, anti-fraud proponents argue that people who do not meet the ID requirements can still cast a vote that will be counted once their identity is verified.¹²⁸ No one, therefore, not even people who cannot meet the ID requirements, is deprived of a vote.

The final rationale offered by the anti-fraud proponents is the idea that people who truly want to vote will take the necessary steps to make sure they can meet the eligibility requirements.¹²⁹ Senator Conrad Burns (R-MT) argued that in order to do most ordinary activities, Americans are already forced to show photo identification. Said Senator Burns, "Everything we do . . . from picking up tickets for the theater or a sporting event or anything else, requires that photo ID."¹³⁰ In the October 16, 2002, Senate Conference on HAVA, Senator Bond stated that the forms of identification required by § 303(a)(5) are widely used, and that the provision offers latitude to voters to use their social security number or a state-issued ID number to prove their identity.¹³¹ Senator Bond cited a statistic released by the Department of Transportation that reports that more than ninety percent of Americans of voting age have a driver's license.¹³² His claim is that this statistic proves that an ID requirement will not have a discriminatory impact on such groups as the poor, the disabled, new citizens, students, and minorities, since these forms of ID are widely accessible to them.¹³³ In addition, he argues that these forms of identification

124. 148 CONG. REC. S10489 (daily ed. Oct. 16, 2002) (statement of Sen. Bond).

125. *See id.*

126. *See id.*

127. 148 CONG. REC. S1226 (daily ed. Feb. 27, 2002) (statement of Sen. Bond).

128. 148 CONG. REC. S10,489.

129. 148 CONG. REC. S1175, S1179 (daily ed. Feb. 26, 2002) (statement of Sen. Bond).

130. *Id.*

131. *See* Help America Vote Act of 2002 §§ 303(a)(5)(i)-(ii).

132. 148 CONG. REC. S10,489.

133. *Id.*

are also required for participation in food stamp assistance and federal temporary assistance, so that low-income voters on welfare already need to possess such ID.¹³⁴

B. Arguments Against Use of Identification Requirement

The most outspoken opponents of the identification requirements as listed in HAVA's Anti-Fraud provision are the members of the civil rights community. This side argues that the provision will have a discriminatory impact on racial and ethnic minorities and the poor.¹³⁵ Since the passage of HAVA, the Leadership Conference for Civil Rights has led the crusade against the Anti-Fraud provision by voicing its fears that the provision will allow election administrators to perpetrate the unlawful suppression of votes through discriminatory implementation of HAVA's procedural measures.¹³⁶

Several civil rights organizations released statistics and information setting forth their arguments opposing the antifraud provision. Quoting a report that reflects Senator Bond's Department of Transportation statistic, these groups highlight a study done by the Task Force on the Federal Election System that revealed that six to ten percent of the existing American electorate does not have any form of state identification, the preferred form of identification under HAVA.¹³⁷ These groups emphasize that this statistic is important because HAVA's requirement of this form of ID could create a barrier to voting and risk the disenfranchisement of otherwise eligible voters who lack this type of ID, up to ten percent of the American population.¹³⁸ It is assumed that the adults who lack

134. *Id.* at S10,490.

135. See NATIONAL COUNCIL OF LA RAZA, *Action Alert: Senate Debates Election Reform* (February 2002), at <http://nclr.policy.net/proactive/newsroom/release.vtml?id=20100> (last visited December 20, 2003).

136. See Rob Randhava, *Fears of Vote Suppression Beginning to Materialize*, THE PROGRESSIVE COALITION FOR EQUAL OPPORTUNITY AND JUSTICE, at <http://www.civilrights.org/issues/voting/details.cfm?id=10540> (Nov. 5, 2002). In Jefferson County, AR, black voters were confronted by poll watchers sent by the state Republican Party and were asked to produce photo ID. *Id.* They were told that if they could not, they risked having their ballots challenged, even though ID is not required to vote under state law. *Id.* It was also reported that stated that the Republican Party compiled a nationwide "database" of 3,273 names of people alleged to have committed fraud in the 2000 election, which they turned over to local authorities for investigation. *Id.* State election officials in Connecticut and elsewhere found that most of the information on the list was inaccurate. *Id.*

137. State identification refers to driver's licenses or other state identification cards also administered by the Department of Motor Vehicles. See Hansen, *supra* note 22.

138. Randhava, *supra* note 136.

driver's licenses are most likely members of a poorer, urban population.¹³⁹ The Civil Rights Community argues that many members of this population are poor minorities who will be hindered from participating in the electoral process.¹⁴⁰ In addition, Civil Rights Organizations argue that the default identification requirements such as presentation of a Social Security number, or use of state issued voter ID numbers, will not prove to be any easier for minority groups to acquire.¹⁴¹

1. *Argument Against Requiring Photo ID*

The Civil Rights Community argues that certain groups experience great difficulty obtaining driver's licenses, especially minorities and the poor. New citizens may endure increasing difficulty in their attempts to secure driver's licenses or state identification, especially after the September 11, 2001, terrorist attacks.¹⁴² Many states require driver's license applicants to provide a Social Security number, something that many immigrants are unable to provide.¹⁴³ Beyond a Social Security number, there are only a few types of documentation that a state will accept to verify identity when obtaining a state identification/driver's license.¹⁴⁴ Those people who are in the midst of the naturalization process may not possess these forms of documentation.¹⁴⁵

Some state DMV's also ask for proof of state residency, through the presentation of a utility bill in the applicant's name to verify his or her address.¹⁴⁶ This may be unduly burdensome for poor immi-

139. See Hansen, *supra* note 22.

140. Randhava, *supra* note 136.

141. *Id.*

142. *Id.*

143. *Id.* at 4. This can be attributed to a Social Security Administration policy effective March 1, 2002, which will not assign Social Security Numbers if the sole reason for application is to obtain a driver's license. *Id.* at 3. The effect of this policy is that it is more difficult for people who are legally present in the United States but who do not work to obtain a Social Security Number and thereby a state identification/driver's license from the DMV because they are not considered to have as much of a need for one as citizens who are employed. *Id.*

144. *Id.* at 6.

145. *Id.* at 8. Some examples include people who have been given temporary protected status due to civil conflict or natural disaster in their country, or abused women who are in the process of applying for legal residency under the Violence Against Women Act. *Id.*

146. *Id.*; Letter on S.565 Photo I.D. Requirement from MALDEF, to the Senate (Feb. 11, 2002) [hereinafter MALDEF Letter], available at <http://www.civilrights.org/issues/voting/details.cfm?id=6850> (last visited Nov. 23, 2003). This letter notes that members of the Latino community are an example of a minority group that is more likely to have several adults living at one address.

grants who live in group homes where utility and other bills may not be registered in their name.¹⁴⁷ The consequences of these restrictions, therefore, go beyond their intended objective of denying these forms of identification to illegal immigrants by handicapping legal non-immigrants, permanent residents, and some U.S. citizens who are then prevented from obtaining such ID. Furthermore, many members of racial and ethnic minority groups have lifestyles that do not fall in line with the traditional standards that would enable them to possess this type of documentation.¹⁴⁸

Another group that arguably experiences impediments in obtaining driver's licenses is the poor. First, the photo ID requirement will lead to discrimination because the fee required to obtain a driver's license calls for resources that indigent would-be voters may not have.¹⁴⁹ This requirement has been likened to unfair and discriminatory poll taxes, which were used in the past to disenfranchise poor minority voters.¹⁵⁰ Civil Rights proponents raise the issue that the photo ID requirement may be unconstitutional on these grounds.¹⁵¹

Another objection offered by Civil Rights organizations deals with HAVA's requirement that mail-in registrants meet the ID requirements in the 2004 election-cycle,¹⁵² though the states have a waiver until 2006 to finalize their statewide computerized voter registration lists.¹⁵³ These lists may be more prone to error if their administrators are not forced to meet uniform national standards for elections that occur within that gap.¹⁵⁴ For example, low-in-

147. See MALDEF Letter, *supra* note 146.

148. *Id.*

149. Katie Drake & Rob Randhava, *Civil Rights Leaders Greet Election Reform with Guarded Praise*, THE PROGRESSIVE COALITION FOR EQUAL OPPORTUNITY AND JUSTICE, at <http://www.civilrights.org/issues/voting/details.cfm?id=7769> (April 15, 2002).

150. *Id.*

151. See, e.g., *Harman v. Forssenius*, 85 S. Ct. 1177, 1184 (1965). The Court held that the poll tax constitutes an abridgment of the right to vote in federal elections in contravention of the Twenty-fourth Amendment. *Id.* The Court noted a general repugnance to the disenfranchisement of the poor occasioned by failure to pay the tax. *Id.* The Court goes on to state "Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.* at 1186.

152. Letter from Leadership Conference on Civil Rights, to Senate on Election Reform (Oct. 9, 2002) [hereinafter Letter from Leadership Conference], available at <http://www.civilrights.org/issues/voting/details.cfm?id=10337> (last visited Feb. 9, 2004).

153. FEDERAL ELECTION COMMISSION, *supra* note 10.

154. See Letter from Leadership Conference, *supra* note 152.

come voters in 2004 and 2005 elections held in states without state-wide computerized lists may have more difficulty complying with the ID provision.¹⁵⁵ Accuracy of address information is imperative, especially for lower-income citizens, who are likely to rent homes and change residences more often than wealthier homeowners.¹⁵⁶ Substandard lists may not reflect these changes, and could therefore increase the risk of disenfranchisement for lower-income voters.¹⁵⁷

2. *Argument Against Requiring Alternative Forms of Identification—Social Security Numbers and Voter ID Numbers*

The opponents of the antifraud provision also argue that the “compromise” provision made by HAVA, that allows voters to provide alternative forms of identification if they cannot show photo ID, are not sufficient and will still have a disparate impact on minority and low-income voters.¹⁵⁸ They claim the procedural method of verifying these forms of ID contains flaws that will prevent it from being administered in the most effective and accurate manner.¹⁵⁹

Voters who cannot produce photo ID have the option of using the last four digits of their Social Security number as identification, and states will then be able to verify voter identity with computer matches using the Social Security database.¹⁶⁰ Civil Rights organizations, however, argue that the Social Security database is a notoriously unreliable and inaccurate source of information.¹⁶¹ There is a large margin of error in the database due to inadvertent mistakes that may have been made by people transposing the data or registering names that have been changed.¹⁶²

155. *Id.*

156. *Id.*

157. *Id.*

158. Drake & Randhava, *supra* note 149.

159. *Id.*

160. See Help America Vote Act of 2002 § 303(a)(5)(i)(II), Pub. L. No. 107-252, 116 Stat. 1666 (2002).

161. Lisa Navarrete, *NCLR Dismayed by Inclusion of Voter ID Requirement in Senate Election Reform Bill*, NATIONAL COUNCIL OF LA RAZA (April 12, 2002), available at <http://nclr.policy.net/proactive/newsroom/release.vtml?id=20540> (last visited December 21, 2003).

162. *Recommendations on Implementation of the “Help America Vote Act”*, THE PROGRESSIVE COALITION FOR EQUAL OPPORTUNITY AND JUSTICE, at <http://www.civilrights.org/issues/voting/details.cfm?id=11153> (Dec. 19, 2002) [hereinafter *Recommendations on Implementation*]. The issue of matching names is especially problematic: many members of the Latino community use two last names which are more prone to

Moreover, the Civil Rights community has expressed concern over the third option for registering voters without photo ID, the system of using a state-issued voter identification number. The opponents of this provision argue that the verification requirements needed to issue someone a voter ID number are too vague.¹⁶³ If the implementation of this scheme is left within the discretion of state election officials, they may request forms of documentation that are unavailable to minorities and low-income citizens.¹⁶⁴ For example, it may be difficult for minorities and low-income residents to produce forms of documentation that verify their address, such as utility or phone bills.¹⁶⁵ It is also less likely that members of these groups will be able to produce government checks or a paycheck because many minorities are paid in cash when they work in the service industry or provide non-taxed domestic services.¹⁶⁶ Yet, these are the types of documentation that states are likely to require in order to issue a voter ID number.¹⁶⁷

III. PROPOSED SOLUTIONS FOR MITIGATING THE PROJECTED DISCRIMINATORY EFFECTS OF HAVA

The need for more rigorous standards for voter registration in federal elections is dire. As evidenced by the Senate and House debates that comprise HAVA's legislative history, voter registration fraud was a persistent problem in past elections, reaching a crescendo during the presidential election of 2000. The 2000 election also illustrated the nationwide turmoil that can occur when registration standards are not uniform. The Help America Vote Act Anti-Fraud provision is a sorely needed piece of legislation that addresses this issue by resolving some of the discrepancies in election administration between states and restoring integrity to the administration of federal election procedure.

Anti-Fraud measures introduced by the Help America Vote Act of 2002, however, may impose an undue burden on minorities as

being listed incorrectly, divorced women may not update their names and some Asians list last name first and enter date of birth in a different order. See Letter from Leadership Conference, *supra* note 152.

163. MALDEF's Statement on Photo ID Provision in S.565, THE PROGRESSIVE COALITION FOR EQUAL OPPORTUNITY AND JUSTICE, at <http://www.civilrights.org/issues/voting/details.cfm?id=6849> (March 12, 2003).

164. HAVA does not list which types of documentation will be required to obtain the voter ID number, so this author assumes that it will be within the discretion of the state election officials to make that determination.

165. See MALDEF Letter, *supra* note 146.

166. *Id.*

167. *Id.*

well as the disadvantaged segments of the U.S. population. Certain minority groups are less likely to possess the requisite photo identification or the alternative forms of identification that are required for voter registration.¹⁶⁸ It is sometimes more difficult for certain ethnic groups and low-income citizens to obtain state identification.¹⁶⁹ The objections put forth by the Civil Rights Community hold great weight because voting is a fundamental right, and the Anti-Fraud provision has the potential to prevent citizens from enjoying the full panoply of rights granted to them under the Constitution.¹⁷⁰

This debate encompasses compelling arguments, and a compromise must therefore be reached in order to achieve the stated objectives of both sides. To reach this compromise, the Civil Rights community has recommended certain actions that can be taken to minimize the potentially discriminatory impact of the Anti-Fraud provision.¹⁷¹ Several of these organizations have released recommendations to help minimize the risk of disenfranchising eligible voters.¹⁷² States can take them into consideration when drafting legislation that will implement the federal provisions.

First, the states must ensure that systems are in place to provide a check on the uniform and nondiscriminatory application of the procedures.¹⁷³ The chief state election official who administers the voter registration list should be held responsible for this task.¹⁷⁴ Second, each state's DMV database should be updated so that it can provide missing or erroneous data for voter registration applications to other state databases.¹⁷⁵ Third, the state should emulate the Motor Voter provision that provides voters with notice about the disposition of their application, so they are informed of any errors detected in their registration application with sufficient time to remedy the problem before the registration deadline.¹⁷⁶ In addition, election officials should be required by the state to assist and

168. See, e.g., Hansen, *supra* note 22, at 4. This report discusses how members of a poor and urban population are less likely to own automobiles and therefore less likely to have drivers' licenses. *Id.*

169. Randhava, *supra* note 136.

170. See, e.g., Navarrete, *supra* note 161.

171. See *Recommendations on Implementation*, *supra* note 162.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

facilitate in the implementation of the notification process.¹⁷⁷ Finally, states should update the language of voter registration forms to clearly indicate which alternative forms of ID are acceptable beyond a photo ID, perhaps consulting a literacy expert who will make sure that the language is intelligible for all readers.¹⁷⁸

Besides the guidelines for state legislators, other suggestions have been made by Civil Rights organizations for standardizing the role played by poll workers in administering the voter registration identification procedure.¹⁷⁹ Civil Rights organizations have expressed concern over the amount of discretion awarded to poll workers in implementing the identification requirements. For example, there is a concern that poll workers will selectively notify voters about the alternative forms of identification that can be used, especially when they are dealing with racial and ethnic minority voters.¹⁸⁰ To combat this, Civil Rights advocates suggest extensive training for all poll workers.¹⁸¹ Workers should be given lists of what types of documentation qualify as alternative forms of identification.¹⁸² In addition, signs should be posted around polling places, which list identification alternatives so that voters can consult a source other than poll workers for this information.¹⁸³ Voters should also be made aware that they could cast a provisional ballot if their identification is not acceptable.¹⁸⁴ Next, states should put together a statewide computerized voting list as soon as possible and not put it off until the 2006 deadline, and provide poll workers with ready access to these lists. This will ensure that voters who have moved in from out of state and registered by mail will not be subjected to unnecessary ID requirements.¹⁸⁵ Further, state and local election officials should collect data about the impact of the new provisions to determine what the impact of these provisions. These sources should also gather demographic information about the characteristics of voters who do not have the requisite identification, so that evidence of any disparate impact will be recorded.¹⁸⁶

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

Civil Rights organizations have also suggested that states require alternative forms of documentation to make it easier for people seeking state identification through the Department of Motor Vehicles.¹⁸⁷ Such alternate forms of identification include legitimate foreign government-issued documents like a national military identification card, a voter registration card, a driver's license, school records, or an original foreign birth certificate.¹⁸⁸ The State Departments of Motor Vehicles can work with foreign consulates to receive information and training regarding how to decipher the documentation.¹⁸⁹ This collaboration would allow foreign consulates to teach American DMV employees to determine if such documentation is valid.¹⁹⁰

These suggestions for vigilant and careful implementation of the new standards may not all come to fruition, but they provide a solid basis for states to work toward simultaneously minimizing the risk of discrimination and the possibility of voter fraud. States can take these policy recommendations into consideration when drafting the legislation to implement the requirements put forth by HAVA. The measures do not seem to demand extravagant state spending; instead they focus on organizing the system in such a way that the risk of voter registration error will be minimized. By incorporating these measures into the legislative drafting process, the new programs can provide a source of institutional change that incorporates an emphasis on accuracy and fairness into the revamped system of state election administration.

One issue, however, may hinder the idea of expanding the range of acceptable identification for both the acquisition of state identification and voter registration. It seems unlikely that the states will give citizens wide latitude in this area. Since September 11, 2001, the U.S. government's attitude toward immigrants, especially those from the Middle East, has been one of cautious tolerance. This presents a large problem for the opponents of the Anti-Fraud provision because HAVA falls in line with this attitude. It is therefore important to note that states and the federal government will likely be less welcoming toward alternative identification schemes that make it easier for immigrants to obtain official U.S. documentation. It is therefore less likely that states will be amenable to passing measures that address the identification problems of new

187. See generally Waslin, *supra* note 22.

188. See *id.* at 13.

189. *Id.*

190. *Id.*

citizens, than they may be to passing measures that deal with the other potential discriminatory effects of HAVA.

HAVA has only been signed into law for several months, and many of the provisions have staggered deadlines for when they are to take effect. Because of this, the American population may see some of the changes during the presidential election of 2004, but the entire bill will not be fully integrated until 2006. Therefore, the court system may not see any challenges to the provisions, including the Anti-Fraud provision, for several years to come.

CONCLUSION

The Help America Vote Act of 2002 provides uniform procedural guidelines for the administration of federal election procedure that were badly needed after the problems that occurred during the presidential election of 2000. Though the legislative intent of the bill emphasizes preservation and enhancement of American citizens' ability to vote, others argue that the stringent identification requirements will impair this ability. Once the bill goes into effect over the course of the next several years, courts may face an onslaught of legislative and constitutional challenges to the identification requirements by those who are unfairly disenfranchised by the law, especially minority and low-income voters. A compromise must therefore be reached between the two sides of this debate, wherein the states drawing up legislation to apply the federal standards to their own election process will seriously consider the needs of minority and low-income voters' ability to obtain such ID, and incorporate these considerations into the legislative drafting process.

