

## Emerging Voting Rights Issues

In the United States of America, the right to vote is ensured through various amendments to the Constitution. Under the Fifteenth Amendment, “the right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. Const., amend. XV. The right to vote was extended to women in 1920, through the Nineteenth Amendment, which provides that “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.” U.S. Const., amend. XIX. Under the 24th Amendment, “the right of citizens to vote in any primary or other election...shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax.” U.S. Const., amend. XXIV. Finally, under the 26th Amendment, “the right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.” U.S. Const., amend. XXVI.

These constitutional amendments were created to guarantee a fundamental right to vote. Congress has enacted various forms of legislation to further protect a qualified American citizen’s right to vote. In 1965, Congress originally enacted the Voting Rights Amendment (VRA), which was amended in 1982 in response to the Supreme Court’s decision in *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). See *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006). Under Section 2 of the current version of the VRA,

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color...

42 U.S.C. § 1973(a). Another legislative act enacted to preserve voting rights was the Help America Vote Act (HAVA), which was passed in 2002. Under this Act, Congress set new standards for voting systems in federal elections, including “ensuring that voting systems are

accessible to voters with disabilities.” Bazelon Center for Mental Health Law and National Disability Rights Network, *VOTE. It's Your Right: A Guide to Voting Rights of People with Mental Disabilities*; Washington D.C., 2008.

Although these constitutional amendments and legislative acts were enacted to ensure that people have the right to vote, recent poll numbers suggest that very few voters actually exercise that right. In the 2008 United States Presidential election, 63.6% of eligible voters, or 131.1 million people, turned out to vote. The number of people who turned out to vote was 5 million more than showed up in 2004, with an increase of 2 million more black voters, 2 million more Hispanic voters, and about 600,000 more Asian voters. “Voter Turnout Increases by 5 Million in 2008 Presidential Election, U.S. Census Bureau Report.” 20 July 2009. U.S. Census Bureau. 1 October 2009. <http://www.census.gov/Press-Release/www/releases/archives/voting/013995.html>. Although there was a slight increase in the number of voters in 2008, the voting process within the United States has disenfranchised many voters from “performing their civic duty” by showing up to vote on the polls on election day. In particular, three forms of disenfranchisement have emerged within our society: felon disenfranchisement, disenfranchisement based on incompetency, and disenfranchisement of people with disabilities resulting from the inaccessibility of polling places. This memo analyzes these three forms of disenfranchisement within our society. A potential remedy to some of the emerging voting issues lies within experimentation with and research of online voting. Although an electronic ballot would be a major transition from the traditional paper ballot, this voting procedure, which definitely still has some issues that must be resolved, may actually help empower some disenfranchised voters within our society to regain the right to vote.

## **I. Felon Disenfranchisement**

As of 2008, there were 5.3 million American citizens disenfranchised from the right to vote because of felony convictions. Erika Wood, *Restoring the Right to Vote*; Brennan Center

for Justice at NYU School of Law, New York, 2008. Felon disenfranchisement has a long and controversial history within our society. Between 1776 and 1821, the constitutions of eleven states “prohibited, or authorized the legislature to prohibit, exercise of the franchise by convicted felons.” *Hayden*, 449 F.3d at 317 (quoting *Green v. Bd. of Election*, 380 F.2d 445 (2d Cir. 1967)). By 1868, “twenty-nine states had such provisions when the Fourteenth Amendment was adopted.” *Id.* By 2002, every state except Maine and Vermont had some form of felon disenfranchisement. *Hayden*, 449 F.3d at 317 (citing *Developments in the Law: One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 Harv.L.Rev.1939 (2002)). Kentucky and Virginia are the only two remaining states that “permanently disenfranchise all people with felony convictions, unless they receive individual, discretionary, executive clemency.” Wood, *Restoring the Right to Vote* at 4.

Eight states permanently disenfranchise people with at least some type of criminal conviction; twenty states restore voting rights upon completion of sentence, including prison, parole, and probation (including Nebraska); five states restore voting rights automatically after release from prison and discharge from parole; and fourteen states restore voting rights automatically after release from prison. *Id.* Felon disenfranchisement laws have a profound effect upon the rights of many citizens, but especially upon citizens within minority groups. “Laws denying ex-felons the right to vote disproportionately weaken the voting power of African-American and Latino communities, who comprise more than half of the convicted offenders prevented from voting.” Robin L. Nunn, *Lock Them Up and Throw Away the Vote*, 5 Chi. J. Int’l L. 763 (2005). As voting rights expand through the enactment of constitutional amendments and legislative acts, felon disenfranchisement continues to plague the American electoral procedure, as evidenced through various case law and law review articles analyzing the constitutionality of felon disenfranchisement. The Circuit split as to Section 2 of the VRA’s

coverage of felon disenfranchisement itself reveals just how controversial felon disenfranchisement has come to be within our democratic society.

**A. *Richardson v. Ramirez***

In 1974, the Supreme Court of the United States addressed the constitutionality of state felon disenfranchisement laws in *Richardson v. Ramirez*, 418 U.S. 24, 94 S.Ct. 2655 (1974). In this case, convicted felons who had completed their sentences and paroles instituted a proceeding for a writ of mandate in the Supreme Court of California compelling election officials to register them as voters. Under Article XX, § 11 of the California Constitution, which had remained unchanged since its adoption in 1879, “Laws shall be made to exclude from voting persons convicted of bribery, perjury, forgery, malfeasance in office, or other high crime.”

*Richardson*, 418 U.S. at 27, 94 S.Ct. at 2658. Under Article II, § 1 of the California Constitution,

No alien ineligible to citizenship, no idiot, no insane person, *no person convicted of any infamous crime*, no person hereinafter convicted of the embezzlement or misappropriation of public money, and no person who shall not be able to read the Constitution in the English language and write his or her name, shall ever exercise the privileges of an elector in this State.

*Richardson*, 418 U.S. at 27, 94 S.Ct. at 2658 (emphasis added). The Supreme Court of California held that these two sections violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Supreme Court of the United States granted certiorari to determine whether felon disenfranchisement under the California Constitution violated the Equal Protection Clause.

In their complaint, the three respondents alleged that after being released from prison and receiving a successfully terminated parole, they applied to register in their respective California counties to vote. However, the County Clerks refused to register each of the defendants because of their felony convictions. *Ramirez*, 418 U.S. at 31 – 32, 94 S.Ct. at 2660. The respondents further alleged that “pardon was not an effective device for obtaining the franchise, noting that during 1968-1971, 34,262 persons were released from state prisons but

only 282 pardons were granted.” *Ramirez*, 418 U.S. at 31, 94 S.Ct. at 2660. The respondents challenged the constitutionality of their disenfranchisement under both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment.

The Court analyzed respondents’ claims by first considering section 2 of the Fourteenth Amendment. Under this less familiar section,

When the right to vote at any election for the choice of electors...is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const, amend. XIV, § 2 (emphasis added). The Court noted that by the time the Fourteenth Amendment was adopted, “twenty-nine states had provisions in their constitutions which prohibited, or authorized the legislature to prohibit, exercise of the franchise by persons convicted of felonies or infamous crimes.” *Richardson*, 418 U.S. at 48, 94 S.Ct. at 2668.

After analyzing the history of section 2 of the Fourteenth Amendment, the Court then analyzed the admission of States following the Civil War. Section 5 of the Reconstruction Act of 1867 established conditions on which former Confederate States would be readmitted. Among these conditions was the condition that the States’ constitutions deprive citizens the right to vote as punishment for any crimes that were felonies at common law and of which they had been duly convicted. See *Richardson*, 418 U.S. at 51 – 53, 94 S.Ct. at 2669 – 70. By 1870, eleven states had been readmitted under this condition. *Id.*

The Court’s final analysis focused on its own approval of felon disenfranchisement. The Court noted that in past cases it had indicated approval of felon disenfranchisement for bigamists and polygamists, suggested that exclusion of felons from the franchise violated no constitutional provision, and affirmed past district court decisions rejecting constitutional challenges to felon disenfranchisement laws. See *Ramirez*, 418 U.S. at 53 – 54, 94 S.Ct. at

2670. Based upon the historical and judicial approval and affirmative sanctioning of felon disenfranchisement, the Court upheld the constitutionality of California's disenfranchisement of ex-felons.

In his dissenting opinion, Justice Marshall noted that the political purpose of Section 2 of the Fourteenth Amendment had little to do with the other underlying interest of the Fourteenth Amendment. Specifically, he claimed that since

Section 2 was not intended and should not be construed to be a limitation on the other sections of the Fourteenth Amendment,...a discrimination to which the penalty provision of Section 2 is inapplicable must still be judged against the Equal Protection Clause of Section 1 to determine whether judicial or congressional remedies should be invoked.

*Richardson*, 418 U.S. at 74, 94 S.Ct. at 2680 – 81 (Marshall, J., *dissenting*). Under Justice Marshall's theory, California's felon disenfranchisement would have to pass a strict scrutiny standard of review. Consequently, the State would have to show that the challenged disenfranchisement is necessary to achieve a compelling state interest and that there are no other less restrictive means to reasonably achieve that goal. Justice Marshall contended that the challenged law would not pass under the strict scrutiny standard because "there is certainly no basis for asserting that ex-felons have any less interest in the democratic process than any other citizen. Like everyone else, their lives are deeply affected and changed by the decisions of government." *Richardson*, 418 U.S. at 78, 94 S.Ct. Based upon his analysis, Justice Marshall concluded that, unlike the majority, he would have invalidated California's disenfranchisement of ex-felons.

#### **B. *Cotton v. Fordice***

After *Richardson v. Ramirez*, many Circuit Courts began to conduct their own analysis of the States' felon disenfranchisement laws. In 1998, the Fifth Circuit Court of Appeals analyzed the constitutionality of Mississippi's felon disenfranchisement laws in *Cotton v. Fordice*, 157 F.3d 388 (5th Cir. 1998). In this case, a state prisoner filed a § 1983 action asserting that the

defendants violated his constitutional rights by denying him the right to vote based upon his conviction for armed robbery. Under the Mississippi Constitution, the ballot was denied to any person “convicted of murder, rape, bribery, theft, arson, obtaining money or goods under false pretenses, perjury, forgery, embezzlement, or bigamy.” Miss. Const., art. XII, § 241 (1890). The district court entered judgment against the prisoner, who was serving a sentence for armed robbery, finding that although “the constitutional disqualifying provision originally intended to discriminate against black felons, its recent reenactment by the people of Mississippi has not been shown to bear that taint.” *Cotton*, 157 F.3d at 390.

In reviewing the district court’s holding, the Court of Appeals first noted that, under the Supreme Court’s holding in *Richardson v. Ramirez*, “Section 2 of the Fourteenth Amendment does not prohibit states from disenfranchising convicted felons.” *Cotton*, 157 F.3d at 391. However, the Court of Appeals did note that the State’s disenfranchisement law could be unconstitutional if it was racially motivated to discriminate against blacks. *Id.* (citing *Hunter v. Underwood*, 471 U.S. 22, 105 S.Ct. 1916, 85 L.Ed.2d 222 (1985)). Although Mississippi’s felon disenfranchisement law had been enacted as a form of racial discrimination in 1890, the Court of Appeals found that the amendment of the State’s Constitution in both 1950 and 1968 “superseded the previous provisions and removed the discriminatory taint associated with the original version.” *Cotton*, 157 F.3d at 391. Based upon the subsequent amendments to and reenactment of Section 241, the Court of Appeals held that Mississippi’s felon disenfranchisement was constitutional.

### **C. *Ways v. Shively***

Within the State of Nebraska, felon disenfranchisement has emerged as a relevant voting rights issue. Under the Nebraska State Constitution, “No person shall be qualified to vote...who has been convicted of [a] felony under the laws of the state or of the United States, unless

restored to civil rights.” Neb. Const. art. VI, § 2. According to the article *Restoring the Right to Vote*, Nebraska is one of twenty states in which voting rights are restored upon completion of sentence, including prison, parole, and probation. However, Nebraska is unique because it is the only state that imposes a two-year waiting period after completion of sentence. Wood, *Restoring the Right to Vote* at 4.

In 2002, the Supreme Court of Nebraska addressed the constitutionality of the process in which a convicted ex-felon’s voting rights are restored in *Ways v. Shively*, 264 Neb. 250, 646 N.W.2d 621 (Neb. 2002). In this case, a felon who was discharged from the Nebraska State Penitentiary after completing his sentences for the crimes of pandering, carrying a concealed weapon, and attempting to possess a controlled substance was denied the right to register to vote. After being released from prison, he received a “certificate of discharge from the Department of Correctional Services” which provided that it restored all of his civil rights as provided by law. *Ways*, 262 Neb. at 251, 64 N.W.2d at 624. The Lancaster County election commissioner denied the ex-prisoner’s request to register to vote, citing Neb. Rev. Stat. § 29-112, which provides

Any person sentenced to be punished for any felony, when sentence shall not have been reversed or annulled, shall be deemed incompetent to be an elector or juror, or to hold any office of honor, trust, or profit within this state, unless such convict shall receive from the Board of Pardons of this state a warrant of discharge, in which case such convict shall be restored to his civil rights and privileges; Provided, such warrant of discharge shall not release such convict from the costs of his conviction, unless otherwise ordered by the Board of Pardons.

After the denial of his request to register to vote, the ex-prisoner filed a petition for a writ of mandamus, seeking a writ compelling the commissioner to permit him to vote. The petitioner’s allegations relied upon Neb. Rev. Stat. § 83-1,118(5), which provides: “Whenever any committed offender has completed the lawful requirements of the sentence, the director [of the Department of Correctional Services] shall issue a certificate of discharge to the offender, and the certificate shall restore the civil rights of the offender.” The district court agreed with the



commissioner that the felon's right to vote could not be restored until he received a warrant of discharge from the Board of Pardons. *Ways*, 264 Neb. at 252, 646 N.W.2d at 625.

In analyzing the district court's opinion, the Supreme Court of Nebraska focused on the issue of which statute controlled the issue of whether the ex-felon's voting rights had been restored. The Court first noted that *Ways* had lost his right to vote under Neb. Const. art. VI, § 2, and that restoration of his right to vote was statutory. *Ways*, 264 Neb. at 254 – 55, 646 N.W.2d at 626. The Court then found that any offender who receives a certificate of discharge is restored only his civil rights "as provided by law." *Ways*, 264 Neb. at 255, 646 N.W.2d at 627. Since Neb. Rev. Stat. § 83-1,118(5) does not include the "civil rights" restored under it, and since sole reliance on that statute ignores the specific language that addresses restoration of the right to vote under Neb. Rev. Stat. § 29-112, the Court held that the ex-prisoner's rights to vote had not been restored. The Court specifically found that since "the specific statute, § 29-112, must control the conditions under which a felon's right to vote is restored," the ex-prisoner's "specific right to vote was not restored...upon his discharge from incarceration at the completion of his sentences." *Ways*, 264 Neb. at 256, 646 N.W.2d at 627.

#### **D. *Farrakhan v. Washington***

As *Ways v. Shively* illustrated, there can be much confusion with regard to the determination of whether a convicted felon's right to vote has been restored; however, the majority of case law analyzes the constitutionality of felon disenfranchisement laws. In 2003, the Ninth Circuit Court of Appeals analyzed the constitutionality of Washington's felon disenfranchisement laws in *Farrakhan v. Washington*, 338 F.3d 1009 (9th Cir. 2003). In this case in which convicted felons challenged Washington's felon disenfranchisement laws under Section 2 of the Voting Rights Act, the district court ultimately granted the State's motion for summary judgment.

The plaintiffs alleged that upon their conviction of an infamous crime in the state of Washington, each one had been disenfranchised and had never had his voting rights restored. *Farrakhan*, 338 F.3d at 1011. The plaintiffs claimed that Washington’s “felon disenfranchisement scheme constitutes improper race-based vote denial in violation of Section 2 of the Voting Rights Act. *Id.* The district court rejected this claim, finding that the plaintiffs had failed to establish a Section 2 violation because “there was no evidence that the...disenfranchisement provision “was motivated by racial animus, or that its operation by itself has a discriminatory effect.” *Id.*

In analyzing the district court’s holding, the Ninth Circuit first focused on the language of the provision at issue. Under Article VI, Section 2 of the Washington State Constitution, “All persons convicted of an infamous crime...are excluded from the elective franchise.” In the State of Washington, a felon’s disenfranchisement will not be discharged until the felon completes all the requirements of the sentence and obtains certificates of discharge under Section 9.94A.637 of the Revised Code of Washington. *Farrakhan*, 338 F.3d at 1012. In their complaint, the plaintiffs challenged both the disenfranchisement law and the process for restoring voting rights to disenfranchised felons who have completed their sentence.

After taking notice of the statutes involved, the Ninth Circuit then analyzed the evidence presented by the plaintiffs. It recognized that “the plaintiffs presented statistical evidence of the disparities in arrest, bail and pre-trial release rates, charging decisions, and sentencing outcomes in certain aspects of the Washington’s criminal justice system.” *Farrakhan*, 338 F.3d at 1013. It further noted that the plaintiffs substantiated these statistics with expert testimony on the extent to which these disparities could be attributed to racial bias/discrimination. The Court highlighted the district court’s recognition of this evidence, but found the district court erred because it misunderstood the “totality of the circumstances” test required under Section 2 of the VRA. See *Farrakhan*, 338 F.3d at 1014.

Under the “totality of the circumstances” test required under Section 2 of the VRA, the Court emphasized that “courts must consider how the challenged voting practice ‘interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.’” *Farrakhan*, 338 F.3d at 1016 (quoting *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986)). Upon applying the “totality of the circumstances test to the facts of the case at hand, the Ninth Circuit held that the plaintiffs’ evidence of racial discrimination was so compelling that the case was remanded to the district court to make further factual findings and to assess the totality of the circumstances. Although the Ninth Circuit noted that the restoration procedure could reflect the same racial discrimination of the disenfranchisement laws, it held that the plaintiffs lacked standing to challenge the procedure because “they presented no evidence of their eligibility, much less even allege that they were eligible for restoration, and had not attempted to have their civil rights restored.” *Farrakhan*, 338 F.3d at 1022.

**E. *Johnson v. Governor of State of Florida***

In 2005, the Eleventh Circuit Court of Appeals addressed the constitutionality of Florida’s disenfranchisement laws in *Johnson v. Governor of State of Florida*, 405 F.3d 1214 (11th Cir. 2005). In this case, ex-felons challenged the constitutionality of Florida’s felon disenfranchisement law under Section 2 of the Voting Rights Act and under the Fourteenth Amendment’s Equal Protection Clause. Under Article VI, § 4 of the Florida State Constitution, “No person convicted of a felony...shall be qualified to vote or hold office until restoration of civil rights or removal of disability.” Plaintiffs appealed after the district court granted summary judgment for the defendants. After a divided panel of the Eleventh Circuit, the Court vacated the panel opinion and granted a rehearing en banc. *Johnson*, 405 F.3d 1214.

In analyzing the plaintiffs’ claims, the Eleventh Circuit first focused on the plaintiffs’ Equal Protection claim. Specifically, the plaintiffs contended that “racial animus motivated the

adoption of Florida’s criminal disenfranchisement provision in 1868 and this animus remains legally operative today, notwithstanding the fact that Florida altered and reenacted the provision in 1968.” *Johnson*, 405 F.3d at 1217. The Court held that since the plaintiffs had failed to offer any evidence that racial discrimination motivated the enactment of Florida’s disenfranchisement law in 1868, they failed to establish that the laws violated the Equal Protection Clause. Furthermore, the Court noted that, like the Mississippi provision in *Cotton v. Fordice*, the Florida provision’s amendment through a deliberative process in 1968, “eliminated any taint from the allegedly discriminatory 1868 provision.” *Johnson*, 405 F.3d at 1224.

After analyzing the plaintiffs’ claim under the Equal Protection Clause, the Court focused on the plaintiffs’ claim under the Voting Rights Act. Like the Court in *Farrakhan v. Washington*, the Court here emphasized the importance of applying a “totality of the circumstances” test to determine the constitutionality of the disenfranchisement laws under the VRA. The Court also cautioned that “interpreting Section 2 of the VRA to deny Florida the discretion to disenfranchise felons raises a serious constitutional problem because such an interpretation allows a congressional statute to override the text of the Constitution.” *Johnson*, 405 F.3d at 1229. Since the plaintiff’s interpretation of the VRA raised important constitutional concerns, the Court declined to adopt the plaintiffs’ interpretation of the VRA because “Congress never intended the VRA to reach felon disenfranchisement provisions.” *Johnson*, 405 F.3d at 1232.

#### **F. *Hayden v. Pataki***

One of the most recent cases to address the constitutionality of a State’s felon disenfranchisement laws is *Hayden v. Pataki*, 449 F.3d 305 (2d Cir. 2006). In this case, the Second Circuit Court of Appeals consolidated two cases to determine the validity of New York’s disenfranchisement laws. In its analysis, the Court specifically focused on the petitioners’ allegations that New York’s felon disenfranchisement laws violated the Voting Rights Act.

In the first case, *Muntaqim v. Coombe*, 396 F.3d 95 (2d Cir. 2004), the petitioner was a black inmate serving a maximum sentence of life imprisonment after being convicted of two counts of first-degree murder. The petitioner filed a complaint alleging that “New York Election Law § 5-106 violates the Voting Rights Act because ‘it results in a denial or abridgement of the right...to vote on account of race.’” *Hayden*, 449 F.3d at 310. The district court granted the defendants’ motion for summary judgment, which was affirmed by a panel of the Second Circuit Court of Appeals. In affirming the district court’s ruling, the Court of Appeals refused to construe the Voting Rights Act to extend to New York’s disenfranchisement statute, noting that “the Supreme Court has instructed us that statutes should not be construed to alter the balance between the states and federal government unless Congress makes its intent to do so unmistakably clear.” *Hayden*, 449 F.3d at 310 – 11.

In the second case, *Hayden v. Pataki*, twenty-one petitioners, including six who were currently incarcerated and four who were on parole, filed a complaint challenging “New York State’s unconstitutional and discriminatory practice of denying suffrage to persons who are incarcerated or on parole for a felony conviction and the resulting discriminatory impact that such denial of suffrage has on Blacks and Latinos in the State.” *Hayden*, 449 F.3d at 311. The plaintiffs alleged that the New York statute resulted in vote denial and vote dilution claims under Section 2 of the Voting Rights Act. The district court ultimately granted the defendants’ motion for judgment on the pleadings and dismissed plaintiffs’ claims, relying upon *Muntaqim*. *Id.*

After an appeal by both the *Muntaqim* and *Hayden* plaintiffs, the Second Circuit Court of Appeals reconsidered the constitutionality of New York Election Law § 5-106. This statute provides, in relevant part, that “No person convicted of a felony ‘shall have the right to register for or vote at any election’ unless he has been pardoned, his maximum sentence of imprisonment has expired, or he has been discharged from parole.” *Hayden*, 449 F.3d at 312. In determining the constitutionality of the statute, the Court first considered the history of felon

disenfranchisement in New York. The Court noted that felon disenfranchisement had been sanctioned since 1821 when the New York State Constitution explicitly “authorized the state legislature to enact laws disenfranchising those convicted of “infamous crimes.” *Id.*

Consequently, the legislature passed its Act for Regulating Elections, which was modified in 1971 to restore the voting right to felons whose maximum sentences had been served or who had been discharged from parole. See *Hayden*, 449 F.3d at 312.

After considering the history of the state law at issue, the Court considered the history of the federal law at issue. Section 2 of the Voting Rights Act was originally enacted in 1965 and essentially prohibits any voting qualification or prerequisite that results in a denial of voting rights based on race or color. See 42 U.S.C. § 1973(a). The second portion of Section 2 provides that “a violation of subsection (a)...is established if, based on the totality of the circumstances, it is shown that...members [of protected minority groups] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). The current language of the Voting Rights Act was enacted in 1982; under the amended version, the “discriminatory purpose” requirement is eliminated because the statute now “prohibits any voting qualification or standard that ‘results’ in the denial of the right to vote ‘on account of’ race.” *Hayden*, 449 F.3d at 313.

In analyzing the interaction between the two statutes at issue, the Court noted the jurisdictional split in regards to the Voting Rights Act’s application to state felon disenfranchisement laws. The Court stated that in *Johnson v. Gov. of State of Florida*, the Eleventh Circuit court held that the VRA does not encompass felon disenfranchisement laws. However, the Court then recognized that the Ninth Circuit did apply the VRA to felon disenfranchisement laws in *Farrakhan v. Washington*. Although the statute in *Hayden* was comparable to both of the felon disenfranchisements statutes in *Johnson* and *Farrakhan*, the Second Circuit Court made the distinction that “the New York provision...is considerably

narrower in its reach than those of Florida and Washington” because it is a “prisoner disenfranchisement statute” rather than a “felon disenfranchisement statute.” *Hayden*, 449 F.3d at 314 n. 7.

In analyzing New York Election Law § 5-106 and the VRA, the Court relied upon its interpretation of the language of the statutes. “In interpreting a statute, we must first look to the language of the statute itself,’ and ‘if the statutory terms are unambiguous, our review generally ends and the statute is construed according to the plain meaning of its words.’” *Hayden*, 449 F.3d at 314 – 15 (quoting *Greenery Rehab. Group v. Hammon*, 150 F.3d 226 (2d Cir. 1998)). The Court noted that although the language of the VRA is broad, the broadness does not mean “the statute is unambiguous with regard to its application to felon disenfranchisement laws.” *Hayden*, 440 F.3d at 315. The Court ultimately decided to look beyond the plain meaning of the statute to determine whether Congress intended that the VRA encompass state felon disenfranchisement laws.

The Court’s first reason for concluding that the VRA does not encompass felon disenfranchisement laws was that the Constitution gives explicit approval of felon disenfranchisement. “When the right to vote at any federal election...is denied to any of the male inhabitants of [a] State...or in any way abridged, *except for participation in rebellion, or other crime*, the basis of representation therein shall be reduced.” U.S. Const. amend. XIV, § 2 (emphasis added.). In reliance upon the Supreme Court’s holding in *Richardson v. Ramirez*, the Court of Appeals found that “felon disenfranchisement provisions are presumptively constitutional.” *Hayden*, 449 F.3d at 316.

Secondly, the Court noted that the constitutionality of felon disenfranchisement is reinforced by its long history, both within and outside of the United States. Both the Ancient Greeks and Romans practiced felon disenfranchisement, especially whenever crimes of moral turpitude were committed. Over time, the laws of infamy evolved into “civil death” and

“attainder” laws. As a result of the long history and tradition of felon disenfranchisement laws, the American Colonies adopted the practice so that today, “every state except Maine and Vermont disenfranchises felons.” *Hayden*, 449 F.3d at 317.

In order to determine whether Congress intended that the VRA encompass state disenfranchisement laws, the Court focused on the legislative intent and history of the VRA. The purpose of the VRA was “to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century.” *Hayden*, 449 F.3d at 317 – 18 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)). Although the Court recognized that Congress intended “to give the Act the broadest scope possible,” it noted that “Congress did not explicitly consider felon disenfranchisement laws to be covered by the Act and indeed affirmatively stated that such laws were not implicated by provisions of the statute.” *Hayden*, 449 F.3d at 318. The Court drew this intention from a statement within the Senate Judiciary Committee Report. Specifically, within the Report it is stated “the provision ‘would not result in the proscription of the frequent requirement of States and political subdivisions that an applicant for voting or registration for voting be free of conviction of a felony or mental disability.’” *Hayden*, 449 F.3d at 381 (quoting S.Rep.No. 89-162 (1965)). Along with the Report, the Court relied upon statements made on the Senate floor. In 1965, Senator Joseph D. Tydings of Maryland stated that the VRA was “not intended to prohibit ‘a requirement that an applicant for voting be free of conviction of a felony or mental disability.’” *Hayden*, 449 F.3d at 381 (quoting 11 Cong. Rec. S8366 (1965)). The Court interpreted these statements to mean that Congress never intended the VRA to cover felon disenfranchisement laws.

To further solidify the conclusion that the VRA does not encompass felon disenfranchisement laws, the Court next considered legislative proposals to the VRA. In 1972 and 1973, House Representatives proposed bills to limit felon disenfranchisement by the States



under the VRA. The Court found that these two bills, which were never passed, reveal “that the [1965] law was not understood by those most familiar with it to encompass felon disenfranchisement provisions.” *Hayden*, 449 F.3d at 319 – 20. The Court drew a further distinction by finding that since the 1965 version of the VRA did not encompass felon disenfranchisement laws, it would be implausible to stretch the VRA to cover prisoner disenfranchisement laws.

The Court’s final two reasons for holding that the VRA does not encompass felon disenfranchisement laws focused on actions taken by Congress after passage of the VRA. In 1971, “Congress affirmatively enacted a felon disenfranchisement statute in the District of Columbia, over which it had plenary power.” *Hayden*, 449 F.3d at 320. The Court found this convincing because Congress would not have bothered to pass a local statute permitting felon disenfranchisement if felon disenfranchisement had been forbidden on a national level through the VRA. Congress has enacted other laws that highly suggest that the VRA does not encompass state felon disenfranchisement laws. In 1993, Congress passed the National Voter Registration Act, which “provides for ‘criminal conviction’ as a basis upon which voters’ names may be removed from lists of eligible voters.” *Hayden*, 449 F.3d at 322. The Help America Vote Act of 2002 specifically tells states to remove the names of disenfranchised felons from their lists of eligible voters. See *Id.* Finally, in the past several years, various bills have been proposed to limit the States’ abilities to disenfranchise felons. The Second Circuit Court interpreted these legislative actions to “indicate that Congress itself continues to assume that the Voting Rights Act does not apply to felon disenfranchisement.” *Hayden*, 449 F.3d at 322. Based upon all of these reasons, the Second Circuit Court ultimately held that the Voting Rights Act does not encompass felon disenfranchisement laws. *Hayden*, 449 F.3d at 323.

In a dissenting opinion, Circuit Judge Parker stated that the Voting Rights Act may have been enacted to encompass felon disenfranchisement laws. Judge Parker found that the case

“begins and ends with the simple question of whether we should read an unambiguous remedial statute, intended to have, as the Supreme Court has emphasized, the ‘broadest possible scope,’ to allow the *Hayden* plaintiffs’ claims to go forward.” *Hayden*, 449 F.3d at 343 (Parker, J., *dissenting*). Since the plaintiffs’ complaint alleged that New York’s prisoner disenfranchisement laws result in a denial or dilution of the right to vote on account of race, Judge Parker did not agree with the dismissal of plaintiffs’ complaint. Although states have a right to disenfranchise felons under § 2 of the Fourteenth Amendment, “the fact that felon disenfranchisement statutes may sometimes be constitutional does not mean they are always constitutional.” *Hayden*, 449 F.3d at 345 (Parker, J., *dissenting*). After citing various cases that have construed the VRA broadly, Judge Parker held that a reading of the VRA to encompass felon disenfranchisement laws is not inconsistent with other case law. *Hayden*, 449 F.3d at 348 (Parker, J., *dissenting*).

Based upon the progression of case law, it seems as if most courts are willing to uphold the constitutionality of felon disenfranchisement laws. The factors leading courts to this conclusion include: subsequent amendments to and reenactments of both state and federal laws, legislative history, and the possible reinstatement of voting rights within most states. Although felon disenfranchisement laws may have a disproportionate impact on racial minority groups, few courts have followed the Ninth Circuit’s lead in applying the VRA to felon disenfranchisement laws. Although judicial declaration of the unconstitutionality of felon disenfranchisements laws may be the most efficient way to restore the right to vote to convicted felons, there are alternative means of restoring the right to vote. The Brennan Center for Justice at NYU School of Law suggests that States automatically restore the right to vote upon the felon’s release from prison, ensure that felons are informed about their disenfranchisement and when their voting rights are restored, create a statewide database of eligible voters for quick and efficient reactivation of felons when released from prison, and educate the local government and citizens about the felon disenfranchisement laws. Wood, *Restoring the Right to Vote* at 19.

However, only time and future legislation and litigation will tell whether States adopt these policies and whether the felon disenfranchisement laws in place in forty-eight states will be declared unconstitutional by the Supreme Court of the United States.

## II. Disenfranchisement Based on Incompetency

Although felon disenfranchisement laws receive the most attention within our judicial system, there is a growing concern for the constitutionality of statutes that disenfranchise people deemed incompetent. As of 2008, about 15 states “have laws that bar voting by individuals who are “under guardianship” or adjudged “mentally incompetent” or “mentally incapacitated;” 20 states bar voting only if a court determines that the individual lacks the capacity to vote; and 11 states “place no disability-related restriction on the right to vote.” Bazelon Center, *VOTE. It’s Your Right: A Guide to Voting Rights of People with Mental Disabilities* at 5. Within the 44 state statutes disenfranchising those deemed incompetent, the “affected individuals are categorized using a variety of terms including the following: idiot, insane, lunatic, mentally incompetent, mentally incapacitated, unsound mind, not quiet and peaceable, or under guardianship and/or conservatorship.” Kay Schriener and Lisa A. Ochs, *Creating the Disabled Citizen: How Massachusetts Disenfranchised People Under Guardianship*, 62 Ohio St. L.J. 481 (2001). Although a majority of states still disenfranchise people found to be mentally incompetent, there were only 6 states without some form of disenfranchisement based on incompetency in 2000. *Developments in the Law – The Law of Mental Illness: Voting Rights and the Mentally Incapacitated*, 121 Harv. L. Rev. 1179 (Feb. 2008).

Under the National Voter Registration Act of 1993, “the name of a registrant may not be removed from the official list of eligible voters except...as provided by State law, by reason of criminal conviction or *mental incapacity*.” 42 U.S.C. § 1973gg-6(a)(3) (2000) (emphasis added).

This means that States are allowed to disenfranchise people deemed mentally incapacitated under federal law. Since voting is a fundamental right under the Constitution, States can only exclude certain voters from the election process in order to promote a compelling state interest. “This high constitutional standard has required voting reforms to eradicate discrimination by race, previous servitude, class, and gender. One category of persons whose right to vote deserves closer attention is those with cognitive disabilities.” Sally Balch Hurme and Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 McGeorge L. Rev. 931 (2007). Although States may have a compelling interest in ensuring that voters understand the election process to such an extent as to cast an independent vote, there is much debate as to the different competency standards imposed and the procedure for mental incapacity disenfranchisement among the various states.

The first major issue with regard to the disenfranchisement of people deemed mentally incompetent is which standards should be used to determine a person’s mental voting capacity. In the past, election officials have taken it upon themselves to determine a person’s voting competence. However, the practices of determining a person’s competency through examinations not required of other voters or of disenfranchising all residents of mental institutions have been invalidated as unconstitutional by the judiciary. Bazelon Center, *VOTE. It’s Your Right: A Guide to Voting Rights of People with Mental Disabilities* at 6. Along with election officials, poll workers and service providers have also contributed greatly to the disenfranchisement of people they thought to be mentally incapacitated. Poll workers have turned away people they felt were not competent enough to vote, and service providers “have inappropriately kept individuals with mental disabilities from registering, voting, or receiving voting assistance.” Bazelon Center, *VOTE. It’s Your Right: A Guide to Voting Rights of People with Mental Disabilities* at 7. With the invalidation of mental competency exams administered by election officials, poll workers, or service providers and the general disenfranchisement of

institutional residents, one major standard has been employed to disenfranchise people deemed mentally incompetent within the United States: guardianship standards.

As of 2003, eleven states specifically disenfranchised people placed under guardianship. Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 Elder L.J. 109 (2003). Guardianship laws are in place to help protect individuals who are incapable of making decisions for themselves, which means they are more apt to be taken advantaged of and abused. There are approximately 1,250,000 adults under some form of guardianship in this country. Roy, 11 Elder L.J. at 112. In order to be placed under guardianship, a person must be found to be mentally incompetent by judges. Only four state statutes “give specific direction as to what a judge is to consider when determining whether a person is ineligible to vote.” Hurme and Appelbaum, 38 McGeorge L. Rev. at 957. The danger of using the same standards used to determine whether a person needs to be appointed a guardian is that “the standards used by courts to determine incapacity to manage personal or financial matters may not coincide with the criteria for voting competency.” Hurme and Appelbaum, 38 McGeorge L. Rev. at 958. Most statutes for guardianship competency contain two components: a categorical condition and a functional determination. “First, the individual must fall within a specific category, such as old age or mental illness, before a guardian can be appointed. Then, the individual must be found to be impaired functionally as a result of one of the above categories.” Roy, 11 Elder L.J. at 114.

The Eighth Circuit Court of Appeals addressed this issue in *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007). In this case, three individual plaintiffs and a non-profit agency filed suit, claiming that a Missouri law unconstitutionally disenfranchised all persons placed under court-ordered guardianship. Under Article VIII, § 2 of the Missouri State Constitution, “No person who has a guardian...by reason of

mental incapacity, appointed by a court of competent jurisdiction...shall be entitled to vote.”

*Missouri Protection and Advocacy Services, Inc.*, 449 F.3d at 805.

Since voting is a fundamental right, the Court recognized that it would need to analyze the plaintiffs’ Equal Protection Claims under the strict scrutiny standard of review. However, before getting to the merits of the case, the court first focused on whether the plaintiffs even had a valid claim. Since one of the parties, Bob Scaletty, who was diagnosed with paranoid schizophrenia, was under a full guardianship order that preserved his right to vote, the Court found that “plaintiffs’ primary facial challenge fails for lack of proof.” *Missouri Protection and Advocacy Services, Inc.*, 499 F.3d at 809. The Court then focused on the validity of the non-profit organization’s claim. Based upon the non-profit’s concession that a state may constitutionally prohibit the mentally incompetent from voting, the Court determined that “the lawsuit may not properly go forward without the participation of one or more individual wards with specific claims based upon a particular incapacity and a record reflecting the basis upon which Missouri officials have denied the right to vote.” *Missouri Protection and Advocacy Services, Inc.*, 499 F.3d at 810.

After making this initial determination, the Court refused to weigh the merits of the plaintiffs’ claim. The Court cautioned that its ruling would be “nothing more than an impermissible advisory opinion by a lower federal court on an issue of voter eligibility that must be decided in the first instance by the State.” *Missouri Protection and Advocacy Services, Inc.*, 499 F.3d at 810. Nonetheless, the Court did provide limited commentary on Missouri’s judicial proceedings to determine competency. The Court ultimately noted that since the judicial proceedings were “individualized and protective of civil liberties,” the “finding necessary to appoint a guardian is indicative of a ‘mental incapacity’ to vote within the meaning of Article VIII, § 2.” *Missouri Protection and Advocacy Services, Inc.*, 499 F.3d at 810. Although the Court ultimately affirmed the judgment of the district court dismissing the plaintiffs’ claims, the Court’s

dicta provides some insight into the confusion as to which standards should be used to determine a person's voting capacity.

Some states have tried to define the standards necessary to determine voting competency within their statutes. A Washington State statute defines "incompetence to vote as 'lacking the capacity to understand the nature and effect of voting such that she or he cannot make an individual choice.'" Hurme and Appelbaum, 38 McGeorge L. Rev. at 961 (quoting Wash. Rev. Code. Ann. § 11.88.010(5) (West 2006 & Supp. 2007)). Likewise, a statute for Wisconsin defines voting incompetence as "incapability of understanding the objective of the elective process." Hurme and Appelbaum, 38 McGeorge L. Rev. at 961 (quoting Wis. Stat. Ann. § 54.25(2)(c)1.g (West Supp. 2006)). The important words within these two statutes seem to be "nature," "effect," and "objective." The descriptive language within these statutes may help courts determine a person's voter capacity; however, the key may be establishing a nationwide standardized test to determine a person's voting capacity.

One instrument that has been developed to help courts determine a person's voting capacity is the Competence Assessment Tool for Voting, or CAT-V. This assessment "poses tasks to subjects designed to probe their understanding of the nature and effect of voting and their ability to choose among candidates." Hurme and Appelbaum, 38 McGeorge L. Rev. at 966 – 67. Although the CAT-V has been tested and proven to be effective in terms of strongly correlating impairment with performance, there may be a few problems with implementing a standardized competency assessment. First and foremost, people likely have differing opinions over the types of questions that should be asked or the kinds of words that should be used. Secondly, since "the current version of the CAT-V focuses exclusively on elections for office," it likely would be ineffective to determine a person's capacity to vote on other issues, such as ballot referenda. Hurme and Appelbaum, 38 McGeorge L. Rev. at 970. Finally, there could be some major concerns about when and how such competency assessments should be used.

Although there seems to be a future need for the use of standardized competency tests, there definitely are a few problems that would need to be worked out before such tests could be implemented effectively and efficiently.

Another major concern with the disenfranchisement of people under guardianship is whether sufficient notice of the implications of guardianship has been given to the person being placed under guardianship. Most states have statutory notice requirements for guardianship proceedings; however, non-compliance with these proceedings does not invalidate the guardianship proceedings. See Roy, 11 Elder L.J. at 121. Non-compliance with the notice statutes can ultimately lead to voter disenfranchisement without the voter's notice. In *Doe v. Rowe*, 156 F.Supp.2d 35 (D. Me. 2001), a group of plaintiffs with mental disabilities challenged a Maine constitutional provision that disenfranchised all persons under guardianship because of mental illness. Immediately just before the 2000 elections, "three mentally ill women were denied the right to vote." 121 Harv. L. Rev. at 1185. The plaintiffs' complaint alleged that since the probate courts that put them under guardianship failed to inform them "that their right to vote would be automatically suspended when they were put under full guardianship," the state disenfranchisement laws violated the Fourteenth Amendment rights. *Id.*

In determining whether the state laws violated the plaintiffs' Fourteenth Amendment rights, the District Court of Maine first considered the language of the constitutional law at issue. Under Article 2, Section 1 of the Maine Constitution, "Persons who are 'under guardianship for reasons of mental illness' are prohibited from registering to vote or voting in any election." *Doe*, 156 F.Supp.2d at 38. In order to analyze the plaintiff's claims, the Court applied the *Mathews v. Eldridge* "balancing test." Under this test, the Court weighed: "(1) Plaintiffs' interest in participating in the democratic process through voting; (2) the risk of erroneous deprivation of the right to vote under the procedures used by the State; and (3) the State's interest, including any extra administrative or financial burden on the State from requiring additional procedures."



*Doe*, 156 F.Supp.2d at 48. In tracing the required procedure for guardianship proceedings under the Maine Constitution, the Court found that the actual practice of the probate courts failed to “ensure uniformly adequate notice regarding the potential disenfranchising effect of being placed under guardianship for a mental illness.” *Doe*, 156 F.Supp.2d at 50. After this finding, the Court assessed the plaintiffs’ Equal Protection Clause claims. The Court ultimately found that the statute failed to pass constitutional muster because the disenfranchisement of people placed under guardianship “because they are idiotic, non compos, lunatic or distracted is not narrowly tailored to meet Maine’s stated compelling interest. *Doe*, 156 F.Supp.2d at 54.

After *Doe v. Rowe*, courts definitely had an outline for the policy and constitutional reasons for why statutes that disenfranchised the mentally incompetent should be construed narrowly. However, many States continue to enforce statutes that disenfranchise people under guardianship due to mental illness. One remedy to the disenfranchisement of people under guardianship is to distinguish between full and limited guardianships. As stated before, the underlying danger of implementing a broad provision that disenfranchises all people under guardianship is that “determining whether someone can competently vote entails a different assessment than whether a person can manage personal finances, make a medical decision, or care for personal safety.” Hurme and Appelbaum, 38 McGeorge L. Rev. at 934.

The concept of limited guardianship recognizes that “a person’s abilities and capacities are variable as to time and as to degree.” Hurme and Appelbaum, 38 McGeorge L. Rev. at 949. In an effort to maximize a person’s self-reliance and independence, many states have begun to favor limited guardianships over full guardianships. In fact, some states even “mandate a preference for orders that are tailored to the specific needs and circumstances of the individual.” Hurme and Appelbaum, 38 McGeorge L. Rev. at 950. Nebraska is one such state that favors limited guardianship; under Neb. Rev. Stat. § 30-2620(2002), “If the court finds that a guardianship should be created, the guardianship shall be a limited guardianship unless the

court finds by clear and convincing evidence that a full guardianship is necessary.” Along with establishing limited, rather than full, guardianships, some states have opted to limit the rights lost by being placed under guardianship. In fact, “nineteen states have specific provisions that persons under full or limited guardianship retain all legal and civil rights not specifically taken away, which at least by implication would include the right to vote.” Hurme and Appelbaum, 38 McGeorge L. Rev. at 950.

A second remedy would be that States redefine their guardianship provisions to eliminate the use of overinclusive and underinclusive terms. Alaska, California, and Minnesota have taken steps to do this by giving courts the power to make individual determinations about voting capacity. 121 Harv. L. Rev. at 1183. New Jersey deleted the phrase “idiot or insane person” within its disenfranchisement statute and now only allows disenfranchisement after a court determines that the person “lacks the capacity to understand the act of voting.” 121 Harv. L. Rev. at 1184. Likewise, voters in both Delaware and Nevada voted to remove the phrase “idiot and insane person” and replace it with the phrase “adjudged mentally incompetent.” *Id.*

Although there have been many improvements within the area of voter disenfranchisement based upon incapacity, many states continue to enforce overbroad statutes. Iowa, Mississippi, and New Mexico continue to disenfranchise “idiots and insane persons.” 121 Harv. L. Rev. at 1184 – 85. This overbroad provision fails to give any person determined to be an “idiot or insane person” the opportunity to prove his or her mental competency to vote. Maryland and Massachusetts disenfranchise voters on the sole basis of guardianship, and Arkansas actually moved backwards by shifting from a policy of requiring a judge to determine the voter’s incompetence to requiring a judge to determine a voter’s competence. 121 Harv. L. Rev. at 1185. Since States have different interpretations and guidelines for determining a person’s competency to vote, it seems clear that, without some legislative or judicial action that

binds the States to one universal competency standard, people with mental disabilities will continue to be disenfranchised without a significant showing of their voting incompetence.

### **III. Inaccessibility of Polling Places**

Although steps have been taken to ensure that people with the mental capacity to vote are able to vote, there remains another major issue for people with disabilities within the voting process: the inaccessibility of polling places. Individuals with disabilities have been excluded from voting at the polls because of persistent barriers, such as inaccessible entrances, lack of handicapped parking, and inaccessible polling booths. According to the American Association of People with Disabilities, “over fourteen million people with disabilities voted in the 2000 election, but more than twenty-one million people of voting age with disabilities did not vote.” Daniel P. Tokaji and Ruth Colker, *Absentee Voting by People with Disabilities: Promoting Access and Integrity*, 38 McGeorge L. Rev. 1015 (2007). In recognizing the number of disenfranchised voters due to inaccessible polling places, “Congress has made some efforts to promote accessibility, most notably through the Voting Accessibility for the Elderly and Handicapped Act of 1984, the Americans with Disabilities Act of 1990, and the Help America Vote Act of 2002.” Tokaji and Colker, 38 McGeorge L. Rev. at 1016. Although these legislative acts have helped improve the plight of voters with disabilities, there are still many voters who are unable to vote because of the inaccessibility of polls, as evidenced through the many cases brought in courts of law to address the issue.

#### **A. *People of New York ex. rel. Spitzer v. County of Delaware***

In 2000, the United States District Court of the Northern District of New York addressed the inaccessibility of polling places in *People of New York ex. rel. Spitzer v. County of Delaware*, 82 F.Supp.2d 12 (N.D.N.Y., 2000). In this case, the State of New York brought suit on behalf of the county’s handicapped voters, seeking an injunction requiring that polling places be made accessible before the 2000 presidential primary. Among their allegations, the plaintiffs

contended that “by dereliction of their duties, defendants have prevented individuals with physical disabilities...from participating in the American tradition of voting at their public places, in an integrated setting, along with their friends, neighbors, and colleagues.” *People of New York*, 82 F.Supp.2d at 14. In their complaint, the plaintiffs specifically alleged that their right to vote at public polling places was infringed because of parking, pathway, entrance, and interior site inaccessibility. Through a survey of the voting sites for the 1998 election, it was revealed that forty-three of the forty-four polling places were inaccessible to people with disabilities; previous surveys found similar results. See *Id.*

The court first began to analyze plaintiffs’ claim by discussing the importance of voting. In recognizing voting as a fundamental right, the court reiterated the Supreme Court’s statement that “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *People of New York*, 82 F.Supp.2d at 16 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964)). The court extended the same right to vote in a general election to a primary election and then continued by weighing the plaintiffs’ claims. In 1990, there were 3,525 residents who had difficulty using stairs and 1,847 who could not even use stairs. *People of New York*, 82 F.Supp.2d at 16. Noting that these figures encompass more than 10 percent of the county’s population, the court found that the plaintiffs had proven irreparable harm, especially since compliance with the ADA is mandatory. See *People of New York*, 82 F.Supp.2d at 17.

The court then analyzed the plaintiffs’ claim under the Americans with Disabilities Act (ADA). Under Title II of the ADA, “No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity or be subject to discrimination by that entity.” 42 U.S.C. § 12132. Under the ADA, “the plaintiffs have to show three things: (1) that they are qualified

individuals with a disability (2) who, by reason of their disabilities, are excluded from participation in or denied the benefits of (3) a service, program, or activity of a public entity.” *People of New York*, 82 F.Supp.2d at 17. The plaintiffs clearly met the first requirement since the State represented the people with physical disabilities within the county. Since voting was a program conducted by the government, the court also found that the third requirement was met. This meant that the validity of the plaintiffs’ claim rested on whether they met the second requirement for an ADA claim.

The court noted that since the defendants conceded that some of the polling places were inaccessible to voters with disabilities, the plaintiffs seemed to have a strong chance of prevailing on their complaint seeking an injunction. The court made this determination by reexamining the plaintiffs’ detailed list of inaccessibility within the polling places. Specifically, the plaintiffs alleged that there were “insufficient access aisles to allow disabled people room to maneuver in and out of their vehicles,” “uneven surfaces that made it difficult for people with walkers or wheelchairs to reach the polling site,” “entrances without ramps or with ramps without handrails,” and interior aisles that “were not large enough for wheelchairs to maneuver.” *People of New York*, 82 F.Supp.2d at 14. In analyzing these complaints, the court found that the “plaintiffs have shown both irreparable harm should the injunction they seek not be granted and a likelihood of success on the merits; therefore, they are entitled to a preliminary injunction.” *People of New York*, 82 F.Supp. 2d at 18.

Since the plaintiffs were entitled to a preliminary injunction, the court next determined the scope of the injunction. The court noted that the defendants would only be required to get the polling places into compliance with the ADA to the degree feasible before the 2000 presidential primary election. Some examples of feasible changes included: “creating sufficient handicapped parking spaces through the use of correctly placed signage,” “installing door handles that can be used by people using wheelchairs or walkers,” “installing a temporary ramp

of acceptable slope with handrails and a non-slip surface at non-complying polling sites,” and even selecting a new polling place that complies with the ADA Accessibility Guidelines. *People of New York*, 82 F.Supp.2d at 18. After giving examples of feasible changes that could be made, the court granted the plaintiffs’ motion for preliminary injunction and consequently ordered the defendant county to “act in good faith to insure compliance with the aforementioned building guidelines and code.” *People of New York*, 82 F.Supp.2d at 18 – 19.

**B. *National Organization on Disability v. Tartaglione***

In 2001, the United States District Court of the Eastern District of Pennsylvania decided a similar issue in *National Organization on Disability v. Tartaglione*, 2001 WL 1231717 (E.D.Pa. 2001). In this case, the plaintiffs, including organizations who advocated for people with disabilities, organizations of people with disabilities, and people with visual or mobility disabilities, filed suit against the Commissioners of the City of Philadelphia under both the Americans with Disabilities Act and the Rehabilitation Act. The plaintiffs’ complaint alleged that people with disabilities were denied “equal and integrated access to polling places and accessible voting machines.” *National Organization on Disability*, 2001 W 1231717 at 1.

According to the plaintiffs’ complaint, the City of Philadelphia failed to provide reasonable accommodations for people with visual and mobility impairments at polling places. Specifically, the plaintiffs claimed that “the voting machines used by the City of Philadelphia are not accessible to visually impaired voters.” *National Organization on Disability*, 2001 W 1231717 at 1. Because the voting machines were inaccessible to blind voters, they were unable to go to the polls to vote independently and secretly with their neighbors because they either had to vote by absentee ballot or with the help of another person. The plaintiffs also claimed that “the vast majority of Philadelphia’s polling places are inaccessible to persons with mobility impairments, and the City does not require that new polling places be accessible to persons who use

wheelchairs.” *Id.* Because of the inaccessibility of polling places, people with mobility disabilities also had to vote by absentee or alternative ballot.

The court first analyzed that defendants’ contention that the plaintiffs’ complaint should be dismissed under Federal Rule of Civil Procedure 12(b)(6). The defendants’ basis for this motion was that they did not deprive individuals with disabilities the right to vote because they provided alternative forms of voting through absentee, alternative and assisted voting to people otherwise unable to access the polls. See *National Organization on Disability*, 2001 W 1231717 at 2. The court ultimately denied the defendants’ motion to dismiss the plaintiffs’ complaint because the plaintiffs’ complaint did not allege that they have been denied the right to vote, rather it alleged that they have been denied the same opportunity to vote as people without disabilities. Specifically, the court found that the plaintiffs’ complaint alleged that

Assisted voting and voting by alternative ballot is substantially different from, more burdensome than, and more intrusive than the voting process utilized by non-disabled voters for the following reasons: (1) visually impaired voters must find a person willing to assist them in voting or rely on the assistance of a poll worker who is a stranger; (2) visually impaired voters cannot vote in privacy and secrecy because the ballot must be read to them and their votes must be disclosed to others; and (3) mobility impaired voters cannot vote with their neighbors in a convenient location because only three percent of polling places in the City of Philadelphia are accessible to persons using wheelchairs.

*National Organization on Disability*, 2001 W 1231717 at 3. Since the plaintiffs’ claim met all the requirements for a valid claim under the ADA and Rehabilitation Act, the court denied defendants’ motion to dismiss plaintiffs’ complaint for failure to state a claim upon which relief could be granted.

After finding that the plaintiffs had made a valid claim and had standing to make such a claim, the Court analyzed whether the plaintiffs’ complaint had to be dismissed for failure to join a necessary party. Since the plaintiffs with visual disabilities alleged that the new polling equipment did not allow them to vote unassisted, the defendants contended that the plaintiffs’

failure to join the Secretary of the Commonwealth of Pennsylvania required dismissal of the plaintiffs' complaint. "The Pennsylvania Election Code prohibits the use of voting machines which have not been pre-approved by the Secretary of the Commonwealth." *National Organization on Disability*, 2001 W 1231717 at 8. As the plaintiffs would not be able to get the remedy they requested without the Secretary of the Commonwealth's approval, the court found that they had failed to join a proper party, thereby granting the defendants' motion to dismiss that portion of the plaintiffs' claim. Ultimately, the court found that the plaintiffs had stated valid claims under both the ADA and Rehabilitation Act against the defendants, but failure to join an indispensable party rendered the plaintiffs' claim on behalf of individuals with visual disabilities invalid. *Id.*

### C. ***Tennessee v. Lane***

In 2004, the Supreme Court of the United States decided an important case that, although not directly related to the accessibility of polling places, had an indirect impact on the requisite accessibility of polling places under the Americans with Disabilities Act. In *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978 (2004), the Court addressed the issue of whether citizens with disabilities had a fundamental right to access state courthouses. Two people who used wheelchairs for mobility filed suit against the State of Tennessee under the ADA, alleging that they "were denied access to, and the services of, the state court system by reason of their disabilities." *Tennessee*, 541 U.S. at 513, 124 S.Ct. at 1982.

In analyzing the plaintiffs' claims, the Court initially looked to the language and legislative history of the ADA. In noting that Congress had the authority to pass the ADA, the Court remarked that along with the suspension of literacy tests and other voting requirements, Congress has the power to enforce the Fourteenth and Fifteenth Amendments by passing other measures protecting voting rights, despite the burdens those measures placed on the States. See *Tennessee*, 541 U.S. at 520, 124 S.Ct. at 1986 n. 4. Although the Court recognized these



measures within congressional power, it cautioned that this power is not unlimited because “while Congress must have a wide berth in devising appropriate remedial and preventative measures for unconstitutional actions, those measures may not work a ‘substantive change in the governing law.’” *Tennessee*, 541 U.S. at 520, 124 S.Ct. at 1986 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997)).

After recognizing the congressional power to enact the ADA, the court focused on Congress’ purpose for enacting the ADA. The Court discussed the long history of discrimination against people with disabilities and noted that Congress passed the ADA because “discrimination against individuals with disabilities persists in such critical areas as...education, transportation, communication, recreation, institutionalization, health services, *voting*, and access to public services.” *Tennessee*, 541 U.S. at 529, 124 S.Ct. at 1992 (quoting 42 U.S.C. § 12101(a)(3)) (emphasis added). Based upon this finding, the Court ultimately held that, under § 5 of the Fourteenth Amendment of the Constitution, Congress has the authority to create laws such as the ADA to enforce the guarantees of the Fourteenth Amendment, including access to state courts, and the right to vote. See *Tennessee*, 541 U.S. at 533 -34, 124 S.Ct. at 1994. After *Tennessee v. Lane*, it seemed as if any future claims brought by individuals with disabilities under the ADA alleging the inaccessibility of polling places would be recognized as valid and would mandate that election officials make polling places accessible for all voters, including voters with visual or mobility disabilities.

D. ***Westchester Disabled on the Move, Inc. v. County of Westchester***

In 2004, the United States District Court for the Southern District of New York addressed the issue of inaccessibility of polling places in *Westchester Disabled on the Move, Inc. v. County of Westchester*, 346 F.Supp.2d 473 (S.D.N.Y. 2004). In this case, various organizations and individual plaintiffs with disabilities filed suit against the County of Westchester and the County Board of Elections, requesting that the court order the defendants to stop discriminating against

individuals with disabilities, to evaluate the accessibility of polling places, and to make the polling places accessible for the 2004 election. The defendants filed a motion to dismiss plaintiff's complaint requesting the preliminary injunction. See *Westchester*, 346 F.Supp.2d at 475.

The court began its analysis with a discussion of the factual background of the case. Approximately 50,000 of the 900,000 residents in Westchester County suffer from physical disabilities. *Westchester*, 346 F.Supp.2d at 475. Over 500,000 residents are registered voters, and there are 440 polling places within the county borders. *Westchester*, 346 F.Supp.2d at 475 – 76. In order to determine the accessibility of these polling places, two non-profit organizations that provide services to people with visual and disabilities surveyed 109 of the polling places. These organizations found that a majority of the polling places were inaccessible. Specifically, they found inaccessibility due to “a lack of handicapped parking spaces, steep inclines leading from parking areas, doors that are difficult to open, and inadequate signage.” *Westchester*, 346 F.Supp.2d at 476.

The factual findings of these two non-profit organizations did not comport with the findings reported by the Board of Elections in 2003. Under New York law,

Each county's board of elections must submit an annual report to the State Board of Elections setting forth: (a) the total number of polling places in the county; (b) the total number of such polling places having at least one entrance that provides access, by ramp or otherwise, to physically handicapped or elderly voters; and (c) the total number of such polling places for which the county board has waived the accessibility requirements of the Election Law.

*Westchester*, 346 F.Supp.2d at 476. In 2003, the Board of Elections' report indicated that only 32 of the county's polling places were not accessible to people with disabilities. Its report indicated that, among the thirty-two inaccessible sites for which waivers had been given, “eight had obstructed walkways or pathways to the entrance and thirty have unramped stairs on inaccessible elevators, but none had inadequate parking or barriers within voting areas.” *Id.* As

there was a major discrepancy in the parties' findings of the inaccessibility of the 441 polling places, the court conducted its analysis carefully.

Since there was no contention that individuals with disabilities were not able to vote through absentee ballot or in alternative locations, the court narrowed its inquiry into whether a voter suffered irreparable harm by not being able to vote at their assigned locations. Ultimately, the court found that voters with disabilities suffered irreparable harm if they had to vote by absentee ballot or at alternative locations. See *Westchester*, 346 F.Supp.2d at 477. The court gave four major reasons for why voters with disabilities had suffered irreparable harm. The first major reason was that voters with disabilities might not be able to find an accessible alternative voting location in time if they do not realize their assigned voting location is inaccessible. A second reason why voters with disabilities may face irreparable harm is that they may be dissuaded from voting if they show up to an inaccessible polling place. Furthermore, the court noted that without a complete analysis of the polling places, there is no proof that there are even enough accessible polling places to accommodate voters with disabilities. Finally, the court found that absentee ballots are an unacceptable alternative to voting in person because absentee ballots do not give the voter as much time to consider their vote before election day. See *Westchester*, 346 F.Supp.2d at 477 -78.

Like the plaintiffs in *National Organization on Disability v. Tartaglione*, the plaintiffs here faced the issue of whether they had named all the necessary parties as defendants within their complaint. The court ultimately held that the plaintiffs here failed to name the necessary parties because "the currently named defendants could not provide complete relief sought by Plaintiffs in this case." *Westchester*, 346 F.Supp.2d at 479. Since the plaintiffs requested that all 441 voting locations be made accessible in time for the 2004 election and included a detailed list of the specific changes that could be made to make the polling places accessible, the court found that the Board of Elections could only select alternative polling places if any polling place was

deemed unsuitable or unsafe. Since there did not seem to be a sufficient number of accessible alternative locations within the County, the Board of Elections could not grant the relief requested because they alone could not make the changes to the existing polling locations. The changes could only be made “with the cooperation of municipalities, which likely own or otherwise control many of the actual or potential polling places in the County.” *Westchester*, 346 F.Supp.2d at 479 - 80. Although the plaintiffs had established an irreparable harm to voters with disabilities due to inaccessible polling places, their failure to name the proper defendants who could accord the relief they requested led the court to deny their motion for a preliminary injunction. *Westchester*, 346 F.Supp.2d at 480.

E. ***Kerrigan v. Philadelphia Board of Election***

In 2008, the District Court for the Eastern District of Pennsylvania analyzed the accessibility of polling places for individuals with disabilities in *Kerrigan v. Philadelphia Board of Election*, 2008 WL 3562521 (E.D.Pa. 2008). In this case, the plaintiffs, registered voters with mobility disabilities, filed suit against the Philadelphia Board of Elections, alleging that they violated the ADA and Rehabilitation Act by denying them access to polling places within the city. Within Philadelphia there are 66 wards with a total of 1,681 polling divisions. *Kerrigan*, 2008 WL 356251 at 1. Under the election laws in Pennsylvania, voters must vote at their assigned polling place unless they vote by alternative or absentee ballot. *Id.*

In analyzing the plaintiffs’ claims that polling places are inaccessible, the court first discussed the Commonwealth’s alternative ballot system. The Voting Accessibility Procedures of Pennsylvania state that “the Secretary of the Commonwealth has implemented an alternative balloting procedure to ensure ‘that any handicapped or elderly voter assigned to a polling place deemed inaccessible by the county board of elections would have another means to cast a ballot on or before Election Day.’” *Kerrigan*, 2008 WL 3562521 at 3 (quoting *Pa. Voting Accessibility Procedures* § 4(a)). Any individual with a mobility disability can cast an absentee or

alternative ballot only after filling out an application form before the election. However, if a voter with a disability does not learn that “he or she has been assigned to an inaccessible polling place, the voter may make an Emergency Application for Alternative Ballot at any time until the polls close on election day.” *Id.*

After discussing the Commonwealth’s alternative balloting system, the court analyzed the Commonwealth’s polling place accessibility designations. The Board of Elections surveys the potential polling places and posts a listing of each polling place’s accessibility in the local newspaper on the day before the election. When surveying the polling places, the Board uses the following criteria:

The pathway must be free of steps from the parking space for the disabled voter to the accessible entrance to the polling place; all ramps, with the exception of curb ramps, must have handrails; it must be possible to approach and enter the building, reach the voting room, vote and leave the building without climbing one or more stairs; thresholds or doorsills must be 1/2 inch or less in height; and clearances through doorways used by the disabled voter must be at least 32 inches wide.

*Kerrigan*, 2008 WL 3562521 at 4. Under these standards, the city of Philadelphia had 110 polling divisions within facilities that were fully accessible; however, at the time of the lawsuit, there were 224 inaccessible polling divisions. *Id.* The plaintiffs questioned the Board’s designation of the accessibility of some of the polling divisions. Specifically, the plaintiffs’ complaint alleged that “36 polling places designated by the defendant as accessible...were not accessible or had accessibility issues.” *Kerrigan*, 2008 WL 3562521 at 6. Furthermore, the plaintiffs alleged that 114 of the 210 polling places designated as accessible were not accessible and that a total of 207 of the polling divisions located in facilities designated accessible were not actually accessible on election day. *Id.*

In determining that there was a discrepancy between the plaintiffs’ and defendants’ determination of polling place accessibility, the court took notice of alternative relief available to the plaintiffs under Pennsylvania law. Specifically, the election laws of Pennsylvania allow

voters to “request that a polling place be moved by submitting a petition from 10 qualified voters to the Board.” *Kerrigan*, 2008 WL 3562521 at 7. When the Board receives a recommendation that a polling place be moved, they determine whether that change should be made and hold hearings to consider the change. The plaintiffs tried to use this alternative form of relief by submitting a request that the Board move 41 inaccessible polling places to accessible locations. See *Id.* After a hearing on 23 of the proposed locations, the Board rejected all of the plaintiffs’ recommendations. *Id.*

After describing the factual background of the case, the court analyzed the validity of the plaintiffs’ claims under both the ADA and Rehabilitation Act. The plaintiffs’ claims echoed many of the claims made by plaintiffs in other polling place inaccessibility cases; specifically, that defendants failed to provide equal access to the voting polls for voters with disabilities, thereby denying them their right to participate in the election in the same manner available to people without disabilities. The basis of the plaintiffs’ claims was that the underlying program provided by the defendants was the ability to vote at local, neighborhood polling places and that inaccessibility to these polling places resulted in the plaintiffs’ inability to participate in that program. *Kerrigan*, 2008 WL 3562521 at 12. The court ultimately rejected the plaintiffs’ contention, finding that the city’s program of voting comprised its entire voting program, rather than recognizing each polling division as a separate program. *Kerrigan*, 2008 WL 3562521 at 13.

In response to the plaintiffs’ allegation that they had been denied equal access to neighborhood polling places, the defendants stated that the alternative or absentee ballot processes allowed them to still have access to the voting process. Relying on the ADA Technical Assistance Manual, the plaintiffs stated that these alternative voting forms were insufficient alternatives because they do “not afford voters with mobility disabilities access to the voting process that is as effective as accessible polling places,” especially since many voters

with disabilities do not know about the alternative ballot process. *Kerrigan*, 2008 WL 3562521 at 15. Based upon the plaintiffs' allegations that the inaccessibility of the polling places unduly burdened their right to vote "like normal people" at their assigned polling location, the court ultimately held that "failing to ensure that mobility disabled voters are able to vote in their neighborhood, to the extent that defendants can do so, is a failure to provide mobility disabled voters with an equal opportunity to access the program of voting and violates the program access mandate." *Kerrigan*, 2008 WL 3562521 at 18.

After finding that the plaintiffs had asserted a valid claim under both the ADA and the Rehabilitation Act, the court focused on defendants' argument that the plaintiffs had failed to join all the necessary and indispensable parties. Like the defendants in *Westchester*, the defendants here asserted that the plaintiffs' failure to join both the Commonwealth and the private polling place property owners rendered plaintiffs' claim invalid. Since the Commonwealth had the ultimate authority and responsibility to survey and determine the accessibility of polling places, the court granted the defendants' motion to dismiss the complaint "with respect to their argument that plaintiffs failed to join the Commonwealth of Pennsylvania a party." *Kerrigan*, 2008 WL 3562521 at 27. Unlike the court in *Westchester*, however, this court found that, since the defendants had the ultimate option to relocate polling places to accessible sites proven to already exist within the County, "the owners of the private properties used as polling places in the City of Philadelphia are not necessary and indispensable parties to this litigation." *Id.*

From the case law available on the issue of the inaccessibility of polling places, it seems clear that courts are more willing to recognize the validity of plaintiffs' claims of discrimination under both the ADA and the Rehabilitation Act. The factors upon which the court makes its final decision include: the inaccessible-to-accessible ratio of polling places within the precinct, the availability of alternative voting systems, and the identification of reasonable accommodations

that can be made. Since voting has been recognized as a fundamental right, courts seem very willing to find that polling places must be made accessible to all voters. However, one weakness in many of these cases is the plaintiffs' failure to name all the necessary and indispensable parties. Regardless of how the courts approach the accessibility of polling places, it seems as though the power may ultimately rest within the people themselves to petition their state legislatures to change their local voting procedures and laws. Through the emergence of easier application processes for absentee or alternative ballot voting, mail voting, and "curbside voting," more people with disabilities may be able to have equal access to the voting process. Nonetheless, with fully accessible polling places, these alternative voting procedures could easily become remnants of a pre-ADA American past.

#### **IV. Emergence of Online Voting**

Within the 21st Century, the Internet has played a dominant role in connecting people and transferring information; however, one area in which the potential use of the Internet remains untapped is the American democratic voting process. "To date, only one major political election has been conducted on the Internet – the 2000 Democratic Presidential Primary in Arizona." R. Michael Alvarez and Jonathan Nagler, *The Likely Consequences of Internet Voting for Political Representation*, 34 Loy. L.A. L. Rev. 1115 (Apr. 2001). Although Internet voting has its strengths in that it could lessen the expense of elections, lessen the time it takes to vote, and render the inaccessibility of polling places for individuals with visual and mobility disabilities moot, there are major problems with Internet voting. Specifically, it would likely not be equally accessible by all voters, it could be more vulnerable to fraudulent and security attacks, and it could be an expensive procedure to implement. In order to fully understand the online voting process, it is best to first examine the only major political election conducted through the Internet.

##### **A. 2000 Democratic Presidential Primary in Arizona**



The first major experiment with Internet voting occurred in Arizona in 2000 after Arizona realized that it had very little positive experience with presidential primary elections. In an effort to increase voter turnout within a very limited number of primary polling places, the Arizona State Democratic party decided to offer voters “four different ways to cast ballots: through remote Internet voting during the four days before the primary, through traditional vote-by-mail absentee voting; through in-precinct paper ballots; or by in-precinct electronic balloting.” Alvarez and Nagler, 34 Loy. L.A. L. Rev. at 1136. The Democratic Party’s primary purpose in offering voters the opportunity to vote through the Internet was to increase voter turnout since “the last competitive contest in 1992 drew barely 35,000 voters – slightly more than the 10 percent of the turnout for the Republican presidential primary in 1996.” Id.

The primary Internet voting process implemented in Arizona was fairly straightforward. Every registered Democratic voter in Arizona received an identification number in the mail within two months before the date of the primary election. Any voter who decided to vote online could do so beginning four days before the date of the primary election by using the identification number he or she had previously received. In order to vote online, voters would “log on to one of two websites run by the Democratic party and Election.com; the log-in process required that the voter accept the election rules, enter a PIN, and then answer two personal questions.” Alvarez and Nagler, 34 Loy. L.A. L. Rev. at 1137. In order to verify the voter’s identity, the identification number and answers to the personal questions would then be matched against voter registration records. As soon as the voter’s identification was verified, a ballot would appear on the screen and the voter would “click on their choice of candidate, click ‘yes’ to confirm their choice, and receive electronic confirmation of the ballot.” Id. The Internet election ended on the day just before the actual presidential primary election. Voters who showed up to vote in person at the 124 polling places on election day had to use their identification numbers in order to ensure that nobody cast more than one ballot in the election.

This election gives great insight into the future potential use of Internet voting. Based upon the information supplied by the Arizona Democratic Party, 41% of the total ballots cast within the primary were cast using remote Internet voting. Alvarez and Nagler, 34 Loy. L.A. L. Rev. at 1138. This number is comparable to the 38% of total votes that were cast by traditional vote-by-mail absentee ballots. See *Id.* These numbers suggest that, alternative ballot procedures, rather than voting at traditional polling places, have begun to emerge as the voters' preference for performing their civic duty of voting. Nonetheless, this election and further research on Internet voting sheds light on the potential advantages and disadvantages of Internet voting.

### **B. Advantages of Internet Voting**

Before a new voting procedure can be implemented effectively and efficiently, research must be conducted to determine just how beneficial and, more importantly, constitutional the new voting system truly is. Through research conducted on Internet voting, it appears that there are many advantages to the use this modern process. The benefits of electronic Internet voting include: cost savings, convenience, fewer polling places, and higher voter turnout.

The first major advantage of Internet voting is the potential cost savings it could provide. As a result of the Internet voting process, "ballot printing costs would be eliminated, training and employment of election poll workers would be eliminated, the costs of mailing absentee ballots could be reduced, and voters would be paying for most of the voting franchise." Kristen E. Larson, *Cast Your Ballot.Com: Fulfill Your Civic Duty Over the Internet*, 27 Wm. Mitchell L. Rev. 1797 (2001). Furthermore, the reduction of paper waste would be an environmental cost saving, which is important because in a society in which "being green" is encouraged, it seems logical that local, state, and federal governments should find more economically efficient and friendly ways to operate. Although some money would be needed to set-up the new voting system, the reduction of the expenses traditionally incurred in the paper ballot process would

likely be very appealing to state and local governments which could use the cost savings to better citizens' lives in other aspects, including education and street maintenance.

A second major benefit of Internet voting is the convenience of the process. Instead of identifying, traveling to, and waiting in line at an assigned polling place, voters could just stay at home or work and vote within a few minutes. In fact, the ease of voting on the Internet would likely enfranchise people who normally do not exercise their right to vote simply because they find the process to be inconvenient. This ease of convenience would also allow voters who are out-of-town on election day to still exercise their right to vote on the same day as other voters, rather than to have to fill out an absentee ballot months or weeks in advance of the election. See Larson, 27 Wm. Mitchell. L. Rev. at 1808. Another aspect of convenience is that voters likely would use the Internet to become informed about the candidates and pressing political issues, so it seems like a natural extension to empower them to speak out on these issues through the same means in which they learn about them.

A third major benefit of Internet voting is that it would greatly reduce the number of polling places. Most cities use schools, churches, and other buildings for polling places, which requires both voters and poll workers to travel to the building and take over for a day. The implementation of Internet voting would lessen any stress placed on workers or students at the polling place and would completely eliminate the need for the training and staffing of poll workers. This process would also render the issue of accessibility of polling places moot with regard to voters with mobility disabilities because they would not need to worry about accessible parking spaces, doorways, and ballot booths with Internet voting.

A final major benefit of Internet voting is that it can greatly increase voter turnout. With the convenience and accessibility of the Internet, voters would likely be more willing to spend a couple minutes to log on to a website and cast their ballot. The 2008 Presidential election had an increase of voter turnout for voters in the 18 to 24 age group, at 49%. See "Voter Turnout

Increases by 5 Million in 2008 Presidential Election, U.S. Census Bureau Report.” 20 July 2009.  
U.S. Census Bureau. 1 October 2009.

<http://www.census.gov/PressRelease/www/releases/archives/voting/013995.html>. However, with the implementation of Internet voting, the participation of younger voters would likely increase to an even greater extent, as would “participation by business executives, overseas military, and other groups that have ready access to the Internet and who typically have lower participation rates.” Larson, 27 Wm. Mitchell L. Rev. at 1809. All of these advantages make it seem as though Internet voting should be implemented as the new electoral process; however, there definitely are some major disadvantages to Internet voting.

### **C. Disadvantages of Internet Voting**

With a focus on voting rights legislation, judicial opinions, and the Constitution itself, it must be remembered that no voting procedure that unduly burdens a person’s fundamental right to vote should be implemented. With a concern for the preservation of a person’s fundamental right to vote, there are some major concerns that arise with the implementation of Internet voting. Specifically, these include: equal access to the polls, the cost of implementing the system, and the security of the process.

Under Section 2 of the Voting Rights Act, no voting procedures can be implemented that deny or abridge a person’s right to vote on the basis of race or color. See Alvarez and Nagler, 34 Loy. L.A. L. Rev. at 1144. The most important concern about Internet voting is whether it truly can be equally accessible to all registered voters. Many people in our society take their ability to access the Internet for granted; however, many people do not have access to Internet. In fact, at the beginning of this century, “roughly half of the adult or politically active populations do not have Internet access; thus, roughly half of the adult or politically active populations would have difficulty accessing the Internet for electronic balloting purposes.” Alvarez and Nagler, 34 Loy. L.A. L. Rev. at 1135. Among the groups of people who have no, or at most a very limited,

access to the Internet are the elderly, the non-white, the unemployed, and residents of rural areas. Alvarez and Nagler, 34 Loy. L.A. L. Rev. at 1144. In order to ensure that all voters have equal access to Internet voting, election boards would need to set up public Internet access areas where voters without personal access to the Internet could conveniently access the Internet and employ their fundamental right to vote. Equal access to the voting process is necessary to ensure that “specific groups behind the digital divide do not lose further political power while other groups see increased political power.” Alvarez and Nagler, 34 Loy. L.A. L. Rev. at 1148.

Another major concern with Internet voting is the expense of transitioning from the paper ballot to the electronic ballot. While it is true that electronic voting would decrease the costs of printing and mailing ballots and training poll workers, a local government would have to bear a heavy financial burden in setting up and maintaining the Internet voting system. The election board would have to invest in electronic voting programs and likely provide written information to voters to ensure that they understood the polling process. Likewise, technical support staff would need to be employed to answer any questions or help voters who have problems voting during the election time period. If public polling places were created to ensure that all voters have equal access, then election boards would also have to bear the costs of supplying, maintaining, and even replacing the computers for public Internet use. Although the cost of implementing the Internet voting system seems daunting, it is likely that the savings from transitioning to this system would offset the cost and make it a more economically efficient process in the long run. See Larson, 27 Wm. Mitchell L. Rev. at 1807 – 08.

The final major concern with Internet voting is that the election officials would need to ensure that it was a secure process. In the Arizona Democratic primary, the election officials ensured that no voter could vote more than once by requiring all voters to use an identification number whether they voted electronically or in person on election day. This would make it seem

as though fraudulent votes would be less likely within the process. However, a major concern with using the Internet for such an important political process is that it places the integrity of the voting process at risk of being manipulated by technologically intelligent hackers. In this modern age of technology, the dangers of being hacked seem to occupy the mind of anybody who places personal information online, which would be especially true for people casting a secret, anonymous ballot. The advent of Internet voting would likely have to be followed by stricter criminal laws for hacking, blocking, or intercepting information within the electronic ballot, but criminal sanctions still may not deter would-be hackers from wreaking havoc on the electronic voting process. Some commentators suggest that “advanced encryption techniques” or “moving the votes from web servers to secure computers for collection” are possible solutions to the problems of Internet security, but these techniques would take more time and money to develop. Larson, 27 Wm. Mitchell L. Rev. at 1807.

Under a cost-benefit analysis, it seems as though Internet voting is a viable future electoral process. As the Arizona Democratic Presidential Primary demonstrated, it is possible to implement an electronic balloting process efficiently and effectively. Although Internet voting has many advantageous elements that make it appealing to election officials, there are many problems that would need to be resolved before the transition from the paper ballot to the electronic ballot would be successful. Only time and money will ultimately tell if Internet voting becomes the new manner through which qualified voters make their political opinions heard.

### CONCLUSION

Although many advances have been made within the voting process in the United States, it seems apparent that American electoral process still has a long way to go. Legislative enactments such as the Americans with Disabilities Act, Help America Vote Act, and the Voting Rights Amendment have helped develop an awareness of the disenfranchisement of thousands of voters. Nonetheless, there are still three major groups of people who are disenfranchised

throughout the country: convicted felons, people deemed incompetent, and people with mobility or visual disabilities. Without major reform in the voting process, it seems unlikely that these people will be able to exercise their fundamental right to vote. With a remembrance of the discriminatory past of the voting process and an appreciation of the relatively recent judicial and legislative reform, it seems apparent that the voting process is a dynamic process that may very well be within every qualified voter's grasp through further reform, including the possible implementation of electronic voting through the Internet.