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# GAMBLING WITH DEMOCRACY: THE HELP AMERICA VOTE ACT AND THE FAILURE OF THE STATES TO ADMINISTER FEDERAL ELECTIONS

## I. INTRODUCTION

Both the United States Congress and the United States Supreme Court have recognized the importance of voting to the democratic system.<sup>1</sup> Yet, despite this acknowledgment, the history of the United States is riddled with examples of the denial of this most fundamental of rights.<sup>2</sup> State, local, and even the federal government have deprived vast portions of the population of the ability to vote.<sup>3</sup> It seems the consent of the governed has not always been the foremost concern of the governments of this nation.<sup>4</sup>

Traditionally, the states were granted extensive control over the administration of federal elections.<sup>5</sup> Despite the persistent adherence to this tradition, states have repeatedly proven to be woefully inadequate at administering federal elections in a manner that ensures suffrage for the voters of America.<sup>6</sup> The controversial presidential election of 2000 was

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1. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 562 (1964) (regulation of the electoral process receives unusual scrutiny because “the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights . . .”); Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (1994). In the Voting Rights Act Congress addressed the problem of racial discrimination in the context of federal election procedures. *Id.*

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 abridgement of the right of any citizen of the United States to vote on account of race or color . . .

*Id.*

2. *See infra* Part II. The history of suffrage in the United States contains instances where the right to vote was limited on the basis of land ownership, gender, race, age, ancestry, literacy, and ability to pay a poll tax. *Id.*

3. *See, e.g., infra* Part II. Historically, there has been a great deal of time that elapsed between the identification of such problems within the electoral system and the action taken by the various levels of government. *Id.*

4. *See infra* Part II. Many groups have been denied, through various means, the ability to vote throughout the history of the United States, most notably women and African-Americans. *Id.*

5. *See, e.g., infra* Part II.A. Traditionally in the United States, the states administered federal elections. *Id.*

6. *See infra* Part II. The states have shown their inability to regulate federal elections adequately in numerous instances. The failure of the states to adequately protect the voting rights of African-Americans is discussed below in Part II.A. Likewise, the states have a similar history regarding the voting rights of women. *See infra* Part II.B. Finally, the states are unable to regulate the procedures of federal elections in a manner that protects the rights of voters, even during the most recent elections. *See infra* Part II.C and accompanying notes.

but one glaring example of the states' inability to properly administer federal elections. In the months and years following that memorable election it has become obvious to many that changes are needed in the federal electoral system. Congress responded to these problems with the passage of the Help America Vote Act in 2002.<sup>7</sup> However, with history as a guide, it is evident that the Act contains a critical deficiency: It allows the states to retain too much control over the administration of federal elections.<sup>8</sup> So long as the states continue to exercise control over the administration of federal elections, the problems with the voting system will persist.

Part II of this Note provides an overview of both historical and contemporary problems in the electoral system, and how the federal government has responded to such problems when the states have failed to adequately address them.<sup>9</sup> Part III of the Note will discuss the implications of the Help America Vote Act as it applies to federal elections in the future.<sup>10</sup> Finally, Part IV of the Note offers several solutions to the problems either unaddressed or under-addressed by the Help America Vote Act.<sup>11</sup>

## II. HISTORY

The United States was established as the world's first constitutional republic. The idealistic framework for democracy set forth in the late eighteenth century spoke of "self-evident" truths that "all men are created equal."<sup>12</sup> However, the young nation did not adhere to these flowery declarations of equality in many contexts, including suffrage.<sup>13</sup> The history of voting rights in the United States offers many examples of the difficult

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7. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 5 U.S.C., 10 U.S.C., 36 U.S.C., and 42 U.S.C.). *See also infra* Part II.C and accompanying notes.

8. *See infra* Part II.D and accompanying notes. The Help America Vote Act has many deficiencies, including the failure to adequately address many problems with the administration of federal elections. *Id.*

9. *See infra* notes 12–131 and accompanying text.

10. *See infra* notes 132–54 and accompanying text.

11. *See infra* notes 155–65 and accompanying text.

12. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

13. *See, e.g.,* Christopher Collier, *The American People as Christian White Men of Property: Suffrage and Elections in Colonial and Early National America*, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY 19 (Donald W. Rogers ed., 1990) (discussing the limitations placed on the voting franchise in early America). *See also* ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000). Keyssar traces the history of the right to vote in the United States and describes that in the American colonies, and later in the first states, voting was not considered a right, but rather a privilege granted by the government. *Id.* at 6–9.

struggles of those excluded from the democratic system, and the methods by which the disenfranchised gradually gained a measure of success in their quest for electoral equality.<sup>14</sup> By tracing the developments in the area of voting rights and procedures over the past two hundred years, it is evident that the only true impetus for change in an inequitable voting system has come from the actions undertaken by the federal government.<sup>15</sup>

#### A. Foundations of United States Voting Procedures

Prior to the enactment of the Constitution, the American colonies each separately defined voter qualifications and the procedures for voting.<sup>16</sup> While the procedures and qualifications for suffrage varied wildly within the colonies, a single common characteristic existed: A lack of universal suffrage.<sup>17</sup> In the years leading up to the American Revolution, the colonies generally limited suffrage to white male land owners who were at least twenty-one years of age.<sup>18</sup> Such limitations obviously excluded large numbers of the population, including many white males, from the ability to participate in the democratic process.<sup>19</sup>

The adoption of the Constitution in 1789 did not drastically affect the states' ability to prescribe the methods by which elections would occur.<sup>20</sup> In fact, the Constitution specifically grants states the power to define the "Times, Places, and Manner" by which members of Congress are

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14. See KEYSSAR, *supra* note 13, at 53–211 (tracing the history of various groups and their struggle to gain the ability to vote); see *infra* Part II.

15. See generally *infra* Part II. The history of suffrage in America details the failure of the states to provide voting rights to blacks, women, and those under 21 years of age without federal instruction.

16. See KEYSSAR, *supra* note 13, at 9–10.

17. *Id.* at 9. See also Collier, *supra* note 13, at 20. "It is generally reported . . . that about 6 percent of the total United States population voted for the presidential electors who chose George Washington in 1789. . . . Scholars agree that from 50 to 80 percent of the adult white males were eligible to vote in the colonial period." *Id.*

18. Collier, *supra* note 13, at 21–22. "But the most significant single factor holding down the number of voters [in the colonies] was the eligibility requirements established in every colony—limiting voters invariably to adult white males." *Id.* at 22. The practice of withholding eligibility to vote until a white male with property reached the age of twenty-one "was rooted in ancient English tradition." *Id.*

19. The percentage of white landowners who were eligible to vote in the early states is a matter that is often debated. Some estimate that as many as 40% of the white men in Virginia were eligible to vote by the time of the first federal election, while others place the number for states such as Massachusetts and Connecticut much lower, at around 10%. See Collier, *supra* note 13, at 20 (citing EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 303 (New York, 1988)); see also *infra* Part II.B–C (tracing the historical limitations placed on suffrage for African-Americans and women).

20. U.S. CONST. art. I, § 4.

elected.<sup>21</sup> Such provisions reflect the Constitutional Framers' intention to reserve to the states those powers that the states had previously held as colonies.<sup>22</sup> Moreover, during the late eighteenth century, it was impracticable for the federal government to maintain a central role in elections.<sup>23</sup>

Despite granting the states seemingly broad power over federal elections, the Constitution also provides that Congress may change the voting methods in the states if it so chooses.<sup>24</sup> However, absent action by Congress, states were able to select various methods by which voting qualifications and procedures would be defined.<sup>25</sup> Thus, the strict limitations on suffrage that had existed in the colonies prior to the Revolution persisted in the states following the adoption of the Constitution.<sup>26</sup>

### *B. Post-Civil War Obstacles to African-American Suffrage*

The Civil War and its aftermath redefined the role of the federal government vis-a-vis the governments of the several states.<sup>27</sup> Nowhere

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21. *Id.*

22. See James A. Gardner, *Forcing States to be Free: The Emerging Constitutional Guarantee of Radical Democracy*, 35 CONN. L. REV. 1467, 1490–92 (2003). In addition, Gardner explains that the arrangement made by the Constitution drafters regarding the ability of the states to regulate elections was a compromise aimed at limiting the power of the national government. *Id.* at 1490–91. He explains:

As much as they complained of the excesses of state power, many of the Framers feared national power even more. State control over national electoral politics was understood as a way to preclude the kind of national tyranny that might be expected were the national government given the power to regulate the very political processes that would produce it.

*Id.* at 1491.

23. See Collier, *supra* note 13, at 22.

24. U.S. CONST. art. I, § 4. “The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” *Id.* (emphasis added).

25. *Id.* The practice in the early states was for the voting procedures in place prior to the enactment of the Constitution to remain intact. Gardner, *supra* note 22, at 1490–92. This meant that generally only about 20% to 50% of the adult white men in America were eligible to vote in the eighteenth century. Collier, *supra* note 13, at 25.

26. See Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787–1860*, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY, *supra* note 13, at 31. Wilentz traces the historical developments of suffrage during the period between the passage of the Constitution and the Civil War. *Id.* In so doing, he explains that there was a great change in attitudes toward suffrage in this time period, but that this change was focused on the attainment of universal suffrage for white males. *Id.* at 32.

27. The passage of the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution redefined the relationship between the federal government and the states. See generally THE OXFORD COMPANION TO AMERICAN LAW 318–21 (Kermit L. Hall ed., 2002). The effect of the Thirteenth and

was this redefinition of federal power more evident than in the effect upon the rights of African-Americans.<sup>28</sup> The issuance of the Emancipation Proclamation in 1863 freed African-Americans from the institution of slavery in the states of the Confederacy.<sup>29</sup> Soon thereafter, the United States Congress sought to extend to all persons freedom from slavery by passage of the Thirteenth Amendment.<sup>30</sup> However, it was soon apparent that many states, still resisting federal intrusion of state sovereignty, would not extend suffrage to the newly freed slaves and other African-Americans.<sup>31</sup> In response to this categorical denial of black suffrage, Congress, in 1870, passed the Fifteenth Amendment, providing, in part, that one could not be denied the right to vote based on one's race.<sup>32</sup> Thus, the first federal remedy for voter discrimination was established.

Despite the content of the Fifteenth Amendment, many states continued to discriminate against blacks' right to vote by passing laws or using extralegal methods to deny African-American suffrage.<sup>33</sup> In part, these intentional discriminatory actions were designed to ensure that African-Americans would be unable to change the composition of both the state and federal legislatures.<sup>34</sup> The methods by which the states sought to limit the ability of African-Americans to vote were numerous. For example, in order to cast a vote in a federal election in many of the southern states, an

Fourteenth Amendments on the southern states in the time period immediately following the Civil War was mainly one of forced subjugation to the federal government in Washington. *Id.* at 318–19. Passage of the Thirteenth and Fourteenth Amendments had, at least theoretically, both freed the slaves and granted them equal rights; consequently these laws were not well-received in southern society. *Id.* at 318–21.

28. See U.S. CONST. amend. XIII–XV. See also Eric Foner, *From Slavery to Citizenship: Blacks and the Right to Vote*, in *VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY*, *supra* note 13, at 55. Foner explains how the Civil War Amendments represented not only a profound change in the legal status of slaves, but also in African-Americans' ability to gain a measure of suffrage. *Id.* at 57–63. "In America, the ballot did more than identify who could vote—it defined a collective national identity." *Id.* at 62.

29. Act of July 17, 1862, ch. 200, 12 Stat. 597.

30. U.S. CONST. amend. XIII, § 1. "Neither slavery nor involuntary servitude . . . shall exist within the United States . . ." *Id.*

31. See Foner, *supra* note 28, at 63–64.

With the end of Reconstruction in 1877, the egalitarian impulse embodied in the amendments of the 1860s faded from national life. The Thirteenth, Fourteenth, and Fifteenth Amendments remained parts of the Constitution, but as far as blacks were concerned, they increasing became dead letters.

*Id.* at 63.

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

33. See Foner, *supra* note 28, at 57–59.

34. *Id.* at 58.

otherwise eligible citizen was required by law to pay a poll tax.<sup>35</sup> The obvious intention behind this practice was to disenfranchise poor African-Americans.<sup>36</sup> In addition to the poll tax, some states implemented a literacy requirement as a prerequisite to voting eligibility.<sup>37</sup> The literacy tests required by many of the states had both the intention and the effect of disenfranchising African-Americans.<sup>38</sup>

Another method by which states limited the voting rights of African-Americans was a practice known as a “grandfather clause” requirement for voter eligibility.<sup>39</sup> In many of the southern states in the late nineteenth

35. See *Harper v. Virginia Bd. Elections*, 383 U.S. 663 (1966). In *Harper*, the Supreme Court addressed the constitutionality of the Virginia state constitution requirement that a poll tax be paid as a precondition for eligibility to vote in state elections. *Id.* at 665. The Court in *Harper* also detailed the origins and purposes of the poll tax, and its use in various states. *Id.* at 667. See also Barry H. Weinberg & Lyn Utrecht, *Problems in America's Polling Places: How They Can be Stopped*, 11 TEMP. POL. & CIV. RTS. L. REV. 401, 404 (2002). “The poll tax, adopted by Alabama during its 1901 Constitutional convention, and intended to keep blacks from voting, worked.” *Id.* Using the poll tax as a means to deny African-Americans (or any other Americans) the ability to cast a vote in federal elections was eliminated in 1964 with the passage of a constitutional amendment forbidding the use of the poll tax in federal elections. U.S. CONST. amend. XXIV, § 1.

The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, 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.

*Id.*

36. See *Harper*, 383 U.S. at 667.

37. See Weinberg & Utrecht, *supra* note 35, at 404. “Literacy tests also precluded applicants from registering if they failed to demonstrate their literacy by reading and/or writing particular matters, such as portions of the state constitution. These tests allowed county voter registrars to arbitrarily keep African-Americans off of the voting rolls.” *Id.* The literacy test requirement was challenged in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). That case arose out of a New York state requirement that in order to be eligible to vote in state elections one must be able to pass an English literacy test. *Id.* at 644. The challengers sought to enjoin the federal government from applying the Voting Rights Act of 1965, which had severely restricted the ability of the states to require literacy as a prerequisite to voting, to the administration of elections in the State of New York. *Id.* at 645–46. The Court found that the power granted to Congress under the Fourteenth Amendment to enforce the Equal Protection Clause was sufficiently broad to include the provision challenged. *Id.* at 653–56. As such, the Court held that the provision restricting the ability of the states to use literacy tests as a prerequisite to voting was a valid exercise of federal power. *Id.* at 657–58.

38. See Foner, *supra* note 28, at 63.

39. See Weinberg & Utrecht, *supra* note 35, at 403. See also *Guinn v. United States*, 238 U.S. 347 (1915). At issue in *Guinn* was an amendment to the Oklahoma constitution that required a citizen be able to write any portion of the state constitution in order to be eligible to vote, unless that person had an ancestor that could vote in the state in 1866, or himself was able to vote in 1866. *Id.* at 357.

No person shall be registered as an elector of this state or be allowed to vote in any election herein, unless he be able to read and write any section of the constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or at any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution.

*Id.*; *Lane v. Wilson*, 307 U.S. 268 (1939) (holding that a state’s use of a grandfather clause to limit

century, laws were enacted that limited voter eligibility to only those persons who had at least one grandfather who had been eligible to vote in the specified geographic area.<sup>40</sup> Because the grandfathers of African-Americans had either been slaves, or otherwise ineligible to vote in the pre-Civil War era, the ability of their African-American grandchildren to vote was effectively denied.<sup>41</sup> This practice, like the poll tax and the literacy test, represented the states' defiance of the constitutional mandate not to withhold suffrage on the basis of race.<sup>42</sup>

In addition to these specific examples of laws aimed at denying African-American suffrage, there were also numerous instances of outright intimidation as a means of limiting African-American voting.<sup>43</sup> When these acts of intimidation and violence are coupled with the state legislative enactments which limited African-American suffrage, it is clear that many states were either unwilling or unable to adequately protect the constitutional rights of their citizens.<sup>44</sup>

These discriminatory practices continued well into the twentieth century.<sup>45</sup> However, following the end of the second World War, a new

suffrage to those whose grandfather's could vote at a time before the abolition of slavery to be a violation of the Fifteenth Amendment to the Constitution).

40. *Guinn*, 238 U.S. at 356.

41. *Id.*; see also Weinberg & Utrecht, *supra* note 35, at 403.

42. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1. While use of these practices was not facially discriminatory to African-Americans, their express purpose was to deny African-Americans the right to vote, thereby defying the constitutional mandate to the contrary. See Weinberg & Utrecht, *supra* note 35, at 404 ("the panoply of practices and procedures that effectively disenfranchised African-Americans voters").

43. See Sherry A. Swirsky, *Minority Intimidation: The Problem that Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359 (2002). Swirsky details instances of voter intimidation both prior to and after the passage of the Civil Rights Acts. *Id.* at 360–63, 370–72. An example of this voter intimidation is found in the case of *United States v. Edwards*, 333 F.2d 575 (5th Cir. 1964), where the Fifth Circuit refused to issue injunctive relief after three black men were beaten by a sheriff and his deputies while attempting to register to vote. Swirsky, *supra*, at 371. Many of the forms of voter intimidation referred to by Swirsky were made illegal by the Voting Rights Act of 1965, 42 U.S.C. § 1973(a)–(j) (1994). The Act states that "No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote . . ." 42 U.S.C. § 1971(b) (1994). Despite the express provisions of the Voting Rights Act prohibiting the practice, instances of minority intimidation continue to exist, though some of the most recent violations have been directed at Hispanic-Americans, as well as African-Americans. Swirsky, *supra*, at 360.

44. This conclusion is based on Congress' determination that the franchise of African-Americans was in need of additional federal protection and consequent passage of the Civil Rights Acts of the twentieth century and the Voting Rights Act. See Weinberg & Utrecht, *supra* note 35, at 404–07.

45. See generally Weinberg & Utrecht, *supra* note 35, at 403–07 (discussing the persistence of problems involving racial discrimination well into the twentieth century); Linda Faye Williams, *The Constitution and the Civil Rights Movement: The Quest for a More Perfect Union*, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY, *supra* note 13, at 97 (finding that many of the barriers to African-

movement arose that challenged the practices that promoted African-American disenfranchisement.<sup>46</sup> The Civil Rights Movement sought to change a variety of aspects of American society and culture.<sup>47</sup> As equal suffrage demands for African-Americans grew more frequent, the United States Congress interjected, at the expense of state power.<sup>48</sup> The passage of the Civil Rights Acts of 1957,<sup>49</sup> 1960,<sup>50</sup> and 1964<sup>51</sup> contained provisions intended to address the barriers erected by the states to African-American enfranchisement.<sup>52</sup> Yet even these laws proved ineffective in combating the nature and enormous scope of the problem.<sup>53</sup> The laws depended too heavily on the acquiescence of the local federal district courts in the South, many of which did not agree with the major principles of the Civil Rights Movement.<sup>54</sup> Congress realized that the denial of suffrage to African-Americans was a problem which required a more effective remedy.<sup>55</sup>

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American franchise were addressed during the Civil Rights Movement of the twentieth century); Brian K. Landsberg, *Sumter County, Alabama and the Origins of the Voting Rights Act*, 54 ALA. L. REV. 877 (2003) (discussing the history of Sumter County, Alabama and the various methods by which suffrage was denied to African-Americans in the time period immediately before the passage of the Voting Rights Act of 1965).

46. See, e.g., TAYLOR BRANCH, PARTING THE WATERS: AMERICAN IN THE KING YEARS 1954–63 (1988) (detailing the development of the Civil Rights Movement in the 1950s and 1960s and how it impacted voting rights).

47. *Id.*

48. *Id.*; see also *infra* notes 49–51.

49. Pub. L. No. 85-315, 71 Stat. 634 (1957) (codified as amended at scattered parts of 42 U.S.C.). 42 U.S.C. § 1971(a)(1) provides:

All citizens of the United States who are otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

*Id.*

50. Pub. L. No. 86-449, 74 Stat. 89 (1960).

51. Pub. L. No. 88-352, 78 Stat. 252 (1964).

52. See *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). The Court stated:

Two points emerge vividly from the voluminous legislative history of the Act contained in the committee hearings and floor debates. First: Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.

*Id.*

53. See Weinberg & Utrecht, *supra* note 35, at 405–06. “These procedures were not effective in dealing with the problem of discriminatory application of literacy test to thousands of individuals throughout the South.” *Id.* at 405.

54. *Id.* “Because of a strong resistance to federal intervention in state functions, the procedures adopted by Congress . . . were ponderous and required continuing participation by the courts.” *Id.* at

Finally, Congress enacted the Voting Rights Act of 1965<sup>56</sup> in an effort to provide the federal government with an adequate mechanism to fulfill the promises of African-American suffrage made in the Fifteenth Amendment.<sup>57</sup> The Act gave the federal government, acting through the Attorney General, the power to initiate lawsuits against local state officials who attempted to deny equal electoral access to African-Americans.<sup>58</sup> In essence, the Act gave the federal government the power to intercede in an area traditionally left to state regulation, causing dramatic results.<sup>59</sup> In practice, the Act proved to be vitally important in removing the vestiges of racial discrimination against African-Americans at the ballot box.<sup>60</sup>

### C. Suffrage for Women

While the Fifteenth Amendment to the Constitution had limited the ability of the states to withhold suffrage from its citizens on account of race,<sup>61</sup> no similar provision assured women the right to cast votes. As a result, many states continued to withhold the right to vote from female citizens until the passage of the Nineteenth Amendment in 1920.<sup>62</sup>

Women had long battled for the right to vote prior to the passage of the Nineteenth Amendment.<sup>63</sup> While a few states had previously extended suffrage to women, most had not.<sup>64</sup> The failure of many states to recognize women as equal partners in American society, coupled with the historical

404–05.

55. *Katzenbach*, 383 U.S. at 313–15. “The Voting Rights Act of 1965 reflects Congress’ firm intention to rid the country of racial discrimination in voting.” *Id.* at 315.

56. The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965).

57. 42 U.S.C. §§ 1971, 1973 (1994). *See supra* note 52.

58. 42 U.S.C. § 1973gg-9 (1994).

59. *See Williams, supra* note 45, at 98–100. Williams argues that many of the barriers erected to deny suffrage to African-Americans have been reduced, and in some instances eliminated, as a result of the Voting Rights Act of 1965. *Id.*

60. *Id.*

61. *See supra* note 42.

62. *See Gabriela Evia, Note, Consent by All the Governed: Refranchising Noncitizens as Partners in America’s Democracy*, 77 S. CAL. L. REV. 151, 163 (2003) (“Until 1920, many States chose to deny the vote to women, and a woman’s right to vote was not protected by the Constitution. Americans now view this as a shameful part of U.S. history.”). *Id.*; Ellen Carol Dubois, *Taking Law Into their Own Hands: Voting Women During Reconstruction*, reprinted in VOTING AND THE SPIRIT OF DEMOCRACY, *supra* note 13, at 67 (tracing the means by which women struggled for suffrage prior to the Progressive Movement and the passage of the Nineteenth Amendment).

63. *See, e.g., Dubois, supra* note 62, at 69–79.

64. *See Evia, supra* note 62, at 163. While the women “suffragists” struggled to make gains in their movement, a few states did allow women to cast ballots. “Women voted in the East, in the Midwest and in the far West; there is one piece of evidence of a black freedwoman in South Carolina voting. Voting accelerated in 1870 and 1871 and peaked during the crucial presidential year of 1872.” Dubois, *supra* note 62, at 74.

limitations of male-only voting denied a large portion of the American population the ability to vote.<sup>65</sup>

Women had attempted for many years to gain a measure of political equality through state legislatures, but most states proved unwilling or incapable of making such a commitment to female suffrage.<sup>66</sup> Thus, action at the federal level was required to ensure that women were allowed to participate in the democratic process.<sup>67</sup> The Nineteenth Amendment, like its Fifteenth Amendment predecessor, invaded the traditional power of the states to define the limitations on voting requirements.<sup>68</sup> No longer could a state deny, on the basis of gender, suffrage to one-half of its adult population.<sup>69</sup> Similar to the assurance of African-American suffrage, the federal government succeeded in providing meaningful progress in electoral democracy when the states had failed to implement measures necessary to ensure women's suffrage.

#### *D. Florida 2000: An Electoral Debacle*

While substantial efforts have helped eliminate voter discrimination due to race, sex, and even age, there are presently numerous deficiencies in the administration of federal elections that are in desperate need of repair.<sup>70</sup> The 2000 presidential election illustrated these problems for all to see as the electoral drama played out in nearly every living room in America.<sup>71</sup>

The outcome of the 2000 presidential election was effectively determined by voters in the State of Florida, as neither George W. Bush, nor Al Gore, could attain the presidency without Florida's electoral votes.<sup>72</sup> Unfortunately, the voting procedures used in that state became an

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65. See KEYSSAR, *supra* note 13, at 172–76.

66. See Evia, *supra* note 62, at 163.

67. See Dubois, *supra* note 62, at 78.

68. “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.

69. *Id.*

70. See Weinberg & Utrecht, *supra* note 35, at 427–34. The authors offer several examples of reported problems. *Id.* at 427–30. Among these are ballot design irregularities, long lines at polling places, inadequate parking at the polling places, lack of well-trained poll workers, and absentee voting regularities. *Id.* at 429–32.

71. *Id.* at 430. See also Bush v. Gore, 531 U.S. 98, 100–04 (2000) (discussing problems with vote tabulations of presidential ballots cast in Florida in the 2000 election); Blake D. Morant, *Electoral Integrity: Media, Democracy and the Value of Self-Restraint*, 55 ALA. L. REV. 1 (2003) (discussing media coverage of the uncertainty of the outcome of the 2000 presidential election).

72. See Richard A. Posner, *Florida 2000: A Legal and Statistical Analysis of the Election Deadlock and the Ensuing Litigation*, 2000 SUP. CT. REV. 1, 3 (2000).

issue of hot debate in the days and weeks following the close of the polls.<sup>73</sup> Foremost among the procedural problems was the use in several Florida precincts of the so-called “punch card balloting” system.<sup>74</sup> Many of these punch cards ballots did not register in the vote-counting machines because voters failed to punch entirely through the card or selected more than one candidate.<sup>75</sup>

Another problem with voting procedures in Florida involved the use of the now infamous “butterfly ballot.”<sup>76</sup> It was reported that many voters in Palm Beach County, Florida, using the “butterfly ballot” had inadvertently cast a ballot for a candidate whom they did not prefer, or had chosen more than one candidate for President, thereby voiding the ballot altogether.<sup>77</sup>

Following election day, the real electoral chaos began.<sup>78</sup> Because of the closeness of the election, manual recount procedures of the ballots commenced in many counties across the state.<sup>79</sup> The recounts, and the procedures associated with them, resulted in both political campaigns filing numerous suits in state and federal court.<sup>80</sup> Finally, the appeals found their way to the Supreme Court of the United States in the case of *Bush v. Gore*.<sup>81</sup>

The case centered on the ballot recount procedures in Florida; namely, whether continuing the recount was a denial of equal protection.<sup>82</sup> The

73. *See id.* at 3–4.

74. *See Bush v. Gore*, 531 U.S. at 101–03.

75. *Id.* at 104. “This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter.” *Id.*

76. *See Weinberg & Utrecht, supra* note 35, at 429–30.

Perhaps the most prominent allegation of flawed ballot design is the now infamous “butterfly ballot” in Palm Beach County Florida. The design of the ballot was such that many people were uncertain which hole to punch for the candidate of their choice. In other instances, voters believed that they might have punched the wrong hole.

*Id.*

77. *See Erwin Chemerinsky, How We Should Think About Bush v. Gore*, 34 LOY. U. CHI. L.J. 1 (2002).

The ballot in Palm Beach County was constructed in a misleading manner: the hole next to Gore’s name was actually a vote for Patrick Buchanan. This resulted in approximately 4000 Palm Beach County voters mistakenly casting their votes for Buchanan, though intended for Gore. This, of course, was far more than the margin of Bush’s victory and more than enough to have made Gore the clear winner in Florida.

*Id.* at 10.

78. *See Bush v. Gore*, 531 U.S. at 101. *See also Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) (explaining the procedural history of the litigation leading up to the decision of the Supreme Court on the matter of the Florida recount).

79. *Bush v. Gore*, 531 U.S. at 101.

80. *Id.*

81. *Id.* at 98.

82. *Id.* at 105.

Court held that the manual recount procedures implemented in the Florida counties were a violation of the Equal Protection Clause.<sup>83</sup> The manual recount procedures failed to ensure that a uniform, statewide standard would be used to tabulate the votes.<sup>84</sup> The Court voiced the concern that voters in some counties would have “greater voting strength” than those in other counties, as a result of the selective process by which the votes were to be recounted.<sup>85</sup> In holding that the recount authorized by the Florida Supreme Court was insufficient to protect the equal protection rights of voters, the Court implicitly found another instance in which the states proved to be incapable of administering elections in a fair and consistent manner.<sup>86</sup>

*E. Other Problems in the Federal Elections of 2000 and 2002*

While the Florida recount battle focused the nation’s attention on the propriety of non-uniform recount procedures and ballot designs, other states have experienced their own problems.<sup>87</sup> In the 2000 presidential election, several states reported a margin of victory that was less than the margin of error associated with the states’ use of voting machines.<sup>88</sup> While this does not necessarily indicate a different outcome of the presidential

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The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another . . . . The question before us, however, is whether the recount procedures the Florida Supreme Court has adopted are consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate. Much of the controversy seems to revolve around ballot cards designed to be perforated by a stylus but which, either through error or deliberate omission, have not been perforated with sufficient precision . . . .

*Id.* at 104–05.

83. *Id.* at 105–08. “[T]he standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another . . . . This is not a process with sufficient guarantees of equal treatment.” *Id.* at 106–07.

84. *Id.* at 106–07.

85. *Id.* at 107 (“[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” (quoting *Moore v. Ogilove*, 394 U.S. 814, 819 (1969))).

86. While the Court did not explicitly state that Florida had failed to properly administer the election, the number of problems originating from the voting procedures in the state at least show that there were substantial deficiencies with the Florida system. See 531 U.S. at 104, where the Court stated: “After the current counting, it is likely legislative bodies nationwide will examine ways to improve mechanisms and machinery for voting.” The Court also found that the Florida Supreme Court’s state election procedures were not uniform enough to prevent a denial of equal protection to large numbers of voters. 531 U.S. at 107–09.

87. See Weinberg & Utrecht, *supra* note 35, at 427–33.

88. *Id.*

election in those states, it raises a concern that perhaps the true intent of a state's electorate was not reflected in the final vote tallies.

In addition to the margin of victory problems, there were a plethora of other voting irregularities during the 2000 election that indicate a substantial national problem with electoral procedures.<sup>89</sup> Many of the problems involved voter registration lists and the absence of qualified voters from the lists provided to election officials at the polls.<sup>90</sup> In St. Louis, Missouri, the absence of adequate voter registration lists caused a state judge to extend the hours of operation for polling places in the city, but nowhere else in the state.<sup>91</sup> Missouri Senator Christopher Bond reacted angrily to the court order, repeatedly claiming that it was "an outrage."<sup>92</sup> A Missouri Court of Appeals later reversed the order, and the polls in St. Louis were closed 45 minutes after the original closing deadline.<sup>93</sup>

Other states reported similar problems with voter registration lists.<sup>94</sup> In addition, there were reports, usually in less-affluent precincts, of lines so long that they discouraged voters from waiting and casting a vote.<sup>95</sup> Some poll workers were accused of being insufficiently trained and unable or unwilling to answer questions from confused voters regarding voting procedures.<sup>96</sup>

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89. *Id.*

90. Weinberg & Utrecht, *supra* note 35, at 432.

There were numerous allegations in 2000 that polling place officials refused to answer questions from confused voters; told voters that there was nothing they could do if they made a mistake in casting their ballots . . . and did not allow voters to have assistance to which they are entitled under federal law.

*Id.*

91. Deirdre Shesgreen, *Senate Panel Focuses on City Election Woes*, ST. LOUIS POST-DISPATCH, May 4, 2001, at A1.

92. Julie Foster, *Something Smells in St. Louis*, WORLDNET.COM, Nov. 11, 2001, available at <http://www.sweetliberty.org/issues/election2k/pee-u.htm> (last visited Jan. 21, 2004). With regard to the court order allowing polls to stay open past their planned closing times, Senator Bond stated: "What I saw and heard on Tuesday night is an outrage, . . . This is the future of our system. This is the integrity of the ballot box." *Id.*

93. *See* Weinberg & Utrecht, *supra* note 35, at 430.

[A] lawsuit was brought on election day seeking to keep the polls open late because it was alleged that long lines caused by inadequate numbers of polling places and voting machines, and machine breakdowns, would result in the de facto denial of the right of many voters to vote. A Circuit Court Judge . . . ordered that the Board of Elections extend the hours of voting, but that order was overturned later that day . . .

*Id.*

94. *Id.* at 430-34.

95. *Id.* at 430. "There were numerous complaints on election day that lines, particularly in minority polling places, were excessively long. Long lines allegedly discourage some voters, particularly those who must take off time from work . . ." *Id.*

96. *Id.* at 432. "While it is possible that some of these allegations involved the deliberate giving of incorrect information, it is far more likely that the majority of these problems were caused not by

In the election of 2002 many of the problems of 2000 recurred, as voters found polling places crowded, understaffed, and incapable of informing voters of the proper voting procedures that would ensure the votes were properly tabulated by the precinct.<sup>97</sup> Several challenges to the procedures employed during the 2002 election were brought in the federal courts, often under the equal protection rationale enunciated in *Bush v. Gore*.<sup>98</sup>

It was clear that the federal election procedures in the United States were in dire need of change.<sup>99</sup> Because the states had exercised substantial authority over the procedures used in the elections of both 2000 and 2002,<sup>100</sup> it was obvious that at least some states had not addressed the problems. As had been the case in the past, federal action was needed to remedy the problem, and Congress acted accordingly by passing the Help America Vote Act of 2002.<sup>101</sup>

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malice of poll workers but because of lack of training and supervision.” *Id.*

97. See Stephen J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore Into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL’Y 357, 358–61 (2002).

98. *Id.* at 358–59. See also *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (holding that the district court had not abused its discretion in denying injunctive relief to challengers of the “punch-card” balloting machines that were to be used in the California gubernatorial recall election); *Black v. McGuffage*, 209 F. Supp.2d 889 (N.D. Ill. 2002) (holding that plaintiffs had standing to sue the state for the use of unreliable voting systems and punch-card ballots); *United States v. Berks County Pennsylvania*, 277 F. Supp.2d 570 (E.D. Pa. 2003) (holding that the election procedures used in Berks County violated the Voting Rights Act by discriminating against Spanish-speaking voters at the polls).

99. See, e.g., Marshall Camp, *Bush v. Gore: Mandate for Electoral Reform*, 58 N.Y.U. ANN. SURV. AM. L. 409 (2002) (arguing that the facts leading to the case of *Bush v. Gore* indicate a pervasive problem in the electoral system in the United States, which should be remedied by appropriate federal action).

100. For examples of the problems in the 2000 election, see Weinberg & Utrecht, *supra* note 35, at 427–32. See also *Black*, 209 F. Supp.2d at 889. For more contemporary problems, see *Southwest Voter Registration Educ. Project*, 344 F.3d at 914.

101. The Help America Vote Act, Pub. L. No. 107-252, 116 Stat. 1666, 1666–1730 (codified at 42 U.S.C. §§ 15301–545), was signed into law by President George W. Bush on October 29, 2002. The President stated:

Today, I’m proud to sign into law an important reform for our nation. Americans are a self-governing people, and the central commitment of self-government is free and fair elections. The Help America Vote Act of 2002 is a bipartisan measure to help states and localities update their systems of voting and ensure the integrity of elections in America.

Press Release, White House Office of the Press Secretary, *President Signs Historic Election Reform Legislation into Law* (Oct. 29, 2002), available at <http://www.whitehouse.gov/news/releases/2002/10/20021029-1.html> (last visited Mar. 5, 2004).

*F. Help America Vote Act of 2002*

The problems in the administration of federal elections were evidenced by the presidential election of 2000 and caused a public outcry among political observers and voters alike.<sup>102</sup> Changes were clearly needed to prevent another *Bush v. Gore* situation.<sup>103</sup> Congress heard the cries for change and acted accordingly. After extensive debate, Congress approved the Help America Vote Act of 2002, as a mechanism which could remedy the electoral problems of 2000.<sup>104</sup>

Title I of the Act authorizes payments to the states for replacement of punch card and lever voting machines,<sup>105</sup> as well as for general improvements of federal election administration.<sup>106</sup>

Title II establishes the Election Assistance Commission (“EAC”).<sup>107</sup> The EAC’s responsibilities include: establishing voluntary voting system guidelines for use by the states,<sup>108</sup> testing and certifying voting system hardware and software,<sup>109</sup> conducting studies on the effective administration of federal elections at the state level,<sup>110</sup> and assisting the states on a voluntary basis as to the ways that federal election administration may be improved.<sup>111</sup> The EAC is composed of four members, each one appointed by the President and confirmed by the Senate.<sup>112</sup> The EAC is intended to be independent of either political party,<sup>113</sup> and so the Senate Majority Leader, the Senate Minority Leader,

102. See Weinberg & Utrecht, *supra* note 35, at 420–27.

103. *Id.* at 433–36.

104. See, e.g., Help America Vote Act of 2002, preamble.

105. Help America Vote Act § 102(1)–(2). The section states that:

Not later than 45 days after the date of this Act, . . . the Administrator shall make a payment to each State eligible . . . in which a precinct within that state used a punch card voting system or a lever voting system to administer the regularly scheduled general election for Federal office held in November 2000 . . .

*Id.*

106. *Id.* § 101.

107. *Id.* § 201. “The Commission shall serve as a national clearinghouse and resource for the compilation of information and review of procedures with respect to the administration of Federal elections . . .” *Id.* § 202.

108. *Id.* § 202(1) (“carrying out the duties described in part 3 (relating to the adoption of voluntary voting system guidelines) . . .”). *Id.*

109. *Id.* § 202(2) (“carrying out the duties . . . relating to the testing, certification, decertification, and recertification of voting system hardware and software . . .”). *Id.*

110. *Id.* § 202(3) (“carrying out the duties . . . relating to conducting studies and carrying out other activities to promote the effective administration of Federal elections . . .”). *Id.*

111. *Id.* § 202(4) (“carrying out the duties . . . relating to election assistance . . . and providing information and training on the management of payments and grants . . .”). *Id.*

112. *Id.* § 203(1).

113. *Id.* § 201.

the Speaker of the House, and the House Minority Leader all are able to submit a recommendation to the President to fill an EAC vacancy.<sup>114</sup> Despite the broad grant of duties,<sup>115</sup> and its intentional bipartisan composition,<sup>116</sup> the EAC does not have the ability to make rules binding upon the states.<sup>117</sup> Thus, the main role of the EAC will likely be as an advisory board and an informational resource.<sup>118</sup>

Title III of the Help America Vote Act is what many consider to be the most important provision.<sup>119</sup> In this Title, the Act requires states to implement certain election procedures required in federal elections.<sup>120</sup> The main provisions mandate that states use voting systems which allow the voter to verify the votes selected prior to casting the ballot;<sup>121</sup> correct any errors made;<sup>122</sup> and receive notification if more than one candidate has been chosen for each office and the consequences of such action.<sup>123</sup> Additionally, each state must establish uniform standards for what counts as a vote.<sup>124</sup>

Further mandatory regulations placed on states under Title III include the permissible error rates of the states' voting systems,<sup>125</sup> provisional

114. *Id.* § 203(2). While the Act provides that both parties are able to make recommendations, there is no indication that the President must consider all or any of the recommendations. *Id.* However, the Act does ensure that the members of the EAC will represent both Democratic and Republican affiliations equally. *Id.* § 203(b)(2)(A)–(B).

115. *See supra* notes 108–14.

116. *See supra* note 114.

117. Help America Vote Act § 209 provides: “The Commission shall not have any authority to issue any rule, promulgate any regulation, or take any other action which imposes any requirement on any State or unit of local government . . .” *Id.*

118. The Act provides that the EAC will serve as a “national clearinghouse and resource for the compilation of information . . .” *Id.* § 202.

119. *See* Brian Kim, *Recent Developments: Help America Vote Act*, 40 HARV. J. ON LEGIS. 579, 590 (2002) (“Lawmakers have called the Help America Vote Act the most significant voting rights legislation since the Voting Rights Act of 1965 and the first civil rights law of the twenty-first century.”).

120. Help America Vote Act §§ 301–03.

121. *Id.* § 301(a)(1)(A)(i) (“the voting system shall . . . permit the voter to verify (in a private and independent manner) the votes selected by the voter on the ballot before the ballot is cast and counted.”).

122. *Id.* § 301(a)(1)(A)(ii) (“the voting system shall . . . provide the voter with the opportunity (in a private and independent manner) to change the ballot or correct any error before the ballot is cast and counted . . .”).

123. *Id.* § 301(a)(1)(A)(iii).

124. *Id.* § 301(a)(6) (“Each state shall adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote for each category of voting system used in the State.”).

125. *Id.* § 301(a)(5) (“The error rate of the voting system in counting ballots (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established . . . by the Federal Election Commission . . .”).

voting for persons not included on election day registration lists,<sup>126</sup> and voting information requirements.<sup>127</sup> The Act also aims to prevent voter fraud by providing regulations for voter registration.<sup>128</sup>

Finally, the Act provides a means of enforcement through the United States Attorney General.<sup>129</sup> The Attorney General may file a civil suit against a state that is in violation of the mandatory requirements of Title III.<sup>130</sup> Additionally, Title IV of the Act provides that in order to receive funds from the federal government, a state must implement a complaint procedure to address and rectify the complaints of citizens regarding the administration of federal elections.<sup>131</sup>

### III. ANALYSIS

The Help America Vote Act is an obvious attempt by Congress to avoid the problems that characterized the presidential election of 2000.<sup>132</sup> It provides federal assistance to the states in order to avoid future difficulties in the administration of federal elections.<sup>133</sup> The Act has been hailed as an example of the type of beneficial, even monumental, legislation that can be produced by bipartisan cooperation.<sup>134</sup> In fact, there

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126. *Id.* § 302(a). If an individual declares that he or she is a registered voter in the jurisdiction, he or she will be permitted to cast a provisional ballot. *Id.* A poll worker must inform the individual that he or she is casting a provisional ballot. *Id.* § 302(a)(1). If it is later determined that the individual was in fact duly registered for that jurisdiction, the provisional vote will be counted. *Id.* § 302(a)(4). However, the voter must also submit a written affirmation to an election official stating that he or she is a registered voter in the relevant jurisdiction and is eligible to vote in that election. *Id.* § 302(a)(2)(A)–(B).

127. *Id.* § 302(b) (“The appropriate State or local election official shall cause voting information to be publicly posted at each polling place on the day of each election for Federal office.”).

128. *Id.* § 303(a)(5).

129. *Id.* § 401. This section provides:

The Attorney General may bring a civil action against any State or jurisdiction in an appropriate United States District Court for such declaratory and injunctive relief (including a temporary restraining order, a permanent or temporary injunction, or other order) as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements under sections 301, 302, and 303.

*Id.*

130. *Id.*

131. *Id.* § 402. Additional provisions apply to the nature of the administrative hearing, the process of filing a complaint, and the state action required to be taken in the event a violation of Title III of the Act is found. *Id.* § 402(2)(A)–(G).

132. *See Kim, supra* note 119, at 579 (“The controversy and debate generated by the 2000 presidential election led lawmakers of both parties to seek legislation to help make federal elections fairer and more accurate exercises of democracy.”).

133. *See supra* notes 106–32.

134. *See generally Kim, supra* note 119, at 579 (stating that the Help America Vote Act was a bipartisan effort that received very little opposition, and sought to improve the electoral system).

is little doubt that the Help America Vote Act is an important piece of legislation—one that will affect the manner in which federal elections are administered for years to come.<sup>135</sup> The changes it brings will, for the most part, be positive. However, it is the changes that it does not provide that are of continuing concern.

Despite the progress that the Help America Vote Act makes in assuring that the right to vote will not be denied because of procedural difficulties, it does not go far enough. In short, the Help America Vote Act does not meet all expectations. The Act leaves too much power in the hands of the very governments historically proven to be incompetent in securing adequate voting procedures: the states.<sup>136</sup> It was, in fact, a failure on the part of the states to establish more reliable voting procedures that led to the electoral fiascos of 2000 and 2002.<sup>137</sup> Furthermore, the Act does not contain sufficient measures to ensure that states will comply with even the Act's mandatory provisions, or what the penalties are if states fail to comply.<sup>138</sup> As the Act stands now, barring a miraculous reform by the states to improve federal election procedures, the electoral rights of too many American citizens are left at risk.

First, there are numerous problems with the act itself: (1) the EAC's lack of authority;<sup>139</sup> (2) the ability of states to delay implementation of various measures of the Act for "good cause";<sup>140</sup> (3) the lack of required

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135. *Id.*

136. *See supra* Part II and accompanying notes. States have failed to adequately provide suffrage to African-Americans and women in the past, and these problems were only addressed after federal government action. *See supra* notes 32, 49–59 (tracing the actions of the federal government in response to the failure of the states to address discrimination against African-Americans in voting).

137. *See supra* Part II.C and accompanying notes.

138. Section 401 of the Act allows the Attorney General to bring "a civil action against any State or jurisdiction . . . for such declaratory and injunctive relief . . . as may be necessary to carry out the uniform and nondiscriminatory election technology and administration requirements . . ." *Id.* However, the only remedy provided for in the Act is the withdrawal of federal funding for elections, which, if withdrawn for noncompliance, would only increase the possibility that the state would be unable to meet the standards as provided by the Act. *See Kim, supra* note 119, at 600. "[E]ach state may comply with these provisions in a way that it sees fit. None of the standards put forward under the Help America Vote Act will fundamentally alter the decentralized character of the administration of federal elections." *Id.*

139. *See supra* Part II.C (describing the role of the EAC). The EAC does not have the power to compel the states to comply with any part of the Act, nor does any state have to comply with the regulations as set forth by the EAC. Help America Vote Act § 209. While the fear of negative political exposure may make it improbable that a state would completely ignore the suggestions of the EAC, it remains to be seen how important a role the EAC will play.

140. *See supra* Part II.C. The Act does require that the states have certain procedures in place, yet for at least one of these procedures it allows the states an alternative. Section 301(a)(1)(B) provides a loophole in the provisions requiring that a voter be told when they are attempting to cast an invalid vote. *Id.* This gives the states an incentive to avoid compliance with the Act.

standards, most specifically in Title III;<sup>141</sup> and (4) citizens' inability to bring enforcement proceedings under Title IV of the Act.<sup>142</sup>

Secondly, if all the provisions of the Act are implemented by all of the states, the exact circumstances that gave rise to *Bush v. Gore*<sup>143</sup> would be prevented; however, a similar situation could still occur.<sup>144</sup> For example, the Act does nothing to prevent an election result where the margin of victory is smaller than the margin of error of the various state voting machines.<sup>145</sup> In such an instance, a recount would be a likely result, and because the Act does not require states to have voting technologies equitably distributed throughout the state, there could be different standards used to recount votes based on the type of voting machine used.<sup>146</sup> Based on the Supreme Court's ruling in *Bush v. Gore* this could lead to equal protection claims by voters who were discriminated against due to the different technologies used to cast votes.<sup>147</sup> Furthermore, the Act does not require states to address long lines at the polls,<sup>148</sup> uninformed election officials, or the use of less reliable voting technologies in certain areas of a state.<sup>149</sup> Such problems will remain, and many more citizens of

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141. See *supra* Part II.C.

142. See *supra* Part II.C.

143. See *supra* Part II.C.

144. See, e.g., *supra* Part II.D (discussing how the controversy surrounding the presidential election of 2000 motivated many lawmakers to take action and ensure that the problems leading to *Bush v. Gore* do not happen again in the future).

145. The Act requires the states to establish uniform standards for determining what counts as a vote for every type of voting machine used. Help America Vote Act § 301(a)(6). However, there is no requirement that the state use any particular type of voting machine, and the same ones need not be used throughout the state.

146. The Supreme Court, in holding the recount procedures to be a violation of the Equal Protection Clause, stated "the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single country from one recount team to another." 531 U.S. at 106. It would appear that under the Help America Vote Act, Title III, the standards for accepting contested ballots would not be different, so long as the same voting technology is used. Help America Vote Act § 301. However, in the very likely event that a state uses more than one type of voting technology, there will not be a uniform manner in which votes can be counted because the definition of a vote would vary with the technology. *Id.* As such, the use of different types of voting technologies, each with their own margin of error in tabulating votes, would give a group using one set of voting machines a better chance of having their votes tabulated properly than others using different voting technologies. The Help America Vote Act fails to address such a situation.

147. See, e.g., Mulroy, *supra* note 98, at 358. Many cases following *Bush v. Gore* have used the majority's rationale as a means to challenge election procedures under the Equal Protection Clause. *Id.* Most specifically, challengers have questioned the use of those voting technologies that are more prone to tabulation errors as grounds for denial of equal protection. *Id.* See also, Black v. McGuffage, 209 F. Supp.2d 889 (2002) (holding that plaintiffs could state a claim for voting rights violations for the state's use of punch-card voting machines).

148. It is of course possible that the provisions of Title III, requiring that the voter be notified when a faulty ballot is cast, will cause greater delay and confusion at the polls.

149. It is possible that a state could effect the outcome of elections in this manner. For instance, a

this nation who, after taking the initiative to have their political preferences heard, could still be denied the most basic of democratic rights.

Finally, the most fundamental criticism of the Act is that it relies too heavily on states' acquiescence in combating this national problem.<sup>150</sup> State power has been effective in many contexts in protecting the rights of the citizenry, however the context of voting rights is not one of these areas.<sup>151</sup> As history has shown, the states have been either unwilling to, or incapable of recognizing and remedying problems involving federal elections.<sup>152</sup> It is the states' failure to act that gave rise to *Bush v. Gore* and it is the federal government, and not the states, that responded to the public outcry for legislative change.<sup>153</sup> By allowing the states to retain substantial power over the process by which federal elections will be administered, Congress invites catastrophe.<sup>154</sup>

#### IV. PROPOSAL

In order to address the problems unresolved by the Help America Vote Act, federal authority should expand to include a greater amount of control over the administration of federal elections. First, Congress should

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state, accepting federal funding under Title I of the Act, could use the funds to replace voting machines that have proven to be less-reliable than newer technologies. The Act does not require the states to replace all of the machines, or even to replace them in a fashion that would be equitable to all voters in the state (though if minority racial groups were unequally affected there could be an equal protection claim under the Voting Rights Act). A state is perfectly free to leave the less-reliable voting technologies in some precincts, but not others. While the mandatory provisions of Title III may mitigate any effect of such a circumstance on the number of votes cast but not counted, it is likely that the less-reliable voting technologies will at the least slow the voting process. *See supra* notes 119–28 and accompanying text (discussing the ability of the states to choose the manner by which the mandatory provisions of the Act will be implemented).

150. *See Kim, supra* note 119, at 601 (“perhaps the problem is too much federalism. Maybe it is time for states to obey uniform federal rules without any discretion in implementing them.”).

151. *See supra* Part II (discussing the various ways in which the federal government has found it necessary to intervene in the administration of federal elections when the actions of the states have proven inadequate).

152. *Id.*

153. *See supra* Part II (discussing the historical failures of the states in administering federal elections and the responses of the federal government to those failures). *See also Kim, supra* note 119, at 595 (“States and localities have expressed a willingness to comply with Title III, but they have also stressed the importance of federal funds in helping them implement the provisions.”).

154. The catastrophe that looms is not necessarily one of *Bush v. Gore* proportions. *See supra* notes 146–50. There are various means by which the franchise of the American voter may be denied, and the Help America Vote Act does not come close to addressing all of them. *See Weinberg & Utrecht, supra* note 35, at 427–33 (detailing the many problems that exist at polling places across the nation). *See also supra* notes 146–50 and accompanying text for a discussion of the instances of voter disenfranchisement that the Act either will not reach or will not be effective in combating.

establish a greater number of voting standards that will apply to the states when administering federal elections.<sup>155</sup> At present, the standards meant to prevent a situation comparable to the one in the 2000 presidential election are determined by each state.<sup>156</sup> In order to remedy this potential problem in the future, Congress should set standards that will apply to all states uniformly in each election. This could be done following the recommendation of the newly formed EAC, and applied to the states through congressional action.<sup>157</sup>

Several issues must be addressed, including the unequal distribution of unreliable voting technologies within many states, the effect of long waits on the ability to cast a vote, and the non-uniform manner in which votes are to be counted from state to state.<sup>158</sup> The Help America Vote Act does not address these problems in a manner that will prevent their recurrence in the future.<sup>159</sup>

Second, the federal government should grant greater authority to the EAC to administer federal election procedures and to punish states that do not comply with national voting standards.<sup>160</sup> The fact that the Help America Vote Act invades the states' traditional power over the administration of federal elections<sup>161</sup> indicates a willingness on behalf of Congress to redefine the scope of federal power in the administration of election procedures. In redefining the federal government's role in the administration of federal elections, Congress should take an approach similar to that of the Voting Rights Act of 1965.<sup>162</sup>

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155. *See supra* Part II.C.

156. *See supra* Part II.C.

157. The function of the EAC under the Act is mainly to serve as a clearinghouse for information on voting technologies and to advise the states on ways to improve the administration of federal elections. *See supra* Part II.D.

158. *See supra* Part II.C.

159. *See supra* Part II.D. The Act does not require that states address the issue of long lines, nor does it require the states to have voting technologies that are uniform across the state. The Act does contain provisions related to these problems, but the standards are flexible with many exceptions. In addition, the Act does not provide for a meaningful penalty if the states fail to implement measures designed to rectify the perceived problems. *See supra* Part II.D.

160. The enforcement provisions of the Act are twofold: First, the receipt of funds for administration of federal elections is contingent on the state having taken certain measures to correct problems in the voting procedures. *See supra* Part II.D (discussing Title I of the Act and its requirements). The second manner in which the provisions of the Act may be enforced is more direct. Title IV allows the Attorney General to file suit in federal court against a state for a violation of the required provisions found in Title III. *See supra* note 138.

161. *See Kim, supra* note 119, at 600 ("An additional objection that has been raised against the Help America Vote Act is that it tramples on the principles of federalism by stripping states of their traditional authority to administer elections.").

162. *See supra* Part II.B. The Voting Rights Act of 1965 was enacted after the failure of the previous Civil Rights Acts in protecting the voting rights of African-Americans in the South.

The enforcement provisions in the Help America Vote Act leave much to be desired because they only allow the Attorney General to seek court intervention through an injunction against a state that is in violation of the mandatory requirements of the Act.<sup>163</sup> Much of the success of the Voting Rights Act of 1965 can be attributed to the ability of the federal courts to force local governments to comply with its provisions.<sup>164</sup> In order for the Help America Vote Act to have the same level of efficacy as the Voting Rights Act of 1965, a similar provision must be added that gives the federal government the ability to force states to comply with uniform standards for voting procedures. This approach has worked once before where the states were unwilling or unable to secure voting rights, and it can be successful if implemented again.

Although it has some weaknesses, the Help America Vote Act should not be repealed. It includes many beneficial programs, and will improve the administration of federal elections in the United States.<sup>165</sup> However, the Act falls far short of its goal, and must be amended to ensure that federal elections are administered in a fair and equitable manner for all present and future voters. Without such amendments, the Help America Vote Act, like the attempts to address problems of African-American suffrage through the Civil Rights Acts, will be remembered as a well-intentioned failure.

## V. CONCLUSION

The Help America Vote Act marks another step taken by the federal government to remove authority from the states over the administration of federal elections. Many observers have high aspirations for the Act. Undoubtedly, the Act will respond to some of the voting problems of recent years, as it provides possible mechanisms by which some necessary changes may be effectuated.

However, the Act does not go far enough to ensure that the reforms needed will actually come to fruition. There is a very real danger that the Help America Vote Act will not prevent another electoral fiasco such as the presidential election of 2000. The states stand as a barrier to the effectiveness of the Act, and the federal government has failed to wrest

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163. See *supra* notes 138–40 and accompanying text (discussing the ability of the Attorney General to bring suit against noncomplying states under the Help America Vote Act and the lack of meaningful penalties for such noncompliance).

164. See Weinberg & Utrecht, *supra* note 35, at 405–08.

165. See *supra* Part II.D. See also Kim, *supra* note 119 (discussing the criticisms of the Act and the responses to these criticisms to show why the Act will improve federal elections).

from the states the necessary authority to improve the means by which the voices of the American people may echo all the way to Washington.

Perhaps the Help America Vote Act, like the Civil Rights Acts of the 1950s and 1960s before it, is an initial step toward progress and a foundation upon which greater reforms can be built.<sup>166</sup> Yet the hope that the Act represents a departure away from the status quo of voting procedures towards a more equitable future will offer little solace to those whose votes are not counted, whose precincts are overcrowded, and whose states refuse to extend to all its citizens a fair opportunity to vote.<sup>167</sup> If one holds fast to the belief, enunciated more than two centuries ago, that a government can only be legitimate with the consent of the governed,<sup>168</sup> then one must also wonder why a government would not take the time and effort to ensure that the voices of the governed are heard.

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166. For a discussion of the failures of the Civil Rights Act in addressing problems related to voting rights, see *supra* Part II.B.

167. See, e.g., *supra* Part II.D and accompanying notes (detailing the problems with the voting procedures in recent federal elections).

168. See, e.g., John Locke, *The Second Treatise*, in TWO TREATISES OF GOVERNMENT 267, 324 (Peter Laslett ed., 1960).

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