

**ELDERLY ELECTORS GO POSTAL:  
ENSURING ABSENTEE BALLOT INTEGRITY  
FOR OLDER VOTERS**

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*The 2000 presidential election brought electoral ballot integrity to the forefront of American consciousness. This note explores that issue with specific focus on the risks of voter fraud perpetrated against elderly voters who cast absentee ballots. Elderly voters often have difficulty traveling to polling stations and procuring absentee ballots. Moreover, elderly voters who need assistance in casting their ballots are especially vulnerable to absentee voter fraud for a variety of reasons. Given the booming elderly population, elderly voter fraud promises to be a significant problem in the future. In this note Jessica Fay outlines these problems and suggests that states must implement specific procedures, such as allowing permanent absentee voter status and specific nursing home balloting provisions, to protect the integrity of elderly voters.*

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The author wishes to thank the entire staff and membership of *The Elder Law Journal* for their guidance and assistance. She would further like to thank her family; her grandfather for being an unending source of encouragement, and above all her mother and father, who each in their own unique and overwhelming way have unselfishly supported this author in every possible way.

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## I. Introduction

Sheridan W. Bryan is a life-long Democrat. So when a woman came to his room at the Chelsea Place Care Center bearing an absentee ballot, Bryan, who is eighty-five years old and blind, told her he wanted to vote for the Democratic candidate.<sup>1</sup> The woman neglected to tell Mr. Bryan that the election was a party primary and the candidates were all Democrats.<sup>2</sup> Interviewed a week later, Mr. Bryan could not name any of the candidates on his ballot. He is not sure who he voted for; he “just signed the paper.”<sup>3</sup>

As disconcerting as this incident is, even more distressing is the bleak outlook facing elderly voters who rely on inadequately designed absentee voting procedures to exercise their rights as electors. With a growing elderly population and insufficient absentee ballot regulation, it may be only a short time before the public spotlight shifts from the remnants of the infamous butterfly ballot debacle of the 2000 presidential election to the increasingly critical issue of absentee voter fraud.<sup>4</sup>

In 2002 over half of persons sixty-five years of age and older lived in nine states.<sup>5</sup> Three of these states faced serious absentee voter fraud allegations in connection with elderly voting at nursing homes.<sup>6</sup> In Cleveland, Ohio, a grand jury indicted Republican campaign worker John Jackson on five counts of tampering with ballots after a fellow election board member observed Jackson marking physically

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1. Anica Butler & Oshrat Carmiel, *Absentee Voters Got Primary Care; Concern Raised on Help Elderly Got with Ballots*, HARTFORD COURANT (Conn.), Aug. 21, 2004, at A1.

2. *Id.*

3. *Id.*

4. Jill Vejnaska, *Elderly Voters: Seniors Have Elected to Object to Being Target of Ballot Jokes*, ATLANTA J. & CONST., Nov. 19, 2000, at 7G.

5. ADMIN. ON AGING, U.S. DEP'T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2002, available at <http://www.aoa.dhhs.gov/prof/Statistics/profile/6.asp> (California, over 3.6 million; Florida, 2.8 million; New York, 2.4 million; Texas, 2.1 million; Pennsylvania, 1.9 million. Illinois, Michigan, New Jersey, and Ohio each over one million).

6. See generally *Ohio v. Jackson*, 811 N.E.2d 68, 70 (Ohio 2004) (election board official indicted for tampering with ballots while providing absentee balloting assistance to physically infirm nursing home residents); Michael Moss, *Absentee Votes Worry Officials as Nov. 2 Nears*, N. Y. TIMES, Sept. 13, 2004, at 1 (persons from outside the facility were allowed to enter, meet alone with residents, and distribute absentee ballots while advising residents on how to cast their vote); Annie Sweeney, *Seniors Complain of Vote Fraud*, CHI. SUN-TIMES, Mar. 15, 2002, at 14 (middle-aged man reportedly entered senior housing building and helped thirty-five seniors apply for absentee ballots, then returned weeks later and punched their ballots).

infirm patients' ballots in a manner contrary to their expressed wishes.<sup>7</sup>

Similarly, in Chicago, Illinois, a man reportedly entered a Cook County senior building and helped thirty-five seniors apply for absentee ballots, returning weeks later to illegally punch their ballots.<sup>8</sup> One elderly resident in the building claimed the man completed her ballot without her participation, telling her only not to worry, "you're voting Democratic," and then instructing her to sign the ballot.<sup>9</sup> Finally, in New York, a grand jury "found problems with the way absentee ballots are handled at certain adult care facilities,"<sup>10</sup> where persons from outside the facility were "permitted to enter the facilit[y], meet with residents one-on-one, distribute absentee ballots and advise residents on how to cast their vote."<sup>11</sup>

This note examines the history, development, and effectiveness of absentee balloting procedures with respect to the risk and occurrence of voting fraud perpetrated against the elderly. Part II outlines the history and recent expansion of absentee voting, and the increasing risk it poses to the elderly population. Part III analyzes federal statutory absentee voting provisions and state methods of conducting and regulating absentee balloting. This section places particular emphasis on those states which have enacted provisions directed specifically towards nursing home electors. Finally, Part IV discusses recent studies and proposals directed at enhancing the integrity of the absentee balloting process, and recommends potential changes to the existing absentee voting system.

## II. Background

Notwithstanding the growing popularity of absentee voting among electors nationwide, the process of absentee balloting has been a crucial element of electoral systems since the middle of the nineteenth century.<sup>12</sup> The recent upsurge in popularity of absentee voting has highlighted the corresponding increases in absentee voting fraud,

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7. *Jackson*, 811 N.E.2d at 70.

8. *Sweeney*, *supra* note 6.

9. *Id.*

10. Robert Gearty, *Justice Absent, She Charges: Seniors' Votes Issue in Race*, DAILY NEWS (N.Y.), Feb. 25, 2001, at 14.

11. *Id.*

12. Pamela S. Karlan, *Ballots and Bullets: The Exceptional History of the Right to Vote*, 71 U. CIN. L. REV. 1345, 1351 (2003).

to which elderly electors are highly susceptible.<sup>13</sup> To analyze potential solutions to the problem of elderly voting fraud, understanding the impact this specific population has on American elections and the risks they face in trying to execute their right to vote is necessary.<sup>14</sup>

#### A. Absentee Voting: Past and Present

Absentee voting is the process by which voters cast their ballots while being physically absent from their county of residence or unable to attend their designated polling place.<sup>15</sup> The absentee voter receives his or her ballot prior to election day.<sup>16</sup> The voter then selects his or her voting choices prior to the election and mails or delivers the ballot to the appropriate authorities on or before election day.<sup>17</sup> By eliminating the need for attendance at the polls, the absentee voting process enables many groups of people, including overseas members of the military, travelers, students, and people with disabilities, to vote when they otherwise might have been denied the opportunity.<sup>18</sup>

Voters who take advantage of the ability to cast their ballots prior to the official election date admittedly encounter a dramatically different voting experience than do voters who cast their ballots at a polling place on election day.<sup>19</sup> Arguments advanced against absentee balloting, which include charges that it increases opportunities for vote tampering and eliminates the “collective experience of voting,”<sup>20</sup> must be placed on balance with the increased participation in the democratic process that absentee balloting provides to those unable to access polling places on election day.

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13. See Kingshuk K. Roy, Note, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 *ELDER L.J.* 109, 119 (2003).

14. See Brian K. LaFratta & Jamie Lake, *Inside the Voting Booth: Ensuring the Intent of the Elderly Voter*, 9 *ELDER L.J.* 141, 146 (2001) (citing the impact of elderly Americans on U.S. elections, due in large part to their reliability in casting ballots); Roy, *supra* note 13.

15. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 *U. MICH. J.L. REFORM* 483, 505 (2003).

16. *Id.*

17. *Id.*

18. Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 *STAN. L. & POL'Y REV.* 353, 356 (2003).

19. *Id.* (“Aside from not participating in the public, civic act of going to a polling place, an absentee voter . . . may have to mail in her absentee ballot well in advance of Election Day, thus foregoing the benefit of last-minute campaigning and other information.”).

20. Fortier & Ornstein, *supra* note 15, at 515.

1. **HISTORY OF ABSENTEE VOTING: THE RIGHT TO VOTE AND THE ROLE OF WAR**

Originally restricted to “property-owning, taxpaying, white males over the age of twenty-one,”<sup>21</sup> the right to vote in the American electoral process was free of most wealth and property ownership provisions by the middle of the nineteenth century.<sup>22</sup> With the onset of the Civil War, “the first constitutional provisions that actually protected the right to vote”<sup>23</sup> were enacted, with military service playing an important role.<sup>24</sup> The wartime environment produced the first situation where millions of voters were away from their homes on election day.<sup>25</sup> The dual responsibilities facing soldiers, the electoral duty of each citizen and the duty to serve, encouraged the initial enactment of absentee voting laws.<sup>26</sup> This preliminary effort culminated in eighteen of twenty-five Union states and seven of eleven Confederate states providing soldiers with the opportunity to cast a ballot in the field.<sup>27</sup>

While the conclusion of the Civil War marked the repeal of most absentee voter laws,<sup>28</sup> the short-lived existence of these laws “reflected a recognition that conditions in a modern nation-state might require modifying the actual mechanism by which votes were cast.”<sup>29</sup> Such modifications were realized and implemented during World War I; almost every state provided some method by which enlisted soldiers could vote while serving overseas, and as the wartime impetus continued, the federal government enacted legislation during World War II to protect a soldier’s voting rights.<sup>30</sup> The Soldier Voting Act, en-

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21. Karlan, *supra* note 12, at 1345.

22. *Id.* at 1347.

23. *Id.* at 1348.

24. *Id.*

25. *Id.* at 1350.

26. *Id.* at 1350–51 (the decision was motivated in part by partisan concerns, as Republicans were much more likely to enlist than Democrats, as well as the desire to keep soldiers in the field during the election).

27. Fortier & Ornstein, *supra* note 15, at 493 (citing JOSIAH HENRY BENTON, VOTING IN THE FIELD: A FORGOTTEN CHAPTER OF THE CIVIL WAR 312–15 (1915) (Union states with absentee voting provisions included California, Connecticut, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, New Hampshire, New York, Ohio, Pennsylvania, Rhode Island, Virginia, West Virginia, and Wisconsin; Confederate states with absentee ballot provisions included Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee, and Virginia.)).

28. Karlan, *supra* note 12, at 1351.

29. *Id.*

30. *Id.*; Absentee Voting in Time of War, Pub. L. No. 78-277, 58 Stat. 136 (1944) (repealed 1955); see Norman Silber & Geoffrey Miller, *Toward “Neutral Principles”*

acted in 1942, used the federal war power to create a “federal Ballot Commission and authorized it to print, distribute, and collect presidential ballots, and return them to the jurisdiction in which soldiers and sailors were registered.”<sup>31</sup>

The governmental support behind providing soldiers with the ability to vote in absentia propelled a similar movement among civilians.<sup>32</sup> “The major wave of reform that introduced absentee voting to civilians occurred between 1911 and 1924, when forty-five of the forty-eight states adopted some form or another of absentee voting.”<sup>33</sup> Such dramatic reform was due to the increased mobility of workers, especially “among traveling salesmen and railway mail clerks who were necessarily absent from their places of residence on election day.”<sup>34</sup> However, the absentee ballot was often entirely restricted to those individuals who were absent from their homes on election day, as only select states allowed absentee voting for electors unable to reach the polling place due to illness or physical disability.<sup>35</sup>

## 2. THE RISING POPULARITY OF ABSENTEE VOTING

The landscape of absentee voting regulation has changed dramatically since the process gained popularity and widespread support in the early twentieth century. Over the last thirty years, there has been a significant movement away from the traditional polling place, instead embracing the concept of “convenience voting.”<sup>36</sup> Several factors have triggered this transformation in the voting environment. For example, many “election officials have also been motivated by . . . low turnout rates in America and view absentee voting in its various forms as a way to increase turnout . . . .”<sup>37</sup> Others see the absentee process as a method of ensuring that every individual wishing

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*in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 879–82 (1993) (discussing the Soldier Voting Act).

31. Karlan, *supra* note 12, at 1354.

32. *Id.* at 1352.

33. Fortier & Ornstein, *supra* note 15, at 492 (citing P. Orman Ray, *Absentee Voting Legislation, 1924–1925*, 20 AM. POL. SCI. REV. 347, 347 (1926) (indicating that all but Connecticut, Kentucky, and Rhode Island enacted absentee voting provisions)).

34. Fortier & Ornstein, *supra* note 15, at 504.

35. *Id.* at 505.

36. *Id.* at 484 (referring to “convenience voting” as any common voting process which eliminates the necessity to travel to a polling place on election day, including voting by absentee ballot and early voting provisions).

37. *Id.*

to exercise his or her right to vote is given that opportunity,<sup>38</sup> specifically elderly or disabled persons who are not physically capable of traveling to their designated polling place on election day.<sup>39</sup>

States are also taking steps to relax the statutory requirements to vote by absentee ballot, allowing a greater portion of the electorate to qualify to vote in absentia.<sup>40</sup> Over half of the states now allow residents to participate in “no-excuse voting,”<sup>41</sup> which permits a voter to register to vote absentee without requiring a reason for the individual’s absence on election day.<sup>42</sup> In the states where such voting has been endorsed, statutory language simply provides that any “qualified elector,”<sup>43</sup> meaning one who meets general age, residency, and competency requirements, may register as an absentee voter and is entitled to receive the necessary application by mail at the address he or she provides upon registration.<sup>44</sup> The lax standards associated with no-excuse voting have led some to criticize the process, as the process

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38. See generally Joe Carmean, *Absentee Ballots*, DAILY TIMES (Salisbury, Md.), Nov. 2, 2002, at 1.

39. *Id.*

40. Compare NAT’L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, available at <http://www.ncsl.org/programs/press/2001/electref0801.htm>, with NAT’L CONFERENCE OF STATE LEGISLATURES, ABSENTEE AND EARLY VOTING, available at <http://www.ncsl.org/programs/legman/elect/absentearly.htm> (updated Oct. 27, 2004) (demonstrating the changes in state law regarding no-excuse voting provisions from the 2001 report through the updated statistics presented in the 2004 report).

41. Moss, *supra* note 6.

42. Fortier & Ornstein, *supra* note 15, at 484 n.2.

43. See, e.g., N.D. CENT. CODE § 16.1-07-01 (2004) (“[A]ny qualified elector of this state . . . may vote an absent voter’s ballot at any general, special, or primary state election, any county election, or any city or school district election.”); *id.* § 16.1-01-04 (“Every citizen of the United States who is eighteen years or older; a resident of this state; and has resided in the precinct at least thirty days next preceding any election . . . is a qualified elector.”); UTAH CODE ANN. § 20A-3-301 (2004 & Supp. 2005) (“Any person who is registered to vote may vote by absentee ballot.”); UTAH CODE ANN. § 20A-3-101 (2004) (“(1) A person may vote in any regular general election or statewide special election if that person: (a) is a citizen of the United States; (b) is a resident of Utah; (c) will, on the date of that election: (i) be at least 18 years old; and (ii) have been a resident of Utah for 30 days immediately before that election; [and] (d) has registered to vote.”); WIS. STAT. ANN. § 6.20 (West 2004) (“Any qualified elector of this state who registers where required may vote by absentee ballot.”).

44. See, e.g., N.D. CENT. CODE § 16.1-07-05 (2004) (“A completed application must be submitted to the appropriate election official in a timely manner so as to allow the applicant to receive, complete, and mail the absent voter’s ballot before the day of the election.”).

of absentee voting is much more susceptible to fraudulent interference than voting in person at polling stations.<sup>45</sup>

A considerable amount of middle ground on the issue exists; ultimately the fact that less restrictive absentee ballot provisions benefit an identified portion of the voting population does not necessarily mean the provisions should be offered to the American population as a whole.<sup>46</sup> As this note will discuss, absentee voter provisions should address the needs of specific groups, for example the elderly and disabled. Addressing the needs of these groups would eliminate the opportunities for abuse of the absentee voting process by limiting its application.

## **B. The Elderly Population and the Risk of Voter Fraud**

### **1. THE EXPANDING INFLUENCE OF ELDERLY VOTERS IN U.S. ELECTIONS**

*a. Traditional Role of Elderly Voters* The strongest force in U.S. elections today is elderly voters<sup>47</sup> because they represent the “largest, most reliable voting bloc”<sup>48</sup> in the nation. Even though persons over the age of sixty-five represent a mere 16.2% of the total population and 19.3% of the population of registered voters,<sup>49</sup> they are the age group with the highest percentage of registered voters.<sup>50</sup> More importantly, elderly voters represent the highest percentage of registered voters who actually cast a ballot.<sup>51</sup>

In addition to their impressive voter turnout, elderly voters are typically the most informed electors. Their increased knowledge and greater turnout may be due “to the fact that many elderly are retired and, thus, have the time to watch television and read up on the candidates and their positions on the issues, enabling them to cast an in-

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45. William T. McCauley, *Florida Absentee Voter Fraud: Fashioning an Appropriate Judicial Remedy*, 54 U. MIAMI L. REV. 625, 632 (2000).

46. Fortier & Ornstein, *supra* note 15, at 515.

47. For purpose of this note, elderly persons are considered to be those over sixty-five years of age.

48. LaFratta & Lake, *supra* note 14, at 148.

49. U.S. CENSUS BUREAU, VOTING & REGISTRATION IN THE ELECTION OF NOVEMBER 2000, <http://www.census.gov/population/www/socdemo/voting/p20-542.html>.

50. *Id.* (76.2% of persons age sixty-five to seventy-four are registered to vote, as are 76.1% of persons over the age of seventy-five).

51. *Id.* (69.9% of registered voters age sixty-five to seventy-four cast a ballot in the 2000 presidential election, as did 64.9% of registered voters age seventy-five and older).



formed vote.”<sup>52</sup> Because these knowledgeable voters are the individuals whose election participation must be strongly encouraged, it is only appropriate that voting procedures be adjusted with the elderly population in mind.

*b. The Impending Growth of the Elderly Population* The U.S. elderly population is about to face its single largest sustained growth in history. The “baby boomer” generation<sup>53</sup> represents the “largest single sustained growth of the population in the history of the United States.”<sup>54</sup> In 2011, the first of seventy-six million baby boomers will turn sixty-five.<sup>55</sup> While the growth of the elderly population slowed during the 1990s, due in large part to the low birth rate observed during the Great Depression of the 1930s,<sup>56</sup> the size of the elderly population is expected to double, growing to seventy million by 2030.<sup>57</sup> With an increase of such monumental proportions on the horizon, coupled with the historic electoral involvement of this age bracket,<sup>58</sup> Congress should protect the integrity of the elderly vote in order to ensure the integrity of U.S. elections as a whole.

## 2. VOTER FRAUD COMMITTED AGAINST ELDERLY

“The right to vote is the right to participate; it is also the right to speak, but more importantly [it is] the right to be heard.”<sup>59</sup> The claim every American has to have his or her voice heard through the electoral process is compromised through voter fraud, a crime to which the elderly are susceptible<sup>60</sup> because they represent a sometimes frail

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52. LaFratta & Lake, *supra* note 14, at 148.

53. The “baby boom” generation is generally identified as the portion of Americans born between the years of 1946 and 1964. AARP, BABY BOOMERS ENVISION THEIR RETIREMENT: AN AARP SEGMENTATION ANALYSIS (1999), [http://research.aarp.org/econ/boomer\\_seg\\_1.html](http://research.aarp.org/econ/boomer_seg_1.html), at 1.

54. *Id.*

55. *Id.*; FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, OLDER AMERICANS 2000: KEY INDICATORS OF WELL-BEING, *available at* <http://agingstats.gov/chartbook2000/population.html>.

56. ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., A PROFILE OF OLDER AMERICANS: 2003, *available at* <http://www.aoa.dhhs.gov/prof/Statistics/profile/2003/2003profile.pdf>, at 3.

57. FED. INTERAGENCY FORUM ON AGING-RELATED STATISTICS, *supra* note 55.

58. U.S. CENSUS BUREAU, VOTING & REGISTRATION IN THE ELECTION OF NOVEMBER 2000, *supra* note 49.

59. Waterstone, *supra* note 18, at 371 (quoting Boardman v. Esteva, 323 So. 2d 259, 263 (Fla. 1975)).

60. Roy, *supra* note 13.

but always fundamental voting bloc in U.S. elections.<sup>61</sup> Focusing on absentee ballots, a commonly employed voting alternative for disabled or elderly persons,<sup>62</sup> the vulnerability of the elderly, together with the coercive and fraudulent tactics of campaign workers and candidate supporters, creates a distressing situation placing millions of ballots at risk of corruption.

*a. Vulnerability of the Elderly* The elderly require heightened protection distinct from that accorded to other population groups because they face a high risk of being victimized by voter fraud.<sup>63</sup> Approximately 1.6 million people age sixty-five and older live in nursing homes, not including the millions of elderly persons who choose to live in assisted living facilities, retirement communities, or rest homes.<sup>64</sup> Many elderly persons, especially those who reside in community living centers, use absentee ballots, “which—unless supervised by election officials—are the type of voting most susceptible to fraud.”<sup>65</sup> Ultimately, the barriers to voting encountered by older persons and those with disabilities who are residents of nursing homes and other similar residential health care institutions have been overlooked, creating an obstacle to the free exercise of their electoral rights.<sup>66</sup>

*b. Coercing the Elderly Absentee Vote* It has been widely documented that the process of absentee voting presents an increased risk of fraudulent interference when compared with in-person voting conducted at polling stations.<sup>67</sup> “Campaign workers tend to target people who are elderly [or] infirm”<sup>68</sup> for coercive treatment, creating a “psychology of almost fear and intimidation,”<sup>69</sup> tainting the sanctity of the

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61. See Vejnaska, *supra* note 4 (“[M]ature Americans represent this country’s largest, most reliable voting bloc” and comprise “a group of people who are extremely well-educated voters.”).

62. Denise Grady, *Change Urged for Nursing-Home Voters*, N.Y. TIMES, Sept. 15, 2004, at 23.

63. Roy, *supra* note 13.

64. Amy Smith & Charles P. Sabatino, *Voting by Residents of Nursing Homes and Assisted Living Facilities: State Law Accommodations*, B. ASS’N FOCUS ON AGING & L., Fall 2004, at 1.

65. Grady, *supra* note 62.

66. Smith & Sabatino, *supra* note 64.

67. McCauley, *supra* note 45.

68. Moss, *supra* note 6.

69. *Id.*

balloting process. For example, in a recent New York election, “persons from outside the [adult care facility] were permitted to enter the facilities, meet with residents one-on-one, distribute absentee ballots and advise residents on how to cast their vote.”<sup>70</sup>

State responses to such blatant displays of fraud vary across the nation. Twenty-three states have enacted laws which specifically address the risk of fraudulent voting conduct in nursing homes and similar institutions.<sup>71</sup> Some states have instituted mandatory oversight provisions for nursing homes,<sup>72</sup> while others require election officials to oversee the absentee balloting process if a certain number of absentee ballots are requested.<sup>73</sup> Still other states offer only discretionary guidelines to instruct the absentee voting process.<sup>74</sup> The other twenty-seven states and the District of Columbia, however, have no laws specifically tailored to curb absentee voter fraud in nursing homes and similar facilities, making them significantly more vulnerable to ballot fraud.<sup>75</sup>

In the states where no statutory provisions specifically address procedures for conducting absentee voting in nursing homes and similar facilities, the regulation of such voting falls under the general provisions applicable to absentee balloting.<sup>76</sup> As a result, nursing home residents are either encouraged or hampered by the relative simplicity or complexity of general absentee assistance procedures.<sup>77</sup> The risk associated with a lack of restrictions on absentee voting with respect to the vulnerable elderly population is well documented.<sup>78</sup> In the 2004 presidential election, fourteen of the nineteen states designated as “swing states”<sup>79</sup> allowed parties to collect absentee ballot applications.<sup>80</sup> Seven of those states permitted party representatives to collect completed ballots, thus “raising the possibility that operatives could gather and then alter or discard ballots from an opponent’s

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70. Gearty, *supra* note 10.

71. Grady, *supra* note 62.

72. Smith & Sabatino, *supra* note 64, at 2.

73. Grady, *supra* note 62.

74. Smith & Sabatino, *supra* note 64, at 2.

75. *Id.* at 5; *see also* Grady, *supra* note 62.

76. Smith & Sabatino, *supra* note 64, at 5.

77. *Id.*

78. *See, e.g.*, Grady, *supra* note 62.

79. Moss, *supra* note 6 (describing “swing states” as states where pre-election polling has shown that voters in that state are almost evenly divided between the two candidates).

80. *Id.*

stronghold.”<sup>81</sup> In addition, “[w]orkers for a party or candidate who show up at a nursing home to ‘assist’ with voting can accomplish ‘wholesale fraud,’ essentially stealing a bloc of votes.”<sup>82</sup>

### 3. THE COURTS AND ELDERLY VOTER FRAUD CASES

The long history of court decisions has shown that the manipulation of elderly Americans is not a new problem, but one which has been occurring for decades. In 1984, the Fourth Circuit Court of Appeals held that participating in a scheme to cast fraudulent absentee ballots and conspiring to vote more than once provided sufficient grounds to convict Mark Douglas Odom after he and several others cast absentee ballots in the names of residents of The Belle’s View Rest Home in Alexander County, North Carolina.<sup>83</sup>

Court decisions clearly show a considerable divergence among states with regard to tolerance of voter fraud. Some states allow various incidences of absentee ballot fraud to continue without reprimand,<sup>84</sup> while others take considerable action when faced with even minor absentee ballot fraud.<sup>85</sup>

In the case of *Womack v. Foster*,<sup>86</sup> the Arkansas Supreme Court cited numerous instances of campaign workers providing improper assistance to elderly voters.<sup>87</sup> In addition, the court cited instances of family members who legitimately served as witnesses but improperly influenced the voting decisions of ailing relatives.<sup>88</sup> Testimony included statements that campaign workers marked ballots for those absentee voters who did not have their glasses, provided advice to absentee voters by encouraging them to sign a spouse’s name to a ballot, and witnessed sons and daughters voting and signing ballots for their ailing parents.<sup>89</sup> Despite multiple egregious violations, the court’s decision in *Womack* only invalidated a handful of the questionable absentee ballots recorded in the relevant election.<sup>90</sup> Even more illustrative

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81. *Id.*

82. Grady, *supra* note 62.

83. *United States v. Odom*, 736 F.2d 104, 106 (4th Cir. 1984).

84. *See generally* *Womack v. Foster*, 340 Ark. 124, 149 (2000) (refusing to void election because of misconduct of election officials).

85. *See* *Pabey v. Pastrick*, 816 N.E.2d 1138 (Ind. 2004); *Straughter v. Collins*, 819 So. 2d 1244 (Miss. 2002).

86. 340 Ark. 124 (2000).

87. *Id.* at 133–34.

88. *Id.* at 136.

89. *Id.*

90. *Id.* at 152.

tive of the court's leniency is the fact that the court used procedural grounds, as opposed to substantive grounds, to invalidate the ballots, such as a missing medical affidavit required by voters who wished to vote absentee because they could not access the polling place for medical reasons.<sup>91</sup> The plaintiff in *Womack* did not make a claim to invalidate only the faulty absentee ballots, most likely because the result of doing so would have been the plaintiff losing the election.<sup>92</sup> Instead, the majority of the votes belonging to elderly electors were fraudulently cast without their knowledge or input.<sup>93</sup>

A similar case arose in Mississippi between competing electoral candidates. The court in *Straughter v. Collins*<sup>94</sup> held that “[e]ven where the percentage of illegal votes is small, this Court will still order a new election if the illegal votes are attended by fraud or willful violations of the election statutes.”<sup>95</sup> In *Straughter*, a campaign worker completed as many as thirty absentee ballots on behalf of elderly or disabled voters, and additionally improperly assisted seven voters at the polling place.<sup>96</sup> These willful violations of the Mississippi Election Code, while only affecting a small percentage of the total votes cast, represented a sufficiently compelling justification for reversing the lower court's decision upholding the election results.<sup>97</sup>

In *Pabey v. Pastrick*,<sup>98</sup> the Supreme Court of Indiana cited trial court findings that “a deliberate series of actions occurred [that] perverted the absentee voting process and compromised the integrity and results of that election.”<sup>99</sup> These deliberate actions included candidate supporters instructing absentee ballot applicants to contact the supporter upon receipt of their ballot so that the supporter could proceed to their home and “assist” the voter in completing the ballot, as well as the “routine completion of substantive portions of absentee ballot applications by [candidate] supporters,” which the applicants were instructed to simply sign.<sup>100</sup>

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91. *Id.* at 153.

92. *See generally id.*

93. *Id.* at 140.

94. 819 So. 2d 1244 (Miss. 2002).

95. *Id.* at 1249 (citing *Rogers v. Holder*, 636 So. 2d 645, 650 (Miss. 1994)).

96. *Straughter*, 819 So. 2d at 1253.

97. *Id.*

98. 816 N.E.2d 1138 (Ind. 2004).

99. *Id.* at 1140.

100. *Id.* at 1145.

### III. Analysis

#### A. Federal Rules Regulating the Fairness and Integrity of the Voting Process

With the recent passage of the Help Americans Vote Act in 2002, the landscape of federal regulation regarding election rights and privileges has expanded to include five sources addressing the issue of voting for persons with disabilities.<sup>101</sup> These regulations, however, focus primarily on ensuring disabled voters access to polling places and secret ballots, leaving the issue of absentee ballot fraud significantly underaddressed.<sup>102</sup> There is a vital need for assistance provisions for the elderly population, specifically those seniors living in nursing homes or other adult care facilities.<sup>103</sup> Regardless of the apparent incongruity and inapplicable nature of current federal legislation, these sources are worthy of analysis, because they provide the basis and framework for future electoral reform.

##### 1. CONSTITUTIONAL PROVISIONS

“There is no recognized constitutional principle guaranteeing people with disabilities the right to vote in their polling places, or to vote secretly and independently.”<sup>104</sup> The Equal Protection and Due Process Clauses of the Fourteenth Amendment are the primary constitutional sources protecting the right to vote,<sup>105</sup> ensuring that no state shall “deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”<sup>106</sup> The Supreme Court has clearly stated that the prohibition on unequal treatment of voters, as set forth under these Amendments to the Constitution, applies to “[a]ll procedures

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101. Waterstone, *supra* note 18, at 357.

102. See generally Brian Kim, *Help America Vote Act*, 40 HARV. J. ON LEGIS. 579 (2003); Kay Schriener, Lisa Ochs & Todd Shields, *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437 (2000); Waterstone, *supra* note 18, at 353.

103. Waterstone, *supra* note 18 (indicating that the voting experience with which disabled and elderly voters are left, specifically the process of curbside voting and casting absentee ballots, is drastically different from the voting experiences in which able-bodied electors are competent to participate).

104. *Id.* at 362.

105. Karlan, *supra* note 12, at 1349.

106. U.S. CONST. amend. XIV, § 1.

used by a State as an integral part of the election process.”<sup>107</sup> Such language may be utilized in future efforts by the elderly, the disabled, and their advocates to ensure the fortification of absentee balloting, a practice which has undoubtedly become an integral part of the modern election process.<sup>108</sup>

## 2. VOTING RIGHTS ACT OF 1965

The Voting Rights Act of 1965 (VRA), as amended in 1982,<sup>109</sup> provides that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.”<sup>110</sup> While the statute does not address the issue of polling place accessibility for disabled voters, “[b]y its very text, this statute accepts that people with disabilities will not have a private independent ballot.”<sup>111</sup>

With regard to absentee voting by disabled people, the VRA ensures an individual’s entitlement to such assistance, but does little to provide guidelines or limitations on how that assistance may be rendered. By placing limitations on those who may provide assistance and allowing the voter the option of choosing his or her own assistant, the VRA makes slight reference to the problem of voter fraud and serves as a preliminary step towards future efforts to protect voters in need of assistance from coercion at the hands of their assistors.<sup>112</sup>

## 3. THE VOTING ACCESSIBILITY FOR THE ELDERLY AND HANDICAPPED ACT

The Voting Accessibility for the Elderly and Handicapped Act (VAEHA) requires states to ensure that registration facilities and polling places chosen for use in federal elections are accessible.<sup>113</sup> The definition of “accessible,” however, is left to the determination of the

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107. Waterstone, *supra* note 18, at 374 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 818 (1969)).

108. Fortier & Ornstein, *supra* note 15, at 484 (“There is little doubt that in the past thirty years, the country has moved in the direction of convenience voting and away from the traditional polling place and its safeguards.”).

109. Voting Rights Act of 1965, 42 U.S.C.S. § 1973aa-6 (LexisNexis 2000).

110. *Id.*

111. Waterstone, *supra* note 18, at 358.

112. 42 U.S.C.S. § 1973aa-6.

113. Voting Accessibility for the Elderly and Handicapped Act, 42 U.S.C.S. § 1973ee-3(a)(1)–(2) (LexisNexis 2000).

states.<sup>114</sup> The VAEHA further requires that any handicapped or elderly voters assigned to an inaccessible polling place be alternatively assigned to an accessible polling place or be provided an alternate means of completing their ballot. However, these alternate procedures are only required following a request by the handicapped or elderly voter.<sup>115</sup> Most applicable to absentee voting regulations, the VAEHA decrees that no notarization or medical certification shall be required of handicapped or elderly voters when applying for or submitting an absentee ballot. The sole exception to this provision permits medical certification requirements for permanent absentee voter registration or late absentee ballot registration.<sup>116</sup> As is often the case in disability provisions, the thrust of the VAEHA is to allow disabled voters to gain access equal to that of nondisabled voters by ensuring “the availability of accessible polling places for individuals having a . . . physical disability and [providing] auxiliary aids,”<sup>117</sup> not to create alternatives to accommodate their disabilities through early voting or absentee voting.

#### 4. THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT OF 1973

The Americans with Disabilities Act (ADA) and section 504 of the Rehabilitation Act of 1973 (Rehab Act) are “broad antidiscrimination statutes that do not specifically address voting.”<sup>118</sup> The ADA states that “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 subjected to discrimination by any such entity.”<sup>119</sup>

Thus, the ADA can be interpreted to provide disabled voters, a reference that necessarily includes a large portion of the elderly population, access to polling places.<sup>120</sup> However, as the ADA does not specifically address voting concerns, there are no specific provisions di-

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114. Waterstone, *supra* note 18, at 358.

115. 42 U.S.C.S. § 1973ee; Schriner, *supra* note 98, at 454 tbl.1.

116. 42 U.S.C.S. § 1973ee.

117. Schriner, *supra* note 98, at 438 (“auxiliary aids” are defined as “instructions, printed in large type . . . and information by telecommunications devices for the deaf.”).

118. Waterstone, *supra* note 18, at 358.

119. Americans with Disabilities Act, 42 U.S.C.S § 12132 (LexisNexis 2002).

120. Schriner, *supra* note 102, at 438.



rected at the issue of absentee voting.<sup>121</sup> One might ask, however, how a disabled person unable to arrive at a polling place on election day, for example due to hospitalization or inability to travel, could participate in the voting process without absentee provisions. This situation seems to indicate that absentee voting provisions must be implemented in order to ensure access to all disabled electors, and such a requirement should be supported by statutory construction.

#### 5. HELP AMERICA VOTE ACT OF 2002

The Help America Vote Act (HAVA) was signed into law on October 29, 2002, and has been heralded as the “most significant voting rights legislation since the Voting Rights Act of 1965 and the first civil rights law of the twenty-first century.”<sup>122</sup> Motivated by the widespread disasters of the 2000 presidential election, the HAVA required states to replace faulty punch-card systems, and established the “Election Assistance Commission to assist in the administration of [f]ederal elections and to otherwise provide assistance with the administration of certain [f]ederal election laws and programs.”<sup>123</sup> Moreover, the Act established “minimum election administration standards for [s]tates and units of local government with responsibility for the administration of [f]ederal elections.”<sup>124</sup>

Despite such widespread election reform motivated by the pervasive election failures reported in the 2000 presidential election,<sup>125</sup> there are no provisions in the HAVA which address concerns over absentee voting procedure and the risk of fraud.<sup>126</sup> Instead, the Act indicates that funds provided to the states should be used for improving the administration of federal elections, educating voters regarding voting procedures and rights as electors, and training election officials and volunteers.<sup>127</sup> The Election Assistance Commission (EAC), established under the HAVA, is designed to serve as a “resource for the compilation of information and review of procedures with respect to the administration of Federal elections.”<sup>128</sup> The EAC is charged with

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121. Americans with Disabilities Act, 42 U.S.C.S. §§ 12101–12213.

122. Kim, *supra* note 102, at 579.

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

124. *Id.*; Waterstone, *supra* note 18, at 377.

125. Waterstone, *supra* note 18, at 377.

126. Help America Vote Act, 42 U.S.C.S. §§ 15301–15545 (LexisNexis 2005).

127. *Id.*

128. *Id.* § 15322(1).

the adoption of voting system guidelines,<sup>129</sup> including “the maintenance of a clearinghouse of information on the experiences of State and local governments in implementing the guidelines and in operating voting systems in general.”<sup>130</sup> Moreover, the EAC is responsible for conducting studies to encourage the effective management of federal elections.<sup>131</sup> If focused towards absentee voting procedures and permanent absentee balloting provisions in each state, the EAC could begin to establish the foundation of a more uniform and effective system of absentee voting.

## B. State Approaches to Absentee Ballot Regulation

State regulations enacted and enforced across the United States vary immensely because “[a]dministering the election process is the responsibility of the individual states.”<sup>132</sup> This is nowhere more evident than in the area of absentee voting. In 2001 alone, “[f]orty-three states introduced legislation regarding absentee voting[, s]ixteen states considered legislation regarding early voting[, and t]hirteen states considered legislation on no-excuse absentee voting.”<sup>133</sup> With the absentee voting process conducted entirely outside the physical control of election administrators and government officials, “what happens in the interim period (between issuance and return), [and] who is voting the ballot, is not known,”<sup>134</sup> making it a provision of voting law which requires substantial regulation.

### 1. ANALYZING ABSENTEE VOTING—PROS AND CONS

Absentee voting provisions have both positive and negative effects. Far from “[r]educing the vote to the equivalent of filling out a Publishers’ Clearinghouse lottery,” in the specific case of elderly voters, the benefits of expanding the breadth of absentee voting provisions certainly outweigh the costs.<sup>135</sup> “States with liberal absentee provisions . . . claim voters have more flexibility and increased access,

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129. *Id.*

130. *Id.*

131. *Id.* § 15322(3).

132. NAT’L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40.

133. *Id.*

134. Brad Smith, *Absentee Ballot System, Witness Under Scrutiny*, TAMPA TRIB., Dec. 24, 2000, at 1.

135. Fortier & Ornstein, *supra* note 15, at 515.

which increases participation. In addition, because of ease and accessibility, absentee and early voting contribute to voter retention. Absentee . . . voting give[s] voters more options in how, where[,] and when to cast votes[,] thus increasing voter satisfaction.”<sup>136</sup> These advantages to the liberal absentee voting provisions are especially relevant to the elderly population, which values the “convenience of being able to vote from home and [the] greater flexibility in choosing when to vote.”<sup>137</sup>

On the other hand, noteworthy concerns surround the increasing popularity of absentee voting, primarily due to the amplified risk of fraud that accompanies the absentee process.<sup>138</sup> “Voters, especially those needing assistance, may face a greater likelihood of experiencing inappropriate influence from other household members when voting.”<sup>139</sup> Furthermore, for those elderly voters who reside in nursing homes or similar adult care facilities, the risk of inappropriate influence is greater, as residents may be visited by campaign workers or candidate supporters seeking to sway the elderly voters’ ballot choices.<sup>140</sup> Finally, the early filing of one’s ballot prevents that elector from hearing and evaluating any “late-breaking information on candidates and ballot measures,”<sup>141</sup> arguably causing absentee voters to be less informed voters.

## 2. METHODS OF OBTAINING AN ABSENTEE BALLOT

*a. No-Excuse Absentee Voting* An analysis of the absentee ballot provisions in all fifty states and the District of Columbia produced two primary state responses to the issue of absentee voting.<sup>142</sup> While

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136. NAT’L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40.

137. U.S. GEN. ACCOUNTING OFFICE, GAO-02-107, VOTERS WITH DISABILITIES—ACCESS TO POLLING PLACES AND ALTERNATIVE VOTING METHODS app. VI at 88 (2001), available at <http://www.gao.gov/new.items/d02107.pdf>.

138. NAT’L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40 (“Some believe that expanded use of absentee and early voting methods may increase the risk of voter fraud.”).

139. U.S. GEN. ACCOUNTING OFFICE, *supra* note 137.

140. See Grady, *supra* note 62.

141. U.S. GEN. ACCOUNTING OFFICE, *supra* note 137.

142. NAT’L CONFERENCE OF STATE LEGISLATURES, ABSENTEE AND EARLY VOTING, *supra* note 40 (no-excuse voting states include: Alaska, Arizona, California, Colorado, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Vermont, Washington, West Virginia, Wisconsin, and

all states have adopted some form of absentee voting, a recent innovation in election law involves allowing “no-excuse absentee voting.”<sup>143</sup> Currently twenty-five states have enacted no-excuse absentee voting provisions,<sup>144</sup> while twenty-five states and the District of Columbia continue to require voters to provide an acceptable excuse before being granted absentee voter status.<sup>145</sup> Examples of valid excuses include, but are not limited to:

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Wyoming; states which still require an excuse to qualify for an absentee ballot include: Alabama, Arkansas, Connecticut, Delaware, the District of Columbia, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia).

143. NAT'L CONFERENCE OF STATE LEGISLATURES, ABSENTEE AND EARLY VOTING, *supra* note 40 (no-excuse voting refers to voting provisions which permit voters to register to vote absentee without providing an approved reason for the individual's absence on election day).

144. The following is a compilation of state statutes providing for no-excuse absentee voting: ALASKA STAT. § 15.20.010 (2004); ARIZ. REV. STAT. ANN. §§ 16-541 to -542 (2004); CAL. ELEC. CODE § 3003 (West 2005); COLO. REV. STAT. ANN. §§ 1-8-104, -202 (West 2000 & Supp. 2004); FLA. STAT. ANN. §§ 97.021, 101.62 (West 2002 & Supp. 2005); HAW. REV. STAT. ANN. §§ 15-2, -4 (LexisNexis 2003); IDAHO CODE ANN. §§ 34-1001 to -1002 (2001); IND. CODE ANN. § 3-11-4-1 (LexisNexis 2002 & Supp. 2004); IOWA CODE ANN. §§ 53.1-2 (West 1999); KAN. STAT. ANN. § 25-1119 (2000 & Supp. 2002); ME. REV. STAT. ANN. tit. 21A, §§ 751, 753-B (2004); MONT. CODE ANN. §§ 13-13-212, -222 (2003); NEB. REV. STAT. § 32-938 (2004); NEV. REV. STAT. §§ 293.309, 313 (2002 & Supp. 2003); N.M. Stat. Ann. §§ 1-6-3, -5 (LexisNexis 2003); N.C. GEN. STAT. § 163-226(a) (2003 & Supp. 2004); N.D. CENT. CODE §§ 16.1-07-01, -04 (2004); OKLA. STAT. ANN. tit. 26, §§ 14-105, -115.4 (West 1997); OR. REV. STAT. §§ 253.015, .030 (2003); S.D. CODIFIED LAWS §§ 12-19-1, -2, -2.1 (1994 & Supp. 2003); UTAH CODE ANN. § 20A-3-301(1) (2003 & Supp. 2005); VT. STAT. ANN. tit. 17, §§ 2531, 2532, 2537 (2002 & Supp. 2004); WASH. REV. CODE ANN. § 29A.40.010 (West 2005); WIS. STAT. ANN. § 6.20 (West 2004); WYO. STAT. ANN. §§ 22-9-102, -105 (2005).

145. The following is a compilation of state statutes indicating what qualifications are necessary for issuance of an absentee ballot: ALA. CODE §§ 17-10-3, -12(b)-(c) (LexisNexis 1995 & Supp. 2004); ARK. CODE ANN. §§ 7-5-402, -403, -418 (2000); CONN. GEN. STAT. ANN. § 9-135 (West 2002); DEL. CODE ANN. tit. 15, §§ 5502, 5503, 5504 (2004); GA. CODE ANN. § 21-2-381 (2003 & Supp. 2005); 10 ILL. COMP. STAT. ANN. 5/19-1, 5/19-2, 5/19-2.1 (West 2003); KY. REV. STAT. ANN. § 117.085 (LexisNexis 2004); LA. REV. STAT. ANN. § 18:1303 (2004); MD. CODE ANN., ELEC. LAW § 9-304 (LexisNexis 2003); MASS. ANN. LAWS ch. 54, § 86 (LexisNexis 2005); MICH. COMP. LAWS ANN. §§ 168.758, .759, .759B, .761 (1989 & Supp. 2005); MINN. STAT. § 203B.02 (1992); MISS. CODE ANN. § 23-15-713 (West 2004); MO. ANN. STAT. § 115.277 (West 2003 & Supp. 2005); N.H. REV. STAT. ANN. §§ 657:1-3 (1996); N.J. STAT. ANN. § 19:57-3 (West 1999); N.Y. ELEC. LAW § 8-400 (McKinney 1998 & Supp. 2005); OHIO REV. CODE ANN. §§ 3509.01, -.03, -.08, 3511.01 (West 1996 & Supp. 2005); 25 PA. CONS. STAT. ANN. § 3302 (West 2005); R.I. GEN. LAWS § 17-20-2 (2004); S.C. CODE ANN. §§ 7-15-320, -330 (1976 & Supp. 2004); TENN. CODE ANN. § 2-6-201 (2003); TEX. ELEC. CODE ANN. §§ 82.001, -.004 (Vernon 2003 & Supp. 2005); VA. CODE ANN. §§ 24.2-700, -701, -703 (LexisNexis 2003 & Supp. 2005); W. VA. CODE ANN. § 3-3-1 (LexisNexis 2002 & Supp. 2004).

being absent from the county on election day, being disabled or ill, being prohibited by his or her religion from voting on election day, having to be at work during the hours the polls are open, being away at school or living overseas, or being engaged in active duty in the military.<sup>146</sup>

*b. Permanent Absentee Voter Status* Another slow moving trend taking hold across the nation is “permanent absentee voter”<sup>147</sup> status. This status provides voters with the opportunity to register to vote absentee for an indefinite period of time into the future by placing that voter’s registration information into a database. As each election approaches, those voters who have registered as permanent absentee voters are sent absentee ballots without having to complete a registration form.<sup>148</sup> This process may be especially useful for the elderly population, allowing older voters who are unable to reach the polling place due to disability or illness to automatically receive an absentee ballot, thereby increasing voter participation by eliminating the extra step of registration. In the case of elderly voters, permanent absentee voter status also reduces the potential for voter fraud because registration is automated and no longer requires a separate visit by those providing voter assistance to the elderly.<sup>149</sup>

The state response to permanent absentee voter provisions has not been as swift as was the case with no-excuse voting provisions because states were required to place the increased amount of data on file to ensure permanently registered voters receive their ballots in a timely manner.<sup>150</sup> Nevertheless, nineteen states have adopted permanent absentee voter provisions.<sup>151</sup> For example, Oregon operates elec-

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146. NAT’L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40.

147. *Id.*

148. *Absentee Voters Aren’t Going Astray in Washington State*, NEWS TRIB. (Tacoma, Wash.), Sept. 14, 2004, at B06.

149. U.S. GEN. ACCOUNTING OFFICE, *supra* note 137.

150. *Id.*

151. NAT’L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40, at tbl.7. States which offer some form of permanent absentee voting include: Alaska, California, Connecticut, Georgia, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Missouri, New Jersey, New York, Oregon, Rhode Island, Tennessee, Utah, Washington, West Virginia, and Wisconsin. Relevant statutes for permanent absentee voter provisions include: ALASKA ADMIN. CODE tit. 6, § 25.650 (2004); CAL. ELEC. CODE §§ 3200–3202 (West 2003); CONN. GEN. STAT. ANN. § 9-31a (West 2002 & Supp. 2005); GA. CODE ANN. § 21-2-381 (2003 & Supp. 2005); KAN. STAT. ANN. § 25-1122 (2000 & Supp. 2002); KY. REV. STAT. ANN. § 117.075 (LexisNexis 2004);

tions on a modified permanent absentee voter system, conducting the voting process entirely by mail and eliminating public polling places altogether.<sup>152</sup> Twelve of these states limit permanent absentee voter status to certain classes of electors, usually including those who are permanently physically disabled, elderly, or members of the armed forces.<sup>153</sup> Several states require voters claiming permanent absentee voter status due to advanced age or permanent disability to submit a doctor's certification of their condition along with their permanent absentee registration form.<sup>154</sup> Once the documentation is provided, the voter is registered as a permanent absentee elector and need not regularly provide verification of his or her disability.<sup>155</sup> While thirty-one states declined to adopt permanent absentee voter provisions, six of those states do allow yearly registration for voters, providing one-stop registration for all elections occurring that year.<sup>156</sup>

### 3. ENSURING ABSENTEE BALLOT INTEGRITY

Once an elector has qualified to vote in absentia, or is permitted to do so based on a state enacted no-excuse absentee voting provision, he or she receives a ballot in the mail, makes his or her balloting choices, and returns the ballot to the proper authorities.<sup>157</sup> But what happens while the ballot is in the hands of the voter is unknown to election officials, expanding the possibilities for fraud and coercion.<sup>158</sup> To combat this concern, states have enacted a variety of measures

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MASS. GEN. LAWS ANN. ch. 54, § 86 (1990 & Supp. 2005); MINN. STAT. § 203B.17 (1992 & Supp. 2005); MISS. CODE ANN. § 23-15-629 (West 1999); MO. ANN. STAT. § 115.284 (West 2003 & Supp. 2005); N.J. STAT. ANN. § 19:57-4 (West 1999 & Supp. 2004); N.Y. ELEC. LAW § 8-400 (McKinney 1998 & Supp. 2005); OR. REV. STAT. § 253.540 (2003); R.I. GEN. LAWS § 17-20-9 (2004); TENN. CODE ANN. § 2-6-201 (2003); UTAH CODE ANN. § 20A-3-304 (2003 & Supp. 2005); WASH. REV. CODE § 29.40.010 (West 2004); W. VA. CODE § 3-3-1 (2002 & Supp. 2004); WIS. STAT. § 6.20 (2004 & Supp. 2005).

152. NAT'L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40, at tbl.7.

153. *Id.* (offering limited permanent absentee voter status in Alaska, Connecticut, Kansas, Minnesota, Mississippi, Missouri, New Jersey, New York, Rhode Island, Tennessee, West Virginia, and Wisconsin).

154. U.S. GEN ACCOUNTING OFFICE, *supra* note 133, at 37.

155. *Id.* at 20.

156. NAT'L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40, tbl.7 (states which permit annual absentee registration include: Arkansas, Colorado, Delaware, Florida, South Dakota, and Virginia).

157. Fortier & Ornstein, *supra* note 15, at 505-06.

158. *Id.* at 484-85.

which seek to impose upon absentee electors some modicum of regulation.<sup>159</sup> These measures attempt to mimic the verification and oversight provisions in place at traditional polling stations.<sup>160</sup>

*a. Witness Requirements* By requiring the signature of a witness upon the completion of an absentee ballot, election officials hope to encourage honest voting practices and ensure voting assistance is not being provided illegally or inappropriately.<sup>161</sup> There is significant variation across the country with respect to this witness requirement. Twenty-four states and the District of Columbia decline to require witness verification of ballots voted in absentia.<sup>162</sup> Provisions enacted by the remaining twenty-six states vary mildly; seven states require witness authentication of an absentee ballot only if the elector required assistance in completing the ballot,<sup>163</sup> six states require two witness signatures to authenticate the absentee ballot, regardless of whether assistance was rendered to the elector,<sup>164</sup> and ten states require only one witness signature to authenticate the ballot.<sup>165</sup>

*b. Notary Requirements* Several states have adopted a slightly more reliable method of ballot authentication, requiring that all electors have their verification signature (signed over the seal of the ballot envelope) notarized prior to submission of the ballot.<sup>166</sup> Only ten

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159. NAT'L CONFERENCE OF STATE LEGISLATURES, ABSENTEE AND EARLY VOTING, *supra* note 40.

160. *See id.*; FED. ELECTIONS COMM'N, FREQUENTLY ASKED QUESTIONS ABOUT ABSENTEE VOTING, at <http://www.fec.gov/pages/faqabsentee.htm> (last visited Oct. 7, 2004) (on file with *The Elder Law Journal*).

161. Moss, *supra* note 6.

162. NAT'L CONFERENCE OF STATE LEGISLATURES, ABSENTEE AND EARLY VOTING, *supra* note 40.

163. *Id.* (states requiring witness verification only if an elector received assistance include: Georgia, Hawaii, Michigan, New York, Pennsylvania, Tennessee, and Utah).

164. FED. ELECTIONS COMM'N, *supra* note 160 (states requiring two witnesses include Alabama, Alaska, Louisiana, Maine, North Carolina, and Rhode Island).

165. *Id.* (states requiring one witness include: Delaware, Florida, Minnesota, Mississippi, Nebraska, New Jersey, Oklahoma, South Carolina, Virginia, and Wisconsin).

166. NAT'L CONFERENCE OF STATE LEGISLATURES, ABSENTEE AND EARLY VOTING, *supra* note 40; FED. ELECTIONS COMM'N, *supra* note 160.

states have implemented this requirement, with nine states providing the elector with an option of notarization or witness verification.<sup>167</sup>

#### 4. PROTECTING THE ELDERLY VOTE

*a. States with Nursing Home Absentee Voting Provisions* The substantial barriers encountered by elderly and disabled voters who are residents of nursing homes and similar adult care facilities are often overlooked.<sup>168</sup> In order to accommodate individuals who reside in residential care facilities, states have taken significant steps through polling place adaptations and absentee voting provisions to provide residents with reasonable access to the electoral process.<sup>169</sup> While the recently enacted HAVA addresses the need for accessible polling places,<sup>170</sup> fewer than half the states have taken any action to assist those voters who are unable to leave nursing homes but greatly desire to fulfill their civic duty to vote.<sup>171</sup> With 1.6 million people over the age of sixty-five living in nursing homes and another one million in assisted living centers,<sup>172</sup> those states with residential facility provisions are leading the nation in providing for informed and reliable absentee voting.

Twenty-three states have enacted laws which address absentee voting by residents of nursing homes,<sup>173</sup> and most states with such provisions also apply those procedures to “other types of similar facilities, such as senior citizen housing, mental health facilities, facilities operated by the Veteran’s Administration, and hospitals.”<sup>174</sup> As with any general regulation, the procedures adopted by individual states often dramatically differ in the provisions provided for elderly voters.<sup>175</sup> While only four states have mandatory voting procedures in

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167. FED. ELECTIONS COMM’N, *supra* note 160 (Missouri is the only state that requires that all absentee ballots be notarized for authentication; states which provide voters with the option of notary or witness verification include: Alabama, Alaska, Delaware, Florida, Louisiana, Maine, Minnesota, New Jersey, Oklahoma, and Rhode Island).

168. Smith & Sabatino, *supra* note 64.

169. Carmean, *supra* note 38 (reporting that in Maryland, “[a] new state regulation requir[ing] [that] elections board staff members . . . visit nursing homes to give residents the opportunity to cast absentee ballots” has caused an unmistakable increase in absentee ballot use).

170. Kim, *supra* note 102, at 579.

171. Grady, *supra* note 62.

172. *Id.*

173. *Id.*

174. Smith & Sabatino, *supra* note 64, at 2.

175. *See id.*



place for nursing homes and similar facilities,<sup>176</sup> many other states have implemented systems which simply require a triggering event, such as a request from the facility or a resident voter, in order to impose “‘duties on the states’ local election officials to follow a specific protocol for absentee balloting.”<sup>177</sup>

*b. The Process of Absentee Voting in Nursing Homes* The “typical voting protocol” implemented for nursing home voters “requires one or more election officials to deliver the absentee ballots at a time prior to the election, and to supervise and assist residents with the casting of ballots.”<sup>178</sup> Of the states that have enacted mandatory procedures triggered by some designated event, ten require a bipartisan team of election officials to conduct the voting.<sup>179</sup> Other states direct the election authority, “such as the municipal clerk or the local registrar of voters,” to conduct and supervise the balloting.<sup>180</sup>

*i. Providing Voter Assistance in Nursing Homes* Election supervisors are necessary to ensure that the balloting process is conducted in an organized, efficient, and legal manner.<sup>181</sup> Special provisions, however, are necessary when these same supervisors are called on to assist elderly residents in completing their ballot.<sup>182</sup> Each state has formulated its own guidelines addressing who may provide assistance to handicapped, blind, or otherwise disabled voters.<sup>183</sup> Those states

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176. *Id.* at 4.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *See id.* at 5.

182. *Id.* at 4.

183. ALA. CODE § 17-9-25 (LexisNexis 1995); ALASKA STAT. § 15.15.240 (2004); ARIZ. REV. STAT. ANN. § 16-580(G) (2004); ARK. CODE ANN. § 7-5-310 (2000 & Supp. 2005); CAL. ELEC. CODE §§ 14282, 14283 (West 2004); COLO. REV. STAT. ANN. § 1-8-112 (West 2000); CONN. GEN. STAT. ANN. §§ 9-159r(a), -159q(g) (West 2002 & Supp. 2005); DEL. CODE ANN. tit. 15, § 4943 (1999); FLA. STAT. ANN. § 101.655 (West 2002 & Supp. 2005); GA. CODE ANN. §§ 21-2-385, -409 (2003); HAW. REV. STAT. ANN. § 11-139 (LexisNexis 2003); IDAHO CODE § 34-1108 (2001); 10 ILL. COMP. STAT. ANN. 5/19-12.2 (West 2003); IND. CODE ANN. §§ 3-11-4-18(a)(5), 3-11-10-25 (LexisNexis 2002 & Supp. 2004); IOWA CODE ANN. § 53.22.1.b (West 1999); KAN. STAT. ANN. § 25-2909 (2000); KY. REV. STAT. ANN. § 117.0863 (LexisNexis 2004); LA. REV. STAT. ANN. § 18:1333 (2004); ME. REV. STAT. ANN. tit. 21-A, § 753(3-A) (2004); MD. CODE ANN., ELEC LAWS § 9-308 (LexisNexis 2003); MASS. ANN. LAWS ch. 54, § 91B (LexisNexis 2004 & Supp. 2005); MICH. COMP. LAWS ANN. §§ 168.751, .754 (1989); MINN. STAT. ANN. § 203B.11 (West 2005 & Supp. 2005); MISS. CODE ANN. § 23-15-

without voting provisions specifically addressing nursing home voter assistance rely on these general disability assistance guidelines to determine who may assist elderly residents.<sup>184</sup> These provisions are essential in fulfilling one of the main purposes of nursing home voting statutes: to ensure that voters residing in nursing homes are accommodated and provided an opportunity to exercise and protect their right to participate in the electoral process.<sup>185</sup>

Of the twenty-three states that address nursing home voting, only “eight states include in their provisions rules or guidance for assisting the residents with voting.”<sup>186</sup> “In three of the states with nursing home procedures, voters may receive assistance by election officials only[,]”<sup>187</sup> . . . [e]ight states provide for election officials or a person of the voter’s choice[,]”<sup>188</sup> . . . [and e]leven states simply permit voters to be assisted by any person the voter selects.”<sup>189</sup> When specifying election officials as designated assistance providers, ten states take the additional step of requiring that the election officials arrive as a “bipartisan pair” to conduct the voting.<sup>190</sup> This requirement acts as

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549 (West 1999); MO. ANN. STAT. § 115.287(2) (West 2003 & Supp. 2005); MONT. CODE ANN. § 13-13-119 (2003); NEB. REV. STAT. § 32-918 (2004); N.H. REV. STAT. ANN. § 659:20 (LexisNexis 1996 & Supp. 2004); N.J. STAT. ANN. § 19:50-3 (West 1999); N.M. STAT. ANN. §§ 1-12-12, -13, -15, -16 (LexisNexis 2003 & Supp. 2005); N.Y. ELEC. LAW § 8-306 (McKinney 2005); N.C. GEN. STAT. § 163-166.8 (2003); N.D. CENT. CODE § 16.1-13-27 (2004); OHIO REV. CODE ANN. § 3509.08 (West 1996 & Supp. 2005); OKLA. STAT. ANN. tit. 26, § 14-115 (West 1997); OR. REV. STAT. § 254.445 (2003); 25 PA. STAT. ANN., §§ 3058, 3146.7 (West 1994 & Supp. 2005); R.I. GEN. LAWS § 17-20-14 (2004); S.C. CODE ANN. §§ 7-13-770, -780 (1976 & Supp. 2004); S.D. CODIFIED LAWS § 12-19-9.1 (2003); TENN. CODE ANN. § 2-6-601(a) (2003); TEX. ELEC. CODE ANN. § 64.032 (Vernon 2003); UTAH CODE ANN. § 20A-3-108 (2003); VT. STAT. ANN. tit. 17, § 2502(b) (2002 & Supp. 2004); VA. CODE ANN. § 24.2-649 (2003 & Supp. 2005); WASH. REV. CODE ANN. § 29A.40.080 (West 2005); W. VA. CODE ANN. § 3-3-5c (2002 & Supp. 2004); WIS. STAT. ANN. §§ 6.875(4)–(5) (West 2004); WYO. STAT. ANN. § 22-13-113 (2003). See generally NEV. REV. STAT. ANN. §§ 293.2955–2956 (LexisNexis 2002) (outlining guidelines of accessibility for elderly or disabled voters and guidelines for assisting physically disabled voters).

184. Smith & Sabatino, *supra* note 64, at 5.

185. *Id.* at 1.

186. *Id.* at 4, 9 n.16 (those eight states are Connecticut, Florida, Louisiana, Maryland, New York, Ohio, Rhode Island, and Wisconsin).

187. *Id.* at 4, 9 n.18 (those three states are Connecticut, Ohio, and Rhode Island).

188. *Id.* at 4, 9 n.19 (those eight states are Florida, Iowa, Maryland, Minnesota, Nebraska, New York, Washington, and Wisconsin).

189. *Id.* at 4, 9 n.20 (those eleven states are Colorado, Illinois, Indiana, Louisiana, Maine, Massachusetts, Missouri, Nevada, Oklahoma, South Dakota, and Tennessee).

190. *Id.* at 4, 9 n.15 (those ten states are Florida, Illinois, Indiana, Minnesota, Missouri, Nebraska, New York, Ohio, Rhode Island, and Tennessee).

an antifraud mechanism, eliminating the risk of one political party unduly influencing elderly voters.<sup>191</sup> Of the states that allow a person of the voter's choice to provide assistance, five have enacted restrictions limiting who that person may be,<sup>192</sup> and all five prohibit the voter from receiving assistance from an employer or officer or agent of the voter's union.<sup>193</sup>

ii. *Assisting Elderly Voters Suffering from Dementia* Because voting rates are highest among the elderly population and age is the main risk factor for dementia, it is no surprise that many elderly voters residing in nursing homes suffer from some degree of dementia.<sup>194</sup> As a result, states need to find a balance between ensuring that those who are competent to vote are not unnecessarily disenfranchised and preventing the incompetent from voting when they are no longer capable.<sup>195</sup>

In a recent study published in the *Journal of the American Medical Association (JAMA)*,<sup>196</sup> mental health experts advocate that some form of mental health evaluation be performed on potential voters to ensure that they have the necessary mental capability to complete the voting process.<sup>197</sup> The study proposes a test designed to determine whether an individual has the "capacity to vote," described as being able to understand "the nature and effect of voting and [being able to] choose among candidates and questions."<sup>198</sup> The process of "testing" potential voters would consist of two questions: "how [do] people elect a governor or president (by voting) and what determines who wins an election (whoever gets the most votes)."<sup>199</sup> The tester would then describe two candidates and ask the voter to pick one.<sup>200</sup> The purpose of this exercise would not be for the voter to choose the "cor-

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191. *Id.* at 4.

192. *Id.* at 4, 9 n.21 (states that allow someone other than an election official to assist voters but place limitations on who that person can be include: Illinois, Louisiana, Maine, Minnesota, and Oklahoma).

193. *Id.* at 4; Voting Rights Act of 1965, 42 U.S.C.S. § 1973aa-6 (LexisNexis 2005) (as amended in 1982).

194. Grady, *supra* note 62.

195. Steven Isbitts, *Experts Push Competency Tests for Voters Suffering Dementia*, TAMPA TRIB., Sept. 16, 2004, at 1.

196. Grady, *supra* note 62.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

rect” candidate, but simply to ensure that the voter is capable of making a choice.<sup>201</sup>

Two identified purposes are behind the proposed guidelines and evaluation. First, the guidelines would “prevent fraud by political groups that would take advantage of patients with dementia by completing their absentee ballots.”<sup>202</sup> Second, the guidelines would “protect the right to vote for people who are in the early stages of dementia but are still competent.”<sup>203</sup> While these are both laudable goals, many have questioned whether the process of testing potential electors interferes with their constitutional right to cast a ballot. The National Voter Registration Act of 1993 permits states to disenfranchise residents “by reason of criminal conviction or mental incapacity.”<sup>204</sup> However, the court in *Doe v. Rowe*<sup>205</sup> ruled that the capacity to vote was not automatically eliminated if a potential voter was under guardianship.<sup>206</sup> Instead, the court in *Doe* ruled that “people have the ‘capacity to vote’ if they understand the nature and effect of voting and can choose among the candidates and questions on the ballot.”<sup>207</sup> As researchers have indicated, that is exactly what this test would accomplish by providing a means to ensure the integrity of absentee ballots without unconstitutionally interfering with an individual’s right to cast a ballot.<sup>208</sup>

The concept of “testing” elderly persons to determine their fitness to vote would not result in the screening of voters at polling places, which could amount to age discrimination.<sup>209</sup> The questions suggested by *JAMA* are meant to be used in nursing homes and similar facilities to ensure that residents and patients understand the task they are undertaking and are competent to make a decision.<sup>210</sup> “The

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201. *Id.*

202. *Id.*

203. *Id.*

204. National Voter Registration Act of 1993, 42 U.S.C.S. § 1973gg-6 (LexisNexis 2000).

205. 156 F. Supp. 2d 35 (D. Me. 2001).

206. *Id.* at 55–56.

207. Grady, *supra* note 62 (paraphrasing the court’s language in *Doe*, 156 F. Supp. 2d at 43).

208. Dave Tobin, *Workers to Assist Elderly in Voting; Many Registered Voters Live in Nursing Homes. Without Help, Some Couldn’t Vote*, POST STANDARD (Syracuse, N.Y.), Oct. 3, 2004, at B1.

209. Grady, *supra* note 62.

210. *Id.*

focus [of the test] is on a patient's ability to make a choice and understand what an election is, not current events."<sup>211</sup>

#### IV. Recommendations

##### A. Nursing Home Specific Provisions

Provisions directly aimed at ensuring the integrity of voting procedures conducted at nursing homes and similar adult care facilities constitute a simple step in the effort to protect elderly voters from fraud and corruption. As one might expect, elderly citizens are frequently targeted with deceptive voting schemes, and consequently require specialized protection of their constitutionally guaranteed right to vote.<sup>212</sup> In order to combat this fraudulent trend, all states should adopt absentee voting provisions specifically tailored to nursing home residents and elderly residents at similar facilities. In addition, the provisions adopted should implement a brief competency test in order to ensure those who vote are capable of exercising their right to vote.

##### 1. EXPANDING THE EXISTING FRAMEWORK OF NURSING HOME PROVISIONS

The existing framework of absentee voting statutes generally, and nursing home absentee voting provisions specifically, provides a substantial framework upon which to structure more specialized provisions for elderly Americans. Currently, all fifty states "permit absentee voting for the elderly or those who cannot make it to the polls for some reason."<sup>213</sup> Twenty-three states now have specialized voting procedures in place for residents of nursing homes and similar adult care facilities.<sup>214</sup>

While the provisions implemented in each of the twenty-three states vary widely, a mere four states have established mandatory vot-

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211. Diane C. Lade, *Policies Sought on Elder Voters; Dementia Study Backs Guidelines*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Oct. 29, 2004, at 1B.

212. Roy, *supra* note 13.

213. Phil Magers, *Analysis: Early Voting Gaining Popularity*, UNITED PRESS INT'L, Nov. 19, 2004.

214. Smith & Sabatino, *supra* note 64, at 2, 6, 7 tbl.1 (states having some form of nursing home voting procedure include: Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New York, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Washington, West Virginia, and Wisconsin).

ing procedures for nursing home residents without requiring a triggering event, such as a minimum number of absentee ballot applications received from residents or a request for voting assistance at the facility.<sup>215</sup> Furthermore, only eight of the twenty-three states with specific provisions include “rules or guidance for assisting the residents with voting” separate from the assistance provisions applicable to all voters or absentee voters.<sup>216</sup>

A mandatory system is necessary for nursing home voting procedures to ensure that elderly individuals maintain their right to receive legitimate assistance when voting, even if no other residents at the facility desired to vote in a given election. Within such a mandatory system there must be specific guidelines dictating who is permitted to assist nursing home residents with the completion of their ballot. Specialized instructions are crucial to nursing home residents; the assistance provisions drafted for the general public casting their vote at public polling stations on election day may not be appropriate for seniors living in a nursing home or similar senior care facility.

States that have implemented nursing home provisions restrict the individuals permitted to provide assistance to, and potentially exert influence over, the elderly elector. Many states allow family members or a person of the voter’s choice to provide assistance, while in some states only the visiting election official may provide assistance.<sup>217</sup> To ensure the integrity of the election process while simultaneously satisfying the needs of seniors voting in adult care facilities, a person of the voter’s choice should be permitted in the room while the vote is taking place. However, the election official should be the only person providing assistance to the voter. The election official should ensure the ballot is completed correctly, while a person of the elector’s choice should ensure that the voter is not influenced in any inappropriate way. Ultimately, these procedures will reduce the risk of voting fraud while providing an opportunity for elderly residents to participate in the electoral process in an unthreatening and efficient manner.

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215. *Id.* at 4, 9 n.16 (those four states are Maine, Rhode Island, Tennessee, and Washington).

216. *Id.* (those eight states are Connecticut, Florida, Louisiana, Maryland, New York, Ohio, Rhode Island, and Wisconsin).

217. *Id.* (those three states are Connecticut, Ohio, and Rhode Island).

## 2. STATES SHOULD IMPLEMENT A CAPACITY TEST TO ENSURE NURSING HOME RESIDENTS ARE CAPABLE OF VOTING

In addition to implementing specific nursing home voting provisions to protect the integrity of the votes cast in adult care facilities, election officials should administer a test to determine whether a particular voter has the capacity to participate in the electoral process. A recent article in *JAMA* observed that voters suffering from dementia, most prominently Alzheimer's disease, are creating "an emerging policy problem."<sup>218</sup> This article recommends that election officials give "brief mental tests to residents with dementia to determine whether they are competent to vote."<sup>219</sup> Ultimately, the recommendation has a dual purpose: first, the test prevents the execution of fraudulent absentee voting schemes by political groups seeking to take advantage of patients with dementia by completing their absentee ballots or telling them what to fill in,<sup>220</sup> and second, the test protects the "right to vote for people who are in the early stages of dementia but are still competent."<sup>221</sup>

The *JAMA* recommendation for preliminary questions posed to elderly voters is based on the *Doe v. Rowe*<sup>222</sup> decision handed down several years ago by a federal district court in Maine.<sup>223</sup> That court held that individuals "have the 'capacity to vote' if they understand the nature and effect of voting and can choose among candidates and questions."<sup>224</sup> These brief questions recommended as part of the competency test are designed to address the individual's "capacity to vote" and ensure that those who demonstrate such a capacity are permitted to participate in an electoral process free from fraud and improper influence.

A competency test, established in conjunction with specifically tailored nursing home absentee ballot provisions, could significantly reduce the risk of elderly voting fraud. Any mandatory nursing home absentee voting provisions will necessarily increase the time and effort required of election officials, likely requiring at least one election official visit at each such facility in the county. However, the imple-

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218. Grady, *supra* note 62.

219. *Id.*

220. *Id.*

221. *Id.*

222. 156 F. Supp. 2d 35 (D. Me. 2001).

223. Grady, *supra* note 62 (paraphrasing the court's language in *Doe*, 156 F. Supp. 2d at 43).

224. *Id.*

mentation of a competency test would not add significantly to that time commitment and would likely increase the integrity of the balloting process, leaving election officials free from suspicion and charges of fraudulent voting practices. Ultimately, such a test would reduce the frequency of voter fraud, meaning less time spent investigating the election abuses in adult care facilities.<sup>225</sup>

## B. Permanent Absentee Voter Rolls

While mandatory nursing home voting provisions only provide assistance to those elderly persons who are living in nursing homes or similar adult care facilities, the process of permanent absentee voter registration may make the electoral process easier for elderly citizens.<sup>226</sup> The process itself allows a person of voting age to register to vote once and remain registered permanently; voter registration terminates only if the elector fails to vote their ballot in a given election, the elector requests to be removed from the registration list, or upon the elector's death.<sup>227</sup> By structuring the provisions of permanent absentee voter provisions so as to limit their application to disabled or elderly electors only, the voting process simultaneously becomes more accessible and more secure for elderly Americans.

### 1. STATES SHOULD PROVIDE PERMANENT ABSENTEE VOTER REGISTRATION

Approximately sixteen states provide permanent absentee ballot registration; however, only twelve of those states limit who may apply for permanent absentee voter status.<sup>228</sup> As the popularity of absentee voting increases, states must put provisions in place to eliminate the risk of vote tampering and fraud throughout the population of electors. One step toward such a goal is to limit opportunities for permanent absentee voter status to those individuals who are elderly or

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225. See *id.*; Isbitts, *supra* note 195; Tobin, *supra* note 208.

226. See U.S. GEN. ACCOUNTING OFFICE, *supra* note 137.

227. See, e.g., CAL. ELEC. CODE § 3206 (West 2005) ("If the voter fails to return an executed absent voter ballot for any statewide general election . . . the voter's name shall be deleted from the list."); MO. ANN. STAT. § 115.284 (West 2005) ("The election authority shall remove from the list of voters qualified to participate as absentee voters pursuant to this section any voter who: (1) Asks to be removed from the list; (2) Dies; (3) Becomes disqualified from voting pursuant to this chapter; or (4) No longer resides at the address of his or her voter registration.").

228. NAT'L CONFERENCE OF STATE LEGISLATURES, VOTING IN AMERICA: FINAL REPORT OF THE NCSL ELECTION REFORMS TASK FORCE, *supra* note 40.



permanently disabled. As is the process in a number of states previously mentioned, electors who wish to apply for permanent absentee voter status should submit a doctor's certification of their disability or need for permanent status with their initial registration form.<sup>229</sup> That single, simple step would then ensure many homebound electors would be able to cast a ballot in each and every election. By instituting such a limitation, the risk of absentee ballot fraud is decreased, as fewer people are permitted to register as absentee voters, while simultaneously limiting the risk of voter fraud among the elderly.

*a. Benefits of Permanent Absentee Voter Registration*

*i. Making the Process of Voting Easier for Elderly Electors* The most attractive feature of the permanent absentee ballot system is its elimination of the frequent election registration process. This is especially poignant for those disabled or elderly electors who may find the two-part process of mailing in a registration form and then mailing in a ballot confusing and cumbersome. Indeed, many who would otherwise vote in any given election fail to do so simply because they neglected to register within the designated time frame.<sup>230</sup> Elderly electors are the single most active bloc of voters in the United States,<sup>231</sup> and as such, it only seems appropriate to extend to them the ability to vote even when they are no longer physically able to go to the polls. While this same goal may be accomplished with absentee voting provisions as well, further concerns of electoral integrity support the permanent absentee voter provisions as ideal for making the process of casting one's vote easier for the elderly population.

*ii. Reducing the Risk of Fraud* Within the absentee voting framework, the necessity of registering for an absentee ballot, receiving it, voting, and returning the ballot, provides numerous occasions for vote tampering or improper interactions with electors by campaign officials or party supporters.<sup>232</sup> Those who claim to be assisting eld-

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229. Smith & Sabatino, *supra* note 64, at 5.

230. Electors age sixty-five and older cited registration problems as one of the top five reasons they failed to cast a ballot in the 2000 Presidential election. U.S. CENSUS BUREAU, VOTING & REGISTRATION IN THE ELECTION OF NOVEMBER 2000, *supra* note 49, at tbl.12.

231. LaFratta & Lake, *supra* note 14, at 148.

232. See *Absentee Votes Aren't Going Astray in Washington State*, *supra* note 148.

erly electors in completing their absentee ballot registration are often using the necessity of such registration to determine who will be receiving an absentee ballot in the election. That knowledge often leads to campaign officials returning to the elector's home once their ballot arrives to exert improper influence over the elector while he or she completes his or her ballot. Such interaction with electors endangers the ideal of democratic elections and places the elderly at a particular risk of intimidation and coercion. With permanent absentee voting, "voters remain on a permanent list, so applications don't have to go out and come back for everyone in every election year[, which] limits opportunities for partisan mischief."<sup>233</sup>

*b. Potential Disadvantages* Beyond the frequently cited concerns regarding absentee voting, including absentee voters lacking "access to late-breaking information on candidates and ballot measures,"<sup>234</sup> the increased risk of fraud,<sup>235</sup> and the necessity for states to provide "additional staff and other resources necessary to accommodate the expansion of absentee voting, such as for mailing, receiving, and counting additional absentee votes,"<sup>236</sup> there are few arguments which specifically target the concept of permanent absentee voter provisions. While some claim that "voters with disabilities may find that requirements in some states for using permanent absentee voting (for example, providing doctor's certification) discourage use of this option,"<sup>237</sup> the hassle of obtaining the required certification seems like a nominal effort to exert in exchange for permanent voter registration. In addition, many elderly voters who reside in nursing homes or similar adult care facilities would have convenient access to a medical professional who could document the resident's disability or condition justifying permanent absentee voter status.

Finally, election officials argue that a significant obstacle to expanding absentee voting or providing permanent absentee voter status is the necessity of developing specialized "procedures to maintain an accurate list of absentee voters."<sup>238</sup> However, with the passage of the National Voter Registration Act of 1993 (also known as the

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233. *Id.*

234. U.S. GEN. ACCOUNTING OFFICE, *supra* note 137.

235. *See* Grady, *supra* note 62.

236. U.S. GEN. ACCOUNTING OFFICE, *supra* note 137.

237. *Id.*

238. *Id.*

“Motor Voter Act”), states are now required to institute mail-in registration systems,<sup>239</sup> necessitating the creation of a “massive, complex database” compiling records of each state’s registered voter population.<sup>240</sup> Additionally, the HAVA requires that each state “implement . . . a single, uniform, official, centralized, interactive computerized statewide voter registration list . . . that contains the name and registration information of every legally registered voter in the [s]tate.”<sup>241</sup> By utilizing these preexisting databases, each state would be capable of compiling and maintaining accurate lists of all absentee voters. In addition, permanent absentee voter provisions would reduce the constant updating required as part of yearly registration systems by eliminating the necessity to update an absentee voter’s registration status each year.

## V. Conclusion

A combination of several factors, namely the increasing prominence of absentee voting in U.S. elections, the position of the elderly population as the largest consistent bloc of voters in the nation, and the impending baby boomer driven expansion of those over the age of sixty-five have created an absentee voting environment ripe for manipulation and fraud.

Congress should ensure the integrity of ballots cast outside the polling place, whether at home or in an adult care facility. There is no question that providing equal access to polling places is important to ensuring that each elector has the opportunity to vote, but the growing population of voters who, for health reasons, convenience, or extenuating circumstance, prefer to vote outside the polling place must be provided with the same confidential and dependable balloting experience. States must implement specific procedures, including permanent absentee voter status and specific nursing home balloting provisions, to protect the integrity of elderly voters in the United States.

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239. Kim, *supra* note 102, at 583.

240. *Id.*

241. 42 U.S.C.S. § 15483(a)(1)(A) (LexisNexis 2004 & Supp. 2005).