

ENFRANCHISING PERSONS WITH DISABILITIES: CONTINUING PROBLEMS, AN OLD STATUTE, AND A NEW LITIGATION STRATEGY

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Despite modern improvements, voting continues to present barriers for persons with disabilities. A 2012 study estimates that voter turnout for persons with disabilities is eleven percent lower than non-disabled voters.¹ Many voting locations are not accessible, deterring voters from the polls.² Voting machines are often outdated and present unique difficulties to persons with disabilities.³ Even if they are able to get to a voting location and inside a voting booth, voters are often forced to rely on the assistance of poll workers or friends to cast a ballot.⁴ Although modern voting technology would allow these voters to cast a ballot independently, it is underutilized and not installed at many voting locations.⁵

Many in the disability rights community saw promise on the horizon with the passage of The Help America Vote Act of 2002 (HAVA).⁶ HAVA was enacted in response to the election debacle of 2000—where outdated voting machines and procedures caused a national controversy over which Presidential candidate won Florida’s electoral votes.⁷ HAVA focused on updating voting machines across the country, and additionally enacted standards for disability access to voting locations.⁸ However, HAVA failed to contain a private right of action to remedy violations.⁹ As many

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1. George Korte, *Study Shows Voters with Disabilities Face Access Barriers*, USA TODAY, Aug. 10, 2012, available at <http://usatoday30.usatoday.com/news/politics/story/2012-08-09/disabled-voters-lack-access-motivation/56922154/1>.

2. *See infra* Part II.

3. *See infra* Part II.B.

4. *See infra* Part II.A.

5. *See infra* Part II.

6. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301–15545(2002)).

7. *See generally* Bush v. Gore, 531 U.S. 98 (2000) (criticizing Florida’s recount process during the 2000 Presidential election).

8. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. § 15481(a)(3)(A) (2002)).

9. *See infra* Part IV.A.

commentators have discussed, this failure to permit persons aggrieved by violations of HAVA to sue for those violations has left many of HAVA's promises unfulfilled.¹⁰

Under-analyzed is the potential for section 504 of the Rehabilitation Act (RA) to enforce voting rights for persons with disabilities post-HAVA.¹¹ The RA, enacted in 1973, was the first piece of federal legislation aimed specifically at remedying the status of persons with disabilities.¹² The RA's section 504 prohibits any "otherwise qualified individual with a disability . . . [from] be[ing] excluded from the participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any program or activity receiving Federal financial assistance"¹³ Section 504 is broad in its scope. It is written in general language, and thus can be applied to a variety of different circumstances.¹⁴ Moreover, the RA provides a private right of action, for damages, for parties aggrieved under section 504—an advantage over other applicable federal statutes, namely the Americans with Disabilities Act. This includes suits against state agencies and governments, as section 504 contains a valid exception to the doctrine of sovereign immunity.¹⁵

Prior to HAVA, section 504 litigants faced difficulty in enforcing voter access through suits against state officials.¹⁶ As a threshold matter, a section 504 litigant must prove that the state agency sued is the recipient of federal funds.¹⁷ It is not enough that the state as a whole has taken federal

10. See, e.g., Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL'Y REV. 353, 382 (2003) (stating "[a]lthough the right to vote is an individual right, [HAVA] creates no individual cause of action, save for an administrative proceeding."); Christina J. Weis, Note, *Why the Help America Vote Act Fails to Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 421, 454 (2005) (stating "[t]he HAVA failed to guarantee that one state actor would be responsible for compliance, or that a voter could seek relief against officials delinquent in their responsibilities under the law.").

11. This idea is not totally new, as other authors have suggested that an action under section 504 may be possible. See, e.g., Arlene Kanter & Rebecca Russo, *The Right of People with Disabilities to Exercise Their Right to Vote Under the Help America Vote Act*, 30 MENTAL & PHYSICAL DISABILITY L. REP. 852, 854 (2006). However, this Article attempts to build on the work of others and provide a full analysis on the feasibility of increased section 504 actions post-HAVA.

12. See *infra* Part III.A.

13. 29 U.S.C. § 794(a) (2006).

14. See *infra* Part III.A.

15. See *infra* Part III.C..

16. See *infra* Part V.A.

17. *Nelson v. Miller*, 170 F.3d 641, 654 n.8 (6th Cir. 1999).

assistance, rather section 504 will only apply against the particular agency given federal funds.¹⁸ This was often difficult to prove since, prior to HAVA, little—if any—federal funding of elections was available to state agencies.¹⁹ Therefore, agencies at the state level responsible for running elections were not often subject to suit under section 504.²⁰ HAVA remedies this difficulty by creating a wealth of new bodies receiving federal funds. In doing so, it opens a number of state agencies to suit under section 504.²¹

This Article suggests that section 504 may provide a de-facto private right of action for enforcing the promises of HAVA. Part I reviews Congressional attempts, historically, to remedy the status of persons with disabilities in voting. Part II summarizes modern challenges that confront voters with disabilities. Part III examines the RA, including its history and modern treatment. It additionally compares the RA with the Americans with Disabilities Act (ADA), with special reference to how the two acts deal with sovereign immunity issues. Part IV evaluates HAVA by discussing its standards, and critically assesses its overall effectiveness to date. Part V discusses the potential use of section 504 in enforcing HAVA's goal to remedy the status of voters with disabilities. This Article concludes that section 504 suits against state agencies can be a viable tool in remedying discrimination against voters with disabilities, and is likely a superior method of enforcement compared to reliance on government enforcement or suits under the ADA.

I. CONGRESSIONAL ATTEMPTS TO ENSURE ACCESS TO THE BALLOT

State and local governments are the primary operators of American elections.²² Even in federal contests, state and local election administrators—not federal officials—are charged with implementing election regulations, which are primarily guided by state statute or local rules.²³ This includes voter registration, absentee procedures, and Election

18. *Id.*

19. *See infra* Part V.A.

20. *See infra* Part V.A.

21. *See infra* Part V.A.

22. Stephen Ansolabehere & Nathaniel Persily, *Measuring Election System Performance*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 445, 448 (2010).

23. *Id.* at 449. This structure has constitutional dimensions. Art. I, section 4 creates a presumption that states will regulate elections unless Congress takes actions to alter that

Day regulations.²⁴ Such a system presents uniformity challenges as one federal election may be subject to the local rules of over 10,000 election jurisdictions.²⁵

This lack of uniformity is particularly difficult on persons with disabilities. State governments have historically varied on their willingness to grant accommodations to voters. Where wide disparities existed, federal courts were often unwilling to step in. For example, a federal court in 1974 flippantly dismissed a claim that a Connecticut statute was unconstitutional when it denied absentee ballots to voters who were incapable of voting in person on Election Day.²⁶ The court denied the challenge with the statement:

A physically incapacitated voter has no more basis to challenge a voting requirement of personal appearance than a blind voter can complain that the ballot is not printed in braille. Nor is it the province of courts to weigh the relative ease or difficulty with which the state could accommodate its voting procedures to meet the needs of various handicapped voters. These are policy questions to be resolved by legislators.²⁷

Variations between the states and the general indifference of some courts have led to a number of federal legislative efforts to increase nationwide voting opportunities for persons with disabilities.

A. *The Voting Rights Act*

The Voting Rights Act of 1965 (VRA)²⁸ is best known for increasing enfranchisement of African Americans following the Jim Crow era.²⁹

presumption. U.S. CONST. art. I, § 4, cl. 1. (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.”).

24. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-90R, ELECTIONS: STATE LAWS ADDRESSING VOTER REGISTRATION AND VOTING ON OR BEFORE ELECTION DAY 1-2 (2012).

25. *Id.*

26. *Whalen v. Heimann*, 373 F. Supp. 353, 357 (D. Conn. 1974).

27. *Id.* (footnote omitted).

28. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2006)).

29. See H.R. REP. NO. 109-478, at 2 (2006), *reprinted in* 2006 U.S.C.C.A.N. 618, 2006 WL 1403199 (stating that “[s]ignificant progress has been made in eliminating first generation barriers experienced by minority voters, including increased numbers of

However, the VRA has additional relevance to voters with disabilities. The VRA was amended in 1982 to permit voters requiring assistance by reason of a disability, to be given assistance in the voting booth by a person of their choice.³⁰ This gave voters with disabilities, for the first time, a federally protect right to cast a ballot for their candidate. The Senate Report accompanying the amendments noted that the only way to make the votes of disabled voters “meaningful” was to permit them assistance inside the voting booth.³¹ This change, although limited in its reach, was the first in a series of Congressional efforts to remedy the status of voters with disabilities.³²

B. The Voting Accessibility for the Elderly and Handicapped Act

The Voting Accessibility for the Elderly and Handicapped Act (VAEHA),³³ passed by Congress in 1984, was the first major stand-alone legislation attempting to address the status of voters with disabilities. It requires political subdivisions conducting federal elections to ensure access to polling locations to persons with disabilities.³⁴ However, the law is limited in its effectiveness.

Under the VAEHA, if the chief election officer of a district determines that no place in the jurisdiction is accessible, the officer can provide the voter with an alternative means to cast a ballot.³⁵ This may include an absentee ballot. Thus, a jurisdiction can ignore problems with access at polling sites and instead force voters with disabilities to vote at home. When Congress later was considering the Americans with Disabilities Act, Congressional testimony highlighted the ineffectiveness of the VAEHA

registered minority voters, minority voter turnout, and minority representation in Congress, State legislatures, and local elected offices. This progress is the direct result of the Voting Rights Act of 1965.”).

30. 42 U.S.C. § 1973aa-6 (Although this protection has been important for voters with disabilities, it is in tension with voters’ right to a secret ballot). See *infra* Part II.C.

31. S. REP. NO. 97-417, at 62 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 241.

32. This right continues to exist in the modern VRA, and was unaffected by the Supreme Court’s recent decision in *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013) (wherein the Court found unconstitutional another portion of the VRA).

33. Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, 98 Stat. 1678 (1984) (codified as amended at 42 U.S.C. § 1973ee (2013)).

34. US DEP’T OF JUST., A GUIDE TO DISABILITY RIGHTS (2009).

35. 42 U.S.C. § 1973ee-1(b)(2)(B) (2013).

based on this provision.³⁶ As one witness in committee testified, “[i]n order to meet the requirements of [VAEHA], some jurisdictions merely encouraged persons with disabilities to vote by absentee ballot, an approach which is merely a ruse to avoid compliance with the clear intent of the Act which is that voting places be accessible to the disabled.”³⁷

The law additionally does not set minimum standards for accessibility, instead leaving such determinations to the sole discretion of state administrators.³⁸ This fails to unify accessibility nationwide in federal elections, continuing to permit variances among the states. Remedies are also limited. Only injunctive relief is available and attorney’s fees are not authorized—limiting the opportunity of litigants to enforce the VAEHA’s requirements.³⁹

C. *Americans with Disabilities Act of 1990*

The Americans with Disabilities Act (ADA)⁴⁰ remains the most sweeping disability rights legislation passed on the federal level.⁴¹ Since its enactment, the ADA has been instrumental in reducing discrimination against persons with disabilities.⁴² The Act is comprehensive. It has five titles, which combined regulate nearly every aspect of public life: Title I, Employment; Title II, Public Services; Title III, Public Accommodations Operated and Services by Private Entities; Title IV, Telecommunications Relay Services; and Title V, Miscellaneous Provisions.

36. See *Americans with Disabilities Act of 1989: Hearing on H.R. 2273 Before the H. Subcomm. on Select Educ. of the Comm. of Educ. and Labor*, 101st Cong. 40-41 (1989) (statement of Nanette Bowling, staff liaison to mayor of Kokomo, Indiana), reprinted in PETER J. MCGOVERN ET AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990*, PUBLIC LAW 101-336 (FEDERAL DISABILITIES) 41 (1992).

37. *Id.*

38. 42 U.S.C. § 1973ee-1(a) (2013).

39. 42 U.S.C. § 1973ee-4(a), (c) (2013).

40. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 USC § 12101 (2009)).

41. See Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 3 (2004) (“[The ADA] represented our society’s first comprehensive acknowledgment that people with disabilities are truly equal citizens, fully entitled to participate in all areas of political, economic, and civic life.”).

42. See *id.* (finding “in large and small ways the statute has improved the lives of countless individuals who have disabilities. The ADA has made buildings more accessible and people with disabilities more visible in the community, and it has accelerated the process of removing the stigma from disability.”).

The ADA additionally enacted important protections for voters with disabilities. Congress, in considering the ADA, specifically set out to remedy the status of persons with disabilities in voting. In the ADA's findings and purpose section, voting was listed as a "critical area" in which discrimination against persons with disabilities persisted.⁴³

Title II and III each have relevance to voters with disabilities. Title II requires states to provide persons with disabilities access to public programs and services.⁴⁴ This includes voting.⁴⁵ Title III covers common carriers and places of public accommodation. Many polling locations are placed in private schools and other non-governmental building. Title III requires these entities to remove physical barriers to these buildings for persons with disabilities.⁴⁶

D. National Voter Registration Act of 1993

The National Voter Registration Act (NVRA), also known as "Motor Voter," was passed to increase voter registration in historically underrepresented communities—including persons with disabilities.⁴⁷ The law requires states to provide voter registration materials in all state offices

43. See Americans with Disabilities Act 104 Stat. at 328. Members of Congress also specifically noted displeasure with voting rights enforcement under the Voting Accessibility for the Elderly and Handicapped Act, passed just four years earlier. Senator Durenberger stated:

We went through this several years ago with the Voting Rights for the Handicapped Act—we are going to make all the voting places in America accessible to persons with disabilities. But we didn't send along a check or the resources to carry it out. It was sort of an encouragement that we sent along. And I figure there are still a lot of folks in this room who are probably having some difficulty gaining access to polling places.

Americans with Disabilities Act of 1989: Hearing Before the S. Subcomm. on the Handicapped of the Comm. on Labor and Human Resources, 101st Cong. (1989) (statement of Sen. Durenberger, Chairman, Select Comm. of Intelligence), reprinted in PETER J. MCGOVERN ET AL., *DISABILITY LAW IN THE UNITED STATES: A LEGISLATIVE HISTORY OF THE AMERICANS WITH DISABILITIES ACT OF 1990*, PUBLIC LAW 101-336 (FEDERAL DISABILITIES) 41 (1992).

44. 42 U.S.C. § 12132 (2013).

45. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-538SP, *VOTERS WITH DISABILITIES: CHALLENGES TO VOTING ACCESSIBILITY* 4 (2013), [hereinafter GAO, *VOTERS WITH DISABILITIES*]; See also US DEP'T OF JUST., *A GUIDE TO DISABILITY RIGHTS* (2009). (listing voting as one of the programs, services, or activities covered by Title II).

46. *Id.*

47. 42 U.S.C. § 1973gg (2013).

primarily engaged in service to persons with disabilities.⁴⁸ The offices must assist individuals in filling out the forms and transmit them to the appropriate state agency.⁴⁹ At the time of its enactment, the NVRA represented the most comprehensive federal regulation of voter registration at the state and local level.⁵⁰ Although the NVRA has been successful in increasing registration, there is little evidence that it has affected turnout.⁵¹

II. CONTINUING BARRIERS TO THE BALLOT FOR PERSONS WITH DISABILITIES

The ability of voters with disabilities to adequately cast a ballot has significantly improved over the last several decades.⁵² More voting locations are accessible than before, and a number of jurisdictions have moved to accessible voting technology that allows voters with disabilities the opportunity to cast a ballot independently. However, significant obstacles continue to prevent full enfranchisement. Barriers for voters with disabilities remain in four major categories: (1) access to voting locations; (2) access to voting machines; (3) the right to a secret ballot; and (4) access to voting for persons with cognitive disabilities. Additionally, recent changes to voting laws in several states likely have relevance to persons with disabilities and have the potential to further decrease participation.

A. Access to Voting Locations

Entering the polling place on Election Day is the first step in the voting process. However, the journey from the parking lot to the ballot box can prove arduous for persons with disabilities and discourage voters wishing to cast a ballot.

48. *Id.* § 1973gg-5(a).

49. *Id.* § 1973gg-5(a)(4).

50. Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 467 (2008).

51. *Id.* at 469-70.

52. See GAO, VOTERS WITH DISABILITIES, *supra* note 45 (finding that “[c]ompared to 2000, the proportion of polling places in 2008 without potential impediments increased and almost all polling places had an accessible voting system as states and localities made various efforts to help facilitate accessible voting.”).

Most voting locations present at least one potential impediment to disabled voters between the parking lot and the voting booth.⁵³ These impediments include lack of accessible parking and architectural barriers—such as narrow doors or hallways.⁵⁴ The Government Accountability Office (GAO) estimates that approximately seventy-three percent of polling locations presented such impediments as recently as 2008.⁵⁵ These barriers to accessibility can prevent voters from casting a ballot during a given election. Additionally, they can have the long-term effect of deterring voters from seeking to vote in future elections.⁵⁶

The Department of Justice (DOJ) has encouraged election administrators to seek out accessible buildings in their jurisdictions and lease private spaces, if accessible space is not available on government property.⁵⁷ However, instead of making voting locations accessible or seeking out accessible space, many states have attempted to remedy lack of access to polling sites by providing alternative means to cast a ballot—namely increased opportunities to vote by absentee.⁵⁸ Others have moved to a system known as curbside voting.⁵⁹ Curbside voting permits voters to wait in their car while a voting official brings them a ballot that they then fill out in the vehicle.⁶⁰ According to the GAO, as of 2008, forty-five percent of voting locations had potential impediments for persons with disabilities, but permitted curbside voting as a substitute.⁶¹

53. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-941, *VOTERS WITH DISABILITIES: ADDITIONAL MONITORING OF POLLING PLACES COULD FURTHER IMPROVE ACCESSIBILITY* 12-19 (2009) [hereinafter GAO, 2009 REPORT].

54. *Id.* at 13-14. See also *Westchester Disabled on the Move, Inc. v. Cnty. of Westchester*, 346 F. Supp. 2d 473, 476 (S.D.N.Y. 2004) (suit alleging polling locations had “a lack of handicapped parking spaces, steep inclines leading from parking areas, doors that are difficult to open and inadequate signage”).

55. GAO, 2009 REPORT, *supra* note 53, at 13.

56. See *United Spinal Ass'n v. Bd. of Elections*, 882 F. Supp. 2d 615, 618 (S.D.N.Y. 2012) (quoting a former Voting Rights Coordinator of The Center for Independence of the Disabled, New York as stating “[t]hese barriers not only impede access in the moment someone is voting, but also cast a chill on people with disabilities’ willingness to participate in future elections and confront the same kind of discriminatory and humiliating treatment.”).

57. DEP'T OF JUST., *THE AMERICANS WITH DISABILITIES ACT: TITLE II TECHNICAL ASSISTANCE MANUAL* (1993).

58. GAO, 2009 REPORT, *supra* note 53, at 28.

59. GAO, *VOTERS WITH DISABILITIES*, *supra* note 45, at 10.

60. See U.S. ELECTION ASSISTANCE COMM'N., *A VOTER'S GUIDE TO FED. ELECTIONS* 8 (2008).

61. GAO, *VOTERS WITH DISABILITIES*, *supra* note 45, at 10-11.

Although absentee ballots and curbside voting permit voters with disabilities to cast a vote, they have disadvantages. First, neither allows the voter to participate fully in the voting experience. They must remain in their home or car and do not have the opportunity to vote with their fellow citizens—a powerful civic experience for some.⁶² Second, particularly with curbside voting, there is a lack of privacy when filling out a ballot. Voters with disabilities who are driven to polling locations by a friend or family members vote with that person sitting next to them in the car or are forced to have an awkward conversation with the driver requesting privacy. Third, there is generally a postage cost associated with absentee ballots. The cost is minimal, but can have a deterrent effect on persons casting a ballot absentee.⁶³ Fourth, both absentee ballots and curbside voting do not cure all accessibility issues. Namely, ballots may not be available in a format that allows visually impaired voters to cast a ballot.

B. Access to Voting Machines

If a voter with a disability is able to enter a voting location, they still may face difficulty with the voting machine used to cast a ballot. One common issue is the physical structure of the voting machine itself. Old voting booths, still in place in some jurisdictions, do not accommodate wheelchairs.⁶⁴ Additionally, many voting machines are not accessible to

62. See *People of N.Y. ex rel. Spitzer v. Cnty. of Schoharie*, 82 F. Supp. 2d 19, 21 (N.D.N.Y. 2000) (Plaintiff's alleging that inaccessible polling locations prevent voters with disabilities "from participating in the American tradition of voting at their public places, in an integrated setting, along with their friends, neighbors, and colleagues"); See also Barry C. Burden, David T. Canon, Kenneth R. Mayer & Donald P. Moynihan, *Early Voting and Election Day Registration in the Trenches: Local Officials' Perceptions of Election Reform*, 10 *ELECTION L.J.* 89 (2011) (conducting survey of election clerks and concluding that the clerks viewed voting on Election Day, rather than voting absentee or voting early, "a civic responsibility").

63. Admittedly, the deterrent is not likely to be great. A survey of voters found that seventy percent of persons with disabilities indicated they would be "far more likely" to vote if postage were free for casting an absentee ballot; See U.S. ELECTION ASSISTANCE COMM'N, *FREE OR REDUCED POSTAGE FOR THE RETURN OF VOTED ABSENTEE BALLOTS* 3 (2008). However eighty-nine percent of those people also said they would still vote by absentee ballot even if postage were charged. *Id.*

64. GAO, 2009 REPORT, *supra* note 53, at 12.

voters with visual impairments. Voters may not be able to read the names of the candidates, making it impossible to vote without assistance.⁶⁵

Several jurisdictions have attempted to remedy this situation by replacing outdated voting machines with accessible ones, but this has not fully resolved issues. The GAO found that, as of 2008, almost all voting sites it visited had at least one accessible voting machine.⁶⁶ However, forty-six percent of those voting systems that were labeled as accessible in reality could pose a challenge to a voter with a disability.⁶⁷ In particular, twenty-nine percent of supposedly accessible voting machines were not set up to accommodate voters using a wheelchair.⁶⁸ In short, jurisdictions have taken some steps to update voting systems, but have failed to address prevailing issues affecting voters with disabilities.

C. Right to a Secret Ballot

One of the defining characteristics of the American voting experience is the secret ballot.⁶⁹ While other countries maintain public voting systems, the United States has zealously protected the secret ballot process. All federal elections are conducted by secret ballot, even though no federal statute requires it.⁷⁰ Some states have specifically protected the right to a secret vote in their constitutions.⁷¹

However, for persons with disabilities this right often proves illusory. In particular, blind voters generally need the assistance of another individual to help them cast a ballot.⁷² There are voting systems that would allow blind voters to vote independently, without assistance, but they have

65. *Id.* at 7 (“Voters who require assistance to vote by reason of blindness, disability, or the 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 agent of the voter’s union”).

66. *Id.* at 12.

67. *Id.*

68. *Id.* at 23.

69. Although a feature of all fifty states today, the Austrian-style secret ballot actually did not appear in the United States until the second half of the 19th century. John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 488 (2003).

70. Waterstone, *supra* note 10, at 358.

71. See, e.g., WASH. CONST. art. VI, § 6 (“All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.”).

72. *Voters with Disabilities Deserve the Opportunity to Vote Privately*, AMERICAN FOUNDATION FOR THE BLIND (last updated 2013), <http://www.afb.org/section.aspx?FolderID=3&SectionID=3&TopicID=110&SubTopicID=258&DocumentID=1954>.

not been installed in many jurisdictions.⁷³ Blind voters must therefore rely on a family member, friend, or polling official to cast a ballot for them. This raises two concerns. First, the potential for fraud is apparent. The individual casting the ballot for the blind voter may, contrary to the voter's wishes, vote for another candidate. Second, the voter loses the ability to keep their voting decisions private. They must disclose their candidate of choice to a third-party, when they may prefer to keep such decisions confidential. As one blind voter described:

Once, after my wife cast my ballot, she said to me, "Jim I know you love me. Now I know that you trust me, because you think I'm marking this ballot for that idiot." Twice in Massachusetts and once in California, while relying on a poll worker to cast my ballot, the poll worker attempted to change my mind about whom I was voting for. I held firm, but to this day I really do not know if they cast my ballot according to my wishes. To voters with disabilities, there is always some level of uncertainty when another person marks your ballot for you.⁷⁴

D. Voting for Persons with Cognitive and Mental Impairments

Persons with mental disabilities have historically faced discrimination in all aspects of life, voting being no exception. Nearly all states have enacted laws limiting the ability of persons with mental disabilities to cast a ballot, and a majority of states include limitations in their state constitutions.⁷⁵ The laws and constitutions are often blunt in describing the class of voters they target, using terms such as "'idiot,' 'insane,' 'lunatic,' 'mental incompetent,' 'mentally incapacitated,' [and] 'unsound mind,'"⁷⁶ No Federal Constitutional protections have been recognized for mentally impaired voters, making them "[o]ne of the only groups of American citizens the Constitution allows to be legally barred from

73. See Waterstone, *supra* note 10, at 362 (describing various systems that would allow voters with disabilities to cast a ballot independently).

74. James C. Dickson, *Testimony before the N.Y. City Council Committees on Mental Health, Mental Retardation, Alcoholism, Drug Abuse and Disability Services*, DISABILITIES NETWORK OF N.Y. CITY (July 22, 2002), <http://dnnyc.net/Issues/testimony/aapd.html>.

75. Jennifer A. Bindel, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. Ann. Surv. Am. L. 87, 92 (2009).

76. Kay Schriener et al., *Democratic Dilemmas: Notes on the ADA and Voting Rights of People with Cognitive and Emotional Impairments*, 21 BERKELEY J. EMP. & LAB. L. 437, 439 (2000).

voting.”⁷⁷ Federal legislation has additionally offered little remedy, and in some cases approves the discrimination. The NVRA, for example, specifically permits a state to remove names from their voter rolls for reason of “mental incapacity.”⁷⁸

While some of the state laws may be defensible on grounds that they protect mentally challenged persons from being taken advantage of, their over breadth is cause for concern. Because the laws are written in broad and general terms, their reach is unclear. In particular, the growing number of Americans suffering from early onset dementia and Alzheimer’s disease have heightened awareness in recent years to the potential reach of such laws.⁷⁹ Since there have been few recent cases analyzing these statutes, it remains ambiguous exactly what degree of mental ailment would be required to prohibit an individual from casting a ballot.

E. Recent Limitations on the Right to Vote

Between 2011 and 2013, over two-dozen states passed new voting legislation that made either registration or voting more difficult.⁸⁰ Several other states considered similar legislation.⁸¹ The changes varied from state to state, but some common trends emerged. The new laws often required voters to present a non-expired government issued photo ID to vote, limited opportunities to vote early, and placed new restrictions on third-party groups attempting to register voters.⁸² Although the wisdom of these new laws has been much debated, it is clear that they have particular implications for persons with disabilities.

77. Bindel, *supra* note 75, at 87.

78. 42 U.S.C. § 1973gg-6.

79. *See* Bindel, *supra* note 75, at 98.

80. *See* Voting Laws Roundup 2013, BRENNAN CENTER FOR JUSTICE (Nov. 4, 2013), <http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup> (stating that at least 180 restrictive voting bills were introduced in 41 states from 2011-2012); Election 2012: Voting Laws Roundup, BRENNAN CENTER FOR JUSTICE (Oct. 11, 2012), <http://www.brennancenter.org/analysis/election-2012-voting-laws-roundup> (stating that nineteen states enacted new restrictive voting laws between 2011-2012).

81. *See* Election 2012, *supra* note 80.

82. *See* Lawrence Norden & Wendy R. Weiser, Voting Law Changes in 2012, BRENNAN CENTER FOR JUSTICE, (Oct. 3, 2011), http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Brennan_Voting_Law_V10.pdf.

1. Voter ID Laws and Persons with Disabilities

Laws requiring voters to present photo identification before casting a ballot have existed for almost a decade.⁸³ However, the number of states with such requirements increased rapidly in the last three years.⁸⁴ The new laws are more restrictive than prior legislation—requiring increasingly specific forms of government issued identification.⁸⁵

Voters with a disability are less likely to have a driver's license, the most common form of government issued photo ID.⁸⁶ The League of Women Voters estimates that ten percent of voters with disabilities do not have any type of photo ID.⁸⁷ The types of identification that disabled voters would be likely to have—such as a social security card—often do not meet the requirements of the identification laws.⁸⁸ Voters with disabilities are thus required to take the additional step of obtaining a non-driver government identification card prior to voting. While these identification cards are free, the documentation required to obtain the cards often carry a fee—detering some from acquiring the appropriate identification.⁸⁹ Disability rights advocates have noted their concern that these laws will decrease the number of voters with disabilities who cast a ballot.⁹⁰ These

83. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 186 (2008) (describing Indiana's voter identification law, passed in 2005).

84. Norden & Weiser, *supra* note 82, at 4.

85. *Id.* at 5.

86. See Rebecca Schleifer, *Disabled and Disenfranchised*, THE HUFFINGTON POST, (Sept. 5, 2012, 9:00 AM), http://www.huffingtonpost.com/rebecca-schleifer/disabled-voting-rights_b_1853234.html; See also Emily Nohr & Alissa Skelton, *Disabled and Elderly Voters Face a New Voter ID Hurdle at Polls*, NBC NEWS, (Aug 20, 2012, 7:57 AM), http://investigations.nbcnews.com/_news/2012/08/20/13374311-disabled-and-elderly-voters-face-a-new-voter-id-hurdle-at-polls?lite (quoting the leader of the American Association of People with Disabilities as stating, "They've stopped driving because of vision or reflex issues. They, for reasons of various disability issues, have moved in with family who drive them around, or they've moved into an assisted living center.").

87. *Protecting Voting Rights, Opposing Photo ID Requirements for Voters*, LEAGUE OF WOMEN VOTERS MINNESOTA, (last visited Nov. 1, 2013), <http://www.lwvmmn.org/page.aspx?pid=734>.

88. Norden & Weiser, *supra* note 82, at 4.

89. *Id.* at 6.

90. See Chas Sisk, *American Association of People with Disabilities Says ID Law Unfair*, THE TENNESSEAN (Jan. 31, 2012), <http://blogs.tennessean.com/politics/2012/american-association-of-people-with-disabilities-says-id-law-unfair/> (quoting the vice president of organizing and civic engagement for the American Association of People with Disabilities as stating that "[v]oting is an amazing experience and it is wrong—wrong—and it is mean-spirited to place a photo ID barrier between a citizen with a disability and a voting booth.").

concerns are mitigated in part by the fact that at least some states have created special exemptions for voters with disabilities.⁹¹

2. *Early Voting and Persons with Disabilities*

Early voting permits voters to go to the polls days prior to an election to cast their ballot—allowing them to avoid long lines and manage their work schedule.⁹² Early voting has been used by increasingly high numbers of voters in the states where it has been implemented. During the 2008 presidential election, in states that permitted early voting, nearly fifty percent of voters voted early.⁹³ Despite its popularity, several states between 2011-2013 decreased the number of days and hours available for early voting.⁹⁴

Although early voting is now available to all voters in many states, early voting originally began to make voting more convenient for persons with disabilities.⁹⁵ The early voting process allows voters with disabilities to avoid waiting in long lines and schedule transportation to the polls at convenient times.⁹⁶ Voters with frequent medical appointments are able to vote at a time they are free.⁹⁷ Voters can also cast a ballot in person, rather than voting absentee.⁹⁸

91. Norden & Weiser, *supra* note 82, at 6.

92. John C. Fortier, *Absentee and Early: Voting Trends, Promises, and Perils* 15 (2006).

93. KATE KENSKI, BRUCE W. HARDY & KATHLEEN HALL JAMIESON, *THE OBAMA VICTORY: HOW MEDIA, MONEY, AND MESSAGE SHAPED THE 2008 ELECTION* 258 (2010).

94. *See* H.R. 1355, 2011 Leg., Reg. Sess. (Fla. 2011) (reducing early voting from fourteen days to eight days prior to elections); H.R. 194, 129th Gen. Assemb., Reg. Sess. (Ohio 2011) (shortening early voting from thirty-five to twenty-one days before elections); H.R. 92, 2011 Leg., Reg. Sess (Ga. 2011) (reducing number of early voting days in the state); S. 923, 107th Gen. Assemb., Reg. Sess. (Tenn. 2011) (limiting early voting period prior to elections); S. 581, 1st Sess. (W. Va. 2011) (reducing early voting period before elections).

95. *See* MARGARET ROSENFELD, NAT'L CLEARINGHOUSE ON ELECTION ADMIN. INNOVATIONS IN ELECTION ADMIN. 4 (William C. Kimberling ed., Fed Election Comm'n 1994),

<http://www.eac.gov/assets/1/Page/Innovations%20in%20Election%20Administration%209.pdf> (noting that Colorado introduced early voting specifically to accommodate disabled voters).

96. *Id.*

97. *Id.*

98. *Id.*

3. *Third-Party Registration and Persons with Disabilities*

Third-party voter registration organizations are groups that set out to register voters, and to assist eligible voters with the registration process.⁹⁹ They have been remarkably successful in registering voters in recent decades.¹⁰⁰ Voter registration organizations are able to travel to eligible voters, eliminating the need for a trip to a government building to register. This is particularly beneficial for persons with disabilities, who may live in dedicated care facilities or have difficulty traveling to registration facilities.¹⁰¹

New laws in several states place new restrictions on third-party voter registration organizations.¹⁰² The laws typically require registration groups to register employees with the state and attend a state-run training program. Several laws have also shortened the period required to return completed registration forms to the state election board.¹⁰³ More troubling than the requirements themselves are the penalties for noncompliance. In Florida, for example, any third-party register that returns a registration application more than forty-eight hours after the form is completed may be assessed a penalty of \$50 per application, per late day.¹⁰⁴ Several voter registration groups argue the fines severally punish what, in many cases, may be an innocent and harmless error.¹⁰⁵ Some, like the League of Women Voters,

99. See *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1317 (S.D. Fla. 2006) (describing voter registration activities of the League of Women Voters).

100. See *New State Voting Laws II: Protecting the Right to Vote in the Sunshine State: Hearing Before the Subcomm. on Constitution, Civil Rights, and Human Rights of the Comm. of the Judiciary*, 112th Cong. 24 (2012) (statement of Daryl D. Parks, President, National Bar Association) (noting that the United States Census Bureau estimates 585,004 Florida citizens, representing 7.3% of all Florida registered voters in 2010, had been registered to vote through a third-party registration organization).

101. See Norden & Weiser, *supra* note 82, at 20.

102. See H.R. 1355, 2011 Leg., 113th Sess. (Fla. 2011); A.B. 82, 76th Leg., Reg. Sess. (Nev. 2011); H.R. 1570, 82nd Leg., Reg. Sess. (Tex. 2011).

103. See, e.g., Erin Ferns Lee, *Election Legislation 2013: Threats and Opportunities Assessment*, PROJECT VOTE, 3 (Mar. 2013) (citing Virginia HB 1747/ SB 1008/Chapter 436), available at <http://projectvote.org/images/publications/Threats%20and%20Opportunities/Legislative%20Threats%20Opportunities-March%202013-1.pdf>. See also H.B. 1570, 2011 Leg., 82nd Sess. (Tex. 2011) (codified as TEX. ELEC. CODE §§ 11.002(a)(5), 13.031(d)(3) (Supp. 2012) (requiring any person registering voters to be a Texas citizen).

104. See H.R. 1355, 2011 Leg., 113th Sess. (Fla. 2011).

105. See Ryan J. Reilly, *Florida League of Women Voters Drops Registration Plan Over Restrictive Law*, TALKING POINTS MEMO (Jul. 15, 2011, 9:55 AM), http://tpmmuckraker.talkingpointsmemo.com/2011/07/florida_league_of_women_voters_drop_registration.php.

suspended voter registration operations for fear that volunteers would be penalized for a mistake.¹⁰⁶

III. THE REHABILITATION ACT

A. History and Standards

The Rehabilitation Act, passed in 1973, was the first comprehensive piece of federal legislation that specifically prohibited discrimination against persons with disabilities. The seminal provision of the Act is section 504, which provides “[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance”¹⁰⁷ The Act’s purpose is expansive, and applies to nearly all activities or services where the administering body receives federal funds.¹⁰⁸

The RA permits private suits for damages, including attorneys’ fees, against persons or agencies found in violation of section 504.¹⁰⁹ Historically, section 504 has been most widely used in education suits.¹¹⁰ Because local school districts often accept federal funds, they are subject to suit under the RA. Section 504 has been less frequently used in a variety of other areas, including prisoner rights suits¹¹¹ and Medicaid coverage suits.¹¹²

106. *Id.* (quoting the President of the Florida League of Women Voters as stating “[w]e did not feel that we as an organization could ask our volunteers to undergo that kind of vague, restrictive and punitive restriction which the legislature has tried to impose.”).

107. 29 U.S.C. § 794(a) (2011).

108. 45 C.F.R. § 84.1 (2013) (“[S]ection 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance”).

109. 29 U.S.C. § 794(a).

110. See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, *Free Appropriate Public Education for Students with Disabilities: Requirements Under Section 504 of the Rehabilitation Act of 1973* (2000), available at <http://www2.ed.gov/about/offices/list/ocr/docs/edlite-FAPE504.html> (the U.S. Department of Education frequently brings suits on behalf of parents and children to enforce section 504 in the school setting).

111. *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000).

112. See *Lovell v. Chandler*, 303 F.3d 1039, 1044–45 (9th Cir. 2002).

One difficulty in proving a section 504 case is establishing that the agency or body sued has accepted federal funding. A state agency accepting federal funds does not make the state as a whole subject to suit under section 504.¹¹³ Rather, the particular agency sued must have accepted federal funds.¹¹⁴ This has presented challenges for some litigants.¹¹⁵

B. Modern Treatment

Section 504's capability to remedy discrimination against persons with disabilities has been given meager treatment in academic circles since the passage of the ADA.¹¹⁶ Several factors might contribute to this. The most obvious being that section 504 only regulates programs receiving federal financial assistance. This limits the number of entities that section 504 applies to, and thus restricts its ability to remedy widespread discrimination. Section 504 is also textually concise. It does not seek the ADA's extensive policy goals, but rather limits its mandate to a few broadly worded phrases. Somewhat related, many view the RA as being displaced by the ADA, therefore eliminating the need to study section 504. This view is in no small part due to the analysis of courts that have faced joined ADA and RA claims. Courts frequently view the substantive standards of the two acts as

113. *Jim C. v. United States*, 235 F.3d 1079, 1081 (8th Cir. 2000).

114. *Id.*

115. *See Lightbourn v. Cnty. of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997).

116. *See* Katie Eyer, *Rehabilitation Act Redux*, 23 *YALE L. & POL'Y REV.* 271, 271–72 (2005) (describing academic treatment of the Rehabilitation Act as “skimpy” and noting this lack of attention “has left a fairly substantial gap in the understanding of whether the Rehabilitation Act may serve as an adequate substitute for the ADA in the area of public employment and services.”).

the same.¹¹⁷ This treatment enhances the relevance of the newer ADA and diminishes the significance of the older RA.¹¹⁸

C. *The RA's Continuing Relevance in Damage Suits Against States*

The RA is still relevant in one area of immense importance—damages. If a plaintiff with a disability is suing a state defendant, the doctrine of sovereign immunity may bar the suit or limit damages to injunctive relief.¹¹⁹ The RA fits within an exception to the general principle of sovereign immunity—state waiver. This makes the RA different from the ADA. Under the ADA, suits against state officials are barred under Title I¹²⁰ and generally barred under Title II, subject to a narrow and still undefined exception.¹²¹

1. *The Supreme Court and Sovereign Immunity*

Sovereign immunity is rooted in the Eleventh Amendment, but encompasses more than the plain text of the amendment. Textually, the amendment only bars suits against a state, in federal court, by a citizen of a

117. See, e.g., Nelson, 170 F.3d at 649 (“The two statutes are quite similar in purpose and scope, such that, the analysis of claims under the ADA roughly parallels those brought under the RA.”) (internal citations and quotation marks omitted); McDonald v. Pa., Dep’t of Pub. Welfare, Polk Ctr., 62 F.3d 92, 95 (3d Cir. 1995) (“Whether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same.”) (citation omitted); See also Eyer, *supra* note 116, at 288 (noting that courts frequently treat the two acts as substantively the same and further stating that there is “[f]airly little case law discussing in any detail the relevant differences between the Acts, beyond the obvious contingency of section 504 claims on the entity’s receipt of federal funds.”).

118. The one possible exception to sparse treatment of section 504 has been in education law. See generally Mark C. Weber, *A New Look at Section 504 and the ADA in Special Education Cases*, 16 TEX. J. C.L. & C.R. 1 (2010). Section 504 has frequently been used to secure accommodations for students with disabilities, and is generally considered still relevant in education law. See *Applying Rehabilitation Act Section 504 to the Education of Homeless Children and Youth*, NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, 1 (May 2001), <http://www.homeless.samhsa.gov/ResourceFiles/jt2lu1gm.pdf> (noting “[e]ducation attorneys frequently use Section 504 of the Rehabilitation Act of 1973 . . . to protect the education rights of students with disabilities.”).

119. See Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).

120. *Id.*

121. See *TennesSee v. Lane*, 541 U.S. 509, 532-34 (2004).

different state.¹²² Yet, the Supreme Court has found the amendment should be read “not so much for what it says, but for the presupposition . . . which it confirms.”¹²³ That presupposition, according to the Court, is to protect a state’s sovereignty by generally prohibiting suit against a state in any court.¹²⁴ Following this understanding, the Court has interpreted the overarching purpose of the amendment to additionally bar suits against state officials,¹²⁵ suits in state court,¹²⁶ and suits by citizens of the same state as the state being sued.¹²⁷ Because of this, litigants seeking to bring a suit that may include a state or state officials must be acutely aware of the doctrine of sovereign immunity, and the consequences of bringing suit under one statute as opposed to another.

If the doctrine of sovereign immunity applies, there are three recognized exceptions that may still permit a suit to go forward: (1) injunctive relief against state officials operating in their official capacity (commonly referred to as the *Ex parte Young* exception, for the case giving the exception its name)¹²⁸; (2) abrogation¹²⁹; and (3) waiver.¹³⁰

The first exception, injunctive relief against a state official, only permits suit to garner prospective relief.¹³¹ This offers little to litigants who wish to remedy past violations and seek financial compensation for their injury. Thus, if the doctrine of sovereign immunity applies, the exceptions of abrogation and waiver are a plaintiff’s best chance of becoming whole through litigation.

122. The amendment reads: “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.” U.S. CONST. amend. XI.

123. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996) (quoting *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 779 (1991)).

124. *Id.*

125. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

126. *Alden v. Maine*, 527 U.S. 706, 747 (1999).

127. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 669–70 (1999).

128. *Ex parte Young*, 209 U.S. 123, 155–56 (1908).

129. *Coleman v. Ct. App. of Md.*, 132 S. Ct. 1327, 1333 (2012).

130. *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011) (citing *Clark v. Barnard*, 108 U.S. 436, 447–48 (1883)).

131. *Young*, 209 U.S. at 155.

2. *The ADA and Abrogation*

Abrogation relies on Congressional action. Congress may abrogate a state's right to sovereign immunity by passing legislation pursuant to its authority under section 5 of the Fourteenth Amendment.¹³² But limitations exist. Congress may only abrogate for Constitutional violations that meet the Supreme Court's "congruence and proportionality test"—first outlined in *City of Boerne v. Flores*.¹³³ Congress must demonstrate by specific evidence that it seeks to remedy a pattern of unconstitutionality by states, and that the methods it has chosen to remedy those violations are proportional to the violations.¹³⁴

In *Bd. of Trustees of Univ. of Alabama v. Garrett*,¹³⁵ the Supreme Court found that Congress had not validly abrogated state sovereign immunity when enacting Title I (Employment) of the ADA. The Court held that Congressional findings on discrimination against the disabled fell "far short of even suggesting the pattern of unconstitutional discrimination on which section 5 legislation must be based."¹³⁶ This meant that money damages were unavailable to private party plaintiffs suing state agencies under the title.¹³⁷

132. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. See *Seminole Tribe of Florida*, 517 U.S. at 47 (holding that Congress could not rely on its authority under the Commerce Clause to abrogate a state's sovereign immunity); See also *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (holding that "Congress retains the authority to abrogate state sovereign immunity pursuant to the Fourteenth Amendment.").

133. 521 U.S. 507, 508 (1997).

134. See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 82 (2000).

135. 531 U.S. 356, 374 (2001).

136. *Id.* at 370 (citing *Kimel*, 528 U.S. at 89–91; *City of Boerne*, 521 U.S. at 530–531).

137. The only potential suit remaining against state officials for violation of Title I after *Garrett* is injunctive relief under the theory of *Ex parte Young* or suit by the federal government on behalf of an individual, as the federal government is not barred by sovereign immunity. As Chief Justice Rehnquist outlined in a footnote in his opinion for the Court in *Garrett*:

Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I does not mean that persons with disabilities have no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908).

Bd. of Trustees of Univ. of Ala., 531 U.S. at 374 n.9.

In *Tennessee v. Lane*,¹³⁸ the Court created a narrow sovereign immunity exception for Title II (Public Services) suits where a “fundamental right of access” is at issue.¹³⁹ Lane, a paraplegic who used a wheelchair, had a court date on the second floor of a county courthouse.¹⁴⁰ The courthouse had no elevator.¹⁴¹ At his first appearance, Lane crawled up two flights of stairs to get to the courtroom.¹⁴² At a second appearance, he refused to crawl again or be carried—instead missing his scheduled hearing.¹⁴³ He was arrested and jailed for failure to appear.¹⁴⁴ The Court held that—unlike Title I—Title II “seeks to enforce a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.”¹⁴⁵ Further, “Congress enacted Title II against a backdrop of pervasive unequal treatment in the administration of state services and programs, including systematic deprivations of fundamental rights.”¹⁴⁶ That being the case, the Court found congressional abrogation appropriate under the circumstances present in *Lane*.¹⁴⁷ However, the Court was careful to limit its holding to a “class of cases implicating the fundamental right of access to the courts.”¹⁴⁸

It is unclear at this point the reach of *Lane*, or what other circumstances the Court might permit abrogation under Title II. The *Lane* Court specifically noted that other courts had “document[ed] a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including the penal system, public education, and voting.”¹⁴⁹ This might suggest that these categories of cases may equally qualify for abrogation. However, the Court did not make a holding to this effect, nor did it analyze whether Congress’s enactment of Title II was a “proportional” response to these patterns of unequal treatment.

138. 541 U.S. 509 (2004).

139. *Id.* at 533.

140. *Id.* at 513.

141. *Id.*

142. *Id.* at 514.

143. *Id.*

144. *Id.*

145. *Id.* at 522-23.

146. *Id.* at 524.

147. *Id.* at 533-34, 538.

148. *Id.*

149. *Id.* at 525.

3. *The RA and Waiver*

A state may waive its sovereign immunity protections and consent to be sued in court for damages.¹⁵⁰ Waiver can attach when a state takes part in a federal program and accepts federal funds conditioned on its waiving sovereign immunity.¹⁵¹

Originally, the RA had no specific provision indicating that states waived sovereign immunity and subjected themselves to suit for monetary relief under section 504 by accepting federal funds.¹⁵² Because of this silence in the statute, the Supreme Court interpreted any waiver based on acceptance of funds to be unknowing, and thus invalid.¹⁵³ The RA was amended in 1986 to specifically include a waiver of sovereign immunity for states that accepted federal funds.¹⁵⁴ Nearly every circuit has held that this amendment validly waives sovereign immunity and may subject a state to suit for monetary relief under section 504.¹⁵⁵ The Supreme Court has supported this view. In *Lane v. Pena*, a case concerning waiver of federal government immunity under section 504, the Court noted in dicta that in passing the 1986 amendment “Congress sought to provide the sort of

150. *Sossamon v. Texas*, 131 S. Ct. 1651, 1658 (2011).

151. *E.g.*, *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 129 (1st Cir. 2003); *Koslow v. Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002).

152. Rehabilitation Act of 1973, Pub. L. No. 93-112, Title V, § 504, 87 Stat. 355 (codified as amended at 29 U.S.C. § 794 (2006)).

153. *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985).

154. 42 U.S.C.A § 2000d-7 (2013) (providing that “A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal Court for a violation of Section 504 . . .”).

155. *See, e.g.*, *Nieves-Marquez*, 353 F.3d at 129; *Koslow*, 302 F.3d at 172; *Litman v. George Mason Univ.*, 186 F.3d 544, 554 (4th Cir. 1999); *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 284 (5th Cir. 2005); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir. 2001); *Stanley*, 213 F.3d at 344; *Jim C.*, 235 F.3d at 1081; *Lovell*, 303 F.3d at 1051; *Brockman v. Wyo. Dep’t of Family Servs.*, 342 F.3d 1159, 1168 (10th Cir. 2003); *Sandoval v. Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), *rev’d on other grounds by Alexander v. Sandoval*, 532 U.S. 275 (2001); *Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1164 (D.C. Cir. 2004). Compare *Garcia v. S.U.N.Y. Health Scis. Ctr. Of Brooklyn*, 280 F.3d 98, 114 (2d Cir. 2001) (holding that a state may not knowingly waive its sovereign immunity under section 504 by accepting federal funds, and therefore a suit for damages against a state is not permitted), with *Alexander v. S.U.N.Y. at Buffalo*, 932 F. Supp.2d 437, 443 (W.D.N.Y. 2013) (holding that states are now on notice that accepting federal funds opens them to a suit under section 504, and the state will be held to have waived sovereign immunity for any receipt of funds pose the decision in *Garcia*), and *Blasio v. N.Y. State Dep’t of Corr. Servs.*, No. 04-CV-653S, 2005 WL 2133601, at *3 (W.D.N.Y. Aug. 31, 2005).

unequivocal waiver that our precedents demand.”¹⁵⁶ It went on to say that the eventual amendment represented “an unambiguous waiver of the States’ Eleventh Amendment immunity.”¹⁵⁷

IV. HAVA

Following the 2000 presidential election controversy, Congress made a push for federal legislative enactments aimed at securing voting rights. The eventual result was passage of The Help America Vote Act (HAVA).¹⁵⁸ HAVA’s primary concern was updating voting technology to ensure that Florida’s 2000 experience was not repeated, but the legislation also included standards for ensuring accessibility to voters with disabilities.¹⁵⁹

A. HAVA’s Standards

HAVA’s section 301(a) outlines the minimum standards for polling locations used in federal elections.¹⁶⁰ It specifically states that all voting systems must be accessible to persons with disabilities.¹⁶¹ Furthermore, it outlines particular requirements that states must satisfy—namely, providing non-visual accessibility to the blind and visually impaired and maintaining at least one voting system at each polling location equipped for persons with disabilities.¹⁶²

HAVA also attempts to remedy concerns with ballot secrecy by allowing voters with visual impairments to cast a ballot independently.¹⁶³ The Act specifically states that election officials must provide voting opportunities to persons with disabilities “in a manner that provides the

156. 518 U.S. 187, 198 (1996).

157. *Id.* at 198, 200 (determining that Congress had not waived federal government immunity in the RA because there was no unequivocal statement indicating that it wished to waive immunity for the federal government).

158. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended at 42 U.S.C. §§ 15301–15545(2002)).

159. 42 U.S.C. § 15301(b)(B-H) (2002).

160. 142 U.S.C. § 15481(a)(3) (2002).

161. *Id.* § (a)(3)(A).

162. *Id.* § (a)(3)(A-B).

163. See Ruth Colker, *Anti-Subordination Above All: A Disability Perspective*, 82 NOTRE DAME L. REV. 1415, 1457 (2007) (“The focus of the disability provisions of HAVA is on gaining access to public polling places and allowing visually impaired voters to vote privately and independently.”).

same opportunity for access and participation (including privacy and independence) as for other voters.”¹⁶⁴ In this respect, HAVA changed the dichotomy present in prior voting legislation. Whereas prior statutes, such as the VAEHA, made third-party assistance available to voters, HAVA requires election locations to provide technology that allows voters with disabilities to cast a ballot on their own.¹⁶⁵

HAVA also established the U.S. Election Assistance Commission (EAC), which acts as “an independent, bipartisan commission charged with developing guidance to meet HAVA requirements, adopting voluntary voting system guidelines, and serving as a national clearinghouse of information on election administration.”¹⁶⁶

HAVA though, more than anything, is a funding statute. The Act’s primary function is to provide states with federal money, to the tune of three billion dollars, to update their voting systems.¹⁶⁷ Title I of the Act grants federal funds to states to update their voting systems and train election officials.¹⁶⁸ Title II approves of funding for states that make their polling locations more accessible to persons with disabilities.¹⁶⁹ Title III allows federal funds to be used to implement uniform voting system standards.¹⁷⁰ States submit plans to the EAC, and are then eligible to receive payments.¹⁷¹

Although HAVA’s standards sound regulatory in nature and place responsibilities on states accepting federal funds, HAVA depends primarily on states self-policing their election systems.¹⁷² As section 305 states “[t]he

164. 42 U.S.C. § 15481(a)(3)(A).

165. Lisa Kinzer, *Voting with a Disability: Post-HAVA Challenges 3* (Jan. 1, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1995785.

166. *About EAC*, U.S. ELECTION ASSISTANCE COMM’N, http://www.eac.gov/about_the_eac/ (last visited Oct. 29, 2013).

167. Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 684 (2007).

168. 42 U.S.C. § 15301(b) (2002).

169. 42 U.S.C. § 15421(b)(1) (2013).

170. 42 U.S.C. § 15481 (2013).

171. Memorandum from Monica Evans, Dir. of Grants Mgmt., U.S. Election Assistance Comm’n, to State Chief Election Officers (Jan. 13, 2012), http://www.eac.gov/assets/1/workflow_staging/Documents/4589.pdf.

172. When HAVA was first being considered, several in the disabilities rights community noted its dependence on state officials for enforcement. *Help America Vote Act of 2001: Hearing on H.R. 3295 Before the H. Comm. on the Judiciary*, 107th Cong. 13 (2001) (statement of James C. Dickson, Vice President, American Association of People with Disabilities) (“17 years ago the Congress passed legislation essentially saying, as this does,

specific choices on the methods of complying with the requirements of this subchapter shall be left to the discretion of the [s]tate.”¹⁷³

The limitations of HAVA enforcement are further evidenced by HAVA’s lack of a private right of action to remedy violations under the Act.¹⁷⁴ Persons aggrieved by HAVA violations may not sue states or election officials. The only true litigation enforcement available under HAVA is authority granted to the Attorney General to bring a civil action against a jurisdiction failing to comply with HAVA.¹⁷⁵ Even then, the action is limited to declaratory or injunctive relief.¹⁷⁶ There is an administrative process available; however, it offers no real remedy. A person may file a complaint with the state alleging non-compliance with HAVA.¹⁷⁷ But, it is left to the sole discretion of the state to decide whether there has been a violation and, if so, what action should be taken.¹⁷⁸

B. HAVA’s Effectiveness: State Compliance and Civil Enforcement

Most states have used at least some HAVA funds to improve access to voting for persons with disabilities.¹⁷⁹ Specifically, in a survey of all fifty states, forty-three states reported that they required local jurisdictions to offer alternative voting methods, such as absentee voting, and most states reported HAVA funds were used in the implementation of these standards.¹⁸⁰ However, several commentators have pointed to slow progress in achieving the full spectrum of HAVA guarantees.¹⁸¹

it’s up to the States to make polling places accessible. The States and local counties have not done that. They have used excuse after excuse . . . This piece of legislation would perpetuate that irresponsible behavior of local and State election officials.”).

173. 42 U.S.C. § 15485 (2013).

174. 42 U.S.C. § 15511 (2013).

175. *Id.*

176. *Id.*

177. 42 U.S.C. § 15512(a)(2)(B) (2013).

178. 42 U.S.C. § 15512(a)(2)(D)-(H) (2013).

179. GAO, 2009 REPORT, *supra* note 53, at 24, 27 (“The majority of states (45) reported spending or obligating HAVA funds and, in some cases, also using state funds to enhance physical access to polling places.”).

180. *Id.*

181. *See, e.g.*, Charles Stewart III, *What Hath HAVA Wrought? Consequences, Intended and Not, of the Post-Bush v. Gore Reforms* 34 (Mass. Inst. of Tech. Dep’t of Political Sci., Working Paper No. 102, 2001), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1843583 (reviewing survey evidence and concluding that “disabled citizens still have problems voting, and that those problems have not changed much since 2000

The DOJ has made some use of its enforcement authority under HAVA. However, this has primarily been limited to providing administrative guidance to jurisdictions, rather than investigating and bringing enforcement actions.¹⁸² An April 2013 GAO report highlighted some of the shortcomings of DOJ HAVA enforcement:

After implementation of HAVA, Justice's oversight of HAVA's access requirements was part of two other enforcement efforts, but gaps remained. While Justice provided guidance on polling place accessibility, this guidance did not address accessibility of the voting area itself. In 2009, Justice conducted polling place observations for federal elections that identified whether accessible voting systems were in place, but it did not systematically assess the physical accessibility of polling places or the level of privacy and independence provided to voters with disabilities. Justice also conducted a small number of annual community assessments of Americans with Disabilities Act compliance of public buildings, which included buildings designated as polling places. However, these assessments did not provide a national perspective on polling place accessibility or assess any special features of the voting area and the accessible voting system that are set up only on Election Day.¹⁸³

Although some criticism of HAVA has focused on the Act's standards and their limited effectiveness,¹⁸⁴ the greatest limitation in enforcing the requirements of HAVA might be its failure to provide a private right of action. Without a private remedy, injured parties must rely on the government for enforcement. Government agencies are often overburdened, underfunded, or do not place primacy on litigation. They are also subject to political priorities and constraints.¹⁸⁵ Even when agencies

[indicating] HAVA has not been an especially effective vehicle for granting to disabled individual richer access to the voting.”)

182. Enforcement has not been totally absent, but limited. *See* GAO, *VOTERS WITH DISABILITIES*, *supra* note 45, at 16 (citing two DOJ settlements with jurisdictions over HAVA violations; specifically, one with Philadelphia, Pennsylvania, in 2009, and another with Flint, Michigan, in 2012).

183. *Id.* at 1.

184. Weis, *supra* note 10, at 424 (noting the standards under HAVA are “vague and do not provide guidance to the states about the extent of the necessary reforms.”).

185. Catherine R. Albiston & Laura Beth Nielsen, *The Procedural Attack on Civil Rights: The Empirical Reality of Buckhannon for the Private Attorney General*, 54 *UCLA L. REV.* 1087, 1133 (2007).

are willing to prosecute, the aggrieved party bears the burden of convincing the agency to accept their case. This limits the availability of relief.

HAVA is also hampered by its limitation on relief. In cases where a party convinces the DOJ to move forward, damages are limited to injunctive or declaratory relief¹⁸⁶—making private parties significantly less likely to pursue enforcement because they are unable to recover monetary damages. The lack of monetary relief also decreases the deterrent effect of the statute. States that fail to comply with HAVA need not be concerned with monetary judgments being assessed against them. Rather, the only consequence of committing a violation is the possibility that funding may eventually be withdrawn.¹⁸⁷ This is a somewhat remote and unlikely outcome in general for funding statutes,¹⁸⁸ but all the more improbable under HAVA because the vast majority of HAVA appropriations have already been distributed by the EAC.¹⁸⁹

The only specific provision in the statute demanding return of funds from states that have previously accepted HAVA money is section 102(d)—which requires jurisdictions to pay back disbursements intended to update voting machines if the updates are not made.¹⁹⁰ The original date for compliance with this provision was November 2, 2004.¹⁹¹ However, states were permitted to take the funds in advance and later file for a waiver if they did not replace machines in time.¹⁹² States that applied for a waiver were then given until 2006.¹⁹³ In 2007, Congress extended the deadline to 2008.¹⁹⁴ In 2009, it further extended it to 2010.¹⁹⁵ As of 2010, only four states had been forced to return funds, which amounted to a grand total of \$226,333.74 that was originally appropriated nearly ten years earlier.¹⁹⁶

186. 42 U.S.C. § 15511 (2013).

187. See 42 U.S.C. §§ 15511–15512(a)(1) (2013).

188. Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 410 n.337 (2008) (noting that the termination of funds occurs only in “an exceedingly tiny proportion of the cases in which funding recipients violate these statutes.”).

189. Cihak, *supra* note 166, at 687 (noting that the entirety of the original \$3 billion appropriated by Congress was distributed to the states by 2006).

190. US ELECTION ASSISTANCE COMM’N, STRENGTHENING THE ELECTORAL SYSTEM ONE GRANT AT A TIME: A RETROSPECTIVE OF GRANTS AWARDED BY EAC APRIL 2003–DECEMBER 2010, Appendix B 11, at 11 (2010), available at <http://www.eac.gov/assets/1/Documents/FY2010%20Grants%20Report%20FINAL.pdf> [hereinafter EAC, 2010 REPORT].

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

Meanwhile, thirteen states retained an unspent \$12,437,267, which was appropriated at the same time for the same purpose.¹⁹⁷

Even more disconcerting is the amount of HAVA funds distributed under sections 101 and 251 that is not used by states. As of the latest EAC report, \$827,497,849 had not been spent.¹⁹⁸ None of these funds have been returned to the federal government.¹⁹⁹ Indeed, they might never be returned, because as funds distributed under section 101 contain “no restriction on when they can be used by the States once” appropriated by EAC.²⁰⁰ Admittedly, some of these funds increased in value after distribution to the states because of interest. However, this does not answer the question of why these funds were not returned to the federal government if, after more than ten years, they had not been used to update voting systems. Nor does it answer why the funds could not be made available in damage suits brought by private litigants who are able to prove that states violated specific provisions of HAVA.

The failure of HAVA to demand states not using federal funds to return them, combined with the federal government’s refusal to defund states that are noncompliant with provisions of HAVA, amounts to a significant deficiency in the Act. This weakness leads to the question of whether another statute can provide a method for enforcing the promises of HAVA other than HAVA itself.

V. ENFORCING VOTING RIGHTS FOR PERSONS WITH DISABILITIES UNDER SECTION 504

Litigants who seek to enforce the promises of HAVA should look to section 504 of the Rehabilitation Act. Following the passage of HAVA, a multitude of state agencies that otherwise did not receive federal funding now do, making them subject to section 504’s non-discrimination provision. Furthermore, private section 504 litigation provides advantages over relying on government enforcement of HAVA, as well as advantages over other federal statutes—such as the ADA—which aim at securing voting rights for persons with disabilities.

197. *Id.* at 12-13.

198. *See id.* at 8-16 (calculating this number by adding the totals in the “Balance of Funds and Interest” columns from tables 2 and 4).

199. *Id.* at 11.

200. *Id.* at 8.

A. HAVA Funds: Opening the Section 504 Door

As of 2010, all fifty states have received some amount of HAVA funds.²⁰¹ Few if any of these states received federal funds for the administration of elections before HAVA.²⁰² Therefore, HAVA can be seen as opening state electoral administration to section 504 suits.

HAVA also cures the primary difficulty that section 504 litigants faced in voting cases before HAVA—establishing that the state agency being sued received federal funds. States receiving federal funds, in general, are not subject as a whole to section 504 suits. Rather, there must be some federal funds going to the particular state agency sued.²⁰³ Prior to HAVA, this was often a challenge. For example, in *Lightbourn v. County of El Paso* a group of blind voters sued the Secretary of the State of Texas under section 504 for failing to ensure that they had access to voting sites.²⁰⁴ The Fifth Circuit held that the Secretary was not a proper party to the suit.²⁰⁵ The court recognized that the State of Texas received federal funding, but held there was no evidence that the Secretary of State received such funding or had the authority to supervise local election districts—making a section 504 suit against the Secretary improper.²⁰⁶

201. *Id.* at 3 (As of 2010, a total of \$3,253,860,616 has been awarded to the 50 states, American Samoa, the District of Columbia, Guam, the Commonwealth of Puerto Rico, and the United States Virgin Islands.).

202. See Frank Emmert et. al., *Trouble Counting Votes? Comparing Voting Mechanisms in the United States and Selected Other Countries*, 41 CREIGHTON L. REV. 3, 4 n.7 (2007) (“Before HAVA, the federal government did not underwrite states’ expenses for elections to federal offices.”); See also Matthew Masterson, *The Help America Vote Act of 2002 and the Evolution of Voting*, 18 ALB. L.J. SCI. & TECH. 691, 694 (2008) (“Prior to the passage of HAVA and the creation of the EAC, the National Association of State Election Directors, a private entity without any Federal funding or Federal support, was in charge of certifying election equipment.”).

203. See 29 U.S.C. § 794(b)(1)(A) (1978) (“[T]he operations of [] a department, agency, special purpose district, or other instrumentality of a State . . . any part of which is extended Federal financial assistance.”); 29 U.S.C. § 794(b)(1)(B) (“In the case of assistance to a State or local government[,] activity is defined as all operations of “the entity of such State . . . that distributes such assistance and each such department or agency . . . to which the assistance is extended.”); See also Jim C., 235 F.3d at 1081 (“The acceptance of funds by one state agency therefore leaves unaffected both other state agencies and the State as a whole.”).

204. *Lightbourn*, 118 F.3d at 423.

205. *Id.* at 427.

206. See *Id.* (stating “Certainly, a plaintiff may not predicate a [section] 504 claim against a state actor on the mere fact that the state itself obtains federal money.”); See also Nelson, 170 F.3d at 653 n.8 (holding district court’s dismissal Rehabilitation Act claim by blind voters was proper because plaintiffs “did not sufficiently plead the financial assistance

HAVA fund disbursements have cured much of the difficulty in finding an agency to sue—or determining the proper agency to sue—under section 504. State governments accept federal HAVA funds and are required to develop a plan for their use, making the state and its chief election official a proper party in a section 504 suit. State officials then often disburse these funds to counties and city governmental bodies,²⁰⁷ making those organizations additionally liable under section 504. Indeed, reviewing the written opinions of voting challenges brought under section 504 post-HAVA shows that many jurisdictions have merely conceded to the funding element of the statute.²⁰⁸

B. Section 504 HAVA Suits: Using Section 504 to Enforce HAVA Standards

HAVA not only makes new section 504 suits possible, HAVA also contains relevant standards for section 504 suits. A section 504 suit requires that a litigant establish, among other things, that they have been “excluded from the participation in, [] denied the benefits of, or [have been] subjected to discrimination under [a] program or activity”²⁰⁹ This language naturally begs the question of what standards should be used when determining whether a voter with a disability has been “exclude[d] denied . . . or subjected to discrimination.” Section 504 does not itself contain an explanation.²¹⁰ A natural fit, though, is Congress’s most recent pronouncement on the appropriate voting standards for persons with disabilities—HAVA.

In other section 504 voting cases, courts have looked to alternative voting legislation when determining whether an entity has breached its duty under section 504. For example, in *Nelson v. Miller*, the court looked to the

jurisdictional prerequisite” since plaintiffs alleged that the State of Michigan received federal funds rather than the Secretary of State).

207. See, e.g., *Nat’l Fed’n of the Blind v. Volusia Cnty.*, No. 605CV997ORL28DAB, 2005 WL 1712038, at *1 (M.D. Fla. July 21, 2005) (noting the state of Florida accepted federal HAVA funds and distributed those funds amongst various counties for the purchase of electronic voting systems).

208. See *Kerrigan v. Phila. Bd. of Election*, No. 07-687, 2008 WL 3562521, at *1, *8 (E.D. Pa. Aug. 14, 2008) (finding that city election board had received “through the state, approximately \$11 million in federal money pursuant to the Help America Vote Act” and that the Board did not contest receipt of federal funds for purposes of plaintiff’s RA challenge).

209. 29 U.S.C. § 794(a) (1978).

210. Section 504 does contain a “[s]tandards used in determining violation of section,” but it is limited to employment law cases. See 29 U.S.C. § 794(d) (2000).

Voting Rights Act of 1965 (VRA) and the Voting Accessibility for the Elderly and Handicapped Act (VAEHA) to evaluate the substance of the plaintiffs' ADA and RA claims.²¹¹ The court recognized that neither the RA nor ADA was meant to displace Congress's more specific pronouncements on voting for persons with disabilities.²¹² It was, therefore, proper to look to the voting statutes to interpret the more general language of the RA and ADA.²¹³ Similar to the VRA and VAEHA, HAVA contains voting standards for persons with disabilities that should inform a reviewing court's analysis under the RA's section 504.

C. Section 504 Advantages over Government Enforcement of HAVA

The federal government is significantly limited in its ability to enforce HAVA's requirements. This can leave many litigants without a remedy. Section 504 is not so limited. The requirements of section 504 can be enforced by private litigants without involvement of the government. Section 504 additionally offers monetary damages to parties, which can encourage attorneys and parties to pursue litigation. This incentive to litigate also acts as a deterrent. States are less likely to violate the commands of federal voting laws if they face a real possibility of answering for violations in court.

D. Section 504 Advantages over the ADA

The ADA can be a powerful tool in pushing for voting accommodations. However, its largest weakness relates to sovereign immunity. The Supreme Court in *Garrett* significantly limited the reach of the ADA's Title I by restricting Congress's authority under the Fourteenth Amendment to abrogate state sovereign immunity.²¹⁴ The Court permitted a limited form of abrogation under Title II in *Lane*, but the Court was unclear about the extent that abrogation would be allowed in future cases.²¹⁵

211. Nelson, 170 F.3d at 644-45.

212. *Id.* at 203.

213. *Id.*

214. *See supra* Part III.C.2.

215. *See supra* Part III.C.2.

Post *Lane*, a Title II suit for damages enforcing voting rights may be successful based on the fundamental nature of voting.²¹⁶ The *Lane* Court specifically noted “a pattern of unequal treatment in the administration of a wide range of public services, programs, and activities, including . . . voting.”²¹⁷ This indicates that denial of voting based on a person’s disability is, at least arguably, a category of conduct that Congress may seek to abrogate for state sovereign immunity. However, the issue is not free from doubt. Of particular concern to potential Supreme Court litigants is Justice Alito’s replacement of Justice O’Connor, who was a member of the 5-4 majority in *Lane*. With this risk looming, the safer route for litigants is to attempt to sue under a statute that does not have similar sovereign immunity barriers.²¹⁸ The RA might fit that mold.²¹⁹

The RA permits suits for damages against state agencies.²²⁰ Nearly every circuit has held that, by accepting federal funds, a state validly waives its sovereign immunity under section 504.²²¹ The Supreme Court has endorsed this reasoning.²²² Thus, in cases where a plaintiff seeks to sue a state agency, and where it can be proven that the state agency has accepted federal funds, plaintiffs are well-served to raise an RA claim in place of—or in addition to—an ADA claim.

216. See Michael E. Waterstone, *Lane, Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 797 (2005) (making a convincing argument that this should indeed be the case).

217. *Lane*, 541 U.S. at 525.

218. It should be noted that, in general, only states are subject to the 11th amendments sovereign immunity doctrine, and not their political sub-divisions, i.e., counties. *Lincoln Cnty. v. Luning*, 133 U.S. 529, 530 (1890). Therefore, litigants should not hesitate to bring ADA damage suits against county governments that are in charge of electoral operations.

219. It is also possible that HAVA may be enforced under § 1983. See *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004) (finding that the right to cast a provisional ballot under the requirements established by HAVA is an enforceable right against state officials under § 1983); *Taylor v. Onorato*, 428 F. Supp. 2d 384, 386 (W.D. Pa. 2006) (holding HAVA’s requirements regarding voting system standards did not create a private right enforceable under § 1983). See also Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 149 (2010) (concluding legislative history of HAVA gives no indication as to whether or not HAVA contains rights enforceable under § 1983).

220. See *supra* Part III.C.

221. See *Lee*, *supra* note 103.

222. See *supra* Part III.C.3.

VI. CONCLUSION

More than ten years after the passage of HAVA, its goal of remedying the status of voters with disabilities has yet to be fully realized. Persons with disabilities still have barriers when they seek to cast a ballot. Those barriers might come in the form of architectural hurdles, or in the form of outdated voting machines.

Voters with disabilities deserve an opportunity to seek redress against states that fail to meet the goals of HAVA. The RA might be their best remedy. After HAVA, state agencies that had not previously accepted federal funds now accept those funds. This brings those agencies under the purview of the RA, and subjects them to suits for damages under section 504. The RA should be used as a tool to enforce HAVA's command.