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COMMENT

HAVA's Unintended Consequences: A Lesson for Next Time

On October 29, 2002, President Bush signed into law the Help America Vote Act of 2002 (HAVA), a watershed in American election law.[1] Passed in the wake of the 2000 election—following Florida's "dimple" and "chad" fiasco and its culmination in *Bush v. Gore*[2]—HAVA was a comprehensive reform package aimed at nearly all aspects of American elections. The Act set out to secure individual voting rights, set national standards for acceptable voting machinery, and enhance voting opportunities for members of the military and persons with disabilities. Congress for the first time earmarked federal money for state procurement of election equipment and established a new federal agency to certify and test voting systems and to oversee the grant programs.[3]

HAVA provided fairly generous funding to the states to meet these goals.[4] The Act did not require states to accept funding or follow its rules, but it did require states taking federal dollars to meet certain conditions. States that used punch-card machines (which received much of the blame for the problems in Florida) or lever-operated machines (which created barriers to voting for the elderly, vision-impaired, and other disabled citizens) in the 2000 election were required to replace all such machines with new equipment certified to meet various standards.[5] And in all states accepting HAVA money, the Act required

1. Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15,301-15,545 (Supp. II 2002)).

2. 531 U.S. 98 (2000).

3. Help America Vote Act § 104 (earmarking federal money); *id.* § 201 (establishing the Election Assistance Commission).

4. Overall, the Act provided $3.86 billion to be spent on election reform. *See id.* §§ 104, 258, 264, 273, 283, 296.

5. *See id.* §§ 101-102, 301. For a discussion of the problems presented by punch-card and lever machines, see *infra* notes 11-15 and accompanying text.

each voting precinct to operate at least one polling machine capable of accommodating disabled voters.[6] States were required to make these upgrades by January 1, 2004, although a two-year extension was permitted for good cause.[7] Most punch-card and lever states took advantage of this two-year extension,[8] so the effective deadline for equipment upgrades was January 1, 2006.

Now that this deadline has passed, the long-lasting effects of the rapid upgrade movement that HAVA spurred are starting to become clear. This Comment points to one such effect: HAVA's strict four-year timetable has encouraged and entrenched the practice of *purchasing* election equipment, despite the fact that *leasing* may well be a better option. By encouraging purchases, HAVA may have led—and may continue to lead—to relatively low levels of investment and innovation in the market for voting machines. Worse still, HAVA might also ensure that future upgrades occur only infrequently and at great cost to state and local election agencies.

I. HAVA AND THE REPLACEMENT OF VOTING MACHINES

The 2000 election exposed a number of fundamental problems that had been lurking in this country's election system. Voter registration systems were decentralized, ill managed, and notoriously problematic on election day.[9] Precincts around the country lacked any means of allowing voters not on the polling list to vote provisionally or to challenge their exclusion after the fact.[10]

But the problem of voting machinery loomed largest in Congress,[11] as lawmakers contemplated the unreliability of the punch-card and lever voting machines used during the 2000 election. Voters using punch cards often failed

6. Help America Vote Act § 301(a)(3)(B).

7. *Id.* § 102(a)(3)(B). Approximately 19% of voters nationwide still used punch-card machines in the 2004 election. Daniel Tokaji, Voting Technology: From 2000 to 2004 . . . and Beyond, http://moritzlaw.osu.edu/electionlaw/ebook/part4/equipment_machines01.html (last visited Oct. 14, 2006).

8. *Roads to Reform: Planning for the Help America Vote Act*, ELECTION REFORM BRIEFING, Aug. 2003, at 9, http://www.electionline.org/Portals/1/Publications/ERIP%20Brief%208-03.pdf [hereinafter *Roads to Reform*].

9. H.R. REP. NO. 107-329, at 38 (2001).

10. *See id.* ("Studies of the nation's election system find that a significant problem voters experience is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters.").

11. *See id.* at 38-39.

to align the card behind the ballot perfectly, thereby casting votes for the wrong candidates, and the machines sometimes failed to punch out the perforated chad on the ballot, thereby nullifying the intended vote.[12] Lever machines, which required voters to click switches corresponding to their chosen candidates and then pull a heavy lever to cast their votes, created barriers for elderly and handicapped voters, who were often unable to pull the lever or reach the switches.[13] By the end of 2000, Congress found that "[l]arge portions of the American public [had] lost confidence" in these antiquated voting machines.[14] HAVA was thus enacted to enable the states to take advantage of technological advances, including electronic equipment that seemed to promise greater accuracy and accessibility. Outdated and discriminatory equipment was to become, in Congress's words, "a part of our history, not our future."[15]

Overall, HAVA authorized $650 million for appropriation to the states, half of which was devoted exclusively to the replacement of punch-card and lever machines,[16] and it also made available a larger pool of money for general use by the states.[17] Crucially, any money unspent by the final deadline of January 1, 2006 was to be repaid to the federal government.[18]

In response to this time pressure, most states have taken and spent their federal grants. Between 2002 and 2004, many states took a conservative stance, preferring a wait-and-see approach to evaluate the success of particular machinery elsewhere before acquiring it. In Missouri, for example, only four of the thirty-seven districts using punch-card machines in 2002 had replaced them in time for the 2004 election; most districts were hesitant to act before others had tested the equipment.[19] But by 2006, at least thirty states had begun

12. *See id.* at 32. Florida officials were faced with the "unenviable task of attempting to divine the intent of a voter based on the amount of depression or partial detachment of a chad." *Id.*

13. For one vivid account, see Amanda Zafian, Disabled Still Frustrated by Voting in New York (Nov. 5, 2002), http://faculty-staff.jrn.columbia.edu/studentwork/election/2002/problems/disabled-zafian.asp.

14. H.R. REP. NO. 107-329, at 32.

15. *Id.*

16. Pub. L. No. 107-252, § 104(a), 116 Stat. 1666, 1672 (2002) (codified at 42 U.S.C. §§ 15,301-15,545 (Supp. II 2002)).

17. *Id.* § 101(a)-(d). States predominated by punch-card and lever machines allocated the bulk of all HAVA money to voting machine replacement. *See Roads to Reform*, *supra* note 8, at 2-3.

18. Help America Vote Act § 102(a)(3)(A)-(B), (d)(1).

19. *See* Paul S. Herrnson, *Improving Election Technology and Administration: Toward a Larger Federal Role in Elections?*, 13 STAN. L. & POL'Y REV. 147, 151-52 (2002).

to upgrade their voting machinery, financing the change mainly with HAVA money.[20]

HAVA permits the states to use federal funds to acquire new machines in virtually any form of transaction, whether "by purchase, lease, or such other arrangement as may be appropriate."[21] Although most states officially allow a choice between purchase and lease,[22] purchasing nevertheless predominates.[23] As a general matter, states and precincts[24] tend to view leasing as a measure of last resort. For instance, the Maryland legislature recently authorized spending for the lease of optical scan machines for the 2006 election season. But it did so only on a temporary basis: the state has already spent $90 million to purchase a touch-screen system from the producer Diebold, Inc. and is using the leased system only until security and reliability concerns about Diebold machines can be resolved.[25]

II. A BETTER WAY TO UPGRADE

From a national perspective, American voters would be better off if states and precincts leased their machines for relatively short terms (say, ten years)

20. DOUG CHAPIN ET AL., ELECTIONLINE.ORG, ELECTION REFORM: WHAT'S CHANGED, WHAT HASN'T AND WHY 2000-2006, at 9 (2006), http://www.electionline.org/Portals/1/Publications/2006.annual.report.final.pdf. A handful of states have lagged behind, failing to upgrade in time "for a variety of reasons, ranging from concerns over voter-verified paper audit trails . . . to inaction at numerous levels of government." *Id*. New York has experienced the most notable failure, probably due to government inaction. *See* United States v. N.Y. State Bd. of Elections, No. 06-CV-0263 (N.D.N.Y. June 2, 2006), *available at* http://www.nyvv.org/doc/USCourtOrder060206.pdf.

21. Help America Vote Act § 102(a)(2).

22. *See, e.g.*, CAL. ELEC. CODE § 19,004 (West 2003) ("Voting equipment may be loaned or rented for any purposes . . . ."); MASS. GEN. LAWS. ch. 54, § 34 (1991) ("A city or town may . . . purchase, lease, or lease with an option to purchase, one or more voting machines . . . .").

23. HAVA required each state to file a "state plan" detailing the manner in which it would comply with the Act's requirements, Help America Vote Act §§ 254-255, and a survey of these plans confirms that purchasing predominates, *see, e.g.*, COMMONWEALTH OF MASS., STATE PLAN 36 (2003), http://www.sec.state.ma.us/ELE/elepdf/havafinal.pdf; *Roads to Reform*, *supra* note 8, at 12-18. Media coverage also confirms the purchasing trend. *See, e.g.*, Michael Cooper, *Albany Leaves Choice of Voting Machines to Counties*, N.Y. TIMES, May 11, 2005, at B8; Stuart Pfeifer, *Supervisors' Committee To Study Election Problems*, L.A. TIMES, Mar. 17, 2004, at B3.

24. Ultimate procurement decisions are made differently in each state, but they typically involve an approvals process at the state level and an acquisition decision by local election officials.

25. *See* Anne E. Marimow, *Ehrlich Seeks To Fund Voting Machine Change*, WASH. POST, Mar. 17, 2006, at B4.

rather than purchasing them outright. Large private businesses have already become wise to the benefits of leasing over purchasing. At one time, large banks, law firms, and other companies purchased their office technology. Today, because technology changes so quickly and because companies only value a fraction of a product's potential life, they prefer to lease their equipment.[26]

The voting industry experiences similar conditions to the private sector, in that the features demanded change rapidly, often in response to newly discovered flaws and problems. In the past four years alone, standards for security, functionality, and accessibility have fluctuated greatly. For example, the move to electronic machines triggered concerns over technological tampering and a desire for "voter-verified audit trails"[27] that led to the return of paper ballot systems.[28] In the past two years, hybrid machines have become the hot item in the voting machine market. Systems such as the ES&S AutoMARK provide the benefits of an electronic interface with the easy counting features of optical scan ballots.[29] But even the most recent machines are believed to be imperfect: "Concerns about punch cards and lever voting machines have given way to concerns about their replacements."[30]

In this environment, purchasers have found themselves either stuck with imperfect machines or fearful of proceeding with acquisitions until a particular product has proven itself successful elsewhere in the market. California counties, because they are unable to purchase more than a few machines at a time, have "lurched from one voting system to another as the state has written and rewritten standards."[31] Maryland found its statewide purchase to be a sour investment when a new problem came to light after the machines had been delivered.[32] And, as the 2006 election approaches, a number of states risk noncompliance with HAVA as a result of the pressure to choose a system whose technology will last.[33]

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26. For instance, the desktop computers at large law firms are more likely to be leased than purchased. *See, e.g.*, Andrew M. Appel et al., *More Bang for the IT Buck*, MCKINSEY Q., Apr. 2003, at 130.

27. *Roads to Reform*, *supra* note 8, at 8.

28. *See* CHAPIN ET AL., *supra* note 20, at 5.

29. *See* Election Sys. & Software, ES&S AutoMARK, http://www.essvote.com/HTML/products/automark.html (last visited Oct. 14, 2006).

30. CHAPIN ET AL., *supra* note 20, at 5.

31. Noam N. Levey, *Voting System Results Still Out*, L.A. TIMES, Jan. 3, 2006, at A1.

32. *See* Kelly Brewington, *Voting Bill May Clear House: Measure Would Change Md. Ballot Machines*, BALT. SUN, Mar. 7, 2006, at 1B.

33. As discussed *supra* note 20, New York is the most infamous among this pack.

These problems could at least be minimized by a short-term lease requirement. First, and most simply, leasing would induce more frequent machinery upgrades. Whereas purchasing can lead to lock-in,[34] leasing provides frequent opportunities to renegotiate or find more up-to-date and inclusive machines. The expiration of a lease would actually *force* each lessee municipality to reconsider its holdings and potentially to shop around for better technology every few years. Voting technology is rapidly evolving. Today, for example, voters can cast ballots on touch-screen machines resembling ATMs;[35] on direct recorded electronic voting machines, which create a paper record while maintaining voter anonymity;[36] or using audio devices, a boon for visually impaired and blind voters[37]—all of which would have been unthinkable a few decades ago. Leasing would enable states to take advantage of these innovations as they become available, whereas outright purchase does not.

At most, a poor choice of machinery or subsequent technological innovation would affect one or two election cycles, after which it would be simpler to correct the problem in the next round of negotiations. Of course, frequent change and multiple upgrades carry the risk of voter confusion or technical inaccuracies and malfunctions. But even if these risks are substantial, a state or locality would consider any potential for additional confusion or malfunction as a cost in its decision-making process. Not every government would benefit from switching machines frequently; many would probably opt to maintain the status quo. But at least in a leasing scenario officials would

34. New York's 7639 lever-operated machines were built more than four decades ago. Frank Lombardi, *Vote's Out on City Meeting New Fed Law*, N.Y. DAILY NEWS, May 24, 2005, at 5, *available at* http://www.nydailynews.com/news/politics/story/312301p-267170c.html. Due to a combination of inaction, indecision, and ineffective government, the state still has not upgraded and has said it will not do so in time for the 2006 elections. *See* United States v. N.Y. State Bd. of Elections, No. 06-CV-0263 (N.D.N.Y. June 2, 2006), *available at* http://www.nyvv.org/doc/USCourtOrder060206.pdf.

35. For one demonstration, see Diebold Election Sys., Demos, http://www.diebold.com/dieboldes/demos.asp (last visited Oct. 14, 2006).

36. For example, the AccuVote TSX, made by Diebold, can be configured with a printer module that provides a verifiable paper trail, and the iVotronic, made by ES&S, can accommodate a "real time audit log" that does the same. *See* Diebold Election Sys., Comprehensive Solutions, http://www.diebold.com/dieboldes/solutions.asp (last visited Oct. 14, 2006); Election Sys. & Software, iVotronic Real Time Audit Log, http://www.essvote.com/HTML/products/ivotronic_rtal.html (last visited Oct. 14, 2006).

37. For a discussion of these devices, see Verified Voting Found., Accessible and Verifiable Voting Technology: Vision (Aug. 16, 2005), http://www.verifiedvotingfoundation.org/article.php?id=6114#audio.

undertake regular evaluations and consider the benefits and costs of keeping the current machinery.

Second, leasing would shift the risk of obsolescence to the private sector. From an economic perspective, this risk ought to be borne by producers because they are in the best position to minimize the risk. They alone can produce longer-lasting and more adaptable machines, and placing the risk on their shoulders would incentivize them to do so. Moreover, compared to states or local governments, private companies would be better suited to own outdated machines because they are better equipped to refurbish old machines, fix glitches, and make the case for continued use of their machines.[38]

Finally, by ensuring more frequent points of entry, leasing could encourage newcomers to enter the voting machinery market. Today, the industry is a highly concentrated one: the two largest suppliers of election equipment at the time of the 2002 Act—Diebold, Inc. and Election Systems & Software, Inc. (ES&S)—accounted for roughly 80% of the votes counted in the 2004 presidential election.[39] With new entrants, the industry might become more competitive: companies in adjacent industries (such as PCs, business equipment, etc.) might themselves invest and innovate, and the current players would, in turn, have to invest more and innovate more. This greater competition could bring higher quality and lower prices—both of which would encourage even more rapid change, to the benefit of American voters.

As everyday experience with cars suggests, leasing and frequently upgrading machinery could cost more in the long run. The first few years after acquisition are the most valuable, and consistently paying for only those years would likely cost more over time than would infrequent sales agreements under which states extracted a greater number of years from each machine. Yet states should still choose leasing for the same reasons that people still lease cars: it is worth paying a small premium for the option to periodically adopt the latest technology.

III. HAVA AS A BARRIER TO CHANGE

Many election officials harbor an aversion to leasing—their districts have owned machinery for so long that purchasing seems natural. For instance, in a telephone interview, a California county official responsible for the purchase of

38. The private sector could even exploit secondary markets for voting machines—a challenge municipalities have failed to meet. *See New Homes Sought for Machines Rendered Useless by Voting Law*, N.Y. TIMES, Jan. 30, 2006, at A16.

39. Sheila Parks, *Hand Counted Paper Ballots in 2008*, TIKKUN, Apr. 10, 2006, http://www.tikkun.org/magazine/specials/article.2006-04-10.1693298872.

new machines explained that she simply did not think that leasing was an option because it had never been offered.[40] In another interview, an official at one of the largest voting machine manufacturers confirmed that state and county officials around the country believed that purchases were the standard way to make full use of their HAVA grants.[41]

The moment of congressional action in 2002 provided a chance to change this attitude and an opportunity for many states and counties to switch from purchasing to leasing. Demand was about to rise dramatically, and the market for voting machines could have shifted toward leases and away from outright purchases. Unfortunately, the structure and timing of HAVA grants squandered this opportunity.

Because funds for upgrading voting machines were available only once—and had to be spent before the 2006 deadline—states could not save money for gradual upgrades. Rather, HAVA incentivized states to spend large amounts of money in long-lasting ways and disincentivized hedging against technological change via short-term leases. As the Texas "Best Practices Guide" for county officials states, leasing "may not be for everyone, especially since this is a onetime allotment of funding from the federal government. Accordingly, some counties may choose to go ahead with a direct purchase of all the hardware and a license agreement for all the software."[42]

Meanwhile, for the producers of voting machines, HAVA was immediately recognized as "an unprecedented sales opportunity."[43] The major players in the market at the time of the Act's enactment were aware that the massive national-scale funding could only be spent for a limited time and that winning market share would depend primarily on their ability to sell quickly. Thus, "there was little incentive to develop 'better' machines and every incentive to sell as many machines as possible."[44] These conditions made it difficult for new players to enter the market quickly enough to compete and have entrenched a preexisting oligopoly in the voting machine market. By encouraging purchase through its strict spending deadline, HAVA wasted an opportunity for a longer-lasting solution to the problem of outdated voting machines.

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40. Telephone Interview with Barbara Howard, Assistant County Clerk, Alpine County, Cal. (July 7, 2006).

41. Telephone Interview with Dick Jablonski, Vice President of Fin., Election Sys. & Software, Inc. (Apr. 25, 2006).

42. Memorandum from Roger Williams, Tex. Sec'y of State, to All Interested County Officials 2 (Mar. 10, 2005), http://www.sos.state.tx.us/elections/hava/pdf/leasepurchase_v6.pdf.

43. Warren Stewart, *Do You Know How Your Vote Will Be Counted?*, WASH. SPECTATOR, Mar. 2, 2006, *available at* http://www.commondreams.org/views06/0302-29.htm.

44. *Id.*

IV. A LESSON FOR NEXT TIME

It might appear at first that this Comment's central argument proves too much—that it is unreasonable to blame HAVA for exacerbating the purchasing trend because states acquired election equipment by purchase even before the Act was passed in 2002.[45] But this criticism misses the fact that upgrades of voting machinery *of any kind* before the 2000 election were few and far between.[46]

My argument—that leases are preferable to purchases—takes as its baseline the fact that an infusion of election spending existed to spur upgrades in the first place. Leases admittedly may *not* make economic sense when upgrades are infrequent (as before 2000): in times of low demand, machines will be produced to order only after a purchaser has been found, and thus lease price is likely to approach purchase price. By contrast, in times of high demand, it becomes possible to produce machines before committed purchasers have been found (because the chances of landing short-term customers are higher), and lease prices thus drop. For this reason, offering machinery for short-term leases is only attractive in high-demand periods;[47] to become a viable long-term strategy, the switch to leasing requires a high-demand jumpstart. HAVA, I believe, was an opportunity for such a jumpstart.

A half-century from now, today's state-of-the-art touch-screen machines may seem as outdated (and perhaps even as exclusionary) as lever machines seem to New Yorkers today. Because the latest round of machinery is being purchased all at once, it will likely mature all at once; the need for a machinery upgrade will again be national in scope, and states may again turn to Congress for funding. In other words, there will likely be a "next time."

When that next time comes around, Congress should look to the lessons learned in implementing HAVA. Congress could require that upgrade funding be spent only for leases and could impose a maximum term length. It could incentivize leasing by providing larger sums to states that agreed to acquire by lease. Or it could simply facilitate leasing by dispensing money over time. In this way, Congress could truly make the concept of outdated voting machines "a part of our history, not our future."[48]

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45. *See supra* notes 40-41 and accompanying text.

46. Telephone Interview with Dick Jablonski, *supra* note 41.

47. *Id.*

48. H.R. REP. NO. 107-329, at 32 (2001).