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One Person, No Vote - How State Courts after Bush v. Gore Ensure Uniform Interpretation of Voter Intent Statutes without Unnecessary Voter Disenfranchisement

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**ONE PERSON, NO VOTE? HOW STATE COURTS
AFTER *BUSH V. GORE* ENSURE UNIFORM
INTERPRETATION OF VOTER INTENT
STATUTES WITHOUT “UNNECESSARY”
VOTER DISENFRANCHISEMENT**

David Odegard*

INTRODUCTION

On May 16, 2008, the New Mexico Attorney General’s office replied to a request from Secretary of State Mary Herrera asking whether a portion of New Mexico’s voter intent statute was inconsistent with the Help America Vote Act (HAVA).¹ The Assistant Attorney General answered in the affirmative and further declared that the New Mexico statute would be vulnerable to an equal protection challenge because of its failure to ensure uniform application of New Mexico’s statute.² The specific portion of the New Mexico statute at issue allows a vote to be counted when the “judges for the precinct unanimously agree that the voter’s intent is clearly discernable.”³ The response from the Attorney General found the section at hand to be “virtually indistinguishable from the Florida standard at issue in *Bush v. Gore*⁴ and raises the same [equal protection] concerns.”⁵ The New Mexico Supreme Court heard the case on an emergency writ of mandamus.⁶ In its opinion, the New Mexico Supreme Court applied HAVA and rejected the contention that the New Mexico

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1. Letter from the Office of the Att’y General, State of N.M., to Mary Herrera, Sec’y of State and Jeff Steinborn, N.M. State Representative, 2008 WL 2204552, at *1 (May 16, 2008) [hereinafter Att’y General Letter].

2. *Id.* at *2.

3. NMSA 1978, § 1-1-5.2 (2010).

4. 531 U.S. 98 (2000).

5. Att’y General Letter *supra* note 2, at *2.

6. *See State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶¶ 11–12, 203 P.3d 94, 97.

law was invalid because it lacked the uniformity required by *Bush v. Gore*.⁷

Voter intent statutes are adopted in order to assist local governments and election administrators in uniformly construing each voter's intent while disenfranchising as few voters as possible.⁸ In New Mexico, election administrators use an optical-scan ballot, where the voter either fills in an oval with a pencil or a machine fills in the oval.⁹ The mark is then read by a machine, which tabulates the votes for each candidate.¹⁰ The tabulator machine, however, is made so as only to read those specific marks inside specific areas and will reject ballots without those marks, whether or not a voter's intent is clearly discernable.¹¹ Courts have recognized that voter intent can be determined whether or not a vote is made in the specific fashion required by a vote tabulator.¹² States have therefore chosen various paths to balance the goal of having uniform ballots while at the same time minimizing voter disenfranchisement when the intent of the voter is clear.¹³

Part I of this comment examines how New Mexico has balanced uniformity and disenfranchisement in light of *State ex rel. League of Women Voters v. Herrera*, while Parts II and III compare New Mexico's method for discerning voter intent to other states' methods. Part I.A reviews the requirements of uniformity from both HAVA and *Bush v. Gore*, which guided the New Mexico Supreme Court's decision in *League of Women Voters*.¹⁴ In this case, the defendant, Secretary of State Mary Herrera, relied on a letter from the Attorney General that argued part of New Mexico's voter intent statute was unconstitutional, in light of federal law, because it did not create the requisite uniformity.¹⁵ Part I.B, in turn, examines how the New Mexico Supreme Court's decision interprets *Bush v. Gore* as requiring a different balance of uniformity and voter disen-

7. *See id.* ¶ 15, 203 P.3d at 97.

8. *See infra* Part I.B.1.

9. *See* Lonna Rae Atkeson, R. Michael Alvarez & Thad E. Hall, *Assessing Electoral Performance in New Mexico Using an Ecosystem Approach*, at ii, available at http://www.pewcenteronthestates.org/report_detail.aspx?id=58623; NMSA 1978, § 1-9-7.1 (2010).

10. *See* NMSA 1978, § 1-9-7.1

11. NMSA 1978, § 1-1-5.2(A) (2010).

12. *See, e.g., In re Primary Election Ballot Disputes* 2004, 2004 ME 99, ¶¶ 22–24, 857 A.2d 494, 501–502.

13. *See League of Women Voters*, 2009-NMSC-003, ¶ 28, 203 P.3d at 100–101 (listing states with different and similar statutes voter-intent statute).

14. *Id.* ¶ 2, 203 P.3d at 95.

15. *Id.* ¶ 5, 203 P.3d at 96.

franchisement than the Secretary of State and Attorney General.¹⁶ This Part will then look at how the New Mexico Supreme Court supports that balance by looking at the language of HAVA along with what the New Mexico Supreme Court considers to be similar state statutes.¹⁷

Reliance on those “similar” state statutes, however, is misplaced, either because of the differences in the construction of the other state statutes, or because of the differences in the interpretations of those state statutes. Therefore, Part II examines more closely state statutes that the New Mexico Supreme Court cites in *League of Women Voters*, as well as other state statutes that have been analyzed in state caselaw and are helpful in discerning the differences between New Mexico’s statute and the statutes that the New Mexico Supreme Court cites.¹⁸ Part II.A reviews three state statutes (Missouri, Alaska, and Iowa) that are constructed differently than the New Mexico statute, while Part II.B focuses on a cited Montana statute that has been interpreted to require a different balance of uniformity than New Mexico’s statute.

Even though the statutes from other states cited in *League of Women Voters* are not necessarily supportive of the type of balance between uniformity and voter disenfranchisement adopted by the New Mexico Supreme Court, there is still support for the validity of New Mexico’s statute. Part III examines three other state statutes, Maine, Wisconsin, and New York, which are varied in their balancing of uniformity and disenfranchisement to show that although the New Mexico Supreme Court relied on incorrect statutes, the New Mexico statute’s balance between uniformity and the risk of voter disenfranchisement is well within the varied application of state statutes nationally. Based upon this examination, this article concludes that the New Mexico statute would survive a challenge based on HAVA or the U.S. Supreme Court’s decision in *Bush v. Gore*.

I. STATE EX REL. LEAGUE OF WOMEN VOTERS V. HERRERA

New Mexico’s voter intent statute has four subsections that describe when hand-tallied paper ballots are to be counted:

- (B) For paper ballots that are hand-tallied, a vote shall be counted if:
 - (1) the ballot is marked in accordance with the instructions for that ballot type;

16. *See infra* at 80.

17. *See infra* at 80.

18. *League of Women Voters*, 2009-NMSC-003, ¶ 28, 203 P.3d at 100.

- (2) the preferred candidate's name or answer to a ballot question is circled;
- (3) there is a cross or check within the voting response area for the preferred candidate or answer to the ballot question;
- or
- (4) the presiding judge and election judges for the precinct unanimously agree that the voter's intent is clearly discernable.¹⁹

The Secretary of State, in her letter to the Attorney General, was concerned with the last provision, subsection (B)(4).²⁰ So on September 30, 2008, the New Mexico Secretary of State promulgated an amendment to 1.10.12.15(c) of the New Mexico Administrative Code requiring that an unclearly marked ballot be counted only if the voter has placed a cross or a check within the voting response area.²¹ The wording in the code's amendment was similar to most of the voter intent statute, except it that essentially requires county clerks and election administrators to ignore the catchall provision, subsection (B)(4).²² Secretary Herrera believed that enforcing subsection (B)(4) was inconsistent with federal requirements and would make an election vulnerable to a challenge on constitutional equal protection grounds.²³

The League of Women Voters of New Mexico ("the League") believed the Secretary of State's amendment to the administrative rule was contrary to New Mexico's voter intent statute.²⁴ So eleven days before the election, the League filed an emergency petition for writ of mandamus to direct Secretary Herrera to enforce subsection (B)(4).²⁵ The League claimed that a refusal to enforce subsection (B)(4) would unnecessarily disenfranchise the voters of New Mexico.²⁶ The Secretary of State, how-

19. NMSA 1978, § 1-1-5.2 (2010). The fourth section, subsection (B)(4) of the statute, which can be considered the catchall provision because it allows for vote markings not enumerated elsewhere in the statute, was added to the statute as an amendment in 2007. See 2007 N.M. LAWS 337 § 11. Throughout this article, the catchall provision, NMSA 1978, § 1-1-5.2(B)(4), will be referred to as (B)(4).

20. Att'y General Letter, *supra* note 2, at *1.

21. Emergency Petition for Writ of Mandamus at ¶ 10; New Mexico *ex rel.* League of Women Voters of New Mexico v. Herrera, 2009-NMSC-003, ¶ 5, 203 P.3d 94, 96.

22. See *League of Women Voters*, 2009-NMSC-003, ¶ 5, 203 P.3d at 96.

23. *Id.* ¶ 6, 203 P.3d at 96.

24. *Id.* ¶ 4, 203 P.3d at 96.

25. *Id.* ¶ 3, 203 P.3d at 95.

26. *Id.* ¶ 4, 203 P.3d at 95. The League claimed that the regulation failed to comply with the statute in two ways: "First, the regulation includes specific, narrow typographical or pictorial definitions . . . that are contrary to the clear intent of the Legislature . . ." Emergency Petition for Writ of Mandamus ¶ 11. The League rea-

ever, believed that enforcement of subsection (B)(4) would be contrary to federal law and used HAVA and *Bush v. Gore* to defend her actions.²⁷ Secretary Herrera's reason for declining to enforce subsection (B)(4) stems from an advisory letter from the Attorney General that warned that the subsection was unconstitutional.²⁸ The letter found subsection (B)(4) to be "inconsistent with HAVA and vulnerable to challenge on constitutional equal protection grounds" because New Mexico's method for determining voter intent is virtually indistinguishable from the standard that was held to be unconstitutional in *Bush v. Gore*.²⁹

A. Applicable Federal Law

1. *Bush v. Gore*

Secretary Herrera believed that New Mexico's catchall provision, subsection (B)(4), negated the possibility of a uniform, statewide interpretation of voter intent because of the Supreme Court's opinion in *Bush v. Gore*.³⁰ In *Bush v. Gore*, the U.S. Supreme Court neither announced a uniform standard for a recount nor identified a statutory standard.³¹ The petition to the U.S. Supreme Court requested that the Court determine whether the use of manual recounts without specific standards violates the Equal Protection and Due Process Clauses of the Fourteenth Amend-

soned the amendment was a sign the New Mexico Legislature anticipated that a ballot would be marked in numerous ways and not necessarily as the ballot instructions required. *Id.* ¶ 5; *see also id.* ¶ 8 ("The amendment indicates a legislative intent not to require a voter to mark any particular form of 'cross' or 'check' in the voting response area in order for a vote to be counted By incorporating no specific definition of terms, the Legislature indicated its intent that the terms be used in their ordinary sense."). "Second, the regulation makes no provision at all to count votes that are required to be counted pursuant to subparagraph B(4) of Section 1-9-4.2" *Id.* ¶ 12.

27. *Id.* ¶ 6, 203 P.3d at 96.

28. *Id.* ¶ 5, 203 P.3d at 96.

29. *Id.* ¶ 6, 203 P.3d at 96 (internal quotation marks omitted).

30. *See id.*

31. *See generally* *Bush v. Gore*, 531 U.S. 98 (2000) (deciding against a recount in Florida in the 2000 election). With *Bush v. Gore*, the Supreme Court ended the 2000 Presidential election controversy by preventing the recount in Florida. *Id.* at 110. The case originated in the Florida court system, where it was held that a legal vote is one in which there is a "clear indication of the intent of the voter." *Id.* at 102. The Florida Supreme Court ordered the recount of thousands of ballots and determined that the circuit court in Florida could order canvassing boards and public officials to conduct a recount of any undervote. *Id.* at 102–103. An undervote occurs when one voter intentionally or unintentionally fails to vote for one or more races on a ballot. Chavez v. Brewer, 214 P.3d 397, 401 n.4 (Ariz. App. 2009).

ment.³² The Supreme Court found that a manual recount without specific standards did indeed violate the Equal Protection Clause, but specifically left the question of which requirements were necessary to satisfy equal protection up to the states.³³

The U.S. Supreme Court requires minimum standards because without them a state could allow disparate treatment among counties.³⁴ The U.S. Supreme Court held that a lack of uniformity dilutes the influence of some citizens and enhances the influence of others, which “is hostile to the one man, one vote basis of our representative government.”³⁵ The Court stated that “where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards . . . there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied.”³⁶ The U.S. Supreme Court explained that the variances by the Florida Supreme Court’s order were indicative of a failure by the court to meet those minimal procedural safeguards.³⁷

The Supreme Court recognized that there was no federal constitutional right to vote for electors for the President of the United States, and it is state legislators that choose how those electors are chosen.³⁸ When the right to vote is vested in the people of a state, the Supreme Court declared, “the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”³⁹ Therefore, the U.S. Supreme Court had to decide whether the Florida Supreme Court had adopted recount procedures “consistent with its obligation to avoid arbitrary and disparate treatment of the members of its electorate.”⁴⁰

32. *Bush*, 531 U.S. at 103.

33. *Id.*

34. *Id.* at 106–107.

35. *Id.* at 107 (quoting *Moore v. Ogilvie*, 394 U.S. 814, 819 (1969)).

36. *Id.* at 109.

37. *Id.* at 107, 109. There were three examples of the Florida Supreme Court’s ratification of the Florida statute that showed the failure to meet minimal procedural safeguards. First, the Florida Supreme Court mandated a recount without further standards, which ratified the disparate treatment by allowing each county to use varying standards to determine a legal vote. *Id.* at 107. Second, the Florida Supreme Court did not specify who would recount the ballots. *Id.* at 109. Finally, the Florida Supreme Court ignored the fact that some counties required recounts of all ballots as opposed to just undervotes. *Id.* at 107–108.

38. *Id.* at 104.

39. *Id.*

40. *Id.* at 105.

While the U.S. Supreme Court allows state courts to resolve voter intent disputes, each state must do so on the basis of a set of uniform standards.⁴¹ Florida has a general requirement that all legally cast votes be counted based on the intent of the voter and leaves it to the Florida Supreme Court to be the ultimate authority as to whether a vote can be counted.⁴² The U.S. Supreme Court found this general requirement unobjectionable, but believed more specifics were required.⁴³ According to the Court, the state also had to have a set of uniform rules, based on recurring circumstances that went beyond the general requirement so as to help determine the intent of a voter.⁴⁴ Therefore, for a state to succeed against an equal protection challenge, a state's voter intent statute must create a level of uniformity in the administration of an election that sets out a procedure based on past practices that explains what types of voter intent will be counted in an election.

Stating in broad terms that a statute violates the Equal Protection Clause because it values one person's vote over another unless there are uniform standards—but without actually enumerating those minimum standards—has expansive implications.⁴⁵ The U.S. Supreme Court was prevented from being more specific because Florida's statute lacked even basic uniformity.⁴⁶ Nevertheless, the requirement of uniform standards must be followed by states when determining voter intent.

41. *See id.* at 106–109.

42. *See id.* at 105–106.

43. *Id.* As an illustration, the Supreme Court reasoned that it is not the voter himself being recounted and reviewed. *Id.* at 106. Rather, the item being scrutinized is the object the voter marked. *Id.* Testimony from lower courts found that in Florida ballots could vary not just from county to county, but also from recount team to recount team all in the same county. *Id.* at 106.

44. *Id.* at 105–106.

45. *See* RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM Baker v. Carr to Bush v. Gore* 65–66 (2006). Years after the opinion, there are questions regarding whose right was being protected by the Supreme Court in *Bush v. Gore*. *Id.* at 66. Hasen argues that it was not a voter's right to cast a vote, but instead the candidate's right to ensure that their votes were counted equally. *Id.* If it is the right of the candidate, then the analysis of treating a voter equally is not for the purpose of protecting the voter, thus creating questions as to the purpose of HAVA. However, the Supreme Court has stated its intent to ensure that each voter is treated with equal dignity. *See Bush*, 531 U.S. at 104.

46. HASEN, *supra* note 45, at 65–66.

No doubt, the most important reason [to give a vague standard] to the Court was the fact that the Florida Supreme Court had instructed the individuals conducting the manual recounts to judge ballots to discern the “intent of the voter,” but [the Florida Supreme Court] had failed to formulate uniform rules to determine such intent, such as whether to count as a valid vote a ballot whose chad is hanging by two corners.

2. The Help America Vote Act (HAVA)

In response to *Bush v. Gore* and the requirement of only minimum standards, Congress enacted the HAVA⁴⁷ to address lingering concerns about uniformity and to protect the integrity of the electoral process after *Bush v. Gore*.⁴⁸ HAVA does not define what constitutes a vote.⁴⁹ HAVA's legislative purpose is to create minimum standards for election administration and should not be construed to prevent a state from establishing stricter requirements as long as they are not inconsistent with federal requirements.⁵⁰ Thus, HAVA is a floor and the statute's language is clear that states retain wide latitude in carrying out these basic requirements.⁵¹ Congress clearly intended to give states the discretion to define what constitutes a vote, and the legislative history of HAVA further underscores states' latitude in supervising and implementing elections.⁵² HAVA's need for uniform and minimum statewide standards rests on consistent application geographically within a given state.⁵³

However, among its new regulations, HAVA requires a computerized statewide voter registration system,⁵⁴ creates a program to encourage college students to participate in the electoral process,⁵⁵ and sets federal voting standards.⁵⁶ The new federal voting standards include requirements allowing voters to verify their vote and mandating that voters be able to change or correct an error.⁵⁷ With respect to voter intent, HAVA requires statewide "uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote."⁵⁸

Id.

47. 42 U.S.C. § 15481 (2006).

48. Ray Martinez III, *Greater Impartiality in Election Administration: Prudent Steps Toward Improving Voter Confidence*, 5 ELECTION L.J. 235, 240 (2006).

49. See generally 42 U.S.C. § 15481 (failing to define a vote).

50. State *ex rel.* League of Women Voters v. Herrera, 2009-NMSC-003, ¶ 25, 203 P.3d 94, 99–100.

51. See *id.* ¶ 25, 203 P.3d at 100.

52. *Id.* ¶ 26, 203 P.3d at 100.

53. See *id.* ¶ 27.

54. 42 U.S.C. § 15483 (2006).

55. *Id.* § 15521.

56. *Id.* § 15481.

57. *Id.* § 15481(a)(1)(A).

58. *Id.* § 15481(a)(6). Some have disputed whether this has gone far enough. For example:

The statute legislated no legal redress for voters who are wrongfully excluded from the voter rolls nor any criminal or civil penalties for officials who actually violate a person's right to vote. There are no real teeth in the statute when it comes to defending voting rights against government misconduct.

B. New Mexico Supreme Court's Decision in State ex rel. League of Women Voters v. Herrera

On October 23, 2008, the League of Women Voters filed an emergency writ of mandamus with the New Mexico Supreme Court urging the court to require Secretary Herrera to enforce subsection (B)(4), which permits ballots to be hand tallied when there is unanimous agreement that the voter's intent is clearly discernable.⁵⁹ On October 28, 2008, the New Mexico Supreme Court expedited oral arguments and issued the requested writ.⁶⁰ The legal question here was whether or not subsection (B)(4) is within the spirit of the law as enunciated by Congress in HAVA, and by the U.S. Supreme Court in *Bush v. Gore*.⁶¹

The New Mexico Supreme Court found that the uniform standards needed in *Bush v. Gore* to ensure equal protection could be met while still enforcing subsection (B)(4).⁶² Furthermore, the New Mexico Supreme Court found that HAVA does not exclude subsection (B)(4) because it sets minimal uniformity standards while leaving deference to states to safeguard against voter disenfranchisement.⁶³ Therefore, the court's issuance of a writ of mandamus to the Secretary of State to enforce the statute was both necessary to protect a great public interest and appropriate to prevent voter disenfranchisement in the 2008 election.⁶⁴

Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 563 (2004).

59. *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 3, 203 P.3d 94, 95.

60. *Id.* ¶ 7, 203 P.3d at 96. First, the New Mexico Supreme Court considered whether the League had standing to bring an action in mandamus and whether it was an appropriate remedy in this case. *Id.* ¶ 11, 203 P.3d at 97. According to the Supreme Court, courts in New Mexico had the discretion to grant private parties standing to "vindicate the public interest in cases presenting 'issues of great public importance.'" *Id.* (quoting *State ex rel. Segó v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975, 979 (1974)). Here, the court stated that determining whether a person's vote is valid rose to the necessary level of importance and that establishing rules on how to determine if a vote is valid was of even greater importance; therefore, the League had the necessary standing to bring the writ. *Id.* ¶ 11, 203 P.3d at 97. The court also rooted its power in the New Mexico Constitution to issue writs of mandamus "against all state officers," N.M. CONST. art. VI, § 3, and stated that "[m]andamus is appropriate to compel state officers to perform a statutory duty." *Id.* ¶ 12, 203 P.3d at 97. The court stated that the Secretary of State is a state officer and she must follow the Election Code. *Id.*

61. *Id.* ¶ 10, 203 P.3d at 97.

62. *Id.* ¶ 22, 203 P.3d at 99.

63. *Id.* ¶ 31, 203 P.3d at 101.

64. *Id.* ¶ 32, 203 P.3d at 101.

1. Balancing Uniformity and the Risk of Voter Disenfranchisement

The Secretary of State argued that the catchall provision, subsection (B)(4), although a state standard, could be interpreted differently throughout the state and thus would be a violation of equal protection.⁶⁵ The New Mexico Supreme Court rejected the Secretary of State's argument and held subsection (B)(4) not to be a violation of equal protection because New Mexico's statute provides more uniformity than the Florida statute in *Bush v. Gore* and is therefore easily distinguishable from that case's holding.⁶⁶ The New Mexico Supreme Court reasoned that Florida's election law violated equal protection principles because "local election officials were to discern the intent of the voter, without anything more specific."⁶⁷ The court distinguished the current case because the guidelines in New Mexico "provide clear context and guidance for local election officials."⁶⁸ As an example, New Mexico's Supreme Court found uniformity in the requirement that the election board be unanimous in a finding of voter intent.⁶⁹ This was not the case in *Bush v. Gore*, where Florida had no requirement that election judges reach unanimous agreement and allowed counties to use different standards for determining voter intent.⁷⁰ Uniformity in the New Mexico statute was obtained because all of the standards laid out in the statute, as minimal as they are, are applicable to every county.⁷¹

But uniformity was not the New Mexico Supreme Court's only concern. The court stated that exact uniformity across the state would disre-

65. *Id.* ¶ 19, 203 P.3d at 98.

66. *See id.* ¶ 18, 203 P.3d at 98. Even though Justice Bosson reviewed *Bush v. Gore*, he claimed it was of limited assistance. *Id.* The New Mexico Supreme Court recognized that the U.S. Supreme Court in *Bush v. Gore* limited its holding to the narrow circumstances of that particular situation because of the complex nature of election processes. *Id.* ¶ 16, 203 P.3d at 98 (quoting *Bush v. Gore*, 531 U.S. 98, 109 (2000)). Indeed, the U.S. Supreme Court painstakingly worked to limit the precedential weight of *Bush v. Gore*. *Id.* ¶ 17, 203 P.3d at 98. Nevertheless, the New Mexico Supreme Court noted that many scholars and other courts have used *Bush v. Gore* to challenge voting systems, to review recount procedures, as well as to determine voter intent; therefore, the New Mexico Supreme Court seemed to suggest there must be some precedential weight to *Bush v. Gore* regardless of the limits the Supreme Court placed on it. *Id.*

67. *Id.* ¶ 16, 203 P.3d at 97 (internal quotation marks omitted) (quoting *Bush*, 531 U.S. at 105–106).

68. *Id.* ¶ 18, 203 P.3d at 98. The court expected the Secretary of State to follow the statute and regulations "and . . . [to] make a forceful effort to achieve uniformity in interpreting ballots." *Id.* ¶ 19, 203 P.3d at 98.

69. *Id.* ¶ 18, 203 P.3d at 98.

70. *Id.* ¶ 18, 203 P.3d at 98 (citing *Bush*, 531 U.S. at 106–107).

71. *Id.*

gard the discretion that local officials need in order to “guard against [voter] disenfranchisement.”⁷² Furthermore, the court questioned how the Secretary of State would be able to capture every valid expression of voter intent using only machines.⁷³ The court stated, “An overly mechanical or formulaic approach might lead to unnecessary disenfranchisement of voters who mark their ballot in ways not accounted for in official guidelines, but which nonetheless, to the human eye, would appear as clear expressions of voter intent.”⁷⁴

Therefore, the court found that the “hypothetical possibility that future violations *may* occur is an insufficient basis for striking down Subsection (B)(4)” for a failure to allow exact uniformity when balanced against this risk of voter disenfranchisement.⁷⁵ The court found that subsection (B)(4), in conjunction with a set of examples from the Secretary of State in the administrative code, demonstrated the type of uniformity that the U.S. Supreme Court found lacking in *Bush v. Gore*.⁷⁶

2. Sufficiency Under HAVA

The New Mexico Supreme Court also found that enforcement of the statute is consistent with HAVA.⁷⁷ HAVA requires “that states adopt uniform and nondiscriminatory standards that define what constitutes a vote and what will be counted as a vote.”⁷⁸ The court read this section to require a “basic level of consistency” for how local officials interpret a ballot as a valid expression of voter intent.⁷⁹ Thus, the court found that HAVA’s legislative history shows bipartisan support for allowing state officials to retain discretion in carrying out elections and rejecting national codification of the entire process.⁸⁰

72. *Id.* ¶ 19, 203 P.3d at 98.

73. *Id.* ¶ 21, 203 P.3d at 99.

74. *Id.* The court was concerned that machines are programmed to recognize only specific markings, and the machine will fail to read valid expressions of voter intent that should be counted in an election. *Id.* According to the New Mexico Supreme Court, the result of refusing to allow humans to review ballots for voter intent is unnecessary disenfranchisement. *Id.*

75. *Id.* ¶ 19, 203 P.3d at 98.

76. *Id.* ¶ 22, 203 P.3d at 99.

77. *Id.* ¶ 23, 203 P.3d at 99.

78. *Id.* (quoting 42 U.S.C. § 15481(a)(6) (2006)) (internal quotation marks omitted).

79. *Id.* ¶ 25, 203 P.3d at 99.

80. *Id.* ¶ 26, 203 P.3d at 100. As an example, the court quotes Senator Chris Dodd as stating that “nothing in this bill establishes a Federal definition of when a voter is registered or how a vote is counted,” *Id.* (citing 148 CONG. REC. S10488 (2002)), and that “[s]tates ought to have the flexibility of deciding what system works best for them.” *Id.* (citing 148 CONG. REC. S10412, S10421 (2002)).

The New Mexico Supreme Court held that subsection (B)(4) “provides sufficient assurances that county clerks in various parts of the state will interpret voter’s intent in a uniform and nondiscriminatory fashion. It is a clear, statewide standard, and therefore meets the requirements of HAVA.”⁸¹ As further support for its conclusion that the New Mexico statute is valid under HAVA, the court analyzed what it considered to be similar statutes that had been upheld in other states.⁸² Therefore, The Court concluded that the voter intent statute with subsection (B)(4) met the basic requirements of uniformity set forth in *Bush v. Gore* and HAVA because the essential elements of uniformity were present in the statute.⁸³

II. RELIANCE ON OTHER STATE STATUTES

Beyond proclaiming that each person must have an equal vote,⁸⁴ the U.S. Supreme Court has never voiced a standard for determining a valid vote.⁸⁵ This has led to states choosing varying election methods, and although those methods are slightly different from state to state, they can be divided into two categories: a voter intent standard and a ballot instruction standard. A voter intent standard allows a ballot to be counted where the intent of the voter can be determined.⁸⁶ This first category of determining a ballot’s validity focuses on whether or not the voter’s intent is clear, rather than whether the voter followed the directions.⁸⁷ New

81. *Id.* ¶ 27, 203 P.3d at 100 (internal quotation marks omitted).

82. *Id.* ¶ 29, 203 P.3d at 101.

83. *See id.* ¶ 25, 203 P.3d at 100–101. *Bush v. Gore* dealt specifically with disparate treatment within a single state and found ballots could vary not only from county to county, but also from one recount team to a different recount team in the same county. *See Bush v. Gore*, 531 U.S. 98, 104–106 (2000).

84. *See Reynolds v. Sims*, 377 U.S. 533 (1964).

85. *See HASEN, supra* note 45, at 65–66. Some scholars found it appropriate for the Court in *Bush v. Gore* to have articulated an unmanageable standard because the Court’s holding was unprecedented and not in line with any social consensus about the proper standard to use in the recounting of ballots. *Id.* Furthermore, there was no real public opinion before this controversy. *Id.* However, voting is a fundamental right and as states diverge, there may be a time in which the Supreme Court will have to review the treatment of voter intent and determine whether or not the disparate treatment of one state’s citizens compared to another rises to a level that requires further intervention by the Supreme Court. *Id.*

86. *See League of Women Voters*, 2009-NMSC-003, ¶ 28, 203 P.3d at 100–101.

87. *See, e.g., NMSA 1978*, § 1-1-5.2 (2010). Several other states use similar language and follow similar guidelines, even if the statute is phrased in the negative. *League of Women Voters*, 2009-NMSC-003, ¶ 28, 203 P.3d at 100–101. Phrased in the negative means that instead of saying “the voter’s intent will be considered,” some statutes state that “ballots where voter intent *cannot* be determined do *not* count.” *Id.*

Mexico's statute with subsection (B)(4), is an example of a voter intent standard⁸⁸ because it the subsection creates a focus on the voter's actions. The second method, in contrast, focuses on whether or not the voter followed the ballot instructions,⁸⁹ which creates more uniformity across a state because it limits the available and valid expressions of voter intent.⁹⁰

The New Mexico Supreme Court found that New Mexico's voter intent statute, with subsection (B)(4), gives sufficient guidance to meet the minimum uniformity requirements set forth by HAVA and *Bush v. Gore*. As proof, the New Mexico Supreme Court cited to other states' statutes that it believed were similar to the New Mexico statute.⁹¹ The statutes cited by the New Mexico Supreme Court are distinguishable from New Mexico's statute in one of two ways: first, the foreign statutes are constructed to be based on the ballot's instructions rather than on the voter's intent, or second, the statutes are construed to produce more uniformity than is required by New Mexico's statute.

A. *Dissimilar Constructions*

The New Mexico Supreme Court's opinion concluded that the New Mexico statute did not violate equal protection, in part, because states with similar laws have not been overturned on equal protection grounds.⁹² But the statutes that the New Mexico Supreme Court considered differ in that they lack a catchall provision like subsection (B)(4) and instead use other ways to balance the risk of voter disenfranchisement with a uniform counting procedure.⁹³ As demonstrated below, the New Mexico Supreme Court improperly relied on dissimilar state statutes because, unlike New Mexico's statute, those statutes focus on the ballot's instructions.

1. Missouri

Missouri follows a ballot instruction standard.⁹⁴ Its statute varies from New Mexico's statute because it does not possess the catchall provi-

The implementation of a negative voter intent standard is still the same as one in the affirmative. *See id.*

88. *League of Women Voters*, 2009-NMSC-003, ¶ 28, 203 P.3d at 100–101.

89. *See, e.g.*, MO. ANN. STAT. § 115.456(3)(1) (West 2006) (“The judges shall count votes marked substantially in accordance with this section and section 115.456 when the intent of the voter seems clear.”).

90. *See id.*

91. *League of Women Voters*, 2009-NMSC-003, ¶ 29, 203 P.3d at 101. The court cited to voter intent statutes from: Arizona, Connecticut, Idaho, Indiana, Maine, Montana, and Utah. *Id.* ¶ 28, 203 P.3d at 100–101.

92. *Id.* ¶ 30, 203 P.3d at 101.

93. *See, e.g.*, MO. ANN. STAT. § 115.456(3)(1) (West 2006).

94. *Id.*

sion that New Mexico uses to balance uniform statutory interpretation and voter disenfranchisement. Rather, Missouri's statute requires voter intent to be determined by set criteria.⁹⁵ The Missouri statute's limited criteria includes only distinguishing marks adjacent to the name of the candidate or issue, or the circling of the name of the candidate or issue preference.⁹⁶ This creates a very limited list of allowable marks.

Missouri courts have found the statute sufficient to guard against disenfranchisement without a catchall phrase by being very specific with the marks allowed on different ballots. Missouri's statute enumerates how to determine voter intent by the type of voting system.⁹⁷ For instance, when there is a recount for punch card ballots, the statute has a list of guidelines to follow that focus on the state of the ballot.⁹⁸ Likewise, for tabulators and paper ballots, the statute has a list of criteria that a voter's mark has to meet before it can be analyzed for voter intent.⁹⁹ The first allowable mark is one "in the printed oval or divided arrow adjacent to the name of the candidate or issue preference."¹⁰⁰ The second allowable mark is one next to the candidate's name or ballot issue,¹⁰¹ and the third allowable mark is when the name of the candidate or issue preference is circled.¹⁰² However, there is no regulation that explains what a distinguishing mark adjacent to the name of the candidate or preference means.¹⁰³ Nevertheless, the Missouri Court of Appeals found that ballots with marks made in, over, or around the candidate's party affiliation

95. *See id.*

96. *Id.*

97. *Id.*

98. *Id.* § 115.456(1). The guidelines are used when inspecting the ballots. *Id.* It includes appointing a bipartisan team to inspect all ballots to look for things like hanging chads. *Id.* For example, if the team finds the chad is hanging by less than two corners, it shall be removed. *Id.*

99. *See id.* § 115.456(2)–(3). A similar statute also requires an election judge's initials on the ballot unless it can be determined that the lack of initials is due to the judge's mistake. *Id.* § 115.457. However, while lower courts have determined that unauthenticated ballots should be counted even in absence of some sort of obvious irregularity, *Dolan v. Powers*, 260 S.W.3d 376, 383 (Mo. Ct. App. 2008), the Missouri Court of Appeals determined that there should be some discovery on whether there was a mistake or irregularity. *Id.* at 385.

100. *Id.* § 115.456(2)(3)(b)(a). Missouri's Secretary of State revised standards for optical scan ballots after HAVA so as to fulfill the requirements of *Bush v. Gore*, which mandated uniform statewide standards "beyond vague directives to determine the intent of the voter." *Dolan*, 260 S.W.3d 376, 380 (2008) (quoting *Bush v. Gore*, 531 U.S. 98, 105–106 (2000) (internal quotations marks omitted)).

101. *Id.* § 115.456(2)(3)(b)(b).

102. *Id.* § 115.456(2)(3)(b)(c).

103. *Dolan*, 260 S.W.3d at 381.

rather than directly in the oval are sufficient to be considered adjacent to the candidate and therefore are valid expressions of voter intent.¹⁰⁴

While these instructions guard against discrimination by allowing valid expressions of voter intent outside of those enumerated in a list, Missouri has found ways to ensure statewide uniform application. Stray marks in Missouri are not sufficient to show voter intent.¹⁰⁵ Furthermore, stray marks are distinguished from other marks that are closely related to marks enumerated in the Missouri statute.¹⁰⁶ The Secretary of State in Missouri adopted this approach when she omitted a provision from the election code that would have made hesitation marks a showing of voter intent.¹⁰⁷ Thus when an office had an oval filled in for one candidate and a mark in another candidate's oval for the same office, as long as that mark is infinitesimal, there is not a clear overvote,¹⁰⁸ and the voter's intent can be determined.¹⁰⁹

2. Alaska

The Alaska ballot instruction standard is similar to Missouri's statute in that it specifies the allowable ballot markings. Specifically,

A voter may mark a ballot only by filling in, making "X" marks, diagonal, horizontal, or vertical marks, solid marks . . . [and] [t]he mark specified in (1) of this subsection shall be counted only if it is substantially inside the oval provided, or touching the oval so as to indicate clearly that the voter intended the particular oval to be designated.¹¹⁰

The Alaska Supreme Court, in *Edgmon v. State* analyzed this statute and made determinations on the validity of stray lines and whether or not they are valid expressions of voter intent.¹¹¹

Edgmon centers on an election for a state representative position where the State Division of Elections ("Division") certified a primary election in which the incumbent won by a margin of one vote after the

104. *Id.* at 382.

105. *Id.* at 382–83. States with ballot instruction standards are not in agreement on whether stray marks can show voter intent or what is included in a stray mark. *See Edgmon v. State*, 152 P.3d 1154, 1158 (Alaska 2007).

106. *See Dolan*, 260 S.W.3d at 381.

107. *Id.* at 382.

108. An overvote occurs "when a voter marks more names than there are persons to be elected to the office." *Edgmon v. State*, 152 P.3d 1154, 1155 (Alaska 2007) (citation and internal quotations marks omitted).

109. *Dolan*, 260 S.W.3d at 382–83.

110. ALASKA STAT. ANN. § 15.15.360(a)(1)(5) (West 2003).

111. *Edgmon*, 152 P.3d at 1155.

Division declared six ballots ineligible to be counted.¹¹² In relying on the state's rules for counting ballots, the Division determined three of the ballots ineligible because of an overvote.¹¹³ The challenger appealed the Division's decision on those three ballots to the Supreme Court of Alaska.¹¹⁴

The Supreme Court of Alaska had to interpret the state's voter intent statute to determine if these three ballots with stray markings elicited a voter's intent and were therefore an overvote.¹¹⁵ Alaska's statute follows the ballot instruction standard, but by reading the statute's provisions together, the court found that an overvote occurs only when the second mark on the ballot shows intent to vote for a second candidate.¹¹⁶ The court rejected the view that having marks in more ovals for a contest than allowed creates an overvote that negates the entire ballot; instead, while the statute finds voter intent to be important, it requires a correct mark *as well as* clear voter intent.¹¹⁷

Two of the ballots in *Edgmon* that the Division claimed to be overvoted "had completely shaded ovals next to [the challenger's] name but also contained tracings that touched the edge of the ovals next to [the incumbent's] name."¹¹⁸ The court reviewed each voter's entire ballot, wherein each voter filled in the ovals for the other races and relied on each ballot to show each voter's choice and each voter did not, in any race, trace an oval to indicate his or her intent.¹¹⁹ The court reasoned then, that these votes, in which the ovals were completely shaded next to the challenger and traced next to the incumbent, showed the voter's intention to vote for the challenger because each voter had nowhere else on the ballot traced an oval to show his or her intent.¹²⁰

The Alaska court followed similar reasoning for the third ballot claimed to be overvoted. This ballot had an X in the oval next to the incumbent's name and had a line that crossed out the challenger's name and the oval next to the challenger's name.¹²¹ Again, reviewing the entire

112. *Id.*

113. *Id.*

114. *Id.* Alaska courts review questions of statutory interpretation using an independent review standard by deciding "the rule of law that is most persuasive in light of precedent, reason, and policy." *Id.* at 1156 (quoting *Guin v. Ha*, 591 P.2d 1281, 1284 n.6 (Alaska 1979)) (internal quotation marks omitted).

115. *Id.* at 1157.

116. *Id.* at 1157.

117. *Id.* at 1158.

118. *Id.* at 1155.

119. *Id.* at 1158.

120. *Id.*

121. *Id.*

ballot, the court found the voter had indicated his choice for the other races using an X in the oval next to the candidate's name.¹²² In the contested race, the incumbent's oval had an X while the challenger had a line through his name and his oval.¹²³ The court reasoned that the line through his name was a "stray marking" and showed intent to vote against that candidate.¹²⁴ Alaska's statute requires a mark to be counted only if it is substantially in the designated area.¹²⁵ However, Alaska seems to be moving toward an interpretation of their statute that places more emphasis on a voter's intent rather than on the ballot's instructions. As recently as the 2010 U.S. Senate election controversy, where Senator Lisa Murkowski was defeated in the primary but ran and won as a write-in candidate, the Supreme Court of Alaska restated that a voter's intent is paramount.¹²⁶ The court maintained its strong and consistent policy of construing statutes in order to effectuate voter intent even though Alaska's statute—unlike New Mexico's statute—has a finite list of valid voter intent expressions.¹²⁷ In Alaska's most recent electoral controversy, Joe Miller, who defeated Senator Murkowski in the Republican Primary, challenged several thousand write-in ballots that misspelled Senator Murkowski's name.¹²⁸ The Supreme Court of Alaska stated its reluctance to disenfranchise voters and affirmed it would not discount such votes because of a mere mistake.¹²⁹ The Alaska Supreme Court found that "abbreviations, misspellings, or other minor variations in the form of the name of a candidate [would] be disregarded in determining the validity of the ballot, so long as the intention of the voter [could] be ascertained."¹³⁰

122. *Id.*

123. *Id.*

124. *Id.* While the court seemed to reason that while there is an intent to vote against the challenger, it should also be considered a stray marking and thus should not be interpreted because it is not a proper mark. *Id.*

125. See ALASKA STAT. ANN. § 15.15.360 (West 2003). This is unlike New Mexico's statute, where the catchall provision only requires the judges to agree unanimously on the voter's intent, no matter where the mark is or what the mark may be. See NMSA 1978, § 1-1-5.2 (2010).

126. *Miller v. Treadwell*, 245 P.3d 867, 869 (Alaska 2010).

127. See *id.*; *supra* text accompanying 110 (the relevant Alaska statute specifically states that a voter may mark a ballot only by "filling in, making 'X' marks, diagonal, horizontal, or vertical marks, solid marks . . . that are clearly spaced in the oval opposite the name of the candidate").

128. *Miller*, 245 P.3d at 872.

129. *Id.* at 869.

130. See *id.* at 869. This appears to be more like New Mexico's voter intent standard than other standards that have a finite list of allowable markings. Compare NMSA 1978, § 1-1-5.2 (2010), with MO. ANN. STAT. § 115.456(3)(1) (Alaska's statute,

3. Iowa

Iowa, a state with a voter intent law similar to Missouri and Alaska,¹³¹ has found that by failing to make a specific mark, the voter violated “a mandatory provision of the election law in casting the ballot.”¹³² Iowa’s statute requires that instructions on the ballot describe “the appropriate mark to be used by the voter.”¹³³ For each paper ballot, the voting mark “may be a cross or check which shall be placed in the voting targets opposite the names of candidates.”¹³⁴

In *Taylor v. Central City Community School District*, the Iowa Supreme Court addressed the issue of a proper mark in an election to issue bonds and a tax levy to pay for school district improvements.¹³⁵ There were four ballots disputed by the opponents of the measure.¹³⁶ The directions for answering the ballot in question were printed on each ballot and required voters to fill the oval target to the left of the words “Yes” or “No.”¹³⁷ The recount board rejected one ballot on the grounds that the voter’s intent was unclear since the mark was outside the voting target and therefore did not meet the statute’s ballot instruction standard.¹³⁸ The board counted the remaining three ballots because the voters had followed the instructions.¹³⁹ The final vote count from the recount board had the measure failing by one vote.¹⁴⁰ The board’s decision was appealed on the basis that the voter’s intent in the final ballot was not discernable and therefore three “No” votes should have been included in the final count.¹⁴¹

The Iowa Supreme Court recognized the comprehensive set of rules and procedures that governed elections in that state, citing statutes that

although appearing facially like Missouri’s ballot instruction standard, operates much more similarly to New Mexico’s statute).

131. See MO. ANN. STAT. § 115.456; ALASKA STAT. ANN. § 15.15.360 (West 2003).

132. *Taylor v. Cent. City Cmty. Sch. Dist.*, 733 N.W.2d 655, 660 (Iowa 2007) (citation and internal quotation marks omitted).

133. IOWA CODE ANN. § 49.92 (West 1997).

134. *Id.*

135. 733 N.W.2d at 656.

136. *Id.*

137. *Id.* The directions specifically stated, “[F]or an affirmative vote on any question upon this ballot, mark the word ‘YES’ like this [example of a filled oval]. For a negative vote, make a similar mark in the box marked ‘NO.’” *Id.*

138. *Id.* at 657.

139. *Id.* at 656.

140. *Id.* at 661. The “Yes” votes totaled 59.89 percent in an election where 60 percent was needed to pass the measure. *Id.* The first ballot had the word “NO” entirely blacked out by the voter whereas the other three had the “O” in the word “NO” filled in. *Id.* at 656.

141. *Id.* at 657.

addressed the form of the ballot and that instructed officials on how to adapt the notice on the ballot to show voters where to mark.¹⁴² The constitutionality of those instructions was not challenged.¹⁴³ However, the statutory instructions¹⁴⁴ require voters “to mark their ballots by placing an ‘X,’ checking, or filling in the oval target next to the word ‘Yes’ or ‘No.’”¹⁴⁵ By failing to make one of those particular marks, the voter violated “a mandatory provision of the election law in casting the ballot.”¹⁴⁶ So the Iowa Supreme Court did not consider whether the intent of each voter was clear in the disputed ballots because the each voter had not made the correct mark.¹⁴⁷ Notably, for the court to review the voter’s intent the challengers needed to make a direct constitutional challenge to the statutory requirement of ballot instructions.¹⁴⁸

4. Comparison to New Mexico’s Statute

In New Mexico, the purpose of the catchall provision is to prevent a voter’s intent from being invalidated because of a simple mark, and without the catchall provision there would be unnecessary disenfranchisement.¹⁴⁹ Missouri, Iowa, and Alaska have more stringent voting statute requirements than New Mexico.¹⁵⁰

A statutory ballot instruction standard like Missouri’s, which does not contain a catchall provision, is similar to what the New Mexico Attorney General and Secretary of State were suggesting in *League of Women Voters*.¹⁵¹ However, the New Mexico Supreme Court rejected that suggestion, concluding that the absence of a catchall provision puts too much emphasis on uniformity thereby creating an overly mechanical approach

142. *Id.* at 659.

143. *Id.* at 660.

144. *See* IOWA CODE ANN. §§ 49.46, 49.42 (West 1997).

145. *Taylor*, 733 N.W.2d at 659.

146. *Id.* at 660 (internal quotation marks omitted).

147. *Id.* at 660–61. Although the Iowa Supreme Court did not get to the issue of whether the intent of the voters was clear, the court recognized “the possibility that the voters in this case intended to vote ‘No’ on each ballot, particularly on the three ballots where the voters filled in the letter ‘o’ in the word ‘No’ and left the oval target immediately to the left of the word “No” blank.” *Id.*

148. *See id.* (“[T]he goal in an election contest is to give effect to the venerable democratic right to vote Yet, our legislature has established certain basic voting requirements that we are obligated to enforce in the absence of a successful constitutional challenge to the statute.”).

149. NMSA § 1978, 1-1-5.2 (2010).

150. *Compare* NMSA § 1-1-5.2, with IOWA CODE ANN. § 49.92 (West 1997), MO. ANN. STAT. § 115.456 (West 2006), and ALASKA STAT. ANN. § 15.15.360 (West 2003). (New Mexico’s statute is the only one of the four with a catchall provision).

151. *See* Att’y General Letter, *supra* note 2, at *1.

that might lead to unnecessary disenfranchisement.¹⁵² Because part of the New Mexico Supreme Court's ruling relied on the validity of Missouri's statute being valid under federal law, the lack of a catchall provision in the Missouri statute lends very little support to the validity to the New Mexico statute.¹⁵³

Furthermore, the New Mexico Supreme Court's reasoning would mean that Missouri, Iowa, and Alaska's statutes would lead to unnecessary disenfranchisement in their application because they are stricter in their uniformity requirements. Each state's constructions lack a catchall voter intent provision and that may be irrelevant—the courts of these other states have implied a voter intent requirement even though they do not fit exactly in the ballot instruction scheme. Moreover, the statutes have not been challenged in the Supreme Court that the balancing that these three states have struck between disenfranchisement and uniformity violate the holding in *Bush v. Gore* or HAVA principles. Therefore, these statutes are not as helpful in determining whether New Mexico's statute violates equal protection as suggested by the New Mexico Supreme Court in *League of Women Voters* because each statute is constructed differently and is still enforceable in that state.

B. A Similarly Constructed Statute, but a Dissimilar Interpretation

The Montana statute has a similar construction to New Mexico's voter intent-based statute. Subsection (B)(4) of the New Mexico statute states that a hand-tallied ballot will be counted if “the presiding judge and election judges for the precinct unanimously agree that the voter's intent is clearly discernable.”¹⁵⁴ Montana's statute similarly requires that each questionable vote on a ballot be set aside and reviewed by a counting board.¹⁵⁵ If a majority of the counting board members agree that the voter's intent can be clearly determined, “the vote is valid and must be counted according to the voter's intent.”¹⁵⁶

Nevertheless, the Montana statute has been interpreted by its state supreme court in a way that puts more emphasis on uniformity than the New Mexico Supreme Court claims is required by *Bush v. Gore* and HAVA.¹⁵⁷ The Montana Supreme Court seemed to suggest that voters had to follow the ballot's specific guidelines irrespective of the voter's

152. State *ex rel.* League of Women Voters v. Herrera, 2009-NMSC-003, ¶ 21, 203 P.3d 94, 99.

153. *Id.* ¶ 28, 201 P.3d at 100–101.

154. NMSA 1978, § 1-1-5.2 (2010).

155. MONT. CODE ANN. § 13-15-206(4)(a)(i) (2009).

156. *Id.* § 13-15-206(4)(a)(ii)

157. See *Big Spring v. Jore*, 2005 MT-64, ¶ 34, 326 Mont. 256, 109 P.3d 219.

intent.¹⁵⁸ Quoting an earlier case, the Montana Court in 2004 reaffirmed the challenge of attempting to determine voter intent:

So many questions arise from the contested ballot itself as to the intentions of the voter, and the confusion that results from attempting to find a consistency in his method of voting that it becomes clear that his ballot should be rejected The voter's intent and choice do not clearly appear.¹⁵⁹

The Montana Supreme Court requires that when a voter's intent is analyzed, the state must ensure that the statute is being applied with strict uniformity across the state.¹⁶⁰

In a 2005 case, *Big Spring v. Jore*, the Montana Supreme Court had evidence that several disputed ballots had markings similar to those found on ballots that had been disqualified, as well as others that had been counted.¹⁶¹ In this challenge, several ballots contained a possible overvote where one of the areas was marked with an X.¹⁶² The candidate-challenger claimed that those ballots could not be counted because the elector's choice could not be clearly determined.¹⁶³ On five of the disputed ballots, the ovals for both candidates had been filled in creating an overvote, but one of the ovals on each ballot had also been marked with an X.¹⁶⁴ While other states have used an X as a revocation of intent,¹⁶⁵ Montana has a history of using an X as a method to identify the elector's choice.¹⁶⁶ However, there were reports that an X in the voting area may have been treated differently from county to county.¹⁶⁷

158. *See id.* (stating that the ballots in question were spoiled "because filling in two ovals in the same designated area and then placing an X in one oval" did not follow voter instructions).

159. *Id.* ¶ 33, 109 P.3d at 326 (quoting *Rennie v. Nistler*, 217 Mont. 412, 417, 735 P.2d 1124, 1127 (1987)).

160. *Id.* ¶ 28, 109 P.3d at 225.

161. *Id.* ¶ 26, 109 P.3d at 225.

162. *Id.* ¶ 25, 109 P.3d at 224.

163. *Id.* ¶ 30, 109 P.3d at 225.

164. *Id.* ¶ 30, 109 P.3d at 225–26.

165. *See, e.g., In re Primary Election Ballot Disputes 2004*, 2004 ME 99, ¶ 28, 857 A.2d 494, 503.

166. *See Big Spring*, 2005-MT-64, ¶ 31, 109 P.3d at 226.

167. *Id.* One of the candidates compounded the difficulty with determining voting intent. That candidate, Cross, ran advertisements that stated, "Cross out the competition and vote for the Cross that matters." *Id.* ¶ 32, 109 P.3d at 226. The Montana Supreme Court discounted both the ballots that made an "x" in the oval for Cross and invalidated five ballots for his opponent with similar markings. *Id.* ¶ 36, 109 P.3d at 227.

Because voters are specifically instructed to request a replacement ballot if they make a mistake, the Montana Supreme Court questioned the fairness of counting these votes in light of the voters who correctly completed the ballot.¹⁶⁸ In one county, for example, sixty-seven individuals obtained a new ballot.¹⁶⁹ The court determined that if they had allowed the ballots of those voters who did not follow the law to be counted, the law-abiding voters would receive unequal treatment because they followed the instructions.¹⁷⁰ The court therefore invalidated the improperly completed ballots to ensure uniform application of the statute.¹⁷¹ In sum, despite having a statute that focuses on the voter's intent, Montana's Supreme Court has established rules similar to those required in a state with a strict ballot instruction standard.

The New Mexico Supreme Court's interpretation of New Mexico's statute, compared to Montana, is much less rigid. The Montana Supreme Court was concerned that a failure to strictly interpret Montana's statute may lead to unequal treatment.¹⁷² The New Mexico Supreme Court, on the other hand, simply expects the Secretary of State to follow the statute and regulations and to "make a forceful effort to achieve uniformity in interpreting ballots."¹⁷³ And they further found that exact uniformity across New Mexico would disregard the discretion that local officials need in order to "guard against disenfranchisement."¹⁷⁴ Therefore, even though the Montana statute closely resembles New Mexico's statute, Montana has more rigidly interpreted the uniformity required by its statute. Thus, Montana's statute, because of its interpretation, does not advance the proposition that the New Mexico statute is within the requirements of *Bush v. Gore* and HAVA, as the New Mexico Supreme Court held it did.

C. Summary

Statutes like those in Missouri require the voter's intent to be determined using a set of criteria but lack a catchall provision as found in New

168. *Id.* ¶ 34, 109 P.3d at 226.

169. *Id.*

170. *Id.*

171. *Id.* ¶ 36, 109 P.3d at 227.

172. *See id.* ¶ 34, 109 P.3d at 226.

173. *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 19, 203 P.3d 94, 98.

174. *Id.* "An overly mechanical or formulaic approach might lead to unnecessary disenfranchisement of voters who mark their ballot in ways not accounted for in official guidelines, but which nonetheless, to the human eye, would appear as clear expressions of voter intent." *Id.* ¶ 21, 109 P.3d at 99.

Mexico's statute.¹⁷⁵ But the courts in states like Missouri have found valid expressions of voter intent, even though such expressions are not enumerated in the statute and are without a catchall section like subsection (B)(4).¹⁷⁶ On the other hand, courts in states such as Montana have strictly construed statutes similar to New Mexico's statute to count a mark only if it is substantially in the designated area.¹⁷⁷ However, in New Mexico, the whole point of the catchall provision is to prevent a voter's intent from being unnecessarily invalidated solely because of an "incorrect" mark.¹⁷⁸ As a result, the New Mexico Supreme Court's comparison of statutes from other states, which the court considers similar to New Mexico's statute, does not necessarily support the contention that New Mexico's statute has the correct balance between uniformity and voter disenfranchisement, either because of the way those state statutes are written or because of how those statutes are construed.¹⁷⁹

III. THE VARIATION IN STATE STATUTES NATIONALLY

Even though the statutes cited in *League of Women Voters* do not directly support the New Mexico Supreme Court's interpretation of the New Mexico statute, the variance in voter intent statutes and caselaw nationally is so great that any statute, including New Mexico's, is valid so long as the statute meets the minimal federal requirements of HAVA and *Bush v. Gore*. Scholars have noted that the Supreme Court in *Bush v. Gore* failed to give the lower courts the tools to determine the validity of their voter intent statutes.¹⁸⁰ However, *Bush v. Gore* and HAVA have, at a minimum, set basic uniformity guidelines for states to follow.¹⁸¹ Nevertheless, because the guidelines are incomplete, it leaves state courts to undertake different approaches to deal with voter intent questions.¹⁸²

The New Mexico Attorney General noted that most states have amended their statutes to "incorporate more precise criteria for determining whether a vote should be counted."¹⁸³ However, states like New

175. See MO. ANN. STAT. § 115.456(3)(1) (West 2006).

176. See, e.g., *Dolan v. Powers*, 260 S.W.3d 376, 381–82 (Mo. Ct. App. 2008)

177. See *supra* notes 158–171 and accompanying text.

178. See NMSA 1978, § 1-1-5.2 (2010); *League of Women Voters*, 2009-NMSC-003, ¶ 19, 203 P.3d at 98.

179. *League of Women Voters*, 2009-NMSC-003, ¶ 28, 203 P.3d at 100–101 (citing MONT. CODE ANN. § 13-15-206(4)(a)(ii) (2009), MO. ANN. STAT. § 115.4563(3)).

180. See HASEN, *supra* note 45, at 66.

181. *League of Women Voters*, 2009-NMSC-003, ¶ 25, 203 P.3d at 100.

182. HASEN, *supra* note 45, at 66.

183. Att'y General Letter, *supra* note 2, at *2 n.1.

York and Maine, which are referenced in a footnote in *Bush v. Gore*,¹⁸⁴ take different approaches to balance uniformity with voter disenfranchisement.¹⁸⁵ Yet, assuming HAVA is a floor, these states demonstrate that New Mexico's statute falls within the range of other states' requirements and therefore does not violate HAVA's requirements.¹⁸⁶

Even though the statutes the New Mexico Supreme Court cites are not necessarily of assistance, as this Part will show, states balance uniformity against voter disenfranchisement so differently that it would be hard for a statute like New Mexico's voter intent statute, which meets the federal minimums of HAVA and *Bush v. Gore*, to be found unconstitutional. Therefore, New Mexico's statute is at least inside the spectrum of valid state statutes and should not violate federal law.

A. *Maine*

Maine's voter intent standard, although similar to states with standards that focus more on the ballot instructions,¹⁸⁷ places the determination of voter intent above the instructions printed on the ballot.¹⁸⁸ Maine also removes the courts from the process for general elections, but does give state courts jurisdiction over recount appeals in primary elections.¹⁸⁹ Furthermore, Maine requires that only when the number of valid challenged ballots affects the outcome of the election do the courts need to determine voter intent.¹⁹⁰

In the primary for the 2008 general election, the Supreme Court of Maine was not presented with any appeals where the result rested on the court's determination of voter intent.¹⁹¹ However, in the primary for the 2004 general election, there were two races where the Maine Supreme Court's determination of voter intent changed the outcome of the elec-

184. *Bush v. Gore*, 531 U.S. 98, 124, n. 2 (2000).

185. See N.Y. ELECTION LAW § 9-112(1) (McKinney 2009); ME. REV. STAT. ANN. tit. 21-A, § 696(4) (2009).

186. See *League of Women Voters*, 2009-NMSC-003, ¶ 25, 203 P.3d at 99.

187. See, e.g., *Edgmon v. State*, 152 P.3d 1154, 1155 (Alaska 2007) (explaining the requirement to follow the ballot instructions).

188. See ME. REV. STAT. ANN. tit. 21-A, § 696(4) (2009) ("If a voter marks the voter's ballot in a manner that differs from the instructions at the top of the ballot but in such a manner that it is possible to determine the voter's choice, then the vote for the office or question concerned must be counted.").

189. *In re Primary Election Ballot Disputes 2004*, 2004 ME 99, ¶ 17, 857 A.2d 494, 500.

190. *Id.* ¶ 20, 857 A.2d at 501.

191. See *In re Primary Election Ballot Disputes 2008*, 2008 ME 17, 955 A.2d 216.

tions.¹⁹² In the 2004 Senate District Twenty Primary, the Maine Supreme Court found that a check mark was valid because the courts could discern the voter's choice.¹⁹³ Four ballots were being disputed for that reason.¹⁹⁴ One had three marks, two in the indicator boxes and one check mark next to a candidate's name.¹⁹⁵ The court looked to the significance of the marking within the indicator box as well as the proximity of a mark to a candidate's name as evidence of the voter's choice.¹⁹⁶ When the court reviewed the voter's entire ballot, it found that the mark was consistent with the manner in which the voter cast his votes.¹⁹⁷ The second ballot contained four marks.¹⁹⁸ This voter had placed three Xs in the indicator boxes on the ballot.¹⁹⁹ The fourth mark was in the indicator box for a write-in candidate, but no name was written.²⁰⁰ Instead, the voter drew an arrow from the mark he had made in the write-in indicator box and pointed the arrow at another candidate in the same race.²⁰¹ The court determined the voter's intent was to choose the printed candidate rather than a write-in candidate.²⁰² Both the proximity of the mark to the candidate's name and the fact that the voter had clearly voted for another candidate in the race, indicated that the voter intended the mark as a vote for the candidate.²⁰³

In that same case but in regards to different ballots, the court declared that it would not count a vote if multiple interpretations were equally reasonable.²⁰⁴ The court made this declaration in reference to two ballots from the same race in which two voters had scribbled over votes.²⁰⁵ In one instance, two ovals were darkened but one of the ovals also had scribble marks over it.²⁰⁶ The court believed that it was most reasonable to interpret the scribbles as a revocation of the voter's choice rather than

192. *See generally In re Primary Election Ballot Disputes 2004*, 2004 ME 99, 857 A.2d 494 (reversing the outcome of two elections).

193. *Id.* ¶ 22, 857 A.2d at 501.

194. *Id.* ¶ 21, 857 A.2d at 501.

195. *Id.* ¶ 22, 857 A.2d at 501.

196. *Id.* ¶ 23, 857 A.2d at 502.

197. *Id.* ¶ 24, 857 A.2d at 502.

198. *Id.* ¶ 25, 857 A.2d at 502.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* ¶ 26, 857 A.2d at 502. The court reasoned the voter did not see the indicator for boxes for that candidate and instead chose the closest indicator box he could find; the voter used the arrow to clarify the choice. *Id.*

203. *Id.*

204. *Id.* ¶ 29, 857 A.2d at 503.

205. *Id.* ¶ 27, 857 A.2d at 502–503.

206. *Id.*

an attempt to emphasize the voter's choice.²⁰⁷ In fact, the voters had scribbled over a separate race as a revocation.²⁰⁸ Thus the court reasoned that the oval that was cleanly darkened was the voter's intent while the oval scribbled over was not.²⁰⁹ The court used similar reasoning with the fourth ballot and found that scribbles over an X were a clear attempt to revoke the vote cast.²¹⁰

Despite possible ballot ambiguities, the Maine Supreme Court decided that it would allow a ballot to be counted if the ballot had multiple markings because of an attempt to revoke the extraneous mark or marks.²¹¹ After the ballots were counted, a Maine House District race was two votes apart and there were three votes that were contested.²¹² For two of those ballots, there was a question of whether there was an overvote.²¹³ The court, interpreting the statute as placing ultimate significance on the indicator box as the space for expressing voter choice, found that marking an indicator box is the ultimate act of voting.²¹⁴ Therefore, when a voter marks more boxes than allowed and makes no attempt to revoke with extraneous marks, the vote is invalid.²¹⁵ However, when it is unclear whether there is an overvote and two boxes or ovals are marked differently, the court looks at the rest of the ballot.²¹⁶

In one instance of different marks, a single dot appeared in one oval while the other oval was fully darkened by the voter.²¹⁷ The Maine Supreme Court looked at the rest of the ballot and determined that the voter demonstrated his intent to comply with the instructions on the ballot and fully darkened other ovals when voting.²¹⁸ The court found that the dot in the oval could not be reasonably interpreted as anything other than a stray mark and could therefore count the vote by determining the voter's intent.²¹⁹

Maine's statute requires that the courts determine voter intent only when the number of valid challenged ballots affects the outcome of the

207. *Id.* ¶ 29, 857 A.2d at 503.

208. *Id.*

209. *Id.*

210. *Id.* ¶ 30, 857 A.2d at 503.

211. *See id.*

212. *Id.* ¶ 31, 857 A.2d at 503.

213. *Id.* ¶¶ 32–35, 857 A.2d at 503–504.

214. *Id.* ¶ 33, 857 A.2d at 504.

215. *Id.* ¶ 34, 857 A.2d at 504.

216. *Id.* ¶ 35, 857 A.2d at 504.

217. *Id.* ¶ 36, 857 A.2d at 504.

218. *Id.*

219. *Id.*

election.²²⁰ If that is the case, the court will not count a vote if multiple interpretations are equally reasonable.²²¹ Thus, the Maine courts put a high value on avoiding voter disenfranchisement by restricting judicial review to only instances where one or a few voters' intent will decide an election.

B. Wisconsin

Wisconsin's voter intent statute²²² has been interpreted similar to Maine's in that although the legislature has defined several marks that can be used to signify the voter's intent, the courts do not see the list as exhaustive.²²³ For the vote to be valid, there must be a mark on the ballot and the mark must show the voter's intent to qualify as a valid vote.²²⁴ However, in Wisconsin, courts do not want to deprive voters of the opportunity to have their votes counted.²²⁵ So Wisconsin voting statutes are construed to give effect to the intent of the voter notwithstanding a failure to comply with provisions governing elections.²²⁶ Therefore, a ballot legally cast by a voter cannot be rejected if it expresses the will of the voter.²²⁷

For example, one voter in a school district referendum had attempted to erase a slash through the "no" vote.²²⁸ The trial court deferred to the board's finding of an inability to determine the voter's intent.²²⁹ However, the Wisconsin Court of Appeals reversed, holding that a mark that might be a partially erased vote is still a mark when there is no other vote cast on that ballot issue.²³⁰ The Wisconsin Supreme Court affirmed the finding that the mark was not intended to invalidate a vote²³¹ and was made in a qualified place on the ballot by a mark enumerated in the statute.²³² Wisconsin's statute, although in appearance restrictive, is distin-

220. *Id.* ¶ 20, 857 A.2d at 501.

221. *Id.* ¶ 29, 857 A.2d at 503.

222. WIS. STAT ANN. §7.50 (West 2011).

223. *See* Roth v. LaFarge Sch. Dist. Bd. of Canvassers, 2002 WI App 309, ¶ 9, 259 Wis. 2d 349, 354–55, 655 N.W.2d 471, 473.

224. Roth v. LaFarge Sch. Dist. Bd. of Canvassers, 2004 WI App 6, ¶ 17, 268 Wis. 2d 335, 345, 677 N.W.2d 599, 604.

225. *Id.* ¶ 19, 677 N.W.2d at 605.

226. *Id.* ¶ 22, 677 N.W.2d at 606.

227. *Id.* ¶ 23, 677 N.W.2d at 606.

228. *Id.* ¶ 16, 677 N.W.2d at 604.

229. *Id.* ¶ 4, 677 N.W.2d at 601.

230. *Id.* ¶ 9, 677 N.W.2d at 603.

231. *Id.* ¶ 29, 677 N.W.2d at 607.

232. *Id.* ¶ 27, 677 N.W.2d at 607. The New Mexico Supreme Court rejects Wisconsin's approach because uniformity similar to Wisconsin would disregard the discretion

guishable from a statute such as Maine's statute. Wisconsin courts have instead decided to put more emphasis on protecting voter disenfranchisement. Instead of restricting judicial review as done by Maine, Wisconsin courts want to find a voter's intent.

C. *New York*

New York has seen several cases in the last few years that have interpreted the state's voter intent statute as focusing on the ballot instructions.²³³ For example, some of the caselaw has invalidated votes when the voter failed to provide the proper information on a ballot,²³⁴ while other votes were invalidated when the voters did not reside in the county in which they voted.²³⁵ New York has also decided whether to invalidate a voter's intent when a ballot has an unintentional stray mark,²³⁶ food stains,²³⁷ overvotes,²³⁸ marks with blue ink,²³⁹ marks in the proper place but of a type not identified in the statute,²⁴⁰ and intentional marks not in the proper place.²⁴¹

In New York, overvotes, which are those votes where it is impossible to determine voter intent, are consistently found to invalidate one

that local officials need in order to "guard against [voter] disenfranchisement." *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 19, 203 P.3d 94, 98. "An overly mechanical or formulaic approach might lead to unnecessary disenfranchisement of voters who mark their ballot in ways not accounted for in official guidelines, but which nonetheless, to the human eye, would appear as clear expressions of voter intent." *Id.* ¶ 21, 203 P.3d at 99.

233. *See, e.g., Carney v. Davignon*, 735 N.Y.S.2d 263, 265 (N.Y. App. Div. 2001) (invalidating ballots because they did not have the markings required by election law); *see also* N.Y. ELECTION LAW § 9-112(1) (McKinney 2009) ("The whole ballot is void if the voter (a) does any act extrinsic to the ballot such as enclosing any paper or other article in the folded ballot or (b) defaces or tears the ballot . . . (d) makes any mark thereon other than a cross X mark or a check V mark in a voting square, or filling in the voting square, or punching a hole in the voting square of a ballot intended to be counted by machine or (e) writes, other than in the space provided, a name for the purpose of voting . . .").

234. *See Carney*, 735 N.Y.S.2d at 265.

235. *See Stewart v. Chautauqua Cnty. Bd. of Elections*, 894 N.Y.S.2d 249, 252-53 (N.Y. App. Div. 2010).

236. *See Carney*, 735 N.Y.S.2d at 265.

237. *See Brilliant v. Gamache*, 808 N.Y.S.2d 728, 731 (N.Y. App. Div. 2006).

238. *See Carney*, 735 N.Y.S.2d at 265.

239. *Mondello v. Nassau Cnty. Bd. of Elections*, 772 N.Y.S.2d 693, 697 (N.Y. App. Div. 2004). The court found that because the election law did not specify the type of pen that may be used, the use of a blue pen did not invalidate the voter's intent. *Id.*

240. *See id.*

241. *See Alessio v. Carey*, 854 N.Y.S.2d 830, 832 (N.Y. App. Div. 2008).

contest but not the rest of the ballot.²⁴² Marks that traverse certain boxes that contain names, ovals, party symbols, and affiliations are included as overvotes.²⁴³ New York, however, differentiates among the types of marks, determining whether they are intentional or unintentional and whether those specific marks invalidate a ballot or a race. For example, unintentional stray marks invalidate a ballot when marks on the ballot can identify the voter no matter the number or placement of the marks,²⁴⁴ and indeed any stray marks outside the designated “voting squares” invalidate not only the race, but also the entire ballot.²⁴⁵ Similarly, when one voter made a mark in the box labeled “Democratic,” which appears outside the voting squares, the mark invalidated the entire ballot.²⁴⁶ The court noted that although voting squares include the space for a voter to mark the vote, the definition of a voting square is not limited to the box next to the candidate’s name.²⁴⁷ So if a mark is placed in a larger square containing a candidate’s name, it may invalidate the race but not necessarily the entire ballot.²⁴⁸

New York law on inadvertent marks appears inconsistent. On an absentee ballot, the New York Appeals Court found that a mark on a ballot does not render the ballot void in whole or in part when the court determines that the mark appears to be inadvertent.²⁴⁹ However, allowing inadvertent marks is contrary to other holdings that have invalidated entire ballots because of inadvertent marks.²⁵⁰ New York courts have addressed the discrepancy by differentiating marks that have the potential to identify an individual’s ballot will invalidate the ballot while others have not.²⁵¹ These other marks include inadvertent underlining or a ballot

242. *See Carney*, 735 N.Y.S.2d at 265.

243. *Alessio*, 854 N.Y.S.2d at 832.

244. *See id.* (finding an intentional mark on a ballot’s lower left-hand margin outside the voting square invalidated the entire ballot); *Carney*, 735 N.Y.S.2d at 265 (finding marks made at the top of eight of the nine voting columns on a ballot invalidated the entire ballot because the marks could have identified the voter). Similarly, a New York court has found that pen marks underlining the names of candidates to be inadvertent and allowed those ballots to be counted as long as those marks do not identify the voter. *See In re Brilliant*, 808 N.Y.S.2d at 730.

245. *See Boudreau v. Catanise*, 737 N.Y.S.2d 469, 471 (N.Y. App. Div. 2002).

246. *See In re Brilliant v. Gamache*, 808 N.Y.S.2d 728, 730 (N.Y. App. Div. 2006).

247. *Mondello v. Nassau Cnty. Bd. of Elections*, 772 N.Y.S.2d 693, 698 (N.Y. App. Div. 2004).

248. *See id.*

249. *See Mondello*, 772 N.Y.S.2d at 698–699.

250. *See, e.g., Boudreau v. Catanise*, 737 N.Y.S.2d 469, 471 (N.Y. App. Div. 2002); *Carney v. Davignon*, 735 N.Y.S.2d 263, 265 (N.Y. App. Div. 2001).

251. *See In re Brilliant*, 808 N.Y.S.2d at 730.

that has an obvious food stain.²⁵² Therefore, the inconsistency in New York's law on inadvertent marks can be explained by the state's policy to ensure that the voter stays anonymous.

The New York voter intent statute is specific in that unless the voting square is filled in, or there is a cross or a check mark in the voting square, the whole ballot is void.²⁵³ For example, in one particular case an appellate judge overruled a lower court judge and determined that an indistinguishable scribble satisfies the requirements of the statute and does not render the ballot void in whole or in part.²⁵⁴ Therefore, when a voter in New York places a mark other than a cross or a check in a voting square it will not invalidate the ballot simply because it is not one of the enumerated marks.²⁵⁵ Similarly, when a voting square contained a cross with multiple lines, which the court believes indicated an attempt to obliterate the vote, those lines did not invalidate the ballot.²⁵⁶ As such, the courts have created case law that interprets New York's statute to require a level of specificity not found in either Maine or Wisconsin's statutes. So rather than focusing on the intent of the voter, New York courts are more concerned with other issues including the anonymity of the voter as well as the instructions on the ballot.

D. Analysis of New Mexico's Statute

Like the Main Supreme Court, the New Mexico Supreme Court requires voter intent to be clear. New Mexico, though, rejects an approach similar to Wisconsin's because such uniformity would disregard the discretion that local officials need in order to "guard against voter disenfranchisement."²⁵⁷

Furthermore, although the New Mexico statute is not as specific as New York's statute, the New Mexico Supreme Court still expects the Secretary of State to enforce the statute and regulations in such a way as to achieve uniformity in interpreting ballots. In New Mexico, subsection

252. *Id.*

253. See N.Y. ELECTION LAW § 9-112(1) (McKinney 2009) ("The whole ballot is void if the voter . . . (d) makes any mark thereon other than a cross X mark or a check V mark in a voting square, or filling in the voting square, or punching a hole in the voting square of a ballot intended to be counted by machine . . .").

254. *Mondello*, 772 N.Y.S.2d at 698.

255. *See id.*

256. *See id.*

257. *State ex rel. League of Women Voters v. Herrera*, 2009-NMSC-003, ¶ 8, 203 P.3d 94, 96; *see also id.* ¶ 21, 203 P.3d 99 ("An overly mechanical or formulaic approach might lead to unnecessary disenfranchisement of voters who mark their ballot in ways not accounted for in official guidelines, but which nonetheless, to the human eye, would appear as clear expressions of voter intent.").

(B)(4) “provides sufficient assurances that county clerks in various parts of the state will interpret voter’s intent in a uniform and nondiscriminatory fashion” in order to meet the requirements of HAVA.²⁵⁸

There are marked differences in the ways various state courts have interpreted their state statutes to balance uniformity and voter disenfranchisement, and yet there has not been any involvement by the U.S. Supreme Court to assess the validity of any of these statutes or their interpretations. Because of the latitude allowed by the U.S. Supreme Court and Congress, it cannot be said that the New Mexico statute is invalid on the grounds that other state statutes vary by having more or less uniformity. With laws that focus more on uniformity than New Mexico, like Wisconsin and New York, and laws that focus more on voter disenfranchisement, like Maine, it is not possible to declare that New Mexico’s balance of uniformity and voter disenfranchisement violates HAVA or the principals set out in *Bush v. Gore*.

CONCLUSION

The New Mexico Supreme Court based the validity of New Mexico’s voter intent statute in part on the statute’s similarity to other state statutes. However, those state’s statutes, such as Missouri, as well as the caselaw interpreting those statutes, like that found in Montana, do not support that contention. This does not mean that New Mexico’s statute is invalid. Other statutes and caselaw associated with those statutes in states like New York and Wisconsin, which not cited by the New Mexico Supreme Court, are varied in their balance of uniformity and disenfranchisement. Each of those statutes is still valid so it follows that so is New Mexico’s statute. State statutes and the state court opinions interpreting those statutes, although not necessarily helpful to the New Mexico Supreme Court, have all articulated several different ways of balancing uniformity with the process of discerning voter intent.

Indeed, at some point in the future, the U.S. Supreme Court may still be called on to draw a more definitive line for state courts to follow. This will probably be done in an equal protection challenge that reviews what has worked and what has not worked for the lower courts.²⁵⁹ For now, however, the state laboratories are continuing to answer questions about balancing uniformity with voter intent. As they do, states continue to diverge in their approaches. But in some cases, those approaches lead

258. *Id.* ¶ 27, 203 P.3d at 100 (internal quotation marks omitted).

259. HASEN, *supra* note 45, at 66.

to similar results.²⁶⁰ With the intentional lack of assistance from Congress and the U.S. Supreme Court, New Mexico should continue to analyze its election administration statutes, specifically those regarding voter intent, to provide the U.S. Supreme Court with further ideas as to what works and what does not so they can make an informed decision as to whether revisit their holding in *Bush v. Gore*.

260. Compare *Big Spring v. Jore*, 2005-MT-64, 109 P.3d 219, with *League of Women Voters*, 2009-NMSC-003, 203 P.3d 94 (using different approaches, both courts found that the voter's intent was clear and counted the ballots).