

Washington Law Review

Volume 80 | Number 3

8-1-2005

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Eric Van Hagen

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Recommended Citation

Eric Van Hagen, Notes and Comments, *The Not-So-Secret Ballot: How Washington Fails to Provide a Secret Vote for Impaired Voters as Required by the Washington State Constitution*, 80 Wash. L. Rev. 787 (2005).

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THE NOT-SO-SECRET BALLOT: HOW WASHINGTON FAILS TO PROVIDE A SECRET VOTE FOR IMPAIRED VOTERS AS REQUIRED BY THE WASHINGTON STATE CONSTITUTION

Erik Van Hagen

Abstract: Secrecy in voting ensures that elections represent the true will of the people by permitting a voter to freely express his or her convictions without fear of even the most subtle form of influence, ridicule, intimidation, corruption, or coercion. Article VI, section 6 of the Washington State Constitution protects this secrecy by requiring the legislature to provide every voter with a method of voting that will secure absolute secrecy in preparing and casting his or her ballot. To that end, Washington election law requires that new technology be implemented by January 1, 2006 to provide visually impaired voters with a secret vote to the extent feasible. However, no similar provision exists for manually impaired voters. Manually impaired voters include a wide range of individuals who lack the manual dexterity to complete a paper ballot, such as amputees and individuals with cerebral palsy. Manually impaired voters must waive their constitutional right to vote in secret and instead must disclose their selections to a third party, usually in an open polling place where not only the person assisting the voter hears the selection, but so does everyone in the vicinity. Voting technology now exists and is approved for use in Washington that allows manually impaired voters to vote in secret. This Comment argues that in light of the plain language of the constitution, the framers' intent in requiring absolute secrecy, and persuasive precedent from other jurisdictions, the Washington State Constitution requires that the legislature provide for secrecy in voting to the extent feasible. By failing to provide a secret vote for manually impaired voters to the extent feasible, the Washington legislature has not complied with the requirements of article VI, section 6.

The ballot is dear to the people; for it uncovers men's faces and conceals their thoughts. It gives them the opportunity of doing what they like, and of promising all that they are asked.
— *Cicero*¹

The Washington State Constitution ensures secrecy in voting by requiring that the legislature provide all citizens with absolute secrecy when preparing and casting ballots.² The purpose of a secret vote is to counteract a “great class of evils, including violence and intimidation, improper influence, dictation by employers or organizations, the fear of

1. 1 WILLIAM FORSYTH, *LIFE OF MARCUS TULLIUS CICERO* 339 (New York, Charles Scribner's Sons, 6th ed. 1896).

2. WASH. CONST. art. VI, § 6.

ridicule and dislike, or of social or commercial injury,—all coercive influence of every sort depending on a knowledge of the voter's political action.”³ In addition, a secret vote ensures that elections represent the “free and honest expression of the convictions of every citizen.”⁴ A recent Ohio case involving alleged voting fraud perpetrated against disabled voters underscores the importance of secret voting.⁵ In 2000, Cuyahoga County in Ohio employed John Jackson to assist physically disabled voters in recording their votes.⁶ A coworker reported to the elections board that she believed Jackson marked ballots in a manner inconsistent with the voters' wishes.⁷ For example, one disabled voter said she told Jackson she wanted to vote for every Democratic candidate on the ballot,⁸ yet Jackson selected Republican presidential candidate George W. Bush.⁹ A grand jury indicted Jackson on five counts of ballot tampering.¹⁰ On the heels of this historically close presidential election,¹¹ and the 2004 Washington State gubernatorial election—the closest in United States history,¹²—fair and accurate elections have never been more important.

Article VI, section 6 of the Washington State Constitution requires that the legislature “provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.”¹³ This provision obligates the legislature to enact laws to protect and preserve voting secrecy.¹⁴ Thus, the legislature is responsible for

3. JOHN HENRY WIGMORE, *THE AUSTRALIAN BALLOT SYSTEM AS EMBODIED IN THE LEGISLATION OF VARIOUS COUNTRIES* 52 (2d ed. 1889).

4. *Id.* at 53.

5. *See State v. Jackson*, 811 N.E.2d 68, 70 (Ohio 2004) (stating that defendant was charged with five counts of vote tampering while assisting disabled voters completing their ballots).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Richard L. Berke, *Bush Barely Ahead Of Gore In Florida As Recount Holds Key To The Election*, N.Y. TIMES, Nov. 9, 2000, at A1.

12. *See* Chris McGann & Lewis Kamb, *GOP To Fight Gregoire Victory; Democrat Wins Second Recount By 130 Votes*, SEATTLE POST-INTELLIGENCER, Dec. 24, 2004, at A1.

13. WASH. CONST. art. VI, § 6.

14. *Cf. Tellevik v. 6717 100th St. S.W.*, 83 Wash. App. 366, 378, 921 P.2d 1088, 1095 (1996) (holding that WASH. CONST. art. XIX, § 1, which requires that legislature “shall protect by law from forced sale certain portion of the homestead and other property of all heads of families,” imposes duty on legislature to protect homesteads at minimum level established by constitution), *review denied*, 133 Wash. 2d 1029, 950 P.2d 476 (1998). Article VI, section 6 establishes a similar

providing voters with a voting method that will ensure absolute secrecy.¹⁵

However, despite this constitutional requirement, Washington election statutes do not include any provisions for a secret vote for manually impaired voters.¹⁶ Beginning January 1, 2006, each county must provide accessible voting technology, to the extent feasible,¹⁷ that will enable visually impaired voters to vote without the assistance of a third party.¹⁸ However, no similar provision exists for manually impaired voters.¹⁹ As a result, manually impaired voters who are unable to use the provided voting technologies must disclose their votes to a third party in order to cast their ballots.²⁰

This Comment argues that the Washington State Constitution requires that the legislature provide every citizen, including manually impaired citizens, with the ability to vote in absolute secrecy to the extent feasible.²¹ This “secrecy to the extent feasible” requirement reflects the framers’ intent and derives from (1) the plain language of the Washington State Constitution; (2) the historical context of the constitutional provision; and (3) other states’ interpretations of similar constitutional provisions.²² Because the Washington Secretary of State has now approved the use of accessible direct recording electronic (DRE) voting systems, which enable manually impaired voters to vote in secrecy,²³ the legislature must require counties to provide accessible

requirement that the legislature “shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot.” WASH. CONST. art. VI, § 6.

15. WASH. CONST. art. VI, § 6.

16. See WASH. REV. CODE § 29A.12.160(1) (2004) (providing only visually impaired voters with right to secret ballot through various devices such as Braille or audio ballot). The 2004 Revised Code of Washington contains two sections numbered 29A.12.160. One is in effect until January 1, 2006; the other is in effect after January 1, 2006. *Id.* This Comment refers to the latter.

17. See *id.* § 29A.12.160(2)–(3) (providing that secret vote for visually impaired voters can be accomplished when county upgrades voting technology and is contingent on available funding).

18. *Id.*

19. This Comment defines “manually impaired” to include any impairment of motor skills that limits manual dexterity and makes it difficult or impossible to clearly and independently complete a paper ballot, such as an optical scan or punchcard voting system. This definition includes individuals with impairments such as cerebral palsy, quadriplegia, amputation(s), and other impairments.

20. See WASH. REV. CODE § 29A.44.240 (noting that voters unable to complete their ballots may vote with assistance of third parties).

21. See *infra* Part IV.A.

22. See *infra* Part IV.A.1–3.

23. See *Am. Ass’n of Disabled People v. Shelley*, 324 F. Supp. 2d 1120, 1125 (C.D. Cal. 2004)

DREs to the extent feasible.²⁴ By neglecting to provide for manually impaired voters in the requirement that counties implement accessible technologies,²⁵ the legislature has not fulfilled its obligation to provide a secret vote to the extent feasible to every citizen as required by the Washington State Constitution.²⁶

Part I of this Comment discusses how new technologies, specifically accessible DREs, enable manually impaired voters to cast secret ballots and also provides an overview of current Washington law related to voting by disabled individuals. Part II examines the rules for interpreting the Washington State Constitution as outlined by the Washington State Supreme Court. Part III discusses article VI, section 6 of the Washington State Constitution, including the plain meaning of the provision, the historical circumstances in which it was adopted, and case law from other jurisdictions that have interpreted similar provisions. Finally, Part IV argues that the legislature's failure to sufficiently provide manually impaired voters with a secret vote violates the secrecy to the extent feasible requirement of article VI, section 6 of the Washington State Constitution.

I. WASHINGTON DOES NOT PROVIDE MANUALLY IMPAIRED VOTERS WITH A SECRET VOTE

Technology currently exists that would enable manually impaired voters to vote secretly.²⁷ The Washington Secretary of State has certified this technology for use in Washington elections;²⁸ however, current laws do not require that counties make this technology available to manually impaired voters, despite the constitutional provision securing absolute secrecy for all citizens.²⁹ Although Washington election laws provide visually impaired voters with a secret vote to the extent feasible,³⁰ no

("Only with the use of these devices [accessible DREs] may such disabled voters, for the first time, vote independently and in private.")

24. See *infra* Part IV.A.

25. See WASH. REV. CODE § 29A.12.160(1).

26. See *infra* Part IV.B.

27. See *Shelley*, 324 F. Supp. 2d at 1125 (noting that DREs enable disabled voters to vote secretly).

28. SAM REED, REPORT OF THE SECRETARY OF STATE ON THE EXAMINATION OF AN [sic] DIRECT RECORDING ELECTRONIC VOTE TALLYING SYSTEM (2003), available at http://www.secstate.wa.gov/elections/certification/JBC_HART_INTERCIVIC_eSlate3000.pdf.

29. WASH. CONST. art. VI, § 6.

30. WASH. REV. CODE § 29A.12.160(1)–(3).

similar provision exists for those who are manually impaired.³¹ Thus, manually impaired voters who are not fortunate enough to live in a county that has independently implemented accessible DRE voting systems are forced to utilize the current statutory framework and receive the assistance of a third party when voting.

A. New Voting Technology Approved for Use in Washington Allows Manually Impaired Voters to Cast Their Votes Secretly

A DRE system is a new voting technology that, for the first time, enables manually impaired citizens to vote in secrecy.³² When equipped with accessible technologies, such as “sip and puff” devices or “jelly switches,” a manually impaired voter can cast his or her vote in secret.³³ A sip and puff device allows manually impaired individuals to cast their ballots by breathing into the device.³⁴ A jelly switch is a switch roughly two inches in diameter that a manually impaired person can activate with a hand, finger, or pencil because it is sensitive to small amounts of pressure.³⁵ A disabled voter can also use a mouth stick to make selections on a DRE touchscreen.³⁶

The Washington Secretary of State has certified DRE systems that include accessible technology allowing manually impaired voters to vote in secrecy.³⁷ The Washington Secretary of State must certify a voting system before a county can use the system in a Washington election.³⁸ The Secretary may certify only those voting systems that meet specific requirements, including the requirement that the voting system secures secrecy.³⁹ Counties may choose to use any certified voting device.⁴⁰ Following the Secretary of State’s certification of DRE systems, Skamania, Yakima, Clallam, Okanogan, and Snohomish counties

31. *See id.* (providing accessible voting for blind and visually impaired voters but not manually impaired voters).

32. *See* Am. Ass’n of Disabled People v. Shelley, 324 F. Supp. 2d 1120, 1125 (C.D. Cal. 2004).

33. *Id.*

34. Am. Ass’n of People With Disabilities v. Hood, 278 F. Supp. 2d 1345, 1349 n.2 (M.D. Fla. 2003).

35. *Id.*

36. *Shelley*, 324 F. Supp. 2d at 1125.

37. REED, *supra* note 28.

38. WASH. REV. CODE § 29A.12.050 (2004).

39. *Id.* § 29A.12.080.

40. *See id.* §§ 29A.12.010–.020.

implemented DRE systems in all or some polling locations.⁴¹

B. Washington Statutes Do Not Require a Secret Vote for Manually Impaired Voters

Washington election laws do not provide manually impaired voters with a secret vote to the extent feasible.⁴² Most counties currently use optical scan ballots that require the voter to manually complete a paper ballot.⁴³ As a result, a manually impaired voter who wishes to vote at a polling place must rely on the disabled voter assistance statute that permits one official from each party or a person of the voter's choosing to assist the voter in casting his or her ballot.⁴⁴ Washington's disabled voter assistance statute does not require third persons to provide this assistance in private or in an area removed from other voters at the precinct.⁴⁵ Thus, a manually impaired voter discloses his or her choice not only to the assistants, but also potentially to others in the vicinity.⁴⁶

Washington counties have the authority to accommodate disabled voters by implementing an optional disabled voting access period.⁴⁷ Counties may provide for a disabled voting access period twenty days before the election.⁴⁸ During this time, disabled voters may vote early at locations established by the county auditor.⁴⁹ However, the disabled voting period does not require that counties make DRE technology available; therefore, the statute does not ensure a secret vote for disabled

41. See WASH. SEC'Y OF STATE, ELECTIONS: VOTING SYSTEMS, <http://www.secstate.wa.gov/elections/votingsystems.aspx> (last visited July 19, 2005) (listing voting systems used in every county, including DREs).

42. WASH. REV. CODE § 29A.44.160(1) (providing accessible voting for visually impaired voters but not manually impaired voters).

43. See WASH. SEC'Y OF STATE, *supra* note 41; see also REPORT OF THE CALTECH/MIT VOTING TECHNOLOGY PROJECT 18 (2001), available at http://www.vote.caltech.edu/media/documents/july01/July01_VTP_Voting_Report_Entire.pdf (describing how voting with optical scan ballot is similar to recording answers on standardized test).

44. See WASH. REV. CODE § 29A.44.240.

45. See *id.* (permitting assistance to disabled voters, but not requiring that assistance be given in secret or away from other voters). *But cf.* MINN. STAT. § 204C.15 (2004) (requiring that assistance to disabled voters be conducted "in as secret a manner as circumstances permit").

46. See generally *Am. Ass'n of People with Disabilities v. Hood*, 310 F. Supp 2d 1226, 1228–29 (M.D. Fla. 2004) (noting that disabled electors had to vote in public room where others may overhear their selections).

47. WASH. REV. CODE §§ 29A.46.010–.250.

48. *Id.* §§ 29A.46.030–.110.

49. *Id.* §§ 29A.46.010–.020.

voters.⁵⁰ Furthermore, the existence of a disabled voting access period is optional.⁵¹ Thus, each county has the discretion not only to decide whether to establish an access period for disabled voters,⁵² but also to decide the location and hours of this access period.⁵³

Absentee voting provides another choice for manually impaired voters.⁵⁴ An absentee ballot allows the voter to make his or her selections on a ballot that he or she receives prior to election day and then return the ballot to election officials, usually by mail.⁵⁵ Absentee voting is unlikely to provide secrecy to manually impaired voters because voters who are unable to complete a paper ballot in secrecy at a polling place would similarly be unable to complete the paper absentee ballot without assistance from another person.⁵⁶ Furthermore, absentee voting requires voters to sign the return envelope,⁵⁷ which may not be possible for manually impaired voters.

In contrast, the Washington legislature requires, to the extent feasible, that counties provide visually impaired voters with accessible technologies to secure a secret vote.⁵⁸ Beginning January 1, 2006, each polling place in Washington must have at least one voting unit that provides access to individuals who are visually impaired.⁵⁹ This can be

50. *See id.* § 29A.46.130 (requiring that “disability access voting must be conducted using disability access voting devices at locations that are acceptable and comply with federal and state access requirements”).

51. *Id.* § 29A.46.110.

52. *Id.*

53. *Id.* § 29A.46.120.

54. *Id.* § 29A.40.010 (permitting any Washington voter to vote by absentee ballot). In 2005, the Washington Legislature permitted any county to conduct elections entirely by mail. Unlike earlier versions of that bill, the bill that eventually passed the legislature makes no provisions for disabled voting. *Compare* SHB 1754, 59th Leg., Reg. Sess. (Wash. 2005), *available at* <http://www.leg.wa.gov/pub/billinfo/2005-06/Htm/Bills/House%20Bills/1754-S.htm> (requiring counties that conduct elections only by mail to also provide disabled voting access period prior to election), *with* Act of 2005, ch. 241, § 1, 2005 WASH. SESS. LAWS 241 (omitting requirement of disabled voting access period from bill that passed legislature), *available at* <http://www.leg.wa.gov/pub/billinfo/2005-06/Pdf/Bills/Session%20Law%202005/1754-S.SL.pdf>.

55. REPORT OF THE CALTECH/MIT VOTING TECHNOLOGY PROJECT, *supra* note 43, at 36.

56. *See* Am. Ass’n of Disabled People v. Shelley, 324 F. Supp 2d 1120, 1125 (C.D. Cal. 2004) (noting that DRE systems let disabled voters vote secretly and independently for first time).

57. WASH. REV. CODE § 29A.40.091.

58. *See id.* § 29A.12.160(1).

59. *Id.* The legislature enacted this law to comply with the requirements of the federal Help America Vote Act (HAVA). 42 U.S.C.A. § 15481 (West Supp. 2004). HAVA creates accessibility requirements for disabled voters, but does not require DRE systems. HAVA requires accessible voting technology for the disabled, including the visually impaired, that may come in the form of a

achieved through a voting unit that utilizes “synthesized speech, Braille, and other output methods.”⁶⁰ The legislature mitigated the cost of such an upgrade in voting technology by making compliance contingent on the availability of funding and by permitting a county to postpone compliance with the accessibility requirements until the next time the county upgrades its voting system.⁶¹ In addition, federal funding has also mitigated the costs of upgrading voting technologies.⁶² Under the Help America Vote Act (HAVA), Washington received over \$62 million from the federal government to upgrade voting technologies and improve voting access for the disabled.⁶³

In sum, Washington statutes do not provide absolute secrecy to manually impaired voters despite the technological ability to do so. New DRE voting systems accompanied with assistive technology allow voters with manual impairments to vote in secret for the first time. The Secretary of State has certified the use of these voting technologies in Washington elections, and several counties have implemented DRE systems as the exclusive voting option at polling locations for manually impaired individuals. While Washington election laws mandate a secret vote for visually impaired voters, they do not do so for manually impaired voters.

II. WASHINGTON COURTS EFFECTUATE THE FRAMERS’ INTENT WHEN INTERPRETING THE CONSTITUTION

When analyzing the meaning of a state constitutional provision, the

DRE “or other voting system equipped for individuals with disabilities at each polling place.” 42 U.S.C.A. § 15481(a)(3)(B); *see* 148 CONG. REC. S10488, S10507 (2002) (statement of U.S. Sen. Christopher Dodd) (noting that disabled voting provision of HAVA “does not require that a jurisdiction purchase a DRE to meet the accessibility requirement since jurisdictions may also choose to modify existing systems to meet the needs of the disabled voter”); Christina J. Weis, Note, *Why The Help America Vote Act Fails To Help Disabled Americans Vote*, 8 N.Y.U. J. LEGIS. & PUB. POL’Y 421 (2005). In order to comply with HAVA, the Washington legislature chose not to mandate DRE systems, but rather only to require accessible voting systems for the visually impaired that consist of Braille ballots, audio ballots or other technology. *See* WASH. REV. CODE § 29A.12.160(4). *But see* GA. CODE ANN. § 21-2-379.7(d)(4) (2003) (requiring that DRE systems be made available for disabled voters in every precinct); OHIO REV. CODE ANN. § 3506.19 (Supp. 2005) (same); R.I. GEN. LAWS. § 17-19-8.2(a) (2003) (requiring accessible voting technology for as many disabled voters as possible through state of the art technology).

60. WASH. REV. CODE § 29A.12.160(4).

61. *See* WASH. REV. CODE § 29A.12.160(2)–(3).

62. *See* 42 U.S.C.A. § 15301.

63. WASH. SEC’Y OF STATE, HAVA FUNDING SUMMARY, <http://www.secstate.wa.gov/Elections/pdf/HAVA%20Funding.pdf> (last visited July 19, 2005).

Washington State Supreme Court seeks to honor the intent of the framers of the constitution.⁶⁴ The court first examines the plain language of the provision.⁶⁵ If the plain language is clear, then no further inquiry is required.⁶⁶ If the plain language is ambiguous, Washington courts turn to extrinsic evidence such as contemporaneous events and decisions from other jurisdictions interpreting similar provisions.⁶⁷

In *Washington Water Jet Workers Ass'n v. Yarbrough*,⁶⁸ the Washington State Supreme Court applied this framework when interpreting the Washington State Constitution.⁶⁹ The court examined the constitutionality of prison employment programs that were operated and managed by private organizations.⁷⁰ The court considered whether these programs violated article II, section 29 of the Washington State Constitution, which prohibits contract prison labor programs.⁷¹ In determining whether certain private prison labor contracts violated the constitution, the court first examined the plain meaning of the provision based on standard dictionary definitions.⁷² The court then explored the historical context of the provision, which included an examination of the records of the state constitutional convention, a discussion of trends in other states at the time of the constitutional convention, the political climate at the time of ratification, and the history of the Washington prison system.⁷³ Finally, the court analyzed other states' interpretations of similar constitutional provisions.⁷⁴

64. See, e.g., *State ex rel. Billington v. Sinclair*, 28 Wash. 2d 575, 579, 183 P.2d 813, 815 (1947) (noting that in interpreting constitution, "courts are required to give effect to the intent and purpose of the framers").

65. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wash. 2d 470, 477, 90 P.3d 42, 45 (2004).

66. *State ex rel. Swan v. Jones*, 47 Wash. 2d 718, 721–22, 289 P.2d 982, 984–85 (1955) ("[I]nterpretation is improper if the particular constitutional language or provision is clear and unambiguous.").

67. See *Yarbrough*, 151 Wash. 2d at 493, 90 P.3d at 53.

68. 151 Wash. 2d 470, 90 P.3d 42 (2004).

69. See *id.* at 480–501, 90 P.3d at 47–57 (examining plain meaning of constitution, historical events from time of ratification, and precedent from other jurisdictions).

70. *Id.* at 474, 90 P.3d at 44.

71. *Id.* at 477, 90 P.3d at 45.

72. *Id.* at 480, 90 P.3d at 47.

73. *Id.* at 484–92, 90 P.3d at 49–53.

74. *Id.* at 493, 90 P.3d at 53.

A. *Under the Yarbrough Framework, Washington Courts First Look to the Plain Language in Interpreting the State Constitution*

When interpreting a constitutional provision, courts must first look to the plain language of the text and accord it “its reasonable interpretation.”⁷⁵ The plain language is the primary source of interpretation because the constitution is an “expression of the people’s will.”⁷⁶ The court gives the words of the constitution their ordinary meaning at the time of drafting.⁷⁷ In examining the plain meaning of the words of the constitution, Washington courts often rely upon dictionary definitions, specifically those of *The Century Dictionary*,⁷⁸ published in the same year that the Washington State Constitution was ratified.⁷⁹

Washington courts may not overlook the plain and unambiguous meaning of the constitutional provision.⁸⁰ If a court determines that the meaning of a constitutional provision is clear and unambiguous, then the court engages in no further analysis.⁸¹ Even if a court believes that a provision in the constitution is too restrictive, the court must leave it to the people to change the constitution through the amendatory process.⁸² Courts may not engraft an exception onto the constitution, even if it is expedient to do so.⁸³

B. *Courts May Analyze the Historical Context of a Constitutional Provision When the Plain Language Is Ambiguous*

Under *Yarbrough*, courts may look to the historical context that surrounded the drafting of the constitutional provision.⁸⁴ The historical context includes historically contemporaneous events and proceedings

75. *Id.* at 477, 90 P.3d at 45 (citations omitted).

76. *State ex rel. Albright v. Spokane*, 64 Wash. 2d 767, 770, 394 P.2d 231, 233 (1964).

77. *Id.*

78. THE CENTURY DICTIONARY: AN ENCYCLOPEDIC LEXICON OF THE ENGLISH LANGUAGE (1889) [hereinafter THE CENTURY DICTIONARY].

79. *See, e.g., Yarbrough*, 151 Wash. 2d at 481, 90 P.3d at 47 (relying on *The Century Dictionary* to determine meaning of constitutional provisions); *State v. Foster*, 135 Wash. 2d 441, 477, 957 P.2d 712, 731 (1998) (same).

80. *See State ex rel. O’Connell v. Port of Seattle*, 65 Wash. 2d 801, 806, 399 P.2d 623, 626 (1965).

81. *State ex rel. Swan v. Jones*, 47 Wash. 2d 718, 721–22, 289 P.2d 982, 984–85 (1955).

82. *See Port of Seattle*, 65 Wash. 2d at 806, 399 P.2d at 626.

83. *See id.*

84. *See Yarbrough*, 151 Wash. 2d at 485, 90 P.3d at 49.

from the time of adoption.⁸⁵ This consists of records of the constitutional convention, the political climate at the time of ratification, and the “public history of the times.”⁸⁶

In addition, the court may derive the framers’ intent from historical facts surrounding the constitutional convention, such as the framers’ decision to employ language different from other constitutions.⁸⁷ The Washington State Supreme Court presumes that the framers’ use of specific and unique language in the constitution was intentional and thus indicative of their intent.⁸⁸ The Washington State Supreme Court gives meaning to all words because many drafters of the Washington State Constitution were lawyers and “appreciated the nuances of language.”⁸⁹

In *Seattle School District No. 1 v. State*,⁹⁰ the Supreme Court of Washington examined article IX, section 1 of the state constitution, which provides that “[i]t is the paramount duty of the state to make ample provision for the education of all children residing within its borders.”⁹¹ The court compared the Washington provision to analogous provisions in other state constitutions that existed in 1889, but were not worded as strongly as Washington’s.⁹² The court noted that Washington’s provision was unique and stronger than that of other state constitutions, and that this stronger language was indicative of the framers’ intent regarding the importance of education in Washington.⁹³ The court added that, “without question,” the language of other state constitutions was before the framers, and the court presumed that the framers intentionally chose the stronger language.⁹⁴

85. *Id.*

86. *See State ex rel. Mason County Lodging Co. v. Wiley*, 177 Wash. 65, 74, 31 P.2d 539, 543 (1934) (citing *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499, 506 (1871)); *see also Yarbrough*, 151 Wash. 2d at 485–87, 90 P.3d at 49–53 (discussing historical context courts consider in interpreting constitution).

87. *See Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 499, 585 P.2d 71, 85 (1978).

88. *See id.* at 499, 585 P.2d at 85 (noting that Washington’s constitutional language is broader than that of other states’, which is indicative of framers’ intent in crafting provision).

89. *Gerberding v. Munro*, 134 Wash. 2d 188, 215, 949 P.2d 1366, 1379 (1998).

90. 90 Wash. 2d 476, 585 P.2d 71 (1978).

91. WASH. CONST. art. IX, § 1.

92. *Seattle Sch. Dist.*, 90 Wash. 2d at 497–99, 585 P.2d at 84–85.

93. *Id.*

94. *Id.* at 499, 585 P.2d at 85; *see also State ex rel. Dearle v. Frazier*, 102 Wash. 369, 374–75, 173 P. 35, 36–37 (1918) (noting that Washington’s constitutional ban on separation of church and state is stronger than other states, and that this “sweeping and comprehensive” language is indicative of framers’ intent to require strict separation of church and state).

C. *Under Yarbrough, the Court May Also Consider the Judicial Interpretations of Similar Provisions in Other States*

The Washington State Supreme Court often considers judicial interpretations of similar constitutional provisions from other states when interpreting the Washington State Constitution.⁹⁵ The court looks to the interpretations of similar constitutional provisions by other state courts when neither Washington case law nor records of the constitutional convention provide a clear indication of the framers' intent in enacting a provision in the constitution.⁹⁶ Decisions from other jurisdictions are especially helpful to the Washington State Supreme Court in cases of first impression.⁹⁷

In sum, to determine the framers' intent, the Washington State Supreme Court first examines the plain language of the constitution. If the plain language does not resolve the issue, the court will consider other evidence to determine the framers' intent. This analysis includes the records of the constitutional convention, the words chosen by the framers, historically contemporaneous events, and judicial decisions from other jurisdictions.

III. WASHINGTON'S CONSTITUTION REQUIRES ABSOLUTE SECRECY IN VOTING TO THE EXTENT FEASIBLE

Article VI, section 6 of the Washington State Constitution provides: "All elections shall be by ballot. The legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and depositing his ballot."⁹⁸ In determining the scope of this right, the court must analyze the plain meaning of article VI, section 6, including the use of the word "absolute" to describe the level of required secrecy.⁹⁹ The Washington State Supreme Court has interpreted

95. See *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wash. 2d 470, 493, 90 P.3d 42, 53 (2004).

96. *Biggs v. State Dep't of Ret. Sys.*, 28 Wash. App. 257, 259, 622 P.2d 1301, 1303 (1981) ("Since neither the case law of our state, nor the minutes of the constitutional convention are of assistance in resolving the question at bench, we look to similar provisions in other state constitutions for guidance."); see also *Yarbrough*, 151 Wash. 2d at 485-87, 90 P.3d at 49-53.

97. See *In re Colyer*, 99 Wash. 2d 114, 119, 660 P.2d 738, 741 (1983) (noting that in cases of first impression, Washington courts "look to other jurisdictions for information and guidance").

98. WASH. CONST. art. VI, § 6.

99. See *Yarbrough*, 151 Wash. 2d at 477, 90 P.3d at 45 (requiring that courts look first to plain language of term when interpreting Washington State Constitution).

“absolute” in a separate context to mean “without exception.”¹⁰⁰ An analysis of the historical context of ratification of the constitution demonstrates that article VI, section 6 requires stricter secrecy than similar provisions in other state constitutions and goes beyond what is necessary to implement the Australian ballot.¹⁰¹ However, laws passed by the first legislature suggest that historically Washington’s secrecy requirement was not absolute.¹⁰² In addition, courts in other jurisdictions have interpreted similar constitutional provisions to require secret voting only to the extent feasible.¹⁰³

A. The Plain Language of Article VI, Section 6 Had an Established Meaning at the Time of the Washington Constitutional Convention

The plain meaning of “absolute” secrecy, according to dictionaries in use at the time of ratification, is secrecy that is not subject to exceptions.¹⁰⁴ *The Century Dictionary* defines “absolute” as “[f]ree from every restriction; unconditional,”¹⁰⁵ and “secrecy” as the “concealment from the observation or knowledge of others.”¹⁰⁶ Thus, the phrase absolute secrecy, as used in 1889, refers to a concealment from the observation or knowledge of others that is unconditional and unrestricted.

The Washington State Supreme Court has interpreted the meaning of absolute in another area of law in a manner consistent with the above definition.¹⁰⁷ In *Sherman, Clay & Co. v. Turner*,¹⁰⁸ a contract case, the

100. See *Sherman, Clay & Co. v. Turner*, 164 Wash. 257, 263, 2 P.2d 688, 690 (1931) (citing 28 C.J. 895).

101. See *infra* Part III.B.

102. See WASH. REV. CODE § 388 (1891) (current version at WASH. REV. CODE § 29A.44.240 (2004)) (permitting assistance to disabled voters unable to independently complete their ballots).

103. See, e.g., *State ex rel. Braley v. Gay*, 60 N.W. 676, 678 (Minn. 1894) (noting that secrecy must be maintained “as far as possible”).

104. See 1 THE CENTURY DICTIONARY, *supra* note 78, at 21 (defining “absolute”); 5 THE CENTURY DICTIONARY, *supra* note 78, at 5454 (defining “secrecy”).

105. 1 THE CENTURY DICTIONARY, *supra* note 78, at 21. Another legal dictionary published in 1889 defined absolute as “[e]xclusive; without condition or incumbrance; complete; perfect; final; opposed to conditional, qualified, relative” WILLIAM ANDERSON, A DICTIONARY OF LAW, CONSISTING OF JUDICIAL DEFINITIONS AND EXPLANATIONS 8 (1889). Black’s Law Dictionary similarly defined absolute as “without condition, exception, restriction, qualification, or limitation.” BLACK’S LAW DICTIONARY 10 (1891).

106. 5 THE CENTURY DICTIONARY, *supra* note 78, at 5454 (1889).

107. See *Sherman, Clay & Co. v. Turner*, 164 Wash. 257, 263, 2 P.2d 688, 690 (1931) (citing 28 C.J. 895).

Washington State Supreme Court defined an “absolute guaranty” in a contract as a situation in which payment is “unconditionally promise[d]” by the guarantor.¹⁰⁹ Thus, the Washington State Supreme Court has used the term “absolute” in a manner similar to the dictionary definition: unconditional and without exception.

B. The Framers Required Stricter Secrecy than Other Constitutions, but the First Legislature Considered an Exception for Infeasibility

An analysis of the historical context surrounding the ratification of article VI, section 6 demonstrates that the framers provided for stricter secrecy in elections than that required by other states’ constitutions, but the first legislature considered an exception from the secrecy requirement if it was infeasible for secrecy to be maintained.¹¹⁰ The framers’ requirement that voters have absolute secrecy is a unique provision; no other state constitution had such a strict constitutional requirement in 1889.¹¹¹ In addition, the framers’ requirement of absolute secrecy was beyond what was necessary to implement the Australian, or secret, ballot system.¹¹² However, the first legislature passed a law permitting assistance to disabled voters, suggesting an exception to secrecy in cases where voting in secret is infeasible.¹¹³

1. The Framers of the Washington State Constitution Provided for Stricter Voting Secrecy Than All Other State Constitutions in 1889

Although the preservation of secrecy and election by ballot are

108. 164 Wash. 257, 2 P.2d 688 (1931).

109. *See id.* at 263, 2 P.2d at 690 (citing 28 C.J. 895).

110. *See infra* Part III.B.1–3. This Comment looks to historical evidence outside the limited records of the Washington State constitutional convention. Most of the original records and proceedings of the convention were lost and only summaries of motions and votes exist. *See* JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION, 1889, at vi–vii (Rosenow ed., 1962). As a result, courts rely on newspaper coverage of the convention. *State v. Rinaldo*, 36 Wash. App. 86, 91, 673 P.2d 614, 617 (1983). These newspaper accounts do not provide detailed information regarding the passage of article VI, section 6. *See, e.g.*, TACOMA MORNING GLOBE, August 13, 1889, at 1 (discussing passage of article VI, section 6, but omitting any details of debates of constitutional convention or framers’ intent in enacting this provision).

111. *See infra* note 115.

112. *Compare* N.D. CONST. art. V, § 129 (amended 1978) (current version at art. II, § 1) (providing that elections be by “secret ballot”), *with* 1891 N.D. Laws Ch. 66 (implementing comprehensive Australian ballot method of voting in North Dakota’s first legislative session).

113. *See* WASH. REV. CODE § 388 (1891) (current version at WASH. REV. CODE § 29A.44.240 (2004)).

common to nearly all state constitutions,¹¹⁴ Washington's guarantee of *absolute* secrecy for all voters is unique. At the time of ratification, this was the strictest requirement for voting secrecy among all state constitutions.¹¹⁵ Two states, Kentucky and Virginia, currently have

114. See ARTHUR S. BEARDSLEY, NOTES ON THE SOURCES OF THE CONSTITUTION OF THE STATE OF WASHINGTON 1889–1939, at 20 (1939).

115. When the Washington constitution was ratified, no other state constitution required absolute secrecy in elections. Thirty-three state constitutions required a vote by ballot, four state constitutions required a secret ballot or some other secrecy provisions, and four states did not require a vote by ballot. Eight state constitutions were ratified after Washington's. Montana, North Dakota, and South Dakota all ratified their constitutions on October 1, 1889, the same day as the ratification of Washington's. Idaho's constitution was adopted by constitutional convention in August 1889, but not ratified until November of 1889 and is therefore not included here.

Prior to the adoption of the Washington State Constitution, vote by ballot was required by: ALA. CONST. of 1875, art. VIII, § 2; ARK. CONST. art. III, § 3, *amended* by ARK. CONST. amend. 50 (repealing ballot requirement and replacing with requirement that voting be by ballot or by voting machine "which insure[s] the secrecy" of voters.); CAL. CONST. art. 2, § 5 (amended 1896 (requiring that voting "be secret")); COLO. CONST. art. VII, § 8 (amended 1946); CONN. CONST. of 1818, art. VI, § 7; DEL. CONST. of 1831, art. IV, § 1; FLA. CONST. of 1886, art. VI, § 6; GA. CONST. of 1877, art. II, § 1; ILL. CONST. of 1870, art. VII, § 2; IND. CONST. art. II, § 13; IOWA CONST. art. II, § 6; KAN. CONST. art. IV, § 1 (amended 1974); LA. CONST. of 1879, art. 184; ME. CONST. art. II, § 1; MD. CONST. art. 1, § 1; *id.* § 3 (amended 1977) (current version at art. 1, §§ 3, 6) (providing penalties for bribery); MASS. CONST. ch. I, § 3, art. III ("Every member of the house of representatives shall be chosen by written votes . . ."); MICH. CONST. of 1850, art. VII, § 2; MINN. CONST. art. VII, § 6 (amended 1974) (current version at art. VII, § 5); MISS. CONST. of 1868, art. VII, § 1; MO. CONST. of 1875, art. VIII, § 3; MONT. CONST. of 1889, art. IX, § 1; NEB. CONST. art. VII, § 6 (amended 1920) (current version at art. VI § 6) (amended 1972); NEV. CONST. art. II, § 5; N.H. CONST. pt. 2 art. 14 (amended 1984); N.Y. CONST. of 1846, art. II, § 5; N.C. CONST. of 1876, art. VI, § 5; OHIO CONST. art. V, § 2; PA. CONST. art. VIII, § 4 (amended 1901 (requiring secrecy in voting)) (amended 1967) (current version at art. VII, § 4); R.I. CONST. OF 1842, art. VIII, § 2; S.C. CONST. of 1868, art. II, § 2; S.D. CONST. art. VIII, § 3 (amended 1974); VA. CONST. of 1870, art. III, § 2; WIS. CONST. art. III, § 3 (amended 1986 (requiring voting by "secret ballot")).

Three states required a secret ballot or other secrecy protections: N.D. CONST. art. V, § 129 (amended 1978) (requiring elections to be by "secret ballot") (current version at art. II, § 1); TENN. CONST. art. IV, § 1 ("The general assembly shall have power to enact laws . . . to secure the freedom of elections and the purity of the ballot-box."); *id.* § 4 (requiring that popular elections be by ballot); TEX. CONST. art. VI, § 4 (providing that legislature shall provide laws to "punish fraud and preserve the purity of the ballot-box"). Vermont's constitution protected secrecy, but did not expressly require a vote by ballot. VT. CONST. ch. II, § 34 ("[A]ny elector who shall receive any gift or reward for his vote . . . shall forfeit his right to elect at that time, and suffer such other penalty as the law shall direct . . ."); *id.* § 45 (requiring legislature to determine method for conducting elections).

Four states did not explicitly require voting by ballot: KY. CONST. of 1850, art. VIII, § 15 ("In all elections by the people . . . the votes shall be personally and publicly given *viva voce*: *Provided*, That dumb persons, entitled to suffrage, may vote by ballot.") (emphasis in original); N.J. CONST. of 1855, art. II (providing for suffrage, but without requirements of vote by ballot or secret ballot); OR. CONST. art. II, § 15 ("In all elections by the legislative assembly, or by either branch thereof, votes shall be given openly, or *viva voce*, until the legislative assembly shall otherwise direct."); W. VA. CONST. art. IV, § 2 ("In all elections by the people, the mode of voting shall be by ballot; but the voter shall be left free to vote by either open, sealed or secret ballot, as he may elect."); *id.* § 11

specific constitutional provisions that permit assistance to the disabled in completing their ballots.¹¹⁶ In fact, Kentucky's fourth constitution, ratified just two years after Washington's constitution, requires the legislature to make provisions for blind, illiterate, and disabled voters.¹¹⁷ Only Idaho's constitution, written at the same time as but ratified after Washington's, provides voters with an "absolutely secret ballot."¹¹⁸ Wyoming's constitution, ratified one month after Washington's, provides for absolute privacy in the preparation of ballots and requires that secrecy of the ballot be compulsory.¹¹⁹

2. *The Australian Ballot Method of Voting Does Not Require Absolute Secrecy*

The Australian, or secret, method of voting does not require an explicit guarantee of absolute secrecy in the constitution.¹²⁰ The Australian ballot is a method of voting by which the government prints a uniform ballot that contains all the candidates' names and voters make their selections in secret.¹²¹ At the time that the Washington constitution was drafted, states throughout the nation had adopted the Australian ballot.¹²² The Australian ballot was viewed in contrast to the only other potential voting system, a *viva voce*, or voice vote.¹²³ At the time the Washington State Constitution was ratified, a vote by ballot was synonymous with a secret vote.¹²⁴ Constitutional provisions requiring

(requiring legislature to pass laws to "prevent intimidation, disorder or violence at the polls, and corruption or fraud in voting").

116. See VA. CONST. art. II, § 3; KY. CONST § 147.

117. See KY. CONST. § 147.

118. IDAHO CONST. art. VI, § 1 ("All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the legislature to enact such laws as shall carry this section into effect.").

119. WYO. CONST. art. VI, § 11 ("All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.").

120. Compare N.D. CONST. art. V, § 129 (amended 1978) (current version at art. II, § 1) (providing that elections be by "secret ballot"), with 1891 N.D. Laws Ch. 66 (implementing comprehensive Australian ballot method of voting in North Dakota's first legislative session).

121. See WIGMORE, *supra* note 3, at 50.

122. See *id.* at 23–49 (documenting dramatic expansion of Australian ballot throughout United States in late 1880s).

123. See, e.g., *Williams v. Stein*, 38 Ind. 89, 91 (1871) (distinguishing between *viva voce* voting, which is open and public, and voting by ballot, which is secret).

124. See *id.* at 92 (noting that "[t]he common understanding in this country certainly is, that the term 'ballot' implies secrecy"); see also *In re Massey*, 45 F. 629, 634–35 (E.D. Ark. 1890) ("That the word 'ballot' implies secrecy is unquestioned."); 26 AM. JUR. 2D *Elections* § 307 (2004) (noting

voting by ballot imply a secret voting system that provides the voter with a secret ballot free from inspection.¹²⁵ However, the framers of the Washington State Constitution went further and mandated not only that voting be by ballot and in secret, but added the specific requirement that every voter have “absolute secrecy in preparing and depositing his ballot.”¹²⁶ North Dakota, whose constitution was ratified on the same day as Washington’s, only requires secrecy in voting.¹²⁷ Yet the first North Dakota legislature enacted a comprehensive Australian ballot system similar to Washington’s.¹²⁸ The constitutional requirement of absolute secrecy is therefore not a condition precedent to legislative adoption of the Australian ballot.

3. *The First Legislature Emphasized Strict Secrecy but Seemed to Anticipate an Exception to the Secrecy Requirement*

In 1889–1890, the first Washington legislature implemented a comprehensive Australian-ballot election law for the state that included detailed procedures for secret voting.¹²⁹ In an address to a joint session of the first legislature, Governor Elisha P. Ferry outlined the various laws the inaugural legislature was required to pass as provided by the constitution.¹³⁰ One of these requirements was to enact an election law.¹³¹ Governor Ferry reminded the legislature of the importance of voting in absolute secrecy as provided in the constitution and said that “[t]he safeguards to be thrown around the ballot box to prevent fraud and corruption cannot be too many nor too stringent.”¹³² To that end, Senator John R. Kinnear, who was part of the constitutional convention and introduced a resolution at the constitutional convention requiring secret

that vote by ballot generally implies secret vote).

125. 26 AM. JUR. 2D *Elections* § 307 (noting that vote by ballot generally implies secret vote).

126. See WASH. CONST. art. VI, §6.

127. See N.D. CONST. art. V, § 129 (amended 1978) (current version at art. II, § 1).

128. 1891 N.D. Laws Ch. 66 (implementing comprehensive Australian ballot method of voting in North Dakota’s first legislative session).

129. See generally Act of March 19, 1890, ch. 13, 1890 Wash. Sess. Laws 400 (codified as amended at WASH. REV. CODE § 363 (1891)).

130. See E.P. Ferry, Message of Governor E.P. Ferry delivered to a Joint Session of the Washington Legislature (November 22, 1889), in SENATE JOURNAL OF THE FIRST LEGISLATURE OF THE STATE OF WASHINGTON 45 (1890).

131. See *id.* at 47.

132. *Id.*

voting in the constitution,¹³³ introduced an election law in the first legislative session.¹³⁴ Senator Kinnear's bill was later combined with another bill and substituted for a single election bill,¹³⁵ which the legislature passed and the Governor signed into law.¹³⁶ This comprehensive election law included a wide range of measures to ensure secrecy, such as voting booths, guard rails to keep people away from those engaged in voting, and official ballots to be furnished at the state's expense.¹³⁷ In addition, the election law of 1890 provided that only voters who declared they were unable to mark their ballot due to disability or blindness could request assistance from election officials.¹³⁸ Thus, the first legislature provided that strict secrecy must be maintained, but also provided an exception to secret voting in cases where it was infeasible for the voter to vote in secret.¹³⁹

However, actions taken by the first legislature may be of limited significance when interpreting constitutional provisions.¹⁴⁰ Washington courts are not bound to consider actions or inactions of early Washington legislatures to be reflective of the framers' intent.¹⁴¹ In *Seattle School District*, the Washington State Supreme Court rejected the idea that laws of the first legislature regarding school funding reflected the framers' intent in making provisions for public education.¹⁴² The court held that it was for the judiciary, not the legislative branch, to

133. See *From Olympia*, SEATTLE TIMES, July 16, 1889, at 1. Senator Kinnear's constitutional resolution regarding secret voting was one of several introduced on the topic. The records of the constitutional convention do not provide additional insight into how the Committee on Elections and Elective Rights of the constitutional convention settled on the specific language of absolute secrecy. See THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 289 (Beverly Paulik Rosenow ed., 1999).

134. See SENATE JOURNAL OF THE FIRST LEGISLATURE OF THE STATE OF WASHINGTON 57-58 (1890) (noting that Senate Bill 7 by Senator Kinnear and Senate Bill 14 by Senator Seeley D. Hicks were introduced in relation to elections).

135. See *id.* at 369 (noting substitution of Senate Bills 7 and 14 for Senate Bill 187).

136. See *id.* at 538 (noting signing of Senate Bill No. 187).

137. WASH. REV. CODE §§ 383-385 (1891) (current version at WASH. REV. CODE §§ 29A.44.060, .36.220 (2004)).

138. *Id.* § 388 (current version at § 29A.44.240).

139. *Id.*

140. See *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 514-15, 585 P.2d 71, 93 (1978) (rejecting actions by first legislature, which included members of constitutional convention, as indicative of framers' intent).

141. See *id.*

142. *Id.*

interpret the meaning of the constitution.¹⁴³ This is true even in cases where members of the legislature also served as members of the constitutional convention.¹⁴⁴ Thus, while some of the individuals who were involved in drafting article VI, section 6 were also involved in writing Washington's first election law,¹⁴⁵ this law did not necessarily represent the framers' intent.¹⁴⁶ However, this law does provide an indication of the public history from the time of ratification.¹⁴⁷

C. Courts in Other Jurisdictions Have Historically Required Voting Secrecy to the Extent Feasible

When interpreting constitutional provisions similar to article VI, section 6, courts in other jurisdictions “jealously” guard voting secrecy.¹⁴⁸ These courts permit an exception to the secret voting requirement when a voter cannot vote in secrecy,¹⁴⁹ but require the state to secure secrecy to the extent feasible.¹⁵⁰ The Washington State Supreme Court has interpreted “feasible” to mean that which is either capable of being accomplished¹⁵¹ or capable of being accomplished technologically and economically.¹⁵² The “secrecy to the extent feasible” interpretation relates as far back as 1894, when the Minnesota Supreme

143. *Id.* at 515, 585 P.2d at 93.

144. *Id.* at 514, 585 P.2d at 93.

145. *See supra* notes 133–36 and accompanying text (noting involvement of Senator Kinnear in drafting article VI, section 6 and Washington's first election law).

146. *See Seattle Sch. Dist.*, 90 Wash. 2d at 514–15, 585 P.2d at 93.

147. *See State ex rel. Mason County Lodging Co. v. Wiley*, 177 Wash. 65, 74, 31 P.2d 539, 543 (1934) (permitting Washington State Supreme Court to consider “public history” of times in interpreting Washington constitution (citing *People ex rel. Bay City v. State Treasurer*, 23 Mich. 499 (1871))).

148. *See, e.g., Board v. Dill*, 110 P. 1107, 1112 (Okla. 1910); *Jones v. Glidewell*, 13 S.W. 723, 725–26 (Ark. 1890).

149. *See, e.g., State ex rel. Braley v. Gay*, 60 N.W. 676, 678 (Minn. 1894) (“A fair interpretation of the law requires the preservation, as far as possible, of secrecy as to the manner in which an elector votes. But impossibilities cannot be required.”).

150. *See Jones v. Glidewell*, 13 S.W. 723, 725 (Ark. 1890) (noting that voting statutes are designed to secure “as perfectly as possible” secrecy in casting ballot); *State ex rel. Runge v. Anderson*, 76 N.W. 482, 485 (Wis. 1898) (“[T]he freest opportunity practicable is given under the law for the voter to deposit such ballot so as to conceal his choices of candidates, indicated therein, if he so desires.”); *State ex rel. Fenner v. Keating*, 163 P. 1156, 1158 (Mont. 1917) (noting that requirement that vote be by ballot is to “insure, so far as possible, the secrecy and the integrity of the popular vote”).

151. *Miller v. State*, 73 Wash. 2d 790, 794, 440 P.2d 840, 843 (1968).

152. *See Rios v. Dep't of Labor & Indus.*, 145 Wash. 2d 483, 498–99, 39 P.3d 961, 969 (2002).

Court upheld votes cast by disabled voters with the assistance of others against challenges that the votes were invalid because they violated the constitutional requirement of secrecy.¹⁵³ The court held that while secrecy must be preserved, “impossibilities cannot be required To demand anything approaching absolute secrecy in such cases would be wholly impracticable.”¹⁵⁴ The court went on to say that although it desired the secrecy demanded by the challenging party, this level of secrecy was not possible.¹⁵⁵ Thus, the court permitted an exception to the state’s secrecy requirement in order to prevent the disenfranchisement of disabled and illiterate voters.¹⁵⁶ Similarly, courts in Kentucky,¹⁵⁷ Michigan,¹⁵⁸ and Virginia¹⁵⁹ have justified an exception to the secrecy requirement where a third party assists disabled or illiterate voters because it was not feasible for these voters to vote in secrecy.

However, courts in other jurisdictions generally refuse to allow individuals who can feasibly vote in secrecy to receive assistance or otherwise breach secrecy when voting.¹⁶⁰ For example, the South Carolina Supreme Court struck down a law that permitted husbands to accompany their wives into the voting booth as violating the constitutional requirement of secrecy.¹⁶¹ Similarly, courts in Minnesota,¹⁶² North Dakota,¹⁶³ Oklahoma,¹⁶⁴ and West Virginia¹⁶⁵ have

153. *Gay*, 60 N.W. at 678.

154. *Id.*

155. *Id.*

156. *See id.*; *see also* *Smith v. Dunn*, 381 F. Supp. 822, 826 (M.D. Tenn. 1974) (noting that some form of assistance is necessary to prevent blind voter from being otherwise deprived of right to vote).

157. *See Rogers v. Jacob*, 11 S.W. 513, 514–15 (Ky. 1889).

158. *See Ellis v. May*, 58 N.W. 483, 485–86 (Mich. 1894).

159. *See Pearson v. Bd. of Supervisors of Brunswick City*, 21 S.E. 483, 485 (Va. 1895) (noting that blind voters must compromise secrecy of ballot to prevent disenfranchisement).

160. *See Board v. Dill*, 110 P. 1107, 1114 (Okla. 1910); *State ex rel. Edwards v. Abrams*, 240 S.E.2d 643, 646 (S.C. 1978).

161. *Abrams*, 240 S.E.2d at 646.

162. *See McEwen v. Prince*, 147 N.W. 275, 277 (Minn. 1914) (noting that ballot secrecy is destroyed when another person assists physically capable voter in casting his or her ballot).

163. *See Grubb v. Dewing*, 187 N.W. 157, 158 (N.D. 1922) (invalidating votes when election official accompanied voters to election booth even though voters did not have disability, in violation of constitutional secrecy requirements).

164. *See Dill*, 110 P. at 1114 (invalidating votes because election officials helped voters whom it was not necessary to help because they were not entitled by statute to assistance in voting).

165. *See Brooks v. Crum*, 216 S.E.2d 220, 228 (W. Va. 1975) (noting that illiteracy is precondition to obtaining assistance in voting).

held that voting secrecy could not be breached in cases where the voter was capable of casting his or her ballot secretly.

D. Other Jurisdictions Are Divided on Whether, in Light of New Technology, Disabled Voters Must Be Provided with a Secret Vote

Courts interpreting secret voting requirements since the advent of accessible voting technology have reached different conclusions as to whether voting secrecy provisions require governments to provide the new technology to disabled voters.¹⁶⁶ Three federal courts have considered whether state secrecy provisions require states to provide accessible technologies to enable disabled voters to vote in secrecy.¹⁶⁷ One court held that statutory voting secrecy provisions require accessible technology for disabled voters.¹⁶⁸ Conversely, two courts held that constitutional voting secrecy provisions are satisfied through third party assistance to disabled voters.¹⁶⁹

In *Lightbourn v. County of El Paso*,¹⁷⁰ the United States District Court for the Western District of Texas interpreted a Texas statute to provide disabled persons with a statutory right to vote in secrecy.¹⁷¹ A group of disabled voters sued the Texas Secretary of State for failing to provide them with accessible voting technology that would allow them to vote in secrecy.¹⁷² The court held that the state statute entitled the disabled plaintiffs to a secret vote and that the state failed to observe this right when it did not consider any possible modifications to voting technology to accommodate persons with disabilities.¹⁷³ The court ruled that the statute required the Secretary of State to take affirmative steps to ensure

166. Compare *Lightbourn v. County of El Paso (Lightbourn I)*, 904 F. Supp. 1429, 1432 (W.D. Tex. 1995) (determining that blind voters are covered by statutory voting secrecy requirement and thus state impermissibly failed to provide system which would allow visually impaired to vote in secrecy), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997), with *Nelson v. Miller*, 170 F.3d 641, 653 (6th Cir. 1999) (holding that constitutional voting secrecy under Michigan Constitution does not require accessible technology for disabled voters), and *Am. Ass'n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1287 (M.D. Fla. 2002) (holding that requirement of "direct and secret" vote under Florida Constitution does not require accessible technology for disabled voters).

167. See *Lightbourn I*, 904 F. Supp. at 1432; see also *Miller*, 170 F.3d at 653; *Smith*, 227 F. Supp. 2d at 1287.

168. *Lightbourn I*, 904 F. Supp. at 1432.

169. *Miller*, 170 F.3d at 653; *Smith*, 227 F. Supp. 2d at 1287.

170. 904 F. Supp. 1429 (W.D. Tex. 1995), *rev'd on other grounds*, 118 F.3d 421 (5th Cir. 1997).

171. *Id.* at 1433.

172. *Id.* at 1430–31.

173. *Id.* at 1432.

that blind voters could vote in secrecy.¹⁷⁴ Thus, the court held that Texas violated the Americans with Disabilities Act (ADA) because the state failed to provide blind voters with the right to participate in the State's voting program in a manner equal to that accorded to voters who are not disabled.¹⁷⁵ However, the Fifth Circuit reversed, holding that the plaintiffs failed to present an ADA claim because they failed to allege that the Secretary of State received federal assistance¹⁷⁶ and because the Texas election laws did not impose a duty on the Secretary of State to ensure compliance with the ADA.¹⁷⁷

In contrast to the analysis in *Lightbourn*, two other federal courts have held that state constitutional secrecy provisions do not require the state to implement accessible technologies to allow the disabled to vote in secrecy.¹⁷⁸ In 1999, the U.S. Court of Appeals for the Sixth Circuit held that the Michigan constitution does not entitle disabled voters to a secret vote.¹⁷⁹ The Michigan constitution requires that the legislature enact laws to "preserve the secrecy of the ballot."¹⁸⁰ The Sixth Circuit noted that this provision is ambiguous and the Michigan State Supreme Court could read the constitutional requirement of secret voting to require fully

174. *Id.* at 1431–32.

175. *Id.* The disabled voters argued that the failure to provide a secret vote as provided by state law violated the Americans with Disabilities Act (ADA). *Lightbourn I*, 904 F. Supp. at 1430. The ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132 (2000). See PETER BLANCK ET AL., *DISABILITY CIVIL RIGHTS LAW AND POLICY* § 10.1 (2004). The three federal cases discussed in this Section are all based on violations of the ADA, but the basis for the alleged discrimination is a denial of a secret vote as provided either by state statute or by a state constitutional provision.

176. *Lightbourn v. County of El Paso (Lightbourn II)*, 118 F.3d 421, 427 (5th Cir. 1997). The parties eventually settled the lawsuit and the Texas Secretary of State made disability accommodations as part of the settlement. See James C. Harrington, *Pencils Within Reach and a Walkman or Two: Making the Secret Ballot Available to Voters Who Are Blind or Have Other Physical Disabilities*, 4 TEX. F. ON C.L. & C.R. 87, 89 (1999).

177. See *Lightbourn II*, 118 F.3d at 432. The Fifth Circuit's holding that the ADA did not place a duty on the Secretary of State left undisturbed the conclusion by the District Court that disabled voters are included in the state's voting secrecy requirement. The applicability of the ADA to secrecy in voting is outside the scope of this Comment. However, contrary to the Fifth Circuit, the Middle District of Florida has held that the ADA is applicable to voting in secrecy. See *Am. Ass'n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1236 (M.D. Fla. 2004), *stay granted by* 2004 U.S. Dist. LEXIS 8349 (M.D. Fla. 2004).

178. *Nelson v. Miller*, 170 F.3d 641, 653 (6th Cir. 1999); *Am. Ass'n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1287 (M.D. Fla. 2002).

179. *Miller*, 170 F.3d at 653.

180. *Id.* at 649 (citing MICH. CONST. art. 2, § 4).

accessible technology.¹⁸¹ However, the court held that accessible technology was not required because Michigan courts had previously permitted assistance to disabled voters.¹⁸² In addition, the court reasoned that the Michigan State Constitution did not require accessible technology because the state legislature had interpreted the constitutional provision preserving the “secrecy of the ballot” voting as not meaning “absolute secrecy.”¹⁸³

Similarly, the U.S. District Court for the Middle District of Florida upheld Duval County’s decision to purchase optical scan ballots that were inaccessible to disabled voters against a challenge that the county had violated Florida’s constitutional requirement of a “direct and secret” vote for the disabled.¹⁸⁴ The court recognized that Florida’s constitutional provision is ambiguous¹⁸⁵ and that the Florida State Supreme Court could interpret the secrecy requirement to mean absolute secrecy or interpret it less restrictively.¹⁸⁶ Like the Sixth Circuit,¹⁸⁷ the court chose the less restrictive definition because the legislature had interpreted the constitution to be satisfied when disabled voters were given assistance by a third party.¹⁸⁸ In a later proceeding, the District Court for the Middle District of Florida found that the Secretary of State violated the ADA because it was feasible for the county to purchase a more accessible voting system.¹⁸⁹

In sum, the plain meaning of absolute secrecy, as defined by the dictionary, means concealment from others that is not subject to any restrictions. The decision of the framers to provide for absolute secrecy in the constitution represented the strictest embrace of secrecy of any state constitution in 1889. Yet, a historical analysis leads to the conclusion that the Washington legislature provided an exception to accommodate those who were incapable of voting in secrecy. In addition, courts in other jurisdictions that have interpreted materially

181. *Id.* at 650.

182. *Id.* at 651 (citing *Common Council v. Rush*, 46 N.W. 951, 953 (Mich. 1890)).

183. *Id.* at 652–53.

184. *Am. Ass’n of People with Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1282–83 (M.D. Fla. 2002) (citing FLA. CONST. art VI, § 1).

185. *Id.* at 1284.

186. *Id.*

187. *See Miller*, 170 F.3d at 653.

188. *Smith*, 227 F. Supp. 2d at 1286–87.

189. *Am. Ass’n of People with Disabilities v. Hood*, 310 F. Supp. 2d 1226, 1236 (M.D. Fla. 2004), *stay granted by* 2004 U.S. Dist. LEXIS 8349 (M.D. Fla. 2004).

similar provisions have required secrecy in voting only to the extent feasible. However, courts that have considered this issue since the advent of new accessible technology are divided on whether statutory and constitutional secrecy provisions require governments to adopt the technology to accommodate disabled persons.

IV. NOT PROVIDING A SECRET BALLOT TO ALL VOTERS TO THE EXTENT FEASIBLE VIOLATES THE CONSTITUTION

Courts should interpret the Washington State Constitution to require that the legislature provide for secrecy in voting to the extent feasible.¹⁹⁰ This requirement derives from the plain meaning of the constitution, historical events from the time of ratification, and persuasive precedent from other jurisdictions.¹⁹¹ By not requiring DRE systems or other accessible voting technologies that will provide manually impaired voters with a secret vote, the Washington legislature failed to ensure absolute secrecy in voting to the extent feasible, as required by the state constitution.¹⁹²

A. Article VI, Section 6 Requires the Legislature to Preserve Secrecy to the Extent Feasible

The Washington State Constitution's mandate that the legislature provide for absolute secrecy in elections requires that the legislature provide secrecy to the extent feasible. The plain meaning and historical evidence from the time of ratification demonstrate that the framers wanted strict secrecy in elections.¹⁹³ The requirement of secrecy to the extent feasible is derived from historical evidence from the time of ratification and persuasive precedent from other jurisdictions.¹⁹⁴

1. The Plain Meaning of Article VI, Section 6 of the Washington State Constitution Requires Strict Secrecy

An examination of the plain language—the first step in constitutional interpretation¹⁹⁵—demonstrates that article VI, section 6 requires strict

190. See *infra* Part IV.A.

191. See *infra* Part IV.A.1–3.

192. See *infra* Part IV.B.

193. See *infra* Part IV.A.1–2.

194. See *infra* Part IV.A.2–3.

195. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wash. 2d 470, 477, 90 P.3d 42, 45

secrecy in voting.¹⁹⁶ Definitions compiled from dictionaries published at the time of ratification of the Washington State Constitution indicate that the right to vote in absolute secrecy is an unconditional, exclusive right to have one's votes cast in concealment from the observation or knowledge of others.¹⁹⁷ The Supreme Court of Washington has interpreted "absolute" in the context of contract law in a manner consistent with the dictionary definition.¹⁹⁸ Thus, the plain language of the constitution suggests that the legislature must maintain strict secrecy in Washington elections.

2. *The Framers Intended Strict Secrecy in Elections but Washington Permitted an Exception for Infeasibility*

Historical analysis of the drafting of article VI, section 6 demonstrates that the framers of the Washington State Constitution intended this provision to require strict secrecy in elections.¹⁹⁹ However, historical analysis also suggests that Washington recognized a limitation to secrecy in voting when secrecy is infeasible.²⁰⁰ The Washington State Supreme Court presumes that the framers were aware of the constitutions of other states and that their choice of stronger language was intentional.²⁰¹ In *Seattle School District No. 1*, the Washington State Supreme Court held that the state had a constitutional duty to provide for the education of its citizens, in part because the framers said that the state's duty to provide education is "paramount," whereas other states merely said that education should be encouraged or cherished.²⁰² This unique and strong language employed by the framers was indicative of the framers' intent.²⁰³ Similarly, the framers used unique and strong language in article VI, section 6 when they required that every voter

(2004).

196. See 1 THE CENTURY DICTIONARY, *supra* note 78, at 21 (defining absolute as "[f]ree from every restriction").

197. See *supra* notes 104–09 and accompanying text.

198. See *Sherman, Clay & Co. v. Turner*, 164 Wash. 257, 263, 2 P.2d 688, 690 (1931) (citing 28 C.J. 895).

199. See *Yarbrough*, 151 Wash. 2d at 485, 90 P.3d at 49 (permitting courts to look at historical context in determining meaning of constitutional provision).

200. See WASH. REV. CODE § 388 (1891) (current version at WASH. REV. CODE § 29A.44.240 (2004)) (permitting assistance to voters unable to vote independently).

201. See *supra* notes 87–94 and accompanying text.

202. See *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 498–99, 585 P.2d 71, 84–85 (1978).

203. See *id.* at 499, 585 P.2d at 85.

have absolute secrecy in preparing and casting a ballot.²⁰⁴ The framers of the Washington State Constitution employed the strictest voting secrecy provision of any state.²⁰⁵ The use of such strong and unique language indicates the framers' intent to require strict secrecy in Washington's elections.

The use of stronger language in article VI, section 6 than needed to adopt the Australian ballot demonstrates the framers' intent to require strict secrecy. The framers' choice of the words "absolute secrecy" was not a condition precedent for adopting the Australian ballot.²⁰⁶ A court cannot interpret the language of article VI, section 6 as merely expressing a desire to implement a system of secret voting—the framers could have adopted such a system by simply requiring voting by ballot or secret ballot.²⁰⁷ Thus, article VI, section 6 goes further than the Australian ballot and requires absolute secrecy, which suggests that the framers intended a stricter level of secrecy in Washington elections.

However, Washington has historically recognized an exception to the secrecy requirement where a secret vote is not feasible.²⁰⁸ The first Washington legislature enacted a comprehensive ballot law in 1890 that went to great lengths to protect secrecy.²⁰⁹ This law also accommodated voters who were "unable" to vote independently due to disability or blindness by allowing them to seek the assistance of a third party in completing their ballot.²¹⁰ This 1890 accommodation law may suggest that the framers believed that the constitutional requirement of voting in absolute secrecy includes an outright exception that allows a third party to assist a disabled voter in casting his or her vote.²¹¹ However, the law may also suggest that the legislature must provide voting secrecy to the extent feasible and that third party assistance is allowed only where it is

204. *See supra* note 115 and accompanying text.

205. *See supra* Part III.B.1.

206. *Compare* N.D. CONST. art. V, § 129 (amended 1978) (current version at art. II, § 1) (providing that elections be by "secret ballot"), *with* 1891 N.D. Laws Ch. 66 (implementing comprehensive Australian ballot method of voting in North Dakota's first legislative session).

207. *See supra* Part III.B.2.

208. *See* WASH. REV. CODE § 388 (1891) (current version at WASH. REV. CODE § 29A.44.240 (2004)).

209. *See* Act of March 19, 1890, ch. 13, 1890 Wash. Sess. Laws 400 (codified at WASH. REV. CODE § 363 (1891)) (providing comprehensive election law).

210. WASH. REV. CODE § 388 (1891) (current version at WASH. REV. CODE § 29A.44.240 (2004)).

211. *See, e.g., Nelson v. Miller*, 170 F.3d 641, 651 (6th Cir. 1999) (assistance to disabled is within "ambit" of constitutional provision for secret ballot).

not feasible for disabled voters to vote in secrecy. This latter interpretation is more consistent with Washington State Constitution for three reasons. First, the sweeping and comprehensive language used by the framers suggests that strict secrecy is required in Washington elections.²¹² A broad reading of article VI, section 6 that considers the absolute secrecy requirement satisfied when a third party assists a disabled person, even though it is feasible for these voters to vote in secrecy, is in opposition to this strict secrecy requirement. Second, courts in other jurisdictions historically justified assistance to disabled persons because it was infeasible for such voters to vote without assistance.²¹³ Third, the Washington State Supreme Court does not necessarily consider actions by the first legislature to be reflective of the framers' intent.²¹⁴ The election law passed by the first legislature in 1890 may not reflect the framers intent in passing article VI, section 6,²¹⁵ but instead acknowledges that Washington has historically recognized an exception to voting in absolute secrecy when this secrecy is infeasible.²¹⁶

3. *Precedent from Other Jurisdictions Suggests that Manually Impaired Voters Are Entitled to Vote Secretly to the Extent Feasible*

Courts in other jurisdictions have historically permitted a narrow exception to voting secrecy in cases when it is infeasible for the voter to cast his or her ballot without assistance.²¹⁷ While some courts have found that secrecy was infeasible where voter disenfranchisement would occur without third party assistance,²¹⁸ other courts have not permitted a breach of secrecy in cases where it was feasible for the voter to cast a

212. See *supra* notes 202–06 and accompanying text.

213. See, e.g., *State ex rel. Braley v. Gay*, 60 N.W. 676, 678 (Minn. 1894) (noting that secrecy must be maintained “as far as possible”).

214. See *Seattle Sch. Dist. No. 1 v. State*, 90 Wash. 2d 476, 514–15, 585 P.2d 71, 93 (1978) (rejecting actions by first legislature that included members of constitutional convention as indicative of framers' intent).

215. See *id.*

216. See *State ex rel. Mason County Lodging Co. v. Wiley*, 177 Wash. 65, 74, 31 P.2d 539, 543 (1934) (permitting Washington State Supreme Court to consider “public history” when interpreting Washington constitution).

217. See *Gay*, 60 N.W. at 678; *Ellis v. May*, 58 N.W. 483, 485–86 (Mich. 1894); *Rogers v. Jacob*, 11 S.W. 513, 514–15 (Ky. 1889); *Pearson v. Bd. of Supervisors of Brunswick City*, 21 S.E. 483, 485 (Va. 1895).

218. See *Ellis*, 58 N.W. at 485 (Mich. 1894); *Smith v. Dunn*, 381 F. Supp. 822, 825–26 (M.D. Tenn. 1974).

secret ballot.²¹⁹ Thus, precedent from other jurisdictions suggests that the state must maintain secrecy in voting to the extent feasible.

Among the courts that have considered whether statutory and constitutional voting secrecy provisions entitle manually impaired voters to a secret vote in light of new technology, the analysis of the *Lightbourn* court is most applicable to Washington.²²⁰ That court concluded that the statutory right to vote in secret in Texas applies to the disabled and that this right is not satisfied when disabled voters do not have a secret vote.²²¹ Federal courts have held that the Florida and Michigan constitutional voting secrecy provisions do not require the states to adopt accessible technology for disabled voters.²²² However, the Florida and Michigan decisions noted that the constitutional requirement of secrecy was ambiguous and that the respective state courts could choose from two plausible readings of the term “secret” in constitutions.²²³ One reading requires the legislature to provide accessible voting technology to ensure that disabled voters have a secret vote.²²⁴ The second interpretation, adopted by these courts, is a more lenient view of secrecy that is satisfied when disabled voters are assisted by a third party.²²⁵ While this may be an accurate description of the ambiguities in the Michigan and Florida constitutions, Washington’s constitution has a much stronger and stricter requirement of absolute secrecy.²²⁶ The framers’ intent to require strict secrecy in voting, as demonstrated by the plain language requirement of absolute secrecy and the strong embrace of secrecy by the framers, suggests that the less restrictive reading of the constitutional guarantee of secrecy by federal courts in Michigan and Florida is inapposite to Washington.²²⁷ Thus, the approach of the *Lightbourn* court is more appropriate to the situation in

219. See *State ex rel. Edwards v. Abrams*, 240 S.E.2d 643, 646 (S.C. 1978); *Board v. Dill*, 110 P. 1107, 1114 (Okla. 1910); *Brooks v. Crum*, 216 S.E.2d 220, 228 (W. Va. 1975); *Grubb v. Dewing*, 187 N.W. 157, 158 (N.D. 1922); *McEwen v. Prince*, 147 N.W. 275, 277 (Minn. 1914).

220. See *Lightbourn I*, 904 F. Supp. 1429, 1432 (W.D. Tex. 1995) (construing statutory voting secrecy requirements to include disabled), *rev'd on other grounds*, 118 F.3d 421, 432 (5th Cir. 1997).

221. *Id.*

222. See *Am. Ass'n of People With Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1287 (M.D. Fla. 2002); *Nelson v. Miller*, 170 F.3d 641, 653 (6th Cir. 1999).

223. *Smith*, 227 F. Supp. 2d at 1284; *Miller*, 170 F.3d at 650.

224. See *Smith*, 227 F. Supp. 2d at 1284; *Miller*, 170 F.3d at 650.

225. See *Smith*, 227 F. Supp. 2d at 1287; *Miller*, 170 F.3d at 653.

226. See *supra* Part IV.A.1–2.

227. See *id.*

Washington.²²⁸ The holding of *Lightbourn* is more consistent with the Washington State Constitution framers' intent to provide for the strictest possible secrecy in elections.²²⁹ In addition, it is also consistent with the rule from other jurisdictions that secrecy be maintained to the extent feasible.²³⁰

In sum, the Washington State Constitution requires the legislature to provide a method of voting that maintains absolute secrecy to the extent feasible. The plain meaning of the constitution and historical evidence of the framers' intent indicate that the framers intended strict secrecy in elections. Additional historical analysis and persuasive precedent from other jurisdictions suggest that secrecy must be maintained to the extent feasible.

B. The Washington Legislature Violates the Constitution by Failing to Provide Manually Impaired Voters with a Secret Vote

Given that the Washington State Constitution requires that the legislature provide a method of voting that ensures every voter absolute secrecy to the extent feasible, the legislature is obligated to assess the feasibility of providing accessible DRE systems to accommodate all voters who are unable to vote in secrecy under the current election law framework.²³¹ The legislature has fulfilled this obligation with respect to visually impaired voters by enacting a statute that entitles visually impaired voters to a secret vote to the extent feasible.²³² However, the Washington legislature did not include a similar provision to accommodate manually impaired voters.²³³ Any voting system that requires a voter to complete a paper ballot does not provide manually impaired voters with a secret vote.²³⁴ As a result, every voter in Washington who lacks the ability to complete a paper ballot must

228. See *Lightbourn I*, 904 F. Supp. 1429, 1432 (W.D. Tex. 1995), *rev'd on other grounds*, 118 F.3d 421, 432 (5th Cir. 1997).

229. See *supra* Part IV.A.1–2.

230. See *supra* Part IV.A.3.

231. See *supra* Part IV.A.

232. WASH. REV. CODE § 29A.12.160(2)–(3) (2004) (making secret vote for blind voters contingent on available funding and permitting counties to comply with this requirement when they upgrade voting technology).

233. See *id.* § 29A.12.160(1) (providing accessible voting for blind and visually impaired voters but not manually impaired voters).

234. See *Am. Ass'n of Disabled People v. Shelley*, 324 F. Supp. 2d 1120, 1125 (C.D. Cal. 2004) (noting that only through DREs can disabled voters vote secretly and independently for first time).

disclose his or her choices to third persons.²³⁵ This lack of secrecy places manually impaired voters at risk of fraud and intimidation, and in fear of ridicule and dislike.²³⁶ This lack of secrecy also creates the possibility that the election outcome will not reflect the true will of the people.²³⁷

The implementation of accessible DRE systems would permit Washington's manually impaired voters to vote in secrecy for the first time.²³⁸ The Washington Secretary of State has certified these accessible voting devices for use by manually impaired voters in Washington State elections.²³⁹ In fact, accessible DRE systems are currently in use in some or all polling sites in several counties in Washington State.²⁴⁰

By not providing manually impaired voters with a secret vote to the extent feasible, the Washington legislature has failed to comply with the secrecy requirement of article VI, section 6. This omission violates the constitutional obligation that article VI, section 6 imposes on the legislature to provide for a method of voting that ensures secrecy to the extent feasible.²⁴¹ Since the Secretary of the State has approved the use of DRE systems and federal funding is available for the purchase of new voting technology, the legislature must require counties to provide DRE systems for disabled voters to the extent feasible.

V. CONCLUSION

Washington election law does not provide for a secret vote for manually impaired voters to the extent feasible despite the constitutional

235. See WASH. REV. CODE § 29A.44.240.

236. See WIGMORE, *supra* note 3, at 52.

237. See *id.* at 53 ("By thus tending to eradicate corruption and by giving effect to each man's innermost belief, [secrecy in voting] secures to the Republic what at such a juncture is the thing vitally necessary to its health,—a free and honest expression of the convictions of every citizen.").

238. See *Shelley*, 324 F. Supp. 2d at 1125.

239. See REED, *supra* note 28.

240. See WASH. SEC'Y OF STATE, *supra* note 41 (listing voting systems used in every county, including DREs).

241. Whether it is feasible for the legislature to provide manually impaired voters with a secret vote is beyond the scope of this Comment. However, the fact that Washington has certified DREs for use in elections, other states require DREs for disabled voters, and the federal government has provided \$62 million for new voting technology suggest it is both technologically and economically possible for the legislature to provide manually impaired voters with a secret vote in a manner similar to blind voters. See GA. CODE ANN. § 21-2-379.7(d)(4) (2003) (requiring DREs be made available for disabled voters in every precinct); OHIO REV. CODE ANN. § 3506.19 (2005 Supp.) (same); R.I. GEN. LAWS. § 17-19-8.2(a) (2003) (requiring accessible voting technology for as many disabled voters as possible through state of the art technology).

requirement of absolute secrecy. The lack of a secret vote for thousands of manually impaired Washington voters increases the potential for fraud and improper influence in Washington elections. Technology now exists and is certified for use in Washington that would permit manually impaired voters to vote in secret. The plain language of the constitution, the intent of the framers of the Washington State Constitution, and persuasive precedent from other states suggest that article VI, section 6 requires the legislature to protect voting secrecy to the extent feasible. By not providing a secret vote to manually impaired voters to the extent feasible, the legislature did not comply with the requirements of article VI, section 6 of the Washington State Constitution. In order to comply with the constitution, the legislature must require counties to provide accessible DRE systems to the extent feasible.

