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Anticipating an Evil Which May Never Exist: Minnesota's Anachronistic Identifying Mark Statute

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Anticipating an Evil Which May Never Exist: Minnesota's Anachronistic Identifying Mark Statute

Abstract

In the aftermath of the 2008 senatorial election race in Minnesota, several election laws were scrutinized by state officials and the public. Specifically, Minnesota statute 204C.22 was attacked; this statute voids ballots containing "identifying" or "distinguishing" marks made in such a way as to make it evident that "the voter intended to identify the ballot". Secretary of State Ritchie proposed narrowing the scope of the identifying mark statutes, and though legislation was introduced in the state legislature, it was not adopted. The existence of these legislative initiatives makes it appropriate to examine the history of statutes prohibiting identifying marks, the policies undergirding them, and how they have been utilized in recent and distant Minnesota history. This article discusses all of these things and concludes by examining whether the Secretary of State's recommendations are needed, or whether the statutes should simply be repealed. Advances in technology have made the process followed in applying these statutes accessible to an unprecedented extent, and the processes followed in the United States Senate recount will be closely examined.

Keywords

Norm Coleman, Al Franken, Dean Barkley, 2008 Senate election, senate race, contested election, election judges, election referees, Mark Ritchie, election reform, identifying mark, distinguishing mark, identify ballot, invalid ballot, voter marks

Disciplines

Law and Politics | Legislation | State and Local Government Law

**“ANTICIPATING AN EVIL WHICH MAY NEVER EXIST”:¹
MINNESOTA’S ANACHRONISTIC IDENTIFYING MARK
STATUTE**

Michael Freiberg, J.D.[†]

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I. INTRODUCTION

News coverage of the recount and subsequent election contest in Minnesota’s 2008 election for United States Senate highlighted several deficiencies in Minnesota election law. These flaws were significant enough that Minnesota Secretary of State Mark Ritchie proposed a package of election reforms.²

Although the election contest focused primarily on issues related to absentee balloting,³ one provision in state law that generated publicity during the recount phase of the election was Minnesota’s statute voiding ballots containing “identifying marks” or “distinguishing marks.” Minnesota Statutes section 204C.22, subdivision 13, provides that a ballot is defective if it “is marked by distinguishing characteristics in a manner making it evident that

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1. *Pennington v. Hare*, 60 Minn. 146, 155, 62 N.W. 116, 120 (1895) (Collins, J., dissenting).

2. *See* Minnesota Secretary of State 2009 Legislative Agenda, *available at* <http://www.sos.state.mn.us/home/index.asp?page=10&recordid=328>.

3. *See* Statement of the Case of Appellants at 1, *Coleman v. Franken*, 767 N.W.2d 453 (Minn. 2009) (No. A09-697), *available at* http://www.mncourts.gov/Documents/0/Public/Other/A_Statement.pdf.

the voter intended to identify the ballot.”⁴ A related statute, section 204C.18, subdivision 2, states that any voter, election judge, or other individual who places such a mark upon any ballot is guilty of a gross misdemeanor.⁵

While the United States Senate recount was underway, the campaigns of Republican Senator Norm Coleman and Democratic-Farmer-Labor candidate Al Franken challenged numerous ballots on the grounds that they contained such marks and were invalid. The challenged marks ranged from understandable—for example, initials placed next to crossed out marks to indicate a correction⁶—to the inexplicable, for example, multiple write-in votes on one ballot for “Lizard People.”⁷

Perhaps because of the sideshow-like atmosphere to some of the ballot discussions, Secretary of State Ritchie proposed narrowing the scope of the identifying mark statutes.⁸ Legislation was introduced at the state legislature to effectuate this goal,⁹ although it was not ultimately adopted into law. The existence of these legislative initiatives makes it appropriate to examine the history of statutes prohibiting identifying marks, the policies undergirding them, and how they have been utilized in recent and distant Minnesota history. This article undertakes this task and examines whether the Secretary of State’s recommendations are needed, or whether the statutes should simply be repealed. Advances in technology have made the process followed in applying these statutes accessible to an unprecedented extent, and the processes followed in the United States Senate recount will be closely examined.

4. MINN. STAT. § 204C.22, subdiv.13 (2008).

5. MINN. STAT. § 204C.18, subdiv. 2 (2008).

6. See Video: *State Canvassing Board - Day 1/part 1* 31:17 (Minn. House Public Information Services Dec. 16, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1741.

7. Rachel E. Stassen-Berger & Dave Orrick, *Franken in Front . . . For Now*, ST. PAUL PIONEER PRESS (Minn.), Dec. 19, 2008; Video: *State Canvassing Board - Day 3/part 1* 30:50 (Minn. House Public Information Services Dec. 18, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1747.

8. Minnesota Secretary of State 2009 Legislative Agenda Fact Sheet, available at http://www.sos.state.mn.us/docs/2009_legislative_proposal_fact_sheet.pdf.

9. See S.F. 1331, 86th Leg. (Minn. 2009); H.F. 1137, 2009 Leg., 86th Sess. (Minn. 2009); S.F. 768, 2009 Leg., 86th Sess. (Minn. 2009); S.F. 662, 2009 Leg., 86th Sess. (Minn. 2009); H.F. 1351, 2007 Leg., 85th Sess. (Minn. 2008).

II. BACKGROUND

Minnesota's identifying mark statutes may seem like some quirky local anachronism. However, laws related to the identification of ballots can be found in nearly every state. The laws take a multitude of forms. The most expansive laws are similar to Minnesota Statutes section 204C.18 in that they criminalize or otherwise prohibit identifying marks, regardless of whether it was the election judge or voter who made the mark.¹⁰ Other statutes target only one of these groups: some laws prohibit the voters from placing identifying marks or other nonuniform markings on their ballots,¹¹ while other statutes apply only to election officials, preprinted ballots, or other nonvoting third parties.¹² Another common approach is that of Minnesota Statutes section 204C.22, preventing ballots containing identifying marks from being counted, rather than criminalizing the usage of such marks.¹³

A few states use unique approaches. A statute in Alabama states that partisan primary voters who deface a pledge to support candidates of that party are presumed to be doing so for purposes

10. COLO. CONST. art. VII, § 8; ARIZ. REV. STAT. ANN. § 16-1018 (8) (2006 & Supp. 2008); KAN. STAT. ANN. § 25-2902(a) (2000); MD. CODE ANN. ELEC. LAW §§ 16-206(a)(1), 16-206(c) (LexisNexis 2003); MASS. GEN. LAWS ANN. ch. 54, § 80 (West 2007); N.Y. ELEC. LAW § 17-130(11)–(12) (McKinney 2009); OHIO REV. CODE ANN. § 3599.20 (West 2007); OR. REV. STAT. ANN. § 260.695(9) (West 2009); P.R. LAWS ANN. tit. 16, § 3375(f) (2006); V.I. CODE ANN. tit. 18, § 794 (2008).

11. CAL. ELEC. CODE § 14287 (West 2003); FLA. STAT. ANN. § 104.20 (West 2008); GUAM CODE ANN. tit. 3, § 9137 (2008); 10 ILL. COMP. STAT. § 5/24A-9.1 (West 2003); MISS. CODE ANN. § 23-15-555 (2007); MONT. CODE ANN. § 13-35-201(1) (2007); NEB. REV. STAT. § 32-1527(3) (LexisNexis 2008); N.H. REV. STAT. ANN. § 659:35(II) (LexisNexis 2007); S.C. CODE ANN. § 7-25-100(A)(3) (1976 & Supp. 2008); VT. STAT. ANN. tit. 17, § 1972 (2002); WASH. REV. CODE ANN. § 29A.84.670(1)(d) (West 2005); WIS. STAT. ANN. § 12.13 (1)(f) (West 2004 & Supp. 2008).

12. VA. CONST. art. II, § 3; ALASKA STAT. § 15.15.290 (2008); GA. CODE ANN. § 21-2-286(b)(1) (2008); IDAHO CODE ANN. § 34-1110 (2008); 65 ILL. COMP. STAT. § 20/21-32 (West 2005); IND. CODE ANN. § 3-11-10-27(d) (West 2006); WASH. REV. CODE ANN. § 29A.08.161; WYO. STAT. ANN. § 22-13-105 (2009).

13. CONN. GEN. STAT. ANN. § 9-295 (West 2002 & Supp. 2009); DEL. CODE ANN. tit. 15, § 4973 (2007); GA. CODE ANN. § 21-2-438(a) (2006); HAW. REV. STAT. ANN. § 16-26(1) (LexisNexis 2006); IND. CODE ANN. § 3-12-1-3(3) (IOWA CODE ANN. § 49.98 (West 1999 & Supp. 2009); LA. REV. STAT. ANN. § 18:1316(A) (2004); ME. REV. STAT. ANN. tit. 21-A, § 6965 (A) (2008); NEV. REV. STAT. § 293.367(1) (LexisNexis 2008); N.J. STAT. ANN. §§ 19:16-3, -4 (West 1999); OKLA. STAT. ANN. tit. 26, § 7-127 (West 1997); 25 PA. CONS. STAT. ANN. § 3063(a) (West 2007); R.I. GEN. LAWS § 17-20-24(b) (2008); TENN. CODE ANN. § 2-7-133(d) (2003 & Supp. 2008); UTAH CODE ANN. § 20A-4-105(5) (2007).

of identifying their ballots, and that such ballots will not be counted.¹⁴ In Arkansas, voters cannot be forced to sign a ballot for purposes of identifying it.¹⁵ West Virginia's statute is similar, although it explicitly criminalizes the inducement of a voter to place an identifying mark on his or her ballot.¹⁶ Finally, statutes in the District of Columbia and South Dakota do not address identifying marks specifically, but do require that voting be secret.¹⁷

All of these identifying mark statutes appear to be rooted in the nineteenth century switch to the "Australian Ballot," or secret ballot, system.¹⁸ To understand this system, it is helpful to understand voting methods which existed prior to it. Prior to the Revolutionary War, voting in the colonies was often accomplished by the show of hands or by the *viva voce* (voice vote) method.¹⁹ Because of the potential for these systems to lead to bribery and intimidation, most states switched to a paper ballot system shortly after the War.²⁰ Problems were still inherent with this system, however, as ballots were neither standardized nor secret.²¹ Justice Blackmun wrote that under this system, "the vote buyer could simply place a ballot in the hands of the bribed voter and watch until he placed it in the polling box."²² Verification was made particularly easy because bribers and political parties would often print ballots "with flamboyant colors, distinctive designs, and emblems so that they could be recognized at a distance."²³

In the mid-nineteenth century, several Australian provinces

14. ALA. CODE § 17-13-8 (LexisNexis 2007).

15. ARK. CODE ANN. § 7-5-309(d)(1) (2007 & Supp. 2009).

16. W. VA. CODE § 3-9-8 (LexisNexis 2006).

17. D.C. CODE § 1-1001.09(a) (2001); *See* S.D. CODIFIED LAWS § 12-18-27 (2004).

18. *See* L.E. FREDMAN, THE AUSTRALIAN BALLOT: THE STORY OF AN AMERICAN REFORM 4 (1968); John C. Fortier & Norman J. Ornstein, *The Absentee Ballot and the Secret Ballot: Challenges for Election Reform*, 36 U. MICH. J.L. REFORM 483, 488 (2003).

19. *Burson v. Freeman*, 504 U.S. 191, 200 (1992); *George v. Mun. Election Comm'n of Charleston*, 516 S.E.2d 206, 209 (S.C. 1999); *see* FREDMAN, *supra* note 18, at 20–21.; *see also* *Elwell v. Comstock*, 99 Minn. 261, 266, 109 N.W. 698, 700 (1906) (discussing 'aye' and 'nay' as examples).

20. *Burson*, 504 U.S. at 200; *see* FREDMAN, *supra* note 18, at 20 (explaining that bribery was diminished after introduction in Australia).

21. *Burson*, 504 U.S. at 200–01; FREDMAN, *supra* note 18, at 21–29.

22. *Burson*, 504 U.S. at 200; *see also* *George*, 516 S.E.2d at 209 (explaining that violence was a tool of intimidation).

23. *Burson*, 504 U.S. at 200.

developed a system intended to curb these abuses.²⁴ Author L. E. Fredman identified the four features of this system as publicly financed ballots; ballots containing all duly nominated candidates; exclusive ballot distribution by election officers at polling places; and physical arrangements, such as voting booths, designed to ensure secrecy.²⁵ The first such system was passed in the Australian state of Victoria in March of 1856.²⁶ This law required voters to strike out the candidates for whom the voter did not want to vote.²⁷ The following month, the state of South Australia adopted a similar law, except that voters selected a candidate “by marking a cross within a square alongside his name on the ballot.”²⁸ This approximates the system later adopted by the United States.²⁹ In a jurisdiction using the Australian Ballot system, it is critical that all of the requirements identified by Fredman are met. One court wrote that under the Australian Ballot system, “form is sacramental, and a voter cannot mark the ballot in any other way than the method prescribed.”³⁰

The Australian Ballot system swept through the United States in the late nineteenth century. Louisville, Kentucky, adopted the first Australian Ballot law in the United States in February of 1888.³¹ Massachusetts and New York adopted similar laws later in the same year.³² By 1892, thirty-eight states had such a system in place.³³

The new system was a success. Contemporary observers of the New York law noted that because of the new voting system, “intimidation by employers, party bosses, police officers, saloon-keepers and others has come to an end.”³⁴ Perhaps because of the success of this system in curbing corruption, the pendulum of voting secrecy swung dramatically in the other direction. Early

24. *Burson*, 504 U.S. at 202 (referring to it as the Australian system); FREDMAN, *supra* note 18, at 6–10.

25. FREDMAN, *supra* note 18, at 46.

26. *Id.* at 46–47.

27. *Id.* at 8.

28. *Id.* at 9.

29. *Id.* at 46–47.

30. *Leray v. Mullican*, 456 So. 2d 1038, 1041 (La. Ct. App. 1984).

31. FREDMAN, *supra* note 18, at 31.

32. *Id.* at ix; *Burson v. Freeman*, 504 U.S. 191, 203 (1992).

33. *Id.* at ix; *see also Burson* 504 U.S. at 204–05 (stating that by 1896, nearly ninety percent of the states had adopted the Australian system).

34. *Burson*, 504 U.S. at 200 (quoting W. Ivins, *The Electoral System of the State of New York, Proceedings of the 29th Annual Meeting of the New York State Bar Association* 316 (1906)).

advocates of the Australian Ballot system so valued the secrecy of ballots that they argued that any ballot which could subsequently be identified should be rejected. In 1891, George Hill argued in the first issue of the Yale Law Journal that “[n]o method of secret balloting can accomplish its purposes, which leaves unguarded any way of so discriminating between ballots cast, as will enable the counters to determine how any individual voted. Hence, any secret ballot law must carefully provide for the rejection of any ballot which is so marked as to be subsequently recognized.”³⁵ Contemporary observers have also noted that ballots capable of identification violate the spirit of Australian ballot laws. One law journal article notes that “[t]here are a number of ways that the secrecy of the ballot can be violated Ballots can be color coded or given distinguishing marks so that party observers can view from afar which party the voter is choosing.”³⁶

Minnesota’s policy prohibiting identifying marks was instituted in this context. The first constitution of the state required that “all elections shall be by ballot,” except in the case of certain township officers.³⁷ This provision has not changed in over 150 years.³⁸ In the 1879 case of *Brisbin v. Cleary*, the Minnesota Supreme Court interpreted this provision to mean that voting must occur “in such a way as to secure to the elector the privilege of complete and inviolable secrecy in regard to the person voted for.”³⁹ Consequently, the court struck down a state law requiring ballots to be numbered in a way that could permit their identification.⁴⁰

From 1878 until 1893, Minnesota election law was in a near-constant state of flux. In 1878, the legislature passed an election law that applied to cities with populations exceeding 12,000.⁴¹ While not an Australian ballot law,⁴² this law contained a provision prohibiting a ballot from being “used or voted” if it contained “any cut or device on its face, or any cut or device, or any written or printed matter on the back, or in any other way made to distinguish

35. George E. Hill, *The Secret Ballot*, 1 YALE L.J. 26, 29 (1891).

36. Fortier & Ornstein, *supra* note 18, at 488.

37. MINN. CONST. art. VII, § 6 (1858).

38. See MINN. CONST. art. VII, § 5 (2008) (sections changed from 6 to 5).

39. *Brisbin v. Cleary*, 26 Minn. 107, 108, 1 N.W. 825, 826 (1879); *accord* Elwell v. Comstock, 99 Minn. 261, 265, 109 N.W. 698, 699 (1906).

40. *Brisbin*, 26 Minn. at 108, 1 N.W. at 826.

41. 1878 MINN. LAWS 133.

42. FREDMAN, *supra* note 18, at 60.

one ballot from another.”⁴³ The law did not criminalize the act of voters placing such “devices” on their ballots, but prevented identifiable ballots from being printed. Consequently, the Minnesota Supreme Court held that this provision did not invalidate ballots on which voters used adhesive stickers containing the name of preferred candidates to indicate their votes.⁴⁴

In 1887, the legislature repealed the 1878 election law, including the provision relating to a distinguishable “cut or device,” and adopted a new election law.⁴⁵ Like the 1878 law, the 1887 law was not an Australian ballot law,⁴⁶ nor did it contain a provision relating to identified ballots. However, the new law did explicitly criminalize the revealing of votes by “any judge or clerk of election, or any other person.”⁴⁷

In 1889, Minnesota adopted the Australian ballot system in cities of over 10,000 in population,⁴⁸ repealing the 1887 law as it applied to cities of that size.⁴⁹ This law provided for uniform ballots supplied by the State Auditor for state elections, County Auditor for county elections, and city clerk for city elections.⁵⁰ Voters were to select their candidate by a “cross (X) mark.”⁵¹ The law included provisions to ensure physical secrecy for voters.⁵² The law did not contain a provision criminalizing the use of identifying marks or providing that ballots containing such marks would not be counted.⁵³ It did, however, disqualify ballots which voters had showed to others,⁵⁴ except in the case of illiterate or disabled voters.⁵⁵ The law also stated that election judges, persons assisting disabled or illiterate voters, and other third parties who disclosed how any voter had voted were guilty of a misdemeanor.⁵⁶

43. 1878 MINN. LAWS 134.

44. *Quinn v. Markoe*, 37 Minn. 439, 440, 35 N.W. 263, 264 (1887).

45. 1887 MINN. LAWS 7.

46. FREDMAN, *supra* note 18, at 60.

47. 1887 MINN. LAWS 37.

48. 1889 MINN. LAWS 13. *See also* 4 FRANK R. HOLMES, MINNESOTA IN THREE CENTURIES 165 (James A. Baker et al. eds., Semi-centennial ed. 1908).

49. 1889 MINN. LAWS 39.

50. *Id.* at 16–17.

51. *Id.* at 19, 22.

52. *Id.* at 21–22.

53. *Pennington v. Hare*, 60 Minn. 146, 154, 62 N.W. 116, 120 (1895) (Collins, J., dissenting).

54. 1889 MINN. LAWS 22.

55. *Id.* at 24.

56. *Id.*

In 1891, Minnesota's Australian ballot law was broadened to cover all cities,⁵⁷ repealing both the 1887 and 1889 laws.⁵⁸ This law had similar provisions to the 1889 law regarding uniform ballots,⁵⁹ physical conditions to ensure secrecy,⁶⁰ the use of cross marks,⁶¹ and assistance for disabled or illiterate voters.⁶² The law did not address identifying marks, but the law did criminalize the disclosure of votes by election judges and voters.⁶³

In 1893, the legislature rewrote the election laws once again,⁶⁴ creating the framework that is used today and repealing the 1891 law.⁶⁵ This law was also an Australian ballot law and had similar provisions to the 1891 law regarding uniform ballots,⁶⁶ secret booths,⁶⁷ cross marks for voting,⁶⁸ and assistance for illiterate and disabled voters.⁶⁹ The 1893 law did not explicitly criminalize the use of identifying marks or prevent ballots containing such marks from being counted.⁷⁰ However, it now prohibited voters from disclosing the contents of their ballots and stated that such ballots should not be counted.⁷¹

The 1893 law also stated that if voters consistently used a mark other than an X, "such as V, or I, or -, or O," it would be considered a sufficient vote, "but not if the crossmark (X) be used elsewhere on the same ballot."⁷² In the 1895 case of *Pennington v. Hare*, the Minnesota Supreme Court interpreted this provision to prohibit the counting of any ballot containing "any distinguishing mark, whereby it may be certified to others how [a voter] voted."⁷³

57. 1891 MINN. LAWS 23; HOLMES, *supra* note 48, at 181.

58. 1891 Minn. Laws 65-66.

59. *Id.* at 37-38.

60. *Id.* at 43-44.

61. *Id.* at 45.

62. *Id.* at 46.

63. *Id.* at 63.

64. 1893 MINN. LAWS 16.

65. *Id.* at 77.

66. *Id.* at 20-21.

67. *Id.* at 42.

68. *Id.* at 48.

69. *Id.* at 50-51.

70. *Pennington v. Hare*, 60 Minn. 146, 155, 62 N.W. 116, 120 (1895) (Collins, J., dissenting).

71. 1893 MINN. LAWS 51.

72. *Id.* at 60. A more limited version of this provision still exists in the Minnesota Statutes. See MINN. STAT. § 204C.22, subdiv. 10 (2008).

73. *Pennington*, 60 Minn. at 149, 62 N.W. at 117-18.

Justice Loren Collins strenuously dissented, describing the court's interpretation as "radical" and noting that the court was "anticipating an evil which may never exist."⁷⁴ Thus, the policy of rejecting ballots containing identifying marks was created judicially, rather than statutorily, in Minnesota. This policy was reinforced by multiple subsequent decisions invalidating ballots on this basis.⁷⁵

In 1933, the Minnesota Legislature adopted the predecessor to section 204C.18, subdivision 2, which criminalizes the use of identifying marks.⁷⁶ The original statute applied to any "voter, judge or clerk of election or other person" who places an identifying mark on a ballot⁷⁷. The penalty is a gross misdemeanor, a serious penalty punishable by a fine of up to \$3,000.⁷⁸ There was still no statute on the books, however, requiring ballots containing identifying marks to be rejected.⁷⁹ Minnesota courts continued to follow this policy, however.⁸⁰

The Legislature formalized the courts' policy of rejecting identified ballots in 1959.⁸¹ The law, which became Minnesota Statutes section 204C.22, subdivision 13, provided that an entire ballot is void if it is "so marked by distinguishing characteristics that it is evident that the voter intended to identify his ballot." In 1961, the Minnesota Supreme Court interpreted this provision as not applying to identifying marks written by election judges, but only by voters.⁸² The court has continued to develop case law as to what constitutes an identified ballot.⁸³

74. *Id.* at 155, 62 N.W. at 120 (Collins, J., dissenting).

75. *McVeigh v. Spang*, 178 Minn. 578, 228 N.W. 155 (1929); *Nelson v. Bullard*, 155 Minn. 419, 194 N.W. 308 (1923); *In re Redwood County Election Contest*, 178 Minn. 578, 156 N.W. 125 (1916); *In re Lannon*, 107 Minn. 453, 120 N.W. 1082 (1909); *Bloedel v. Cromwell*, 104 Minn. 487, 116 N.W. 947 (1908); *Elwell v. Comstock*, 99 Minn. 261, 109 N.W. 698 (1906); *Truelsen v. Hugo*, 81 Minn. 73, 83 N.W. 500 (1900), *overruled in part on other grounds*.

76. 1933 MINN. LAWS 310.

77. *Id.*

78. MINN. STAT. § 609.02, subdiv. 4 (2008).

79. *Hanson v. Emanuel*, 210 Minn. 271, 273, 297 N.W. 749, 751 (1941).

80. *See State v. Hanson*, 229 Minn. 341, 38 N.W.2d 845 (1949) (involving the secret ballot provisions of labor laws which relied on precedents discussing identifying marks on ballots); *Murray v. Floyd*, 216 Minn. 69, 11 N.W.2d 780 (1943); *Aura v. Brandt*, 211 Minn. 281, 1 N.W.2d 381 (1941), *overruled in part on other grounds*; *Pye v. Hanzel*, 200 Minn. 135, 273 N.W. 611 (1937); *Frajola v. Zanna*, 193 Minn. 48, 257 N.W. 660 (1934), *overruled in part on other grounds*.

81. 1959 MINN. LAWS 1182.

82. *Marshall v. Stepka*, 259 Minn. 533, 560, 108 N.W.2d 614, 619 (1961).

83. *Johnson v. Swenson*, 264 Minn. 449, 119 N.W.2d 723 (1963); *Fitzgerald v.*

The Minnesota Supreme Court has generally identified ensuring secrecy and preventing corruption as the primary rationales for refusing to count ballots containing identifying marks. The rationale for the policy has been stated variously as avoiding the evil of voting “according to contract,”⁸⁴ preventing “the corruption of the voter and to secure a free and untrammelled expression of the popular will,”⁸⁵ preventing “the corruption and intimidation of the voter in violation of the letter and spirit of the Australian ballot law,”⁸⁶ “to preserve secrecy in voting and to prevent bribery, fraud, and intimidation at elections,”⁸⁷ and preventing “the possibility of connivance between a corrupt elector and third persons who require evidence that a vote has been cast in a particular manner.”⁸⁸ The case that initially created the policy perhaps put it most colorfully:

A ballot so marked cannot be counted; otherwise, a corrupt candidate might, by previous agreement, arrange with his purchased creatures to place a particular mark after his name, whereby he could ascertain, when the ballots were canvassed, that they had kept faith with him, and were entitled to the purchase price of their honor.⁸⁹

III. ANALYSIS

Having analyzed the history of and policy behind statutes in Minnesota and elsewhere criminalizing the identification of ballots or prohibiting such ballots from being counted, it is worth evaluating whether or not these statutes are still needed. Although many states follow similar practices, the policies underlying the Minnesota statutes are in fact anachronistic. This is the case for several reasons.

Most obviously, refusing to count identified ballots disenfranchises voters. The U.S. Supreme Court has noted, perhaps somewhat surprisingly, that “the Constitution of the

Morlock, 264 Minn. 520, 120 N.W.2d 339 (1963); *Sperl v. Wegwerth*, 265 Minn. 47, 120 N.W.2d 355 (1963); *Bell v. Gannaway*, 303 Minn. 346, 227 N.W.2d 797 (1975).

84. *Truelsen v. Hugo*, 81 Minn. 73, 74, 83 N.W. 500, 501 (1900).

85. *Elwell v. Comstock*, 99 Minn. 261, 270, 109 N.W. 698, 702 (1906).

86. *Hanson v. Emanuel*, 210 Minn. 271, 273, 297 N.W. 749, 751 (1941).

87. *Aura v. Brandt*, 211 Minn. 281, 283, 1 N.W.2d 381, 384 (1941).

88. *Johnson*, 264 Minn. at 456, 119 N.W.2d at 728 (Otis, J., dissenting).

89. *Pennington v. Hare*, 60 Minn. 146, 149, 62 N.W. 116, 118 (1895).

United States does not confer the right of suffrage upon any one.”⁹⁰ The Court also noted, however, that it is “for the States to determine the conditions under which the right of suffrage may be exercised.”⁹¹ Minnesota is one state which takes the right of suffrage seriously. Indeed, the Minnesota Supreme Court has observed that “the right to vote is considered fundamental under both the U.S. Constitution and the Minnesota Constitution.”⁹²

The right of suffrage in Minnesota begins with the state constitution, which provides unequivocally that “[n]o member of this state shall be disfranchised.”⁹³ This provision has existed unchanged since statehood,⁹⁴ but has not been extensively litigated. In one case, the Minnesota Supreme Court held that the provision did not invalidate a law voiding ballots on which the voter voted for more than one county division question, in an election with several conflicting questions.⁹⁵ A second decision held that the constitutional provision required county commissioner districts to be roughly equal in population, unless disparities were unavoidable.⁹⁶ In this decision, the Minnesota Supreme Court held that the “right to vote on a basis of reasonable equality with other citizens is a fundamental and personal right essential to the preservation of self-government. Fundamental rights may be lost by dilution as well as by outright denial.”⁹⁷ Refusing to count an identified ballot is, of course, an example of “outright denial” that would presumably be discouraged by the court were it to rule on the question.

A related provision of the state constitution provides that eligible voters “shall be entitled to vote.”⁹⁸ The criteria for voting eligibility have changed since statehood, but the mandatory nature

90. *Minor v. Happersett*, 88 U.S. 162, 178 (1874) (language reaffirmed in *City of Mobile v. Bolden*, 446 U.S. 55, 76 (1980)); *see also* *State v. Webber*, 96 Minn. 422, 430, 105 N.W. 490, 493 (1905).

91. *City of Mobile v. Bolden*, 446 U.S. 55, 76–77 (1980) (internal quotations omitted).

92. *Kahn v. Griffin*, 701 N.W.2d 815, 830 (2005) (citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966)).

93. MINN. CONST. art. I, § 2.

94. *Id.*, quoted in S. Rep. No. 36-21, accompanying S. 86 to the Committee on Territories (1858).

95. *State v. Falk*, 89 Minn. 269, 274, 94 N.W. 879, 881 (1903).

96. *State v. Hetherington*, 240 Minn. 298, 305, 61 N.W.2d 737, 742 (1953).

97. *Id.* at 303, 61 N.W.2d at 741.

98. MINN. CONST. art. VII, § 1 (emphasis added).

of the franchise has not.⁹⁹ Case law interpreting this provision bears on the question of whether identified ballots should be excluded. A 1912 case held that “the right of a qualified elector to vote at any election . . . cannot be changed or added to by statute,” although “the Legislature may make and impose such reasonable regulations and conditions which it deems necessary to secure a pure and orderly election and to guard against unfair combinations, undue influence, and coercion, although they may incidentally affect the right of an elector to vote.”¹⁰⁰ One justice described the constitutional provision as “an express guaranty of a right or privilege which cannot be denied, or substantially impaired or abridged by legislation. It is a civil privilege protected by the fundamental law.”¹⁰¹

Consistent with this view, nearly all of the Minnesota cases that have approved of the invalidation of identified ballots have recognized that the disenfranchisement of voters is a substantial evil that should be avoided.¹⁰² The case creating the policy not to count identified ballots took it as a given that “electors unaccustomed to the use of pen or pencil” should not be “disfranchised.”¹⁰³ Numerous other cases involving identified ballots have frowned upon the disenfranchisement of voters.¹⁰⁴ In discussing voter intent, one decision held that “to the end that the unintelligent voter might not be disfranchised and deprived of his vote, liberal rules for ascertaining the intent of the voter and for counting ballots are provided.”¹⁰⁵ This is in contrast to courts from

99. *Id.* (quoted in S. Rep. No. 36-21).

100. *State v. Erickson*, 119 Minn. 152, 156, 137 N.W. 385, 386 (1912). *See also Saari v. Gleason*, 126 Minn. 378, 382, 148 N.W. 293, 295 (1914).

101. *Farrell v. Hicken*, 125 Minn. 407, 415, 147 N.W. 815, 818 (1914) (Brown, C.J., dissenting).

102. *See, e.g., Elwell v. Comstock*, 99 Minn. 261, 270, 109 N.W. 698, 701 (1906); *Bloedel v. Cromwell*, 104 Minn. 487, 488, 116 N.W. 948, 948 (1908); *Nelson v. Bullard*, 155 Minn. 419, 426, 194 N.W. 308, 311 (1923); *Aura v. Brandt*, 211 Minn. 281, 283, 1 N.W.2d 381, 384 (1941), *overruled in part on other grounds by Murray v. Floyd*, 216 Minn. 69, 75, 11 N.W.2d 780, 785 (1943); *Marshall v. Stepka*, 259 Minn. 553, 558, 108 N.W.2d 614, 618 (1961); *Johnson v. Swenson*, 264 Minn. 449, 457, 119 N.W.2d 723, 728 (1963); *Fitzgerald v. Morlock*, 264 Minn. 520, 539, 120 N.W.2d 339, 354 (1963); *Sperl v. Wegwerth*, 265 Minn. 47, 52, 120 N.W.2d 355, 359 (1963).

103. *Pennington v. Hare*, 60 Minn. 146, 149, 62 N.W. 116, 118 (1895).

104. *See supra* note 102.

105. *Truelsen v. Hugo*, 81 Minn. 73, 74, 83 N.W. 500, 501 (1900), *overruled in part on other grounds by Murray v. Floyd*, 216 Minn. 69, 75, 11 N.W.2d 780, 785

other states, which apply identifying mark statutes formalistically.¹⁰⁶ Indeed, Minnesota might actually be more hesitant than other jurisdictions in voiding ballots because of identifying marks.¹⁰⁷ Consequently, one would think that voiding identified ballots would be frowned upon in Minnesota.

The identifying mark statutes may also be anachronistic and constitutionally suspect because they lead to the unequal treatment of voters. Although there is no federal constitutional right of suffrage, federal law does frown on the unequal treatment of voters. Perhaps most notably, *Bush v. Gore* held that “[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over that of another.”¹⁰⁸ In that case, the U.S. Supreme Court held that a Florida law requiring a voter’s intent to be determined was not being applied consistently in the case of the notorious “hanging” and “dimpled” chads, failing constitutional scrutiny.¹⁰⁹ The Court noted specifically that the law violated the equal protection clause because “the standards for accepting or rejecting contested ballots might vary not only from county to county but indeed within a single county from one recount team to another.”¹¹⁰ As we will shortly see, the Minnesota Supreme Court and the State Canvassing Board have also not consistently applied tests determining what constitutes an identified ballot, creating a potential problem of federal constitutional law.

The Minnesota Supreme Court has evaluated numerous examples of what could be considered identifying marks, and its rulings have been far from consistent. The court has held that the following constitute identifying marks: a voter’s name written on the back of a ballot,¹¹¹ a voter’s initials,¹¹² “a distinct X” on the back

(1943); see also *Fitzgerald*, 264 Minn. at 535, 120 N.W.2d at 352; *McVeigh v. Spang*, 178 Minn. 578, 585, 228 N.W. 155, 158 (1929).

106. See, e.g., *Leray v. Mullican*, 456 So. 2d 1038, 1041 (La. Ct. App).

107. See *Hanson v. Emanuel*, 210 Minn. 271, 274, 297 N.W. 749, 752 (1941).

108. 531 U.S. 98, 104–05 (2000).

109. *Id.* at 105–06.

110. *Id.* at 106.

111. *Pye v. Hanzel*, 200 Minn. 135, 139, 273 N.W. 611, 614 (1937); *Bloedel v. Cromwell*, 104 Minn. 487, 488, 116 N.W. 948, 949 (1908); *Pennington v. Hare*, 60 Minn. 146, 149, 62 N.W. 116, 118 (1895).

112. *Bloedel*, 104 Minn. at 488, 116 N.W. at 949; *Elwell v. Comstock*, 99 Minn. 261, 270, 109 N.W. 698, 701 (1906).

of a ballot,¹¹³ cross marks over the word “judge,”¹¹⁴ inconsistent use of voting marks or superfluous voting marks,¹¹⁵ numbers written on a ballot by a voter,¹¹⁶ a candidate’s name written in unnecessarily with a line through it,¹¹⁷ unnecessary marks by a candidate’s name,¹¹⁸ “a diagonal mark with a faint curl at the top and two very small curls at the bottom,”¹¹⁹ cross marks on the back of a ballot,¹²⁰ a cross mark over the ballot instructions,¹²¹ two parallel lines next to a candidate’s name,¹²² a cross mark next to a blank write-in area,¹²³ a “distinctive check mark” after the proper cross,¹²⁴ four “heavily penciled circle[s]” next to the cross marks which “appear like four balls added with conscious effort,”¹²⁵ the underlining of a candidate’s name,¹²⁶ an indecent remark or drawing,¹²⁷ and ballots marked with the words “AFL” and “NO.”¹²⁸

In contrast, the court ruled that the following were not identifying marks: stickers containing names of candidates;¹²⁹ marks written on ballots by election judges;¹³⁰ a “vulgar expression” after a

113. *McVeigh v. Spang*, 178 Minn. 578, 582, 228 N.W. 155, 156–58 (1929).

114. *Pye*, 200 Minn. at 138, 273 N.W. at 614.

115. *Fitzgerald v. Morlock*, 264 Minn. 520, 524, 120 N.W.2d 339, 348 (1963); *Sperl v. Wegwerth*, 265 Minn. 47, 48–49, 120 N.W.2d 355, 357 (1963); *Murray v. Floyd*, 216 Minn. 69, 71, 11 N.W.2d 780, 783 (1943); *Pye*, 200 Minn. at 140, 273 N.W. at 614.

116. *Aura v. Brandt*, 211 Minn. 281, 291, 1 N.W.2d 381, 388 (1941); *Pye*, 200 Minn. at 139, 273 N.W. at 614.

117. *Pye v. Hanzel*, 200 Minn. 135, 139, 273 N.W. 611, 614 (1937).

118. *Hanson v. Emanuel*, 210 Minn. 271, 277–78, 297 N.W. 749, 753–54 (1941); *Pye*, 200 Minn. at 145, 273 N.W. at 617.

119. *Hanson*, 210 Minn. at 278, 297 N.W. at 754.

120. *Aura*, 211 Minn. at 286, 1 N.W.2d at 386.

121. *Id.*

122. *Id.*

123. *Id.* at 290, 1 N.W.2d at 387, *overruled by* *Murray v. Floyd*, 216 Minn. 69, 74–75, 11 N.W.2d 780, 784 (1943) (expressing judicial reluctance to disenfranchise a voter).

124. *Aura*, 211 Minn. at 290, 1 N.W.2d at 387.

125. *Id.*

126. *Murray v. Floyd*, 216 Minn. at 71, 11 N.W.2d at 783.

127. *Id.* at 72–74, 11 N.W.2d at 784 (overruling portions of *Frajola v. Zanna*, 193 Minn. 48, 257 N.W. 660 (1934) and *Truelsen v. Hugo*, 81 Minn. 73, 83 N.W. 500 (1900)).

128. *State v. Hanson*, 229 Minn. 341, 350–351, 38 N.W.2d 845, 850 (1949).

129. *Hanson v. Emanuel*, 210 Minn. 271, 275–280, 297 N.W. 749, 752–54 (1941); *Quinn v. Markoe*, 37 Minn. 439, 440, 35 N.W. 263, 264 (1887).

130. *Fitzgerald v. Morlock*, 264 Minn. 520, 533–34, 120 N.W.2d 339, 351 (1963); *Johnson v. Swenson*, 264 Minn. 449, 455–56, 119 N.W.2d 723, 728 (1963); *Marshall v. Stepka*, 259 Minn. 533, 560, 108 N.W.2d 614, 619 (1961); *Pye v.*

candidate's name;¹³¹ a voter's erased name;¹³² the word "nit";¹³³ the phrase "May the best man win";¹³⁴ an attempted erasure of a voting mark;¹³⁵ the words "wet" and "dry" on a county prohibition initiative;¹³⁶ various stray marks;¹³⁷ the phrase "SkverDeall O. K." written at the end of the ballot;¹³⁸ the phrase "10 yrs" written after a vote;¹³⁹ the phrase "No good" next to a candidate's name;¹⁴⁰ slight damage to ballots, such as burns, rips, or smudges;¹⁴¹ cross marks outside the proper square for voting;¹⁴² the inaccurate but phonetically correct spelling of a write-in candidate's name;¹⁴³ a write-in vote for an office not up for election;¹⁴⁴ an obliteration of a voting mark;¹⁴⁵ cross marks consistently in the wrong place;¹⁴⁶ a

Hanzel, 200 Minn. 135, 144–45, 273 N.W. 611, 616 (1937); Pennington v. Hare, 60 Minn. 146, 147–49, 62 N.W. 116, 117 (1895).

131. Truelsen v. Hugo, 81 Minn. 73, 77, 83 N.W. 500, 502 (1900), *overruled by* Murray v. Floyd, 216 Minn. 69, 73–74, 11 N.W.2d 780, 784 (1943) (offering the conclusory statement: "such a remark . . . has no legitimate connection with bona fide voting.").

132. Elwell v. Comstock, 99 Minn. 261, 270, 109 N.W. 698, 701 (1906).

133. *Id.* at 271, 109 N.W. at 702.

134. *Id.*

135. *Murray*, 216 Minn. at 72, 11 N.W.2d at 783; *Aura v. Brandt*, 211 Minn. 281, 290, 1 N.W.2d 381, 388 (1941), *overruled in part on other grounds*; *Pye v. Hanzel*, 200 Minn. 135, 144, 273 N.W. 611, 616 (1937); *In re Lannon*, 107 Minn. 453, 456–57, 120 N.W. 1082, 1084 (1909).

136. *In re Redwood County Election Contest*, 132 Minn. 290, 293–94, 156 N.W. 125, 126 (1916).

137. *Fitzgerald v. Morlock*, 264 Minn. 520, 528, 120 N.W.2d 339, 348 (1963); *Sperl v. Wegwerth*, 265 Minn. 47, 52, 120 N.W.2d 355, 358–59 (1963); *Hanson v. Emanuel*, 210 Minn. 271, 276–77, 297 N.W. 749, 753 (1941); *Frajola v. Zanna*, 193 Minn. 48, 257 N.W. 660, 660–61 (1934); *In re Redwood County*, 132 Minn. at 293, 156 N.W. at 126.

138. *Frajola*, 193 Minn. at 49, 257 N.W. at 660 (holding that the voter believed those he voted for "represented to him a 'square deal' and that they were 'all right.'"), *overruled by* Murray v. Floyd, 216 Minn. 69, 11 N.W.2d 780, 784 (1943).

139. *Id.*

140. *Pye v. Hanzel*, 200 Minn. 138, 139–40, 273 N.W. 611, 614 (1937).

141. *Sperl v. Wegwerth*, 265 Minn. 47, 53, 120 N.W.2d 355, 359 (1963); *Aura v. Brandt*, 211 Minn. 281, 286, 1 N.W.2d 381, 386 (1941), *overruled in part on other grounds*; *Hanson v. Emanuel*, 210 Minn. 271, 279, 297 N.W. 749, 754 (Minn. 1941); *Pye*, 200 Minn. at 146, 273 N.W. at 617.

142. *Hanson*, 210 Minn. at 276–77, 297 N.W. at 753.

143. *Id.* at 280, 297 N.W. at 754–55.

144. *Aura*, 211 Minn. at 284–85, 1 N.W.2d at 385 (requiring a reasonable belief that the office was up for election).

145. *Fitzgerald v. Morlock*, 264 Minn. 520, 532, 120 N.W.2d 339, 350 (1963); *Murray v. Floyd*, 216 Minn. 69, 72, 11 N.W.2d 780, 783 (Minn. 1943); *Aura*, 211 Minn. at 290, 1 N.W.2d at 388.

146. *Aura*, 211 Minn. at 287, 1 N.W.2d at 386. *See Fitzgerald*, 264 Minn. at 528,

cross mark next to the blank line for write-in votes;¹⁴⁷ non-uniform voting marks;¹⁴⁸ the word “no” next to an obliteration;¹⁴⁹ a heavily penciled line indicating a desire not to vote for coroner;¹⁵⁰ an oval mark presumably resulting “from the voter’s testing the writing quality of his pen before marking the ballot;”¹⁵¹ votes made in pencil and pen on the same ballot;¹⁵² the use of two cross marks while voting for one office;¹⁵³ write-in votes for “Anderson,” “Jake,” “anyone else,” “Phillips,” and “C”, as well as write-in votes of candidates for different offices and an incomplete write-in vote;¹⁵⁴ an illegible write-in vote;¹⁵⁵ and a torn ballot fixed with Scotch tape.¹⁵⁶

Although these holdings are based on different versions of statutes or no statute at all, the court in each case undertook the ostensible task of determining whether the voter intended to identify the ballot. The inconsistencies are apparent. It is difficult to comprehend, for example, why cross marks over the word “judge” are identifying marks but a heavily penciled line indicating a desire not to vote for coroner is not. Similarly, it is difficult to comprehend why the inconsistent use of voting marks or superfluous voting marks would be found to be identifying marks in one case but the opposite result would be reached in the case of non-uniform voting marks. Indecent remarks have received similarly inconsistent treatment. Finally, one wonders why the words “AFL” and “No” were held to identify a ballot, but the words “wet” and “dry” were not, when they both emphasized the voters’ preferred result. It is easy to see how such conclusions could run afoul of *Bush v. Gore*’s command that all votes be treated equally.

During the recount phase of Minnesota’s 2008 election for

120 N.W.2d. at 347–48.

147. *Murray*, 216 Minn. at 75–76, 11 N.W.2d at 785 (overruling in part *Aura v. Brandt*, 211 Minn. 281, 1 N.W.2d 381 (1941)); see also *Fitzgerald*, 264 Minn. at 529, 120 N.W.2d at 348 (accepting as valid a ballot containing a non-uniform mark).

148. See, e.g., *Fitzgerald*, 264 Minn. at 528, 120 N.W.2d at 347; *Sperl v. Wegwerth*, 265 Minn. 47, 51–52, 120 N.W.2d 355, 358 (Minn. 1963).

149. *Fitzgerald*, 264 Minn. at 528, 120 N.W.2d at 347.

150. *Id.* at 529, 120 N.W.2d at 348.

151. *Id.*

152. *Id.*

153. *Bell v. Gannaway*, 303 Minn. 346, 346–49, 227 N.W.2d 797, 800–01 (1975); *Fitzgerald*, 264 Minn. at 533, 120 N.W.2d at 350.

154. *Fitzgerald*, 264 Minn. at 352–53, 120 N.W.2d at 339, 350 (1963).

155. *Id.*

156. *Sperl v. Wegwerth*, 265 Minn. 47, 50, 120 N.W.2d 355, 359 (1963).

United States Senate, the State Canvassing Board also applied Minnesota Statutes section 204C.22, subdivision 13, and the results were similarly inconsistent. Before examining the Board's rulings, however, it should be noted that the State Canvassing Board is a body with limited authority that does not adhere to judicial procedures such as the Rules of Evidence.¹⁵⁷ Recounts of federal races are "limited in scope to the determination of the number of votes validly cast for the office to be recounted. Only the ballots cast in the election and the summary statements certified by the election judges may be considered in the recount process."¹⁵⁸

This does not mean, however, that there is no value in studying the Canvassing Board's rulings. Even though the Board does not adhere to the Rules of Evidence, it does follow the Administrative Procedures Act in the case of recounts.¹⁵⁹ Further, the Board is composed of the Minnesota Secretary of State and four judges: two district court judges, and two state supreme court justices.¹⁶⁰ During the 2008 U.S. Senate recount, the Canvassing Board included the Chief Justice of the Minnesota Supreme Court.¹⁶¹ These are individuals who are more than marginally acquainted with judicial procedures and the interpretation of statutes such as section 204C.22, subdivision 13. Consequently, it is illustrative to examine the rulings of the State Canvassing Board as to what constitutes an identified ballot. During the 2008 Senate recount, the Board's proceedings were accessible to an unprecedented extent via video streaming over the internet. Such an examination is therefore a simple endeavor.

Several rulings of the Canvassing Board in the 2008 U.S. Senate recount are inconsistent. For example, after a voter made a correction to his ballot, he had that correction witnessed by two people. The Board held that this did not constitute an identified

157. MINN. STAT. § 204C.31, subdiv. 3 (2008).

158. MINN. STAT. § 204C.35, subdiv. 3 (2008). *See also* Video: *State Canvassing Board - Day 2/part 4* (Minn. House Public Information Services Dec. 17, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1746 (stating that the State Canvassing Board does not address legal questions and is limited to conducting a canvass and "plowing through something around 1,000 challenged ballots in the next two days").

159. MINN. STAT. § 204C.361(a) (2008).

160. MINN. STAT. § 204C.31, subdiv. 2 (2008).

161. *See* State Canvassing Board Minutes, December 16, 2008–December 19, 2008, page 1, available at http://www.sos.state.mn.us/docs/december_16_2008_state_canvassing_board_minutes.pdf.

ballot.¹⁶² Yet the next day, the Board held that a ballot witnessed by a non-voter was identified and void.¹⁶³ Some statements of Canvassing Board members directly anticipate inconsistent application of the rules. For example, one Board member stated that “[w]hen it comes to the armed services, we should err on the side of what they intend.”¹⁶⁴ Yet, nothing in the statutes suggests that more liberal rules should be applied in the case of military voters as opposed to civilian voters.

Several Canvassing Board decisions also directly contravened established case law in Minnesota, leading to additional inconsistencies. *Murray v. Floyd* held that “an indecent remark or drawing on a ballot serves to identify it as much as a superfluous cross or other mark.”¹⁶⁵ Yet, the 2008 Canvassing Board held that what one Board member described as “slanderous commentary” did not constitute an identifying mark.¹⁶⁶ In *Bloedel v. Cromwell*, the Minnesota Supreme Court held that “[n]ames or initials on a ballot are generally and naturally regarded as identifying marks. Explanations that they were intended for another purpose must be excluded.”¹⁶⁷ Regardless, the Canvassing Board consistently held that voters who changed their votes and initialed their corrections did not improperly identify their ballots.¹⁶⁸ It is clear that not only

162. See Video: *State Canvassing Board - Day 2/part 2*, 56:19–57:30 (Minn. House Public Information Services Dec. 17, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1744.

163. See Video: *State Canvassing Board - Day 3/part 3*, 7:00–7:31 (Minn. House Public Information Services Dec. 18, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1751.

164. See Video: *State Canvassing Board - Day 3/part 2*, 1:38:50 (Minn. House Public Information Services Dec. 18, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1748.

165. 216 Minn. 69, 73–74, 11 N.W.2d 780, 784 (1943).

166. See Video: *State Canvassing Board - Day 4/part 1*, 7:40–7:55 (Minn. House Public Information Services Dec. 19, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1753.

167. 104 Minn. 487, 490, 116 N.W. 947, 949 (1908). This is not the rule in other jurisdictions. See, e.g., *Courtney v. Abels*, 17 So. 2d 824, 825 (La. 1944) (“A distinction . . . has to be made between [a distinguishing] mark and one which, on the other hand, merely indicates the attempt of the voter to correct a mistake honestly made by him in marking his ballot, for again the courts and the law are equally as zealous in safeguarding and protecting the right of the voter to cast his ballot and to have it counted.”).

168. See Video: *State Canvassing Board - Day 1/part 2*, 37:46–38:45 (Minn. House Public Information Services Dec. 16, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1742.

were some of the decisions of the 2008 Canvassing Board inconsistent, but many decisions went directly against established case law. *Bush v. Gore* rejected decisions that varied “from county to county,” and the situation was similar in Minnesota.¹⁶⁹

Beyond the disenfranchisement and unequal treatment of voters, additional arguments undermine, if not eliminate, the value of Minnesota's identifying mark statutes. First, the statutes are, at best, overinclusive. Most instances in which the statutes have been applied involve no actual or apparent corruption or vote-buying. Generally speaking, the cases either explicitly acknowledge the good faith of the voter, or are silent as to any bad intentions. In *Bloedel*, for example, the court held that “this ballot was properly excluded by the trial court, although it was cast in good faith, without fraud or corruption, and without any intention of identifying it.”¹⁷⁰

Indeed, a search of commercial legal databases yielded no instance in which a voter had been prosecuted under section 204C.18, subdivision 2 of the Minnesota Statute. The only instance the author was able to uncover in which it was even alleged that a vote-buying scheme was evidenced through identifying marks occurred in the Commonwealth of Northern Mariana Islands.¹⁷¹ In that case, the Commonwealth's Board of Elections found that “voters voluntarily entered code names such as ‘Rambo,’ ‘Bimbo,’ ‘RM Dela Cruz No. 1’ and ‘RM Dela Cruz No. 15’ on their ballots in order to reveal their identities” in legislative and municipal elections.¹⁷² Although the Ninth Circuit found that the “ballot-marking scheme . . . constitutes a direct subversion of the freedom to vote as one chooses,” it held that it lacked jurisdiction to address a candidate's claims.¹⁷³ This case does present disturbing facts, but the fact that one example of a ballot-marking scheme arose over twenty years ago in an outlying U.S. territory suggests that the

169. 531 U.S. 98, 106 (2000).

170. 104 Minn. at 491, 116 N.W. at 949 (internal quotation omitted). *See also* Nelson v. Bullard, 155 Minn. 419, 424, 194 N.W. 308, 310 (1923) (stating that illiterate voters who received assistance without taking statutorily required oath acted without fraud); Elwell v. Comstock, 99 Minn. 261, 270–71, 109 N.W. 698, 702 (1906); Pennington v. Hare, 60 Minn. 146, 152–54, 62 N.W. 116, 119 (Minn. 1895) (Collins, J., dissenting).

171. *See* Nabors v. Manglona, 829 F.2d 902 (9th Cir. 1987).

172. *Id.* at 904.

173. *Id.* at 905.

identification of ballots does not pose a rampant problem. Certainly, no similar facts have been alleged in recent Minnesota elections.

It would seem that the vast majority of voters whose ballots have been voided because of identifying marks simply did not know that placing such a mark on their ballot would invalidate it. The Minnesota Supreme Court alluded to this possibility using considerably less charitable language in *Hanson v. Emanuel*: “The body of electors includes not only the well-informed, capable, and careful voter, but also the ignorant, incapable, and careless voter.”¹⁷⁴ It would seem that the concerns leading to the creation of the identifying mark statutes—corruption and bribery—likely do not inhere in cases where a person has signed a ballot. As noted, the statutes are, at best, overinclusive. At worst, they address a problem that “may never exist,” in the words of Justice Collins.¹⁷⁵ The primary effect of the statutes seems to be the disenfranchisement of well-intentioned voters who do not know that placing an identifying mark upon their ballots will invalidate them.

The overinclusive nature of the identifying mark statutes is not just reflected in the apparent good faith of the voters whose ballots were excluded.¹⁷⁶ The Minnesota Supreme Court has gone so far as to suggest that unscrupulous judges could use the subjective nature of the identifying mark statutes to void ballots with which they disagreed.¹⁷⁷ One justice suggested that applying similar rules may “afford an excuse for throwing out ballots marked with the slightest deviation from the usual form of the ‘X’ mark and offer too much of an opportunity for a prejudicial count.”¹⁷⁸

The identifying mark statutes are also underinclusive in some respects. First, the statutes may not always target the proper party, because the statutes apply only to voters who place identifying

174. 210 Minn. 271, 275, 297 N.W. 749, 752 (1941); *See also* Murray v. Floyd, 216 Minn. 69, 73–75, 11 N.W.2d 780, 784 (1943).

175. Pennington v. Hare, 60 Minn. 146, 155, 62 N.W. 116, 120 (1895) (Collins, J., dissenting).

176. *See* MINN. STAT. § 204C.22, subdiv. 13 (2008) (making a ballot defective with any identifying mark); MINN. STAT. § 204C.18, subdiv. 2 (2008) (making it a misdemeanor to place any mark on a ballot).

177. State v. Hanson, 229 Minn. 341, 360, 38 N.W.2d 845, 855 (1949) (Loring, C.J., dissenting).

178. *Id.*

marks on their ballots.¹⁷⁹ They would not apply, however, to an election judge who corruptly directs a voter to place an identifying mark on a ballot, hoping to invalidate the ballot.¹⁸⁰ Although there was no claim of corruption, this fact pattern occurred in *Elwell v. Comstock*: “[T]hey had no intention of identifying their ballots, but understood the judges of election to direct them to indorse their initials thereon.”¹⁸¹ Another case noted that election officers “are in a position appreciably to affect results.”¹⁸² It should be noted that *Marshall v. Stepka* held that marks made by election judges (as opposed to voters) did not invalidate ballots.¹⁸³ It would appear, however, that the decision of *Elwell* remains in force,¹⁸⁴ because the voter in that case signed the ballot himself, albeit at the election judge’s direction.

Second, the identifying mark statutes do not target activities with the greatest potential for fraud.¹⁸⁵ A greater potential for fraud might exist with absentee voting, where voters do not have the physical protections present at the polling place and ballots are out of the control of election judges for prolonged periods.¹⁸⁶ Third, the *application* of the identifying mark statutes may be underinclusive.¹⁸⁷ During the 2008 U.S. Senate recount, the Canvassing Board held that many ballots were not voided, even though they contained statements that could have made the ballots easily identifiable. In several cases, voters expressed various “public policy views,” but they were held not to be identifying marks.¹⁸⁸ The Board found another ballot not identified that contained a

179. MINN. STAT. § 204C.22, subdiv. 13 (2008); § 204C.18, subdiv. 2 (2008).

180. MINN. STAT. § 204C.22, subdiv. 13 (2008); § 204C.18, subdiv. 2 (2008).

181. 99 Minn. 261, 271, 109 N.W. 698, 702 (1906); *See also* Johnson v. Swenson, 264 Minn. 449, 452–53, 119 N.W.2d 723, 726 (1963).

182. Nelson v. Bullard, 155 Minn. 419, 428, 194 N.W. 308, 312 (1923).

183. 259 Minn. 553, 558–60, 108 N.W.2d 614, 618–19 (1961).

184. It should be noted that the court in *Bell v. Gannaway* stated that “prior contrary case law relied upon by the contestant has, at least sub silentio, been overruled by *Fitzgerald*.” 303 Minn. 346, 349, 227 N.W.2d 797, 801 (1975); *Fitzgerald v. Morlock*, 264 Minn. 520, 120 N.W.2d 339 (1963).

185. *See* MINN. STAT. § 204C.22 subdiv. 13; MINN. STAT. § 204C.18 subdiv. 2.

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

187. *See* MINN. STAT. § 204C.18, subdiv. 2 (2008); MINN. STAT. 204C.22, subdiv. 13 (2008).

188. *See, e.g.*, Video: *State Canvassing Board – Day 2/part 1*, 51:44–52:26 (Minn. House Public Information Services Dec. 17, 2008), available at http://www.house.leg.state.mn.us/htv/archivessem.asp?ls_year=85.

distinctive symbol (a circle with a crooked arrow) in several write-in spots.¹⁸⁹ Various other extraneous statements, which could theoretically have been arranged in advance to identify a voter, were nonetheless found not to be identifying marks.¹⁹⁰

The application of the statutes is also underinclusive on a broad scale. During the 2008 elections, nearly all ballots in Minnesota were tabulated by optical scan machines,¹⁹¹ authorized by Minnesota statute.¹⁹² If there is no recount or post-election review, the ballots remain unseen until the end of the retention period of twenty-two months.¹⁹³ It is only if a ballot is challenged (*i.e.*, during a manual recount or election contest) that the identifying mark statutes may be applied.¹⁹⁴ If ballot marking schemes were commonplace, one would think that *all* ballots containing identifying marks should be voided, regardless of the closeness of the election. The failure of the identifying mark statutes to recognize the ubiquity of optical scanning machines highlights the anachronistic nature of the statutes. Indeed, in *McVeigh v. Spang*, the court held that a “mark placed upon the back of a ballot . . . is more of an identification mark than if placed on the face of the ballot. The voter, before returning his ballot, is required to fold it so as to conceal its face and all marks thereon.”¹⁹⁵ This concern is not at all relevant when a ballot is not folded, but is placed into an optical scan machine. The small number of recounts that occur is further evidence of the underinclusive nature of the application of the identifying mark statutes. State-funded recounts occur only when the margin

189. Video: *State Canvassing Board – Day 3/part 2*, 50:30–51:33 (Minn. House Public Information Services Dec. 17, 2008), available at http://www.house.leg.state.mn.us/htv/archivessem.asp?ls_year=85.

190. See, e.g., Video: *State Canvassing Board - Day 3/part 3*, 15:44–16:24 (Minn. House Public Information Services Dec. 18, 2008), available at http://www.house.leg.state.mn.us/htv/archivessem.asp?ls_year=85 (displaying two separate non-identified ballots with the words “I love you, Barack” written on one ballot and “Thanks for counting my vote!” written on another).

191. See generally OFFICE OF THE MINN. SEC’Y OF STATE, UNOFFICIAL RESULTS GENERAL (2008), available at <http://electionresults.sos.state.mn.us/20081104/PrecRpt.asp?M=TPR> (listing the estimated voter turnout in each Minnesota county, along with the date and exact time that each precinct reported its voting results).

192. MINN. STAT. § 206.55 (2008).

193. MINN. STAT. § 204B.40 (2008).

194. MINN. STAT. § 209.06 (2008).

195. 178 Minn. 578, 580, 228 N.W. 155, 157 (1929).

separating two candidates is less than one-half of one percent.¹⁹⁶ In 2008, recounts occurred in only two out of 134 state house races – approximately 1.5%.¹⁹⁷ The fact that the identifying mark statutes would be applied in only such a small number of races suggests that ballot marking schemes are not a pervasive problem. Indeed, it is ironic that these races are the ones in which the statutes would be applied. One would think that it would be particularly critical to count every vote in such a close race. Yet the effect of the identifying mark statutes is to disenfranchise numerous voters in close races.

IV. LEGISLATIVE PROPOSALS AND CONCLUSION

As part of his 2009 Legislative Agenda, Minnesota Secretary of State Mark Ritchie proposed a change in law that would define “an identifying mark on a ballot as a name outside of the space for a write-in, a signed ballot, or an ID number written on the ballot.”¹⁹⁸ Legislation was introduced in both the House of Representatives and Senate to effectuate this goal.¹⁹⁹ None of this language was adopted into law, nor did the final version of the Omnibus Election Bill contain the language.²⁰⁰

The proposed legislation would be an improvement in some respects. Primarily, it will remove the subjective nature of

196. MINN. STAT. § 204C.35, subdiv. 1 (2008) (federal, state, and judicial elections); MINN. STAT. § 204C.36, subdiv. 1 (2008) (county, school district, and municipal elections).

197. See OFFICE OF THE MINN. SEC'Y OF STATE, RECOUNT PLAN (11/18/08), available at http://www.sos.state.mn.us/docs/2008_general_election_final_recount_plan_rev_nov_19.pdf.

198. See OFFICE OF THE MINN. SEC'Y OF STATE, 2009 LEGISLATIVE AGENDA, available at http://www.sos.state.mn.us/docs/2009_legislative_proposal_fact_sheet.pdf.

199. See H.F. 1137, 2009 Leg., 86th Sess. (Minn. 2009), S.F. 768, 2009 Leg., 86th Sess. (Minn. 2009), S.F. 1331, 2009 Leg., 86th Sess. (Minn. 2009) (third engrossment). These bills relate only to Minn. Stat. § 204C.22, subdiv. 13, which provides that identified ballots are defective. Legislation was also introduced to modify Minn. Stat. § 204C.18, subdiv. 2, the complementary criminal statute. However, this legislation made only minor changes. H.F. 1229, 2009 Leg., 86th Sess. (Minn. 2009), H.F. 1266, 2009 Leg., 86th Sess. (Minn. 2009), and S.F. 659, 2009 Leg., 86th Sess. (Minn. 2009). These changes modified the criminal statute only as it relates to the initialing of ballots by election judges. S.F. 662, 2009 Leg., 86th Sess. (Minn. 2009), would provide that a name written on a write-in line does not constitute an identification mark for purposes of a criminal penalty.

200. See Conference Committee Report to S.F. 1331, 2009 Leg., 86th Sess. (Minn. 2009) (third engrossment). This legislation was vetoed by Governor Pawlenty on May 22, 2009.

determining what constitutes an identifying mark. Only names, identification numbers, and signatures would constitute such marks. The legislation also clears up an issue that occurred occasionally in case law by stating that properly placed write-in votes are not identifying marks.

However, the legislation would still cause voters to be disenfranchised in close races. Voters unfamiliar with the requirements of the law might sign their ballot in good faith but have their ballots excluded. The statute would also be superfluous in that ballots not subjected to a hand recount—the vast majority of ballots cast in the state—would not be voided, even if identifying marks were present.

In at least one way, this legislation would in fact exacerbate the problem of disenfranchisement. As the statute is currently written, it must be evident “that the voter intended to identify the ballot” for a ballot to be voided.²⁰¹ The legislation would do away with the intent to identify requirement. As a result, a ballot will be voided if a voter places any name outside of the write-in box, regardless of whether or not the voter intends to identify the ballot. The experience from the 2008 U.S. Senate recount suggests that this is more than a speculative possibility.²⁰² Indeed, members of the Canvassing Board used this intent requirement to hold that certain markings were not identifying marks, and that the ballots could be counted.²⁰³ The law could even be interpreted to void ballots where an election judge (rather than the voter) had written a name on the ballot.

Rather than attempting to salvage the existing identifying mark laws as these bills do, it would be preferable to simply repeal them. There appears to be no instance of a vote-buying scheme being evidenced by unique ballot markings in Minnesota since the state switched to the Australian ballot system in 1891. A nonexistent threat of an awkward form of corruption does not appear to be a strong rationale for the disenfranchisement of a large number of presumably well-meaning voters.

201. MINN. STAT. § 204C.22, subdiv. 13 (2008).

202. See, e.g., Video: *State Canvassing Board - Day 3/part 3*, *supra* note 190.

203. See, e.g., Video: *State Canvassing Board - Day 1/part 1*, 34:30–34:55 (Minn. House Public Information Services Dec. 16, 2008), available at http://www.house.leg.state.mn.us/htv/programa.asp?ls_year=85&event_id=1741 (Chief Justice Magnuson stated he did not believe the initials written on the ballot warranted rejection of the entire ballot).

To the extent vote buying and other forms of corruption and bribery are concerns, they would be better addressed by Minnesota's existing, more broadly phrased bribery and voter fraud statutes.²⁰⁴ Presumably, any actual ballot-marking scheme would fall under one of these statutes. The penalty in these statutes is a felony²⁰⁵ and a gross misdemeanor²⁰⁶—the same or stronger penalty that is in the criminal identifying mark statute. Consequently, sufficient deterrence should exist to prevent vote-buying schemes that could be evidenced by identifying marks.

The Minnesota Supreme Court has noted that “we are not free to change at will our prior rulings construing present election laws.”²⁰⁷ Because of the sedentary nature of these precedents, any legislator contemplating comprehensive election reform should seriously contemplate abandoning anachronistic statutory language. Minnesota's identifying mark statutes fit squarely into this category, and should simply be repealed.

204. *See, e.g.*, MINN. STAT. §§ 211B.07-13 (2008); MINN. STAT. § 609.42 (2008).

205. MINN. STAT. § 211B.13 (2008) (Minnesota's current bribery, treating, and solicitation statute).

206. MINN. STAT. § 211B.07 (2008) (Minnesota's current undue influence on voters statute).

207. *Sperl v. Wegwerth*, 265 Minn. 47, 49, 120 N.W.2d 355, 357 (1963).