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## Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy

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**DEMOCRACY AND THE SECRETARY: THE CRUCIAL ROLE OF  
STATE ELECTION ADMINISTRATORS IN PROMOTING  
ACCURACY AND ACCESS TO DEMOCRACY**

JOCELYN FRIEDRICHS BENSON\*

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INTRODUCTION

If elections are the bedrock of our American democracy, election administrators are our masons. While there are several entities and actors that

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each interact to shape, enforce, and execute election law and policy, none plays a role that is as crucial as the individual or group of individuals who are charged with overseeing the administration of all elections in the state. Congressional authority in this area is limited,<sup>1</sup> and federal courts are increasingly likely to defer to a state's interest in a particular policy unless it is blatantly unconstitutional or discriminatory.<sup>2</sup> State legislatures sporadically enact piecemeal and reactive laws that establish parameters for elections,<sup>3</sup> and state courts rarely intervene to alter the course of an election.<sup>4</sup> While the work of each of these entities in this context is consequential, connecting all four is the state entity, typically the Secretary of the Department of State,<sup>5</sup> who is responsible for overseeing, interpreting, and implementing all directives from these authorities and, when necessary and permissible, developing her own.

This Article builds on the premise that the Secretary of State<sup>6</sup> is not simply charged with running elections, but is responsible for administering them in such a way that effectively promotes the dual values that are at the heart of a healthy democratic process: accuracy and access.<sup>7</sup> All entities that play a role in the electoral process have a responsibility of promoting a healthy democracy, one free from discrimination, political pressures, and allowing for

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1. U.S. GEN. ACCOUNTING OFFICE, GAO Doc. No. GAO-01-470, ELECTIONS: THE SCOPE OF CONGRESSIONAL AUTHORITY IN ELECTION ADMINISTRATION (Mar. 2001), *available at* <http://www.gao.gov/new.items/d01470.pdf>.

2. *See generally* *Burdick v. Takushi*, 504 U.S. 428 (1992); *Spencer v. Pugh*, 543 U.S. 1301 (2004). *See also* *Crawford v. Marion County Election Board*, 533 U.S. \_\_\_\_ (2008).

3. *See infra* Part I.C.

4. Note, *Toward a Greater State Role in Election Administration*, 118 HARV. L. REV. 2314, 2315 (2004) (noting that “court intervention merely sets wide boundaries within which local officials have broad discretion”).

5. In thirty-eight states, the Secretary of State is the chief administrator of all elections. In all but six of those thirty-eight states (Fla., Me., N.H., N.J., Pa., and Tex.) the Secretary of State is elected by the voters in a popular election. National Association of Secretaries of State, Contact Roster, [http://nass.org/index.php?option=com\\_content&task=view&id=89&Itemid=223](http://nass.org/index.php?option=com_content&task=view&id=89&Itemid=223) (last visited March 27, 2008). Eleven states (Del., Haw., Ill., Md., N.C., N.J., N.Y., Okla., S.C., Va., Wis.) place the responsibility of administering elections in the hands of an appointed state board of elections, with as few as three (Okla.), or as many as twelve members. US. Dept. of State, The Administrative Structure of State Election Offices, <http://usinfo.state.gov/infousa/government/elections/tech3.html> (last visited March 28, 2008).

6. Because the Secretary of State is the chief election administrator in thirty-eight of fifty states, with the lieutenant government or appointed boards of elections charged with this responsibility in eleven other states, this article will use the term “Secretary of State” to refer to the entity that is primarily responsible for overseeing the administration of elections in the state.

7. *See* 42 U.S.C. § 1973gg (2000) (stating that the purpose of promoting the exercise of the right to vote, a duty held by “Federal, State, and local governments,” involves both “establish[ing] procedures that will increase the number of eligible citizens who register to vote in elections for Federal office” as well as “protect[ing] the integrity of the electoral process; and . . . ensur[ing] that accurate and current voter registration rolls are maintained”).

the participation of the informed voter.<sup>8</sup> But it is the Secretary of State who consistently serves on the “front lines” before, during, and after an election, and who is positioned as a bridge between the policy making entities—Congress, state legislatures—and the local election officials who implement those policies. As such, it is the Secretary of State who is most responsible for executing laws and programs that further the dual interests at the core of democracy: ensuring accurate electoral outcomes, including efforts to reduce fraud or intimidation and promote integrity, and prioritizing access to the vote by enabling the full, uniform, and equal participation of the electorate in the democratic process.<sup>9</sup>

This balance is particularly crucial because some policies that are designed to promote accuracy, such as voter identification requirements that seek to reduce the possibility of voter fraud, can lead to the formation of barriers to voting and participation.<sup>10</sup> But, with proper administration, such effects may be offset by corresponding voter education or other efforts to increase turnout.<sup>11</sup> Similarly, critics contend that some laws designed to promote participation, such as election day voter registration,<sup>12</sup> can lead to voter fraud, thus reducing the accuracy or integrity of election results.<sup>13</sup> The use of election day registration in states such as Minnesota and Wisconsin, however, shows that effective administration at the state and county levels can ensure accuracy and integrity while also increasing voter turnout.<sup>14</sup>

8. See generally Raleigh Hanna Levine, *The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225 (2003).

9. Several commentators have also noted the partisan undertone to the access/accuracy divide. See, e.g., Daniel J. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1233 (2005) (describing “HAVA’s access/integrity compromise”); see also Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 983–85 (2005) (proposing a model for nonpartisan election administration “where the allegiance . . . is to the integrity of the process itself, and not to any particular electoral outcome”). It is just as important for a Secretary of State to bridge this partisan divide and recognize a balanced approach that administers elections in a way that furthers both goals.

10. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634–35 (2007) (discussing the lack of evidence of widespread voter fraud, despite the reference to voter fraud as a justification for voter identification requirements).

11. See *infra* Part II.B.

12. Report: *Election Day Voter Registration Would Boost Voter Participation in Iowa; ‘EDR Could Help Increase Voter Turnout Over 10 Percentage Points’*, ASCRIBE NEWSWIRE, Mar. 22, 2007, available at [http://www.vote.caltech.edu/news/RMA\\_EDRpress-conf\\_3-22-07.pdf](http://www.vote.caltech.edu/news/RMA_EDRpress-conf_3-22-07.pdf).

13. Hasen, *supra* note 9, at 962–63.

14. *Election Day Registration and Provisional Voting: Committee Hearing Before the Subcomm. on Elections*, 110th Cong. (2007) (statement of Mark Ritchie, Secretary of State of Minn.); see also *infra* notes 171–173 and accompanying text.

This Article contends that it is the Secretary of State who plays the pivotal role in properly administering and overseeing elections to ensure that these dual values of accuracy and access are promoted, enforced, and attained. Part I seeks to emphasize the role that the Secretary plays through describing the general roles that Congress, federal courts, state legislatures, and state courts each play in developing and enforcing election laws. This discussion of the different responsibilities of these areas of government illustrates the significant position that the Secretary of State occupies vis-à-vis each entity.

Parts II and III detail several different areas of election law and administration where the Secretary of State plays a crucial, if not pivotal, role in ensuring that the goals of accuracy and access are met. Part II focuses on some of the responsibilities that the Secretary of State exercises prior to election day.<sup>15</sup> Comparing various examples and case law, it details how the actions of the state's chief election officer can make the difference as to whether laws achieve the goals of promoting accuracy or access to the electoral process. That section specifically discusses the Secretary's role regarding the methods and ease of voter registration, managing lists of registered voters, and the general use of the office to promote civic engagement. It also discusses the Secretary's role in administering voter identification laws. While the act of voter identification takes place on election day, some of the most important aspects of administration occur prior to an election. Part III addresses similar issues as they relate to election day itself. In particular it analyzes the Secretary's ability to work with local clerks to ensure that polling places function uniformly and properly, with an emphasis on ballot counting technology, assistance to English learning voters, and accommodations to voters with physical disabilities.

#### PART I: THE ELECTORAL ROLE OF CONGRESS, STATE LEGISLATURES, AND THE COURTS

##### *I.A. The Congressional Role in Election Administration and Regulation*

The role of Congress in overseeing or administering elections is executed from afar, with most of its actions, with the exception of segments of the Voting Rights Act,<sup>16</sup> potentially applying to elections throughout the entire country. As a result, congressional acts relating to election administration

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15. While the responsibilities of state election administrators are great and varied when it comes to elections, this article focuses only on five separate areas. Other issues that are beyond the scope of this article include the enforcement of campaign finance laws, handling of the nomination and registration of parties and candidates, overseeing recounts and audits, and the administration of provisional and absentee ballots.

16. Federal oversight is particularly strong under §§ 5 and 203 of the Voting Rights Act. *See infra* notes 36–44 and accompanying text.

must necessarily be broad and sweeping in order to be relevant to each of the country's vastly diverse jurisdictions.

Congress has explicit authority to enact laws regarding the administration of elections for congressional and presidential elections.<sup>17</sup> Article II of the U.S. Constitution, for example, grants Congress the power to set the date for presidential elections.<sup>18</sup> And although Article I, Section 4 of the U.S. Constitution, the "Elections Clause," grants state legislatures the authority to regulate the "times, places, and manner of holding Elections" for Congress, it grants Congress the ability to "make or alter" these regulations.<sup>19</sup> The Supreme Court has interpreted these provisions to apply to presidential elections as well.<sup>20</sup>

In furtherance of the power granted under the Elections Clause, Congress enacted the National Voter Registration Act of 1993 (NVRA).<sup>21</sup> The NVRA substantially increased opportunities for voter registration, most significantly by enabling citizens to register to vote in a federal election when they apply for

17. For a general and thorough discussion of the role of Congress in developing and administering election law, see U.S. GEN. ACCOUNTING OFFICE, *supra* note 1.

18. See U.S. CONST. art. II, § 1, cl. 4 ("The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.").

19. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."); see also *Ex parte Siebold*, 100 U.S. 371, 388 (1879) (interpreting art I. § 4 to grant Congress expansive and supreme powers to regulate congressional elections). But see *Ass'n of Cmty. Org. for Reform Now v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995) (cautioning that Congress's power under the Elections Clause is not limitless and stating that Congress was restrained to pass laws that pertain to the state's regulation of federal elections).

20. See *Burroughs v. U.S.*, 290 U.S. 534, 545 (1934) (extending the congressional power under the Elections Clause to presidential elections). But see U.S. GEN. ACCOUNTING OFFICE, *supra* note 1.

The precise parameters of Congress' authority to pass legislation relating to presidential elections are not as clearly established as Congress' authority over its own elections . . . . [W]hereas Congress' authority under the Elections Clause provides for the regulation of times, places, and manner of congressional elections, its authority over presidential elections, at Article II, Section 1, Clause 4, simply provides that Congress may determine the time of choosing presidential electors. Despite this distinction, Congress' authority to regulate presidential elections is clearly not confined only to matters related to timing. However, federal legislation relating solely to the administration of presidential elections has been fairly limited and, therefore, federal case law on the subject is also rather sparse.

*Id.*

21. National Voter Registration Act, Pub. L. 103-31, § 2, 107 Stat. 77(codified as amended at 42 U.S.C. § 1973gg (2000)); see generally *Ass'n of Cmty. Org. for Reform Now v. Miller*, 129 F.3d 833, 836 (6th Cir. 1997); *Voting Rights Coal. v. Wilson*, 60 F.3d 1411, 1413-14 (9th Cir. 1995); *Ass'n of Cmty. Org. for Reform Now v. Edgar*, 56 F.3d 791, 793 (7th Cir. 1995) (rejecting several challenges to congressional authority to enact the NVRA).

their drivers' licenses or at various other state offices.<sup>22</sup> But in recognition of state-based variances, the NVRA allowed an exemption for the handful of states that allow same-day voter registration.<sup>23</sup> To that end, though the NVRA directed states to provide and accept completed voter registration forms at certain state agencies, such as any office in the state providing public assistance, it also allowed for some state discretion in determining which other agencies to provide registration, such as county clerks' offices, public schools, and public libraries.<sup>24</sup> The NVRA also granted states the authority to investigate suspicious voter registration applications<sup>25</sup> and provided detailed circumstances under which states may permissibly purge the names of ineligible voters from registration lists.<sup>26</sup>

Congress has a more limited role, however, in relation to state and local elections.<sup>27</sup> This role is primarily derived from four separate constitutional amendments. Each forbids specific discriminatory practices in any and all elections—based on race, color, previous condition of servitude,<sup>28</sup> gender,<sup>29</sup> age,<sup>30</sup> equal protection,<sup>31</sup> or ability to pay a tax<sup>32</sup>—and each grants Congress the authority to enforce these prohibitions through “appropriate legislation.”<sup>33</sup> Out of Congress's authority to enforce the Fourteenth and Fifteenth Amendments grew the Voting Rights Act of 1965 (VRA).<sup>34</sup> The enactment of the VRA was a crowning achievement of the classical civil rights movement and the culmination of a bloody series of events seeking political empowerment for African Americans in the United States.<sup>35</sup> The Act contains several provisions that together form a fabric of protection against racial discrimination in all elections, and it allows for the appointment of federal observers to monitor

22. National Voter Registration Act § 5.

23. National Voter Registration Act § 4.

24. National Voter Registration Act § 7.

25. National Voter Registration Act § 8.

26. *Id.*

27. *See Oregon v. Mitchell*, 400 U.S. 112, 124–25 (1970) (holding that Congress exceeded its authority under the Constitution by enfranchising eighteen-year-olds in state and local elections).

28. U.S. CONST. amend. XV, § 1.

29. U.S. CONST. amend. XIX.

30. U.S. CONST. amend. XXVI, § 1.

31. U.S. CONST. amend. XIV, § 1.

32. U.S. CONST. amend. XXIV, § 1.

33. *See, e.g.*, U.S. CONST. amend. XV, § 2.

34. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. § 1971, 1973 to 1973bb-1 (2000); *South Carolina v. Katzenbach*, 383 U.S. 301, 337 (1966).

35. *See generally*, ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 263–66 (2000) (describing events leading to the passage of the VRA).

compliance.<sup>36</sup> Section 2 protects against discriminatory election laws or practices, prohibiting any voting “qualification . . . prerequisite . . . standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color.”<sup>37</sup> Section 202 prohibits all states and localities from using any “test or device” to establish voter eligibility, including literacy, English proficiency, or character requirements.<sup>38</sup> Section 203 requires that certain jurisdictions provide translation assistance for English learning voters who are of Spanish, Asian, Native American, or Alaska Native descent.<sup>39</sup> Sections 4 and 5 together apply to certain areas of the county—“covered” jurisdictions—that in 1964, 1968, or

36. 42 U.S.C. § 1973d (authorizing the Justice Department to appoint federal observers to monitor compliance with the requirements of the Voting Rights Act).

37. Voting Rights Act § 2. As codified, this section states:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

38. National Voting Rights Act § 201.

39. National Voting Rights Act § 203. As codified, this section states:

A State or political subdivision is a covered State or political subdivision for the purposes of this subsection if the Director of the Census determines, based on the 2010 American Community Survey census data and subsequent American Community Survey data in 5-year increments, or comparable census data, that—

(i)(I) more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and are limited-English proficient;

(II) more than 10,000 of the citizens of voting age of such political subdivision are members of a single language minority and are limited-English proficient; or

(III) in the case of a political subdivision that contains all or any part of an Indian reservation, more than 5 percent of the American Indian or Alaska Native citizens of voting age within the Indian reservation are members of a single language minority and are limited-English proficient; and

(ii) the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate.

42 U.S.C. § 1973aa-1a(b)(2)



1972 required compliance with “any test or device” as a prerequisite to voting.<sup>40</sup> These provisions were designed to prevent the enactment of discriminatory voting procedures by requiring the “pre-clearance” of all new election laws in these covered jurisdictions. To receive pre-clearance, jurisdictions must, in part, prove to the Attorney General or the U.S. District Court for the District of Columbia that their proposed changes do not have the effect of “retrogressing” or weakening the ability of minority voters in the jurisdiction to participate in the electoral process.<sup>41</sup>

Finally, in addition to the above explicit grants of authority to regulate elections, the Constitution’s Spending Clause<sup>42</sup> empowers Congress to impose certain requirements on states receiving funds from the federal government, so long as those requirements are related to the federal interest that the funding grants are intended to further.<sup>43</sup> In furtherance of the Spending Clause, Congress enacted the Help America Vote Act of 2002 (HAVA).<sup>44</sup> The most significant provisions of HAVA provided funding for states to replace outdated voting machines,<sup>45</sup> required states accepting federal funding to offer provisional ballots and establish state-wide computerized registration lists,<sup>46</sup> and required voters who registered by mail and are voting for the first time to show photo identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.<sup>47</sup> In addition, Title II established the Election Assistance Commission to serve as a national clearinghouse and resource for the compilation and review of federal election procedures.<sup>48</sup> Title III established uniform requirements for all voting systems used in federal elections, mandating that all voting systems purchased with the federal funds

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40. National Voting Rights Act §§ 4-5. As codified, subsection (f)4 includes jurisdictions that in 1972 failed to provide translated materials if more than five percent of its electorate were members of a single language minority group. 42 U.S.C. § 1973b(f)4.

41. This “retrogression” standard is not part of the text of the VRA, but it was articulated ten years after its enactment in the Supreme Court opinion of *Beer v. U.S.*, 425 U.S. 130, 141 (1976) (holding that a district apportionment plan will be denied preclearance if it harms or leads to a reduction in the current electoral power of voters of color).

42. The Spending Clause provides, in part, that, “the Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl. 1.

43. *S.D. v. Dole*, 483 U.S. 203, 206 (1987) (holding that Congress could withhold federal highway funds from states that failed to adopt the age of twenty-one as the minimum drinking age).

44. Help America Vote Act of 2002, Pub. L. 107-252, 116 Stat. 1668 (codified at 42 U.S.C. §§ 15301-15545 (2002)).

45. Help America Vote Act § 102.

46. Help America Vote Act § 302.

47. Help America Vote Act § 303.

48. Help America Vote Act § 201.

permit the voter an opportunity to verify and change or correct their vote, alert voters of when they have over-voted, and produce a permanent paper record with manual audit capacity that could serve as the official record in the event of a recount.<sup>49</sup>

*I.B. The Role of Federal Courts in Election Administration and Regulation*

In recent years the role that federal courts play in overseeing the electoral process has gained increased attention, due in part to the U.S. Supreme Court's 2000 decision in *Bush v. Gore*.<sup>50</sup> But the role that federal courts play in regulating elections was a source of debate and controversy long before the 2000 presidential election. The evolution of voting as a fundamental right under the U.S. Constitution originated in the 1962 Supreme Court case of *Baker v. Carr*, in which the Court established that equal protection challenges to redistricting plans were justiciable under the Fourteenth Amendment.<sup>51</sup> The Court's subsequent analysis, two years later, in *Reynolds v. Sims* specifically articulated the use of a strict scrutiny analysis in evaluating any laws that potentially infringe on "the right to exercise the franchise in a free and unimpaired manner."<sup>52</sup> Under this strict scrutiny standard, a state is required to demonstrate a compelling interest and show that its law affecting a fundamental right is narrowly tailored to serve that interest. The analysis carries a significant presumption against any state election law abridging a fundamental right, and it is rare for a law to survive such scrutiny.<sup>53</sup>

Roughly twenty years after *Reynolds*, the Supreme Court issued an opinion introducing the concept of a more flexible scrutiny for some state election laws and procedures. In *Anderson v. Celebrezze*, the Court was asked to determine whether an early filing deadline for presidential candidates in Ohio, arguably making it difficult for independent candidates to appear on the ballot, placed an unconstitutional burden on the voting and associational rights of independent

49. Help America Vote Act § 301.

50. *Bush v. Gore*, 531 U.S. 98 (2000). Numerous law review articles have been written in the years since *Bush v. Gore* analyzing its impact on the question of the federal courts' role in regulating elections. See, e.g., Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. 925 (2007). For alternative taxonomies, see Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. 1007 (2007); Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065 (2007); Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007).

51. *Baker v. Carr*, 369 U.S. 186, 237 (1962).

52. *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

53. Though the *Reynolds* opinion on its face applied strictly to apportionment claims, the Supreme Court explicitly extended the use of strict scrutiny to any election law burdening the casting of the voter in *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670–71 (1966) (holding that states' use of a poll tax did was an unconstitutional burden on the right to vote that was not justified by or narrowly tailored to serve any compelling state interest).

candidates and their supporters.<sup>54</sup> In upholding the filing deadline, the Court emphasized the slight deference to states provided in the Election Clause of the U.S. Constitution<sup>55</sup> and concluded that any court evaluating a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments” against “the precise interests put forward by the State as justifications for the burden imposed by its rule.”<sup>56</sup> To this end, the *Anderson* Court stated that the state’s vague but “important” interest in regulating elections is “generally sufficient to justify reasonable, nondiscriminatory restrictions.”<sup>57</sup>

This call for increased recognition of the state’s interest in promoting a particular election law or procedure was fortified in the Court’s 1992 decision in *Burdick v. Takushi*.<sup>58</sup> In *Burdick*, the Court rejected a constitutional challenge of a Hawaii law prohibiting write-in voting.<sup>59</sup> Applying the somewhat relaxed standard of review set forth in *Anderson*, the Court concluded that Hawaii’s prohibition on write-in voting did not unreasonably infringe upon its citizens’ rights under the First and Fourteenth Amendments. The Supreme Court reasoned that all election laws “invariably impose some burden upon individual voters” and that subjecting “every voting regulation to strict scrutiny and [requiring] that the regulation be narrowly tailored to advance a compelling state interest [ties] the hands of States seeking to assure that elections are operated equitably and efficiently.”<sup>60</sup> The Court re-emphasized *Anderson*’s “more flexible standard” by stating that a state’s regulatory interests are “generally sufficient to justify” any reasonable, nondiscriminatory restrictions upon the fundamental right to vote.<sup>61</sup>

Less than ten years later came the Supreme Court’s blockbuster opinion in *Bush v. Gore*,<sup>62</sup> overturning a decision by the Florida Supreme Court that ordered, among other things, a statewide manual recount of all registered undervotes cast for the presidency in Florida during the 2000 presidential election.<sup>63</sup> Though only five Justices agreed that the recount should not go

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54. *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983).

55. U.S. CONST. art. 1, § 4, cl. 1 (granting states the power to establish the time, place, and manner of holding elections for Senators and Representatives).

56. *Anderson*, 460 U.S. at 789.

57. *Id.* at 788.

58. *Burdick v. Takushi*, 504 U.S. 428 (1992).

59. *Id.* at 432–42.

60. *Id.* at 433.

61. *Id.* at 434.

62. *Bush v. Gore*, 531 U.S. 98 (2000).

63. *Id.* at 102 (explaining that undervotes are those cast that do not register a selection in a particular category).

forward based on their interpretation of the Electoral Count Act,<sup>64</sup> seven joined a per curiam opinion, which emphasized that the Equal Protection Clause of the Fourteenth Amendment required the creation and enforcement of uniform standards to guide individuals in counting ballots and votes during the statewide manual recount.<sup>65</sup> The per curiam opinion reasoned that, under the Equal Protection Clause:

[T]he right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having 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.<sup>66</sup>

The Supreme Court's per curiam opinion in *Bush v. Gore* also included murky language seeking to limit the "consideration" of the issues before the Court "to the present circumstances," reasoning that "the problem of equal protection in election processes generally presents many complexities."<sup>67</sup> The language, along with a substantial flurry of academic commentary on the meaning of those terms,<sup>68</sup> led several courts to confusingly grapple with the question of whether to apply the Court's expanded interpretation of the Equal Protection Clause to other cases.

Most notably, the Ninth and Sixth Circuits confronted the question of whether *Bush v. Gore*'s requirement of uniformity in the counting of ballots extended to election machinery. In *Stewart v. Blackwell*, a three-judge panel of the Sixth Circuit Court of Appeals initially concluded that however "[m]urky, transparent, illegitimate, right, wrong, big, tall, short or small," the Supreme Court's opinion in *Bush v. Gore* "is first and foremost a decision of the Supreme Court of the United States and we are bound to adhere to it."<sup>69</sup> The panel applied the rationale from *Bush v. Gore* and strictly scrutinized Ohio's

64. *Id.* at 135. For an extensive analysis of the details surrounding this aspect of the *Bush v. Gore* holding, see generally Richard L. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U.L. REV. 691 (2002); Laurence H. Tribe, *Erog .v Hsub and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*, 115 HARV. L. REV. 170 (2002).

65. *Bush*, 531 U.S. at 103, 111. Justices Souter and Breyer agreed that the lack of uniform recount standards implicated the Equal Protection Clause but disagreed with the other five Justices on the remedy, believing that the case should instead have been remanded back to the Florida courts upholding the recount decision but requiring the court to develop uniform standards to guide the recount. *Id.* at 134–35 (Souter, J., dissenting).

66. *Id.* at 104–05.

67. *Id.* at 109.

68. See, e.g., Richard L. Hasen, *Bush v. Gore and the Future of Equal Protection Law in Elections*, 29 FLA. ST. U. L. REV. 377, 378 (2002); Daniel P. Tokaji, *Political Equality After Bush v. Gore*, in *THE FINAL ARBITER: THE CONSEQUENCES OF BUSH V. GORE FOR LAW AND POLITICS* 107, 109–15 (Christopher Banks et al. eds., 2005).

69. *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *superseded en banc*, 473 F.3d 692, 859 (6th Cir. 2007).

policy to allow the use of different ballot machines in counties throughout the state. Under this analysis, the three-judge panel struck down Ohio's policy, finding that some of these counties used machines with a higher error rate, and the state showed no compelling interest to justify its allowing the use of these machines.<sup>70</sup> Similarly, in *Southwest Voter Registration Education Project v. Shelley*, a three-judge panel of the Ninth Circuit Court of Appeals applied strict scrutiny to conclude that the sporadic use of punch card machines violated the Equal Protection Clause.<sup>71</sup>

But the impact of these two opinions is minimal.<sup>72</sup> The Ninth Circuit voted to review the three-judge panel decision en banc<sup>73</sup> and subsequently reversed the decision, offering almost no analysis.<sup>74</sup> Similarly, the Sixth Circuit also voted to review *Stewart* en banc,<sup>75</sup> which automatically vacated the decision of the three-judge panel.<sup>76</sup> Concurrently, the Ohio Secretary of State, Kenneth Blackwell, decided to replace the punch card machines throughout the state. Plaintiffs in the case then filed a brief before the court in which they conceded the controversy behind the case was moot, and the en banc court dismissed the case without an opinion on the underlying equal protection analysis.<sup>77</sup>

Despite the uncertainty surrounding the future applicability of the Supreme Court's extension of Equal Protection Clause under *Bush v. Gore*, federal courts continue to maintain their role of ensuring that state and federal authorities regulate elections in compliance with the Court's view of constitutional duties and limitations.

### *I.C. The Role of State Legislatures in Election Administration and Regulation*

State legislatures are the primary source of laws regulating the electoral process.<sup>78</sup> This central role of state legislatures is identified in the Elections Clause of the U.S. Constitution, which explicitly grants state legislatures the

70. *Id.* at 846.

71. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 900 (9th Cir. 2003), *vacated*, 344 F.3d 914 (9th Cir. 2003).

72. *See generally* Hasen, *The Untimely Death of Bush v. Gore*, *supra* note 68, at 9–14 (providing a full description of the opinions, cases, and the reasons each case was vacated).

73. *Shelley*, 344 F.3d at 914.

74. *Shelley*, 344 F.3d at 918 (concluding that “reasonable jurists may differ” over the equal protection evaluation of the sporadic use of punch card machines).

75. *Stewart v. Blackwell*, 473 F.3d 692 (6th Cir. 2007) (en banc).

76. 6TH CIR. R. 35(a) (“The effect of the granting of a rehearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket as a pending appeal.”).

77. *Stewart*, 473 F.3d at 692-94.

78. Note, *supra* note 4, at 2316 (“Subject to a few federal constraints and trace amounts of federal funding, states and localities have plenary authority to structure their election systems.”).

power to regulate the time, place, and manner of administering elections.<sup>79</sup> It is also a role that has received deference from the U.S. Supreme Court, which has noted that states “have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.”<sup>80</sup>

Through the development of the state election code, the state legislatures have the significant authority to enact laws imposing limits where constitutionally permissible on nearly everything related to election administration. These areas include issues regarding ballot access,<sup>81</sup> registration requirements,<sup>82</sup> voter identification requirements,<sup>83</sup> the date and time of state elections,<sup>84</sup> the casting of absentee ballots, campaign finance regulations, and methods of counting, recounting, and auditing election results.<sup>85</sup> State legislatures also can establish remedies and punishments for

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

80. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

81. See BRENNAN CENTER FOR JUSTICE, N.Y.U. SCH. OF LAW, CRIMINAL DISENFRANCHISEMENT LAWS ACROSS THE UNITED STATES 1–4, [http://www.brennancenter.org/page/-/d/download\\_file\\_48642.pdf](http://www.brennancenter.org/page/-/d/download_file_48642.pdf) (last visited Feb. 24, 2008) (demonstrating that nearly every state imposes some restriction on the right to vote for individuals with criminal convictions).

82. See THE PEW CENTER ON THE STATES, VOTER REGISTRATION INFORMATION 1–2, [http://www.pewcenteronthestates.org/uploadedFiles/voter%20reg%20info\(1\).pdf](http://www.pewcenteronthestates.org/uploadedFiles/voter%20reg%20info(1).pdf) (last visited Feb. 24, 2008) (pointing out that registration requirements vary by state). Seven states—WI, MN, ME, ID, NH, WY, MT, and IA—allow voters to register up to and including Election Day. Other states require that voters register to vote up to thirty days prior to an election. *Id.*

83. See ELECTIONLINE.ORG, THE PEW CENTER ON THE STATES, VOTER ID LAWS 1 (2008), <http://www.pewcenteronthestates.org/uploadedFiles/voter%20id%20laws.pdf>. Eighteen states currently require all voters to present some form of identification (photo or non-photo) when voting, and seven states currently require all voters to show photo identification in order to cast a ballot. Further, without proper identification, Florida, Indiana, and Georgia require voters to cast provisional ballots. Voters without proper identification in Hawaii, Louisiana, Michigan, and South Dakota must sign affidavits to cast regular (non-provisional) ballots. *Id.*

84. Several states have unique laws regarding the dates of elections for state and local positions that provide for increased turnout. Louisiana, for example, holds state elections on Saturdays. See SUE O’CONNELL, MONTANA STATE LEGISLATURE, COMMITTEE ON HOUSE RESOLUTION 46, OVERVIEW OF SATURDAY ELECTIONS 1 (2007), [http://leg.mt.gov/content/committees/interim/2007\\_2008/st\\_admn\\_vet\\_affairs/assigned\\_studies/hj46saturdayelections.pdf](http://leg.mt.gov/content/committees/interim/2007_2008/st_admn_vet_affairs/assigned_studies/hj46saturdayelections.pdf) (staff report for the Montana State Legislature’s Committee on House Joint Resolution 46 to revise election laws). In New Jersey, election day is a state holiday. N.J. STAT. ANN. § 36:1-1 (West 2002).

85. Hasen, *supra* note 50, at 4 (noting that many state legislatures have, with financial support from the federal government, promoted improved voting technology in the years

violations of these laws, and they are able to empower state authorities and agencies, such as the State Attorney General or the Secretary of State, to monitor or investigate certain violations.

Perhaps most significantly, state legislatures grant a varying range of discretion to the state and local officials that are charged with administering and supervising elections.<sup>86</sup> The effect of this grant of discretion can take varying forms and could potentially be so vast on the local level as to give rise to an equal protection violation. In 2000, for example, Florida's law for counting ballots provided that "no vote shall be declared invalid or void if there is a clear indication of the intent of the voter as determined by the canvassing board."<sup>87</sup> This general "intent of the voter" standard granted so much discretion to local election officials that the U.S. Supreme Court expressed the concern in *Bush v. Gore* that a varying application of the vague standard gave rise to an equal protection violation.<sup>88</sup> No lower court has yet to effectively apply the Supreme Court's *Bush v. Gore* Equal Protection rationale in other election administration contexts.<sup>89</sup>

In addition, the legislative development of state election codes also varies widely from state to state. Some states, for example, do not allow individuals convicted of certain crimes to vote, even after their sentences are completed, while many others only disenfranchise offenders who are currently incarcerated.<sup>90</sup> Minnesota, Wisconsin, Iowa, and a handful of other states

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following *Bush v. Gore* and arguing that as a result, "fewer votes are now 'lost' due to inadequate vote counting machinery").

86. See Note, *supra* note 4, at 2316 ("[s]tates vary in how much power they delegate to counties and municipalities. States also vary in how they provide for the selection and removal of local election administrators and how they fund local elections." However, the author also notes that "any delegation of power grants a measure of executive discretion that even the most meticulously detailed rules will not eliminate entirely. Moreover, when administrators are not held accountable for rule violations—is likely, given courts' reluctance to intervene in electoral disputes—the rules do little to curb discretion.").

87. FLA. STAT. § 101.5614 (2007).

88. Tokaji, *supra* note 50, at 1070–71 (describing the U.S. Supreme Court's expressed concern over the "excessive discretion vested in the local officials charged with overseeing elections" in *Bush v. Gore* and reasoning that "[j]ust as the absence of specific standards for regulating speech once allowed local officials to suppress the political speech of unions and civil rights demonstrators, the absence of specific standards for counting votes would allow partisans to suppress the votes of those favoring the other side's candidate").

89. See *id.* at 1071 (noting two federal lawsuits challenging the Ohio legislature's failure to articulate specific standards governing its system of election administration under the Equal Protection Clause standard in *Bush v. Gore*, but also noting that neither case came to fruition).

90. E.g., THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2007), [http://www.sentencingproject.org/Admin/Documents/publications/fd\\_bs\\_fdlaw\\_sinus.pdf](http://www.sentencingproject.org/Admin/Documents/publications/fd_bs_fdlaw_sinus.pdf).

allow voters to register to vote up to and during Election Day.<sup>91</sup> Georgia, Indiana, and Florida require voters to present photo identification before they receive a ballot on election day.<sup>92</sup> Twenty-three states, including Illinois, North Carolina, and Mississippi, do not require voters to produce any form of identification prior to voting, other than identification requirements for first time voters under federal law.<sup>93</sup>

The state-to-state variance in election laws illustrates another aspect to the process. Often times, the state's passage of laws is piecemeal,<sup>94</sup> sporadic, and dominated or driven by partisan concerns.<sup>95</sup> Such a system, void of consistency and sometimes even logic, has led at least one commentator to lament that this vast "diversity of systems" reflects either "a thriving example of federalist experimentation or a horrifying mishmash of self-serving behavior."<sup>96</sup>

#### *I.D. The Role of State Courts in Election Administration and Regulation*

In his speech entitled "The Role of State Courts in the Battle for Inclusive Participation in the Electoral Process," Judge George Bundy Smith, a sitting judge on the New York Court of Appeals,<sup>97</sup> argued that the primary role of both state and federal judges is twofold. "First, judges are required to maintain constant vigilance to ensure that the level playing field promised . . . in *Baker*

91. Minnesota Election Center, Register to Vote, <http://www.sos.state.mn.us/home/index.asp?page=204> (last visited Feb. 4, 2008); Wisconsin Government Accountability Board, FAQ's: How to Register to Vote, [http://elections.state.wi.us/faq\\_detail.asp?faqid=119&fid=27&fname=&linkid=](http://elections.state.wi.us/faq_detail.asp?faqid=119&fid=27&fname=&linkid=) (last visited Feb. 4, 2008); MICHAEL A. MAURO, SECRETARY OF STATE, IOWA ELECTION DAY REGISTRATION GUIDE, available at <http://www.sos.state.ia.us/pdfs/elections/EDRbrochure.pdf>.

92. VOTER ID LAWS, *supra* note 83, [http://www.pewcenteronthestates.org/initiatives\\_detail.aspx?id=34044](http://www.pewcenteronthestates.org/initiatives_detail.aspx?id=34044).

93. *Id.* (stating that photo and non-photo identification are accepted in CA, DC, ID, IL, IA, ME, MD, MA, MN, MS, NE, NV, NH, NJ, NY, NC, OK, OR, RI, UT, VT, WV, WI, WY).

94. PROJECTVOTE.ORG, POLICY BRIEF NO. 11, MAINTAINING CURRENT AND ACCURATE VOTING LISTS 2, (2006), [http://projectvote.org/fileadmin/ProjectVote/Policy\\_Briefs/PB11\\_List\\_Maintenance.pdf](http://projectvote.org/fileadmin/ProjectVote/Policy_Briefs/PB11_List_Maintenance.pdf) ("State legislation and regulations in response to HAVA's list maintenance provisions have been piecemeal and broadly drafted, lacking clearly drawn specific purge criteria and adequate procedures to safeguard against removal of eligible voters in error").

95. See Tova Andrea Wang, *Competing Values or False Choices: Coming to Consensus on the Election Reform Debate in Washington State and the Country*, 29 SEATTLE U. L. REV. 353, 354 (2005); see also Hasen, *supra* note 9, at 944 (noting that the extreme partisan nature of election reform post-2000 "decreases the possibility of reform being enacted in the serious and bipartisan manner").

96. Note, *supra* note 4, at 2316.

97. George Bundy Smith, *State Courts and Democracy: The Role of State Courts in the Battle for Inclusive Participation in the Electoral Process*, 74 N.Y.U. L. REV. 937, 937 (1999) (delivering the annual Justice William J. Brennan Lecture of State Courts and Social Justice at New York University School of Law).



v. *Carr* becomes and remains a reality.”<sup>98</sup> This primarily entails, in his view, ensuring that the one-person-one-vote principle is preserved and enforced. Second, “judges must ensure that the Federal Constitution, state constitutions, and the Voting Rights Act are enforced to prevent discrimination against African Americans and other minorities.”<sup>99</sup> In furthering this responsibility, Judge Smith reasons, courts must ensure that “the playing field is the same for all of those who play a part in determining the electoral winner.”<sup>100</sup>

To that end, state courts occupy a precarious position in the world of election law. On one hand, they are charged under every state constitution with resolving disputes or punishing violations of the election code that the state legislature develops and the state election official administers. It is rare, however, for a state court to intervene to overturn an electoral outcome. State election codes usually empower their courts to invalidate elections when it is impossible to determine the legal outcome<sup>101</sup> or when an election is irreparably tainted with fraud.<sup>102</sup> But state court intervention more typically amounts to ordering a recount,<sup>103</sup> disqualifying or certifying absentee ballots,<sup>104</sup> issuing a declaration regarding the counting of certain ballots as “legal” votes,<sup>105</sup> or issuing criminal sanctions against individuals, including campaign officials and election officials, who commit acts such as voter fraud, manipulation, or intimidation.<sup>106</sup>

Yet on the other hand, state courts are often the most effective and influential in addressing the type of enforcement that Judge Smith identifies in his speech, and less effective in influencing election administration on a regular basis. As a Note in the *Harvard Law Review* observed, court intervention may cast a “shadow” over the duties of election officials, and

98. *Id.*

99. *Id.* at 942.

100. *Id.* at 943.

101. See *Akizaki v. Fong*, 461 P.2d 221, 225 (Haw. 1969) (holding, pursuant to state law, election to be invalid).

102. See *In re the Matter of the Protest of Election Returns & Absentee Ballots in the Nov. 4, 1997 Election for the City of Miami, Fla.*, 707 So.2d 1170, 1173 (Fla. Dist. Ct. App. 1998); see also SAMUEL ISSACHEROFF, ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 958–960 (Foundation Press Thomson/West 2007) (2004) (citing N.Y. ELEC. LAW §§ 16–102 (McKinney 1999) (“the court may direct...the holding of a new primary election . . . where it finds there has been such fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected”)).

103. See, e.g., *Pullen v. Mulligan*, 561 N.E.2d 585 (Ill. 1990).

104. *Boardman v. Esteva*, 323 So.2d 259, 269 (Fla. 1976) (evaluating the validity of absentee ballots and concluding that strict compliance with absentee ballot requirements was not necessary when it was possible to determine the “spirit” of the vote).

105. See, e.g., *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 (Mass. 1996); *Fischer v. Stout*, 741 P.2d 217 (Ala. 1987).

106. See ISSACHEROFF ET AL. *supra* note 103, at \_\_\_\_.

courts generally set “wide boundaries within which local officials have broad discretion.”<sup>107</sup> The Note contends that, for example, it is rare for state courts to “unseat a victor declared by a state election process.”<sup>108</sup> As a result, any subsequent “hue and cry in the courts is largely futile: state and local bureaucrats single-handedly translate voter action into virtually final electoral outcomes.”<sup>109</sup>

*I.E. The Role of the Secretary of State in Election Administration and Regulation*

This brings us to the position of the state’s chief election official or entity, typically the Secretary of State, in this web of players that influence the administration of democracy. Nearly every state has an official or appointed board that is responsible for ensuring the smooth and efficient administration of elections throughout the state.<sup>110</sup> In each of the above discussions—the roles of Congress, federal courts, state legislatures, and state courts—the Secretary of State bears a great deal of the burden of ensuring that nearly each piece of legislation or almost every court order meets its practical goals. Indeed, the responsibility, discretion, and power of the Secretary of State can even dwarf that of local election officials. Though states may “abdicate responsibility for administering” elections to local government,<sup>111</sup> and while the extent of that abdication differs a great deal from state to state,<sup>112</sup> statewide officials are usually empowered to exert supremacy over the local authorities should they choose to do so. In all states, for example, Secretaries of State are the final certifiers of all election results.<sup>113</sup> In some states, such as Rhode Island,

107. See Note, *supra* note 4, at 2314–16.

108. *Id.* at 2314.

109. *Id.* at 2315.

110. About.com, State Election Boards and Information, <http://usgovinfo.about.com/blstateelection.htm> (last visited Mar. 9, 2008) (providing links to websites of election boards or officials, with links to officials for Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, Wyoming).

111. Note, *supra* note 4, at 2323–24.

112. *Id.* at 2324–25 (“State-level involvement varies dramatically across the country, from one full-time equivalent (FTE) in South Dakota to sixty FTEs in Illinois . . . . States also fund their election administration systems differently, with some states reimbursing all localities for their election expenses, and others forcing localities to shoulder the entire financial burden alone.”).

113. *Id.*

Secretaries of State also have the power to remove local election officials.<sup>114</sup> In other states involvement may be “limited to reimbursing the county for a percentage of its election costs, depending on the nature of the election.”<sup>115</sup>

Apart from these differences, the state’s chief election officer exerts significant authority and influence over implementing the intent, goals, and policies of every other governmental entity involved in the electoral process. Because she is on the front lines of administering or effectuating the goals of the other actors described in this section, she must also be guided, not by partisanship, but by the larger values of a healthy democracy—particularly when the directives from other authorities are vague or delegate extensive discretionary authority.

As such, it is crucial that in administering elections the Secretary of State recognize and actively promote democracy’s dual goals of accuracy and participation. These dual goals are found in multiple authorities. Congress’s stated purpose in enacting the NVRA, for example, was to both “establish procedures that will increase the number of eligible citizens who register to vote in elections” and “protect the integrity of the electoral process; and ensure that accurate and current voter registration rolls are maintained.”<sup>116</sup> Election law expert Tova Wang describes these dual goals, “sometimes in conflict,” as “making voting as easy and as accessible as possible for all Americans, and protecting the integrity of the vote and the voting process against fraud and malfeasance.”<sup>117</sup> Others point out that Democrats are often more likely to support policies of promoting voter access and the related issue of equal participation, while Republicans typically focus on the need to promote integrity and the resulting higher accuracy of electoral outcomes.<sup>118</sup> Regardless of the partisan perspectives, or perhaps because of them, it is particularly important that the state’s chief election administrator seeks to promote both values.

The remainder of this article analyzes the actions of various state election officials in light of the aforementioned goals of promoting integrity and accuracy while also enabling access and participation. The primary contention of the analysis centers upon the view that any move that promotes integrity and

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114. *Id.* at 2326 (citing ELECTIONLINE.ORG, ELECTION REFORM BRIEFING: WORKING TOGETHER? STATE AND LOCAL ELECTION COORDINATION 12, 14 (2002), available at <http://www.electionline.org/site/docs/pdf/working.together.pdf>).

115. *Id.*

116. 42 U.S.C. § 1973gg (b) (2000). This article takes the position that the accuracy goal also captures the integrity position because the primary impetus behind protecting the integrity of the electoral process is to ensure the accuracy of the outcome of the vote.

117. Wang, *supra* note 96, at 354.

118. Hasen, *supra* note 50, at 18; Tokaji, *supra* note 9, at 1207 (“For the most part, Democrats advocated expanded access that would enhance equality, while Republicans advocated tougher antifraud measures that would enhance integrity.”).

accuracy must be coupled with a move to increase participation and access, and vice versa. And it is the Secretary of State, this article suggests, who bears the largest burden and responsibility in ensuring that both of these goals are advanced in elections throughout the state.

## PART II. THE CRITICAL ROLE OF THE SECRETARY OF STATE PRIOR TO ELECTION DAY

The first segment of this analysis examines the influence that the Secretary of State is able to wield in the roughly 360 days of the year when elections are not being held. It offers examples of three different areas of election law and administration that come into play prior to election day: identification requirements for voters,<sup>119</sup> the methods and ease of voter registration, and the maintenance of voter registration lists. Certainly, state and federal courts, legislatures and Congress have some authority over advancing, evaluating, or enforcing policies in each of these areas. But as the forthcoming discussion details, the Secretaries of State occupy a crucial position in implementing these policies. As such, they play a pivotal role in ensuring that each policy is administered and applied to ensure accuracy and access to the political process.

### II.A. Voter Identification Laws

When Congress enacted the Help America Vote Act (HAVA) in 2002, it created the first federal identification requirement for voters. HAVA requires that all voters who register to vote by mail and vote in person in their first election provide some form of acceptable identification when they arrive at the polls to vote.<sup>120</sup> The federal law allows voters to present either a copy of “a current and valid photo identification” or “a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.”<sup>121</sup> In addition, any voter who is required to show identification under HAVA and is unable to do so when they show up to vote is entitled to cast a provisional ballot,<sup>122</sup> which would be counted if the voter presents proper identification within a certain time period. HAVA’s section on when to count provisional ballots, however, does not indicate what such a voter is required to do or provide in order to ensure their vote is counted.<sup>123</sup>

119. While the actual act of identification as a pre-requisite to voting occurs on Election Day, this analysis begins from the presumption that much of the work that goes into administering the law, and any related controversies, occurs prior to Election Day.

120. 42 U.S.C. § 15483(b)(2)(A)(i)(I) (2000).

121. 42 U.S.C. § 15483(b)(2)(A)(i)(II).

122. 42 U.S.C. § 15483(2)(b)(i) (“[A]n individual who desires to vote in person, but who does not meet the requirements of subparagraph (A)(i), may cast a provisional ballot under § 302(a)”).

123. See Tokaji, *supra* note 9, at 1234 (describing this problem in greater detail).

Beyond those terms, the determination of what comprises “current and valid” photo identification or “other government document” is left to the states. Law Professor Dan Tokaji notes that as a result states are confronted with numerous questions: “Should a student ID, for example, suffice? What about a bus pass? If a student is enrolled at a public university, will a printout from the registrar’s office showing her address suffice?”<sup>124</sup> States have accordingly developed multiple answers clarify these gray areas, with Secretaries of State promulgating various additional interpretations of acceptable identification.

The lack of specificity in HAVA’s identification requirements thus grants significant discretion to states in determining how to administer and enforce the law, as well as how to publicize its requirements. This deference leads to one of two outcomes, both of which implicate the Secretary of State. The state legislature, particularly when enacting legislation to adopt HAVA’s requirements for their state elections, could enact its own legislation to fill the void by enacting a long list of acceptable identifications and instructions as to how the provisional ballot “safety net” should be addressed. Or, the state legislature could, like Congress, offer little to no detailed directives for implementing the new requirements. And in both situations, the Secretary of State is charged (or left) with providing answers to any and all questions left unanswered and ensuring that she, the local clerks, and the voters are prepared for all possible election day scenarios.

California, for example, enacted legislation with one of the most comprehensive and detailed interpretations of the HAVA identification requirements, permitting items ranging from “an ID card provided by a commercial establishment” to “a lease or rental statement or agreement” to a doctor’s prescription with the voter’s name and address to suffice as proper identification.<sup>125</sup> The California law further requires that “any doubts regarding the sufficiency of identification presented shall be resolved in favor of the voter.”<sup>126</sup> The law also allows the Secretary of State to permit “any

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124. *Id.* at 1233.

125. CAL. CODE REGS. tit. 2, § 20107 (2008) (the full list includes: a driver’s license of any state, a passport, an employee ID card, an ID card provided by a commercial establishment, a credit or debit card, a military ID card, a student ID card, a Health club ID card, an insurance plan ID card, utility bill, bank statement, government check, government paycheck, any document issued by a governmental agency with a voter’s name and address, a voter notification card, a public housing ID card, a lease or rental statement or agreement, a tuition statement or bill, discharge certificates, pardons, or other official documents issued to the voter in connection with the resolution of a criminal case, indictment, sentence, or other matter, senior citizen discount cards issued by public transportation authorities, ID documents issued by government disability agencies, ID documents issued by government homeless shelters and other temporary or transitional facilities, drug prescription provided by a doctor or other health care provider, tax return, property tax statement, vehicle registration or certificate of ownership).

126. CAL. CODE REGS. tit. 2, § 20107(b).

other document specified in writing by the Secretary of State that includes the name and address of the individual presenting it, and is dated since the date of the last general election.”<sup>127</sup> Thus, although the law establishes a detailed baseline of acceptable documents, and there are many, it still allows the Secretary of State to develop an additional set of acceptable forms of identification.

Ohio took a different approach. The state assembly did not pass any legislation expanding or adding detail to the HAVA requirements prior to the 2004 election.<sup>128</sup> This meant not only that the question of acceptable ID was left vague and indistinct, but there was also no additional direction offered on how election administrators should evaluate any provisional ballots cast by voters without acceptable ID. In February 2004, then-Ohio Secretary of State Kenneth Blackwell sought to fill this void, announcing that provisional ballots cast by first time voters without proper ID would only be counted if the voters returned to the polling location and presented either a valid photo ID, other proof of name and address, their driver’s license number, or the last four digits of their Social Security number, before the polls closed for the day.<sup>129</sup> After surviving a challenge in federal court, this significant interpretative directive was enforced during the presidential election in Ohio in 2004.<sup>130</sup>

Two years later, in 2006, the Ohio legislature enacted a state law that expanded the identification requirements in HAVA and required all voters to present some form of ID at the polls prior to voting.<sup>131</sup> The law requires all voters to provide proof of their identity, which can include

a current and valid photo identification, a military identification that shows the voter’s name and current address, or a copy of a current utility bill, bank statement, government check, paycheck, or other government document, other than a notice of an election mailed by a board of elections . . . or a notice of voter registration mailed by a board of elections . . . that shows the name and current address of the elector.<sup>132</sup>

Voters arriving at the polls without such identification may cast a provisional ballot<sup>133</sup> and now have ten days, under state law, to present the relevant identifying information or documents to the local election official.<sup>134</sup>

127. FairVote, California Electoral Situation, <http://www.fairvote.org/?page=1184> (last visited Feb. 6, 2008); CAL. CODE REGS. tit. 2, § 20107(d)(2).

128. Tokaji, *supra* note 9, at 1233.

129. *Id.* at 1234 (citing Directive No. 2004-07 from J. Kenneth Blackwell, Ohio Sec’y of State to All County Boards of Elections Members, Directors, and Deputy Directors (Feb. 20, 2004) (on file with author)).

130. *League of Women Voters v. Blackwell*, 340 F.Supp.2d 823, 825–26 (N.D. Ohio 2004).

131. OHIO REV. CODE ANN. § 3505.18(A)(1) (West 2007).

132. OHIO REV. CODE ANN. § 3505.18(A)(1).

133. OHIO REV. CODE ANN. § 3505.18(A)(2)–(6).

Michigan has also enacted new identification requirements in recent years.<sup>135</sup> Though the state legislature enacted the law in 1997, it was dormant until 2007 when the Michigan Supreme Court deemed the requirement to be “facially constitutional under the balancing test articulated by the United States, Supreme Court in *Burdick v Takushi*.”<sup>136</sup> The Michigan Supreme Court found the identification requirement to be a “reasonable, nondiscriminatory restriction designed to preserve the purity of elections and to prevent abuses of the electoral franchise, as demanded by art 2, § 4 of the Michigan Constitution, thereby preventing lawful voters from having their votes diluted by those cast by fraudulent voters.”<sup>137</sup> The Michigan law mandates that each individual voting in person on election day must present a driver’s license, state-issued photo identification, “or other generally recognized picture identification card.”<sup>138</sup> Under the text of the law, if a voter is unable to present an acceptable piece of photo identification, she is permitted to “sign an affidavit . . . and be allowed to vote” but is “subject to challenge” by any observing individual who has “good cause” to do so.<sup>139</sup>

Nearly two months after the Michigan State Supreme Court issued an opinion activating the ID requirement, Michigan Secretary of State Terry Lynn Land issued a set of regulations that instituted enforceable clarifications to guide the local implementation of the law.<sup>140</sup> These regulations, written and issued without any opportunity for public comment,<sup>141</sup> offered a limited

134. OHIO REV. CODE ANN. § 3505.181(B)(8) (“During the ten days after the day of an election, an individual who casts a provisional ballot . . . shall appear at the office of the board of elections and provide to the board any additional information necessary to determine the eligibility of the individual who cast the ballot.”).

135. MICH. COMP. LAWS § 168.523 (2007).

136. *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 447–48 (Mich. 2007).

137. *Id.* at 448.

138. MICH. COMP. LAWS § 168.523(1).

139. MICH. COMP. LAWS § 168.727(1) (any registered voter of the precinct present in the polling place may challenge the right of anyone attempting to vote if the voter “has good reason to suspect the applicant is not a qualified and registered elector of the precinct . . .”). However, in regulations for implementing the photo identification requirement that were issued to local clerks prior to the November 2005 general election, the Secretary of State instructed that “[a] voter cannot be challenged just because he or she is not in possession of picture identification . . . and signs the affidavit in order to vote.” MICH. DEP’T OF STATE, PICTURE IDENTIFICATION AT THE POLLS: QUESTIONS AND ANSWERS 3 (2007), available at [http://www.michigan.gov/documents/sos/090507\\_Voter\\_Id\\_QA5\\_209294\\_7.pdf](http://www.michigan.gov/documents/sos/090507_Voter_Id_QA5_209294_7.pdf).

140. See MICH. DEP’T OF STATE, *supra* note 140.

141. The lack of any opportunity for the public to weigh in and comment on the Secretary of State’s development of regulations was arguably in violation of Michigan law. Section 168.31(1)(a) requires the Secretary of State to “issue instructions and promulgate rules pursuant to the [Michigan] administrative procedures act . . . for the conduct of elections and registrations in accordance with the laws of this state.” MICH. COMP. LAWS § 168.31(1)(a) (2001). The

definition of “generally recognized picture identification card” that did not include, for example, photo identification issued by an employer or a credit or ATM card with a photo,<sup>142</sup> both of which are acceptable forms of identification under Michigan’s interpretation of HAVA.<sup>143</sup> In addition, nowhere in the instructions are poll workers instructed to resolve doubts as to a voter’s identity in favor of the voter, inviting reliance on subjective perceptions of poll workers as to whether a voter’s photograph clearly resembles the voter. According to Secretary Land’s guidelines, a voter may be directed to cast a provisional ballot if a poll worker does not believe that the photo in the identification card resembles the voter.<sup>144</sup>

The independent actions of both Secretary Blackwell and Secretary Land had a significant effect on the implementation of the new identification requirements on voters in their states. To that end, it is notable that the actions of Blackwell and Land focused on developing rules to implement the identification requirements in an effort to advance electoral integrity and accuracy. These are laudable goals, but importantly, both Secretaries failed to balance their efforts to promote integrity and accuracy with likeminded efforts to encourage voter access and participation. While working to develop regulations and add substance to their state’s or the federal government’s ID requirements, neither Secretary instituted additional regulations or advocated for new laws that would promote participation and access as a way to offset any limitations on access and participation indirectly caused by the new photo identification requirements.

Further, either Secretary could have also used his or her position to send every registered voter a letter personally alerting them to the new identification requirements. Or, they could send targeted letters to individuals on the registration list who do not have a state-issued ID or driver’s license, alerting them to the new identification requirements and offering assistance in helping them acquire the proper documentation. In 2007, for example, Georgia’s

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Michigan Administrative Procedures Act requires state agencies to give notice and opportunity for comment prior to promulgating any “agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency, or that prescribes the organization, procedure, or practice of the agency, including the amendment, suspension, or rescission of the law enforced or administered by the agency.” MICH. COMP. LAWS § 24.207.

142. In addition to driver’s license or state issued photo identification, Michigan voters under the Secretary’s regulations could present a driver’s license or personal identification card with photo from any state or federal government, a passport, student ID with a photo from a high school or other accredited school, a military ID, or other tribal identification. MICH. DEP’T OF STATE, *supra* note 140, at 2.

143. MICH. DEP’T OF STATE, PROCEDURE FOR IMPLEMENTING FEDERAL IDENTIFICATION REQUIREMENT IN POLLS 2 (2007), *available at* [http://www.michigan.gov/documents/Fed\\_ID\\_Req\\_105890\\_7.pdf](http://www.michigan.gov/documents/Fed_ID_Req_105890_7.pdf).

144. MICH. DEP’T OF STATE, *supra* note 140, at 3.



Secretary of State sent a written notice to over 166,000 registered Georgia voters who did not have a Georgia driver's license or state identification card.<sup>145</sup>

In short, in areas such as voter identification or other policies that are ostensibly aimed at promoting accuracy and integrity, Secretaries of State play an important, and sometimes overlooked, role in ensuring that those policies further their goals. And if a vibrant democracy requires both accuracy and access, the public should look to Secretaries of State to ensure that policies that risk furthering one goal, accuracy, while thwarting the other, access, are implemented in a way as to protect or advance both values.

### *II.B. Methods and Ease of Voter Registration*

Another area where the actions of a state's chief election administrator make a significant impact is the area of voter registration. The requirements for voter registration are generally established through state law, with the exception of the federal NVRA and VRA.<sup>146</sup> The NVRA requires most states<sup>147</sup> to allow individuals to register to vote when they apply for a driver's license, and it also mandates that states provide and accept voter registration forms at several state agencies.<sup>148</sup> The NVRA also requires that states accept a national voter registration form.<sup>149</sup> In addition, § 202 of the VRA permits otherwise qualified residents of a state to vote in any presidential election, regardless of any state residency requirement, so long as the individual registers to vote prior to thirty days before the election.<sup>150</sup> The Act also requires states to allow voters who move to another state within thirty days of a presidential election to vote in their former state.<sup>151</sup>

Every state but North Dakota requires that citizens register to vote,<sup>152</sup> and eight states—Iowa, Minnesota, Wisconsin, Maine, Idaho, Montana, New Hampshire, and Wyoming—allow voters to register on Election Day.<sup>153</sup> Thirty

145. Votelaw, Georgia: Secretary of State Sends Letters to the Non-I.D.'ed, <http://www.vote-law.com/blog/archives/005450.html> (Oct. 13, 2007, 8:31 EST).

146. 42 U.S.C. § 1973gg-2 (2000).

147. Some states that allow voters to register to vote on Election Day are exempt from NVRA requirements. These states include: New Hampshire, Idaho, Minnesota, Wyoming, and Wisconsin.

148. 42 U.S.C. § 1973gg-2.

149. *Id.*

150. 42 U.S.C. § 1973aa-1.

151. 42 U.S.C. § 1973aa-1.

152. See NORTH DAKOTA LEGISLATIVE COUNCIL, VOTER REGISTRATION IN NORTH DAKOTA: A HISTORY & BACKGROUND (1999), <http://www.nd.gov/sos/electvote/voting/vote-history.html> (describing the history behind North Dakota's lack of registration requirement).

153. *E.g.*, IDAHO CODE ANN. § 34-408A (West 2001); MINN. STAT. § 201.061 (2007); WIS. STAT. § 6.29 (2006).

of the remaining forty-one states require voters to register roughly one month prior to election day, and eleven others have deadlines ranging from two or three weeks (Oregon, West Virginia, Maryland, New Jersey, Massachusetts, Nebraska, California, Connecticut, Kansas, South Dakota, Alabama) to one week (Vermont).<sup>154</sup>

Though registration requirements originated in the late 19th century following the Civil War and the formal enfranchisement of African Americans,<sup>155</sup> the modern justification behind the registration laws in these forty-one states is that they promote accuracy and integrity in the electoral process.<sup>156</sup> Registration requirements, for example, arguably prevent voters from voting more than once in multiple locations, or, because they require an administrator to review a registrant's eligibility prior to processing their form, they prevent ineligible individuals from casting a ballot.

That said, however, stringent registration requirements, particularly where they require voters to register at least thirty days before an election, have been shown to limit access or otherwise harm voter participation rates.<sup>157</sup> The eight states with election day registration, for example, have "consistently boasted turnout rates 10 to 12 percentage points higher" than states that impose registration deadlines.<sup>158</sup> As such, actors within each state electoral system must work to ensure a careful balance is struck between the accuracy and integrity benefits of registration requirements and making registration easy enough so as to reduce the potential for access limitations.

To that end, the actions of Secretaries of State can have a direct effect on whether any access-impeding side effects of registration requirements are offset with efforts to promote participation. As a result of efforts from Secretary of State Sam Reed, eligible voters in the State of Washington may

154. Rock the Vote, 2006 Voter Registration Deadlines, <http://www.rockthevote.com/2006-voter-registration-deadlines.php> (last visited Jan. 24, 2008) (listing general voting deadlines, where the following states had deadlines approximately one month before the election date: Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Virginia, Washington).

155. KEYSSAR, *supra* note 35, at 45.

156. R. MICHAEL ALVAREZ, VOTER REGISTRATION: PAST, PRESENT AND FUTURE 3 (2005), available at [http://www.vote.caltech.edu/media/documents/wps/vtp\\_wp30.pdf](http://www.vote.caltech.edu/media/documents/wps/vtp_wp30.pdf).

157. Hasen, *supra* note 9, at 965 ("When a person moves from one state to another or even within a state, the voter must re-register, and the person often must comply with different registration rules. Those citizens who do not speak English may have difficulty finding registration information and forms in their language. Registration deadlines mean that by the time many people start paying attention to a campaign, even a presidential campaign, it may be too late to register to vote.").

158. DEMOS, VOTERS WIN WITH ELECTION DAY REGISTRATION 1 (2008), available at <http://www.demos.org/pubs/Voters%20Win.pdf>.

register to vote online. A Secretary's actions, however, can also move in the opposite direction, enforcing or administering registration requirements in a way that minimizes participation and creates access barriers to the vote. For example, nonprofit organizations registered under § 501(c)3 of the tax code are permitted under federal law to conduct voter registration drives.<sup>159</sup> In fact, many citizens register to vote through the drives of one of several nonprofit organizations, making their role in the registration process significant in ensuring access and promoting participation.<sup>160</sup> On June 14, 2004, a nonprofit organization in Georgia submitted several voter registration applications of individuals seeking to vote in a primary election on July 20, 2004.<sup>161</sup> Three days later, Georgia's then-Secretary of State Cathy Cox rejected all of the registrations because they were delivered to her office in a bundle and were not collected in the presence of an authorized individual; both of which violated her regulation broadly interpreting the Georgia Election Code.<sup>162</sup>

159. AMERICAN CENTER FOR LAW & JUSTICE, PERMISSIBLE AND IMPERMISSIBLE ACTIVITIES OF NON-PROFIT ORGANIZATIONS AND PUBLIC CHARITIES UNDER FEDERAL CAMPAIGN FINANCE AND TAX LAWS 2 (2004), [http://www.aclj.org/media/pdf/040317\\_fed\\_campaign\\_finance.pdf](http://www.aclj.org/media/pdf/040317_fed_campaign_finance.pdf).

160. Brennan Center For Justice, Restrictions on Voter Registration Drives Publications (2006), [http://www.brennancenter.org/page/-/d/download\\_file\\_38283.pdf](http://www.brennancenter.org/page/-/d/download_file_38283.pdf).

161. Charles H. Wesley Educ. Found., Inc. v. Cox, 324 F. Supp.2d 1358, 1361 (N.D.Ga. 2004).

162. *Id.* at 1361. The Court explained,

Georgia law permits voter registration by mail. That section of the Georgia code provides as follows: "The Secretary of State shall design, publish, and distribute voter registration application forms with which a person may apply to register to vote by completing and mailing the form to the Secretary of State." The Secretary of State interprets that section of Georgia law to mean that "a person" may register by sending one application in an individual envelope to the Secretary of State. The state contends that sending in a bundle of applications in one envelope is not permitted under § 21-2-223 . . . . In the letter the Secretary of State's office sent informing plaintiffs' counsel that it was rejecting the bundled applications, it indicated that it could not accept the package because "the Georgia Election Code does not allow for the acceptance or collection of voter registration applications by any person other than a registrar, a deputy registrar, or a person authorized to accept voter registration applications." The Georgia Code places restrictions on "additional registration places" (which include voter registration drives) in that they may operate only during fixed hours and only if they have been advertised in the local media. The Rules and Regulations interpreting the Election Code specifically provide that a deputy registrar must be present at any "additional voter registration place." . . . . The state asserts that it is unable to accept bundled applications precisely because they were collected by someone other than a deputy registrar. So, although the anti-bundling policy is allegedly supported by the provision of Georgia law permitting registration by mail only when the application is mailed by the registrant, it is also a result of the state's insistence that applications be collected by only a registrar or deputy registrar.

*Id.* at 1366 (citations omitted).

The nonprofit organizations were forced to file lawsuits in federal court in order to have their registrations accepted. On July 1, 2004, less than three weeks prior to election day, the court ruled that Secretary Cox's actions violated the NVRA, ordered her to process the applications, and enjoined her office from rejecting any additional voter registration applications on similar grounds.<sup>163</sup> Though litigation resolved the issue, the actions of the Secretary resulted in several weeks where nonprofit organizations were unable to collect and submit additional registrations. The policy was later formally nullified in a consent decree between the Secretary and the nonprofit organizations.<sup>164</sup>

In response to the court's decision, the Georgia Election Board, on which the Secretary of State wielded considerable power, reacted. The board amended its registration regulations to prohibit any non-governmental organizations from collecting and submitting voter registration applications unless they were "sealed" and also to forbid the organization from copying completed voter registration applications.<sup>165</sup> In August 2006, the same nonprofit organizations filed another challenge in federal court.<sup>166</sup> Two months later (and one month before the election), the federal district court issued a preliminary injunction barring the enforcement of the regulations on the grounds that they violated the plaintiff's First Amendment rights to register voters.<sup>167</sup>

In both 2004 and 2006, Secretaries of state in Ohio and Florida also issued regulations that created hurdles for groups seeking to register voters.<sup>168</sup> Like the actions of Georgia's Secretary Cox, these hurdles similarly were the result of an administrator placing integrity concerns high above concerns of access and participation in interpreting state registration requirements, instead of developing efforts to advance both legitimate goals.

163. *Id.* at 1369.

164. Votelaw, <http://www.votelaw.com/blog/archives/003865.html> (March 5, 2006, 11:15 EST).

165. The Regulations provided specifically "No person may accept a completed registration application from an applicant unless such application has been sealed by the applicant. No copies of completed registration applications shall be made. This paragraph shall not apply to registrars and deputy registrars." GA. COMP. R. & REGS. § 183-1-6-.03(3)(o)(2) (2006). Also, "Notwithstanding any provision of this rule to the contrary, a valid registration application that is timely received by the Secretary of State or the registrars shall be accepted." GA. COMP. R. & REGS. § 183-1-6-.03(3)(o)(4).

166. *Ass'n of Cmty. Orgs. For Reform Now v. Cox*, No. 06-1891, 2006 U.S. Dist. LEXIS 87080, at \*1-2 (N.D. Ga. Sept. 28, 2006).

167. *Id.* at \*20-\*22.

168. Richard Wolf, *New Voter Registration Laws Leave Thousands Off the Rolls*, USA TODAY, Oct. 10, 2006, at 5A; *see also* Election Law@Moritz, Election Law Litigation, <http://moritzlaw.osu.edu/electionlaw/litigation/diaz.php> (last visited Jan. 26, 2008); Election Law@Moritz, Election Law Litigation, <http://moritzlaw.osu.edu/electionlaw/litigation/lucas.php> (last visited Jan. 26, 2008).

In the year leading up to the 2004 presidential election, Ohio Secretary Blackwell issued three directives regarding the rejection of voter registration applications.<sup>169</sup> Two of the directives required the rejection of completed voter registration forms that left blank information on citizenship or age, or where the applicant failed to provide driver's license numbers or the last four digits of their Social Security number. The policies were in place for several months before Blackwell, at the behest of the Election Assistance Commission, issued clarifying directives overturning his policy requiring information on citizenship or age.<sup>170</sup> But after a federal court challenge failed based on the judge's finding that it had been filed too late, Blackwell left in place the requirement that hand-delivered registration forms be rejected if they did not include a driver's license or Social Security number.<sup>171</sup> A third directive, issued in September 2004, just two months before election day, required the submission of all voter registration forms to be on heavy-stock card paper.<sup>172</sup> As a result, voters—and the nonprofit organizations seeking to register them en masse—were unable to use photocopied forms unless they were reproduced on heavier, and pricier, paper.<sup>173</sup> One month later, after advocates and their attorneys raised the specter of the Voting Rights Act, arguing the potentially discriminatory effect and animus behind the heavy-stock card paper directive, Blackwell backtracked and withdrew the requirement.<sup>174</sup>

Apart from these examples of Secretaries increasing the severity of already stringent registration requirements, Secretaries of State can also play a pivotal role in ensuring that less stringent registration requirements, such as election day registration, are administered in a way that emphasizes and promotes the need for accuracy and integrity. A statewide computer file of all voters that poll workers at each precinct can access and update in “real time” as a voter registers and casts their vote mitigates the fear of citizens traveling from precinct to precinct on election day to register and vote in each location.<sup>175</sup> In

169. Tokaji, *supra* note 9, at 1224–28 (describing the events surrounding all three directives).

170. *Id.* at 1225.

171. *Id.*

172. *Id.* at 1227.

173. *See id.* (noting that in addition to the “paper weight” directive, Blackwell also required that “certain federal voter registration forms be accepted even on lighter paper weight”).

174. *See, e.g.,* Mary Beth Beazley & Edward B. Foley, *Registration Rules: Special Commentary: Stealing Votes Before Election Day*, ELECTION LAW @ MORITZ, Sept. 29, 2004, [http://moritzlaw.osu.edu/electionlaw/ebook/part1/eligibility\\_rules08.html](http://moritzlaw.osu.edu/electionlaw/ebook/part1/eligibility_rules08.html).

175. A similar version to this example is proposed in a report produced by Election Law @ Moritz. STEVEN F. HUEFNER, DANIEL P. TOKAJI & EDWARD B. FOLEY, FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 177 (2007) (“One uniformly desirable feature would be the ability to correct and update the [registered voter] database from each precinct on Election Day.”); *see also id.* at 177–78 (suggesting that to minimize costs concerns about that proposal, “states still could employ electronic poll books,

Montana, for example, computers are installed in polling locations throughout the state to allow election officials to access the voter registration database and register new voters on election day.<sup>176</sup> As a result, this minimal registration requirement does not impede participation and is also administered in a way that protects the accuracy and integrity of the democratic process.<sup>177</sup>

Thus, success in ensuring that registration requirements in elections promote both accuracy and access goals can be directly attributed to the actions of a Secretary of State. While some scholars have emphasized the negative aspects of this role, arguing for federalized registration as a remedy,<sup>178</sup> if Secretaries of State work consistently and energetically to balance accuracy and access issues as they relate to registration requirements, the holders of this office could be the most appropriate and fitting officials charged with this responsibility.

### *II.C. Voter Registration List Management*

As the principal keeper of any statewide voter file,<sup>179</sup> a Secretary of State plays the primary role in maintaining, managing, or removing voters from voter registration lists. Both the HAVA and the NVRA seek to establish some limitations for when state officials can remove or “purge” voters from federal registration lists. Under HAVA § 303(a), states receiving federal funds under the legislation were required to create, maintain, and administer a statewide voter registration list.<sup>180</sup> This maintenance included requirements that states periodically remove voters who are registered twice, have moved, died, or are otherwise ineligible. The NVRA also requires state authorities to periodically make a “reasonable effort to remove the names of ineligible voters” from the list of registered voters if they die, move, or otherwise become ineligible to

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rather than paper ones, that could share information with each other across precincts about who has voted, even if they did not allow changes to the registration information itself”).

176. *Same-day Registration Has Minor Problems*, BILLINGS GAZETTE, Nov. 8, 2006.

177. See Ben Ysursa & Matthew Dunlap, *Never Too Late to Vote*, N.Y. TIMES, May 11, 2007 at A27.

178. Hasen, *supra* note 9, at 945.

179. Each state accepting federal funds is required to develop and maintain a statewide voter file. 42 U.S.C. § 1973gg-6(b) (2000). The ultimate responsibility for the maintenance and administration of the state list falls to the State’s chief election official, defined as “the highest ranking State official” whose primary duty is “to ensure the lawful administration of voter registration in Federal elections.” U.S. ELECTION ASSISTANCE COMM’N, VOLUNTARY GUIDANCE ON IMPLEMENTATION OF STATEWIDE VOTER REGISTRATION LISTS 4 (2005), available at [http://www.eac.gov/election/docs/statewide\\_registration\\_guidelines\\_072605.pdf/attachment\\_download/file](http://www.eac.gov/election/docs/statewide_registration_guidelines_072605.pdf/attachment_download/file).

180. Help America Vote Act, Pub. L. No. 107-252, § 303(a), 116 Stat 1708 (codified at 42 U.S.C. § 15483).

vote where they are registered.<sup>181</sup> In addition, election officials are required to complete any list maintenance and remove any ineligible voters no later than ninety days before a federal election.<sup>182</sup>

A primary purpose behind both federal requirements is to ensure that any state effort to purge voters from registration lists is done in a fair, uniform, and nondiscriminatory fashion, and in a way that does not diminish the participation of any eligible voters. Both statutes, however, lack any specific guidelines or instructions to states as to how to remove ineligible voters from their lists. States also have failed to develop any significant guidelines, particularly for removing individuals who commit crimes that render them ineligible to vote under a specific state law.<sup>183</sup> For example, a 2004 report on registration management by Demos surveyed maintenance policies in fifteen states and found that none of them required its election officials to use “any specific or minimum criteria to ensure that an individual with a felony conviction is the same individual being purged from the voter rolls,” and two-thirds of the states did not even require election officials to notify the voters they removed from the registration lists.<sup>184</sup> As a result, voter eligibility and purge decisions are left almost completely to state and local election officials.<sup>185</sup>

While list maintenance is an important way for election officials to maintain accuracy and electoral integrity, the actions of Florida’s Secretary of State provide two recent examples of how errors or missteps of the state’s chief election official can result in an elimination of access to the electoral process. In the months following the November 2000 presidential election, information came to light through a series of investigations that Florida’s Secretary of State hired a private firm to compile a list of registered voters who were ineligible to

181. 42 U.S.C. §§ 1973gg-6(a)(4), (c)(2)(A) (2000). States may only remove voters from the registration list closer than 90 days before an election if they are reported dead, mentally incompetent to vote, or become ineligible under any felon disenfranchisement law. 42 U.S.C. § 1973gg-6(a)(3)–(4) (2000).

182. *Id.*

183. LALEH ISPAHANI & NICK WILLIAMS, ACLU & DEMOS, PURGED! HOW A PATCHWORK OF FLAWED AND INCONSISTENT VOTING SYSTEMS COULD DEPRIVE MILLIONS OF AMERICANS OF THE RIGHT TO VOTE 2 (2004), available at [http://www.demos.org/pubs/Voting\\_Report.pdf](http://www.demos.org/pubs/Voting_Report.pdf) (concluding that “states, even those with identical disenfranchisement policies,” conduct purges very unevenly because of flawed or nonexistent legislative guidance. As a result, legal voters, including voters who share similar names with felons, are mistakenly taken off of voter rolls.).

184. *Id.*

185. See Editorial, *How America Doesn’t Vote*, N.Y. TIMES, Feb. 15, 2004, at WK10 (“City and county election offices are responsible for adding new registrants to the voting rolls, and purging voters who die, move away or are convicted of felonies. If election offices had adequate resources and precise rules, voting lists might accurately reflect who is entitled to vote. But the reality is far more chaotic, and errors abound.”).

vote under Florida's restrictive felon disenfranchisement law.<sup>186</sup> The United States Commission on Civil Rights conducted hearings after the election that revealed Secretary Harris had dismissed the advice of the private firm and removed the names of thousands of voters whose names only roughly matched the names of individuals convicted of felonies.<sup>187</sup> In addition, many of the voters wrongly removed by Secretary Harris's purge were African Americans, who in Florida are also strong Democratic voters, prompting many individuals to question the partisan motives behind the purge.<sup>188</sup>

Apart from maintenance efforts that result in the erroneous removal of voters from registration lists, the notification (or lack thereof) given to individuals who are removed from the rolls is also significant in ensuring that voter participation is not wrongfully diminished through any purging efforts. While Secretaries of State in most states are not required under any law to notify voters they remove from the list for purposes of compliance with a state's felon disenfranchisement law, no election official is barred from providing such notice. Notification can be important in promoting access, however, by ensuring that voters are aware of their removal prior to election day, and thus are able to address any errors and ensure they are able to vote if they are legally eligible. For example, while Virginia does not require election officials to provide notice to voters who are removed from the registration list under the state's felon disenfranchisement law, the Virginia Board of Elections encourages local election officials to send notices of cancellation to such voters, along with information on how to challenge the removal or restore their voting rights.<sup>189</sup> Such a practice exemplifies how a state's chief election authority can independently ensure that while accuracy and integrity are

186. Florida's Constitution denies individuals from voting for life if they are convicted in any state of any felony. FLA. CONST. art VI, § 4 (amended 1992). It is possible for voting rights to be restored after application to a state executive review board, though in practice only a few clemencies have been granted. *E.g.*, Jason Grotto & Debbie Cenziper, *Clemency System Veiled in Secrecy*, MIAMI HERALD, Nov. 14, 2004, at 16A.

187. Editorial, *supra* note 187; see also U.S. COMM'N ON CIVIL RIGHTS, *Chapter 5: The Reality of List Maintenance*, in VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION (2001), available at <http://www.usccr.gov/pubs/vote2000/report/ch5.htm>.

188. Robert E. Pierre, *Botched Name Purge Denied Some the Right to Vote*, WASHINGTON POST, May 31, 2001, at A01. (describing one woman who was removed because her sister had been convicted of a felony and was ineligible to vote); Hasen, *supra* note 9, at 965–66 (noting that the Harris list of voters to purge from the list “included a number of ‘false positives,’ that is, persons who should not have been listed as felons. The error in part was caused by the name-matching program used by the private company, in which nonfelons with names similar to felons were placed on the purge list. It appears that somewhere between 1000 and 8000 eligible voters—many African-Americans with Democratic voter registrations—were removed from the list because they were incorrectly identified as ineligible former Florida felons.”).

189. PROJECT VOTE, *supra* note 95, at 3.



promoted through the removal of legally ineligible voters from registration lists, voter rights and access to participation are not wrongly affected through the removal of otherwise eligible citizens.<sup>190</sup>

### PART III. THE CRITICAL ROLE OF THE SECRETARY OF STATE ON ELECTION DAY

On election day the Secretary of State, local election officials and poll workers take center stage. Thus, the analysis shifts from discussing how a Secretary of State can work effectively within the legal boundaries set by Congress, the state legislature, and the courts to a view of how the Secretary interacts with local election officials on election day. The interaction is different, but just as important, because the Secretary has the ability to work with local clerks to ensure voters' experiences and outcomes are consistent throughout the state. And even without legislative mandates, the Secretary may also have the power to set goals, such as limits on ballot spoilage rates<sup>191</sup> or provisions for assistance for English Learning voters,<sup>192</sup> for local officials to follow and which promote accuracy, uniformity, and access.

190. In 2006, the Secretary of State of Kentucky came under fire from the state Attorney General after he did not notify voters who were removed from Kentucky's list because of a potential change in residency. Press Release, Office of the Att'y Gen., Attorney General Stumbo Challenges State Board of Elections and Secretary of State on Number of Eligible Voters Purged (Sept. 18, 2006), available at <http://ag.ky.gov/pmc/KII.Portal.MediaCenter.CMS.Templates/PMC.ConnectedPressReleasePage.aspx?NRMODE=Published&NRNODEGUID=%7B6A990437-10B4-4C8A-A5E9-626869D833DD%7D&NRORIGINALURL=%2Fnews%2Feligiblevoters.purged.htm&NRCACHEHINT=Guest>; see also PROJECT VOTE, *supra* note 95, at 3.

In a very broad interpretation of the state laws, Kentucky officials concluded that voters whose names later appeared on the Tennessee or South Carolina voter databases had implicitly requested removal from the Kentucky voter list. This list of cancelled voters was generated not by notification from elections officials in other jurisdictions that the person had registered in that jurisdiction, but by a simple voter database match. As Kentucky deemed that those voters requested removal from the voter rolls, the Kentucky election officials determined that these voters were not entitled to notice of their removal. The Kentucky Attorney General filed suit to stop the purge program. The Kentucky Franklin Circuit Court ruled in favor of the attorney general finding that the Defendants had conducted an illegal purge under Kentucky law.

*Id.*

191. Ballot spoilage rates are a calculation of the number of ballots that are cast but which do not register any votes for the highest office on the ticket. For a survey of the disparities of ballot spoilage rates in the 2000 election, see THE CIVIL RIGHTS PROJECT AT HARVARD UNIVERSITY, DEMOCRACY SPOILED: NATIONAL, STATE AND COUNTY DISPARITIES IN DISFRANCHISEMENT THROUGH UNCOUNTED BALLOTS, [http://www.civilrightsproject.ucla.edu/research/electoral\\_reform/ResidualBallot.pdf](http://www.civilrightsproject.ucla.edu/research/electoral_reform/ResidualBallot.pdf) (last visited Feb. 1, 2008).

192. Former Iowa Secretary of State Chet Culver voluntarily provided voter registration forms in five different languages, a practice continued by his successor, Michael Mauro. Iowa

The following section details three specific aspects to election day administration over which the Secretary of State is able to exercise authority sufficient to ensure the protection of integrity and accuracy and the encouragement of uniform and equal access to the ballot box. First and foremost, the Secretary has the ability to set standards and mandates to promote uniformity and decorum at precinct polling locations. This includes issuing clear directives to clerks and establishing policies that ensure all voters are adequately accommodated and protected when they arrive to vote. A related duty concerns the mechanisms for counting the votes that are cast on election day. In many states, Secretaries of State are the primary decision maker in selecting voting machines, ensuring they are impervious to misuse, and providing training for all local officials and, potentially, all poll workers. Finally, because some of the problems that occur on election day may be unpredictable, this section also considers the importance and rapidity of the Secretary of State's response to any problems that occur throughout the day. From precincts running out of ballots to challengers causing a ruckus at the polls, a statewide election official who is aware of and quickly responds to any mishaps can play a pivotal role in preventing any election day meltdowns.

### *III.A. Polling Place Policies*

Most Secretaries of State have the discretion to issue instructions regarding several aspects of election day administration, ranging from regulating the behavior of challengers in polling places, to providing translated election materials, to helping ensure that citizens are aware of their polling place locations, and to enforcing any voter identification procedures. Though some state and federal laws also regulate polling place behavior, most of the details are left to state and local election officials.

In recent years, for example, several Secretaries of State have gone beyond the requirements of state and federal law to provide translated election materials or recruit appropriate translators to serve in jurisdictions with multilingual constituencies. Federal and state laws requiring election officials to provide translated materials omit several constituencies and languages.<sup>193</sup> In independent efforts to address any omissions, Secretaries of State in several states, including California, Iowa, and Washington, voluntarily post translated election materials, such as voter registration and absentee ballot request forms,

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Secretary of State, Iowa Voter Registration, <http://www.sos.state.ia.us/elections/VoterInformation/VoterRegistration.html> (last visited February 1, 2008).

193. For further discussion of the omissions of current state and federal translation requirements, see, e.g., Jocelyn Benson, *Language Protections for All? Extending and Expanding the Language Protections of the Voting Rights Act*, in *VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER*, 327–30 (Ana Henderson ed. 2007).

on their websites, in languages ranging from Spanish to Laotian to Russian to Bosnian.<sup>194</sup>

Though polling place locations are predominantly determined by local election authorities,<sup>195</sup> in many states the state election officials can exercise some influence over the number and location of polling places as well as the type of machines they receive. An exercise of state authority can also offset any local maneuvers or changes that would have the intent or effect of disenfranchising voters or harming the integrity of the election.<sup>196</sup> Through mailings or a website, state officials can also institute programs to ensure all voters in the state receive or can access information about their polling place.<sup>197</sup> State officials can also ensure that early voting locations or any local Secretary of State offices are equally dispersed throughout the state and accessible to underrepresented constituencies. And where possible, state officials can and should intervene when local authorities move polling places away from underserved populations—unlike the actions of the Tennessee Election Commission, which in 2005 approved of a decision to close a precinct in an area with many elderly and disabled voters, requiring this somewhat immobile group of voters to travel an extra mile to reach their nearest precinct.<sup>198</sup>

Finally, state officials can institute guidelines to limit chaos at polling locations on election day. Such statewide instructions and regulations can also protect voters from intimidation and disruption from “challengers,” or representatives of political parties and other groups present in the polling

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194. See, e.g., California Secretary of State, Multilingual Voting Services, [http://www.ss.ca.gov/elections/elections\\_multi.htm](http://www.ss.ca.gov/elections/elections_multi.htm) (last visited Jan. 24, 2008); Iowa Secretary of State, Voter Registration, <http://www.sos.state.ia.us/elections/VoterInformation/VoterRegistration.html> (last visited Jan. 24, 2008); Washington Secretary of State, Elections & Voting, <http://www.secstate.wa.gov/elections/> (last visited Jan. 24, 2008).

195. See Note, *supra* note 4, at 2315 (“The 2004 efforts by both parties reflected a fundamental realization: election administrators exercise discretion. And like any actor with discretion, an election administrator can, within limits, help a cause or kill it.”).

196. *Id.* (describing the efforts of local election officials to move “early voting locations far from disfavored populations” and lengthen “wait times” for voters) (citing John M. Glionna, *Nov. 2 Is V-Day for Blacks in Florida*, L.A. TIMES, Oct. 11, 2004, at A1 (“In a [Florida] county the size of Rhode Island, the only voting site is in a predominantly white community, a location inaccessible by public transportation, 30 miles away from black neighborhoods.”)).

197. In an effort to limit the potential for intimidation and harassment, the Michigan Secretary of State, for example, has issued regulations that forbid challengers from speaking to voters in the polling place. See MICH. DEP’T OF STATE, ELECTION NEWS 3 (2007), available at [http://www.michigan.gov/documents/sos/ELNEWS56\\_219590\\_7.pdf](http://www.michigan.gov/documents/sos/ELNEWS56_219590_7.pdf) (declaring that “challengers do not have the authority to approach voters or talk to voters in the polls or within 100 feet of any doorway being used by voters to enter the building in which the polling place is located”).

198. Note, *supra* note 4, at 2318 (citing Duane W. Gang, *Efforts Aim at Ousting Director of Elections*, CHATTANOOGA TIMES FREE PRESS, Mar. 10, 2005, at A1).

place.<sup>199</sup> In their book, *From Registration to Recounts*, researchers at the Center for Election Law @ Moritz discussed the benefits of a challenge procedure, particularly its potential for “deter[ring] voter fraud or other improper attempts to influence election.”<sup>200</sup> The book issued a number of recommendations that could be instituted from a state legislature, Secretary of State, or local election officials to balance the accuracy and integrity benefits of a challenger process with procedures to protect voters’ access to the polls.<sup>201</sup> Among its suggestions are the importance of a challenge procedure providing “adequate due process to voters, including an opportunity to present evidence demonstrating their eligibility to vote” and a process that “deter[s] an overly aggressive use of challenges.”<sup>202</sup>

Recent events in Michigan illustrate how a challenge process can go awry and the impact a Secretary of State can have in attempting to limit future problems. In a 1999 city election in Hamtramck, Michigan, members of a group named “Concerned Citizens for a Better Hamtramck” (CCBH) placed challengers, as permitted under state law in Michigan, in over half of the polling locations throughout the city.<sup>203</sup> Throughout the day, the organization’s challengers questioned the eligibility of over forty voters with Arabic-sounding surnames.<sup>204</sup> A CCBH member would require the “challenged” voter to take an oath of citizenship in English in order to vote,<sup>205</sup> even if the challenged voter was able to produce an American passport.<sup>206</sup> The U.S. Department of Justice subsequently sued the city of Hamtramck for approving the organization and allowing the challengers to treat the voters in a discriminatory fashion.<sup>207</sup>

199. HUEFNER ET AL., *supra* note 176, at 178.

200. *Id.*

201. *Id.* at 173–86.

202. *Id.* at 178.

203. Jocelyn F. Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 298 (2007).

204. Complaint at 1, U.S. v. City of Hamtramck, No. 0073541 (E.D. Mich. Aug. 4, 2000), available at [http://www.usdoj.gov/crt/voting/sec\\_2/hamtramck\\_comp.pdf](http://www.usdoj.gov/crt/voting/sec_2/hamtramck_comp.pdf) (“This action arises out of the general election that took place in Hamtramck, Michigan on November 2, 1999. In that election, more than forty dark-skinned or Arab-American citizens were required to take an oath as a condition to voting, a requirement that was not imposed on white voters.”)

205. *Id.*

206. Consent Order and Decree at 4, U.S. v. City of Hamtramck, No. 0073541 (E.D. Mich. Aug. 7, 2000), available at [http://www.usdoj.gov/crt/voting/sec\\_2/hamtramck\\_cd.pdf](http://www.usdoj.gov/crt/voting/sec_2/hamtramck_cd.pdf) (“Some voters were challenged before they signed their applications to vote. Other voters were challenged after they had signed their applications and their names had been announced. The challenged voters had dark skin and distinctly Arabic names, such as Mohamed, Ahmed, and Ali. The challengers did not appear to possess or consult any papers or lists to determine who to challenge.”).

207. *Id.*

Several years later, a few days before the November 2006 election, the Michigan Secretary of State issued a policy that banned the use of video cameras, cell phones, cameras, televisions, and recording equipment from the polls “to ensure that all voters . . . have a full opportunity to exercise their right to vote in private without undue distractions or discomfort.”<sup>208</sup> The regulations also, for the first time, prohibited challengers from approaching or talking to voters “for any reason.”<sup>209</sup> While this broad ban itself led to some confusion on behalf of mainstream political parties wishing to place representatives at the polling locations on election day to assist voters in the voting process,<sup>210</sup> the Secretary’s act arguably also had the effect of protecting voters from less innocent organizations such as Concerned Citizens for a Better Hamtramck.

### *III.B. Voting Technology*

One of the central issues on election day is the accuracy and accessibility of the machines voters use to cast their ballots. The role of the Secretary of State in selecting and implementing ballot counting technology has received increased attention in the post-2000 election world. This is due in part to the difficulties that emerged in Florida and Ohio in 2000 and 2004, respectively, as well as the enactment of HAVA, which provided over \$300 million for states wishing to replace outdated voting equipment and \$3 billion for other voting system improvements.<sup>211</sup> Any states receiving federal funds must maintain voting systems that meet certain standards, including providing the voter with the opportunity to correct any errors in a ballot before it is cast.<sup>212</sup> The Act also requires that new machines have the capacity for audits, and at least one in each polling place must be accessible for individuals with disabilities.

Despite this federal support for improved technology, a 2007 report from Electionline.org and the Pew Center for the States reported in many places, the

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208. MICH. DEP’T OF STATE, ELECTION NEWS 3 (2007), *available at* [http://www.michigan.gov/documents/sos/Issue\\_40\\_177190\\_7.pdf](http://www.michigan.gov/documents/sos/Issue_40_177190_7.pdf) (making exceptions for broadcast stations and news media representatives to be present in certain areas of the polling room, stating: “Regardless of whether a film crew making such a request positions themselves in the public area of the polling place or the entryway to the polling room, the precinct chairperson must supervise the filming process to ensure that the secrecy of the ballot is fully protected and no voters are inconvenienced by the filming process.”).

209. *Id.* at 3.

210. *See, e.g.,* Amber Hunt and John Wisely, *Turnout High, With Some Glitches, Workers Say*, DETROIT FREE PRESS, Nov. 8, 2006, at 11 (describing lawsuits filed on Election Day in Detroit, Michigan over compliance with the Secretary of State’s ban on challengers talking to voters).

211. NATIONAL CONFERENCE OF STATE LEGISLATURES, “HELP AMERICA VOTE ACT OF 2002”: NASS/NCSL SUMMARY 2002, <http://www.ncsl.org/programs/legismgt/elect/nass-ncslsummaryw-orecs.htm>.

212. 42 U.S.C. § 15481 (2004).

new machines “have not instilled . . . confidence in the election systems.”<sup>213</sup> The report indicated that the actions of the Secretary of State were particularly important to ensuring that the transition to new machines promoted the dual goals of accuracy and access that the HAVA drafters sought to accomplish with the legal changes. When detailing some of the problems with the 2002 transition to new systems, the analysis specifically pointed to “poor training and machine glitches” as a “large part” of the “meltdown” that occurred in places such as Broward and Miami-Dade counties in Florida.<sup>214</sup> The authors noted, however, that the actions of a Secretary of State in nearby Georgia enabled a “far smoother transition to the new technology,” particularly due to then-Secretary Cox’s work to coordinate “detailed hands-on training and preparation” for all poll workers in the state.<sup>215</sup>

Allocation of machines is also an issue, and one that in most states the Secretary of State can directly influence. One infamous example of their role in distribution of technology occurred in Ohio during the 2004 presidential election, when then-Secretary Ken Blackwell misallocated machines in several locations, leading to voters having to wait in line in some precincts as long as five hours.<sup>216</sup> During the day of the election, the Ohio Democratic Party filed suit against Blackwell on behalf of voters in two Ohio counties that did not have enough electronic machines to accommodate the large numbers voting that day.<sup>217</sup> The lawsuit requested that the court order the boards of elections in both counties to provide other options for voters—namely, paper ballots—to use instead of waiting in line for hours to cast their vote.<sup>218</sup> A federal judge later that day mandated that paper ballots be provided to those still in line waiting to vote in the counties. The judge’s order, however, did not—and indeed, could not—provide a complete remedy for many of the voters who still waited in line for several hours after the polls had closed in order to cast their vote.<sup>219</sup>

A third area of development in election technology surrounds growing questions regarding the accuracy and reliability of voting systems. At the center of much of the controversy are Direct Recording Electronic (DREs)

213. ELECTIONLINE.ORG, THE PEW CENTER ON THE STATES, THE HELP AMERICA VOTE ACT AT 5 2 (2007), <http://www.pewcenteronthestates.org/uploadedFiles/HAVA.At.5.pdf> (noting also that “[e]lectronic voting system glitches, snafus and full-blown breakdowns in Sarasota County, Fla., Carteret County, N.C., Montgomery County, Md. and other localities have eroded confidence in paperless systems”).

214. *Id.* at 13.

215. *Id.*

216. Tokaji, *supra* note 9, at 1238; *see also id.* at 1220-22 (detailing the causes and results of Ohio’s failure to upgrade all of their voting machines by 2004).

217. *Id.* at 1238.

218. *Id.*

219. *Id.* at 1239.

machines, which many critics argue are subject to tampering and other security concerns.<sup>220</sup> Across the country, Secretaries of State have led the charge to investigate the concerns and, where founded, have decertified machines that fail to prove secure, accurate, or reliable. In 2007 alone, chief state election officials in Colorado,<sup>221</sup> Kentucky,<sup>222</sup> Ohio,<sup>223</sup> and California<sup>224</sup> engaged in systematic investigations into the reliability and accuracy of their voting systems.

Making perhaps the greatest statement was California Secretary of State Debra Bowen, who in August 2007 announced that she was decertifying the three voting systems that were used in most of California's counties after "expert reviewers demonstrated that the physical and technological security mechanisms . . . for each of the voting systems analyzed were inadequate to ensure accuracy and integrity of the election results and of the systems that provide those results." Among Bowen's findings was evidence that the "Diebold software contains vulnerabilities that could allow an attacker to install malicious software on voting machines and on the election management system, which could cause votes to be recorded incorrectly or to be miscounted, possibly altering election results."<sup>225</sup> Bowen's initiative in reviewing and subsequently decertifying these voting systems throughout the entire state of California serves to underscore the significant effect the actions a Secretary of State can have on promoting the accuracy and integrity of elections. And through restoring or encouraging voters' faith in the electoral system, her actions also promoted access and participation in the democratic process.

220. E.g., Tim Padgett, *Voting Out E-Voting Machines*, TIME, Nov. 3, 2007, available at <http://www.time.com/time/nation/article/0,8599,1680451,00.html>; Jim McElhatton, *Touch Screen Voting Faulted*, WASH. TIMES, Feb. 18, 2004, at B01 (describing concerns with the security of electronic voting systems).

221. Christopher Osher, *Coffman: Voting Machines Don't Measure Up*, THE DENVER POST, Dec. 17, 2007, available at [http://origin.denverpost.com/ci\\_7744376](http://origin.denverpost.com/ci_7744376).

222. GREGORY D. STUMBO, ENSURING YOUR VOTE COUNTS: KENTUCKY'S ELECTRONIC VOTING SYSTEMS, ATTORNEY GENERAL GREG STUMBO'S INVESTIGATIVE REPORT & EXPERT REPORT (2007), available at [http://www.eac.gov/voting%20systems/docs/report-kentucky-voting-systems-certification-process2.pdf/attachment\\_download/file](http://www.eac.gov/voting%20systems/docs/report-kentucky-voting-systems-certification-process2.pdf/attachment_download/file).

223. JENNIFER L. BRUNNER, PROJECT EVEREST: EVALUATION AND VALIDATION OF ELECTION RELATED EQUIPMENT, STANDARDS AND TESTING (2007), available at <http://www.sos.state.oh.us/sos/info/EVEREST/00-SecretarysEVERESTExecutiveReport.pdf>.

224. California Secretary of State, Voting Systems Review, [http://www.sos.ca.gov/elections/elections\\_vsr.htm](http://www.sos.ca.gov/elections/elections_vsr.htm) (last visited Jan. 30, 2008).

225. DEBRA BOWEN, WITHDRAWAL OF APPROVAL OF DIEBOLD ELECTION SYSTEMS, INC., GEMS 1.18.24/ACCUVOTE-TSX/ACCUVOTE-OS DRE & OPTICAL SCAN VOTING SYSTEM & CONDITIONAL RE-APPROVAL OF USE OF DIEBOLD ELECTION SYSTEMS, INC. GEMS 1.18.24/ACCUVOTE-TSX/ACCUVOTE-OS DRE & OPTICAL SCAN VOTING SYSTEM (2007), available at [http://www.sos.ca.gov/elections/voting\\_systems/ttbr/diebold\\_102507.pdf](http://www.sos.ca.gov/elections/voting_systems/ttbr/diebold_102507.pdf).

### CONCLUSION

The above discussion seeks to emphasize the central role of a state election administrator in promoting a healthy democracy. It recognizes that a state's chief election official or board is a direct extension of the government, and thus they may only engage in actions that they are permitted to take under state and federal law. For example, Secretary of State of California Debra Bowen was specifically empowered under California law to "conduct periodic reviews of voting systems to determine if they are defective, obsolete, or otherwise unacceptable."<sup>226</sup>

But in addition, whether an official has wide or cabined discretion, her ability to exercise judgment and influence over how elections are administered is significant.<sup>227</sup> As such, academics, advocates, and voters alike should hold accountable a state's chief election official to act in a way that promotes access and accuracy in administering elections. Similarly, state election officials must recognize their unique responsibility to not only avert election crises but also sidestep partisan concerns and political pressures. Through placing a greater focus on the ability and responsibility of a Secretary of State to further neutral democratic goals, all actors move slightly closer to the systematic promotion of a healthy democracy.

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226. CAL. ELEC. CODE § 19222 (West 2003).

227. Several commentators have suggested confining a Secretary of State's discretion, but admit that it is impossible to completely eliminate it. *E.g.*, Hasen, *supra* note 9, at 978–79; Note, *supra* note 4, at 2315–16 (discussing proposals for "precisely designed rules - like crafting a precise definition for what constitutes a valid vote" for state election administrators).



