State Secretaries of State

Guardians of the Democratic Process

Jocelyn F. Benson

Election Law, Politics, and Theory

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

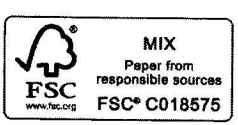
British Library Cataloguing in Publication Data
Benson, Jocelyn F.
State secretaries of state : guardians of the democratic process. -- (Election law, politics, and theory)
1. Cabinet officers--United States. 2. Elections--United States.
I. Title II. Series
352.2'93'0973-dc22

Library of Congress Cataloging-in-Publication Data
Benson, Jocelyn F.
State secretaries of state : guardians of the democratic process / by Jocelyn F. Benson.
p. cm. -- (Election law, politics, and theory)
Includes bibliographical references and index.
ISBN 978-0-7546-7745-1 (hardback) -- ISBN 978-0-7546-9482-3 (ebook) 1. Election law--United States--States. 2. Secretaries of State (State governments)--United States. I. Title.
KF4886.B46 2010
342.73'07--dc22

2009040126

ISBN 978-0-7546-7745-1 (hbk)
ISBN 9780754694823 (ebk)

Transfered to Digital Printing in 2012



Printed and bound in Great Britain by the
MPG Books Group Ltd, UK

This book is dedicated to all of the men and women who have worked since the founding of our country to make the American system of democracy open and accessible to all.

Foreword

Mark Ritchie, Secretary of State, Minnesota

Secretaries of State perform a wide range of public services—from business services and securities regulations to historical and cultural heritage promotion and of course, elections. One thing at the core of most of this work is the task of certifying official acts relating to government—including public documents, official signatures, enacted legislation, emergency declarations, and final election results.

This role, certifying the veracity or legitimacy of official actions, goes back to the Middle Ages when this function was performed largely by church officials. By the time of our Revolutionary War, Charles Thomson, the Secretary of the Continental Congress, had raised the profile of this certification task to one that the British Monarchy considered treasonous and subject to hanging. Undeterred by British threats, Secretary Thomson kept the official records and publicly "attested" to the veracity of all documents signed by President John Hancock, including the Declaration of Independence.

This task of independently certifying the accuracy and truthfulness of official documents and reports is the underlying logic for Secretaries of State being assigned the title of Chief Elections Officer in most states and being responsible for the final certification of results. With this authority comes a great responsibility. To be the certifier of truth and accuracy is to demand a very different standard for ourselves than is commonly assumed among politicians. From the earliest recorded history of election campaigns there has been a tendency for candidates and their supporters to stretch or bend the truth, especially when it comes to the views or actions of their perceived political opponents. This has been especially vicious inside modern political parties, where endorsement and primary election battles have become extreme at times.

Secretaries of State special responsibility has been highlighted over the past few election cycles, as close races have turned into highly visible recounts in Washington State, Virginia, New York, Minnesota, and of course Florida. While Florida has been the most high profile, it is also the only one that has been truly controversial. The care taken by Secretary Sam Reed in Washington State in the extremely close Governor's race in 2004 is a legend among other Secretaries who have faced, or fear they will face, similar situations.

This book provides an opportunity to hear about some of the finest public servants in the nation—Secretaries of State who come from many different political backgrounds and affiliations but who bring a nonpartisan, "public-trust

first" perspective and approach to all the different tasks that they face, including elections. Readers who are as captivated by these stories may just become so motivated that they decide to run for Secretary of State themselves. That would make me, and I am guessing most other Secretaries, extremely happy and proud.

Mark Ritchie
Secretary of State, Minnesota
May 19, 2009

Preface

It is a tremendous honor to have the opportunity to write a book that details the crucial role that state Secretaries of State and other statewide election administrators play in promoting and protecting the American democratic process. For if elections are the bedrock of our American democracy, a state's chief election official is our mason.

In recent years, we as a nation witnessed the increasingly prominent role of Secretaries of State in recent elections, beginning in 2000 with the role of Florida Secretary Katherine Harris. Secretary Harris ran the Florida election in 2000 and oversaw the recount of the closest presidential election in our country's history. And, as a co-chair of Bush's Florida campaign who flew to New Hampshire to campaign for him during the primaries, Harris was widely presumed to have based her decisions on the advice of then-Governor Bush's national campaign strategists.

But 2000 was just the beginning of our modern obsession with election administration. In 2002, Congress passed the Help America Vote Act, paving the way for the purchase of millions of new electronic voting machines. The machines were subsequently decertified in several states after Secretaries found them to be easily subject to tampering. Then in 2004, Ohio Secretary Ken Blackwell endured controversy as he made several contentious decisions as Ohio's chief elections official and subsequently took credit for helping deliver the state of Ohio to President Bush's re-election. Two years later, at the American Democracy Conference in Washington DC following the 2006 election, then FEC Chairman Michael Toner said "The state of election administration in this country has been an embarrassment."

This book seeks to expand the story beyond the controversial headlines of a few Secretaries. While emphasizing what the Harris/Blackwell controversies underscored, the unparalleled role of a state's chief elections official in overseeing a smooth election, the following chapters illustrate the honorable, creative, innovative, and far reaching work that Secretaries of State have engaged in over the same decade that the negative stories captured headlines. The stories and case studies reinforce the central role of a state election administrator in promoting a healthy democracy, and highlight the work that Secretaries from all walks of life are doing to serve as guardians of the election process.

Who is the State Secretary of State?

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 enabling the participation of the informed voter.[1] But it is the state Secretary of State who consistently serves at 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 election officials who implement those policies. As such, it is the state Secretary of State who is most responsible for developing and executing policies 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 to enable the full, uniform, and equal participation of the electorate in the democratic process.[2]

In thirty-seven states, the state Secretary of State is the chief administrator of all elections. In all but seven of those thirty-seven states the Secretary of State is elected by the voters in a popular election. Legislatures elect their state's Secretaries in Tennessee, Maine and New Hampshire, and Governors appoint Secretaries in Florida, New Jersey, Pennsylvania, and Texas. In ten states—Illinois, South Carolina, Virginia, Wisconsin, New York, Maryland, Hawaii, Delaware, North Carolina, Oklahoma—the statewide oversight of election administration is in the hands of appointed boards or committees, comprised of as few as three (Oklahoma), or as many as twelve (Wisconsin) appointed members. In Utah, Hawaii, and Alaska, the Lieutenant Governor oversees election administration for the state.

Of course, 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 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."[3]

---

1 Raleigh Levine, *The (Un)Informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 Case W. Res. L. Rev. 225 (2004).

2 Several commentators have also noted the partisan undertone to the access/accuracy divide, see, e.g., 73 Geo. Wash. L. Rev. 1206 at 1233 (describing "HAVA's access/integrity compromise"). See also Richard L. Hasen, *Beyond the Margin of Litigation: Reforming US Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. R. 937 (2005) at 983–85 (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.

3 California Elections Code section 19222.

But whether an official has wide or cabined discretion within the boundaries of state law, her ability to exercise judgment and influence over how elections are administered is significant.[4] To that end, the Secretary of State[5] is not simply charged with running elections, but is responsible for administering them in such a way that effectively promotes two values that are at the heart of a healthy democratic process: integrity and access.[6] It is particularly crucial for a Secretary to be mindful of this balance because some policies that are designed to promote integrity, such as voter identification requirements, can lead to the formation of barriers to voting and participation.[7] But with careful administration, such effects may be offset by corresponding policies that ease or alter registration requirements, or enable citizens to vote early in the days preceding the official Election Day.

Research for this Book

The research for this book was conducted over several months in 2008, during a sabbatical from my position as Assistant Professor of Law at Wayne State University Law School. In addition to reviewing various primary and secondary resources describing the work of current and former Secretaries, collected with the help of my Research Assistants Peter Sauer and Lena Kemal, I spent several hours meeting with thirty of the thirty-seven sitting Secretaries of State who oversee elections in their state.

The accessibility of many of these Secretaries was striking. South Dakota Secretary of State Chris Nelson answered the phone directly and scheduled his own interview. Minnesota Secretary of State Mark Ritchie responded to email requests within minutes. At the other end of the spectrum, scheduling time to meet with

---

4 Several commentators have suggested confining a Secretary of State's discretion, but admit that it is impossible to completely eliminate it. See, e.g., Hasen, *supra* note 2 at 978–79; *Note: Toward a Greater State Role in Election Administration*, 118 Harv. L. Rev. 2314 at 2315–16 (2005) (discussing proposals for "precisely designed rules—like crafting a precise definition for what constitutes a valid vote" for state election administrators).

5 Because the Secretary of State is the chief election administrator in thirty-seven of fifty states, with appointed boards of elections or Lieutenant Governor charged with this responsibility in thirteen other states, this article will use the term "Secretary of State" to refer to the entity in the state that is primarily responsible for overseeing the administration of elections in the state.

6 See 42 U.S.C. 1973gg(b) NVRA, stating that the purpose of promoting the exercise of the right to vote, a duty held by "Federal, State, and Local Governments," involved 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."

7 Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 634–35 (2007) (discussing the lack of evidence of widespread voter fraud, and its justification for voter identification requirements).

some Secretaries was not always as easy—many required detailed applications and descriptions of the project before agreeing to be interviewed, some scheduled interviews that were subsequently cancelled and never rescheduled, and some simply ignored my requests to meet.

While many were understandably hesitant to participate initially, perhaps due to the fact that most interviews were conducted in the months leading up to the 2008 presidential election, I greatly appreciated the time each Secretary gave to share their wisdom and experiences in support of this project. I am particularly thankful to have had the opportunity to meet with Indiana Secretary of State Todd Rokita and other Secretaries who may have been initially wary of whether this book would ultimately provide a fair and intellectually honest description of their work. I hope that the finished product within these chapters is an accurate and balanced summary of the many honorable projects in which so many Secretaries are engaged.

In the time I spent conducting interviews for this book, there were many unique and memorable moments. I spoke with Alabama Secretary of State Beth Chapman on her cell phone as she was en route to certify the results for the November 2008 elections. I discussed with Georgia Secretary of State Karen Handel, whose intelligence is rivaled only by her warmth, the minute details of her efforts to educate Georgia voters of the state's voter identification requirement. I met with Maine Secretary of State Matt Dunlap, who was extremely down to earth, unscripted, and candid, in a former one-room school house that is now his office in Augusta, Maine. And I benefited from the accessibility of Secretary of State Mark Ritchie, who never failed to quickly and directly respond to an email seeking information. I owe a great deal of thanks to him for his early enthusiastic encouragement and sincere support of this project.

I am also thankful to the Secretaries who were willing to take time out of their busy schedules to meet with me in person while they attended the July 2008 Summer Convention of the National Association of Secretaries of State (NASS), held in my home state of Michigan and sponsored by the Michigan Department of State. Current NASS President and Pennsylvania Secretary of State Pedro Cortés was particularly accommodating, meeting with me twice on the day he was sworn in as President of the Association.

But the aspect of my research that was the most rewarding, enlightening, informative, and inspiring were the two days I spent in Concord, New Hampshire with Secretary of State Bill Gardner. Gardner is currently the longest serving Secretary of State and the "Dean" of the collective Secretaries. I flew out to New Hampshire to meet with him, at the urging of several of his colleagues, and learned more in the hours I spent meeting with him in his State Capitol office than most political history majors do in an entire collegiate career. One of Gardner's favorite quotes is from Oliver Wendell Holmes—"An ounce of history is worth a pound of logic." Gardner's presence as a sitting Secretary, his dedication to fair elections, and his willingness to share his own experiences with anyone willing to listen, including many current Secretaries whom he mentors, ensures that the history he

has witnessed in his thirty-plus years as Secretary will inform the work of those administering democracy in many years to come.

I also wish to thank the many individuals who assisted with the progress of this book throughout the course of its development. Put simply, this book would not have come to fruition were it not for the generous support of the Cohn family, who through former Wayne State University Law School Dean Frank Wu appointed me as the Cohn family endowed scholar in the fall of 2008. Being named as the Cohn scholar, and the subsequent financial support, enabled me to thoroughly research and develop this book. I am extremely grateful to the Cohn family for providing such support.

This book would also not exist without the efficient and tireless work of my research assistants, particularly Lena Kemal and Peter Sauer, who worked at all hours to help me schedule and transcribe my interviews with Secretaries while researching and verifying all background information. I am also grateful to Matt Cameron for assisting with the development of the individual profiles for each Secretary, along with Shamyle Nesfield, Stephanie Copabianco, Nicole Adams, Erin Bartos, and Lauren Leto for their additional research assistance.

Overview of the Chapters

It is my hope that this book provides a readable and informative description of the various roles that a state's Secretary of State (or any state's chief election administrator) is able to play when it comes to administering elections. The chapters seek to detail several different areas of election law and administration where the Secretary of State plays a crucial, if not pivotal, role in ensuring their state's democratic system is accessible and accurate. The first three chapters seek to emphasize the preeminent role of the modern state Secretary of State in promoting democracy while detailing the relations between Secretaries and the two entities that exert perhaps the most influence over their work: Congress and Political Parties. While Chapter 1 specifically describes the contemporaneous roles that Congress, the U.S. Justice Department, state and federal courts, and state legislatures play in election administration, Chapter 2 explores the tension between the need for Secretaries to serve as nonpartisan overseers of the political process and any loyalty or obligation they may feel to the political party that enabled their rise to the position. Similarly, Chapter 3 examines the impact of congressional oversight of elections on the ability of Secretaries to exercise their own independent authority to promote democracy, specifically describing the impact of three pieces of federal legislation—the Voting Rights Act of 1965, the National Voter Registration Act of 1993, and the Help America Vote Act of 2002—on the work of Secretaries of State.

The remaining chapters detail the various roles that Secretaries with election oversight authority play on a regular basis. Chapters 4, 5, and 6 examine the Secretaries in their role as the state's chief advocate for voters, primary educator

for voting, and champion of election reforms. Chapter 7 details the importance of the Secretary in promoting access to voting for citizens with special needs, including English Learning and LEP voters, voters with physical disabilities, voters living overseas, or voters serving in the military. And Chapters 8, 9, and 10 detail the unique legal role of the Secretary in protecting the integrity of the elections process, enforcing all relevant campaign finance and election laws, and certifying signatures or the results of elections, including overseeing recounts. In addition, between each chapter is a short profile on a recent Secretary of State. The profiles seek to highlight some of the many Secretaries who go above and beyond their statutory duties and implement programs that promote a fair and accessible democracy.

Each chapter, as well each profile, seeks to emphasize how critical the state Secretary of State is to ensuring that elections remain free, fair, accessible, and accurate. It is my goal to communicate to all who read these pages just how many current Secretaries are developing innovating agendas to promote those democratic goals. Because one of the other themes that carried through my interviews with several of the Secretaries, and emerges in the following pages, is that in states where Secretaries are elected representatives, voters must hold them directly accountable for protecting the election process. In other words, voters can't forget that they hold the keys to ensuring that their state's chief elections official oversees the election process in a fair, transparent, and judicious manner.

It is my hope that this book will leave voters and engaged citizens better prepared to actively embrace their role as the "employers" of these Secretaries of State.

Contents

Chapter 1
The Preeminent Role of the State Secretary of State in Election Administration

> "The thing that gets my heart pounding is standing [up] for every citizens' constitutional right to vote, and working every chance I get to support policies that make it easier for people to vote, and oppose policies that either disenfranchise people or make it more difficult for them to vote. That swells my chest up. If there is a reason to be here, that's it."
>
> Former Oregon Secretary of State Bill Bradbury

Throughout the twentieth century, the role of a state's Secretary of State and their relationship to election administration was relatively unnoticed and publicly unremarkable. At meetings of their national organization, the National Association of Secretaries of State (NASS), the interactions of various State Secretaries of State were described as "friendly" and "free of political bias" and meetings took place out of the public eye, marked with "cooperation, altruism, and deep-seated convictions while acting and reacting to the growing pains of the nation in the 20th Century."[1] One current Secretary, Matt Dunlap of Maine, referred to NASS meetings prior to the 2000 election as a "quiet, friendly little polo club" where Secretaries would "get together and do resolutions in support of each other and it was all good fun." No major controversies, no significant allegations of partisanship, no spotlight.

Then came November 6, 2000. Words like "hanging chad," "punch cards," and "butterfly ballot" inserted themselves into the cultural lexicon, and the only name to rival "Bush" and "Gore" in notoriety was Florida Secretary of State Katherine Harris. Allegations flew over Harris's partiality, pointing in part to the fact that while she was under law charged with overseeing the counting of the ballots and ultimate certification of the vote total between rivals Bush and Gore, she was simultaneously serving as the Florida chairwoman for the Bush–Cheney campaign.

Subsequent chapters address in greater detail the effects of the Katherine Harris spotlight on the evolving roles and expectations for state Secretaries of State. What that spotlight confirmed, however, for the first time in our country's history, was that a state's chief election official plays a significant, if not crucial, role in the administration of democracy.

---

1 *Pillars of Public Service: A History of NASS*, National Association of Secretaries of State, updated 2009, available at: http://nass.org/index.php?option=com_content&task=view&id=40&Itemid=186, at 4, 24.

The Other Players: Congress, State Legislatures, Courts, and Local Administrators

In the seminal case of *Reynolds v. Sims*, 377 U.S. 533 (1964), the United States Supreme Court recognized that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." The Court had noted in a case decided just a few months prior that "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[2]

Certainly, multiple entities and actors interact to ensure these principles of democracy are realized throughout the United States. Legislators on the federal and state level draw the parameters of the game, setting minimum requirements for enforcing and protecting citizens' access to free, fair, and accurate elections. But congressional authority to affect elections is fairly limited, state legislatures deliver typically piecemeal solutions that vary greatly from state to state, and legislation emerging out of both entities is more often the product of political maneuvering and reactions to the most recent election controversy. Similarly, federal and state courts have played an increasingly influential role in election administration in recent decades, particularly since the United States Supreme Court decisions in *Baker v. Carr*, 369 U.S. 186 (1962) and *Bush v. Gore*, 531 U.S. 98 (2000). Yet courts are limited to intervening in cases and issues that come before their bench. They are thus inherently reactive, unable to address or proactively improve how elections are administered on a regular basis. And while in many states, local election officials engage in unique and innovative techniques to ensure fair, accessible, and accurate elections, their reach and influence is limited only to their geographical area, and their innovation is in most states cabined by the oversight—direct or indirect—of the state's chief election authority.

So although none of the work of these entities in this context is inconsequential, students of democracy can simply not ignore the significant role that a state Secretary of State, if given the authority over elections, plays in consistently overseeing, interpreting, and implementing election law and democratic principles in their state. Indeed, a state's Secretary of State is not simply charged with running elections, but is responsible for administering them in such a way that effectively promotes interests that are at the heart of a healthy democratic process. Notably, they are primarily responsible for executing policies and programs that further the need to ensure accurate electoral outcomes, including efforts to reduce fraud or intimidation and promote integrity, while also prioritizing access to the vote and enabling the full, uniform, and equal participation of the electorate in the democratic process.

---

2 *Wesberry v. Sanders*, 376 U.S. 1 (1964).

The Congressional Role in Election Administration and Regulation

The role of Congress in election administration is limited by the powers granted to it in the U.S. Constitution. Within those boundaries, policies are executed from afar and, with the exception of some segments of the Voting Rights Act and the National Voter Registration Act, apply uniformly to elections throughout the entire country. As a result, Congress's role is necessarily broad and subject to a significant amount of state and local interpretation.

Under the U.S. Constitution, Congress has explicit authority to make laws regarding the administration of elections for congressional and presidential elections.[3] For instance, Article II grants Congress the power to set the date for presidential elections and some parameters for the Electoral College. Article I, Section 4, the "Elections Clause," grants state legislatures the authority to regulate the "times, places, and manner of holding Elections" for Congress, but grants Congress the ability to "make or alter" these regulations. In Ex Parte Siebold, 100 U.S. 371 (1879), the Supreme Court has interpreted these provisions to apply to presidential elections as well.

It is in furtherance of the power granted under the Elections Clause that Congress enacted the National Voter Registration Act of 1993 (NVRA). The NVRA substantially increased opportunities for voter registration, most significantly through enabling citizens to register to vote in a federal election when they apply for their driver's license, or at various other state offices. But in recognition of state-based variances, the NVRA allowed an exemption for the handful of states that had already enacted same-day voter registration. And 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 or state-funded disability, it also allowed for some state discretion in determining which other agencies were to provide registration such as county clerks' offices, public schools, and public libraries. The NVRA also granted states the authority to investigate suspicious voter registration applications and contains detailed regulations for when states may permissibly purge the names of ineligible voters from registration lists. Chapter 3 provides an additional discussion on the specific work that Secretaries of State have taken on to implement or otherwise react to the NVRA.

Congress has a more limited authority in enacting legislation relevant to state and local elections. This role is primarily derived from four separate Constitutional amendments that protect the enfranchisement of individual citizens against specific discriminatory practices in any and all elections based on race, color, previous condition of servitude (the 15th Amendment), gender (the 19th Amendment), age

3 For a general and thorough discussion of the role of Congress in developing and administering election law, see United States General Accounting Office, *The Scope of Congressional Authority in Election Administration* (March 2001). (Online June 2009) available at: http://www.gao.gov/new.items/d01470.pdf (accessed June 9, 2009).

(the 26th Amendment), or the ability to pay a tax. Each of these amendments grants Congress the authority to enforce these prohibitions through appropriate legislation.

Congress's authority to enforce the Fourteenth and Fifteenth Amendments of the U.S. Constitution enabled the passage of the Voting Rights Act in 1965 (VRA), one of the most seminal pieces of legislation in the country's history. The VRA contains several provisions that combine to create a fabric of protection against racial discrimination in all elections, and allows for the appointment of federal observers to monitor compliance. 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." Section 202 prohibits all states and localities from using any "test or device" to establish voter eligibility, including literacy, English proficiency, or character requirements. Section 203 of the VRA requires that certain jurisdictions provide translation assistance for English-learning voters who are of Spanish, Asian, Native American, or Alaska Native descent. Sections 4 and 5 together apply to certain areas of the county—"covered" jurisdictions—that in 1964, 1968, or 1972 required compliance with "any test or device" as a prerequisite to voting. The 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.

Finally, the Constitution's Spending Clause, spelled out in Article I, 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. Congress was able to enact the Help America Vote Act of 2002 (HAVA) in furtherance of its powers under the Spending Clause. The most significant provisions of HAVA provided funding for states to replace outdated voting machines, required states accepting federal funding to offer provisional ballots and establish state-wide computerized registration lists, and required voters who registered by mail and are participating 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 their name and address. In addition, HAVA established the Election Assistance Commission and established uniform requirements for all voting systems used in federal elections. These latter requirements mandate that all voting systems purchased with the federal funds permit the voter an opportunity to verify and change or correct their vote, alert voters of when they've 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.

The Role of Federal Courts in Election Administration and Regulation

In recent years the impression that federal courts may seem to be playing an increasingly large role in overseeing the electoral process has gained increased attention, due in no small part to the U.S. Supreme Court's majority opinion in *Bush v. Gore*. 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. 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." 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 *Reynolds* analysis carried a significant presumption against any state election law that abridges a fundamental right, and it is rare for a law to survive such scrutiny.

Roughly twenty years after *Reynolds*, the Supreme Court introduced the concept of a more flexible scrutiny of some state election laws and procedures in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Court in *Anderson* was asked to determine whether an early filing deadline for presidential candidates in Ohio that arguably made it difficult for independent candidates to appear on the ballot placed an unconstitutional burden on the voting and associational rights of independent candidates and their supporters. In upholding the filing deadline, the Court pointed to the clause in Article I of the U.S. Constitution that grants states the power to establish the time, place, and manner of holding federal elections for Senators and Representatives. The court concluded that any challenge to a state election law must evaluate "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." 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."

This increased recognition of the state's interest in promoting a particular election law or procedure was underscored in the U.S. Supreme Court's 1992 decision in *Burdick v. Takushi*, 504 U.S. 428 (1992). In *Burdick*, the Court applied the more relaxed scrutiny articulated in *Anderson* and upheld a state law that prohibited write-in voting. 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