

CHAPTER 1

BACKGROUND AND METHODOLOGY

IT IS AN OBVIOUS but frequently unexamined truth that democracy – the exercise of government power at the direction of its citizens – depends on a sound method for measuring citizen preferences. Accordingly, the United States repeatedly sends election observers to other countries to monitor how successfully they are promoting core democratic values in the conduct of their elections. This study is an effort to monitor and report on how well we are promoting core democratic values in the conduct of our elections here at home.

We have approached this study with the conviction that a healthy election ecosystem should promote three core values: access, integrity, and finality.¹ The value of access seeks to ensure that all citizens in our representative democracy can readily and equally participate in elections. The value of integrity seeks to ensure that this voting process occurs in a fair, accurate, and transparent manner that protects voter privacy and minimizes the potential for fraud. The value of finality recognizes that elections, and any resulting disputes over their outcome, must be concluded expeditiously, so that political representatives can serve with their electorate's full confidence at the time appointed for the start of their terms. These three values inform this study of election administration in Illinois, Michigan, Minnesota, Ohio, and Wisconsin.

The history of voting in the United States is one of increasing *access* to the electoral process. From removal of property qualifications, to the adoption of the Fifteenth Amend-

ment, to the granting of women's suffrage, to passage of the Voting Rights Act, to the reduction of voting age to 18, the proportion of the general public eligible to vote has increased. To be sure, progress has not always come easily. It has in fact been sporadic, marked by short periods of rapid change, often followed by long periods of stasis or even backsliding.

Practical barriers to participation remain. Examples include polling places that are inaccessible to certain voters, such as those with disabilities or limited English proficiency; polling places that are overcrowded or open only during inconvenient hours; potential voters intimidated from going to the polls; and registration requirements that impede some eligible voters from qualifying to vote.

The history of voting in the United States is also one of remarkable improvements in the *integrity* of the electoral process. The anonymous ballot was one early reform that reduced the potential for corruption, by making it much more difficult for voters to sell their votes or be coerced into voting a particular way. Partly to reduce the risk of ballot box stuffing, paper ballot voting gave way to machine voting, which although also manipulable was seen as rendering outright vote fraud more difficult. The focus of attention now has shifted to the security of electronic voting mechanisms, which are also potentially manipulable but otherwise may provide the most accurate form of voting yet. Today, the largest potential for vote fraud likely lies in the processes for voting by absentee ballot. The processes for both Elec-

tion Day and absentee voting therefore merit continuing refinement to enhance the integrity of our election systems. In addition, the relationship between the mechanisms of voting and the individuals responsible for administering these mechanisms also merits continuing attention, in order to promote the proper training and neutrality of election boards and judges.

While the values of access and integrity figure prominently in the history of electoral reform and are widely accepted as touchstones of a strong election system, the value of *finality* has received comparatively little attention. Indeed, some aspects of our contemporary election ecosystems may actually be working to undermine the prospects for finality, as our election processes become increasingly complicated (and the number of matters on each ballot grows), and as these processes are increasingly litigated.

The 2000 presidential election brought home the importance of the value of finality, as the entire country witnessed how awkward and unsettling it is to have election outcomes ultimately resolved in court after a bitter and protracted legal battle – and ultimately terminated only because the clock had run out.² Occasional resort to the courts to resolve close elections, with the lingering uncertainty about who will be the victor, may be inevitable, but frequent lawsuits are not a desirable feature of a sound election system. Rather, the processes should be designed to maximize the likelihood that the outcome will be determined quickly and conclusively, with minimum court involvement after Election Day.

All three of these values – access, integrity, and finality – should successfully coexist in a sound

election ecosystem. However, the excessive promotion of any one of these values can sometimes create tension with the others. For instance, enhanced judicial review of election procedures and irregularities may help to enhance access or to identify and resolve some types of electoral fraud, but could come at the cost of prolonged uncertainty about electoral outcomes. The debate over voter identification provides another example of this tension. To some observers, requiring all voters to prove their identity at the time that they vote is an important step in protecting the integrity of the voting process. Others, however, see some voter identification requirements as doing little to prevent fraud while significantly reducing access to the polls for certain classes of voters. Voter identification rules may also dissuade the goal of finality, to the extent that they result in more provisional ballots being cast, which may be fought over after an election.

In addition to giving rise to questions about such matters as the appropriate form of judicial supervision over electoral processes, or the proper structure of a voter identification requirement, state election systems also give rise to a number of other questions about how to reconcile the values of access, integrity, and finality. Chief among these questions today is how to implement the provisional ballot requirements mandated by the Help America Vote Act (“HAVA”), which Congress enacted in 2002.³ Although provisional balloting received a fair amount of attention in the 2004 election, particularly in Ohio, a number of issues deserve further attention. At stake is determining how best to minimize the number of eligible voters who are forced to vote a provisional ballot while maximizing the number of provisional ballots that are actually counted (among those cast by eligi-

ble voters), all while streamlining the process for speed and transparency.

The creation and use of the statewide electronic voter databases mandated by HAVA has also posed new questions for our election ecosystems. These databases have the potential to resolve some provisional balloting problems, and to reduce the prospects of electoral fraud, but if not implemented carefully they may also result indirectly in denying some citizens the right to vote. Moreover, potential problems with the registration databases may be every bit as serious as, yet much harder to identify than, glitches in the operation of a voting machine technology.

Indeed, today the most pressing issues surrounding the mechanics of voting involve not just what machines to use but how to implement those technologies. These questions include how to ensure that election boards and poll workers are adequately trained in the set up and operation of the equipment, know how to assist voters properly, can troubleshoot problems effectively, and will safeguard the integrity of the selected equipment throughout the process. Allegations of misconduct in the handling of ballots, electronic data packs, and memory cards in the 2005 Detroit mayoral race and the 2006 primary election in Ohio's Cuyahoga County (home to Cleveland) are but two examples of the need for clear and sensible procedures in this area. Related issues also include how to allocate the voting systems to ensure that each precinct has enough equipment, and how to keep the equipment maintained properly.

Separate and apart from questions about how readily courts ought to intervene in adjudicating claims of election fraud are questions about

when courts should supervise the recounting of close races. For instance, a large number of provisional ballots could prevent a prompt determination of an election's outcome, and provide fuel for contentious litigation. Under what circumstances, and with what evidentiary showings, should courts intervene to resolve close races?

These are some of the aspects of contemporary election processes in the United States that we discuss in the pages to follow. By analyzing election administration in the five key states of Illinois, Michigan, Minnesota, Ohio, and Wisconsin, this study identifies ways in which specific election procedures may fall short. By considering each state's election ecosystem as a whole, the study illuminates the extent to which these states are currently fostering the values of access, integrity, and finality overall. After describing what is and is not working in each state, the study offers some reflections on what makes a healthy election system and recommends some systematic approaches to these problems and challenges. We hope these recommendations will enable a state to enhance these values throughout the entirety of its election ecosystem.

In conducting this study, we proceeded as follows. After breaking the topic of election administration into the nine subtopics presented briefly in the Introduction (and discussed in more detail in Chapter 2), we used these nine areas to identify and research the answers to more than fifty core questions relevant to understanding the legal framework within which each state's existing election ecosystem operates. This research began in the summer of 2006, when we commenced working under a Joyce Foundation grant, and proceeded

throughout the 2006 election season. We conducted this research with the substantial assistance of a number of law student research assistants, and *Election Law @ Moritz* web editor Nathan Cemenska, who has continued to collaborate in numerous aspects of the preparation of this report. We then posted a full set of answers for “50 Questions for 5 States” on the *Election Law @ Moritz* website, where it remains available (at http://moritzlaw.osu.edu/electionlaw/election06/50-5_index.php). We invited the election administration communities in each state to review the answers and to alert us to any errors or omissions. In addition, shortly after the November 2006, election, we prepared and also published to the *Election Law @ Moritz* website a report on the election administration experiences of each state in the 2006 election (at <http://moritzlaw.osu.edu/electionlaw/election06/November2006Votingin5KeyStates.php>).

After the 2006 election, we focused our attention on collecting input from local election administrators in each state by arranging and conducting a series of meetings where we encouraged local officials to speak freely and frankly about their experiences. We also sought and collected input from many other knowledgeable individuals in each state, including state (in addition to local) election officials, election attorneys, government prosecutors, and various advocacy and interest groups. In each of the five states we held at least two such meetings, and in some cases several more, in addition to gathering additional information by telephone and e-mail. Appendix A contains a list of those individuals with whom we met or from whom we received information helpful to our study.

Meanwhile, throughout the study we have collected and analyzed relevant social science research and legal scholarship, including works by various political scientists, other election law research organizations, and a number of recent government reports. Appendix B contains a bibliography of the works that we have consulted. We also have reviewed the “State Plans” that each state prepared pursuant to the Help America Vote Act. Additionally, as a core component of our research, we have reviewed court decisions addressing election controversies in each state. These cases shed light on the practical, political, and psychological factors that influence how courts intervene in the processes of election administration, and in turn help to complete the understanding of each state’s ecosystem. As part of this component of the study, we developed a typology of election contests, described in greater detail in Chapter 2, which we used to examine how each state would handle several types of prototypical election problems.

Throughout the study, we have benefited enormously from our interactions with, as well as the previous work of, the many knowledgeable election law scholars, political scientists, reform advocates, and election officials with whom we share an interest in these issues. Yet our study has confirmed that, notwithstanding all the attention given to matters of election administration since 2000, the field remains underdeveloped in confronting the foundational issues of democratic government that it involves. Indeed, nothing approaching this type of comprehensive analysis of individual states’ systems of election administration has previously been done. For instance, in its 2005 report the Carter-Baker Commission did not comprehensively assess the experience of

states in implementing existing election laws (at a time when key provisions of HAVA had not yet become effective).⁴ Similarly, the Century Foundation's working group report, while making some recommendations for state-level reforms, did not undertake the detailed analysis of specific states' election systems that follows.⁵ Likewise, the Government Accountability Office's report on the 2004 election did not approach its analysis from a systemic perspective.⁶ We certainly are indebted to, and have built upon, these and other previous contributions to the field of election administration, but we nevertheless believe that the analysis herein makes an important new contribution.

6. See Government Accountability Office, *The Nation's Evolving Election System as Reflected in the November 2004 General Election*, June 2006.

REFERENCES

1. Different sets of values of course are also possible. See, e.g., Tova A. 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 (2006) (identifying such possible values as access, participation, efficiency, integrity, accuracy, and finality).
2. For a sampling of the voluminous literature about the 2000 election, see Richard A. Posner, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); *THE VOTE: BUSH, GORE, AND THE SUPREME COURT* (Cass R. Sunstein & Richard A. Epstein eds., 2001); Symposium, *Recounting Election 2000*, 13 STAN. L. & POLY REV. 1 (2002); Gillian Peele, *The Legacy of Bush v. Gore*, 1 ELECTION L.J. 263 (2002).
3. Pub. L. No. 107-252, 116 Stat. 1666 (codified at 42 U.S.C. §§ 15301-15523).
4. See Commission on Federal Election Reform (Carter-Baker Commission), *Building Confidence in U.S. Elections*, Sept. 2005. Two of this report's co-authors, Professors Foley and Tokaji, served on that working group.
5. See The Century Foundation, *Balancing Access and Integrity: The Report of The Century Foundation Working Group on State Implementation of Election Reform*, July 2005.