

## CHAPTER 2

### PRIMARY COMPONENTS OF AN ELECTION ECOSYSTEM

ELECTION ADMINISTRATION involves a multitude of processes and events, supervised and implemented by a variety of state and local officials and offices. Although no one rubric for analyzing these activities and individuals is necessarily preferable, in this study we have chosen to organize election administration sequentially into eight topical areas “from registration to recounts.” But first, critical to understanding this entire sequence is an understanding of the particular administrative structures that a state has chosen for overseeing its elections. Accordingly, as the first of nine areas of focus, we examine each state’s institutional arrangements for conducting elections. We then turn our attention to the eight sequential categories of the election administration process, beginning with the steps by which a citizen qualifies to vote, and ending with the way in which a contested election is finally resolved.

As a preliminary to the state-by-state chapters that follow, this chapter introduces in more detail the matters that we have reviewed in each of these nine areas, as well as the principal ways in which we believe that these matters ought to be understood as an election ecosystem. The nine areas are: (1) institutional arrangements, including the role of partisan, nonpartisan, or bipartisan bodies in exercising authority over election administration matters; (2) voter registration, including both how registration occurs and how the state manages its database of electors; (3) challenges to voter eligibility; (4) voting technology and equipment;

(5) early and absentee voting; (6) polling place operations, including poll worker training; (7) ballot security, including voter identification requirements; (8) provisional voting; and (9) vote counting, recounting, and post-election contests. We have deliberately chosen not to include in our study any of the processes by which candidates or issues qualify to be on the ballot, or any of the regulations that govern the way in which campaigns occur, including the complex and shifting mix of state and federal laws regulating campaign finance contributions and expenditures. Instead, we have limited this study to the administration of the voting processes themselves.

***1. Institutional arrangements.*** In 2004, Ohio attracted a great deal of negative publicity because its elected secretary of state, Kenneth Blackwell, was actively and publicly involved in supporting individual candidates and ballot issues (and generally positioning himself to run for governor in 2006) at the same time that he was responsible for administering the state’s elections. While some were critical of Secretary Blackwell for his political activities, others were critical of an administrative structure that placed responsibility for election administration in the hands of an official elected on a partisan basis and subject to the political realities of the day. In this respect, however, Ohio is far from unique. In fact, throughout the country the predominant form of institutional arrangement is to assign an elected secretary of state the responsibility of serving as the state’s chief election officer.

Three of the five states in this study, including also Michigan and Minnesota, follow this same approach.

By contrast, Illinois and Wisconsin use a state board of elections to oversee their election administration systems. In Illinois, the state board consists of eight members, appointed on a bipartisan basis by the governor with the consent of the state senate. In Wisconsin, the state board has historically consisted of eight or more appointees, one designated by each of the following individuals: the governor, the chief justice of the state supreme court, the majority and minority leaders of both houses of the state legislature, and the head of each political party in the state that received at least ten percent of the vote in the preceding gubernatorial election. But while the Wisconsin board has final responsibility over election administration, in practice it has delegated most day-to-day matters to its nonpartisan executive director. However, as of September 2007, Wisconsin has completely restructured its board, creating a new Government Accountability Board to handle both election administration as well as campaign finance regulation, as discussed in Chapter 6.

The five states differ not only in what individual or body has state-level responsibility over elections, but also in how much authority resides at the local level, and in how reliant local election administrators are on their state level counterparts. In addition, the five states also differ in whether local level responsibility for operating the polls and administering elections resides primarily with the counties, as in Ohio and Illinois, with the municipalities, as in Michigan and Wisconsin, or involves more of a hybrid, as in Minnesota. The states also differ

in whether local administration is the responsibility of a county or municipal clerk, either elected or appointed, or instead occurs under the direction of a bipartisan elections board.

**2. Voter registration.** Turning to the sequence of processes involved in conducting elections, the first step in most states is to create a roster of voters by requiring eligible individuals to register to vote. One alternative, now employed only in North Dakota<sup>1</sup> but more common in the days when America was heavily agrarian, is to forgo registration entirely and permit eligible voters simply to appear at their polling place and declare their eligibility on Election Day. Several other states, including Minnesota and Wisconsin, in some fashion permit voters to register at the polls on Election Day. But the overwhelming majority of American states, including Ohio, Illinois, and Michigan, require voters to register to vote in advance of the election.

Advance registration provides states a period of time in which both government officials and private individuals can confirm the eligibility of those seeking the authorization to vote. However, it may entirely foreclose from voting some citizens who are otherwise eligible to vote but who have failed to take the required steps ahead of time. Meanwhile, although Election Day Registration may make it easier for citizens to vote, it may also complicate states' ability to check their eligibility. With multiple examples of both approaches among the five states in our study, we have examined the particular requirements that each state uses to conduct its voter registration process, and the ways in which these registration requirements serve to promote both access to the polls and the integrity of an election.

Closely related to each state's voter registration requirements is the way in which the state manages its database of registered electors. The Help America Vote Act ("HAVA") required all states by 2006 to develop and implement a statewide electronic database of registered voters, as a means of promoting greater accuracy in the registration lists and of reducing the chances of vote fraud through multiple voting.<sup>2</sup> Because Michigan already had a statewide electronic system in place, it has had the easiest time complying with this HAVA requirement. However, as discussed in the chapters to follow, to a greater or lesser degree the remaining states in our study have struggled to implement and use their statewide voter database effectively.

**3. Challenges to voter eligibility.** Also closely related to the mechanics by which eligible voters are included on the roster of voters are the processes by which election officials check voter eligibility. These processes include reviewing registration applications for *prima facie* compliance with a state's eligibility requirements, correcting duplicate names that result when voters submit multiple applications, and purging from the registration list voters who were once eligible but are no longer. Electronic databases are making it increasingly easy to eliminate duplicate names, as well as to conduct systematic purges of voters who have been convicted of a felony, which in all five states renders a citizen ineligible to vote at least during the individual's period of incarceration. Purges also can occur in response to mass mailings to identify voters who have moved, or in response to specific challenges to individual voters. Finally, in some states the eligibility of individual voters may be challenged at the polls, either by other voters or by

the political parties' designated "challengers." Each state has its own set of processes by which its registration lists are purged and updated.

**4. Voting technology.** In all five states, registration requirements are one type of voting preliminary, used to determine which individuals will be allowed to cast a ballot. Also preliminary to the actual voting itself is choosing a type of voting equipment and preparing the ballots. In the 2000 presidential election, Florida showed the nation that problems can occur both as a result of the type of voting equipment used, as exemplified in the difficulties in determining how to conduct a recount of punch card ballots, and as a result of poor ballot design, as exemplified not only in the infamous butterfly ballot of Palm Beach County but also in the multiple page optical scan ballot used in Duval County.<sup>3</sup>

Accordingly, since 2000 the most common election "reform" around the country has been to change voting equipment, although this change has not happened overnight. By some accounts, the 2006 election saw the largest one-time swap of equipment, with almost one-third of the country's voters using a type of equipment different from what they had used in the previous election, and more than two-thirds using something different from what they had used in 2000.<sup>4</sup> These changes also are partially a result of the Help America Vote Act, which created heavy financial incentives for states to abandon punch card voting systems.<sup>5</sup>

Furthermore, in some states these changes have occurred uniformly throughout the state, while in other states individual counties or municipalities have been free to make their own choice of equipment. But from among a wide

range of new equipment options, states and localities have sometimes struggled to decide what to use. In large part this is because the newer equipment has not eliminated the prospect of serious election administration problems. Sophisticated electronic voting machines bring concerns about computer viruses, including the possibility of deliberate or accidental distortion or loss of the actual votes cast. In response to some of these concerns, an increasing number of states are requiring that electronic voting machines also generate a paper audit trail that voters can peruse as they vote to confirm the accuracy of their ballot. The choice of election technology also implicates the way in which disabled voters will be able to participate in the voting process, as some types of equipment are clearly better than others for individuals with certain disabilities.<sup>6</sup>

**5. Early and absentee voting.** Once states have established who can vote and using what equipment, it is time for voting to begin. Because not all voters may be able to vote in person on Election Day, all states make some provision for voting at an alternative time or place. Traditional absentee voting rules allowed voters who could not get to the polls, either because of a physical impediment or because they would be absent from their voting precinct, to request a paper ballot that they could mark at home and return prior to Election Day. In recent years, many jurisdictions have expanded their absentee voting processes to allow any voter to cast an absentee ballot for any reason. Meanwhile, other jurisdictions have begun to permit voters to appear at select locations prior to Election Day to cast an early vote.<sup>7</sup>

Increased use of absentee and early voting has the promise of increasing access to the polls,

but brings with it greater risks to the integrity of the election. This is especially true for absentee ballots cast at remote locations, such as homes or businesses, where voters may be subject to intimidation or bribery, rather than in polling locations, where the voters can vote in secret. But to a lesser extent it may be true of early voting as well, if the period of early voting itself distorts the underlying election campaigns. In turn, some forms of absentee and early voting may increase the costs of election administration, and they inevitably alter the type of work that poll workers and election judges are needed to perform, as next discussed.

**6. Polling place operations.** Traditionally, the heart of the democratic process has been the casting of votes at the polls. Notwithstanding the substantial increase in the amount of early or absentee voting occurring in many states, most of the voting in the five states in this study, at least for the near future, is likely to continue to occur at the polls on Election Day. A critical component of a state's election administration process therefore is how polling place operations are conducted during this daylong event.

In no small part, how polls operate is a function of how poll workers are recruited and trained. In most states, the vast majority of election officials are volunteers who receive a modest stipend for staffing the polling places from the time the polls open until the time they close. They are expected to attend a training program, typically a couple of hours long, in the days prior to the election. In practice, however, local boards of election or their elections directors often have difficulty even recruiting the necessary number of poll workers, let alone

getting them all to attend the training programs. The state-specific chapters to follow include individual states' experiences in this regard.

Polling place operations are closely related to several other topics of our study, such as each state's election-day experience in using its database of registered voters, and in implementing its choice of voting technology. These factors contribute to the efficiency with which voting occurs, and affect the amount of time that voters spend at the polls waiting for an opportunity to cast a ballot. In analyzing polling place operations, we therefore focus in substantial part on the voters' experience engaging with the democratic process, including how well the election process protects voters' ability to vote freely and without intimidation. One critical subset of voters are those who need accommodation at the polls for a disability, whether mobility impairments, vision impairments, or cognitive impairments, as well as those with limited English proficiency, who may require extra time or assistance in casting their ballots.

The topic of polling place operations also could encompass such matters as safeguarding the ballots, provisional voting, and counting the votes, but as next described we have chosen to treat each of these matters separately (while mindful of the importance of understanding all of these matters as an ecosystem).

**7. Ballot security.** A crucial step in protecting the integrity of an election is protecting the integrity of the ballots themselves. In today's election environment, ballot security arguably partakes of three distinct components: protecting physical ballots (or other physical records of voting) from tampering, damage, or loss;

protecting electronic voting equipment and records from tampering, hacking, contamination, viruses, damage, or loss; and ensuring that only eligible voters are allowed to cast a ballot.

With respect to both physical voting records and electronic voting equipment and records, a critical component of securing their integrity is maintaining the proper chain of custody, from the time the ballots or equipment are prepared, through the casting of the ballots, and through the post-election counting (and any recounting) of the ballots. Maintaining an impeccable chain of custody is paramount because many forms of tampering or alteration might not be self-evident, and can only be presumed not to have occurred because the ballots have been properly secured. But a state's chain of custody requirements also should protect against accidents that would undermine or invalidate an election. Protecting electronic equipment also may include various kinds of tests and audits, before, during, and after an election, as well as steps taken at the design or procurement stages to develop and select a voting system with lower risks of security problems.

As a third aspect of ballot security, we have also chosen to address the steps that states take on Election Day to confirm the eligibility of those who desire to vote. Although these steps are closely related to the way in which states conduct their voter registration process, the registration process itself has no direct implication on ballot security until a voting official makes a decision about whether to give a person a ballot. In states that require advance voting registration, this decision often involves asking the person to sign a poll book and then comparing the signature with the signature on file from

the time of registration. But increasingly this decision is also turning on whether the person can present some additional form of personal identification.

Including the topic of voter identification in the ballot security category may be somewhat controversial. We have chosen to discuss it here because the principal justification for voter identification requirements is to promote the security of the ballot. But certain types of voter identification requirements may result not so much in enhancing election integrity as in constraining election access. We address these issues in greater detail with respect to individual state systems.

**8. Provisional voting.** Also closely related both to preventing ineligible voters from casting a ballot, and to polling place operations generally, is the use of provisional ballots. Already in use in some states but required in all states by the Help America Vote Act,<sup>8</sup> provisional ballots permit poll workers to accommodate individuals who present themselves at the polls to vote but whom the poll workers are unable to confirm are proper voters at that poll, by letting them vote special ballots “provisionally.” These provisional ballots then are subject to subsequent verification that the voter was eligible and in the right place, in which case they are counted like regular ballots.

Although their obvious purpose is to enhance access to the ballot, they may have the opposite effect if the result of their availability is that election officials fail to ascertain ahead of or on Election Day whether a voter is properly registered and in what polling location. This can lead to the casting of provisional ballots that end up uncounted. The states in our study have a range of experiences with provisional

ballots, including litigation over when provisional ballots must be cast and when they can be counted, and wide variations in the number of provisional ballots cast and counted.

**9. Vote counting, recounting, and contests.**

The final step in administering an election is to determine the result. In most cases, this is a straightforward matter of tabulating the ballots and certifying the outcome. To this end, all states have established procedures by which poll workers either process and report their precincts’ totals to supervising officials, or transmit their ballots to regional centers for counting.

Occasionally, however, determining a final result becomes more complicated, either because an outcome is sufficiently close, or because an error occurs that renders the tallies unreliable. In these circumstances, recounts and election contests provide supplemental mechanisms for determining the outcome. Wide variation exists among states in how they conduct both recounts and contests, including whether a recount is automatic when an election outcome is within a certain margin, what tribunal has jurisdiction over an election contest, and what remedies are available for an unreliable election outcome.

In order to better understand these variations and their implications, we have examined how each state in our study would likely handle several prototypical election controversies. These scenarios include: an election in which a number of unverified ballots (or ballots in excess of voters who have properly signed in) are cast; an election in which ballot shortages or equipment failures deprive a number of voters from the opportunity to vote; a controversy over the eligibility of a number of provisional ballots; and evidence that absentee voters were im-

properly influenced in their votes. Our reflections on these and other scenarios inform this report, and a more detailed discussion is available separately.<sup>9</sup>

## **THE NOTION OF AN ELECTION ECOSYSTEM**

Having described the nine components of our study of election administration, the nature of their interconnectedness merits brief elaboration. We have approached this study from the perspective that a state's processes for administering its elections deserve to be understood as an ecosystem because the choices that a state makes about the procedures and requirements in one area inevitably affect the health and functioning of several other areas as well. For instance, the nature of a state's voter registration process can have a dramatic impact not only on the ease with which the state can maintain its statewide voter database, but also on whether that database is a valuable Election Day tool both for ensuring the integrity of an election, as well as for minimizing the need for provisional ballots. The choice of which type of voting equipment to use affects not only the ease with which voters, including those with disabilities, can vote, but also the way in which recounts will occur, and perhaps the grounds available for an election contest. And obviously the institutional arrangements, at both the state and local levels, will relate to each of the other components of the election administration process.

Furthermore, as previously described, a key component of our study is an examination of each state's implementation of the Help America Vote Act, several critical requirements of which only took effect in 2006. HAVA required states to make significant changes regarding voting equipment, registra-

tion, provisional voting, and identification requirements.<sup>10</sup> This study is one of the first to examine the impact of these newly effective requirements, as well as how they might be improved. Yet such an analysis can only be properly conducted with an appreciation of each state's entire election ecology. It is for this reason that we have studied not only how the requirements of HAVA are being implemented, but how these changes relate to other aspects of state and local election administration.

The chapters to follow will spell out and justify our conclusions regarding the election ecosystems of these five states in greater detail, but we can briefly note here some of the principal findings of our examination of these matters. These include the following: (1) the health of a state's election ecosystem is affected by its underlying political culture; (2) regardless of the underlying culture, an effective statewide elections bureau or administrator can play a crucial role in the smooth operation of an election ecosystem; (3) good communication and trust between levels of election officials is critical to a healthy election ecosystem; (4) to varying degrees, all states are struggling to find and train poll workers; (5) also to varying degrees, all states suffer when they seek or are required to make wholesale changes to their election systems too quickly; (6) statewide consistency in administrative practices and procedures provides a substantial advantage; (7) most states can benefit from improving their processes for handling post-election proceedings; and (8) it is increasingly important that election administration be approached as a professional administrative task, rather than as an adjunct to a political or partisan position.

We discuss each of these conclusions in greater detail in Part III. Some of them are detailed in Chapter 8, which is structured around a set of general observations about election ecosystems. Others are discussed in Chapter 9, which makes specific recommendations for each of the nine areas of election administration that we have studied. Finally, Chapter 10 prioritizes three key reforms for each state, tailored to their particular circumstances. But first, in Part II we consider the current condition and characteristics of the election ecosystems of each of these states.

## REFERENCES

1. North Dakota has not had a voter registration requirement since 1951. For a history, see <http://www.nd.gov/sos/electvote/voting/vote-history.html>.
2. See 42 U.S.C. §15483(a).
3. See Raymond Bonner, *Counting the Vote: Duval County; Democrats Rue Ballot Foul-Up in a 2nd County*, N.Y. TIMES, Nov. 17, 2000, at A1.
4. See Election Data Services, *Almost 55 Million, or One Third of the Nation's Voters, Will Face New Voting Equipment in 2006 Election*, Oct. 2, 2006, available at [http://www.edssurvey.com/images/File/ve2006\\_nrpt.pdf](http://www.edssurvey.com/images/File/ve2006_nrpt.pdf).
5. See 42 U.S.C. §15302.
6. See Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711 (2005).
7. In a state that allows anyone to vote an absentee ballot, the distinction between absentee and early voting may blur. For a thoughtful discussion of recent developments in both early and absentee voting, see John C. Fortier, *ABSENTEE AND EARLY VOTING: TRENDS, PROMISES, AND PERILS* (2006).
8. See 42 U.S.C. §15482(a).
9. For a more extended discussion of how the five states might handle these kinds of problems, see Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POLY REV. 350, 361-74 (2007).
10. See 42 U.S.C. §15302 (equipment); §15483(a) (registration); §15482(a) (provisional voting); §15483(b) identification.