

## CHAPTER 8

### GENERAL OBSERVATIONS

OUR EXAMINATION of Ohio, Illinois, Michigan, Wisconsin, and Minnesota yields valuable insights for election administration across the United States, as well as more specific advice for these five states. The experiences described in the preceding chapters should therefore be taken into consideration as election reform deliberations proceed in other states and in Congress. In some areas, these five states provide examples worthy of emulation; in others, they provide warnings of what to avoid; in still others, they suggest the need for further research.

We divide our discussion of lessons learned into three chapters. This chapter offers a set of general observations from our research that should guide state and federal policymaking. In Chapter 9, we offer a set of specific recommendations for each of the nine areas of election administration around which this study is organized. Chapter 10, the final chapter, offers particularized reforms tailored to each of the five states in the study.

#### **1. STATE ELECTION ECOSYSTEMS ARE CRITICAL TO FEDERAL ELECTIONS.**

Each of the five states in this study has structured its political system so as to advance the three democratic values that we identified at the outset of this study: access, integrity, and finality. Each state recognizes that every citizen's vote should be viewed as equally valuable, not merely as a constitutional requirement of one-person-one-vote but also as a political norm. The election ecosystems of all five states seek to promote this

principle to some degree, through practices designed to facilitate participation by all eligible citizens. They also include features designed to ensure that the results obtained are reliable and that disputes can be resolved fairly and without undue delay. At the same time, it is clear that there is room for improvement in how the election ecosystems of all the subject states advance the values of access, integrity, and finality.

From a national policymaking perspective, one of the questions that must be considered is how to prioritize the various reforms that are needed, not only in these five states but also throughout the country. We suggest that, under our federal system, there is a particular need for attending to problems in those states upon which the federal elections – including the presidential election – are likely to turn. In this regard, there is no denying the fact that Ohio, because of its past and probably future significance in presidential elections, receives more attention to matters of its election administration than other states. We think this is appropriate. Given our federal structure, the election ecosystems of each state function to serve not just each state's needs, but also the needs of the nation as a whole. This reality should be kept in mind in establishing priorities.

For instance, considered on their own, the need for reform in Illinois might be considered just as urgent as in Ohio. Looking at the recent history of each of these states in isolation, Ohio does not seem any more mismanaged than Illinois. But an electoral disaster in Ohio is more likely to have national implications than one in Illinois. It therefore makes sense to devote spe-

cial attention to whether Ohio can improve the administration of its elections by 2008, especially in Cuyahoga County. That is not to say that election administration problems in Chicago or East St. Louis, Illinois should be ignored but rather that, from a national perspective, problems in swing states should be considered especially urgent. The states, in other words, can be compared on two dimensions: 1) the vulnerability of their election ecosystems, and 2) their significance in federal elections. The first dimension is the one that matters for internal purposes, while both matter for national purposes. Both perspectives are legitimate and, indeed, necessary for policymakers to take into consideration as they attempt to set priorities for reform.

Even aside from their importance to federal elections, there is another reason why state election ecosystems are a matter of national importance. Election administration, although historically an exclusively state matter, is today becoming more and more federalized. This reality affects all states, even those with relatively smooth-running systems. Federal statutes in this area – most notably the National Voting Registration Act (“NVRA”) and the Help America Vote Act (“HAVA”) – reflect Congress’ awareness of the central role that state and local election administrators play in federal elections. These laws have given rise to a federal infrastructure that, although presently quite limited, will assume increasing importance in years to come.

To be clear, we do not advocate the federalization of election administration, in the sense of putting federal officials in charge of the day-to-day operations involved in running elections. State and local control over election

administration is the reality and is likely to remain so for the foreseeable future. We do, however, think it necessary for there to be a stronger set of guiding principles that will enhance election fairness and uniformity throughout the nation. This will also necessarily mean that Congress will have to assume some responsibility for funding the administration of federal elections on an ongoing basis, rather than simply leaving states to their own devices as it did before HAVA.

The need for this federal infrastructure also means that state and local officials must be active participants in national policy debates. Even states like Minnesota, which in many respects has an exemplary system, cannot simply go it alone. Instead, as Secretary of State Ritchie has recognized, Minnesota and other states need to participate in and contribute to the development of federal policy. If through this process states can export some of their electoral successes to other states, that would be an enormous contribution.

## **2. INDIVIDUAL VOTERS’ PRIORITIES AND SYSTEMIC PRIORITIES WILL SOMETIMES DIVERGE.**

Any state’s election ecosystem can be evaluated from multiple perspectives. As we have just discussed, it can be viewed from either a state or a national perspective. It can also be viewed from either an individualistic or a systemic perspective. The individualistic perspective considers how well the system serves needs of the individual voter, in allowing people to register easily, cast their votes conveniently, and have those votes counted accurately. The systemic perspective, by contrast, focuses on how well the state’s system aggregates individual voter

preferences into a reliable outcome. This requires not only that all eligible citizens have equal access to the polls, but also that the process be transparent, fair, and timely in its resolution of election disputes. The systemic perspective must therefore take into account the values of access, integrity, and finality.

Although the individualistic and systemic perspectives are usually reinforcing, they occasionally are not. For example, individual voters might prefer the convenience of no-excuse absentee voting by mail. From a systemic perspective, however, such a policy may pose problems – such as voter errors in submitting absentee ballots, administrative mistakes in their handling, or fraudulent use of such ballots – that may call election results into question. More significantly, the individualistic and systemic perspectives may give rise to a different order of priority for potential reforms, even when both perspectives would put the same reforms on the list.

The extent to which any state adopts the individualistic or systemic perspective depends on a variety of factors, including its place in the national landscape. In states like Ohio and Wisconsin, because of their prominent place in presidential elections today, the systemic perspective is particularly important. Such states should therefore make a special effort to ensure fairness and transparency in their processes for conducting elections and resolving disputes that arise afterwards. Moreover, in keeping with our first observation, federal policymakers – including Congress – must adopt a systemic perspective in their ongoing attempts to improve the federal infrastructure of elections.

### **3. A STATE'S POLITICAL CULTURE AFFECTS THE HEALTH OF ITS ELECTION ECOSYSTEM**

From the outset we approached this study with the expectation that the specific background and traditions of each state would substantially influence its election ecosystem, especially in how the system's practical operation differed from its theoretical design. We had not anticipated, however, the close correlation between the relative health of each state's election ecosystem and a pre-existing framework for classifying a state's political culture – namely, the typology of political scientist Daniel Elazar, which we discuss beginning in Chapter 5. Professor Elazar describes three dominant types of political culture in American states: individualist, moralist, and traditionalist.<sup>1</sup> Although some scholars have criticized this classification scheme,<sup>2</sup> we believe it is instructive to compare how these political cultures map onto the election ecosystems of this study.

The order of the five state chapters in Part II reflects our rough evaluation of each state's relative electoral health, with Ohio's election ecosystem being the weakest and Minnesota's the strongest. After making this evaluation of electoral health, we were intrigued to discover that the healthiest state election ecosystems were in states whose political cultures Elazar has described as predominantly "moralist." In his original work, Elazar labeled Minnesota, our strongest state, as almost entirely moralist, and Wisconsin, our next strongest state, as largely moralist with a hint of individualist culture. In contrast, Elazar identified Michigan as having more of a mix of (primarily) moralist and (secondarily) individualist cultures, while Illinois and Ohio were largely individualist (with pockets of moralist and traditionalist cultures).<sup>3</sup>

The underlying characteristics upon which Elazar focused in classifying a state's political culture as "moralist" or "individualist" are useful in thinking about how political culture influences election administration. In oversimplified terms, Elazar describes a moralist culture as one in which government is viewed positively as a shared enterprise to enhance community well-being.<sup>4</sup> It is not surprising to find that this culture is associated with a commitment to nonpartisan and professional election administration. Such states are likely to have an easier time functioning in nonpartisan or bipartisan administrative structures because administrators see their positions as an opportunity and an obligation to serve the public interest. This in turn entails a commitment to procedural fairness and transparency in the conduct of elections. In contrast, Elazar describes an individualist political culture as one in which government is viewed ambivalently as a marketplace for responding to competing demands.<sup>5</sup> It is not surprising that states where this culture predominates may be less attentive to procedural fairness, and may sometimes lose sight of the public interest in matters of election administration.

To be clear, these generalizations certainly do not describe all election officials in any given state. In the course of our research, we have encountered election officials deeply committed to procedural fairness and the public interest in each state. Our focus here is not on the integrity of individual administrators, but rather on the overall health of a state's election system. Elazar's typology captures an important contributing factor to the functioning of each state's ecosystem.

#### **4. CENTRAL LEADERSHIP AND COMMUNICATION MAKE A GREAT DIFFERENCE**

The health of a state's election ecosystem also depends on the presence of an effective state elections authority. Yet while central leadership plays a crucial role in the smooth operation of an election ecosystem, the mere presence of strong central leadership is not sufficient. This chief elections bureau or officer must use the power of that position *effectively*. This requires at least three things: 1) asserting vigorous leadership to promote statewide consistency and uniformity where appropriate, 2) avoiding conduct that would give rise to any appearance of bias, and 3) providing meaningful assistance and guidance to local election officials.

It is also essential that a state's central election authority foster excellent communication with other election officials around the state, constantly earning and confirming their trust. This requires both a comprehensive knowledge of what is occurring at the local level and the ability to provide authoritative guidance to local officials. For guidance to be authoritative, the state election authority must also have the means to make sure that state policies are actually followed. This partly depends on enforcement authority, a subject we discuss in Chapter 9, but a strong relationship between state and local authorities is at least as important to a healthy state ecosystem.

#### **5. STATEWIDE EQUALITY SHOULD GENERALLY TRUMP LOCAL AUTONOMY.**

In the field of election administration, as in other areas of public policy such as education, an inevitable tension exists between the values

of local autonomy and statewide equality. Preserving some degree of local control over election administration is important, not merely because of tradition but also because local variation can foster experimentation, which in turn yields greater knowledge about innovative best practices. One good example from Illinois is DuPage County's technological innovation involving electronic protocols for when poll workers should use provisional rather than regular ballots. Such experimentation should be encouraged, because it will eventually benefit the system as a whole.

It is nevertheless critical for states to accord equal treatment to all their citizens, especially with respect to the casting and counting of ballots. The exercise of the franchise is one sphere in which equality of citizenship must be the paramount concern. Therefore, although each state ought to do more to foster local experimentation, this should occur only within a framework that guarantees the essential equality of the right to vote. A certain degree of statewide uniformity in election practices and procedures is helpful, and in some cases necessary, to ensure equality.

There is no obvious or easy way to properly promote equality while protecting innovation, but all five states – and especially Illinois and Ohio – have room to improve in this respect. In particular, the wide variation in provisional voting rates across Ohio (as discussed in more detail in the Ohio Provisional Voting Supplement to Chapter 3), and the extent to which Ohio's local elections officials have operated without statewide standards in recent elections, provide evidence of unequal treatment that might give rise to an Equal Protection claim under the principles of *Bush v. Gore*.

Whether or not such variations violate the law, the practical effect of such disparities is to undermine the ideal of democratic equality. Our examination of Illinois similarly reveals a lack of statewide standardization in many areas of its election administration. In contrast, Michigan, Wisconsin, and Minnesota have achieved a greater degree of statewide consistency, and thus appear closer to the ideal of equal treatment of all citizens regardless of where in the state they happen to live.

## **6. THE STATE JUDICIARY PLAYS A SIGNIFICANT ROLE IN AN ELECTION ECOSYSTEM, AND NOT ALWAYS A CONSTRUCTIVE ONE.**

Each state's judiciary plays a significant role in determining the law that actually is put into effect, usually in circumstances where the judicial interpretation of the law has the potential to make a real difference in the outcome of an election. It is not uncommon to see state judicial decisions in which rules are interpreted creatively, or overturned as unconstitutional, by courts not fully attentive to the rules' application in particular circumstances. The content of any state's election laws is much more amorphous and unsettled than what any examination of the state's statutes would indicate.

This observation in turn leads to two related comments: First, it suggests the value of drafting the rules and procedures of election administration with as much clarity and specificity as possible. The less ambiguity in a rule, the fewer discretionary judgments that administrators and judges will have to make. Second, where such ambiguity inevitably remains, it points to the tremendous importance of the particular individuals who sit at the apex

of a state's judiciary, its supreme court. The ultimate authority to define the meaning and application of a state's election laws lies in their hands, except to the extent that the U.S. Supreme Court intervenes based on a conflict with federal law, as it did in *Bush v. Gore*.

The interpretation of any state's election laws thus depends in part on the identity and personal philosophies of the individuals who constitute that state's supreme court. The implications of this observation are significant. Consider Ohio, where all of the current state supreme court justices are elected Republicans. In any significant election law controversy, there is a realistic chance that a majority of these current justices would clash with the Ohio Secretary of State, an elected Democrat – as they did in a recent case involving the timetable and procedures for vetoing state legislation.<sup>6</sup> The members of that court might view themselves as simply interpreting the state's constitution and statutory laws as objectively as they can. But when in a given case there is a Democratic interpretation vying with a Republican interpretation, it is difficult for the elected justices to claim convincingly that they are transcending party allegiance if they adopt the Republican interpretation. The situation could get ugly in October or November 2008 if, for example, the Democratic secretary of state and the Republican-controlled state legislature become embroiled in a dispute that winds up before the Republican state supreme court, over the meaning of Ohio's rules regarding provisional voting or voter identification.

The same point applies in Michigan. There, a state supreme court that is bitterly divided along party lines has already made a spectacle of itself on various matters, and was deeply di-

vided in adjudicating the state's voter identification measure. It is doubtful that many people would trust that court to operate "above the partisan fray" if an important election law issue came before it in October or November 2008, with Democrats and Republicans on opposite sides. The "perfect storm" in Michigan in 2008 would be if the race to be the state's chief justice is close and contested and, in order to resolve it, the Michigan judiciary is called upon to review a potentially determinative issue of state law.

Regrettably, there has been no effort in any of these five states to develop a bipartisan or non-partisan institutional arrangement, even if only temporary, to handle a partisan election dispute that might arise in the heat of battle. None of these states has in place a court with the institutional credibility needed to resolve such a dispute in a manner that both sides would perceive as fair. In that sense, all of these states – and probably most states in the country – have failed adequately to prepare for the next election. The U.S. Supreme Court might try to step in and perform that role. In fact, this may be what the Court thought it was doing in *Bush v. Gore*, and what the Court thinks it is doing by agreeing to review the dispute over Indiana's voter identification requirement in early 2008. But some doubt remains about whether the U.S. Supreme Court would be accepted as an evenhanded tribunal guaranteed to deliver a fair result in a partisan election dispute.

It is therefore incumbent on the states to rise to the occasion, by creating institutions capable of fairly resolving disputes over the administration of elections. One possibility is a specialized election court whose members are

selected through a mechanism that will ensure bipartisan consensus, something we discuss in Chapter 9's treatment of post-election processes and in Chapter 10 with reference to Ohio and Illinois. The need to resolve election disputes fairly may also be a factor counseling in favor of merit selection of state judges, rather than partisan judicial elections. While the best solution is debatable, there is an undeniable need for bipartisan leadership to address this systemic weakness.

## **7. SYSTEMWIDE RISK ASSESSMENT AND MANAGEMENT IS CRITICAL.**

There can be no question that the field of election administration remains underdeveloped, both as a profession and as a subject of research.<sup>7</sup> We need greater professionalization and, in turn, better research to direct the profession. One approach to this need would be the development of a science of risk management, comparable to that which one might learn in business school. No state can determine what requires attention without identifying and weighing the various risks that it confronts.

Currently, only Secretary of State Brunner in Ohio seems to have adopted a risk management approach to election administration, perhaps in large part because she feels the glare of the national spotlight on her. But even her office has not yet fully come to terms with all of the various risks that Ohio faces, like abuses of no-excuse absentee voting and partisan decisionmaking by the state supreme court. Even more problematic is that, without the benefit of much research on "election risk management," a conscientious secretary of state has little choice but to operate on the fly in

attempting to mitigate risks. Nor has the state legislature, ultimately responsible for lawmaking and funding in the state, stepped in to assist. This may be one situation where the separation of powers, with its diffusion of authority, facilitates buck-passing and the inability of government to tackle an issue for the benefit of the citizenry. Still, it is only because Secretary Brunner will be held primarily accountable if things go wrong in Ohio in 2008 that there has been any progress in an effort to get a systemwide handle on the health of the state's election ecosystem.

Although nothing comparable appears to be occurring elsewhere, Illinois has taken a positive step to identify certain kinds of election administration problems, in the form of its requirement of a partial audit (five percent) of its vote tallies. Specifically, for two decades the Illinois code has tasked the state board of elections with randomly identifying five percent of each jurisdiction's precincts, after the election is over, in order for the jurisdiction then to recount the ballots in those precincts (using the paper trails in the case of DRE voting, and rescanning the ballots in the case of optical scan ballots). The results of the audit then can be compared with the official results, to identify equipment or other problems in vote counting. This is a welcome innovation, although Illinois needs to ensure compliance with it more rigorously than it appears to have done to date. This kind of post-voting audit of the process has real value and importance in identifying some kinds of system failures that affect voting machine accuracy, and all states should be implementing some similar form of post-election audit. Minnesota, too, has much more recently adopted its own post-voting audit procedure, and the one time that it has been implemented

so far (November 2006) was successful. While more needs to be done, these steps are examples of how states might act to reduce the risks of an Election Day meltdown.

## **8. POLICYMAKING IN THE AREA OF ELECTION ADMINISTRATION IS OVERLY PARTISAN.**

In the course of conducting this study, it has been disconcerting to learn the extent to which the mindset of elected policymakers is not on how to design the voting process for the public's benefit, but rather on how to advance one's candidacy or party. Perhaps it is too much to expect state legislators and other political actors to think about the public interest, rather than their own interests, when it comes to the administration of elections. The cynic will say that politicians will always think and act like politicians. We believe, however, that legislators and other elected officials have the capacity to rise above their narrow political interest and act like "statesmen." It may not happen often, but when it does – as in the case of Wisconsin's legendary governor and senator Robert LaFollette, Sr. – the history books reward them. Each of the states we have studied needs leaders from both major political parties to transcend narrow-minded partisanship and work together to strengthen their state's election ecosystem for the benefit of the people whom they are sworn to serve.

## **9. URBAN ELECTIONS POSE SPECIAL CHALLENGES.**

Some of the most serious problems in the administration of elections are in large cities like Detroit, Cleveland, Chicago, and Milwaukee. Greater attention therefore should be devoted

to the special challenges of running elections in urban localities. Social scientists need to study this problem more systematically and learn from studying other urban social systems, such as schools, hospitals, and libraries. Among other challenges, elections in an urban setting require massive logistical coordination at the precinct level for what is a large but one-day event, staffed by volunteers. This makes running elections different from running a school or hospital, which is kept in continuous operation day after day through permanent employees.

The role of the poll workers looms large in any jurisdiction, as discussed in more detail in Chapter 9, but nowhere is the need for an adequate number of qualified poll workers greater than in urban precincts. Indeed, with election processes increasingly complicated, staffing the polls is an issue approaching crisis levels. To an even greater extent than other public functions, the fair administration of elections depends on following procedures that may make it difficult to recruit enough poll workers. The need for bipartisan processes at each polling place, for example, imposes a legitimate constraint on poll worker recruiting in some jurisdictions – such as the requirement that they cannot all be of the same party. Our research also suggests that the education level of poll workers is a factor in the quality of service provided to voters. To the extent that a locality's public education system lags behind the mean, it is likely to have difficulty staffing its polls adequately. While there is no magical solution, there is an undeniable need for greater attention to the significant challenges that urban electoral jurisdictions face in running elections.

## REFERENCES

1. See Daniel J. Elazar, AMERICAN FEDERALISM: A VIEW FROM THE STATES 114-142 (3d ed. 1984).
2. See, e.g., Rodney E. Hero & Caroline J. Tolbert, *A Racial/Ethnic Diversity Interpretation of Politics and Policy in the States of the U.S.*, 40 AM. J. POL. SCI. 851 (1996); John Kincaid, *Political Cultures of the American Compound Republic*, 10 PUBLIUS 1 (1980).
3. See Daniel J. Elazar, *supra* note 1, at 124-25.
4. See *id.* at 117-121.
5. See *id.* at 115-121.
6. See *State ex rel. Ohio General Assembly v. Brunner*, 872N.E.2d 912 (Ohio 2007).
7. See Daniel P. Tokaji, *The Birth and Re-Birth of Election Administration*, 6 ELECTION L.J. 118, 126-31 (2007).