

## Getting from Here to There in Election Reform

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I want to talk about what ought to be the central question in election reform, but isn't: how to get change passed in this country. That's a tendentious claim given that lots of people devote lots of time to making our election system better. The problem is that they are fighting this battle on hostile terrain, and almost no one is thinking about how to change the terrain itself. We have spent too much time identifying the journey's end and not enough time figuring out how to smooth the road that leads there.

We have a "here to there" problem in election reform.<sup>2</sup> We spend a great deal of time thinking about what's wrong with our election system (the "here") and how to fix it (the "there"). But we spend almost no time thinking about how to get from here to there -- how to create an environment in which reform can actually take root. Reform advocates, of course, work tirelessly to help specific projects blossom. But they lack the time and resources to think about the "here to there" problem writ large.

Rather than continuing to fight the same fight in the vague hope that something will eventually take, we should take a step back and figure out how to create an environment that is more receptive to change generally. It is time to think less about the end game and more about the interim strategies and institutional tweaks that will help us get from here to there.

In keeping with this vision, I want to focus on one of the most important problems we face: our badly administered election system. While many people think that election problems exist only in Florida and Ohio, in fact the problems we saw there afflict election systems across the country. I will spend a little time describing the problem. I'll then identify the main reasons why it has been hard to fix: political incentives run against reform. And I'll propose a solution for getting from "here to there": a Democracy Index, which would rank states and localities based on how their election systems perform and thus alter the perverse political calculus that now stymies reform efforts.

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<sup>1</sup> What follows is a lightly footnoted version of a speech delivered on April 3, 2008.

<sup>2</sup> These arguments are pursued in greater detail and more nuance in my forthcoming book, *The Democracy Index: Why Our Election System is Failing and How to Fix It* (forthcoming 2009, Princeton University Press).

## I. The Problem

The system we use to administer our elections is clunky at best and dysfunctional at worst. Ballots are discarded. Poll workers are badly trained. Machines malfunction. Most people think the problems we saw in Florida in 2000 and Ohio in 2004 are outliers, crises caused by a level of partisanship and mismanagement that does not exist elsewhere. Though both partisanship and mismanagement surely played a role in those debacles, both states also happened to be in the wrong place at the wrong time, victims of a turnout tsunami that too few states are equipped to handle. A crisis is not around every bend in the United States. But that's only because most elections aren't close enough for these problems to matter. Unless we fix the underlying causes of these recent crises, problems can arise almost anywhere.

Consider a few examples. In 2006, a hotly contested congressional race took place in Florida. The margin of victory? 373 votes. The number of people who went into the voting booth but did not cast a ballot that counted? 18,000.<sup>3</sup> A malfunctioning computer in Carteret County, North Carolina, lost 4,400 votes during the 2004 election, with no means of recovering them.<sup>4</sup> The same year poll workers in Orange County, California, gave the wrong ballots to 7,000 people in a primary election, a mistake that may have affected the results in several races.<sup>5</sup> During a 2006 primary, election workers in Maryland forgot the cards they needed to start up the election machinery. More than 200 precincts could not open until late morning.<sup>6</sup> That same year, a group of computer scientists discovered it was surprisingly easy to steal votes by inserting a virus into the electronic voting machines used by 10 percent of Americans.<sup>7</sup> In Colorado, long lines at polling places deterred about 20,000 people from voting, 20 percent of expected turnout.<sup>8</sup> A subsequent review largely blamed Colorado's new software, which was "of decidedly sub-

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<sup>3</sup> Abby Goodenough, "In Florida, Echoes of 2000 as Vote Questions Emerge," *New York Times*, November 10, 2006.

<sup>4</sup> Building Confidence in U.S. Elections: Report of the Federal Commission on Election Reform, September 2005, available at <http://american.edu/ia/cfer/>.

<sup>5</sup> Thad Hall et al., "Are Americans Confident Their Ballots Are Counted?" 3, unpublished draft, 2007.

<sup>6</sup> Electionline, *Briefing: The 2006 Election*, 7 (2006), [http://www.pewcenteronthestates.org/report\\_detail.aspx?id=32758](http://www.pewcenteronthestates.org/report_detail.aspx?id=32758).

<sup>7</sup> Ariel J. Feldman, J. Alex Halderman, and Edward W. Felten, "Security Analysis of the Diebold AccuVote-TS Voting Machine," September 2006, <http://itpolicy.princeton.edu/voting/summary.html>.

<sup>8</sup> Fred Hessler and Matt Smith, *City and County of Denver 2006 Election Technical and Operational Assessment*, December 8, 2006, 5, [http://www.votetrustusa.org/pdfs/Colorado\\_Folder/Denver\\_Report.pdf](http://www.votetrustusa.org/pdfs/Colorado_Folder/Denver_Report.pdf).

professional architecture and construction and appears never to have been tested in any meaningful manner.”<sup>9</sup> That’s expert speak for “tut, tut, tut.”

Cuyahoga County, Ohio, is probably lucky that MSNBC’s Keith Olbermann doesn’t choose a “worst election system in the world.” Problems seem to occur every cycle. After suffering the long lines and chaos that afflicted many Ohio counties in 2004, Cuyahoga denizens opened their morning papers to read headlines like “Election Staff Convicted in Recount Rig.”<sup>10</sup> In May 2006, election workers lost 70 computer memory cards containing voting records, 15,000 absentee ballots had to be hand-counted because the machines could not read them, and numerous polling problems occurred. It took five days to report the results.<sup>11</sup> All of this led Ohio’s new secretary of state, Jennifer Brunner, to demand the resignations of the entire board.<sup>12</sup> But problems persist. In November 2007, the server used to count votes repeatedly froze and crashed.<sup>13</sup> Worse, administrators discovered that “20 percent of the printouts from touch-screen voting machines were unreadable and had to be reprinted.”<sup>14</sup> All of this might be quite funny -- a local government version of *The Office* -- if election results weren’t riding on it. “God help us,” said one county official, if the next presidential race “depend[s] on Cuyahoga County.”<sup>15</sup>

There’s not only a good deal of consensus about what problems exist, but a myriad of proposals for solving them. Not a week goes by without someone issuing a report or proposing a change in the way we run elections. During 2007, hundreds of academic articles addressed reform issues. Dozens of good-governance groups offered hundreds of reports and proposals on their websites. There are also plenty of working models of reform. Not only do state and local practices vary widely, but other advanced democracies offer useful examples of how potential reforms work in practice.

At first glance, the political environment looks like it should be receptive to change. There are plenty of good governance groups, staffed with energetic and dedicated experts, ready to help put new policies into place. One would also think that voters would support reform. Who, after all, is against making our democracy work better? Indeed, the main reason that the

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<sup>9</sup> Hessler and Smith, *Denver 2006 Election Technical and Operational Assessment*.

<sup>10</sup> M. R. Kropko, “Election Staff Convicted in Recount Rig,” *washington.com*, January 24, 2005.

<sup>11</sup> “Ohio’s Largest County Finishes Tabulating Votes Five Days after Primary,” *CantonRep.com*, May 8, 2006; Dan Tokaji, “Cuyahoga County’s Election Woes,” *Equal Vote Blog*, May 9, 2006.

<sup>12</sup> Press release, “Brunner Calls for Clean Slate in Cuyahoga County,” <http://www.sos.state.oh.us/>.

<sup>13</sup> Clive Thompson, “Can You Count on These Machines?” *New York Times Magazine*, January 6, 2008.

<sup>14</sup> Joe Guillen, “20 Percent of Election Printouts Were Unreadable,” *Cleveland Plain Dealer*, November 28, 2007; see also Thompson, “Can You Count on These Machines?”

<sup>15</sup> Guillen, “20 Percent of Election Printouts,” *supra* note 14.

word *democratic* has become such a popular appendage to policy proposals may be that it conveys more gravitas than “motherhood” or “apple pie.”

Finally, the semi-regular election fiascos we’ve seen in recent years should have provided a powerful impetus for change. Reform is a notoriously crisis-driven industry. It is always tough to get anything on the legislative agenda. But “electoral meltdowns,”<sup>16</sup> small and large, have been a regular occurrence in recent years. Just ask any academic who specializes in elections. Many of us have moved from laboring in obscurity to commenting on CNN. Like a plague of tweed-clad cicadas, we return from academic hibernation every couple of years to feed on whatever election controversy is brewing.

Despite all of this, election reform has not yet gotten traction in this country. Even in the wake of the 2000 Florida fiasco, where election administration problems prevented us from knowing who won the presidency for more than a month, the most Congress could do was pass the relatively toothless Help America Vote Act.<sup>17</sup> This was a crisis so big that Fidel Castro – admittedly not a man cursed with self-awareness – sent election monitors to the United States.<sup>18</sup> Though the Act provided funding for better machines and made some modest adjustments to state balloting process, it failed to provide comprehensive national standards for how elections are run. More importantly, HAVA addressed a handful of symptoms of the Florida debacle, not their root causes: inadequate funding, amateur staffing, and partisanship. Congress, in other word, was engaged in the policymaking version of whack-a-mole.

Just think about that for a moment. All of the basic ingredients for change exist. There’s a strong consensus that we have a problem, lots of potential solutions, a reform community ready to act, a cause that is at least superficially appealing to voters, and semi-regular crises to put the problem on the national agenda. Yet even a debacle like the 2000 election, which transfixed the nation, prompted only modest changes. If that’s not a sign that we need a new approach to reform, I don’t know what is.

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<sup>16</sup> The term was coined by Rick Hasen. See Richard L. Hasen, “Beyond the Margin of Litigation: Reforming Election Administration to Avoid Electoral Meltdown,” 52 *Washington & Lee Law Review* 937 (2005).

<sup>17</sup> For an assessment of HAVA’s modest accomplishments and important shortcomings, see Gerken, *supra* note 1, ch. 1.

<sup>18</sup> Richard Lacayo, “Eye of the Storm,” *Time*, November 20, 2000.

The problem is hardly insurmountable. If reformers can persuade legislators to restore the voting rights of felons,<sup>19</sup> improving our election system is surely a cause with political legs. The key is to identify the political factors that are putting a drag on reform efforts . . . and fix them.

## II. Why Reform Has Not Yet Gotten Traction

Why hasn't reform gotten much traction in the United States? Partisanship and localism generate political tides that run against change. Unlike most developed democracies, state and local officials run our elections, leading to what one scholar has termed "hyper-decentralization."<sup>20</sup> Worse, many of those local officials have strong partisan ties. This unusual combination of partisanship and localism not only results in a poorly run system, but makes change hard to come by. At worst, election officials administer elections in a partisan or unprofessional fashion. At best, they have few incentives to invest in the system and lots of reasons to resist change. These factors combine to stymie reform.

Although reformers and academics are well aware of the sources of the problem, phrases like "the perils of partisanship" or the "problem of localism" are usually punch lines to the story, not starting points for the analysis. As a result, proposals for reform often have a "just add water" quality to them, as if we could "just add water" and reform would get passed. Reformers and academics rarely address the *prior* question – what institutional tweaks or legal reform will create an environment in which these proposals might realistically get passed? Reformers, of course, spend a lot of time thinking about the "here to there" problem at the micro-level. They work tirelessly to build support for specific proposals – educating the public, lobbying officials, filing law suits. But good governance groups lack the resources they need to grapple with the "here to there" problem at the macro-level.

It's surprising that in a field devoted to the relationship between substance and process, we think so little about how to get from "here to there." After all, most arguments for election reform depend on a single premise: process shapes substance. Academics are quick to tell you that the structures of our political process (campaign finance law, redistricting rules) helps

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<sup>19</sup> See, e.g., <http://www.aclu.org/votingrights/exoffenders/statelegispolicy2007.html>.

<sup>20</sup> Daniel P. Tokaji, "The Birth and Rebirth of Election Administration," 7 *Election Law Journal* 118, 121 (2007), reviewing Roy G. Saltman, *The History and Politics of Voting Technology: In Quest of Integrity and Public Confidence*.

determine the substance of our policies (who gets elected, what gets passed). But they do not apply that lesson to election reform. The structure of our political process also determines what kind of election reform gets passed. Or, in the case of the United States, it creates an environment where precious little gets passed.

If you want to know why reformers haven't focused on the "here to there" problem at the macro-level, follow the money. Reformers are beholden to funders. And funders tend to favor big over small, end goals over interim solutions, silver bullets over institutional tweaks. As one reform advocate observed, "process is not sexy."<sup>21</sup> And the "here to there" question is process squared – changing the reform process to make more significant procedural reforms possible. The result is that the people with the greatest knowledge about how the reform process works may have the fewest opportunities to change it.

If the work of reformers is to be something other than a Sisyphean task, however, process should be our main focus, and smoothing the path for change ought to be at the top of the reform agenda. The kinds of institutional correctives and intermediary interventions that would help us get from "here to there" may seem modest when compared to typical reform proposals, like demands for a nonpartisan election administration or national election standards. But these wide-ranging reform proposals have been met with a deafening silence from voters and politicians. We have plenty of ideas about what kind of change we want. What we need is an environment in which change can actually happen.

My proposal for getting from "here to there" in election administration is to create a Democracy Index, which ranks states and localities based on their election performance.<sup>22</sup> The basic idea behind the Democracy Index is quite straightforward. The Index would function as the rough equivalent of the U.S. News and World Report rankings for colleges and graduate schools.<sup>23</sup> It would focus on issues that matters to all voters: how long did voters spend in line?

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<sup>21</sup> Interview with Justin Levitt, June 14, 2007.

<sup>22</sup> For my own take on how the Index should be designed, see Gerken, *supra* note 1, chs. 1 & 5.

<sup>23</sup> Invoking the U.S. News and World Report rankings always rankles academics familiar with the foolish competition those rankings have induced. For a full analysis of the problems associated with rankings, including the problem of "teaching to the test," see Gerken, *supra* note 1, ch. 4. I'll simply note here that the key question to ask about any ranking is this – "as opposed to what?" We can't decide whether teaching to the test is a problem unless we know whether it's a good test and what kind of teaching takes place when there's no test. Right now, we are in a world with no test; we lack even the most basic data for evaluating the performance of our election system. If the Democracy Index works, it will surely reorient state and local priorities, perhaps causing them to neglect concerns that the Index doesn't measure. The cost might be significant enough to eschew data-driven analysis if the most of the basic components of election administration can't be captured in a statistic. As I argue in my book, however, a well-designed Democracy Index is surely better than the alternative . . . a world without data, one with no test at all.

how many ballots were discarded? how often did voting machines break down? The Index would not only tell voters how well things are working in their own state, but show them how well their state is doing compared to its neighbors. It is premised on a simple idea: no one wants to be at the bottom of the list.

### **A. The perils of partisanship and the problems of localism.**

Here's why I think the Democracy Index will help us get from here to there. Even as the United States seeks to spread democracy abroad, two problems prevent us from having the type of election system we deserve at home: partisanship and localism.<sup>24</sup> First, *partisanship* is the central obstacle to reform in this country. Every other mature democracy relies on professional administrators, protected from political interference, to run the election system.<sup>25</sup> In the U.S., in sharp contrast, we depend on partisans to administer our election system. The foxes are guarding the henhouse.

It's not hard to imagine why it is a bad idea to have partisan officials run our elections. We generally don't allow people to referee a game they are playing, and with good reason. It creates too many temptations to administer the election process in a partisan fashion. The problem is not simply that election officials are likely to root for their own political party. The problem is that election officials *depend* on the parties for their jobs.

Consider the dilemma faced by an elected secretary of state, the most common overseer of elections in the United States. As political junkies are well aware, the position is widely thought to be a stepping stone for higher office. The problem is that what matters most for the many secretaries of states who want to run for reelection or seek higher office is not professional performance, but political support. In a world without data<sup>26</sup> -- where voters have little information on how well the election system is working -- the fate of a secretary of state depends

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<sup>24</sup> For more detailed analysis, see Gerken, *supra* note 1, ch. 2.

<sup>25</sup> As the Carter-Baker Commission has observed, "Most other democratic countries have found ways to insulate election administration from politics and partisanship by establishing truly autonomous, professional, and nonpartisan independent national election commissions that function almost like a fourth branch of government" (*Building Confidence in U.S. Elections*, 49). For helpful comparative surveys, see Michael Gallagher and Paul Mitchell, eds., *The Politics of Electoral Systems* (New York: Oxford University Press, 2005); Louis Massicotte, André Blais, and Antoine Yoshinaka, *Establishing the Rules of the Game: Election Laws in Democracies* (Toronto: University of Toronto Press, 2004); Administration and Cost of Elections Project Survey, <http://aceproject.org/>.

<sup>26</sup> For a comparative analysis of the striking dearth of data on how our elections run, see Gerken, *supra* note 1, ch. 2.

heavily on her standing within the party, which will provide the resources and support for her next campaign. The same is true of the many partisan officials at the local level whose job similarly depends on standing within the party.

The most disturbing consequence of letting partisans administer our elections is political bias. But there are other ways in which politics interferes with well-run elections. For instance, a system that depends on the political parties to staff it is unlikely to be run as professionally as it should. In too many states, the overriding qualification for administering elections at the local level is party membership, not professional qualifications. As a result, too many local election administrators are amateurs.

Compounding all of these problems is that when foxes are guarding the henhouse, it is hard to jettison them from that powerful position. One obvious solution to the problem of partisanship is to take partisans out of the process and replace them with bureaucrats whose long-term fate does not depend on their political standing. But the people who decide who decides – the federal and state legislators who have the power to place our election system in the hands of nonpartisans – are themselves partisans. And if you are the party who controls the legislature, what incentive do you have to abandon this important weapon in the political arsenal?

In addition to partisanship, we have the problem of localism. Even when democracy is working – when elected officials set aside their self-interest and do what voters want – localism causes problems in the way we administer elections. In our decentralized election system, we expect states and localities to compete against one another to win the hearts and minds of citizens, run the best system, generating a healthy “race to the top.” But states will only invest in improvements that voters can see.

The problem is election problems in the United States are, for the most part, *invisible* to voters. While lost ballots, badly administered registration systems, and machinery breakdowns occur routinely, they become visible to voters only when an election is so close that those problems threaten to affect the outcome of an election. The episodic way in which problems become visible means that voters have only a haphazard sense of how well our elections are run, and they have no comparative data that would tell us which states’ systems work and which don’t. It’s like measuring annual rainfall based on how often lightening has struck.

When voting problems are hard to see, states put their money into projects that are visible to voters – roads, new schools, cops on the beat – rather than upgrade our underfunded balloting

process. In a world where election problems are largely invisible, federalism creates an incentive for a race to the bottom, and that's just what we see today.

## **B. Reversing the tides of partisanship and localism**

Although partisanship and localism generate political tides that run against change, those tides could be reversed if voters were willing to put pressure on their representatives to do the right thing.<sup>27</sup> But even when voters become aware that a problem exists, they have no metric for judging reform proposals. Bread-and-butter reform proposals involve details about counting ballots, jargon-filled evaluations of election machinery, and nitty-gritty registration requirements. Even election junkies rarely have the stomach for it.

Think about how debates run. It's like watching a policymaking version of *The Odd Couple*. Election administrators play Oscar Madison's role. They preside over a messy, chaotic system. In a world without data, it can be easier for an administrator to deny that a problem exists than buckle down to fix it. Put yourselves in the shoes of an election administrator, struggling to do a big job with few resources. Is it surprising that change seems like a pain, and the people needling you to change seem like a bigger pain? Surely we can forgive election administrators' bristling at the "holier-than-thou-ness"<sup>28</sup> sometimes displayed by reformers. Election administrators are the one group that does a harder job and makes less money than reformers. The temptation is to shut reformers out instead of turning to them for help. It's no wonder that election administrators sometimes come off as grumpy, gruff, and cynical.

Reformers, in turn, sometimes play the role of the histrionic Felix Ungar. The absence of data may lead reformers to up the rhetorical ante in reform debates. Without concrete data on performance, it is very hard to get policymakers' attention. So reformers are tempted to overstate the problem or present solutions as silver bullets.<sup>29</sup> Fearing that any concession will license

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<sup>27</sup> For a more fine-grained analysis of these problems and their potential solutions, *see* Gerken, *supra* note 1, chs. 2 & 3.

<sup>28</sup> I borrow this phrase from Dan Esty. Interview with Dan Esty, October 24, 2007.

<sup>29</sup> As Bruce Cain observes:

[T]he real effects of reform are usually smaller in every direction {word lost here} . . . mainly because of their intermingling with other factors that work in the opposite direction. . . . Because reform is usually made in a politically charged setting, the claims and counter-claims of opposing sides are often exaggerated and simplistic. Campaign finance reformers, for example, often imply that a proposed change will lessen corruption or lower election costs. Redistricting changes promise neutral and fair procedures, or higher levels of competition. New

election administrators to ignore real problems (the old worry about “giving 'em an inch”), reformers sometimes speak as if a single discarded ballot or a single voter deterred is one too many.

Election administrators and reformers should not be playing to these stereotypes. They are serious people doing serious work, and they need each other to get the job done. But it is hard to avoid the problem in a world without data, where reformers have few means other than rhetoric to establish that a problem exists, and administrators lack the data they need to defend themselves against unfair charges.

The crux of the problem, of course, is that the debates that take place between election officials and reformers are all but useless to voters. Reformers say that administrators haven't done enough. Administrators counter by talking about what they have done. And we're off -- into a world of arcane detail about the right number of poll workers or residual ballot rates or registration rules, things that voters have no yardstick for judging. For voters, the situation resemble that famous Far Side cartoon entitled “What dogs hear,” in which an owner prattles away to his pet while the dog here “\_\_\_\_, \_\_\_\_, \_\_\_\_, Ginger. \_\_\_\_, \_\_\_\_, Ginger, \_\_\_\_.” Voters aren't stupid.<sup>30</sup> But none of us is born into the world with a strongly held intuition about whether optical scan systems are a good idea, or whether provisional ballots should be counted only if they are cast in the correct precinct. Voters need a yardstick to help them figure out who's right.

A Democracy Index, a national ranking system of state and local election performance, would go far in addressing these problems.<sup>31</sup> *First*, the Index makes the problems in our election

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voting technology was supposed to end voter confusion and restore confidence in the election process. . . . In fact, the claims on both sides rarely live up to the hype. . . Bruce E. Cain, “Reform Studies: Political Science on the Firing Line,” 15 *PS* 635, 637 (2007).

<sup>30</sup> Lest you think that only a law professor would feel the need to footnote this claim, it is worth noting that many scholars argue, with some evidence, that voters cast their ballots in an irrational fashion. See, e.g., Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* (Princeton, N.J.: Princeton University Press, 2007). Arguments like these often underestimate the useful role that heuristics can play in guiding voting behavior, a point nicely made by David Schleicher in his review of Caplan's book in “Irrational Voters, Rational Voting,” 7 *Election Law Journal* 149.

<sup>31</sup> For a more in-depth argument focused on the three key leverage points for reform – voters, policymakers, and bureaucrats – see Gerken, *supra* note 1, ch. 3.

system visible to voters; it enables voters to hold state officials accountable for their missteps, and it encourages states to compete against one another to design the best system.

Just imagine how different debates about reform would look like in a world with a Democracy Index. Rather than bogging voters down in technical details of election administration, reformers could let the numbers speak for themselves. In place of debates about which tabulating machine is “better” or atmospheric claims that the state hasn’t invested “enough” money in training poll workers, we would know the results of each state’s choices: which state has the longest lines, which state discards the most ballots, and which state has the most registration problems. Election administrators can talk all they want about what they have done. But they cannot get around the stark reality: How is the system working? And why is the state next door doing so much better?

Consider what happened when the Environmental Performance Index was first released.<sup>32</sup> The EPI ranks nation-states based on environmental performance – how clean is the water? how high is the air quality? What is the child mortality rate? Consider what occurred in Belgium when the first version of the EPI was released. Belgian environmentalists had long tried to persuade legislators that the country’s environmental practices were subpar. It’s not hard to imagine why. Without any concrete, comparative information, all environmentalists in Belgium could do was exhort the government to do more or to engage policymakers in complex policy discussions well beyond the grasp of most citizens. We’re back to a differently accented version of the Far Side cartoon.

When the EPI showed that Belgium fell well below its European counterparts on the ranking system, roughly in the same range as Cameroon and Albania,<sup>33</sup> the conversation changed. The story made the headlines of the country’s major newspapers, and reformers suddenly had a rather large stick to beat legislators into doing something. Government officials could go on and on about the merits of its policies and what Belgium had done to promote reform. But they could not dispute the bottom line: Belgium was not keeping up with its peers along a wide range of measures. The EPI created a modest political crisis in Belgium, and the result was genuine reform.

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<sup>32</sup> For information on the EPI, *see* <http://www.yale.edu/epi/>. All of the information about the effects of the EPI are drawn from an interview conducted with Dan Esty, one of the founders of the EPI. Interview with Dan Esty, October 24, 2007.

<sup>33</sup> See [http://sedac.ciesin.columbia.edu/es/esi/rank\\_01.html](http://sedac.ciesin.columbia.edu/es/esi/rank_01.html).

*Second*, the Index would give voters the metric they need to evaluate reform debates. The Index takes advantage of the power of data-driven comparisons. Think about the dramatic effect that the *U.S. News and World Report* rankings have had upon colleges and graduate schools. Voters may not have strong intuitions about what kinds of reform policies they want, but they certainly know what they don't want: long lines, discarded ballots, machine breakdowns. The Index provides voters precisely the information they need: comparative information about bottom-line results.

In this way, the Democracy Index addresses the two central obstacles to election reform: partisan self-interest and local competition. Most reformers ask the foxes to stop guarding the henhouse – to give up their power and let professional bureaucrats step in. Perhaps unsurprisingly, it hasn't been all that successful.

The Index does not ask politicians to act contrary to their self-interest. Instead, it realigns the interests of politicians with the interests of voters, harnessing politics to fix politics. After all, virtually every Secretary of State has higher political ambitions. The Democracy Index creates both a carrot and stick for Secretaries of State. Any Secretary of State worth her salt would like to trumpet the fact that her state ranks high. And no Secretary of State wants to be at the bottom of the list. Imagine, for example, you were running against a former Secretary of State like Ohio's Kenneth Blackwell or Florida's Katherine Harris. What better campaign weapon could you imagine than a ranking system showing that your state is one of the worst-run systems in the country?<sup>34</sup>

The Democracy Index also harnesses localism in favor of reform. When problems are visible to voters, states and localities can compete against one another. If the Index works as it should, we should see that "race to the top" federalism is supposed to spur.<sup>35</sup>

One might work that the Index will put pressure only on the worst-performing states, leaving highly ranked states to rest on their laurels. That would still be an improvement on the status quo – at least the index would provide an impetus for change *somewhere* in the system. But it is also possible that a ranking system will encourage top-ranked states to compete among themselves. Consider, for instance, what took place when the first version of the Environmental Performance Index was released, showing Norway ranked second on the worldwide ranking. As

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<sup>34</sup> For a more fine-grained analysis of the ways in which the Index interacts with partisan incentives – and whether partisan heuristics will swamp the effects of the Index -- see Gerken, *supra* note 1, ch. 3.

<sup>35</sup> For a more detailed and nuanced analysis of local dynamics, see Gerken, *supra* note 1, ch. 3.

soon as the ranking was released, Norway invited the EPI team to visit. Members of the team expected to be greeted by press conferences and government ceremonies trumpeting Norway's extraordinary achievement. Instead, they were quietly ushered into closed-door sessions with top-level policymakers to discuss how Norway could improve its position. Norwegian leaders didn't care that they were ranked ahead of 120 other states. What mattered to them? *Finland* was number one.

### **C. Creating more allies for the cause of reform: the Democracy Index and the importance of professional norms.**

Here's a final reason to think the Democracy Index would work. Even if you are skeptical that the Index will have much of an effect on political incentives, you might nonetheless think it could help begin to generate a better set of professional norms among election administrators.

When we think about improving a system, we generally assume that the pressure for reform comes from the outside. But the long-term health of any system depends on administrators policing themselves based on shared professional norms. Indeed, professional norms may ultimately be more important to a well-run system than pressures from the outside. Bureaucrats represent a key ally in the push for reform, and their day-to-day activities often have a greater effect on how well a system is run than any legislation Congress could pass.

Lawyers, of course, are quite familiar with the power of professional norms. Professional norms have a powerful effect on our conduct even when they don't involve any sanctions. Our sense that we are doing a good job often turns on our compliance with the norms of our profession. Professional norms also provide useful shortcuts – the distilled wisdom of the experts. No one has the time to think through the practical and moral considerations involved in every decision. Lawyers need a shorthand to guide their behavior, and a professional consensus on best practices is as good a shorthand as you can find.

What is true of the legal profession is generally true of policymakers. We see what scholars called “policy diffusion” – the spreading of policies quickly across localities, states even nation states – as policymakers adopt policies in part because others did.<sup>36</sup> Experts have

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<sup>36</sup> For a detailed canvassing of the social science literatures on policy diffusion, see Gerken, *supra* note 1, ch. 3.

identified a basic set of mechanisms for spreading best practices. Sociologists tend to emphasize peer pressure and social meaning – the ways in which behavioral “scripts” signal prestige and become the model for individual or institutional behavior. If a peer states does something, people in other states want to do it as well. For those trying to suppress memories of high school, it’s nice to know that the herd instinct can do a bit of good in the world.

Political scientists, in contrast, tend to emphasize the ways in which time pressures lead officials to use the decisions of others as a shortcut to guide their behavior. Rather than investigate the policy yourself, you rely on the fact that legislators you trust adopted it. You look again to your peers. For instance, legislators in New York and Pennsylvania might ask – if I may be flip for a moment – not what would Jesus do, but “What would Jersey do?”

Unfortunately, the type of professional norms and networks that could shape individual behavior and spur policy diffusion are absent in the elections arena. There is no accreditation system or training program used by election administrators across the country, nor is there a widely read trade magazine in the field. Although there are several election administration membership groups, most are locally oriented. Some of these organizations even shy away from endorsing “best practices” on the ground that local variation prevents us from identifying them.<sup>37</sup>

While the Index is an admittedly poor substitute for a vibrant professional association network, it might be able to perform at least some of the functions that sociologists and political scientists have identified as means for disseminating best practices.

It’s easy to see how the Democracy Index would at least provide a focal point for election administrators’ attention. Surely it would be hard for anyone to resist checking how his state or locality measured up on the ranking. Administrators would want to peek at the Index for the same reason that people “Google” their names or give a book a “Washington read” (scanning the index to see what was said about them). If the Index were well-designed and put out by a credible group, there is good reason to think that one’s professional prestige would be increased by a high ranking, something that would be quite useful in a world where we all tend to mimic high-status people and institutions. The Index might develop into a professional touchstone for the field.

In addition to generating some professional peer pressure, the Democracy Index could help disseminate best practices by giving people shortcuts. Policy diffusion is most likely to

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<sup>37</sup> For an extended discussion of these problems, see Gerken, *supra* note 1, ch. 3.

occur when innovations in other states are visible. The problem in the election administration context, of course, is that the usual tools for drawing attention to best practices are largely missing. It is hard for policymakers to identify the policy innovation needle in a haystack of widely varying practices.

The Democracy Index might provide a partial substitute for some of the diffusion mechanisms that political scientists have identified by creating the “information shortcut” that policymakers need. The Index will give us a pretty good sense about which states and localities have performed best and, if properly designed, should simultaneously offer information about which policy “inputs” drove that success. Imagine, for instance, that the Democracy Index website provided not just the rankings, but tables and charts within each category identifying which jurisdictions followed which policies. The website might also provide links to extant research on the subject, even examples of implementing legislation. The Index would thus provide a portal that not only identifies which policies are succeeding, but gives policymakers instant access to the best available information on how to implement them. It would, in short, help policymakers identify the innovation needle in a haystack of widely varying practices

## **Conclusion**

The Democracy Index is a quintessentially “here to there” strategy. It does not create national performance standards. It does not take power away from partisan officials. It does not even endorse a set of best practices for administering elections. Instead, it pushes in the direction of better performance, less partisanship, and greater professionalism. The Index does so not by trying to resist the fierce push against change generated by our political system’s twin engines -- partisan warfare and local competition -- but by harnessing partisanship and localism in the service of change. It harnesses politics to fix politics. The Index may seem quite modest in comparison to conventional reform proposals. But it’s the kind of reform that makes bigger, better reform possible. And here I’ll close with the point with which I began. Scholars and reformers have spent a lot of time thinking about the end game, what we want the world to look like. They haven’t spent enough time thinking about how to get from here to there – how to create an environment in which change might actually occur. In my view, we should start there . . . or, rather, start with the “here to there.”

