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## Article

### Shortcuts to Reform

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This Article is loosely organized around the idea that shortcuts can play a useful role in promoting election reform. Shortcuts are a well known phenomenon in elections scholarship.<sup>1</sup> The best known example is the party label, which provides voters an important heuristic for casting their vote. This Article focuses on what shortcuts can do to promote reform. It explains that shortcuts can and do play an important role in influencing three of the main leverage points for reform: voters, policymakers, and bureaucrats. The Article also proposes we create one such shortcut—a Democracy Index, which would rank states and localities based on how well their election systems perform—and explains why it ought to help create an environment more receptive to reform. Along the way, the Article offers some general observations about the challenges posed by election reform and how to solve them.

Part I identifies what ought to be the central concern for those interested in election reform: we operate in a reform environment where change rarely takes root. Part II examines this problem in the context of election administration. It argues that partisanship and localism generate political tides that run against reform; it then proposes a Democracy Index as a potential solution. Part III argues that by providing a useful shortcut for the three main constituencies for reform—voters, policymakers, and bureaucrats—an Index could help create an environment in which bigger, better reform is possible. Part IV

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1. See sources cited *infra* notes 14–15.

briefly canvasses the costs associated with such a solution and weighs them against the potential benefits. The Article concludes by offering examples of additional shortcuts that might help jumpstart reform in other election arenas.

### I. THE “HERE TO THERE” QUESTION AND WHY IT MATTERS

Scholars are quite aware of how hard it is to get election reform passed in the United States. I call it the “here to there” problem. We have a firm sense of what is wrong with our election system (the “here”) and how to fix it (the “there”). But getting from “here to there” has been remarkably difficult in the elections context. Reformers are fighting for change on difficult terrain, and scholars have spent too little time thinking about how to change the terrain itself. The vast majority of our scholarship has been devoted to the journey’s end, with precious little devoted to figuring out how to smooth the path that leads there.<sup>2</sup>

This is surprising. After all, most arguments for election reform depend on a single premise: process shapes substance. Academics are quick to claim that the structure of our political process (campaign finance law, redistricting rules) helps 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.

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2. There are, however, several exceptions to this general trend. *See, e.g.*, Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366 (2005); Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184 (2007) [hereinafter Gerken, *Double-Edged Sword*]; Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708 (2006); Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L. REV. 667 (2006); Heather K. Gerken, *Citizens Must Drive Electoral Reform*, ROLL CALL, Nov. 15, 2005 [hereinafter Gerken, *Electoral Reform*]; Posting of Christopher Elmendorf & Heather Gerken to Balkinization, <http://balkin.blogspot.com/2005/11/next-time-start-with-people.html> (Nov. 10, 2005, 23:40 EST); Daniel P. Tokaji, *The Moneyball Approach to Election Reform*, ELECTION L. @ MORITZ, Oct. 18, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php>.

If the work of reformers is to be something other than a Sisyphian task, process should be an important scholarly focus. “Here to there” proposals may seem modest when compared to typical reform proposals, like calls for public financing or non-partisan election administration. But these wide-ranging reform proposals have been met with a deafening silence. We have plenty of ideas about what kind of change we want. What we need is an environment in which change can happen.

## II. THE PROBLEM OF ELECTION ADMINISTRATION AND A POTENTIAL SOLUTION

Let me give you an example of a “here to there” problem and a promising shortcut for moving toward a solution. The problem is our badly run election system. The best evidence we have suggests that our election system is clunky at best and dysfunctional at worst. Most experts agree that the system we use to run our elections is chronically underfunded, often poorly run, and sometimes administered in a partisan fashion.<sup>3</sup> The problem is that we do not have a very good way to reverse the political tides that now run against reform. The solution I propose—a Democracy Index—should help do just that.

### A. WHY ELECTION REFORM RARELY GETS TRACTION

At first glance, it seems like it ought to be easy to reform our election system. After all, the basic ingredients for change exist. There is a fairly robust consensus that we have a problem. Improving how our democracy works is an intuitively popular cause. And there have been semi-regular crises (most notably, *Bush v. Gore*<sup>4</sup>) to place the issue on the agenda.

The problem, as I explore in greater detail in Part III, is that 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>5</sup> Because election problems

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3. For ease of exposition, throughout this Article I will often use terms like “election system” to refer to our system of election administration—the “nuts-and-bolts” activities of running an election (registration, balloting, vote counting). The phrase usually refers to a far broader set of rules and institutional arrangements, including those surrounding districting and campaign finance.

4. 531 U.S. 98 (2000).

5. Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121 (2007) (reviewing ROY G. SALTMAN, *THE HISTORY AND*

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are largely invisible to voters, the pressure of local competition pushes states to invest in things that voters can see—schools, roads, more cops on the beat—while neglecting the problems in our election system. Moreover, many of the local officials who run our elections have strong partisan ties. While bias is the most disturbing consequence of partisanship, it is not the most common. Perhaps the most unfortunate byproduct of partisanship is a lack of professionalism. A system that depends on the political parties to staff it is unlikely to be staffed with trained experts.

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 change.

#### 1. Partisanship

For instance, the obvious solution to the problem of partisanship is to replace politicians with bureaucrats whose jobs do not depend on their political standing. But when foxes are guarding the henhouse, it is hard to jettison them from that powerful station. The people who decide who decides—the federal and state legislators with the power to place our election system in the hands of nonpartisans—are partisans themselves. The party in control has little incentive to abandon this important weapon in its political arsenal. It is not a coincidence that election reform proposals tend to come from the party out of power, which loses interest in reform the moment it gains a majority of seats.

#### 2. Localism

As with partisanship, localism does not just undermine the quality of our system; it makes it hard to put a better one in place. When partisanship blocks change, it is because politics is working badly; representatives are putting their own interests ahead of their constituents'. But even when politics is working correctly—when politicians are attentive to what voters want—political incentives run the wrong way in election reform. That is because problems in our election system are mostly invisible

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to voters. While the problems we saw in Florida in 2000 and Ohio in 2004—long lines, poor balloting machines, problems with registration, discarded ballots—occur all too often, voters become aware of them only when an election is so close that these mishaps affect the outcome. Because these crises occur episodically, voters have a haphazard sense of how well our elections are run and no comparative data to tell them which systems work and which do not.

In a decentralized system like our own, the invisibility of election problems reduces the incentives for even reform-minded politicians to invest in the system. One reason to favor decentralization is that states and localities will compete to win the hearts and minds of citizens, leading them to try to outdo each other in providing useful services and passing good policies. But states and localities will compete only along the dimensions that voters can see. When election problems are invisible, localities will invest in projects that voters can readily observe—new schools, roads, and more cops on the beat. In this respect, our failure to maintain our election infrastructure parallels our failure to maintain our physical infrastructure. Both occur because voters see only the occasional and haphazardly distributed results of neglect but have no means to gauge how things are working generally.

### 3. Voters' and reformers' lack of information

Unfortunately, voters and reformers have been unable to alter this perverse political dynamic. Without comparative data on how election systems work, voters have only a haphazard sense of how well elections are run. We do not even know how many people *cast a ballot* during our last presidential election,<sup>6</sup> let alone how well our election system is performing. Voters learn that there is a problem only when an election is so close that the outcome is in doubt. That is like measuring annual rainfall by counting how often lightening strikes.

Reformers similarly struggle in today's political environment. Even when lightening strikes—when there is a crisis that could energize a coalition for change—debates about reform quickly descend into highly technical arguments about

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6. Twenty percent of states do not report this information; they only disclose how many ballots were successfully counted. Thad Hall & Daniel Tokaji, *Money for Data: Funding the Oldest Unfunded Mandate*, ELECTION LAW @ MORITZ, June 5, 2007, <http://moritzlaw.osu.edu/blogs/tokaji/2007/06/money-for-data-funding-oldest-unfunded.html>.

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things like direct-recording electronic (DRE) voting machines and residual vote rates that voters have no yardstick for judging. Similarly, when reformers manage to get policymakers' attention, they lack the information they need to make a credible case for change. Reformers work hard to overcome these obstacles, but most ask policymakers to ignore their self-interest and do the right thing. It is little wonder that reform has not yet gotten much traction.

#### 4. Bureaucrats' lack of resources

Finally, the people who represent the other main leverage point for reform—bureaucrats—are similarly handicapped in their efforts to improve our election system. The bureaucrats who run our system lack adequate training, funding, and staff. It is hard for local administrators to perform basic election functions, let alone spend time on activities that would improve the system, like collecting performance data or studying best practices. Moreover, election administrators' pleas for more funds often fall on deaf ears, as politicians would much prefer to fund projects that are visible to voters.

Even when reform is not costly, the tide of local competition runs against change. The financial capital of states and localities is limited, but so is their political capital. There are only so many issues that can make it on the agenda of top-level policymakers. Governors, legislators, even secretaries of state must pick and choose what issues will occupy their time. If voters do not pay much attention to a question, the odds are that state and local officials will not either.

Localism also makes it harder to create professional norms that would push election officials to do better. It is not just that local administrators barely have the time and resources to do their jobs, let alone travel to conferences or study up on best practices. Localism means that professional associations are organized at the state level, thus preventing the type of cross-state interactions that help good ideas spread.

#### B. A POTENTIAL SOLUTION: THE DEMOCRACY INDEX

In my forthcoming book,<sup>7</sup> I propose a “here to there” solution for addressing these problems: a “Democracy Index,” which would rank states and localities based on how well their elec-

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7. HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (2009).

tion system performs. The Index would function as the rough equivalent of the *U.S. News and World Report* rankings for colleges and graduate schools. It would focus on issues that matter to all voters: How long did you spend in line? How many ballots were discarded? How often did voting machines break down? The Index would not only tell voters whether things are working in their own state, but how their state compares to its neighbors.

The Democracy Index would include nuts-and-bolts metrics (the length of lines, the number of ballots discarded) rather than broader measures of a state's democratic health (campaign finance laws, the robustness of political debate, or the level of electoral competition). It would be organized around three simple, intuitive categories that reflect the experiences of voters and mirror the cyclical rhythms of the administrator's job: (1) registering voters, (2) casting ballots, and (3) counting votes. In each category, the Index would measure performance "outputs" (How many errors are in the registration lists? How long are the lines? How many ballots got discarded?) rather than policy "inputs" (How good is the registration system? Does the jurisdiction train its poll workers properly? Are ballots counted using "best practices"?). In measuring performance, the Index would rely on hard data over subjective assessments wherever possible.

The Democracy Index is an information shortcut. It distills a wide variety of data on election performance into a highly intuitive, accessible form: a ranking. There are dangers associated with such shortcuts, as I discuss briefly in Part IV. In Part III, however, I will canvas the potential benefits that can come from creating such a shortcut.

### III. SHORTCUTS AND LEVERAGE POINTS

In this Part, I argue that if we focus on the key leverage points in the reform process—voters, policymakers, and election administrators—there is good reason to believe that a Democracy Index could do a great deal to smooth the path for change, creating an environment in which bigger and better reform is possible.

#### A. VOTERS

Voters are a key leverage point in the reform process. We would not worry about partisanship or local competition if voters pressured elected officials to do the right thing. Unfortu-

nately, it is often tough for reform proposals to gain traction with voters. That might seem strange given that the word “democracy” is invoked with reverence by school children and politicians alike. Everyone is affected by a badly run system. So why are voters not energized about these issues?<sup>8</sup>

### 1. Framing the issue

While voters care about how elections are run, discussions about reform are largely inaccessible to them. As a robust political science literature has demonstrated, voters need a “frame” to understand a problem and get behind a solution.<sup>9</sup> Unfortunately, election administration problems are hard to frame for voters in a manner that demonstrates their relevance. The discussion either takes place at such a high level of generality that

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8. Public-choice scholars would not be surprised that an issue that affects everyone is not at the forefront of the political agenda. Oddly enough, minority groups—sometimes condemned as “special interests”—are often the ones that succeed best in a majoritarian system like our own. *See, e.g.*, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985). Political scientist Robert Dahl famously claimed that “minorities rule” in the United States; coalitions of organized interest groups join together to form majorities and get legislation passed. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 133 (1956). Or, as Jesse Jackson put it, “in politics, an organized minority is a political majority.” *CNN: Both Sides with Jesse Jackson*, (CNN television broadcast Jan. 30, 2000). What matters in a system where “minorities rule” is the ability to organize—to turn out the vote, lobby representatives, and raise money. And it is often easier to organize a small, easily identified group with a concrete complaint than it is to get a large majority affected by a diffuse harm to coalesce. The public-choice explanation is not, of course, a complete answer. Other problems that impose diffuse harms are salient to voters—and thus to politicians. Politicians are careful to sketch out positions on issues like the environment or foreign policy. Moreover, politicians are notoriously risk-averse; no politician is going to be wildly enthusiastic about flouting the preferences of the majority even when no special-interest group is there to fight about it.

9. Building on the work of Erving Goffman, see ERVING GOFFMAN, *FRAME ANALYSIS, AN ESSAY ON THE ORGANIZATION OF EXPERIENCE* (1974), social scientists have extensively analyzed the ways that issues are presented to, and affect the behavior of, voters. For a sampling of this literature, see, for example, FRANK R. BAUMGARTNER & BRYAN D. JONES, *AGENDAS AND INSTABILITY IN AMERICAN POLITICS* (1993); SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* (1987); WILLIAM H. RIKER, *THE ART OF POLITICAL MANIPULATION* (1986); DEBORAH A. STONE, *POLICY PARADOX AND POLITICAL REASON* (1988); Dennis Chong & James N. Druckman, *Framing Theory*, 10 ANN. REV. POL. SCI. 103 (2007); James N. Druckman, *Political Preference Formation: Competition, Deliberation, and the (Ir)relevance of Framing Effects*, 98 AM. POL. SCI. REV. 671 (2004); Deborah A. Stone, *Causal Stories and the Formation of Policy Agendas*, 104 POL. SCI. Q. 281 (1989).

people have no sense of what ought to be done, or it descends into a sea of incomprehensible detail that would try the patience of even the wonkiest voter.

When reformers make their pitch, they often speak in stirring terms, invoking democracy, the dignity of the ballot, the right to vote. You can practically hear the National Anthem playing in the background. This is all well and good, but the National Anthem does not give a citizen much to go on. Moreover, everyone can play the patriotism game; election officials can also claim the moral high ground and accuse the other side of neglecting fundamental principles. As any parent knows, it is hard to resolve an argument whose basic rhetorical structure is some variant of “am not, are too.”

Things are little better when reformers and election officials swoop from these lofty heights to what election scholars call “the weeds.” Reformers “have to talk mostly in generalities,” claims Jonah Goldman of the National Campaign for Fair Elections, because the underlying policy debates seem so “dull.”<sup>10</sup> The subject matter is arcane. Fights often involve intricate debates about counting ballots, jargon-filled discussions of election machinery, and disputes about nitty-gritty registration requirements. Even election junkies rarely have the stomach for it.

More importantly, these are debates that voters have no yardstick for judging. Reformers point to a problem—an inadequate registration system, outdated machinery, a poor system for training poll workers—and argue that the state can do “better.” Election officials respond by talking about regulations issued, resources allocated, and staff trained. Reformers talk about discarded ballots or unregistered voters. Election officials assure us these numbers are normal.

For voters, these debates are reminiscent of that famous Far Side cartoon about what dogs hear. The clueless owner prattles away to his pet, and all the dog hears is “\_\_\_\_, \_\_\_\_, \_\_\_\_, Ginger. \_\_\_\_, \_\_\_\_, Ginger, \_\_\_\_.”<sup>11</sup> So what do voters hear when reformers and administrators go at it? A stream of technical details, occasionally punctuated with grand terms like “the right to vote” or “democracy.”

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10. Interview with Jonah Goldman, Dir., Nat'l Campaign for Fair Elections (Jan. 4, 2008) (on file with the author).

11. Gary Larson, *The Far Side*, S.F. CHRON., Oct. 25, 1983, at 51.

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Voters are not stupid.<sup>12</sup> But no one is born 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 guide to help them figure out who is right.

The Democracy Index could help change these dynamics by giving voters a yardstick to judge these fights. First, it gives voters the right information. Rather than bogging voters down in technical details about how the ideal system would be run or making vague assertions that we could do “better,” reformers could give voters information on something they can evaluate: bottom-line results.

Second, the Democracy Index presents the information in the right form by distilling the data into a highly intuitive, accessible format: a ranking. Voters do not need to wade through reams of data in order to assess how things are working. The Index, in effect, gives them a shortcut for making that judgment. Moreover, because the Index grades election systems “on a curve”—measuring them against one another instead of some ideal standard—voters can feel confident that they are rewarding those who have succeeded while holding those on the bottom rung to a realistic standard of performance.

## 2. Jumpstarting grassroots organizing

The most optimistic hope for the Index is that it will encourage voters to get more engaged with grassroots activities. It is not surprising that voters have been passive about election reform until now. Current debates put voters in a situation where they have nothing to contribute. Everyone can invoke the same vague generalities about the right to vote. But if voters are going to talk about policy, they would have to master a daunting set of minutiae. Otherwise, even if the average voter had some impulse to write her representative or call a radio talk show or organize a petition drive, she would find she had nothing to say.

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12. 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* (2007). Arguments like these often underestimate the useful role that heuristics can play in guiding voting behavior. *See, e.g.*, David Schleicher, *Irrational Voters, Rational Voting*, 7 *ELECTION. L.J.* 149 (2008) (reviewing CAPLAN, *supra*).

Ranking systems are useful because, as Dan Esty observes, they “democratize who can render an opinion.”<sup>13</sup> (Whether you think the opinion is properly informed is a different question, explored in Part IV). Everyone can express a view on whether his state ought to be ranked higher than forty-fifth on the Democracy Index. By giving voters an issue they can wrap their hands around, it may be possible to get voters exercised about election reform. After all, the rare instances in which voters have gotten engaged with grassroots organizing—issues like paper trails or voter ID—have all involved issues that appeal to people’s intuitions.

The Democracy Index would also expand the grassroots organizer’s time frame. In a world without data, people only get riled up about reform when there is a crisis. Once a winner is picked, the media coverage that keeps voters engaged ends abruptly. Reformers thus have a very short time to organize a coalition for change. An Index, however, ensures that the reform remains salient long after a crisis (and even in its absence). A ranking creates a durable reminder that a problem exists. By expanding the organizer’s time horizon, the Index may help build support for change over the long haul.

### 3. Giving voters an information shortcut

Even if the Democracy Index does not spawn new grassroots organizing, it should at least help voters do something that they *already* do: cast a vote. The great advantage of ranking systems is that they offer voters information shortcuts for holding elected officials accountable for their missteps. Creating a new shorthand for voters ought to affect the political incentives that currently run against reform.

For those who bristle at the idea of voters’ using shorthand to evaluate the way our elections are run, it is worth pointing out that voters will inevitably use some sort of shorthand in casting a ballot. In most cases, party labels serve as a heuristic for voters choosing a candidate.<sup>14</sup> The label “Democrat” or “Re-

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13. Interview with Dan Esty, Hillhouse Professor of Envtl. Law and Policy, Yale Law School, in New Haven, Conn. (Oct. 24, 2007) (on file with the author).

14. For early work in what is now a vast literature, see, for example, JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995); BERNARD R. BERELSON ET AL., *VOTING: A STUDY OF OPINION FORMATION IN PRESIDENTIAL CAMPAIGNS* (1954); ANGUS CAMPBELL ET AL., *THE AMERICAN VOTER* (1960); V.O. Key, Jr. & Frank Munger, *Social Determinism and Electoral Decisions: The Case of Indiana*, in

publican” functions like a “*Good Housekeeping Seal of Approval*.” It tells the voter that the candidate in question subscribes to a set of values or policy preferences that are close enough to the voter’s to choose him.<sup>15</sup> As several scholars have explained, if a voter “knows the big thing about the parties, he does not need to know all the little things.”<sup>16</sup>

Political scientists have devoted a lot of energy to making party cues function more effectively for a simple reason: they are a good deal better than the other types of shorthand voters might use.<sup>17</sup> Without the party heuristic, voters would be more likely to base their votes on something unappetizing, such as a candidate’s race or gender. Or they might cast ballots randomly so that voter preferences are disconnected from electoral outcomes. The basic defense of party labels is not that they are perfect—far from it—but that they are the best thing we have got. If you ask a political scientist whether it is a good idea for voters to rely on party cues, the likely response will be a sarcastic “as opposed to what?”

If we think about the “as opposed to what” question here, a ranking system looks a good deal more appealing. Think about the proxies voters are likely to use today in casting their vote for election officials. The best bets seem to be (1) anecdotal evidence, (2) news about a widely reported crisis, or (3) partisan cues. For all its potential shortcomings, a ranking system is superior to each of these alternatives.

Anecdotal evidence is, of course, just that. A glitch here and there is not good evidence of a full-fledged problem. A ranking system, in contrast, focuses voters on the bigger pic-

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AMERICAN VOTING BEHAVIOR 281 (Eugene Brudick & Arthur J. Brodbeck eds., 1959).

15. See, e.g., Richard R. Lau & David P. Redlawsk, *Voting Correctly*, 91 AM. POL. SCI. REV. 585, 590 (1997); Arthur Lupia, *Shortcuts Versus Encyclopedias: Information and Voting Behavior in California Insurance Reform Elections*, 88 AM. POL. SCI. REV. 63 (1994); Arthur Lupia, *Dumber than Chimps? An Assessment of Direct Democracy Voters*, in DANGEROUS DEMOCRACY? THE BATTLE OVER BALLOT INITIATIVES IN AMERICA 66 (Larry J. Sabato et al. eds., 2001); SAMUEL L. POPKIN, *THE REASONING VOTER* (2d ed. 1994).

16. BERELSON ET AL., *supra* note 14, at 321.

17. Indeed, a major movement within political science insists that we need strong, cohesive parties in order to give voters a better predictive cue as to how candidates will vote. Better party cues, the argument goes, means greater accountability. This notion of “responsible party government” was first endorsed by the American Political Science Association’s Committee on Political Parties in 1950. See Am. Political Sci. Ass’n, *Toward a More Responsible Two-Party System: A Report of the Committee on Political Parties*, 44 AM. POL. SCI. REV. (Supp. 1950).

ture, directing their attention to systemic concerns instead of the modest anomalies that can afflict even well run systems. It also directs their attention to the good as well as the bad and the ugly, revealing which states and localities have done an especially impressive job of running elections.

Even evidence of a crisis may not be a useful guide for voters. While the worst-run systems are more vulnerable to a crisis, not all badly run systems will experience a crisis. Indeed, given the dearth of the data, we cannot definitively rule out the possibility that recent brouhahas (Florida 2000, Ohio 2004) have happened in relatively well-run systems, places that just happened to be in the path of a turnout tsunami. Crisis-based voting also has the flavor of closing the barn door after the horse has been stolen. Voters need a tool that will help them prevent crises rather than merely react to them.

Finally, partisan cues do not provide a dependable heuristic for voters in the context of election reform. A party label can tell a voter whether a candidate is liberal or conservative and thus indicate to a voter how a candidate is likely to approach issues like campaign finance or felon disenfranchisement. But in choosing an election administrator, voters need shorthand for evaluating professionalism and performance, and the party cue does not help. Democrats and Republicans are equally susceptible to running elections badly.

For all of these reasons, the Democracy Index has the potential to provide voters with a much needed shorthand for casting a vote. By conveying information about the “big thing” in election administration—a rough sense of how well the system performs overall—it enables voters to make sensible decisions without knowing all of “the little things” buried in the data.

If the Democracy Index provides voters with a useable shorthand, it ought to generate a new political dynamic in the reform environment. The current system offers politicians and local officials few reasons to pay attention to reform issues. The Index may give political actors more incentives to pay attention to how elections are run if votes start to turn on performance.

#### 4. Realigning partisan incentives

Consider, for instance, the fate of Ohio’s Secretary of State, Kenneth Blackwell, whose travails as Secretary of State are

well known.<sup>18</sup> In 2006, Blackwell ran for governor. Imagine if Ted Strickland, the Democrat running against him, could have shown that Ohio was one of the worst-run election systems in the country. Surely Strickland would have trumpeted those results whenever he could. You can also be sure that secretaries of state across the country would take notice of that campaign.

An Index would also be invoked by election officials whose systems rank high. Candidates are always on the hunt for something to distinguish them from their opponents, some “*Good Housekeeping Seal of Approval*” to attract voters’ attention. We see lots of examples of this type of self-promotion with other rankings. For instance, the latest release of the Government Performance Project, which grades state management practices, prompted immediate press releases by the governors of the top-ranked states.<sup>19</sup>

The Index will not only matter during the campaign season. It is also likely to be used in any recount battle. Parties wage recount wars on two fronts. In court, the parties’ job is to get their ballots counted and their opponents’ excluded.<sup>20</sup> Any lawyer worth her salt will try to introduce the Index into evidence if it helps her case.

Parties also battle in the arena of public opinion, trying to enlist voters in their effort to win the legal battle and score political points. And it is hard to imagine that neither party would invoke the Democracy Index in framing the recount debate for public consumption. After all, if the state ranked low, it would provide further evidence that the party in power failed to do its job properly. Conversely, if the state generally scored high on the Index, the party in power could use it as a shield against the accusations being levied by its opponents.

Should the Democracy Index be deployed in either context, it ought to help raise public awareness about the need for

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18. For a summary of Blackwell’s travails, see GERKEN, *supra* note 7, at ch. 3.

19. News Release, Office of Governor Christine Gregoire, Washington Earns Top Rating for Managing Public Resources (Mar. 3, 2008), *available at* <http://www.governor.wa.gov/news/news-view.asp?pressrelease=804&newsType=1>; News Release, Office of Governor Timothy M. Kaine, Virginia Gets Top Grade in Performance (Mar. 3, 2008), *available at* <http://www.governor.virginia.gov/mediarelations/newsreleases/viewRelease.cfm?id=621>.

20. For example, see the Coleman versus Franken Minnesota 2008 election Senate recount and following court action. *See generally* Dave Orrick and Rachel E. Stassen-Berger, *Franken’s Lead Increases to 312 Over Coleman in Minnesota U.S. Senate Race*, PIONEER PRESS (St. Paul), Apr. 7, 2009.

reform and create incentives for politicians to get behind it. If there is any lesson to be drawn from successful efforts at election reform in other countries, it is that the most effective proponent of reform is usually the opposing party. When the party out of power has a weapon—an advisory commission report, a judicial ruling, a ranking system—it will use it to beat on the other party at every opportunity. It is ugly, but effective.

Even setting aside political races and recount wars, one can imagine other ways in which the Index might be used as a sword or shield in partisan politics. For instance, election officials at the bottom of the list might be vulnerable to targeted fundraising or get-out-the-vote organizing by political blogs like DailyKos<sup>21</sup> or RedState.<sup>22</sup> Similarly, any politician dissatisfied with an election rule would surely invoke the Index. The Index, after all, makes an instance of special pleading look like a defense of the public interest.

For all of these reasons, the Democracy Index should hang like a sword of Damocles over politicians, a notoriously risk-averse group. While it will not be salient in every race, it should matter in some. That would mean that at least some of the time, the fate of elections officials would hinge in part on their professional performance, not just their party standing. Instead of asking an election official to stop thinking about her political interests in administering the election process, the Democracy Index links her political fate to her professional performance.

##### 5. Will party heuristics trump?

A skeptic might still insist that the party heuristic—whether someone has an “R” or “D” by her name—is all that really matters for low-salience campaigns like races for the secretary of state.<sup>23</sup> The worry is that party labels will drown out any competing information about candidates except during well-publicized campaigns for higher office, like Kenneth Blackwell’s gubernatorial campaign. But even if partisan heuristics generally trump all else, a low ranking can still affect a candidate’s political fate. To begin, the Index ought to matter when the party heuristic is unavailable—during the primary,

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21. Daily Kos: State of the Nation, <http://www.dailykos.com> (last visited Apr. 14, 2009).

22. Redstate, <http://www.redstate.com> (last visited Apr. 14, 2009).

23. See, e.g., David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 14 J.L. & POL. 419 (2007).

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when candidates compete against members of their own party, or during the general election in a nonpartisan race. In these low-information races, voters do not have a party label to sort candidates, so any means of distinguishing one candidate from another is potentially important. Indeed, not only should the Index itself provide a heuristic for voters, but it should also affect which organizations and newspapers endorse the candidate, thus influencing another basis on which voters cast their ballots.

Further, even in races where the party heuristic matters, the Index may affect the behind-the-scenes maneuvering that determines which candidates get nominated. Party elites play an important role in the candidate selection process. During this “invisible primary,” their decisions about funding and endorsements can determine who ends up running and winning the party primary.<sup>24</sup> Imagine that you were a party leader, major donor, or get-out-the-vote organizer. There are a large number of candidates competing for your support. Why would you back someone whose ranking has rendered him potentially damaged goods? And would not a high ranking increase a candidate’s standing in your eyes? Even if the ranking will matter only rarely, a risk-averse political operative will prefer to place a bet on someone without any handicaps. These behind-the-scenes decisions all matter to a candidate’s political fate, and they all increase the likelihood that politicians will care about how their state or locality ranks on the Index.

#### 6. Realigning local incentives

As noted in Part I, partisanship is not the only reason our election system does not function as well as it should. Even when politics are working correctly—when politicians are attentive to what voters want—political incentives run against election reform. Local officials compete only on issues that voters can see. When a problem is invisible, a race to the bottom ensues.

A ranking system not only makes the problems in our election system *visible* to voters, but it casts those issues in explicitly competitive terms. By ranking states and localities against one another, the Democracy Index should help shame local officials into doing the right thing.

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24. Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 151 (2005).

Consider, for instance, the competition that seems to have been spurred by one of the rare comparative metrics we have in election administration: the residual vote rate. In the wake of the 2000 election, reformers and political scientists used the residual vote rate as a rough proxy for assessing how many votes had been lost to machine problems, bad ballot design, and the like. As a CalTech/MIT study observes, when jurisdictions “were told they had high residual rates in 2000,” many “worked to cut them to a fraction of what they were by 2002,”<sup>25</sup> even before Congress provided funding for new machines. Georgia, for example, had a high residual vote rate of 3.2% in 2000 but reduced it to 0.9% by 2002.<sup>26</sup> Reformers continue to rely on the residual vote rate to pressure localities to do better. A recent Brennan Center report, for instance, argues that residual vote rates should not be higher than one percent.<sup>27</sup>

We see a similar effect with other ranking systems. Take the Government Performance Project (GPP), sponsored by the Pew Center on the States, which grades states based on their management practices.<sup>28</sup> The GPP has had a remarkable amount of success pushing states to do better on the management front. For instance, its emphasis “on the importance of workforce planning appeared to be central to enormous advances in the area,” says Richard Greene, who has played a major role in its implementation.<sup>29</sup> While half of the states did such planning in 2005, forty-one did so by 2008.<sup>30</sup>

You can also see the GPP’s effects on individual states. In Georgia, for instance, the governor made the state’s low ranking a central platform of change. The state began to measure

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25. CALTECH/MIT VOTING TECH. PROJECT, INSURING THE INTEGRITY OF THE ELECTORAL PROCESS: RECOMMENDATIONS FOR CONSISTENT AND COMPLETE REPORTING OF ELECTION DATA 2 (2004), available at [http://vote.caltech.edu/drupal/files/report/insuring\\_integrity\\_of\\_electoral\\_process.pdf](http://vote.caltech.edu/drupal/files/report/insuring_integrity_of_electoral_process.pdf).

26. *Id.*

27. Press Release, Brennan Center for Justice, Brennan Center Report Finds New Improvements in New Voting Technology Being Implemented in Several States (Aug. 28, 2006), available at [http://www.brennancenter.org/content/resource/brennan\\_center\\_report\\_finds\\_improvements\\_in\\_new\\_voting\\_technology\\_being\\_imp](http://www.brennancenter.org/content/resource/brennan_center_report_finds_improvements_in_new_voting_technology_being_imp).

28. Pew Center on the States: About Us, <http://pewcenteronthestates.org/about.aspx> (last visited Apr. 14, 2009).

29. Interview with Richard Greene, Consultant, Pew Ctr. on the States (June 12, 2008) (on file with the author). Unless otherwise noted, what follows in the next two paragraphs is drawn from an interview with Richard Greene.

30. See David S. Broder, *Managing: An Affair of States*, WASH. POST, Mar. 9, 2008, at B7.

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itself against the GPP's criteria and has dramatically in a short time, moving itself from a B to a B+ in three years.<sup>31</sup> Similarly, when the first GPP gave Alabama the lowest grade received by any state, state officials invited the GPP's architects to speak to its leadership and has been "getting steadily better" on all fronts, says Greene. Greene thinks Alabama's improvement is particularly impressive because success "is a moving target," as all of the states are improving at the same time.<sup>32</sup>

A skeptic might worry that local competition matters only for issues that are important enough for people to "vote with their feet," like schools and taxes. But it is a mistake to assume that people must vote with their feet before local officials will pay attention. Politicians pay attention to issues even when they have a captive constituency. They do so for a simple reason. They are risk-averse and would rather represent happy constituents. Local officials worry not only about latent crises that might develop, but the cumulative effect of one bad headline after another. They also like to tout their successes, which is why one often sees high rankings proudly announced on local and state websites.

The worry about captive constituencies is nonetheless well taken. It reminds us to recognize the limits of any strategy designed to generate a "race to the top" in election reform. There are lots of issues competing for voters' attention, and a ranking system is not going to push election reform ahead of bread-and-butter issues like jobs and the economy. States will continue to feel pressure to commit resources to the many other problems they face. What the Democracy Index does is give election reform a much-needed boost in this competition for resources. And that is a good deal better than nothing.

7. Do people care enough about election reform for an Index to work?

The arguments above depend on a crucial assumption: that some voters will care about election administration some of the time. If they do not, giving voters an information shortcut will not matter much. Indeed, a skeptic might argue that voters will never care enough about reform to pay attention to a ranking. After all, it is not hard to imagine why the *U.S. News and*

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31. PEW CTR. ON THE STATES, GOVERNMENT PERFORMANCE PROJECT, GRADING THE STATES: GEORGIA (2005), [http://www.pewcenteronthestates.org/uploadedFiles/gpp2005\\_22.pdf](http://www.pewcenteronthestates.org/uploadedFiles/gpp2005_22.pdf) (last visited Apr. 14, 2009).

32. Interview with Richard Greene, *supra* note 26.

*World Report* college rankings are read by so many people—anyone with a kid applying to college has a personal stake in knowing how the colleges stack up. But our relationship to election administration is more tenuous and less personal.

Although we cannot know for sure whether a Democracy Index would have an effect on voters, it would be a mistake to infer that voter preferences are fixed. Voter opinions tend to be quite fluid. They are shaped by institutions, the media, and political elites. Political scientist E.E. Schattschneider argued that the ability to define a problem and its solution “is the supreme instrument of power,”<sup>33</sup> an idea buttressed by a long-standing political science literature on the importance of “framing.”<sup>34</sup> Thus, in assessing voter preferences, we must think in dynamic terms.

There are several reasons to be optimistic about the Index’s potential. First, other indices have made a splash even though they do not involve issues that affect people as directly as the quality of their children’s education. The Environmental Performance Index, for instance, had an effect on environmental policy well before the world and his wife became cognizant of global warming. And the Government Performance Project’s evaluation of state management systems—a topic that surely ranks below election reform on the boredom scale—generates hundreds of news stories whenever it is released. Unless reporters and politicians have an absolutely tin ear on these questions, that is a sign that something is afoot.

Second, reformers *have* been able to get traction on election issues when they frame them effectively. As Jonah Goldman points out, debates about paper trails have become salient in large part because reformers came up with a simple metaphor for capturing the problem: if we can get a receipt from an ATM, touch-screen vote machines should be able to generate a paper trail.<sup>35</sup> That frame drives some experts crazy because they think it fundamentally mischaracterizes the problem.<sup>36</sup> But it

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33. E.E. SCHATTSCHEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA* 68 (1960) (emphasis omitted).

34. See sources cited *supra* note 9.

35. Interview with Jonah Goldman, *supra* note 10. For an excellent overview of the role of framing in this debate, see R. MICHAEL ALVAREZ & THAD E. HALL, *ELECTRONIC ELECTIONS: THE PERILS AND PROMISES OF DIGITAL DEMOCRACY* (2008).

36. See generally, Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 *FORDHAM L. REV.* 1711, 1807 (2005).

is certainly driving policymaking,<sup>37</sup> confirming physicist G.C. Lichtenberg's observation that "a good metaphor is something even the police should keep an eye on. . . ." <sup>38</sup> If the Index can provide a similarly intuitive frame for the public, it too ought to be able to get traction with voters. At the very least, there are enough stories on election administration controversies these days that a Democracy Index would surely generate some press, even if it were only a sidebar to ongoing reporting.

Finally and most importantly, the key difference between the Democracy Index and many other indices is that the Democracy Index has a ready-made ally that cares deeply about this information: political parties. As is clear from the preceding discussion, political parties can use the Index for partisan advantage if they get the word out. Partisan politics—the engine that drives most public debates<sup>39</sup>—offers a built-in publicity machine for making the Democracy Index salient.

The problem for election reformers in the past is that they have had a hard time harnessing political competition in the service of election reform. Though reform issues bubble up during an election crisis, for the most part politicians ignore them. Without political entrepreneurs to take up the cause, it is hard to get reform on the agenda. The fact that the Democracy Index

37. See, e.g., Voter Confidence and Increased Accessibility Act of 2007 (Holt Bill), H.R. 811, 110th Cong. (2007).

38. GEORG CHRISTOPH LICHTENBERG, APHORISMS 79 (R.J. Hollingdale trans., Penguin Books 1990) (1800–06 and 1844–53).

39. Political competition represents an important force in shaping public opinion. As Robert Bennett explains, "American democracy is an extraordinary engine for producing a conversation about public affairs" that ultimately shapes "the content of public policy decisions . . ." ROBERT W. BENNETT, TALKING IT THROUGH: PUZZLES OF AMERICAN DEMOCRACY 2 (2003). The fuel for that engine is political competition, as political leaders compete against one another to "shape, coordinate, and frame the public's understandings about electoral politics, public policy, and civic affairs." Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 753 (2008). The literature on the relationship between political competition and public opinion dates back at least to the work of venerable political scientists like V.O. Key, Jr. and E.E. Schattschneider. See, e.g., V.O. KEY, JR., THE RESPONSIBLE ELECTORATE 1936–1960 (1966); SCHATTSCHEIDER, *supra* note 33. Scholars often call these leaders "political entrepreneurs" because of the creative ways in which they forge new platforms, frame issues, and exploit latent political energies in the process of building new political coalitions. See, e.g., Kang, *supra*, at 738 n.17. For a necessarily incomplete sampling of the seminal work in this area, see, for example, ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS (1972); KEY, *supra*; WILLIAM H. RIKER, THE STRATEGY OF RHETORIC (Randall L. Calvert et al. eds., 1996); and SCHATTSCHEIDER, *supra* note 33.

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turns election reform into a source of political advantage increases the likelihood that entrepreneurs will take up the cause. When politicians see a potentially useful weapon, they will fire it.<sup>40</sup>

## B. POLICYMAKERS

The arguments above portray politicians in a rather bad light—as craven creatures motivated by self-interest. Political incentives plainly matter to elected officials, and it is important to be aware of them in thinking about the “here-to-there” problem. But the vast majority of elected officials try to do the right thing within existing political constraints. We therefore should not underestimate the appeal of the right answer to politicians. The appeal of the right answer is another reason that the Democracy Index should get the attention of the top-level officials who set policy and hold the purse strings. A performance index is something that appeals to every politician’s inner wonk; it gives them a much-needed information shortcut to identify lawmaking priorities and choose among policy options.

### 1. Giving politicians a baseline

In many ways, the Index serves the same purpose for top-level policymakers as it does for voters: it gives them a baseline, an information shortcut for refereeing debates between the election administrators who work for them and the reformers who lobby them. Policymakers see plenty of untrustworthy arguments coming from administrators who are not doing their jobs properly. Many grow tired of the insistent drum beat for change emanating from the reform community. Top-level policymakers have to pick sides, and they do not have time to work through all the details. They need an information shortcut to guide them.

While top policymakers may be reluctant to hold election officials accountable based on the necessarily atmospheric judgments of the reform community, they are likely to be convinced by hard numbers and comparative data. Election administrators can talk all they want about what they have done, but they cannot get around the stark reality of the ranking: is the

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40. One could, of course, make an argument like this about most “latent” reform platforms that are amenable to effective framing. But few issues are as closely linked to partisan politics as this one. We are *already* waging political battles in which the Index could be used as a partisan weapon.

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system working or not? And why is the state next door doing so much better?

## 2. Identifying policy priorities

A ranking provides a useful shorthand in a second way: it helps flag policymaking priorities. Legislators and governors are often bombarded with information. They hear lots of complaints, listen to lots of requests for funding, and sift through lots of reports. What they need is something that helps them to separate the genuine problems from the run-of-the-mill complaints, a means of distinguishing the signal from the static. A ranking can perform that role, as it focuses on systemic problems and provides a realistic baseline for judging performance.

Consider, for instance, what occurred in Mexico when the first version of the Environmental Performance Index (then called the Environmental Sustainability Index) was released.<sup>41</sup> The EPI ranks 149 countries along twenty-five performance indicators. Environmentalists had spent a lot of time trying to convince Mexico it had a problem. They ended up spending most of their time addressing low-level bureaucrats. When the first version of the EPI came out, ranking Mexico in the bottom fifth of the countries evaluated, it caught the attention of Mexico's President. The organizations that created the EPI received dozens of calls and emails from Mexican officials up and down the political hierarchy, all complaining about Mexico's ranking and, eventually, trying to figure out how to fix it. Mexican bureaucrats cared because the President cared.

## C. ELECTION ADMINISTRATORS

A final, and often underappreciated, leverage point for reform is election administrators—the people who do the day-to-day work of running our election system. We usually assume that pressure for change can only come from the outside—from voters or reformers or top-level policymakers. But some of the most effective lobbyists for change are people working inside the system. Moreover, the long-term health of any bureaucracy depends heavily on bureaucrats' policing themselves through professional norms. The Democracy Index would help on both fronts. It gives election administrators the information they need to lobby for much-needed resources. At the same time, the

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41. See <http://epi.yale.edu/Contents> for the rankings and more information on the EPI.

Index has the potential to promote stronger professional norms within the field.

To that end, perhaps the most important role an Index could play with election administrators is to help create a consensus on best practices, as professional norms may ultimately be more important to a well-run system than pressures from the outside. Professional norms are what Jerry Mashaw calls “soft law”<sup>42</sup> because they rely on an informal source of power—peer pressure. They work because government workers are just like the rest of us. They care what other people think, and they are likely to care most about the opinions of people in their own professional tribe.

Anyone who lives with a teenager knows that peer pressure can affect people’s behavior. Social scientists have done extensive work identifying the ways in which the pressure to conform affects individual behavior.<sup>43</sup> Although peer pressure is not always a force for good, it can serve useful ends in the policy-making context. Many professional groups—lawyers, accountants, engineers—possess a set of shared norms about best practices. While these norms are often informal, they cabin the range of acceptable behavior. When professional identity becomes intertwined with particular practices, a person’s sense that he is doing a good job depends on conforming to these norms. For those of us trying to suppress memories of high school, it is nice to know that the herd instinct can do a bit of good in the world.

It is not just peer pressure that causes people to conform to professional standards; it is also time constraints. No one has the time to think through the practical and moral considerations involved in every decision they make. Like voters and policymakers, administrators need shorthand to guide their behavior. A professional consensus on best practices can

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42. See Jerry L. Mashaw, *Structuring a “Dense Complexity”: Accountability and the Project of Administrative Law*, ISSUES IN LEGAL SCHOLARSHIP, Mar. 2005, at 6–7, <http://www.bepress.com/cgi/viewcontent.cgi?article=1061&context=ils>.

43. Cass Sunstein, for example, has written about the pressures of conformity upon individuals. CASS R. SUNSTEIN, *WHY SOCIETIES NEED DISSENT* (2003). One of the results of conformity is a decision-making “cascade.” *Id.* at 10–11. If one set of decision makers or “early movers” converge on a particular option, subsequent decision makers—influenced by the agreement of the first movers—make the same choice even if they would not have reached such a decision independently. *See id.* Sunstein also explains both why reasonable people rely on the decisions of “early movers” and why this tendency sometimes has unfortunate consequences. *See id.* at 54–73.

represent a pretty sensible heuristic for figuring out the right choice.

Peer pressure not only can shape individual behavior, but can push *institutions* to adopt reforms that experts have christened as best practices. Social science research on the “global polity”<sup>44</sup> reveals that despite vast cultural and resource differences among nation-states, countries follow what social scientists call “common models or scripts of what a nation-state ought to be.”<sup>45</sup> Mimicry even happens in areas where you would

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44. The global polity “consists of much more than a ‘system of states’ or ‘world economy’ or ‘international system.’ Rather, the global environment is a sea teeming with a great variety of social units—states and their associated polities, military alliances, business enterprises, social movements, terrorists, political activists, nongovernmental organizations . . . .” John Boli, *Sovereignty from a World Polity Perspective*, in PROBLEMATIC SOVEREIGNTY: CONTESTED RULES AND POLITICAL POSSIBILITIES 53, 59 (Stephen D. Krasner ed., 2001). For a helpful survey of this literature, see GLOBALIZATION AND ORGANIZATION: WORLD SOCIETY AND ORGANIZATIONAL CHANGE (Gili S. Drori et al. eds., 2006); Martha Finnemore, *Norms, Culture, and World Politics: Insights from Sociology’s Institutionalism*, 50 INT’L ORG. 325 (1996); John W. Meyer, *The World Polity and the Authority of the Nation-State*, in INSTITUTIONAL STRUCTURE 41 (George M. Thomas et al. eds., 1987); John W. Meyer et al., *World Society and the Nation-State*, 103 AM. J. SOC. 144 (1997). For a general introduction to the social science behind the global-polity literature, see W. RICHARD SCOTT, INSTITUTIONS AND ORGANIZATIONS (2d ed. 2001). Ryan Goodman and Derek Jinks have led the way in connecting this literature to legal scholarship and exploring its potential ramifications for international law, particularly human rights law. See Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749 (2003) [hereinafter Goodman & Jinks, *Theory of Sovereignty*].

45. GILI S. DRORI ET AL., SCIENCE IN THE MODERN WORLD POLITY: INSTITUTIONALIZATION AND GLOBALIZATION at ix (2003). For instance, nation-states often deploy similar record-keeping systems and mandate mass education in school systems using similar curricula and administrative structures. Isomorphism and decoupling have been found in areas such as “constitutional forms emphasizing both state power and individual rights, mass schooling systems organized around a fairly standard curriculum, rationalized economic and demographic record keeping and data systems, antinatalist population control policies intended to enhance national development,” as well as “formally equalized female status and rights, expanded human rights in general, expansive environmental policies, development-oriented economic policy, universalistic welfare systems, standard definitions of disease and health care, and even some basic demographic variables.” Meyer et al., *supra* note 44, at 152–53 (citations omitted); see also Karen Bradley & Francisco O. Ramirez, *World Polity and Gender Parity: Women’s Share of Higher Education, 1965–85*, 11 RES. IN SOC. OF EDUC. AND SOCIALIZATION 63 (1996); David John Frank et al., *What Counts as History: A Cross-National and Longitudinal Study of University Curricula*, 44 COMP. EDUC. REV. 29 (2000); John W. Meyer, *The Changing Cul-*

think that cultural or economic differences would trump. For instance, landlocked nations seem to follow global standards when designing their militaries, leaving them with navies without ports.<sup>46</sup> Similarly, countries where “scientists and engineers comprise less than 0.2% of the population, and research and development spending is infinitesimal” create “science policy bureaucracies.”<sup>47</sup>

We similarly see a great deal of imitation by state and local governments in the United States—instances where the adoption of a policy by a handful of institutions pushes others to adopt the same policy. At least since the late 1960s,<sup>48</sup> social scientists have documented the ways in which policies spread from state to state.<sup>49</sup> As one of the most recent and comprehen-

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*tural Content of World Society*, in STATE/CULTURE: STATE FORMATION AFTER THE CULTURAL TURN (George Steinmetz ed., 1999).

46. See Finnemore, *supra* note 44, at 336–37. Another example is the fact that the enrollment of women in institutions of higher education increased around the world at roughly the same rate and at about the same time in Western and non-Western countries. See Bradley & Ramirez, *supra* note 45, at 83–84.

47. Goodman & Jinks, *Theory of Sovereignty*, *supra* note 44, at 1760.

48. See, e.g., Virginia Gray, *Innovation in the States: A Diffusion Study*, 67 AM. POL. SCI. REV. 1174 (1973); Jack L. Walker, *The Diffusion of Innovations Among the American States*, 63 AM. POL. SCI. REV. 880 (1969).

49. This literature is vast, so what follows is only a sampling drawn primarily from the work of sociologists and political scientists. See, e.g., HENRY R. GLICK, *THE RIGHT TO DIE* (1992); ANDREW KARCH, *DEMOCRATIC LABORATORIES: POLICY DIFFUSION AMONG THE AMERICAN STATES* (2007); KAREN MOSSBERGER, *THE POLITICS OF IDEAS AND THE SPREAD OF ENTERPRISE ZONES* (2000); RICHARD ROSE, *LESSON-DRAWING IN PUBLIC POLICY* (1993); Steven J. Balla, *Interstate Professional Associations and the Diffusion of Policy Innovations*, 29 AM. POL. RES., 221 (2001); Frances Stokes Berry & William D. Berry, *Innovation and Diffusion Models in Policy Research*, in THEORIES OF THE POLICY PROCESS 169 (Paul A. Sabatier ed. 1999); Frances Stokes Berry & William D. Berry, *State Lottery Adoptions as Policy Innovations: An Event History Analysis*, 84 AM. POL. SCI. REV. 395 (1990); Frances Stokes Berry & William D. Berry, *Tax Innovation in the States: Capitalizing on Political Opportunity*, 36 AM. J. POL. SCI. 715 (1992); Michael Mintrom, *Policy Entrepreneurs and the Diffusion of Innovation*, 41 AM. J. POL. SCI. 738 (1997); Michael Mintrom & Sandra Vergari, *Policy Networks and Innovation Diffusion: The Case of State Education Reforms*, 60 J. POL. 126 (1998); Anne Schneider & Helen Ingram, *Systematically Pinching Ideas: A Comparative Approach to Policy Design*, 8 J. PUB. POL'Y 61 (1988); David L. Weimer, *The Current State of Design Craft: Borrowing, Tinkering, and Problem Solving*, 55 PUB. ADMIN. REV. 110 (1993); Harold Wolman & Ed Page, *Policy Transfer Among Local Governments: An Information-Theory Approach*, 15 GOVERNANCE: AN INT'L J. POL'Y, ADMIN., & INSTITUTIONS 477 (2002). For a critical take on some of this work, see Christopher Z. Mooney, *Modeling Regional Effects on State Policy Diffusion*, 54 POL. RES. Q. 103 (2001) (questioning whether regional effects on diffusion are as pronounced as prior work has suggested). For an examination of interstate dif-

sive studies explains, policy ideas of all sorts—from the adoption of city council-manager systems to crime control policies—can spread rapidly from “city to city [and] from state to state.”<sup>50</sup>

Institutions imitate each other for roughly the same kinds of reasons that individuals do. Sociologists and anthropologists tend to emphasize peer pressure and social meaning—the ways in which behavioral “scripts” signal prestige and become the model for institutional behavior.<sup>51</sup> Political scientists, in contrast, tend to emphasize the ways in which time pressures lead officials to use the decisions of others—particularly their peers—as a “heuristic” or “shortcut” to guide their behavior.<sup>52</sup> Legislators in New York and Pennsylvania, for instance, might ask not “what would Jesus do,” but “what would Jersey do?”

#### 1. The absence of professional norms in election administration

Unfortunately, the type of professional norms that could shape individual and institutional behavior are largely absent in the elections arena, as are the vehicles for creating and spreading them. 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 a number of membership groups, most are locally oriented and do not have a sufficiently large membership to generate a field-wide consensus.<sup>53</sup> These groups also do not provide as much support and service as other local government

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fusion in different countries, see Katerina Linos, *How Can International Organizations Shape National Welfare States? Evidence from Compliance with European Union Directives*, 40 *COMP. POL. STUD.* 547 (2007); James M. Lutz, *Emulation and Policy Adoptions in the Canadian Provinces*, 22 *CAN. J. POL. SCI.* 147 (1989); Dale H. Poel, *The Diffusion of Legislation Among Canadian Provinces: A Statistical Analysis*, 9 *CAN. J. POL. S.* 605 (1976); Note, *When Do Policy Innovations Spread?: Lessons for Advocates of Lesson-Drawing*, 119 *HARV. L. REV.* 1467 (2006). For a survey of the literature on diffusion among non-state organizations, see David Strang & Sarah A. Soule, *Diffusion in Organizations and Social Movements: From Hybrid Corn to Poison Pills*, 24 *ANN. REV. SOC.* 265 (1998).

50. KARCH, *supra* note 49, at 2–3.

51. See *supra* notes 41–42 and accompanying text.

52. See KARCH, *supra* note 49, at 7–9.

53. A recent survey indicates that sixty percent of local officials did not belong to a national professional association, and one quarter of local officials did not belong to any professional association. ERIC A. FISCHER & KEVIN J. COLEMAN, *CONG. RESEARCH SERV., ELECTION REFORM AND LOCAL ELECTION OFFICIALS: RESULTS OF TWO NATIONAL SURVEYS*, RL-34363, at 5–6 (2008), available at [http://assets.opencrs.com/rpts/RL34363\\_20080207.pdf](http://assets.opencrs.com/rpts/RL34363_20080207.pdf).

organizations, like the National Association of Counties or the National Conference of State Legislatures.<sup>54</sup>

Most importantly, the membership of these associations is often quite reluctant to endorse “best practices.” For instance, one of the rare nationwide associations, the National Association of Secretaries of State, uses the term “shared practices” on the ground that local variation prevents it from identifying which practice is best.<sup>55</sup> Similarly, Ray Martinez, a former commissioner of the Election Assistance Commission (EAC), the federal agency charged with election administration issues, notes that whenever the EAC even raises the possibility of promoting best practices, it receives “pushback.”<sup>56</sup> One political scientist bemoaned the field’s resistance to best practices, noting: “Every time I go to a conference, people tell me ‘that won’t work where I’m from,’ as if they lived on a different planet.”<sup>57</sup>

## 2. Can the Democracy Index help?

The Democracy Index might provide a useful start toward building professional norms and disseminating good policies. If we focus on the issues deemed salient to sociologists and anthropologists, the question is whether the Democracy Index could generate professional peer pressure among election administrators or disseminate a “script” as to what constitutes a well-run system.

The Democracy Index should 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

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54. Interview with Trey Grayson, Sec’y of State, Kentucky (Jan. 9, 2008) (on file with the author); Interview with Jonah Goldman, *supra* note 10; Interview with Anonymous Election Official (Apr. 15, .2008) (on file with the author). It is worth noting that these organizations lack the resources they need to provide such broad services to their members. The National Association of Secretaries of State, for instance, has an extraordinarily small staff and has accomplished an impressive amount with the staff it possesses. Similarly, the institution that seems to have made the most headway in promoting professional norms is the Election Center, a Texas-based nonprofit headed up by Doug Lewis. The Election Center offers training and continuing education to election administrators while serving as an advocate for their interests. Unfortunately, the Election Center is not yet big enough to reach most election administrators.

55. Interview with Leslie Reynolds, Executive Dir., Nat’l Ass’n of Sec’y of State (Dec. 11, 2007) (on file with the author).

56. Interview with Ray Martinez, Former Comm’r, Election Assistance Comm’n (Jan. 24, 2008) (on file with the author).

57. Interview with Anonymous (April 15, 2008) (on file with the author).

Index for the same reason that people “Google” their own 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 created by a credible group, there is good reason to think that an election administrator’s professional prestige would be increased by a high ranking, something that would be quite useful in a world where individuals and rule-making bodies tend to mimic high-status people and institutions.<sup>58</sup> 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. As election administrators and political scientists work through the data, they should be able to identify what policies succeed and thus help create a set of “scripts” for what a well-run system looks like.

Consider, for example, the role that the GPP has played in generating and disseminating best practices among government administrators. Why do state administrators pay attention to the GPP? Philip Joyce, one of its architects, argues that one reason that the GPP is so effective is because it is published by *Governing*, a trade publication widely read and widely respected by state administrators.<sup>59</sup> Although *Governing*’s main audience is administrators, people care about the GPP report. It may not affect an administrator’s political standing, but it matters to her professional standing.

Someone might worry that, consistent with the view of the National Association of Secretaries of State, there is too much local variation for a set of best practices to emerge within the field of election administration.<sup>60</sup> I am frankly skeptical about that claim, at least when it is cast in broad terms. It is hard to imagine that we will not be able to identify some broad policies—funding, training policies, registration systems—that would be useful across jurisdictions.

Even if it *is* impossible to create a consensus on model policy inputs, however, it should still be possible to generate professional norms about performance *outputs*. The Democracy Index could create something akin to a *lingua franca* in the realm

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58. Strang & Soule, *supra* note 49, at 274–75; Note, *supra* note 49, at 1473.

59. Interview with Philip Joyce, Professor of Pub. Policy & Pub. Admin., George Washington University (Sept. 19, 2007) (on file with the author).

60. See Interview with Leslie Reynolds, *supra* note 55 and accompanying text.

of election administration, a shared set of performance standards that would apply to localities regardless of their policy practices. For instance, a professional norm might develop that, regardless what machine one uses, no machines should exhibit anything lower than a one percent residual vote rate. The Index might similarly generate a set of performance baselines regarding the number of errors in the registration process or the number of poll worker complaints that fall within an acceptable range for a well-run system.

If we focus on the political science work on policy diffusion, we can similarly identify ways in which the Democracy Index might help promote best practices among election administrators and institutions. Political scientists think that policy diffusion is most likely to occur when innovations in other states are visible because policymakers tend to rely on information that is “timely, available, and salient.”<sup>61</sup> One of the reasons that professional associations,<sup>62</sup> “policy entrepreneurs,”<sup>63</sup> and public interest groups or think tanks<sup>64</sup> matter, says Professor Andrew Karch, is that they “typically provide timelier, more accessible, and more detailed information about policy innovations” than other sources of information.<sup>65</sup>

The Democracy Index could be useful in this regard, because it can help policymakers to identify the policy innovation needle in a haystack of widely varying practices. It is just the kind of “information shortcut” that scholars like Karch argue policymakers need. The Index would give us a pretty good sense about which states and localities have performed best and, if it is properly designed, should simultaneously offer information about which policy “inputs” drove that success. If, as Karch argues, “the most influential causal mechanisms” of the agenda-setting process are “those that can heighten the visibili-

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61. KARCH, *supra* note 49, at 8. This is, to be sure, not a conclusion reached only by political scientists. Sociologists Harold Wolman and Ed Page, for instance, have reached a similar conclusion. Wolman & Page, *supra* note 49, at 498.

62. KARCH, *supra* note 49, at 105–43; Balla, *supra* note 49. For sociology work exploring similar themes in the context of private institutions, see, for example, Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the American Workplace*, 95 AM. J. SOC. 1401 (1990).

63. Mintrom, *supra* note 49; Mintrom & Vergari, *supra* note 49.

64. KARCH, *supra* note 49.

65. *Id.* at 31.

ty of a policy innovation,”<sup>66</sup> the Index moves at least one step in the right direction.

Second, the Democracy Index might provide an opportunity to create a poor man’s substitute for a vibrant professional network. Imagine, for instance, that the Democracy Index website provided not just the rankings and the underlying performance data, 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 and contact information for jurisdictions that have implemented the policy successfully. 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. Here again, if the problem for officials is how “to sift through the massive amount of information that is available to find what is needed,”<sup>67</sup> perhaps a well-designed DemocracyIndex.com site could play a useful role.

There is limited evidence that rankings can promote this type of contact and information sharing between jurisdictions. Richard Greene of the Government Performance Project, for instance, says that states that earn a good grade on the GPP are regularly contacted by other states for more information about their policies. In Greene’s words, “States are absolutely hungry for good, solid, well-researched information to help them do what they do better.”<sup>68</sup>

The Democracy Index is not a perfect substitute for the many mechanisms that social scientists have identified for creating professional norms and diffusing policy innovations—far from it. But a ranking system does have the potential to move us a little farther in the right direction.

#### IV. THE COSTS OF SHORTCUTS

Needless to say, there are real costs to using shortcuts to jumpstart the reform process, as I detail at length in my forthcoming book.<sup>69</sup> For instance, rankings like a Democracy Index simplify. It is an inevitable consequence of trying “to provide *one* answer to a question when that answer depends on several

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66. *Id.* at 9.

67. *Id.*

68. Interview with Richard Greene, *supra* note 29.

69. GERKEN, *supra* note 7, chs. 4 & 5.

bits of data,” in the words of Oxford’s Stein Ringen.<sup>70</sup> Distilling information can serve many useful ends, but any effort to rank necessarily involves a tradeoff between precision and accessibility, or “rigor and intuition,” to use Dan Esty’s phrase.<sup>71</sup>

It is a mistake, however, to insist that rankings necessarily *oversimplify*, as if any type of shorthand is necessarily illegitimate in the policymaking world. Policymaking would be impossible without shorthand. If all shorthand were eliminated, we would not have a GDP and thus could not distinguish between an economic blip and a recession. Congress would never stop holding hearings, because there would always be more testimony to collect. *Consumer Reports* would go out of business. Heaven knows what the New York Stock Exchange would do.

Even *disaggregated* data are a form of shorthand. As Dan Esty notes, “quantification is about distillation.”<sup>72</sup> The raw ingredients of the Democracy Index are stand-ins for a vast and complicated process that no individual could possibly evaluate first-hand. The very purpose of data is to distinguish between what Esty calls “signal” and “noise.”<sup>73</sup>

Because shorthand is inevitable, the real question is what kind of shorthand to use. I have offered several reasons to favor ranking as a form of shorthand. But there are costs that accompany those benefits. The first is that voters will imbue the results with greater precision and accuracy than they deserve. The second is that a ranking may provide such a blunt tool for holding people accountable that it ends up putting pressure on the wrong people. Secretaries of state, for instance, may be pushed to do better when the real problem is the absence of adequate funding, something controlled by legislators or local commissioners. While these costs can certainly be mitigated, they cannot be eliminated. For example, the reasons the Democracy Index is likely to succeed are precisely the reasons that we are wary of indices in the first place: voters may not look past the ranking itself. The costs associated with ranking are simply the flip side of its benefits: accessibility, simplicity, and popular appeal. Given that we cannot make these problems go away, we ought to be clear-eyed about acknowledging them.

So how do we balance the benefits of accessibility against the costs of imprecision? While the costs of ranking are serious,

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70. STEIN RINGEN, WHAT DEMOCRACY IS FOR 283 (2007).

71. Interview with Dan Esty, *supra* note 13.

72. *Id.*

73. *Id.*

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in my view the benefits still outweigh them. To begin, even if voters vest too much faith in an Index, at least they will be putting their trust in what ought to be a pretty good measure of democratic performance. The fact that there is not an “objective” answer on these issues does not mean that the Index’s architects will have a license to engage in free-form engineering. There *are* answers to these questions, and some answers will be better than others. If the Index is properly designed, even those who quibble with a decision should nonetheless think it was a reasonable one.

On the other side of the equation, there are costs associated with *not* having a ranking. We come back to the “as opposed to what?” question. A ranking will surely oversimplify the state of affairs. But, as Ringen observes, “[s]ome information gets lost, but something else is gained.”<sup>74</sup> Reams of comparative data cannot give us a clear view of how jurisdictions are performing overall. As with party labels, rankings tell voters about the “big thing” even if they lose track of the “little things.” A well-designed Index fares particularly well when compared to the other shortcuts citizens and policymakers use in evaluating these questions—*anecdote*, haphazard evidence of a crisis, or partisan labels. People place unwarranted faith in each of these heuristics. Each leads to oversimplification and errors of a more significant sort than a well-designed Index will. And not one of them gets us any closer to improving our failing system. Editorial writer Meg Greenfield once observed that “[e]verybody is for democracy—in principle. It is only in practice that the thing gives rise to stiff objections.”<sup>75</sup> It is just the reverse for rankings. It is easy to be against rankings in principle. It is only in practice that they start to look good.

#### CONCLUSION

A Democracy Index would provide a better set of decision-making shortcuts than we have now. It would give voters a better cue when they cast their vote. It would give policymakers the shorthand they need to figure out whether a problem exists and how to fix it. It might even provide a professional touchstone for election administrators, helping identify the kinds of best practices that professionals have long used as a decision-making shortcut.

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74. RINGEN, *supra* note 70, at 284.

75. Meg Greenfield, *The People’s Revenge*, WASH. POST, June 14, 1978, at A27.

In my view, the field has not thought hard enough about the ways in which shortcuts can help solve the “here to there” problem in election reform. One can imagine lots of other shortcuts that might serve a useful role. Chris Elmendorf and I have written about the use of “citizen commissions” in blessing reform proposals, thus providing a potentially powerful heuristic for voters trying to figure out which proposals to trust.<sup>76</sup> Ed Foley has written about the useful role an “amicus” court could play in providing a guide to judges struggling to wade through arcane election rules.<sup>77</sup> A model election code might provide a helpful template for legislators revising election rules, offering them a set of regulations “blessed” by experts and used in other states and thus facilitating the diffusion of best practices. “Shadow” districting commissions might also provide a useful baseline for judges evaluating the merits of a districting plan.<sup>78</sup> These “here to there” strategies do little more than create shortcuts for decision makers in the reform process. For that reason, they may seem quite modest. But they are the kind of modest reforms that can make bigger, better reform possible. Shortcuts like these beat out most other reform proposals for a simple reason: they should help make those alternatives possible.

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76. See Gerken, *Double-Edged Sword*, *supra* note 2; Gerken, *Electoral Reform*, *supra* note 2; Elmendorf & Gerken, *supra* note 2.

77. Edward B. Foley, *A Model Court for Contested Elections (Or the “Field of Dreams” Approach to Election Law Reform)*, ELECTION L. @ MORITZ, June 19, 2007, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=157>.

78. See Heather Gerken, *Out of the Shadows: Private Redistricting Can Help Overcome Lawmakers’ Partisanship*, LEGAL TIMES, May 5, 2008, at 62.