

Election Administration Reform and the New Institutionalism

THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT

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INTRODUCTION

One of the hallmarks of a mature democracy is professionalized, centralized, and nonpartisan election administration. It is hardly news that the United States does not fit this model, and that since the 2000 election meltdown culminating with the Supreme Court's decision in *Bush v. Gore*,¹ the country has faced biennial anxiety over whether the next meltdown is imminent.² A decade after the Florida debacle, election law scholars and others are still grappling with how to fix an obviously broken system.

Some election law scholars at first hoped the courts would spur election administration reform through a generous reading of *Bush v. Gore*'s equal protection holding.³ Much like the Supreme Court solved the problem of grossly malapportioned districts through the creation of the "one person, one

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1. 531 U.S. 98 (2000).

2. See Richard L. Hasen, Op-Ed., *Keeping the Voting Clean*, N.Y. TIMES, Nov. 11, 2006, at A15 (referring to continued "anxiety over whether we are headed for another election meltdown").

3. See, e.g., Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore into a Vehicle for Reform?*, 9 GEO. J. POVERTY L. & POL'Y 357 (2002); Cass R. Sunstein, *The Equal Chance to Have One's Vote Count*, 21 L. & PHIL. 121, 133 (2002); Samuel Issacharoff, Op-Ed., *The Court's Legacy for Voting Rights*, N.Y. TIMES, Dec. 14, 2000, at A39.

vote” doctrine under the Equal Protection Clause,⁴ *Bush v. Gore* could have “create[d] a more robust constitutional examination of voting practices.”⁵ Despite some initial movement in this direction, courts so far have not been the vehicle of change in our system of election administration,⁶ even though the amount of election-related litigation has more than doubled since 2000.⁷

Nor has Congress taken the lead. The one piece of election reform legislation passed since 2000, the Help America Vote Act (HAVA),⁸ has not been viewed as a success.⁹ Helpfully, HAVA provided money to replace the worst-performing voting machines.¹⁰ But it also included a host of vague requirements that have increased litigation around the time of elections,¹¹ and it mandated the creation of an agency—the United States Election Assistance Commission (EAC)—that has limited enforcement authority.¹²

Faced with little action by the courts and Congress, some election law scholars, whom I dub “New Institutionalists,” have turned to institutional design. These New Institutionalists are considering new institutions or mechanisms, such as amicus courts¹³ and electoral advisory commissions,¹⁴ to prod existing institutions into reforming election administration. Heather Gerken’s significant new book, *The Democracy Index: Why Our Election System Is Failing and How to Fix It*,¹⁵ represents the most sustained effort in this New Institutionalist vein. The well-written and enjoyable book makes the case for creating a ranking of states (“the Democracy Index”) along a number of election administration criteria, such as how well the system counts votes and how long it takes voters to cast a ballot. Gerken argues that establishing the

4. *Reynolds v. Sims*, 377 U.S. 533 (1964); see also SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* ch. 3 (3d ed. 2007); DANIEL H. LOWENSTEIN ET AL., *ELECTION LAW—CASES AND MATERIALS* ch. 3 (4th ed. 2008).

5. Issacharoff, *supra* note 3.

6. Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1 (2007) [hereinafter Hasen, *Untimely Death*].

7. Marcia Coyle, *Election Litigation Has Doubled Since 2000*, NAT’L L.J., Feb. 19, 2009, <http://www.law.com/jsp/article.jsp?id=1202428407304>.

8. Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified in scattered sections of 42 U.S.C.).

9. See, e.g., HEATHER K. GERKEN, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* 14 (2009) (discussing failures of HAVA).

10. *Id.* at 14.

11. Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 89–91 (2009) (documenting the rise in election law litigation since 2000).

12. GERKEN, *supra* note 9, at 119.

13. See Edward B. Foley, *Setting an Example of Non-Partisan Judging: An “Amicus Court” for Election Cases*, ELECTION LAW @ MORITZ, Apr. 28, 2008, <http://moritzlaw.osu.edu/electionlaw/freefair/articles.php?ID=409>.

14. See Christopher S. Elmendorf, *Election Commissions and Electoral Reform*, 5 ELECTION L.J. 425 (2006) [hereinafter Elmendorf, *Election Commissions*]; see also Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1395–1404 (2005) [hereinafter Elmendorf, *Advisory Commissions*].

15. GERKEN, *supra* note 9.

Index would create the right incentives for jurisdictions to move toward professionalized and nonpartisan election administration.

Gerken's proposal, if enacted in the right way, is a worthy one that could well lead to the creation of greater professionalism in the election administration field. The public pronouncement of rubrics to measure election administration performance could spur the emergence of best practices. Furthermore, the publicity surrounding the Index and its potential to cause embarrassment could generate competition among jurisdictions. Increased professionalization of American election administration would be a notable achievement because a great deal of the potential for election meltdown stems from a lack of resources and training.

Gerken is surely right that the Index is better (I would say much better) than nothing;¹⁶ but it is no panacea. A congressionally mandated (or foundation-funded) Index likely would have insufficient strength to overcome the pathologies of partisanship and localism, both of which pervade American election administration. The war over voter identification and accusations of fraud in the 2008 election, as well as the partisan sniping in the extended Minnesota U.S. Senate recount, provide ample proof of the difficulties ahead. Even Gerken's criteria for creating the Index, emphasizing "access" over "integrity," would be viewed by some Republicans as having a conscious or subconscious pro-Democratic Party bias. Given these significant obstacles, meaningful election reform may come only when imposed from the top by a unified party government or on the state level through the initiative process, rather than cajoled from the bottom through shaming mechanisms and potential interjurisdictional competition.

Part I of this Review sets forth Gerken's proposal for a Democracy Index. Part II situates the book within the New Institutional approach to election administration reform, arguing that Gerken's work is significant not only for its specific proposal but also because it advances the New Institutionalism. Next, the same Part catalogs the various ways in which the addition of information may spark both rational and emotional reactions by election administrators, legislators, judges, the public, and political parties that could lead to improved professionalism in election administration.

Part III turns from examining the theory of the New Institutionalism's causal mechanisms to looking at the available evidence. Based upon what we know, it appears that the Index could increase the professionalism of election administration in the United States, and thereby decrease the risk of electoral meltdown. But the Index likely would not be enough to overcome the twin pathologies of partisanship and localism that have thus far blocked comprehensive election administration reform. This Review concludes by

16. *Id.* at 137 ("Even if you don't buy everything I've said, it's worth asking yourself this question: As opposed to what? Is there a better reform proposal on the horizon?").

noting that rather than the soft politics of the New Institutionalism, *Old* Institutionalism—hardball politics backed by one party or the use of an initiative bypass in states—may present the best hope of fully revamping our election administration system.

I

WHY A DEMOCRACY INDEX?

Heather Gerken is known for her sophisticated and nuanced writing, primarily in the fields of election law and constitutional law, but she is not a typical law school professor ensconced in her ivory tower. Though even the titles of her law review articles sometimes send me running for my dictionary,¹⁷ *The Democracy Index* is written informally and casually for the general reader. To keep the reader's attention, the book engages in a fair bit of storytelling and makes a valiant attempt at humor; I never expected to see references to the sport of “extreme ironing,”¹⁸ much less to Chia Pets and tongue rings,¹⁹ in a work discussing residual vote rates. Gerken is also committed to having her ideas translated into action. In the last congressional term, she worked with then-Senators Obama and Clinton to embody her ideas in legislation,²⁰ and has teamed with think tanks and foundations interested in election administration reform²¹ to advance the arguments in the book.

The book begins by detailing the problems in U.S. election administration since 2000, a recitation that will be familiar to those in the field²² but probably shocking to a more general reader. She describes the 18,000 undervotes²³ in a 2006 Florida congressional race,²⁴ which likely resulted from poor ballot design on electronic voting machines in Sarasota County;²⁵ absurdly long lines in places like Colorado;²⁶ server crashes leading to lost votes in North Carolina and Ohio;²⁷ and a host of other problems. She concludes that “[t]he best

17. See, e.g., Heather K. Gerken, *Lost in the Political Thicket: The Supreme Court, Election Law, and Doctrinal Interregnum*, 153 U. PA. L. REV. 503 (2004).

18. GERKEN, *supra* note 9, at 69.

19. *Id.* at 87. In the interest of disclosing potential bias, I have neither a Chia Pet nor a tongue ring, and would have a difficult time choosing between the two of them.

20. See *infra* Part III.

21. GERKEN, *supra* note 9, at 130 (noting 2007 conference on the Democracy Index “sponsored by the Pew Center on the States, the Joyce Foundation, the AEI-Brookings Election Reform Project and the Ohio State University Moritz College of Law”).

22. See, e.g., Hasen, *Untimely Death*, *supra* note 6; Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005) [hereinafter, Hasen, *Beyond the Margin*].

23. Undervotes are “instances where no candidate is selected in a race.” Lauren Frisina et al., *Ballot Formats, Touchscreens, and Undervotes: A Study of the 2006 Midterm Elections in Florida*, 7 ELECTION L.J. 25, 26 (2008).

24. GERKEN, *supra* note 9, at 2.

25. Laurin Frisina et al., *supra* note 23, at 31–36.

26. GERKEN, *supra* note 9, at 2.

27. *Id.* at 2–3.

evidence we have suggests that our election system is clunky at best and dysfunctional at worst.”²⁸

Gerken lingers on the words “the best evidence we have”²⁹ for good reason. When it comes to election administration, the data situation is dire. As Professor Persily recently testified to the Senate Rules Committee, “We do not really know how many voters are registered or even how many, in fact, voted in 2008.”³⁰ Our failure to collect such basic data should give a sense of the scope of the problem.

The first chapter of Gerken’s book previews her argument. She details her best guess why there are problems in running U.S. elections and puts forward her proposed Index as a solution.³¹ She begins with a problem she refers to as “deferred maintenance,”³² a category in which she includes broken voting machines, poor registration systems, inadequate poll worker training, and insufficient compensation.³³ Like others,³⁴ she focuses much of her attention on inadequate voter registration systems.³⁵

28. *Id.* at 1.

29. *See id.* at 1 n.*.

30. *Voter Registration: Assessing Current Problems, Hearing Before S. Comm. on Rules & Admin.*, 111th Cong. (2009) [hereinafter *Hearings*] (testimony of Nathaniel Persily, Charles Keller Beekman Professor of Law and Political Science, Columbia Law School); *see also* GERKEN, *supra* note 9, at 43 (“We do not know how many people *cast a ballot* during our last presidential election because 20 percent of the states do not report this information; they disclose only how many ballots were successfully counted.”).

31. Gerken notes some earlier election law scholarship expressing the importance of data in overcoming the difficulties of adopting election reform measures. *See* GERKEN, *supra* note 9, at 144 n.18; *see also* Dan Tokaji, *Weekly Comment: The Moneyball Approach to Election Reform*, ELECTION LAW @ MORITZ, Oct. 18, 2005, <http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php>.

32. I do not think that the label “deferred maintenance” is accurate. Gerken uses the analogy of the 2007 collapse of a bridge in Minnesota, which she says was due to failure to take care of aging physical infrastructure. GERKEN, *supra* note 9, at 11. But the analogy does not hold up. Presumably, the Minnesota bridge originally was well designed and built to carry its load, and over time its strength deteriorated because of the failure to take steps to forestall deterioration. In contrast, I would argue that in many jurisdictions, our election administration system was never properly designed or implemented, and that the problem is less a failure to maintain than a failure to build a system correctly in the first place.

33. *Id.* at 12.

34. *See, e.g., Hearings, supra* note 30 (Testimony of Nathaniel Persily); *see also id.* (Testimony of Stephen Ansolabehere) (“According to data from the Cooperative Congressional Election Study, 4 to 5 million people report administrative procedures as the reason for not registering, and approximately 4 million of registered voters did not vote because of administrative problems, approximately the same magnitude as we saw in 2000.”); Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453 (2008).

35. *See* GERKEN, *supra* note 9, at 13 (“What evidence we do have indicates that between one and a half and three million votes were lost solely because of problems with the registration process during the 2000 election, with several million more lost to other causes.”); *see also* Daniel P. Tokaji, *The Birth and Rebirth of Election Administration*, 6 ELECTION L.J. 118, 121 (2007) (book review) (characterizing “decentralization and partisanship” as the “two dominant characteristics of American election administration,” and citing as support Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 82 (2004)).

Gerken then lays blame for these problems with the twin forces of partisanship and localism.³⁶ As to partisanship, she notes that the United States is an outlier among advanced democracies in relying upon “election officials [who] depend on their party for their jobs.”³⁷ Using former Ohio Secretary of State Kenneth Blackwell as her poster child, Gerken details how, while he was chair of the George W. Bush reelection campaign in Ohio, Blackwell made a host of election administration decisions (such as the requirement that voter registration cards be submitted on eighty-point weight card stock) that were roundly criticized as being motivated by partisan considerations to keep down the number of new Democratic Party registrations.³⁸

Gerken also considers lack of professionalism among election administrators (state and local officials who run our elections) to be a byproduct of partisanship. Whether or not partisanship is the cause for lack of professionalism,³⁹ the lack of professionalism is certainly a problem, and it stems from the localized and decentralized nature of U.S. election administration. As Gerken details, there are no general sets of best practices, few learning opportunities for election officials, inadequate pay, and many other deficiencies. She cites a national survey of local election officials revealing “that the average election official doesn’t possess a college degree and earns less than \$50,000 per year, with some local officials earning as little as \$10,000 per year. The average local official oversees a wide range of responsibilities beyond running elections but has received fewer than twenty hours of training.”⁴⁰

“Invisibility” compounds the problem of lack of professionalism. People do not focus on election administration until there are problems, usually when it is too late to do anything about them.⁴¹ The institutional press, too, stops paying attention to problems as soon as an election ends without a meltdown.⁴² The problem of invisibility, along with concerns about partisan ramifications of election administration reforms, makes it difficult to get policymakers to dedicate enough money to fund election reform efforts.

36. GERKEN, *supra* note 9, at 15.

37. *Id.* at 16 (emphasis omitted).

38. *Id.* at 17–18.

39. Gerken states that “[a] system that depends on the political parties to staff it is unlikely to be staffed with trained experts.” *Id.* at 18. She offers no evidence that political parties tend to fill rank-and-file positions in election administration. My impression is that those positions typically are civil service positions with only the top staff chosen through political appointment.

40. *Id.* at 22 (citing ERIC A. FISCHER & KEVIN J. COLEMAN, CONG. RESEARCH SERV., RL-34363, ELECTION REFORM AND LOCAL ELECTION OFFICIALS: RESULTS OF TWO NATIONAL SURVEYS (2008)). In an effort to keep things light, Gerken reminds us a few times throughout the book that Fischer also is an expert on the sex life of hermaphroditic sharks. *See id.* at 22, 125.

41. *Id.* at 23–24.

42. *See id.* at 141; *see also* Richard L. Hasen, *Eight Years After Bush v. Gore, Why is There Still So Much Election Litigation and What Does This Mean for Voter Confidence in the Electoral Process?*, FINDLAW’S WRIT, Oct. 20, 2008, http://writ.news.findlaw.com/commentary/20081020_hasen.html.

Gerken's proposed solution to these problems (what she refers to as a "here-to-there" strategy⁴³) is the creation of a Democracy Index. The book itself does not offer an actual Index that ranks the states;⁴⁴ instead, it makes an argument for developing such an Index and, as a first step, for collecting the kind of data that would be necessary to construct the Index.

To be effective, the Index would need to appeal to "a wide range of stakeholders—voters, experts, election administrators, policymakers, and reformers," and to focus on the "nuts-and-bolts issues (the basic mechanics of election administration) . . ." ⁴⁵ that can be readily corrected. Gerken would therefore refrain from focusing on issues beyond election administrators' control.⁴⁶ To appeal to issues of concern to the average voter and to what is fairly in the ambit of an election administrator's control, "the Index ought to focus on three simple things: (1) registering voters, (2) casting ballots, and (3) counting votes."⁴⁷ More specifically, Gerken writes that the Index should assess how close a jurisdiction comes to reaching these goals:

Every eligible voter who wants to register can do so.

Every registered voter who wants to cast a ballot can do so.

Every ballot cast is counted properly.⁴⁸

Gerken argues that these three performance categories balance issues of accuracy, convenience, and "integrity," by which she means "preventing fraud."⁴⁹ As I discuss in Part III, this is the most contestable point in the book;

43. GERKEN, *supra* note 9, at 26.

44. Do not be misled by the "U.S. News"-like cover of the book, which makes it appear as though the book includes lists of the "#1 States to Vote" and of "over 300 municipalities" with "the shortest lines," the "top states where your vote really counts," the "easiest places to cast an absentee ballot," the "cities with the most accurate voter rolls," the "leading states for accurate voting machines," and the "best registration process." This hyperbole is no doubt the brainchild of someone in the publisher's marketing department rather than the fault of the author. The book's only actual election administration ranking is a ranking of states in terms of how well they reported certain data to the EAC. *See id.* at 44–47. I saw no ranking in the book of "300 municipalities" or any other list the book's cover art displays.

45. *Id.* at 26–27.

46. Gerken offers the example of low turnout as one issue potentially beyond an election administrator's control. "Low turnout . . . is caused in part by socioeconomics and the absence of competitive elections. Administrators in low-ranked states will not bother with a ranking that expects them to remedy systemic problems associated with poverty or compensate for lack of excitement about a race." *Id.* at 27. In fact, low turnout could be caused in part by election administrator failures, such as the presence of long lines, or by a lack of faith that election administrators will count the votes of people who show up. Turnout could still be a relevant measure in the Index, so long as controls were introduced to deal with issues such as socioeconomic status, as Gerken acknowledges. *Id.* at 132. If the Index focused on turnout at the top of the ballot, lack of excitement about a race should not be a serious concern. Gerken is surely right on the broader point: an Index that measured "hot-button topics like felon disenfranchisement or campaign finance," *id.* at 27, would be ill-suited as a measure of the competence of the system of election administration.

47. *Id.* at 28.

48. *Id.* at 29; *see also id.* at 123.

49. *See id.* at 29–30.

by not prominently including the standard that *only eligible voters* are able to register and vote, the list of three performance categories places Gerken clearly in the “access” instead of “integrity” camp. This means that she is advocating for an Index favoring values trumpeted by Democrats (making it easier to vote) over those favored by Republicans (making sure elections are free of fraud).⁵⁰

Gerken concludes her discussion of the main goals of the Index by discussing its design in detail.⁵¹ The Index must be constructed using simple categories with reasonably comprehensive and transparent metrics, such as the influential CalTech-MIT “residual vote rate,” which measures the difference in presidential election years between the number of voters recorded as showing up at the polls and the number of voters who cast a vote for president.⁵²

The remainder of Gerken’s book argues that the Index is likely to improve the state of U.S. election administration. Gerken posits that “[b]y presenting the right information in the right form, a Democracy Index has the potential to harness partisanship and local competition in the service of reform.”⁵³ She emphasizes the importance of having the “right information in the right form” in her comparison of the work of election law scholar Spencer Overton with that of environmental law scholar Dan Esty. Overton, a member of the Carter-Baker Election Reform Commission, issued a blistering dissent from the commission’s recommendation for adopting photographic voter identification requirements at the polls.⁵⁴ The voter identification battle later went all the way

50. At one point later in the book, Gerken refers to an administrator’s “fraud score” as part of the Index. *See id.* at 106. She also says that “we’d want to be sure that the voters being registered are eligible.” *Id.* at 124. It is not clear, however, how this fraud measure would be calculated. On the general problems of measuring election fraud and even defining it, see Lorraine Minnite, *Finding Election Fraud—Maybe*, 8 ELECTION L.J. 249, 255–56 (2009) (book review).

Elsewhere in the book, Gerken argues that the Index’s architects “should use polling and focus groups to be sure that they are including metrics that appeal to most voters.” GERKEN, *supra* note 9, at 122. If the architects did so, they might focus more on questions of “integrity,” since support for voter identification laws remains popular. *See 80% Believe Voters Should Be Required to Show Photo ID*, RASMUSSEN REPORTS, Jan. 9, 2008, http://www.rasmussenreports.com/public_content/politics/current_events/general_current_events/80_believe_voters_should_be_required_to_show_photo_id; *but see* Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1740 (2008) (“We find that voters who have been forced to show identification are no less likely to perceive fraud than those not similarly subject to an ID requirement.”). Another example of a potential gap between the opinions of experts and the public is electronic voting. By many accounts, electronic voting is one of the most accurate systems for recording votes. But public distrust of the technology and the possibility of “hacked votes” remain a salient force against its adoption, and indeed has been responsible for its abandonment in some jurisdictions. *See* Charles Stewart III, *Assessment of Voting Systems*, 8 ELECTION L.J. 261 (2009) (book review).

51. GERKEN, *supra* note 9, at 31–36.

52. *See infra* Part III (discussing residual vote rates).

53. GERKEN, *supra* note 9, at 26.

54. The dissenting statement is posted at Spencer Overton, *Dissenting Statement*, <http://www.carterbakerdissent.com> (last visited Feb. 23, 2010). *See also* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007).

to the Supreme Court, which upheld Indiana's new voter identification law, the strictest such law in the nation.⁵⁵ As Gerken tells it, Overton's side lost in the Supreme Court due to the lack of data.⁵⁶ She writes: "The Supreme Court didn't have much evidence to cite for its view that in-person vote fraud was a problem. So it cited the Carter-Baker Report, which in turn didn't have much evidence to cite It's turtles all the way down."⁵⁷

In contrast, Gerken argues, the environmental rankings that Etsy pioneered supplied countries with the right information in a form that motivated them to improve their environmental regulatory schemes.⁵⁸ Esty created the "Environmental Performance Index" (EPI), a ranking of 149 countries along twenty-five performance indicators related to the environment.⁵⁹ Gerken hopes the success of Esty's ranking system internationally can be replicated domestically for election administration. For example, when Belgium fell below its peer countries in the EPI rankings, it worked hard to pull its numbers up.⁶⁰ When South Korea was ranked relatively low, it "assembled a team of thirty people—at a cost of roughly \$5 million per year—to figure out how to do better."⁶¹

Gerken attributes the EPI's success to a number of factors: "It packages environmental concerns in the language of business, providing policymakers and voters hard data and comparative benchmarks to assess their nation's performance."⁶² It "helps reformers and policymakers pinpoint problems and identify where they can do better."⁶³ It allows for comparison between similarly situated countries,⁶⁴ and therefore can spur competition between neighbors or peer countries.⁶⁵

Gerken then argues that a similar dynamic would occur with the creation of a Democracy Index. The Index would give voters an easy-to-understand handle on how well, relative to other places, a jurisdiction administers its

55. *Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008).

56. After bemoaning the lack of data in the election administration field, Gerken looks at how the private sector, such as Wal-Mart, mines data for competitive advantage, and how the government uses data such as the Gross Domestic Product for successful government planning. GERKEN, *supra* note 9, at 49–53.

57. *Id.* at 41. There was little evidence presented in the case either that voter identification laws would prevent fraud or boost confidence, or that such laws would burden many voters. Given the paucity of evidence on both sides, Gerken does not explain why the lack of data (as opposed to other factors) led the Court to side with the Carter-Baker suppositions rather than with others making contrary arguments. It is hard to believe that the report itself did anything to change the minds of the Justices on the Court.

58. *Id.* at 54–57.

59. *Id.*

60. *Id.* at 55.

61. *Id.*

62. *Id.* at 56.

63. *Id.*

64. *See id.* at 57.

65. *See id.* at 56.

elections.⁶⁶ Further, low rankings would give competing candidates for election administration jobs (such as secretary of state) something to discuss in their campaigns.⁶⁷ She believes the Index would be immune to claims of political bias, assuming a politically neutral group, and not an organization such as the ACLU or Cato Institute, issued it.⁶⁸ But she acknowledges that in terms of public acceptance, the *content* of the Index matters as well: “If the rankings opponents can point to a set of metrics reasonably identified with one side of the partisan divide, the Index may lose its power.”⁶⁹

Gerken also argues that a ranking “should help shame local officials into doing the right thing.”⁷⁰ She points to improvement in the residual vote rate as an example of such success.⁷¹ She expects that the Index would spur a race to the top among states, or at least a race not to be at the bottom of a peer group of states.⁷² Finally, Gerken believes that the rankings would give election administrators the ammunition they need to demand from elected officials greater resources for machinery, training, and salaries.⁷³

The fourth chapter of the book delves deeper into the weeds to deal with common problems that can arise with issuing rankings. These problems will be well-known to law professors familiar with the *U.S. News* law school rankings: cheating, overvaluation of the meaning of rankings, and unintended consequences.⁷⁴ It is within this chapter that Gerken responds as best as she can to potential problems, given that there is no actual Index yet, and therefore there is no way to know whether the Index would work as intended.⁷⁵

Gerken concludes her book with a chapter (and an *Afterword*, written right after the election of President Obama, for whom Gerken served as a member of his election law team) on how to put the Index into practice. Here, Gerken recounts how she published her initial idea for a ranking system in *Legal Times*, how the idea was quickly embodied in legislation introduced by then-Senators Obama and Clinton, and how the Pew Center on the States’ “Making Voting Work” project and other foundations supported this effort.⁷⁶ If and when the

66. *Id.* at 66–72. There are, however, reasons to believe the analogy between the Democracy Index and the EPI are inapt. First, in many democracies there are large, affluent groups of citizens agitating for environmental regulation on a scale much larger than election administration reform movements in the United States. Second, countries may retaliate against other countries with low EPI scores, such as by not cooperating on trade or other issues. No such outside dynamic would occur between states with low scores on the Democracy Index.

67. *Id.* at 72–74.

68. *Id.* at 75.

69. *Id.* at 75 n.*.

70. *Id.* at 75.

71. *Id.*

72. *Id.* at 76–77.

73. *Id.* at 82–91.

74. *Id.* at 93–109.

75. Gerken argues that the Index would shift the burden of proof to election administrators with low rankings to prove that their rankings are undeserved. *Id.* at 101–03.

76. *Id.* at 110.

current Congress turns to election administration reform, Gerken and her allies are sure to push the Index idea once again.

Gerken argues for federal legislation and federal funding to support both the data collection effort and the subsequent creation of the Index.⁷⁷ Barring federal funding, she argues that the resources should come from private foundations, perhaps with support from the EAC.⁷⁸ She outlines a host of strategies to cajole jurisdictions to produce data, and to verify those data with outside sources.

In the end, Gerken concludes that the Index would be successful because it would not directly “impose standards” on election jurisdictions.⁷⁹ Rather it would use “shaming of an unusual sort” that “does not turn on some ideal standard, but holds poor performers up to a realistic baseline, challenging them to do as well as their neighbors.”⁸⁰ As I explain below, such tactics are a part of the New Institutionalism strategy of “soft politics.”

II

THE NEW INSTITUTIONALISM: INFORMATION, SHAME, AND REFORM

In contrast to earlier juricentric models of election law that are premised upon courts correcting political market failures, the New Institutional approach expects mechanisms or institutions other than courts to stimulate change. Gerken’s Democracy Index offers the richest account so far of these new mechanisms and institutions, so it is worth exploring them in some detail.

As noted in Part I, Gerken offers a number of reasons why she expects the Democracy Index to improve election administration. Some of the causal mechanisms for change that Gerken posits depend upon whether state and local election administrators act rationally upon receiving additional information and upon facing outside pressures from legislatures, courts, the public, or political parties. Other mechanisms depend upon the administrators’ emotional reactions to the rankings. Figure 1 is my interpretation of how Gerken argues that the new information about election administration performance that the Index provides could lead to improved outputs.

Under the model, new information from the Index has both a direct and indirect effect on state and local election administrators. Directly, as the straight lines indicate, the new information that the Index provides may trigger both rational and emotional responses in the administrators that could motivate them to improve election systems. Indirectly, as the arrows indicate, the new information may trigger rational and emotional responses in legislators, the public, courts, and political parties, each of whom may pressure or encourage

77. *Id.* at 118–20.

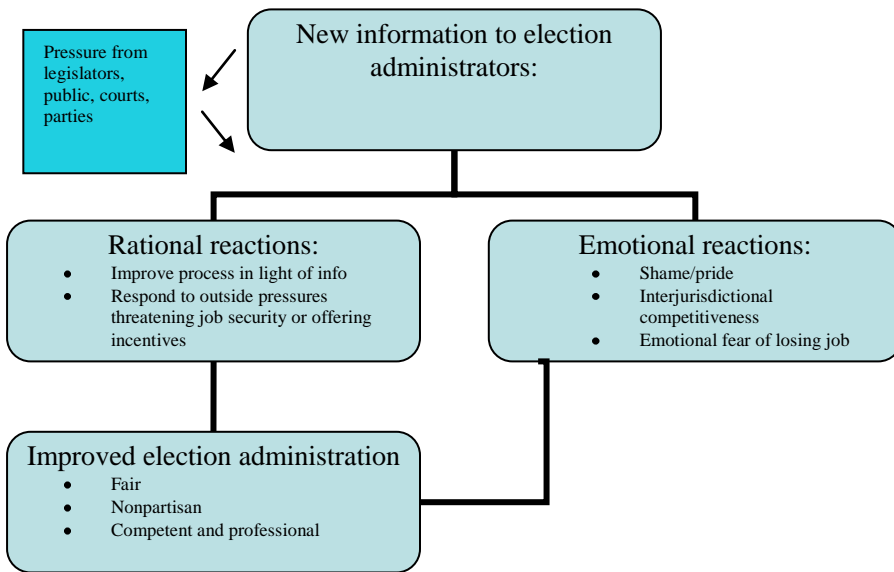
78. *Id.* at 120–21.

79. *Id.* at 134.

80. *Id.* at 135.

election administrators to act in certain ways.

Figure 1. State and Local Election Administrators' Potential Response to New Information Generated by the Democracy Index



Gerken posits that election administrators (as well as outsiders, such as legislators and the public) would react rationally to information that the Index provides and would therefore act to improve election administration. Furthermore, election administrators also would rationally respond to threats to job security and incentives for better performance from legislators, the public, and others who would want to improve their standing in the Index. Jurisdictions would learn of their strengths and deficiencies relative to other jurisdictions, and would explore the reasons for relatively low rankings. Some problems require additional funds, which are easier to justify (and demand) in the presence of comparative data. Other problems require revamping of machinery, or organizational management, chains of command, or public relations.

Gerken predicts that election administrators also would respond emotionally to the rankings. They may feel shame in not being highly ranked, or not ranked as highly as a relevant peer group. They may feel pride at being ranked highly, and may be determined to keep a high ranking. Similarly, the rankings may engender interjurisdictional competitiveness, just as the *U.S. News* rankings trigger competitive behavior among competing law schools.⁸¹ Finally, election administrators may react emotionally out of fear of losing their

81. GERKEN, *supra* note 9, at 75 (“By ranking states and localities against one another, the Democracy Index should help shame local officials into doing the right thing.”).

jobs because of disapproval of legislators, the public, and others, or, to the extent that the administrators are elected, to competitors who run against them in future elections.

Of course, legislators, the public, and others may also react rationally and emotionally to the rankings. Legislators in their oversight function may demand competent election administration, and the public may do so as well. The same forces of shame, pride, and interjurisdictional competition that motivate election administrators may drive the public, legislators, and others into pressuring election administrators to improve performance. Judges too may be influenced by the rankings, deferring more to the decision of an election administrator that a neutral ranking system deemed relatively competent than to an administrator with a low ranking.

In the next Part, I consider whether the idealized assumptions of Gerken's causal mechanism are likely to match reality. Here, I note the affinity of the Index with other New Institutionalist approaches to election reform. Consider, for example, Ned Foley's "Amicus Court" proposal.⁸² Foley would convene an Amicus Court comprised of equal numbers of Democratic judges, Republican judges, and Independent judges to evaluate high-profile election cases pending before real courts.⁸³ The Amicus Court would submit its proposed decision in the form of an amicus brief to the actual court. According to Foley, the Amicus Court could indirectly influence courts to decide cases without regard to partisanship:

Unanimity among the amicus judges would show how to resolve the case without partisanship. But even a divided ruling from the Amicus Court, given its independent tiebreaker, would cast a salutary shadow over the actual court's deliberations. If the actual result differed from the Amicus Court's, the divergence would be questioned. To avoid such scrutiny, the actual judges might follow the Amicus Court's outcome and reasoning. In this way, without government power, the Amicus Court could promote fairness — and the perception of fairness — in resolving election disputes.

Over time, if the Amicus Court develops a strong reputation for nonpartisan fairness, candidates might feel compelled to accept its judgment, pledging not to seek a contrary ruling from an actual court. The Amicus Court then would become a kind of alternative arbitration panel for election litigation, much like labor arbitration developed to settle union-management disputes. This scenario is most likely to occur if the Amicus Court's members, in addition to having blue-ribbon résumés, display judicious temperament in striving for consensus rulings grounded in the objective requirements of law.⁸⁴

82. Foley, *supra* note 13.

83. *See id.*

84. *Id.*

The underpinnings of Foley's arguments are quite similar to Gerken's. The Amicus Court could provide information about "the objective requirements of law."⁸⁵ The judges might rationally use this information as an aid to their decisions. Emotionally, judges might also feel shame if they were to deviate from the neutral Amicus Court's requirements, and would feel pride if they followed it. The public would gain a new tool to evaluate the fairness of judges, an objective baseline, much like how the Index would allow the public and legislators to evaluate the competence and fairness of election administrators.

Consider also Christopher Elmendorf's discussion of advisory electoral commissions in other countries that take on such tasks as recommending election administration and redistricting reform. He explains that independent commissions might "develop *persuasive authority* with the citizenry, i.e., the capacity to shift aggregate public opinion in the direction of the commission's preferred policy, on questions about electoral reform and legislative ethics."⁸⁶

Elmendorf points to some anecdotal evidence from the United Kingdom and elsewhere suggesting that advisory election commissions may use this kind of "bully pulpit" to shame legislators into election reform out of fear of incurring the wrath of an angry public,⁸⁷ though he notes there are not yet any systematic empirical studies to prove it.⁸⁸

Thus, Foley and Elmendorf, like Gerken, posit that both rational and emotional forces can be leveraged through information from credible sources to achieve better election administration rules. The provision of additional, neutral information, combined with the forces of shame, pride, and competition, hold out the promise of getting "from here to there."⁸⁹ The remainder of this Review considers the likelihood that Gerken's Index can achieve what it promises.

III

WOULD THE DEMOCRACY INDEX WORK?

There is a certain irony to Gerken's book: in arguing for more data to spur election administration reform, Gerken must rely primarily on anecdotes, not hard data, to show that increased information about election administration

85. *Id.*

86. Elmendorf, *Electoral Commission*, *supra* note 14, at 431. He adds that although there is little reason to think voters would generally have greater faith in independent actors than in elected representatives, it might be different in the election law context, given the self-interest problem. Elmendorf's proposal allows the advisory commission to mandate a closed-rule vote on proposed legislation (i.e., an up-or-down vote without the possibility of amendment). *See id.* at 431–32.

87. *Id.* *See also* Elmendorf, *Advisory Commission*, *supra* note 14, at 1447 (advisory electoral commissions "could enhance political competition by putting disentrenching reforms on the lawmaking agenda—and by raising the ballot-box tariff for incumbents who vote against those reforms"). Elmendorf also points to some empirical evidence of the importance voters attach to their perception that a candidate will serve the public interest in good faith. *Id.* at 1421–23.

88. *Id.* at 1448 (calling for further empirical inquiry).

89. *See supra* note 43 and accompanying text.

practices and the accompanying rankings would spur election reform. From those anecdotes, Gerken posits that when it comes to election administration reform, the Democracy Index would spark states such as New York and Pennsylvania to ask questions like “What Would Jersey Do?”⁹⁰

But how do we know what would happen? Pennsylvania has had its share of election administration problems.⁹¹ Would the rational and emotional causal mechanisms that Gerken posits actually lead a state like Pennsylvania to fix its system of election administration if it were ranked lower than New Jersey on the Index, much like the EPI spurred Belgium and Korea to fix their low environmental ratings?

Without actually putting the Index into effect, there is no way to know for sure whether it would work. Although Gerken (and the other New Institutionalists) cannot be faulted for relying primarily upon anecdote in the absence of better empirical data,⁹² my sense is that they use their anecdotes to paint too rosy a picture about the likely success of New Institutional strategies. Lacking hard data, in this Part I offer my own seat-of-the-pants empiricism on whether the Index, if created, is likely to improve U.S. election administration.

My hypothesis is that the Index is likely to lead to improvements to the extent it measures things that are (1) easily susceptible to measurement and (2) not subject to much ideological disagreement. On these matters, relative rankings could well work, like the EPI, to provide relevant information to rational decision makers and to elicit emotions of shame, pride, and competition that would spur professionalization and the allocation of additional resources to election administration reform efforts. However, much of election administration is so politicized that the Index, or at least the Index alone, would be unlikely to bring us to Gerken’s ideal. Moreover, the forces of localism are likely to reject reliance on an Index that could lead to the emergence of national standards that would weaken local power and control.

A. The Democracy Index and Increased Professionalism

I begin with an example showing how the Index could work to improve performance and professionalism in the case of easily measured, relatively nonideological indicators of election administration performance. Consider the residual vote rate, which measures the difference between the number of voters recorded as showing up at the polls and the number of voters who cast a valid

90. GERKEN, *supra* note 9, at 88.

91. See the work of the voter organization VotePa, as chronicled on the website <http://www.votepa.us/>.

92. Gerken does rely upon data about mimicry and norm diffusion. See GERKEN, *supra* note 9, at 87. For reasons I give in the next Part, though, it is not clear that these general trends would apply in the election administration context.

vote for a candidate at the top of the ticket in any given election.⁹³ A voluntary choice of voters not to cast a vote for the top of the ticket (undervoting) accounts for some of the residual vote rate. But problems with how voters try to cast votes that either are not correctly recorded on the ballot (such as when a voter inadvertently “overvotes” for more than one candidate for the office), or are not correctly counted on the voting machine, also partially accounts for the residual vote rate. Though there is some reason to think that the rate of deliberate undervoting could differ somewhat by race or other categories,⁹⁴ logically the choice to undervote should not depend on the type of machinery used,⁹⁵ especially if one controls for socioeconomic factors.

The residual vote rate, then, can be used as a diagnostic tool to ferret out problems with election administration, especially vote counting and casting technology. Consider the controversial California gubernatorial recall election in 2003. The recall ballot contained only four questions: (1) should the sitting governor be recalled (yes or no)?, (2) if he is recalled, who should replace him?, and (3) and (4) posed questions on unrelated ballot measures.⁹⁶ According to Henry Brady’s calculations, the residual vote rate for the top of the ballot, the first question on the recall, was more than 5 percent of voters in counties using unreliable punch card technology, with Los Angeles (then a punch card jurisdiction) coming in just below 9 percent of the ballots.⁹⁷ It defies reason that one in eleven Los Angeles voters would turn out to vote in the recall election, and then deliberately decide not to vote for or against the recall. The 9 percent figure is especially disconcerting in light of the 0.74 percent residual vote rate in Alameda County, a jurisdiction somewhat similar in demographics to Los Angeles but different in that it used electronic voting machines.⁹⁸

The residual vote rate is relatively easy to measure because it requires knowing only two numbers: the number of voters reported to show up at the polls, and the total number of votes cast for all candidates at the top of the

93. Charles Stewart III, *Residual Vote in the 2004 Election*, 5 ELECTION L.J. 158, 158–59 (2006).

94. See Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?*, 47 AM. J. POL. SCI. 46 (2003).

95. Some have suggested that voters using electronic voting machines feel pressured not to undervote by the machines’ “review page” allowing voters to confirm their choices, but I have seen no academic studies of this phenomenon.

96. CAL. ELECTIONS DIV., OFFICE OF SEC’Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE: STATEWIDE SPECIAL ELECTION 4 (2003), available at <http://vote2003.sos.ca.gov/voterguide/english.pdf> (“At the October 7, 2003, Statewide Special Election there will be three questions on the ballot. The first is a two-part question regarding the recall of the governor. The second and third questions are ballot measures (Propositions 53 and 54).”).

97. Henry E. Brady, *Postponing the California Recall to Protect Voting Rights*, 37 PS: POL. SCI. & POL. 27, 30 (2004).

98. *Id.*; see also Richard L. Hasen, *The California Recall Punch Card Litigation: Why Bush v. Gore Does Not “Suck,”* in CLICKER POLITICS: ESSAYS ON THE CALIFORNIA RECALL 170, 178 (Shaun Bowler & Bruce E. Cain eds., 2006).

ticket.⁹⁹ Thus, its use as a measure of election administration effectiveness is not open to much question. Put differently, there is no sound ideological argument for high residual vote rates.

The Caltech-MIT Voting Technology Project focused its attention on residual vote rates in the aftermath of the 2000 Florida debacle,¹⁰⁰ and we have seen marked improvement in residual vote rates nationally since 2000.¹⁰¹ Once the project began measuring the residual vote rate, Congress devoted HAVA funds to replacing unreliable voting machines, since they are a major factor in high residual vote rates.¹⁰² The example shows how increased information to policymakers can lead to reform.

Public attention to residual vote rates continues, with the *New York Times* recently calling attention to a report from the Florida Department of State¹⁰³ comparing the residual vote rates in Florida in the years 2000, 2004, and 2008.¹⁰⁴ In 2000, when Florida counties used many different kinds of voting machines, including unreliable punch card machines, the residual vote rate was 2.9 percent.¹⁰⁵ Then, in 2004, Florida shifted mostly to electronic voting machines and the number plummeted to 0.41 percent.¹⁰⁶ Eventually, in 2008, Florida abandoned those machines due to public concern about their security, shifting in many counties to the use of optically scanned ballots.¹⁰⁷ The residual vote rate then rose to 0.75 percent.¹⁰⁸ The shift was unsurprising, given that electronic voting machines are very good at preventing voters from inadvertently voting for more than one candidate for a race (overvoting).¹⁰⁹ Interestingly, when it comes to shaming, the *Times* headline negatively characterized Florida's 2008 residual rate as "doubling" since 2004.¹¹⁰ However, many experts in the field believe that a residual vote rate under 1 percent is a good election administration practice.¹¹¹ Florida's choice to

99. Perhaps surprisingly, these numbers are not always generally available. See *supra* note 30 and accompanying text.

100. See Caltech-MIT Voting Technology Project, Residual Votes, <http://www.vote.caltech.edu/drupal/taxonomy/term/43> (last visited Feb. 23, 2010) (collecting the project's research on the topic of residual votes).

101. See Stephen Ansolabehere, *Voting Machines, Race, and Equal Protection*, 11 *ELECTION L.J.* 61 (2002); Stewart, *supra* note 93.

102. See *supra* note 100.

103. FLA. DEP'T OF STATE, ANALYSIS AND REPORTING OF OVERVOTES AND UNDERVOTES FOR THE 2008 GENERAL ELECTION (2009), available at http://election.dos.state.fl.us/reports/pdf/Over_Under_Report_08.pdf.

104. Gary Fineout, *Invalid Ballots in Florida Doubled in 2008*, N.Y. TIMES, Feb. 26, 2009, at A21.

105. FLA. DEP'T OF STATE, *supra* note 103, at 4.

106. *Id.*

107. Fineout, *supra* note 104.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (quoting Professor Jones as stating that a residual vote rate below 1 percent was on the "good side"); cf. GERKEN, *supra* note 9, at 90 ("[A] professional norm might deem that voting

abandon electronic voting machines, whose security the public had come to doubt, in exchange for a higher but still very low residual vote rate, seemed like a reasonable choice for the state to make.

In any event, Florida's experience with changes in the residual vote rate since 2000 demonstrates that when the right factors come together—easily measurable data, money, and ideological agreement on the direction of change—election administration reform is possible. To the extent that the Index could find criteria to measure that are comparable to the residual vote rate, the Index would be able to succeed in improving election administration. As best practices develop and money is targeted to solve problems about which there is ideological agreement and which are solvable with better data and more money, professionalization of election administration should increase.¹¹²

Unfortunately, as demonstrated below, few other election administration rubrics will be as nonideological and as easily measured as the residual vote rate. If Pennsylvania can credibly claim that the Index is biased, or that New Jersey values the wrong things in its election administration process, Pennsylvania's attitude may be less "WWJD?" and more that of Rosanne Rosannadana.¹¹³

B. The Problems of Partisanship

Despite Gerken's noble intentions, I have little doubt that the Democracy Index, at least as currently framed, would be painted as a partisan effort to help Democrats in the election administration wars. The Index faces this danger not just because Gerken worked for President Obama's presidential campaign, a fact she notes in the book's *Afterword*,¹¹⁴ but also because Gerken's election administration arguments are vulnerable to claims of partisanship because they will resonate more with Democratic concerns about accessibility than Republican concerns about integrity.

machines should not produce a residual vote rate higher than 1 percent.”).

112. Even in the face of problems, however, states do not always legislate election administration reform. See Hasen, *supra* note 6, at 18 (“For example, given that there were over *twenty* lawsuits brought challenging one or another aspect of California recall law in 2003, the California legislature has done nothing to fix the obvious contradictions and problems with the California Elections Code. My favorite example is the internal code contradiction on the rules for nominating someone to be a replacement candidate in the event voters choose to recall a sitting governor. The recall rules state that the ‘usual nomination rules shall apply’ to recall elections. And the first of the ‘usual nomination rules’ provides that the rules do not apply to recall elections. The California Secretary of State then applied the rules (which normally apply to primary elections) requiring that candidates wishing to run for governor in the recall provide only 65 signatures and \$3,000, leading to the unwieldy 2003 election and ballot featuring 135 candidates for governor, including the child actor Gary Coleman, a porn star, and a watermelon-smashing Gallagher.”).

113. Rosannadana was a *Saturday Night Live* character created by Gilda Radner who made consistently disparaging remarks about New Jersey. See ALAN ROSENTHAL & MAUREEN MOAKLEY, *THE POLITICAL LIFE OF THE AMERICAN STATES* 221 (1984).

114. GERKEN, *supra* note 9, at 139–42.

Recall that Gerken writes that the Index should assess how close a jurisdiction comes to reaching these goals:

Every eligible voter who wants to register can do so.

Every registered voter who wants to cast a ballot can do so.

Every ballot cast is counted properly.¹¹⁵

These factors put Gerken on the “access” side of the “access” versus “integrity” debate.¹¹⁶ A Republican would likely ask: where is the concern about potential voter fraud? Where are the measures of voter registration fraud? Why not list as one of the core Index principles the idea that no ineligible voters may register to vote or cast a ballot?

ACORN gets no mention in the book, not even in the book’s *Afterword* reflecting on the 2008 election, despite the fact that for Republicans, voter registration fraud committed by ACORN employees was *the* election administration story of 2008.¹¹⁷ The Republican demonization of ACORN was such a part of the 2008 campaign that it appeared in one of the presidential debates, when Senator John McCain, the Republican presidential nominee, hyperbolically accused the group of being “on the verge of maybe perpetrating one of the greatest frauds in voter history in this country, maybe destroying the fabric of democracy.”¹¹⁸

This is not to say that Gerken’s Index would not consider rubrics such as the amount of voter registration fraud (though to the extent such fraud is outside the control of election administrators, perhaps it would not).¹¹⁹ As noted above,¹²⁰ Gerken does suggest some “fraud” measures generally, though it is difficult to know what they would be and how “fraud” would be measured. But preventing registration fraud does not figure at all prominently in Gerken’s book, further illustrating that she sides with Democratic “access” over Republican “integrity.”

More importantly, the book does not acknowledge that a cumulative ranking of election administration in the states would have to come up with

115. *Id.* at 29; *see also id.* at 123.

116. *See supra* text accompanying notes 50–52 (explaining access versus integrity debate).

117. *See* Joel A. Heller, Note, *Fearing Fear Itself: Photo Identification Laws, Fear of Fraud, and the Fundamental Right to Vote*, 62 VAND. L. REV. 1871, 1907–08 (2009).

118. Jess Henig, *ACORN Accusations*, FACTCHECK.ORG, Oct. 18, 2008, http://www.factcheck.org/elections-2008/acorn_accusations.html. *See generally* Daniel P. Tokaji, *Voter Registration and Institutional Reform: Lessons from a Historic Election*, 3 HARV. L. & POL’Y REV. ONLINE, Jan. 22, 2009, http://www.hlpronline.com/Tokaji_HLPR_012209.pdf (recounting the disputes over ACORN and third party voter registration). ACORN has faced new controversies since the 2008 election, leading to numerous investigations and a cutoff of federal funding. Judy Keen & William M. Welch, *For ACORN, Controversy Now a Matter of Survival*, USA TODAY, Sept. 24, 2009, at 1A. Nonetheless, a recent Congressional Research Service report found no evidence of voter fraud by the group; *see also* John Schwartz, *Report Uncovers No Voting Fraud by Acorn*, N.Y. TIMES, Dec. 24, 2009, at A15.

119. *See supra* note 46 and accompanying text.

120. *See supra* note 50.

some way of measuring the tradeoff between access and integrity. Consider, for example, a statistic showing that one state turns away more voters because they lack photographic identification at the polls than another state does. Should the Index use this factor to give the state turning away voters lacking identification a *lower* score, on the grounds that not every eligible voter who wishes to cast a valid ballot should do so, or should the Index use it to give that state a *higher* score, on the grounds that the state has done more than others to deter voter fraud?¹²¹ A single Index score cannot do both, and dual scores would defeat the Index's purpose of removing a partisan valence from the rankings.

Perhaps, then, it is no surprise that no Republicans agreed to cosponsor either then-Senator Obama's bill putting the Index into federal law,¹²² or then-Senator Clinton's bill that, among other things, would have required a study of the Index's feasibility.¹²³ Consider also the access-oriented (as opposed to integrity-oriented) types of data that likely would have been collected under the 2007 Obama bill:

- (1) The amount of time spent by voters waiting in line.
- (2) The number of voters who appeared at, or were incorrectly directed to, the wrong polling place.
- (3) The rate of voter ballots discarded or not counted, and the reasons those voter ballots were discarded or not counted.
- (4) Provisional voting rates, including the percentage of provisional ballots that were cast and not counted and the reasons those provisional ballots were not counted.
- (5) The number and a description of registration and election day

121. I am not arguing that voter identification laws in fact deter voter fraud. In fact, I believe that such laws do little, if anything, to prevent such fraud. But the point is that this is a contested political position, one that would not be subject to technocratic resolution by the crafters of the Index. Even if one took the position that such laws do little to deter fraud, an Index that discounted the value of voter identification for this reason would be seen as weighing in on one side of the access-integrity debate.

It might be valuable to construct an index measuring only questions of voter access, or two separate measures of "access" and "integrity," but such indices would be unlikely to serve the bipartisan shaming functions on which Gerken's argument depends.

122. Voter Advocate and Democracy Index Act of 2007, S. 737, 110th Cong., 1st Sess. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-737> (cosponsored by Sen. Feingold). Similarly, Obama's Deceptive Practices and Voter Intimidation Prevention Act of 2007 had twenty-one cosponsors in the Senate, all Democrats, and sixty cosponsors in the House, all Democrats. See S. 453, 110th Cong., 1st Sess. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-453>; H.R. 1281, 110th Cong., 1st Sess. (as passed by House of Representatives, June 25, 2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1281>.

123. Count Every Vote Act of 2007, S. 804, 110th Cong., 2d. Sess. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-804> (cosponsored by seven Democratic Senators). The House version of the Clinton bill was sponsored by a Democratic Representative and cosponsored by twenty-one Democrats. See H.R. 1381, 110th Cong., 1st Sess. (2007), available at <http://www.govtrack.us/congress/bill.xpd?bill=h110-1381>. No Republicans cosponsored the proposed legislation.

complaints, including any problems faced by individual voters in becoming involved and participating effectively in the process and the reasons given for such problems.

(6) The rate of voting system malfunctions and the average time required to put malfunctioning voting systems back online or otherwise correct the malfunction, or to replace them.¹²⁴

Although Gerken notes that “John McCain [has] [] long been interested in election reform,”¹²⁵ there is no indication that the Index has sparked any interest by Senator McCain (one of the leading pro-reform Republican senators) or by anyone else on the Republican side of the aisle, or that it would be viewed as anything but a Democratic plan concerned primarily with voter access. When it comes to election reform, Republicans have cared primarily about questions of voter fraud,¹²⁶ and it is likely that any ranking system that does not place that issue front-and-center would not be accepted on that side of the aisle. To the extent Republicans discuss access, it is typically around the issue of improving election administration for overseas military voters,¹²⁷ a question that does not receive much attention in Gerken’s book.¹²⁸

As I have chronicled elsewhere, partisan wars over voter identification have spilled into state legislatures, with Democrats supporting legislation allowing election day voter registration to ease voter access, and Republicans favoring voter identification laws on the grounds of election integrity.¹²⁹ Republicans sometimes view such Democratic efforts as easing the way for ineligible voters to vote, or for allowing eligible voters to cast more than one ballot. Democrats, in contrast, frequently see voter identification laws as a means of suppressing the votes of likely Democratic voters. One of the ugliest situations dealing with this issue was in Texas, where in 2007 Democrats had to wheel in a Democratic Senator recovering from a liver transplant in a hospital bed to vote to filibuster a Republican-favored voter identification law in the Texas Senate.¹³⁰ Two years later, Texas Republicans pushed through a special rule exempting voter identification bills from the possibility of a filibuster, and

124. See S. 737.

125. GERKEN, *supra* note 9, at 119.

126. See, e.g., JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (rev. ed. 2008).

127. See Richard L. Hasen, *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 CORNELL L. REV. (forthcoming 2010) (recounting history of recent legislation helping overseas military voters favored by Republicans), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1532424.

128. I have no reason to doubt that Gerken favors improving election administration issues for overseas military voters. But the fact that she chooses not to highlight the issue will serve as a signal to Republicans that the issue is relatively low on Gerken’s priority list.

129. See, e.g., Hasen, *Untimely Death*, *supra* note 6; Hasen, *Beyond the Margin*, *supra* note 22.

130. Mark Lisher, *Ill Senator Settles in for Voter ID Fight*, AUSTIN AM.-STATESMAN, May 22, 2007, at B1.

the bill passed the Texas Senate on a party-line vote.¹³¹

Consider as well the partisan recriminations over the state of election administration in Minnesota in light of the 2008 Senate contest between the incumbent Republican Senator Coleman and successful Democratic challenger Al Franken. Minnesota has a reputation for sound and fair nonpartisan election administration, at least compared to its surrounding neighbors.¹³² Yet with a razor-thin race, every problem with election administration was seen through a partisan lens, as when Professor Stokes Paulsen attributed the decisions to count or not count certain ballots in the recount to partisan mischief,¹³³ and when the *Wall Street Journal* editorialized that the recount process was “being overseen by Democratic Secretary of State Ritchie, who isn’t exactly a nonpartisan observer.”¹³⁴

In this intensely partisan atmosphere, it is hard to imagine the creation of an overall Index that could transcend the election administration wars. The few attempts at bipartisanship have mostly failed, including HAVA and the Carter-Baker Commission, which many Democrats, including Gerken, characterized as making poor decisions in the face of insufficient data.¹³⁵

Intense partisanship means that if the Index were actually promulgated, campaigns for secretaries of state would be unlikely to coalesce around the rankings. If Republicans could paint the Index as slanted toward the Democratic Party, the Index would be lost in the partisan noise. In any case, party label would likely be more important than Index score in influencing how voters vote in low-salience secretary of state races. Indeed, Democrats in recent years have been raising money for secretary of state races by promising that electing Democratic secretaries of state would protect against partisan election administration by Republicans.¹³⁶ And while Democrats have portrayed Jennifer Brunner, the Democrat who replaced the controversial Kenneth Blackwell as Ohio’s Secretary of State, as a fair and nonpartisan reformer, Republicans believe she has tilted election administration in favor of Democratic interests. Republicans even went as far as the U.S. Supreme Court to attempt to overturn Brunner’s decision not to allow local Ohio election jurisdictions to use a HAVA-mandated list of “mismatches” between voter registration databases and motor vehicle department records as a basis for

131. Graham Leader Online, *Voter ID Bill Passes Texas Senate*, Mar. 24, 2009, <http://www.grahamleader.com/news/get-news.asp?id=15283&catid=1&cpg=get-news.asp>.

132. See Steven F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 137 (2007).

133. Michael Stokes Paulsen, Op-Ed., *The Minnesota Recount Was Unconstitutional*, WALL ST. J., Jan. 15, 2009, at A11.

134. *Mischief in Minnesota*, Editorial, WALL ST. J., Nov. 12, 2008, at A18.

135. Gerken, *supra* note 9, at 39–41.

136. See Avi Zenilman, *Secretaries of State Give Dem Firewall*, POLITICO, Nov. 2, 2008, <http://www.politico.com/news/stories/1008/15105.html> (recounting actions of “Secretary of State Project”).

excluding voters from the polls.¹³⁷

The partisan nature of election administration in this country makes the analogy to the EPI, discussed above, a strained one. No credible foreign leaders will speak out against a clean environment or against the EPI. There may be differences across countries over how to achieve reductions in pollutants in the air and sea, but there is widespread agreement that reducing pollutants is a good thing. There is much less consensus within the United States—beyond lower residual vote rates—about what makes up a good system of election administration. For Gerken’s plan to succeed, she will have to be much more specific about how the Index would actually work.¹³⁸ In addition, the partisan debate would need to cool down before the Index could have a major effect on election administration in this country.

C. The Resistance of State and Local Election Officials

As if the likely partisan resistance to the use of the rankings would not be enough of an impediment to the success of Democracy Index, Gerken may underestimate the power of local and state interests to block Congress from promulgating any uniform standards (or even “best practices”).

Gerken acknowledges the power of localism. She quotes former EAC Commissioner Martinez discussing the “pushback” he encountered whenever the EAC raised the possibility of crafting best practices.¹³⁹ Moreover, she notes that the National Association of Secretaries of State, a bipartisan group of state chief election officers, “demanded that Congress dismantle [the EAC] even before all of its members had been appointed.”¹⁴⁰

137. The case over the Ohio Secretary of State’s refusal to produce a list of mismatches between state voter registration databases and the statewide motor vehicle database went all the way to the U.S. Supreme Court a few days before election day. The Court held that the Ohio Republican Party could not sue the secretary for her alleged failure to follow a provision of HAVA regarding database mismatches because the party was unlikely to be able to prove that the statute created a private right of action. *See Ohio Republican Party v. Brunner*, 129 S.Ct. 5 (2008).

138. Gerken needs to go further in providing specifics for how a consensus ranking could actually be created. *See Jessica Leval, Viewpoint: How Do You Measure Election Reform?*, AEI-BROOKINGS ELECTION REFORM PROJECT, Apr. 1, 2009, <http://www.electionreformproject.org/Resources/830152c3-a32a-459e-9cdf-391880863433/r1/Detail.aspx?emc=lm&m=224304&l=29&v=209825> (“While Gerken successfully tackles the political questions and practical methods for the overall creation of a Democracy Index, she provides only general topics with potential proxy measurements that are often slightly too amorphous to translate into specific questions to be included such an Index.”). Some of Gerken’s lack of specificity may be deliberate. *See Michael S. Kang, To Here From Theory in Election Law* 87 TEXAS L. REV. 787, 789 (2009) (reviewing GERKEN, *supra* note 9) (“Gerken offers mainly strategic agnosticism about the Democracy Index’s details for fear of compromising its political viability before the idea gets off the ground.”).

139. GERKEN, *supra* note 9, at 88.

140. *Id.* at 114. This is a position that NASS has consistently maintained and not reversed to the best of my knowledge.

The history of election administration in this country is one of hyper-decentralization.¹⁴¹ Much of the power for administering elections rests at the sub-state level, at the county level or lower. Local election officials mistrust state officials, and neither local nor state officials want the federal government interfering with traditional state prerogatives in administering elections.

So far as I know, political scientists have yet to study whether the lobby of local and state election administrators, including the National Association of Secretaries of State, the National Association of State Election Directors, and the Election Center, is powerful enough to block federal election reform that impinges on state and local control. But anecdotal evidence (again, the best we have) suggests the forces are considerable. The common wisdom about election administration reform in the current congressional environment is that anything that increases a federal role over state and local election administrators is a nonstarter because of the power of these groups. For example, Congress, in enacting HAVA, granted the EAC only minimal power to issue rules or regulations binding on state or local governments.¹⁴²

The Index, of course, does not impose standards on state and local officials. But given that local election administrators have fought the promulgation of best practices, they are likely to fight the creation of the Index as well. Moreover, to the extent that the legislation creating the Index were to mandate nothing but data collection, it is not clear that forces of shame or pride would overcome local resistance to uniformity and centralized control.

CONCLUSION

Gerken's engaging book asks all the right questions, and creatively considers how to move from "here to there" in election administration reform. It is a breath of fresh air from earlier juricentric thinking about reform. To the extent that data collection can lead to rankings based upon objective measures subject to ideological agreement, the Index would be likely to increase the professionalization of election administration in the United States and thereby to decrease the chances of electoral meltdown.

As Part III shows, however, the Index has its limitations as well. Some measures of election administration are not as easily quantified as a residual vote rate, and some measures have an ideological dimension. The measures that Gerken proposes are ones that fall on the Democratic Party/access side of the

141. See ALEC EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* (2009).

142. The EAC may issue binding regulations in one area: mail registration under the NVRA. See 42 U.S.C. § 15329 (2006); see also 42 U.S.C. § 1973gg-7(a) (2006). The EAC deadlocked on the one major issue it considered under this power. See Sean Greene, *Arizona Secretary of State prepares for legal action against the EAC*, ELECTIONLINE WEEKLY, Apr. 3, 2008, http://www.pewcenteronthestates.org/uploadedFiles/wwwpewcenteronthestatesorg/Reports/Electionline_Reports/electionlineWeekly04.03.08.pdf.

access versus integrity debate. I sympathize with the values embodied in Gerken's Index, but the political reality is that the Index would be viewed through partisan lenses. As a result, unless it moved more toward incorporating "integrity" values, the Index would not be likely to gain universal acceptance as a technocratic nonideological improvement in this partisan era. Moreover, the lobbying forces of state and local election administrators appear considerable, and at this point they seem resistant even to soft attempts to cajole them into developing a set of best practices.

Gerken rightly asks the "compared to what" question. It is easier to knock down Gerken's proposed "here-to-there" strategy than to propose something else that might work better. Nevertheless, here I briefly propose two "old institutionalist" suggestions.

First, election reformers should lobby state legislatures and Congress in cases of unified party control of the executive and legislative branches to pass election administration reform packages. The experience after 2000 shows that the best predictor of election administration reform is unified party control.¹⁴³ Reformers should press Democrats in Congress to pass an election reform package, even over Republican objections, which would directly impose certain best practices on state and local governments, such as maximum residual vote rates and maximum poll wait times. In light of both registration problems and registration fraud, registration reform should be enacted. Overseas voting, by military personnel and others, should be improved greatly. This is an old institutionalist answer, but one that does not depend upon courts: have legislative leaders use typical hardball politics to push reform through a legislative body.¹⁴⁴

Second, wealthy individuals interested in election administration reform should back nonpartisan election administration initiatives in those states with an initiative process. For example, California should consider an initiated constitutional amendment removing the power to administer elections from the partisan elected office of Secretary of State, and place that power in the hands of a nonpartisan appointed election official, nominated by the governor and subject to a 75 percent approval of the state legislature. Both Democrats and Republicans would likely consider fair anyone who can get 75 percent approval of the state legislature.¹⁴⁵ This idea is also old institutionalist in that it uses the initiative process to bypass a state legislature that likely would not tackle

143. Doug Chapin & Daniel J. Palazzolo, *Beyond the End of the Beginning*, in *ELECTION REFORM: POLITICS AND POLICY* 225, 227 (Daniel J. Palazzolo & James W. Ceaser eds., 2005).

144. Somewhat surprisingly, Democrats recently supported Republican-favored legislation making it easier for overseas military voters to vote. In 2009, Congress passed the Military and Overseas Voter Empowerment Act, which expands the rights of military and other overseas voters to cast a vote that will be counted in federal elections. P.L. 111-84 §§ 575-89, 123 Stat. 3409 (2009). It is unclear what Democrats expect to get in return, since the prospect of more comprehensive election administration reform from Congress seems uncertain at best.

145. For more on this proposal, see Hasen, *Beyond the Margin*, *supra* note 22.

election administration reform by itself.

There is no harm in trying to use the Democracy Index to encourage and cajole improvements in election administration. If such an Index can be created, it would surely improve the professionalization of election administration in this country. The collection of data alone would be a great leap forward in our understanding of elections and election problems. But it may take much more than an Index to move us from “here to there.”