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The Invisible Election: Making Policy in a World Without Data

HEATHER K. GERKEN*

I. INTRODUCTION

Election policy gets made in a world without data. Recently I've proposed a solution to that problem – creating a Democracy Index, which would rank states and localities based on how well their election systems are run. Imagine a U.S. News and World report for the election system that would rank jurisdictions based on basic questions that matter to voters: How long did you stand in line? How many ballots got discarded? How many machines broke down? This idea – one that was put into legislation by then Senators Barack Obama and Hillary Clinton – is the first and most useful step we could take to improving our badly administered election system.

Elsewhere, I have described why a Democracy Index should help get change passed.¹ Here, I want to focus on a different question: how to figure out what kind of change we want. Part II describes the problems associated with policymaking in a world without data. Part III explains why a Democracy Index, by pulling together the right data in the right form, would provide a much-needed corrective to ongoing debates about election policy.

* J. Skelly Wright Professor of Law, Yale Law School. What follows is a modestly expanded, lightly footnoted version of a speech I delivered on January 22, 2009 as part of the Ohio Northern University Dean's Lecture Series. An extended and more detailed argument can be found in my book, *THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT* (Princeton University Press, 2009).

1. Heather K. Gerken, *Shortcuts to Reform*, 93 MINN. L. REV 1582 (2009).

II. POLICYMAKING IN A WORLD WITHOUT DATA

A. A New Style Reform Encounters an Old Problem

Spencer Overton, a former professor of law at George Washington University who now works in the Office of Legal Policy, does not fit the stereotype of an election reformer.² Polished and professional, it is easier to imagine him in Armani than Birkenstocks. Overton draws his idealism from a civil rights background and is capable of talking about the right to vote in stirring terms. But with his Harvard Law degree and measured baritone, it is as easy to imagine him relating to corporate executives as to public interest lawyers. Perhaps unsurprisingly, Overton has often served as a translator for the reform community. His first book recast complex and sometimes arcane election law questions in terms that everyone can understand.³ In Overton's words, the goal of the book is to show "the relationship between the technical details of election administration and big questions of power."⁴

People have written a good deal about the new generation of reformers. Entrepreneurial and pragmatic, they eschew old political divides and attack problems with the hard head of a corporate executive. They look to a variety of institutions (the market, administrative agencies) and not just the courts for solutions. They are as likely to appeal to business-minded ideas – accountability, competition – as progressive values like participation and empowerment. Overton perfectly embodies this new style.

Overton's problem is that he is fighting for change in a world without data. Indeed, he found himself in the middle of one of the biggest election policy debates we have seen in recent years – one that made it all the way to the Supreme Court – and lost in large part because he did not have the data he needed to make his case.

1. Voter ID and the Carter-Baker Commission

The policy fight was over voter identification – the requirement that voters show a government-issued photo ID when they cast a ballot at the polls. Voter ID has been a significant source of contention in election circles. Conservative commentators insist that an ID requirement deters fraud. Liberal commentators counter that the requirement is a disguised effort to suppress

2. What follows below is drawn from Spencer Overton's dissent to the Carter-Baker Commission, <http://www.carterbakerdissent.com/dissent.php>; an article he wrote on the controversy, Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631 (2007); and two telephone interviews with Spencer Overton conducted by the author.

3. SPENCER OVERTON, *STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION* (2006).

4. Telephone interview with Spencer Overton (Nov. 15, 2007).

(largely Democratic) votes.⁵ The rhetoric on both sides of the issue has been quite heated, with one side talking about “stolen” elections and the other side equating ID requirements with voter suppression.

Overton became embroiled in the issue when it was taken up by the Commission on Federal Election Reform, chaired by former Democratic President Jimmy Carter and former Republican Secretary of State James Baker. Though most of the members of the bipartisan Commission had strong political ties, it included a handful of academics, including Overton.

The Carter-Baker Commission eventually staked out a position on voter ID that looked an awful lot like a political deal.⁶ It roughly tracked the compromise that would emerge if a prominent Democrat and a prominent Republican sat down to work out something both sides could live with. The Commission blessed the ID requirement (something Republicans usually want) while demanding that the state take affirmative steps to distribute IDs (something that Democrats would want if forced to accept an ID requirement in the first place).

Deal or no deal, the main problem with the Commission’s position was that it was utterly unsupported by empirical evidence. A pure political compromise can be produced without coming to grips with the empirics; a sound decision cannot. Although the Commission did an excellent job of amassing data on how our election system is run in many areas, this was not one where it managed to find much. As the Commission itself stated, there is “no evidence of extensive fraud in U.S. elections[.]”⁷ To the extent there is evidence of fraud, it is almost entirely due to absentee voting scams or ballot-box stuffing, not the type of fraudulent in-person voting that photo ID is supposed to deter. The only other justification that the Commission offered for its decision was that a photo ID requirement would enhance public trust in the system.⁸ That claim, too, was unsupported by empirical evidence (and may be misplaced⁹).

Overton did his best to persuade the Commission not to endorse an ID requirement. Most advocates contesting voter ID have simply invoked civil-rights rhetoric. Overton called upon that tradition, but he mainly focused on the kind of cold-blooded cost-benefit arguments that conservatives stereotypically use. Working with the Brennan Center, he tried to amass as

5. That’s because many people from traditionally Democratic constituencies – poor people, racial minorities – lack a driver’s license and would find it cumbersome to get an ID.

6. Comm’n on Fed. Election Reform, *Building Confidence in U.S. Elections* (2005) [hereinafter Carter-Baker Report], available at http://www1.american.edu/ia/cfer/report/full_report.pdf.

7. *Id.* at 18.

8. *Id.* at 50.

9. Stephen Ansolabehere & Nathan 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 (2008).

much data on the effects, good and bad, of photo ID. When he failed to change the majority's mind, he published a forcefully worded dissent. I saw Overton a day after the fight went public. I have never seen anyone more exhausted.

The reason Overton faced such an uphill slog is that the data were haphazard and inconsistent. As he discovered, "[n]o systematic, empirical study of the magnitude of voter fraud has been conducted at either the national level or in any state to date[.]"¹⁰ Nor were there any good studies on an ID requirement's effect on voter behavior. Overton pulled together some basic numbers (how many voters lack ID, how many fraudulent votes might have been prevented by an ID requirement). Based on these numbers, he argued that it would be a mistake to endorse a voter ID requirement at this stage because the Commission could not show that it "would exclude even one fraudulent vote for every 1000 eligible voters excluded."¹¹ But Overton candidly admitted that his data, standing alone, could not tell us what would happen if an ID requirement were enacted.¹²

Overton and the Carter-Baker Commission had the same problem: they were debating policy in a world without data. The Carter-Baker Commission justified its conclusions with the only evidence available: anecdote. Overton believed that anecdotal evidence led the Commission to overestimate both the problem of fraud and the likelihood that an ID requirement would solve it.¹³ Overton did not spare his allies criticism either. He rebuked opponents of voter ID because they "regularly recite talking points about threats to voter participation by the poor and minorities but often fail to quantify this assertion[.]"¹⁴ Overton's frustration about the debate remains palpable: "I'm an academic," he says, "I believe in facts."¹⁵

2. Enter the Supreme Court

The same year that the Carter-Baker Commission released its report, the Republican-dominated Indiana legislature passed a photo ID requirement in

10. Overton, *Voter Identification*, *supra* note 2, at 635.

11. Overton, *Carter-Baker Dissent*, *supra* note 2.

12. On the one hand, as Overton observed, his numbers might lead one to overestimate the effect of an identification requirement. For example, voters who don't possess ID may "have lower participation rates," so that an identification requirement may not have a significant effect on turnout. Overton, *Voter Identification*, *supra* note 2, at 660. Moreover, people who do not currently possess an ID might try to get one rather than sit out an election. *Id.* at 661. On the other hand, Overton's numbers may underestimate the effect of an identification requirement. For instance, even people who possess ID might be deterred from voting because of the hassle involved in bringing it to the polls. *Id.*

13. *Id.* at 635.

14. *Id.* at 636.

15. Telephone interview with Spencer Overton (Nov. 15, 2007).

a straight party-line vote. The state conceded it was not aware of a single episode of in-person voter fraud in its entire history and the legislature failed to do anything about the security of absentee ballots (the one area where Indiana had recently had a fraud problem). “Let’s not beat around the bush[,]” wrote one of the lower court judges reviewing the case, “[t]he Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”¹⁶

When the lawsuit challenging Indiana’s law worked its way to the Supreme Court, Justice Stevens, writing for the plurality, upheld the requirement.¹⁷ He concluded that photo ID was a reasonable strategy for combating fraud and building voter confidence.¹⁸ What evidence did Justice Stevens cite in support? A funny anecdote dating back to Tammany Hall,¹⁹ the fact that one person had voted fraudulently in a Washington gubernatorial election²⁰ . . . and the Carter-Baker Report.²¹

The problem is obvious. The Supreme Court did not have much evidence to cite for its view that in-person voter fraud was a problem. So it cited the Carter-Baker Report, which in turn did not have much evidence to cite. The Supreme Court had no evidence to cite for its intuition that an ID requirement boosts voter confidence. So it cited the Carter-Baker Commission, which in turn had no evidence to cite. It is turtles all the way down.

3. The Bigger Story

The debate over voter ID is part of a larger story about policymaking in a world without data. Several things are worth noting. First, set aside the obvious moral to this story. Whether your intuitions are closer to Justice Stevens’ or Spencer Overton’s, surely you would prefer the decision rested on data.

Second, think about what policy debates look like when no one has good data. Most policy proposals never see the light of day. The rare proposals that do get traction are those with intuitive appeal, like an ID requirement. Middle-class voters are accustomed to showing ID to get on a plane or pay with a credit card, so it is easy to frame the issue in a way they can understand. (Think about the only other issue to get traction in recent years – paper trails for voting machines. It’s another issue people can wrap their hands around.)

16. *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

17. *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008).

18. *Id.* at 1620.

19. *Id.* at 1619 n. 11.

20. *Id.* at 1619 n. 12.

21. *Id.* at 1618.

There is no reason, of course, to think that intuitively appealing reform is the right reform.

Third, in the absence of data, policy debates are completely at the mercy of politics. The reason photo ID got passed in Indiana is because it aligned with partisan incentives and the other side could not build a case against it. (Lest you think I am picking on the Republicans, I should emphasize that Democrats are similarly inclined to oppose photo ID because of their own political interests. Remember, the Indiana law was passed without a single Democratic defector.) Similarly, when the Carter-Baker Commission announced its position on voter ID, it had no empirical basis to think it was announcing good policy. All that the Carter-Baker Commission could offer was a position that both political parties could live with. Here again, there is no reason to think that “change the parties can live with” bears any resemblance to the change we need.

Fourth, think about how hard it is to referee this fight. There are lots of accusations and few facts. The Republicans and Democrats shout about partisanship. Reformers hint darkly about voter suppression. Whether you are a voter or a Supreme Court Justice, it is hard to figure out who is right unless you subscribe to Lev Tolstoy’s wry claim that “[a]mong coachmen, as among us all, whoever starts shouting at others with the greatest self-assurance, and shouts first, is right.”²²

Finally, and most importantly, note that the ultimate referees of this fight – members of the Supreme Court – were hungry for guidance. The Court encountered the dilemma we all face in the elections context: distinguishing between legitimate efforts to regulate the election system and illicit attempts to hijack it for political ends. The Justices were plainly on the hunt for a yardstick to evaluate the Indiana law. Justice Stevens’ opinion was not the only one to rely on the Carter-Baker Report. The two dissenting opinions did so as well.²³ Unfortunately, it was not a very good yardstick for the Justices to use. The Carter-Baker Commission had nothing to go on except atmospheric and anecdote. All it could offer is a compromise that smelled like a political deal. The voter ID fight makes clear just how powerful a yardstick can be in election debates. Even an imperfect baseline – a bipartisan compromise unsupported by empirical evidence – was enough to sway the Supreme Court. Imagine what a better metric could achieve.

22. Diego Gambetta, *“Claro!”: An Essay on Discursive Machismo*, (quoting Leo Tolstoy) in *DELIBERATIVE DEMOCRACY* 19 (Jon Elster ed., 1998).

23. See *Crawford*, 128 S. Ct. at 1627, (Souter, J., dissenting); *Id.* at 1643 (Breyer, J., dissenting).

B. Election Administration: A World Without Data

The story of the photo ID looks a lot like the story of election policymaking generally. Policy debates take place in a world without data. We know more about the companies in which we invest, the performance of our local baseball team, even our dishwashers, than we do about how our election system is working. The institutions that administer our election system – the linchpin of any democracy – do not give us the information we need to evaluate how they are performing. The limited data that exist are often undependable, unverifiable, and too inconsistent to allow for comparisons across jurisdictions. It is remarkable that we spend so much time arguing about which direction election reform should take when we do not even have a map telling us where we are now.

1. The Absence of Data

Consider a few remarkable facts. We do not know how many people *cast a ballot* during our last presidential election because twenty percent of states do not report this information; they disclose only how many ballots were successfully counted.²⁴ We do not know how long voters stood in line. We do not know how many poll workers showed up to work. We do not know what percentage of voting machines broke down on Election Day.

Our data problems are so basic that in October 2004, the CalTech/MIT Voting Technology Project, composed of some of the most highly respected political scientists in the country, issued a plea for all states and localities to collect data on such rudimentary questions as the number of registered voters, the number of ballots cast, and the types of ballots included in the official count.²⁵ Four years later, we still do not have that information.

The data are so sparse that it is hard to even evaluate how much things have improved since the 2000 election. As Charles Stewart of MIT has observed, “for all the attention focused on the problem [of election administration] since November 2000 and all the money thrown at improving voting in the United States, it is impossible to demonstrate anything but the most basic improvements in voting, nationwide, using systematic data.”²⁶

24. 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>.

25. Cal Tech/MIT Voting Tech. Project, *Insuring the Integrity of the Electoral Process: Recommendations for Consistent and Complete Reporting of Election Data* (2004), available at http://www.vote.caltech.edu/drupal/files/report/insuring_integrity_of_electoral_process.pdf.

26. Charles Stewart III, *Measuring the Improvement (Or Lack of Improvement) in Voting Since 2000 in the U.S.* 37 (2006), http://web.mit.edu/cstewart/www/papers/measuring_2.pdf.

Even the jurisdictions that do keep data often define basic terms differently. As the University of Utah's Thad Hall and Ohio State's Dan Tokaji have explained, states do not have "a common definition regarding what constitutes an early or absentee ballot."²⁷ Even the states that report residual vote rates – that elegant metric political scientists invented to assess balloting problems – record that number inconsistently. In category after category, cross-jurisdiction comparisons cannot be trusted because election administrators do not adhere to the same protocols for gathering information.

Even states that keep rudimentary data on election performance fail to record the information we need to identify problems and figure out solutions. For instance, most of the jurisdictions that keep information on how many ballots were cast but not counted cannot tell us *why* these ballots were not counted. The same holds true for the registration process. As the Carter-Baker Commission found, "we still do not know how many people are unable to vote because their name is missing from the registration list or their identification was rejected at the polls. We also have no idea about the level of fraud or the accuracy and completeness of voter registration lists."²⁸

If you need further evidence of the woeful state of the data, look no farther than the latest survey of state practices conducted by the Election Assistance Commission ("EAC"),²⁹ the federal agency charged with helping states improve how they administer federal elections.³⁰ In submitting three reports to Congress in 2007,³¹ the EAC asked states for information on such important topics as voter registration, turnout, balloting, voting machines, and poll workers. A striking number of states simply did not report that information.

Worse still, what we see in the EAC report is actually a good deal better than what the states initially reported. Sometimes states did not even bother to fill in information. Others reported answers that were obviously wrong on their face. EAC staffers and consultants spent countless hours tracking down officials about their disclosures and pounding the data into shape. Even after all that effort, many states still failed to report all the data requested, and it

27. Hall & Tokaji, *supra* note 24. The difference between absentee and early ballots is complicated. If you are ever at an election administration cocktail party and do not know what to say, just raise the question, step back, and enjoy your martini.

28. Carter-Baker Report, *supra* note 6, at 57.

29. Election Assistance Commission, *2006 Election Administration and Voting Survey*, available at <http://www.eac.gov/News/press/clearinghouse/2006-election-administration-and-voting-survey>.

30. See 42 U.S.C. § 15322 (2009).

31. The three reports that the Election Assistance Commission published on election administration are the 2006 Election Administration and Voting Survey, the 2005-2006 National Voter Registration Act Survey, and the 2006 Uniformed and Overseas Citizen Voting Act Survey Report, all available at <http://www.eac.gov/clearinghouse/reports-and-surveys/>.

would be hard to draw state-by-state comparisons in many categories due to inconsistencies in reporting practices.

2. A Comparative View

a. The Private Sector

To place these data-collection problems in perspective, it is worth considering how many public and private organizations have come to rely on data-driven policymaking. My colleague Ian Ayres has written about how “supercrunchers” use data-driven analysis to build sports teams, diagnose disease, evaluate loan risk, assess the quality of a new wine, predict the future price of plane tickets, calculate the likelihood that a parolee will commit another crime, choose which passenger will be bumped off an airline flight, and inform car dealers how far they can push a customer on price.³²

Take Wal-Mart, for instance. Wal-Mart’s database is gigantic; only the federal government keeps more data.³³ The company mines that data relentlessly to increase sales. For example, Wal-Mart’s data revealed that bananas are the grocery item that its customers purchase most often. The company therefore made sure that bananas were available not just in the produce aisle, but also near the cereal.³⁴ Wal-Mart’s data are so precise that it knows that strawberry Pop-Tarts sell at seven times their usual rate just before a hurricane.³⁵ It now stocks not just extra flashlights, but extra boxes of Pop-Tarts in advance of a storm.³⁶ Wal-Mart has similarly used data on customer satisfaction to identify where it could most easily improve, leading it to create faster checkout processes and cleaner stores.³⁷ Wal-Mart may represent an extreme example, but data crunching and benchmarking are routine practices in Fortune 500 companies.

It is easy to see why. Would you invest in a company that kept as little performance data as election administrators collect? Imagine a corporation that did not know how many people it employed, how many customers it had, or what percentage of its business came from on-line sales. (Many states and localities cannot tell you how many poll workers showed up on Election Day,

32. IAN AYRES, *SUPERCRUNCHERS: WHY THINKING-BY-NUMBERS IS THE NEW WAY TO BE SMART* (2007).

33. Emily Nelson, Editorial, *Retailing: Why Wal-Mart Sings, ‘Yes, We Have Bananas!’*, WALL ST. J., Oct. 6, 1998, at B1.

34. *Id.*

35. Constance L. Hays, *What Wal-Mart Knows About Customers’ Habits*, N.Y. TIMES, Nov. 14, 2005, available at http://www.nytimes.com/2004/11/14/business/yourmoney/14wal.html?_r=1.

36. *Id.*

37. *Priority is Clear: Improve the Shopping Experience*, MMR, Dec. 11 2006, available at http://findarticles.com/p/articles/mi_hb3235/is_20_23/ai_n29313764/?tag=content;coll.

how many people were registered to vote or cast a ballot during the last election, or what share of the ballots came from absentee or early voters.) Imagine a company that did not know its customers' preferences or why they went elsewhere to make their purchases. (Election administrators generally do not survey voters about their voting experiences or keep track of how many voters tried to register and cast a ballot but failed.) Imagine a company that never sent testers to evaluate whether it was easy to navigate its stores or purchase its products, or one that failed to conduct regular audits of its accounting books. (Election administrators do not deploy testers to evaluate and many fail to conduct adequate post-election audits.) Imagine that the corporation never engaged in the routine business practice of benchmarking – comparing its performance against other companies to identify where it could do better. (Benchmarking rarely occurs in the elections context.) Imagine a company that does not know its own market share. (Election administrators often do not know what percentage of their jurisdiction's eligible citizens they serve).

My guess is that you would not invest a dime in the company I just described. So why are you willing to entrust the nation's most precious noncommodity – the vote – to an election system like ours?

You do not have to be a supercruncher to care about performance data. Think of something much simpler: buying a dishwasher. If you want to choose a dishwasher, Consumer Reports offers extensive comparative information about performance, price, and repair histories. Election officials, however, cannot give you comparable information about how well the state's registration system or ballot-counting process is working. Voting machines, of course, have received the greatest scrutiny. Academics have generated some information about their reliability and performance,³⁸ though even here the data fall short.³⁹ In other areas, though, we have almost nothing to go on.

b. The Public Sector

Lest you think that data matter only to the private sector, government agencies at the state⁴⁰ and federal level⁴¹ routinely rely on data-driven analysis

38. See, e.g., Brennan Center for Justice, *The Machinery of Democracy: Usability of Voting Systems* (2006), http://brennan.3cdn.net/bb59042f6839b7fee2_njm6bcl84.pdf.

39. Stewart, *supra* note 26, at 25 ("the best data we have to track how the use of voting machines is evolving in the United States is still imprecise and incomplete.").

40. See, e.g., Julia Melkers & Katherine Willoughby, IBM Ctr. for the Bus. Of Gov't, *Staying the Course: The Use of Performance Measurement in State Governments* (2004), available at <http://www.businessofgovernment.org/pdfs/MelkersReport.pdf>.

41. For a survey, see Harry P. Hatry et al., IBM Ctr. for the Bus. Of Gov't, *How Federal Programs Use Outcome Information: Opportunities for Federal Managers* (2003), available at <http://www.businessofgovernment.org/pdfs/HatryReport.pdf>.

to improve their performance.⁴² One of the most well-known programs is called CitiStat, which was modeled on the Comstat program that brought the New York Police Department so much success.⁴³ CitiStat was first used in Baltimore with impressive results.⁴⁴ The city's mayor met regularly with department heads to create performance targets and assess progress using data generated and collected by the city. For instance, the mayor decided that every pothole should be fixed within forty-eight hours of someone reporting it. The city then used performance data to evaluate its progress in reaching that goal.⁴⁵ Data-driven analysis has been used in a variety of public institutions, ranging from police departments⁴⁶ to housing agencies,⁴⁷ from transportation agencies⁴⁸ to education departments.⁴⁹ Indeed, we are starting to see consultants, long associated with the corporate world, helping nonprofits and government agencies plan for the future.⁵⁰

Data-driven analysis has a long and distinguished historical pedigree as well. Just think about the vast amount of economic data that the government collects. We are all familiar with the GDP, which aggregates the value of goods and services over a set time period. The GDP has become a key metric for evaluating economic performance, providing a universal quantitative reference point for evaluating economic conditions.

The GDP gives us a snapshot of economic conditions. It maps where we are and helps us chart our future path. For instance, when the GDP shows a particular level of decline, we know we are in a "recession," a diagnosis that prompts a set of policy responses to jumpstart the economy. In the 1900s, in sharp contrast, economic downturns often prompted "panics." As the name suggests, the term refers to "'a sudden fright without cause,'"⁵¹ an apt description for a financial crisis that occurs in a world without aggregate

42. For a useful sampling of these programs, see Daniel C. Esty & Reece Rushing, *Governing by the Numbers: The Promise of Data-Driven Policymaking in the Information Age* (2007), http://www.americanprogress.org/issues/2007/04/pdf/data_driven_policy_report.pdf.

43. See, e.g., Paul E. O'Connell, The PricewaterhouseCoopers Endowment for the Bus. of Gov't, *Using Performance Data for Accountability: The New York City Police Department's CompStat Model of Police Management* (Aug. 2001), http://www.businessofgovernment.org/pdfs/Oconnell_Report.pdf.

44. For a comprehensive but perhaps unduly cheerful analysis of CitiStat, see Robert D. Behn, IBM Ctr. for the Bus. of Gov't, *What All Mayors Would Like to Know about Baltimore's CitiStat Performance Strategy* (2007), available at <http://www.businessofgovernment.org/pdfs/BehnReportCiti.pdf>.

45. *Id.* at 9.

46. See O'Connell, *supra* note 43.

47. See Hatry et al., *supra* note 41, at 37-43.

48. *Id.* at 57-58.

49. *Id.* at 21-30.

50. The consulting giant McKinsey, for instance, devotes a section of its website to the work it does in this area. See <http://www.mckinsey.com/clientservice/socialsector/home.asp>.

51. CHARLES P. KINDLEBERGER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES*, 105 (4th ed. 2000).

economic data. In a world without data, it is hard to tell the difference between a genuine problem and a statistical glitch, between a recession and a random economic dip.

The economy is not the only area our government constantly measures. We conduct a full-blown census every ten years. Almost 100 federal agencies boast data-collection programs.⁵² We collect statistics on the environment, transportation, crime, prisons, farming, disease, housing, childcare, immigration, aging, patents, the labor market, international development, medical services, imports and exports, and gas prices. We even try to measure things that many people believe cannot be measured, like the quality of a public education.

c. Election Administration: The Mysterious Outlier

Given how pervasive data-driven policymaking is, the mystery is why something that so naturally lends itself to measurement – election performance – is barely measured at all. Most of the arguments against data-driven analysis – debates over the widespread use of CitiStat by government agencies, the U.S. News and World Report rankings, No Child Left Behind – boil down to a worry that institutional performance cannot be measured. People argue, with some justification, that quantitative measures cannot possibly capture how well a school educates its students or whether the government is providing the right social services.

The main thrust of these arguments is that gauging institutional performance requires us to make value judgments, and data cannot make these judgments for us. Data-driven analysis may be a natural tool in the business arena, some argue, because the goal is clear: businesses are supposed to make money. Government agencies and educational institutions, in contrast, are supposed to carry out a variety of tasks that necessarily require more complex normative assessments.

While it is plainly true that judging election performance requires us to make value-laden decisions about what matters and why,⁵³ some government activities lend themselves more easily to measurement than others. Election data fall on the comfortable end of this sliding scale. Academics call election administration practices the “nuts and bolts” with good reason. These are not the issues that have riven the election community, like campaign finance or felon disenfranchisement. Even if the parties have a tendency to play politics on some issues, there is actually a good deal of agreement on how an election system should work. Moreover, much of what we value in election

52. Federal Agencies with Statistical Programs, <http://www.fedstats.gov/agencies/> (last visited June 17, 2008).

53. Gerken, *supra* note *, ch. 4.

administration can be captured in a statistic. How long were the lines? How many ballots got discarded? How often did the machines break down? How many people complained about their poll workers?

Rather than rehash these familiar debates about measuring performance, I'll simply note two things about how those debates play out here. It is hard to make the case that election administration involves more complex normative judgments than are made in the vast swathes of our lives – employment, health, education – where the government constantly measures. It is harder still to argue that the normative judgments we are already making in election administration should not be informed by good data.

III. THE NEED FOR DATA-DRIVEN POLICYMAKING

The problem with reform battles in a world without data is that we all end up acting too much like Lev Tolstoy's coachmen. When there is no evidence to analyze, there is not much left to do but shout. For too many election issues we are in exactly the same position as Spencer Overton or the Carter-Baker Commission or Justice Stevens. We lack the information we need to be confident that we have correctly identified the problem and chosen the right solution. We argue incessantly about which path election reform should take even though no one can even map where we are right now.

Photo ID is a question where most of the reform community thinks that the Carter-Baker Commission and the Supreme Court got the wrong answer. But reformers make plenty of claims that are not supported by empirical evidence. They do not have much of a choice. Without good data, there is not much but intuition and anecdote to go on. Common sense intuitions can get you reasonably far but at some point the absence of data calls into question the basic facts on which those intuitions are based. As Ohio State's Dan Tokaji argued in a rather pointed rebuke of the reform community, "efforts at election reform have been based on an intuition-based approach . . . [that] places too much weight on seat-of-the-pants assessments of what makes for good elections[.]"⁵⁴

Drawing on Michael Lewis's book on the use of statistics in baseball,⁵⁵ Tokaji argues that we need to take a "moneyball" approach to election reform.⁵⁶ He writes that arguments for election reform have too often been based on the same approach as "the old-time scouts in Lewis's book . . . neglecting serious empirical research into what works and what doesn't in the

54. Daniel P. Tokaji, *The Moneyball Approach to Election Reform*, Election Law @ Moritz, Oct. 18, 2005), <http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php>.

55. See MICHAEL LEWIS, *MONEYBALL: THE ART OF WINNING AN UNFAIR GAME* (W.W. Norton & Company, 2003).

56. Tokaji, *supra* note 54.

real world.”⁵⁷ Tokaji says we need “hard data and rigorous analysis” in place of “the anecdotal approach that has too often dominated election reform conversations.”⁵⁸

A Democracy Index fits neatly with Tokaji’s moneyball approach. Rather than focusing on necessarily atmospheric judgments about what problems exist, the Index provides concrete, comparative data on bottom-line results. It would allow us to figure out not just what is happening in a given state or locality, but how its performance compares to similarly situated jurisdictions. It would help us spot, surface, and solve the problems that afflict our system. The Democracy Index would, in short, give us the same diagnostic tool used routinely by corporations and government agencies to figure out what is working and what is not.

A. Identifying Problems and Solutions

The absence of good data poses the most basic of dilemmas for those who care about reform: it is hard to figure out whether and where problems exist in a world without information. Election experts can name the symptoms they see routinely; even the haphazard information available now reveals this much. But if you were to identify a specific election system and ask whether the problem existed there, experts might not be able to answer your question. Problems are hard to pinpoint in a world without data.

For example, we would presumably be worried if a large number of people tried to cast a ballot in the last presidential but failed to do so. It might be a sign that registration systems were not functioning properly, that poll workers were doing a bad job, that ballots were designed poorly, or that machines were not working well. Yet twenty percent of states cannot even tell you how many people cast a ballot that was not counted, let alone how many were turned away before they filled out a ballot.

Conny McCormack, who just retired as the County Clerk/Recorder-Registrar of Los Angeles County, has been better situated than most election officials to identify cost-effective strategies for reducing the number of lost ballots.⁵⁹ The reason is simple: L.A. County keeps better data than most states and localities. Her staff routinely tracked not just how many ballots were cast but not counted, but *why* ballots were not counted. For instance, McCormack could tell you how many absentee ballots were not counted because they

57. *Id.*

58. *Id.*

59. The information in this paragraph is all drawn from a telephone interview with Conny McCormack, fmr. County Clerk/Recorder-Registrar, Los Angeles County, CA (Oct. 26, 2007).

arrived after the deadline, lacked a necessary signature, or were returned as undeliverable.

Because L.A. County tracks these numbers, McCormack was able to identify when she had a problem.⁶⁰ For instance, early on in her tenure, McCormack and her staff realized that a large number of absentee ballots were not counted because they arrived after the deadline. Taking a look at the packets sent to voters, McCormack realized that the deadline was announced only inside the packet. She and her staff then redesigned the envelope so that it informed voters in red letters when the ballot had to be received. By placing this information in a more prominent place for voters, L.A. County was able to reduce the number of absentee ballots that were disqualified on timing grounds. It was a simple, virtually cost-free solution.

There are many examples where data have helped election administrators do a better job. Take Bob Murphy, who is Maryland's Electronic Poll Book Project Monitor.⁶¹ A poll book is what election staff use to check you in when you vote. Murphy, a computer junkie, realized that Maryland's new electronic poll books contained extremely helpful information on turnout patterns. "We always knew who voted before," says Murphy, "but now we know *when* they voted." When Murphy started playing around with the data, he realized that people's voting patterns depended on things like where they lived and how old they were. The elderly, for instance, tend to vote mid-morning, which means you will want to staff up polling places in areas with large elderly populations during those periods. Murphy even discovered that the "conventional wisdom" that there's a noontime rush in polling places is true only for a small percentage of Maryland's polling sites. Armed with four elections' worth of data, Murphy can figure out exactly how many poll books and how many staffers he needs in a given precinct to prevent lines from developing.

Gary Smith, a businessman-turned-election administrator, has also put data on turnout patterns to good use.⁶² Like many election administrators, Smith has to figure out "how to disperse my assets in a more efficient way." He has used data on turnout patterns not only to distribute his voting machines efficiently, but to ensure that every community in Atlanta received equal service, not just an equal number of machines. For instance, Smith has mapped the residence of all the people who vote early in one of Atlanta's early voting sites.⁶³ He is thus able to make sure that the early voting sites are

60. *Id.*

61. The information in this paragraph is all drawn from a telephone interview with Bob Murphy, Electronic Poll Book Project Monitor in Maryland (July 8, 2008).

62. The information in this paragraph is all drawn from a telephone interview with Gary Smith (May 21, 2008).

63. Gary Smith, *Using GIS Data to Confirm Viability of Early Voting Sites*, available at <http://datafordemocracy.org/blog/?q=node/17>.

serving every community equally. Moreover, Smith can tell when an early voting site is being underused and fix the problem (perhaps by providing better signage or switching locations). These adjustments do not just make it easier for Atlanta residents to vote. They reduce the number of people who vote absentee. Because absentee ballots are more expensive to process than early votes, Smith's adjustments have a direct effect on his office's bottom line.

Joe Mansky has used data to improve the design of Minnesota ballots.⁶⁴ Badly designed ballots lead voters to make mistakes when they vote; they can vote for the wrong candidate (remember Palm Beach County's infamous butterfly ballot?) or cast an invalid ballot. Mansky oversaw one of the earliest rollouts of optical scan machines, and there were a lot of questions about how best to design an optical scan ballot at the time. By gathering data during the early stages of the process, his staff learned how to fashion the ballots so that voters made fewer mistakes in marking them.

B. Distinguishing Between a Glitch and a Trend

Even when we can identify a potential problem with good data, it is hard to figure out where the problem looms largest or to distinguish between a statistical blip and a genuine pattern. Tammy Patrick, an election administrator for Maricopa County in Arizona, can tell you a lot about distinguishing between glitches and trends.⁶⁵ Like most people in election administration, Patrick fell into the job through some combination of happenstance and interest. Most of her career was spent working in sales in the private sector. Patrick was eventually tapped to be Maricopa's Federal Compliance Officer at a time when the county was tussling with the Department of Justice over federal language assistance requirements. The County eventually agreed to create a program to track compliance with those provisions. But Patrick thought that it could do much more. Why not create a system that could track election problems of *all* types?

When Patrick came up with the idea, voter complaints were all tracked on slips of paper.⁶⁶ Patrick and her co-workers created an online database for tracking complaints in real time. Patrick's sales experience paid off. She made sure that the software "prepopulated" data and minimized the number of keystrokes needed to enter a complaint. The resulting program has been a great success, earning the County national recognition. It allows the staff not only to dispatch "trouble shooters" to deal with discrete problems, but to adopt

64. The information in this paragraph is all drawn from a telephone interview with Joe Mansky, May 6, 2008.

65. The information in this paragraph is all drawn from a telephone interview with Tammy Patrick, election administrator in Maricopa County, AZ (June 5, 2008).

66. *Id.*

system-wide solutions when the data reveal a troubling trend. Maricopa's reporting system does not just allow for mid-course corrections. It also serves as a long-term diagnostics tool so that county officials can evaluate employee performance and do a better job of training in the future.

I asked Patrick to give me an example of how it worked. She told me to imagine that I had gotten a report from Precinct X – the ink had run dry in the pens voters need to fill in their ballots (a reasonably common problem in a desert community).⁶⁷ Maybe it is a glitch (perhaps that is the precinct where the pens sat in the hot delivery truck the longest so I can fix the problem just by sending a new box of pens there). Maybe it is a trend (the manufacturer sent bad pens and the problem is going to shut down the voting process). Needless to say, I would want to find out quickly whether it is a glitch or a trend. “We can do that in real time,” she noted proudly.

C. Benchmarking

The secret to Tammy Patrick's idea is that it provides the right information in the right form. As Patrick recognized, a reporting system is a good start, but those bits of data are most useful if they are pulled together into a useable form.

The Democracy Index is Tammy Patrick's idea writ large. Good policy requires something more than a bunch of individual jurisdictions collecting data on their own performance. It requires us to benchmark. Benchmarking is a routine practice in the business world as corporations constantly compare their performance with that of their competitors to identify best practices and figure out where they can improve.

Most of the benchmarking studies we have were done by social scientists who wangled enough funding to gather the necessary data. But those studies are inherently limited. They tend to be small-scale and focus on narrow questions. More importantly, they cannot provide grounds for drawing conclusions across widely varying jurisdictions. Election administration is too complex and too varied to be captured by studying a small sample. As several scholars have explained, an election system is like an “ecosystem” . . . changes in any one part of the system are likely to affect other areas, sometimes profoundly.”⁶⁸ When ecosystems vary as much as they do in the elections context, large-scale, cross-jurisdictional studies are essential.

Put differently, election reformers and policymakers today function a lot like doctors did in the old days. Based on limited information they have about the symptoms of the problem (lots of ballots are discarded, the lines seem

67. *Id.*

68. STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS: THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES (2007), available at <http://moritzlaw.osu.edu/electionlaw/joyce/book.pdf>.

long), they try to identify the underlying disease (is the source of the problem badly trained poll workers? malfunctioning machinery?). Like the doctors of yore, election reformers and administrators may even try one fix followed by another, hoping that their educated guesses turn out to be correct. The problem is that their educated guesses are still just that: guesses.

Even when someone comes up with a good guess as a solution, we cannot tell how much improvement it will bring or how its effects would compare to other less costly solutions. In today's environment of tight budgets and limited resources, this lack of precision undermines the case for change.

What we need is what modern medicine provides: large-scale, comparative studies that tell us what works and what does not. The Democracy Index is a first step in that direction. It would provide comparative data regarding both policy inputs (registration practices, balloting rules, training programs) and performance outputs (discarded ballots, the length of lines, the number of voter complaints). Those numbers would allow us to run the type of large, cross-jurisdictional studies that we need to identify best practices.

D. Figuring Out What Drives Performance.

The dearth of data does not just make it hard to cure specific ailments in our election system. It also prevents us from inoculating the system against future disease. Put yourselves in the shoes of a reformer or an election administrator and you can see why comparative data are crucial. While you are certainly interested in specific fixes for discrete problems, you really want a robust system capable of self-correction so that problems can be avoided rather than corrected. You want to identify not just best practices, but the basic drivers of performance.

If you are interested in the drivers of performance, absolute numbers matter to you but comparative numbers are far more useful. After all, if you cannot even identify who is doing well, it is hard to figure out precisely what drives good performance. Without comparative data on performance, we cannot know whether, for instance, well-funded systems tend to succeed, or whether the key is centralization, better training, or nonpartisan administration.⁶⁹ Because the Democracy Index ranks states and localities based on overall performance, it provides precisely the comparative information we need.

69. Some initial answers to these questions have been offered by a group of scholars based on an in-depth, qualitative study of five election systems in the Midwest. *See Id.* This important study should be immensely useful in trying to figure out how to generate answers to these questions on a larger scale once better data becomes available.

IV. CONCLUSION

Whether we are arguing about discrete policy solutions or the drivers of performance, too much of the debate takes place in a world without data. The Democracy Index would help address this problem by giving policymakers the same tool that doctors, businessmen, and now environmentalists possess: comparative information on bottom-line results. By providing the right information in the right form, the Index would enable policymakers to figure out which jurisdictions do well in individual categories and which ones run the best systems overall.

The Democracy Index is especially intriguing because it would help turn one of the biggest obstacles to reform – decentralization – into an advantage. Academics like to tell you that one of the benefits of decentralization is that it allows states and localities to function as “laboratories of democracy,”⁷⁰ with different jurisdictions coming up with different solutions for the same problem. But there is little point to having laboratories of democracy if no one reports the results of the experiments.

If the Democracy Index did nothing more than give us a map – helping us identify where we are and figure out where we want to go – it would represent a significant improvement on the status quo. At the very least, we would have some confidence in our assessment of the problems we face and the solutions we should pursue. Policymaking works badly in a world without data. The Democracy Index would provide a much-needed corrective to that problem.

70. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (Scholars of “democratic experimentalism” have explored the practical and theoretical dimensions of benchmarking in the governance context); See, e.g., Joshua Cohen & Charles Sabel, *Directly-Deliberative Polyarchy*, 3 EUR. L. J. 313 (1997); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

