Book Review

To Here from Theory in Election Law

THE DEMOCRACY INDEX: WHY OUR ELECTION SYSTEM IS FAILING AND HOW TO FIX IT. By Heather K. Gerken. Princeton, N.J.: Princeton University Press, 2009. 192 pages. $24.95.

Reviewed by Michael S. Kang*

I. Introduction

Heather Gerken's book, *The Democracy Index: Why Our Election System Is Failing and How To Fix It*,[1] addresses what is now the most important practical concern in election law: election administration. In today's hypercompetitive political environment, election administration directly affects the vote in every race and changes outcomes in many elections. However, legal scholarship addressing election administration as a serious academic issue has been sparse, with some exceptions.[2] Even after *Bush v. Gore*,[3] legal scholarship has neglected election administration as a substantive concern and generally failed to keep pace with election administration's emergence as a practical one. Legal scholarship has tended to approach election administration as a field unto itself, somewhat disconnected from scholarly debates elsewhere in election law.

Nonetheless, the central importance of election administration is no longer a secret in American politics. Although larger margins of victory and electoral noncompetitiveness over large swaths of the country once obscured the effect of election administration, the narrowness of election margins across virtually the entire nation now makes clear how subtle nuances of

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

2. For examples of legal scholarship addressing election administration, see SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION (2006); Edward B. Foley, *The Analysis and Mitigation of Electoral Errors: Theory, Practice, Policy*, 18 STAN. L. & POL'Y REV. 350, 361 (2007); Edward B. Foley, *The Promise and Problems of Provisional Voting*, 73 GEO. WASH. L. REV. 1193, 1203 (2005); Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 945 (2005); Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 FORDHAM L. REV. 1711, 1807–08 (2005).

3. 531 U.S. 98 (2000).

election administration threaten to alter political outcomes.[4] It is a fact of which political actors are keenly aware in today's politics. They seek to exploit election administration—and are conscious of their political enemies' attempts to do so—for political gain. Issues like voter identification and voting technology are now fought over as partisan issues in ways that would have been hard to imagine not long ago.[5]

Heather Gerken's timely book may refocus public and scholarly attention on election administration at exactly the right time. Gerken cites a wide array of evidence—thousands of votes routinely lost in every election, intolerably long lines at polling places, widespread computer failures in connection with electronic voting—to argue that the patchwork system of election administration in America badly needs overhauling.[6] Gerken explains that "the election system is usually underfunded, often run by people without adequate training, and occasionally hijacked to serve partisan ends."[7] She warns that it may only be a matter of time before another debacle like the 2000 presidential election and that "[i]t's hard to tell where disaster will strike, but it doesn't make sense to bet against disaster in the long haul."[8]

As a first step, Gerken proposes a comprehensive system for the collection of data about election administration, to be aggregated into a "Democracy Index" that ranks the states by their effectiveness in election administration.[9] Gerken seeks to engage the states in federalist competition by objectively quantifying the problems of election administration. The Democracy Index would aggregate data about election-administration performance by localities and states for the purpose of providing voters with an intuitive, accessible ranking that voters could use to punish bad performance and reward good performance. Gerken hopes that the Democracy Index, which was already proposed in Congress separately by then-Senators

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4. *See* Hasen, *supra* note 2, at 944 (describing how the "close division of the American electorate" makes inconsistent election administration threaten the fairness and accuracy of electoral outcomes).

5. *See, e.g.*, Marc Fisher, Op-Ed., *In Early Voting Trend, Democracy Is the Biggest Loser*, WASH. POST, Oct. 26, 2008, at C1 (arguing that the advent of early-voting periods has inspired a debate based largely on perceived partisan self-interest); David Stout, *Supreme Court Upholds Voter Identification Law in Indiana*, NYTIMES.COM, Apr. 29, 2008, http://www.nytimes.com/2008/04/29/washington/28cnd-scotus.html?sq=david%20stout%20apr.%2029,%202008&st=cse&adxnnl=1&scp=1&adxnnlx=1232672455-gM1jnvEyZ+YtOD0G6Yjr5Q (describing a Supreme Court ruling upholding an Indiana voter-identification law and accusations by Democrats that "[t]he real motivation of those behind the law was to hamper Democrats" and benefit Republicans in the state).

6. GERKEN, *supra* note 1, at 12.

7. *Id.* at 14.

8. *Id.* at 12–13.

9. *Id.* at 26. Gerken's Democracy Index, though, should not be confused with "democracy index rulemaking." *See* David Fontana, *Reforming the Administrative Procedure Act: Democracy Index Rulemaking*, 74 FORDHAM L. REV. 81, 83 (2005) (proposing that judicial deference to administrative-agency rules should depend on the degree of public participation in the rulemaking process).

Barack Obama[10] and Hillary Clinton[11] in 2007, will develop democratic and professional accountability among election administrators and will make visible the real problems in election administration beyond the "atmospherics and anecdote" that critics often offer today.[12]

The Democracy Index not only reconnects the legal academy with election administration at just the right time, but also points to a new framework for reorienting election law as a field of study and an area for legal reform. Of course, written for a popular audience, *The Democracy Index* does not make these connections as explicit as I do here. What is more, Gerken sets out a vision for the Democracy Index without detailing which specific data ought to be built into it. 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.[13] Her agnosticism makes it less clear whether the Democracy Index is in fact politically viable, whether objective data can feasibly be collected across so many local jurisdictions, and precisely how the Democracy Index ought to be constructed. *The Democracy Index*, nevertheless, represents an important move toward engaging election administration with the legal scholarship of election law. What is more, the book does so from the proper normative orientation, with necessary attention to leadership incentives and political institutions rather than a narrow focus on courts as watchdogs. Although the book offers these suggestions only subtly, I develop these ideas further in this Review.

First, the heart of *The Democracy Index* establishes that the central problem for legal reform in election administration—and a central concern of election law—is the political self-interest of lawmakers locking themselves into office.[14] Election law structures the incentives and restrictions on the process by which lawmakers, who make the election law that governs them, gain and maintain public office.[15] The risk of incumbent entrenchment is not unique to election law, but it is the defining concern of this area of law, just as Gerken suggests.[16] Although entrenchment is understood as central to certain concerns, such as partisan gerrymandering,[17] it has not been a prominent

10. Voter Advocate and Democracy Index Act of 2007, S. 737, 110th Cong. § 2 (2007).

11. Count Every Vote Act of 2007, S. 804, 110th Cong. § 902 (2007).

12. GERKEN, *supra* note 1, at 43.

13. *See id.* at 123 (asserting that "it would be foolhardy to try to describe the Index in intimate detail at this early stage" because of unknowns, including the opinions of stakeholders, the types of data that will be available, and the costs involved).

14. *See infra* notes 44–51 and accompanying text.

15. *See infra* text accompanying note 53.

16. *See* GERKEN, *supra* note 1, at 15, 15–20 (describing election administration as a case of "foxes guarding the henhouse").

17. *See, e.g.*, Mitchell N. Berman, *Managing Gerrymandering*, 83 TEXAS L. REV. 781, 781 (2005) (discussing partisan gerrymandering as a way for representatives to entrench themselves by choosing their voters, rather than allowing voters to choose their representatives); Yasmin Dawood,

element of scholarship or jurisprudence about many other election-law concerns, such as campaign finance and election administration.

Part of the scholarly innovation of *The Democracy Index* is that it unexpectedly brings this entrenchment focus to election administration. Although many problems plague effective election administration, Gerken purposefully seizes on political self-interest as both the problem and the solution. Gerken explains that entrenchment, usually along what she sees as partisan lines, freezes out election reform and encourages self-serving legislative inertia.[18] But Gerken does not view political self-interest strictly as a problem to be overcome. Instead, Gerken argues that political self-interest can be harnessed for good ends: the Democracy Index embodies an effort to force electoral accountability on party actors who would respond to voter pressure on the issue of election administration.[19] The same political self-interest that motivates legislative inertia today might be redirected to motivate legislative action and administrative performance once the Democracy Index makes election administration more salient and visible. In other words, as part of an emerging trend among commentators in election law, Gerken's *The Democracy Index* looks to politics as the solution for politics.

Second, for these reasons, Gerken turns away from courts as the main vehicle for reform and for checking incumbent entrenchment. *The Democracy Index* suggests an institutional shift in election law from courts to new political structures such as regulators of politics and elections.[20] It is typically undesirable for courts to regulate the political process directly, as advocates of a "structural approach" to election law generally advocate.[21] The Supreme Court's many decisions in election law demonstrate that the judiciary is neither institutionally well equipped nor legitimately invested with the policy-making judgment necessary to design election law appropriately.[22]

The better solution is the creative use of new institutions that would align leadership incentives properly with the public interest but nonetheless promote democratic participation and engagement with the central questions of election law. For election administration, Gerken proposes the Democracy Index as a new tool that would help stimulate voter interest in election administration and thus create political competition among states

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The Antidomination Model and the Judicial Oversight of Democracy, 96 GEO. L.J. 1411, 1415–16 (2008) (discussing entrenchment through partisan gerrymandering as a problem of antidomination).

18. *See* GERKEN, *supra* note 1, at 19–20 (stating that majority parties are reluctant to reform—or surrender control of—the election process).

19. *See id.* at 135–36 ("The Democracy Index . . . realigns partisan and local incentives by linking officials' political fates to their professional performance and giving top policymakers a reason to care about reform.").

20. *See infra* text accompanying notes 115–17.

21. *See infra* notes 108–12 and accompanying text.

22. *See infra* note 107 and accompanying text.

and among elected officials.[23] The new institutional approach in election law should be this type of turn toward political structures that would realign elite incentives to harness popular politics and engage the public in a political process. *The Democracy Index* thus embodies the right normative instinct, which is emerging in my work as well as in Gerken's, to generate fresh institutions that would deter elite collusion for purposes of self-entrenchment and, indeed, would channel elite incentives toward competition in the public interest.

II. The Democracy Index

American election administration, in Heather Gerken's words, is "clunky at best and dysfunctional at worst."[24] Election Day disasters in Florida during the 2000 elections and in Ohio during the 2004 elections were only flash points in what Gerken sees as a deeper crisis in election administration.[25] Gerken echoes the consensus in the reform community that major disasters have become a regular feature of Election Day. Today, registration systems work badly, voting machinery does not work properly, and ballots are too often lost or miscounted.[26] What is worse, such breakdowns are no longer masked by large margins of electoral victory as in the past.[27] As Gerken explains, "When elections are competitive—when lots of new voters want to register, when turnout is high, when elections are decided by a small margin—we put more pressure on our creaky system than it can bear."[28] In other words, election administration not only works badly, it is at its worst when the stakes are highest.

A key introductory question is why election administration has not been repaired as an urgent concern of public policy. Elections are vitally important. The ballot-counting fiasco of *Bush v. Gore* in 2000, among other things, demonstrated the practical relevance of election administration and the costs of failure. However, even after *Bush v. Gore*, there has been little activity aimed at reforming election administration during the last decade.[29] If anything, the problems seem increasingly regular and evident.

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23. *See* GERKEN, *supra* note 1, at 6 ("By distilling performance data into a highly accessible form, the Index gives voters a rough sense of how well their system is doing . . . . A ranking should work for the simplest of reasons: no one wants to be at the bottom of the list.").

24. *Id.* at 1.

25. *See id.* at 12 ("The problem is that we aren't prepared for the electoral equivalent of a Category 4 or 5 hurricane.").

26. *Id.* at 13.

27. *See* Hasen, *supra* note 2, at 946–60 (discussing how the closeness of elections has put greater pressure on election administration).

28. GERKEN, *supra* note 1, at 12.

29. *See* Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 17–28 (2007) (describing the paucity of election reforms enacted since 2000).

Political self-interest, Gerken argues, is the main culprit for the failure of reform.[30] For the most part, election administration in the United States is left to the supervision of partisan elected officials.[31] Given that election administration provides the ground rules for electoral politics, Gerken explains that this arrangement leaves "the regulation of politics *to* politics."[32] In the worst instances, partisan administrators appear to decide questions of election administration on the basis of their partisan interests. Gerken cites as "exhibit A" the infamous Kenneth Blackwell, Ohio's former secretary of state during the 2004 and 2006 elections, whose strained interpretations of Ohio's election code outraged many critics and were overturned by courts.[33]

But even short of outright biased administration, Gerken believes that partisanship may stall reform through a more passive channel: legislative inertia.[34] Election reform would require new resources for a problem that voters seem to notice only once every two to four years. Although voters may be unhappy about the registration process or long lines at the polling place, there are many pressing problems facing government, and election administration is a complicated, arcane issue that only episodically affects voters in the most immediate sense. Gerken notes that voters "see only the occasional and haphazardly distributed results of neglect [in election administration] but have no means to gauge how things are working generally."[35] As a result, elected officials, already safely in office, have little interest in diverting resources toward reforming a system that, after all, has successfully landed them there.

Gerken's proposed solution, and the subject of the book, is the Democracy Index. Using quantitative data on election administration, the Democracy Index would rank states and localities based on their performance.[36] Gerken explains that the Democracy Index would serve as an analog to the *U.S. News & World Report* rankings for colleges and graduate

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30. *See* GERKEN, *supra* note 1, at 16 ("The problem is that election officials *depend on their party for their jobs*.").

31. *See* Hasen, *supra* note 2, at 974–76 (explaining that state election officials are elected officials in a majority of states); Jennifer Nou, Note, *Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts*, 118 YALE L.J. (forthcoming 2009) (arguing that election administration is run by partisans).

32. GERKEN, *supra* note 1, at 15.

33. *See* Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 575–76 (6th Cir. 2004) (holding that Blackwell's directive requiring a voter's residence in a precinct to be determined by poll workers and empowering poll workers to deny a voter a provisional ballot on that basis violated the Help America Vote Act); White v. Blackwell, 409 F. Supp. 2d 919, 923 (N.D. Ohio 2006); *see also* Daniel P. Tokaji, *Early Returns on Election Reform: Discretion, Disenfranchisement, and the Help America Vote Act*, 73 GEO. WASH. L. REV. 1206, 1231–33 (2005) (describing controversies over Blackwell's rulings as secretary of state before the 2004 elections).

34. *See* GERKEN, *supra* note 1, at 23–24 (discussing how the "political market" fails because "the invisibility of election problems reduces the incentives for even reform-minded politicians to invest in the system").

35. *Id.* at 24.

36. *Id.* at 5.

schools: a rank ordering that offers an accessible summary of an institution's relative performance.[37] Gerken proposes that data be collected for the Democracy Index about three basic dimensions of performance in election administration: convenience of voter registration, efficiency of balloting, and accuracy of vote counting.[38] Each, at least as a starting point, ought to be weighted equally because equal weighting is transparent, intuitive, and amenable to adjustment as debate about the Democracy Index develops.[39]

Gerken hopes that the useful distillation of objective data might effectively "'democratize who can render an opinion'" about the obscure issue of election administration.[40] The Democracy Index not only would provide voters with basic data on election administration—thus making an otherwise obscure problem more visible to voters—but would provide a simple, salient summary that even the most casual voter could use competently.[41] Gerken hopes that, by making performance in election administration more transparent to voters, the Democracy Index would position voters to reward good performance and punish bad performance.

The Democracy Index thus offers an innovative approach to reforming election administration—it aspires to empower voters as a disciplining force for elected officials who otherwise appear happy to let election administration be. As Gerken explains, "A ranking should work for the simplest of reasons: no one wants to be at the bottom of the list."[42] Elected officials, currently benefitting under the status quo and facing little electoral pressure to change it, may suddenly confront new, better incentives to reform. Gerken hopes that, as a result, the Democracy Index would serve as a new institutional device with the "potential to harness partisanship and local competition in the service of reform."[43]

It is noteworthy that Gerken indicts partisan and local self-interest as the chief culprits for the state of election administration in the United States.[44] Many structural considerations converge in the unmaking of the patchwork system of American election administration, including, among other things: the federalist design of devolving election administration;[45] basic incompetence of administrators and election-day volunteers;[46] competing

37. *Id.*

38. *Id.* at 28.

39. *Id.* at 33.

40. *Id.* at 69 (quoting Interview with Daniel C. Esty, Professor, Yale Law Sch. (Oct. 24, 2007)).

41. *Id.* at 28–31.

42. *Id.* at 6.

43. *Id.* at 26.

44. *Id.* at 15. Gerken identifies partisan and local incentives as pointing in the wrong direction for election reform, *id.* at 66, but political self-interest underlies both types of incentives that Gerken views as problematic.

45. *See id.* at 20, 20–23 (describing how election jurisdictions are starved of resources because of "hyper-decentralization").

46. *See id.* at 18, 18–19 (decrying the "lack of professionalism" resulting from the partisan appointment of election administrators).

policy priorities that win away government resources;[47] the minimal everyday salience of election administration, given the relative infrequency of elections;[48] and sporadic media attention to the problem.[49] Gerken analogizes the negligent maintenance of the election infrastructure to the deferred maintenance of the deteriorating American physical infrastructure of roads, bridges, and highways.[50] The analogy, though, is more revealing than Gerken explains. Longstanding need for infrastructure upgrades, virtual or physical, regularly get deferred when resources are scarce. It is unlikely that partisan and local self-interest is squarely to blame for the negligent maintenance of the nation's physical infrastructure (which is equally important and also in need of overhaul). It would be just as questionable as an empirical matter to blame mainly partisan and local self-interest for the problems in election administration.

Gerken's focus on political self-interest, however, is purposefully myopic. Gerken, one of the sharpest commentators in election law, understands the complicated causal tangle underlying the election-administration mess. She herself discusses in the book such crosscutting factors, and she documents the general good faith of election administrators across the country.[51] However, Gerken's indictment of partisan and local self-interest is a strategic decision clothed as an empirical assessment. Gerken indicts political incentives as the main cause of election-administration failure, perhaps because they may be the most susceptible to beneficial adjustment. Gerken focuses on political self-interest because it may not only be a source of failure in election administration, but also perhaps the most promising route to lasting reform.

The aspiration of Gerken's Democracy Index is to rearrange leadership incentives and align them properly with the public interest. Gerken does not simply propose new funding for election administrators, though she would be in favor of it.[52] She does not propose, for example, specific new methods of voter registration or new systems for handling provisional voting. Instead,

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47. *See id.* at 24 (suggesting that the "invisibility of election problems" means that local governments invest in other projects).

48. *See id.* at 24, 23–24 (arguing that, although voting problems occur regularly, voters rarely become aware of problems because elections are episodic and the results of failures are "haphazardly distributed").

49. *Id.* at 23–24. The Franklin County Board of Elections in Ohio determined that it needed 5,000 voting machines to help process the additional 102,000 newly registered voters before the 2004 election, but it decided to run the election with 2,866 machines, resulting in wait times of more than five hours. OVERTON, *supra* note 2, at 44. Deputy director of the Board Michael Hackett explained, "Does it make any sense to purchase more machines just for one election? I'll give you the answer: no." *Id.*

50. GERKEN, *supra* note 1, at 11.

51. *See id.* at 82–92 (suggesting that election problems are mostly caused by insufficient funding and maintenance of voting machines, rather than by administrator malice).

52. *See id.* at 21, 20–23 (acknowledging that many people, including the author, "have a bad tendency to genuflect toward the problem of local resources and then blithely . . . demand more from election administrators").

she hopes that changing incentives at the top of the system will induce political leaders—those who might know best—to propose, implement, and maintain the best solutions.[53] Effective reform in the area will flow from leadership efforts to respond to better incentives. Partisan and local incentives, which Gerken identifies at the beginning as a primary obstacle to reform, may be transformed by the Democracy Index into an engine for reform.

The challenges facing the Democracy Index are many, beginning with the fundamental question of how it should be composed. The ingenuity of the Democracy Index, and Gerken's persuasive skill in advocating the concept, make it easy to miss the basic fact that Gerken does not articulate with real specificity what data she would include in the Democracy Index. A chapter of the book offers a menu of possible data inputs that might ultimately be part of Democracy Index (version) 1.0, such as survey data on the voting process, length of wait to vote, residual vote rate, and average number of days between election day and state-certified results.[54] But Gerken herself offers few definite opinions about what data ought to go into the Democracy Index, even under the most ideal, hypothetical circumstances.[55] She not only refrains from opining about which data should comprise Democracy Index 1.0, but also does not express any views about how data measuring different dimensions of performance ought to be differentially weighted, except to say at the most general level that registration, balloting, and vote counting should be weighted equally.[56] In other words, *The Democracy Index* provides a brilliant vision and strategy for selling the idea of a Democracy Index, but offers little detail about what Democracy Index 1.0, or any subsequent iteration, actually would look like.

Of course, Gerken's reticence about the details of a Democracy Index is again strategic. Gerken clearly identifies and recognizes the intense contestability of the design of any Democracy Index.[57] Any Democracy Index, however constructed, would embody a series of value choices about what is important in election administration and, by extension, in democratic governance. Basic choices about what types of data to include would flow from assumptions about which values ought to be encouraged and promoted through effective election administration. Similar choices of how to weight different types of data, even once selected, would flow from independent assumptions about which values are more or less important as a relative matter.

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53. *See id.* at 136, 134–36 ("[B]ecause the Index can serve as both sword and shield in partisan warfare, the Index should encourage the political parties to do the work of reform for us.").

54. *Id.* at 131.

55. To be fair, Gerken considers these data inputs to be the "most promising" possibilities out of a list of performance metrics suggested at a 2007 conference at Ohio State University about the Democracy Index. *Id.* at 131, 131–32.

56. *Id.* at 33.

57. *See id.* at 27 (commenting that the Democracy Index would have difficulty gaining political support if it gathered information on controversial issues).

Gerken therefore sidesteps controversy regarding the precise design of a Democracy Index by pleading a degree of agnosticism. Gerken's agnosticism is a strength of the book in the sense that it permits, just as Gerken intends, the birth of a new discussion about election administration. Agnosticism about the proper design of a Democracy Index thus broaches the topic without killing the basic idea before any discussion has a chance to take root. Gerken argues that scholars and reformers ought to be cognizant of the "here to there"[58] problem for election reform—how actually to enact reform in a political world where real reform is difficult to achieve.[59] Her reticence about the details of the Democracy Index is part of her own "here to there" strategy for getting the proposal off the ground and starting a discussion about it.

Gerken argues that any Democracy Index, indeed any data at all, would be an advance over the nearly absolute absence of information we have today about the performance of election administration. Gerken explains that "[r]ather than focusing on necessarily atmospheric judgments about what problems exist, the Index would provide concrete comparative data on bottom-line results."[60] She points out that today's debates over election administration, such as the controversy about voter-identification requirements, "take place in a world without data."[61] For example, she observes that we do not know how many people cast a ballot during the 2004 presidential election because 20% of states do not report this data.[62] As such, the comprehensive data collection intrinsic to the Democracy Index may prove independently valuable even if the Democracy Index never achieves the currency Gerken hopes it does. Better data, as Gerken convincingly argues, would help improve our understanding of the problems in election administration, give us better tools for diagnosing those problems, and help generate systematic fixes to address them.

Gerken's agnosticism about the specifics of the Democracy Index, though, is not only a strength of the book, but also a weakness. The devil is in the details, one might warn.[63] Some data is not always better than none. Incomplete data may be misleading or encourage the wrong incentives. Whatever data becomes available might be unreliable or otherwise inaccurate. The political incentives that bog down election-administration reform may likewise bog down the production of objective data. Data would be vulnerable to partisan manipulation and political spin, as well as exorbi-

58. *Id.* at 110.

59. *See id.* at 7 (describing political and organizational barriers that frequently prevent reforms from being implemented).

60. *Id.* at 59.

61. *Id.* at 43.

62. *Id.*

63. To be sure, Gerken herself acknowledges such a warning. *Id.* at 37.

tantly expensive to collect. By sidestepping the controversy inherent in a Democracy Index, Gerken therefore might be ducking the hardest questions.

Indeed, there is legitimate question whether consensus regarding the proper construction of a Democracy Index is politically feasible, given the political stakes. Gerken offers what seem like uncontroversial values in proposing that eligible voters should be able to vote and that all valid votes should be counted.[64] But these values may be uncontroversial only at that level of generality, glossing over what would become intense partisan struggles over voter registration, identification, and fraud when the debate is made more specific.[65] With election outcomes in the balance, Democrats and Republicans are fighting pitched battles on these issues today, as the political brouhahas over voter-identification requirements[66] and the Justice Department's enforcement of the Voting Rights Act,[67] among other things, make clear. It is hard to imagine that the same partisan divide would not spill into and dominate debate about a Democracy Index as well, at least if the index is to be anywhere near as politically relevant as Gerken intends. Gerken assumes that Republicans and Democrats will be able to compromise over their competing concerns, but intense, partisan conflicts of just the sort that Gerken laments in the area of election administration may likewise discredit the Democracy Index before it gets off the ground.[68] The Democracy Index is thus more a worthy aspiration than concrete policy at this point, with almost all the hard work still to be done.

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64. *See id.* at 27, 27–29 (implying that an index that assesses whether interested voters are able to register and vote—and whether the ballots are counted properly—is favorable because it stays away from "hot-button topics").

65. *See* Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443, 469 (2005) (explaining that "political actors try to achieve political ends through whatever available means" and citing election law as providing opportunities for such exploitation).

66. *See* Hasen, *supra* note 29, at 19–25; Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 633–37 (2007) (both describing the political debate over voter-identification requirements and arguing that a more comprehensive academic analysis of the issue is required).

67. *See* Luis Fuentes-Rohwer & Guy-Uriel E. Charles, *The Politics of Preclearance*, 12 MICH. J. RACE & L. 513, 514–16 (2007) (reviewing enforcement of the Voting Rights Act under the Bush Administration); Michael J. Pitts, *Defining "Partisan" Law Enforcement*, 18 STAN. L. & POL'Y REV. 324, 324–27 (2007) (describing recent controversies surrounding allegedly partisan nonenforcement of Section 5 of the Voting Rights Act); Dan Eggen, *Staff Opinions Banned in Voting Rights Cases: Criticism of Justice Dept.'s Rights Division Grows*, WASH. POST, Dec. 10, 2005, at A3 (describing allegations that political appointees blocked career Justice Department attorneys from making recommendations on whether to approve election-practice changes covered by Section 5 of the Voting Rights Act); *see also* David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 MICH. L. REV. 317, 325–26 (2008) (discussing allegations that the Bush Administration fired U.S. Attorneys for failing to pursue voter-fraud cases following state elections in which Democratic candidates prevailed).

68. *See, e.g.*, Hasen, *supra* note 29, at 27–28 (noting that then-Senator Obama's proposal for a Democracy Index had "apparently received no support from Republican lawmakers"). Gerken, however, also suggests that private institutions, such as the Pew Foundation, may be willing and able to sponsor at least some data collection without government participation. GERKEN, *supra* note 1, at 120–21.

It may be fair to question whether Gerken has sufficiently mapped out a plan for getting from "here to there" with respect to the Democracy Index itself. Gerken believes that reform advocates have dedicated too much energy theorizing about the ideal reform rather than developing a realistic strategy for implementing any effective reform, ideal or otherwise.[69] As I explain further in the next Part, this theme and proposed shift from abstract theory to practical politics is an important insight. Nonetheless, the task of creating a creditworthy Democracy Index in the first place, burdened by theoretical tangles, bears its own problem of "here to there." Once up and running as a creditworthy metric of performance, the Democracy Index may well operate as a self-sustaining engine for reform that eases the way for new improvements in election administration. But how do would-be reformers get from here to the "there" of having a Democracy Index that is not bogged down in normative controversies about which values it ought to prioritize, how they should be weighted, and which data should be credited?

Even with a clearer blueprint for the details of the Democracy Index, there are concerns about how well a Democracy Index would work. First, the task of collecting comprehensive data across local jurisdictions would face the same problems that plague election administration itself. The lack of resources and training among election administrators, the decentralized patchwork system of election administration, and the partisan inertia among elected officials who oversee the system—all of these appear to be obstacles to what Gerken seems to propose in terms of systematic data gathering performed regularly by local officials across a deep stretch of the country.[70] The degree of practical challenge depends on the ambition and scope of the initial efforts, and Gerken offers several ingenious approaches, drawing heavily on corporate marketing and inventory management for inspiration.[71] The larger concern is that these obstacles to election reform will handicap Democracy Index 1.0 at its birth, before it has the chance to alter leadership incentives once fully functional.

69. *See* GERKEN, *supra* note 1, at 6. Gerken notes that:

> We spend a great deal of time thinking about what's wrong with our election system (the "here") and how to fix it (the "there"). But we spend almost no time thinking about how to get from here to there—how to create an environment in which reform can actually take root.

Id.

70. Gerken argues, however, that at least some data may be collected by private institutions without the participation of election administrators. *Id.* at 128–30. Although the most robust ambitions for the Democracy Index require government-collected data, there is also no doubt that there is useful data relevant to performance that can be collected by private institutions without government cooperation. The Democracy Index's popularity as a reform proposal and focus on quantitative data have already prompted many suggestions about creative ways to collect such data, as discussed in the book, and may hasten efforts to act on those suggestions.

71. Gerken proposes, among other things, a Nielsen-style rating service by which randomly selected voters would voluntarily record data about their voting experiences, and pop-up surveys—following Wal-Mart's lead—asking voters to answer optional additional questions at the end of their electronic ballots. *Id.* at 126–30.

Second, even if Democracy Index 1.0 gets off the ground with rich, complete data, Gerken may be overly optimistic about how responsive voters will be to the index rankings.[72] Again, a basic problem is that election administration does not sit at the forefront of voter concerns.[73] The Democracy Index might provide voters with additional leverage to judge officials for election administration, but voters still might not care enough anyway. As Gerken worries in the book, party identification might swamp the Democracy Index as a voting heuristic if voters opt to vote their party lines notwithstanding the Democracy Index's telling them that performance in election administration was good or bad.[74] Empowering voters and democratizing issues of election administration via the Democracy Index is a wonderfully creative approach, but its success ultimately relies on voters to care about election administration, and therefore it still might not work in the end.

Third, even if the Democracy Index gets off the ground and voters heed it, the example of the *U.S. News & World Report* rankings of law schools looms as cautionary. Introducing the Democracy Index, Gerken herself invokes the example of the *U.S. News* rankings,[75] which in many ways epitomize the success to which the Democracy Index aspires. The *U.S. News* rankings have generated intense competition among schools to advance in the rankings and, in the process, have produced abundant, accessible data about school characteristics upon which applicants rely extensively.[76] Nonetheless, critics argue that the *U.S. News* rankings are substantively misleading and subject to manipulation by the schools who self-report much of the data used in the ranking formula.[77] The fierce competition among law

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72. *See, e.g.*, Herbert E. Cihak, *The Help America Vote Act: Unmet Expectations?*, 29 U. ARK. LITTLE ROCK L. REV. 679, 696 (2007) ("If there are any topics that United States citizens think often about and exhibit great passion for, election law reform is not generally among those topics.").

73. To the degree that election administration is on voters' minds, views about election administration may be somewhat unresponsive to new information. *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, 1746–49 (2008) (finding that voters' perceptions of voter fraud are unaffected by the presence or absence of voter-identification requirements).

74. GERKEN, *supra* note 1, at 73–75.

75. *Id.* at 5.

76. For descriptions of the methodology, factors, and effect of the *U.S. News* rankings, see Mitchell Berger, *Why the* U.S. News and World Report *Law School Rankings Are Both Useful and Important*, 51 J. LEGAL EDUC. 487, 487–88 (2001); William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the* U.S. News *Rankings Era*, 81 IND. L.J. 163, 165 (2006); and Michael Sauder & Ryon Lancaster, *Do Rankings Matter?: The Effects of* U.S. News & World Report *Rankings on the Admissions Process of Law Schools*, 40 LAW & SOC'Y REV. 105, 117 (2006).

77. For discussion of the *U.S. News* rankings, see STEPHEN P. KLEIN & LAURA HAMILTON, ASS'N OF AM. LAW SCH., THE VALIDITY OF THE *U.S. NEWS & WORLD REPORT* RANKING OF ABA LAW SCHOOLS (1998), http://www.aals.org/reports/validity.html; Michael E. Solimine, *Status Seeking and the Allure and Limits of Law School Rankings*, 81 IND. L.J. 299, 307 (2006); David A. Thomas, *The Law School Rankings Are Harmful Deceptions: A Response to Those Who Praise the*

schools may produce little substantive improvement in legal education, effecting only trivial reshufflings of similarly ranked schools at the top and larger, though seemingly random, reshufflings lower down in the rankings.[78] In other words, the *U.S. News* rankings have been successful in attracting attention and spawning competition, but the substantive payoff has been mixed. What is more, contrary to Gerken's hopes for the Democracy Index, the success of the *U.S. News* rankings has crowded out the emergence of competitors in the form of similarly prominent ranking systems.[79]

Despite these reasons for caution, Gerken's Democracy Index not only represents a specific proposal but, more importantly, also embodies a positive new approach to election administration. The Democracy Index signals the way for future scholarship in election law more generally toward proposals that are attentive to shifting the incentives of political leaders, rather than toward courts for neutral oversight.

III. To Here from Theory in Election Law

In pioneering works, Samuel Issacharoff, Richard Pildes, and others have developed what has become known as a "structural approach" to election law.[80] They argue that the traditional focus in constitutional law on individual rights weighed against the interests of the state was inappropriate for judicial oversight of democratic politics. Under a structural approach to election law, courts should affirmatively regulate "the institutional [structures] within which politics" play out, rather than correct "individual harms" as conventionally defined.[81] Courts ought not reflexively apply

Rankings and Suggestions for a Better Approach to Evaluating Law Schools, 40 HOUS. L. REV. 419, 422 (2003).

78. *See, e.g.*, Henderson & Morriss, *supra* note 76, at 202 (showing how law schools have increased their rankings by taking measures that have "little obvious educational merit"); Nancy B. Rapoport, *Eating Our Cake and Having It, Too: Why Real Change Is So Difficult in Law Schools*, 81 IND. L.J. 359, 360–61 (2006) (describing the University of Houston Law Center's 2005 strategic plan for increasing its *U.S. News* ranking).

79. *See* Michael Sauder & Wendy Nelson Espeland, *Strength in Numbers?: The Advantages of Multiple Rankings*, 81 IND. L.J. 205, 206–07 (2006) (arguing that multiple, competing rankings would be beneficial, but noting *U.S. News*'s virtual monopoly on law-school rankings).

80. *See, e.g.*, Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 519–31, 539 (2004) (arguing that an individual-rights framework is unsuitable for resolution of gerrymandering cases that require structural remedies); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644–51 (1998) (contrasting individualistic conceptions of harm with questions about the political structures of governance); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1217–18 (1999) (observing that election-law scholarship has moved away from a rights-based, individual-centered view of politics to a more pragmatic, structural, and institutional view of politics); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 46–55 (2004) (warning that the U.S. judicial system focuses too narrowly on individual rights in isolation from their political and structural context).

81. Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1417 (2002).

individual-rights frameworks from other areas of constitutional law but instead should directly regulate democratic politics and shape election law to achieve the best structural aims of elections.

Despite the many successes of the structural approach, election law and its scholarship have not fully embraced the structuralist call. For one thing, courts continue to analyze election law through an individual-rights framework, usually borrowed from other areas of constitutional law.[82] Just as importantly, election-law commentators continue to analyze many questions in the field through essentially the same lens. Not all problems lend themselves equally to structuralist treatment.[83] Some appear to be, consistent with the structuralist understanding, clear process failures that require systemic correction and may not be fully captured by the traditional individual-rights framework. Partisan gerrymandering by incumbents—manipulating legislative district lines to ensure their reelection—appears more like a structural process failure.[84] By contrast, denial of the right to vote by virtue of onerous voter-identification requirements may appear more similar to the traditional, individual-based harm that constitutional law traditionally prohibits.

Gerken's approach to election administration is interesting, at least in part, because she unexpectedly imposes a structural lens for viewing election administration, which was previously seen by many as a question of individual rights. Previous commentators debated issues of election administration, such as voter identification, by weighing the applicable government interest against individual protections under the First and Fourteenth Amendments.[85] Gerken sharply departs from this practice by viewing election administration almost exclusively as a question of proper political process. What is more, Gerken's reframing of election administration as a structural problem (with a

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82. *See infra* notes 101–05 and accompanying text.

83. Frederick Schauer argues that on questions of speech regulation ranging from copyright to securities regulation to sexual harassment, "the question whether the First Amendment shows up at all is rarely addressed, and the answer is too often simply assumed." Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004). Schauer contends that a legally immaterial array of political, cultural, and economic factors influence whether a specific problem carries "constitutional salience" such that it becomes regarded as a First Amendment problem, while other, analytically similar problems are not. *Id.* at 1765. Of course, most legal questions may be susceptible to either type of framing in some measure, but a similar process of sorting may occur in election law whereby some problems are more easily viewed as individual-rights questions and other problems are more easily viewed as structural questions.

84. *See* Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 578 (2004) (arguing that traditional rights analysis does not capture the structural concern inherent in partisan gerrymandering).

85. *E.g.*, Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 328–29 (2007); Hasen, *supra* note 29, at 3; Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1067 (2007); Laurence H. Tribe, eroG v. hsuB *and Its Disguises: Freeing* Bush v. Gore *From Its Hall of Mirrors*, 115 HARV. L. REV. 170, 188–89 (2001).

structural solution) may point the way for future scholarship in election law. All election law, including election administration, structures the incentives and restrictions on the process by which the lawmakers, who make the election law that governs them, gain and maintain public office.[86] Officeholders have rich incentives and the power to maintain or alter the laws governing election administration in ways that help ensure their continued tenure.

However, attention to the risk of entrenchment is inconsistent across different areas of election law. Gerken's example suggests that courts and commentators should examine anew familiar problems in election law as problems of entrenchment and partisanship, even if they have not been considered in that fashion before. For instance, although the entrenchment threat in certain areas of election law such as partisan gerrymandering is well recognized,[87] a similar risk in campaign finance is much less discussed. By tilting campaign-finance law in their favor, incumbent elected officials can advantage themselves and make it more difficult for challengers to defeat their reelection bids. Elected officials can, in other words, "gerrymander" campaign-finance law much like they gerrymander district lines.[88] Campaign-finance regulation, in the usual formulation, imposes restrictions on candidates' and contributors' ability to transact campaign donations,[89] but while these restrictions apply formally to all candidates, incumbents are likely to fare better than out-of-office challengers because they enjoy decided advantages in raising money.[90]

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86. *See* Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 629 (2002) (arguing that redistricting ought to be deemed unconstitutional per se when conducted by self-interested elected officials); Issacharoff & Pildes, *supra* note 80, at 668 (discussing ballot-access restrictions as problems of legislative entrenchment); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 503 (1997) (posing entrenchment as the central question for the legal analysis of election law).

87. *See, e.g.*, Michael S. Kang, *De-Rigging Elections: Direct Democracy and the Future of Redistricting Reform*, 84 WASH. U. L.R. 667, 683 (2006) (arguing that the basic motivation underlying redistricting reform has been the concern that "[s]elf-dealing incumbents can and do substitute their political interests as the overriding priority for redistricting in place of any broader sense of the public good").

88. The empirical literature on this question is ambiguous, however. *Compare* John R. Lott, Jr., *Campaign Finance Reform and Electoral Competition*, 129 PUB. CHOICE 263, 292 (2006) (finding that campaign-finance contribution limits advantage incumbents and depress electoral competition), *with* Thomas Stratmann & Francisco J. Aparicio-Castillo, Comment, *Campaign Finance Reform and Electoral Competition*, 133 PUB. CHOICE 107, 108–10 (2007) (criticizing Lott's findings), *and* Thomas Stratmann & Francisco J. Aparicio-Castillo, *Competition Policy for Elections: Do Campaign Contribution Limits Matter?*, 127 PUB. CHOICE 177, 199 (2006) (finding that contribution limits increase electoral competition by making incumbents more vulnerable).

89. For instance, federal campaign-finance law, among other things, restricts the maximum contribution from an individual contributor to a particular candidate, 11 C.F.R. § 110.1(b)(1) (2008), restricts the amount any individual contributor can give in aggregate during an election cycle, *id.* § 110.5(b), and prohibits campaign contributions to candidates and political parties by particular classes of contributors, including corporations, banks, and unions, *id.* § 114.2(a)–(b).

90. Incumbent officials generally possess significant advantages in campaign fundraising compared to potential challengers. First, campaign contributors are motivated to donate funds to incumbents because incumbents, by definition, presently hold office. Contributors, at least in part,

The "Millionaires' Amendment," at issue in the recent Supreme Court decision *Davis v. FEC*,[91] represents a particularly egregious instance of incumbent-friendly campaign-finance law. The Millionaires' Amendment,[92] part of the Bipartisan Campaign Reform Act of 2002, relaxed campaign-finance restrictions for candidates who face a self-financed opponent who spend more than $350,000 in personal funds.[93] Advocates argued that the Millionaires' Amendment simply equalized campaign finance by limiting the advantages of wealthy candidates willing to spend heavily on their campaigns.[94] However, as a practical matter, the Millionaires' Amendment

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hope to curry favor with those politicians who wield lawmaking power and can influence the legislative process to the contributors' benefit. Second, incumbents are a good investment for campaign contributors who look prospectively toward the next election. Incumbents are usually a "winning bet" to triumph in the next election, retain office, and continue helping out contributors in the future. Incumbents tend to be successful politicians who have already demonstrated their ability to win elections and have built-in electoral advantages by virtue of their incumbency, such as name recognition and media exposure. For these reasons, it is not surprising that incumbents attract the bulk of contributions. Indeed, the moment a politician takes office, his ability to raise campaign contributions improves dramatically. E. Joshua Rosenkranz, *Faulty Assumptions in "Faulty Assumptions": A Response to Professor Smith's Critiques of Campaign Finance Reform*, 30 CONN. L. REV. 867, 874–75 (1998); *see also* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1072 (1996) (noting that "[c]ontribution limits tend to favor incumbents" and "hinder the ability of challengers to compete on equal terms with those already in power").

What is more, lacking the name recognition and credibility of incumbents, challengers are already more reliant on having a large campaign treasury to win elections. Challengers typically need to raise more than $1 million, on average, for a congressional seat. *See* Kelly D. Patterson, *Spending in the 2004 Election*, *in* FINANCING THE 2004 ELECTION 68, 75 (David B. Magleby et al. eds., 2006) (showing total campaign expenditures in 2004 of $660.3 million for the House and $496.4 million for the Senate); Ctr. for Responsive Politics, The Dollars and Cents of Incumbency, OpenSecrets, http://www.opensecrets.org/bigpicture/cost.php (reporting that the odds of defeating a U.S. House incumbent in the 2006 election cycle dropped to 100:1 if the challenger spent less than $1 million); *see also* McConnell v. FEC, 540 U.S. 93, 249 (2003) (Scalia, J., dissenting) ("[A]s everyone knows, [campaign finance] is an area in which evenhandedness is not fairness.").

91. 128 S. Ct. 2759 (2008).

92. Pub. L. No. 107-155, § 319, 116 Stat. 81, 109–12 (codified at 2 U.S.C. § 441a-1 (2006)).

93. The Millionaires' Amendment permitted a candidate facing such a self-financed opponent to raise money at three times the otherwise applicable contribution limit, 2 U.S.C. § 441a-1(a)(1)(A), to receive contributions from donors who otherwise would be capped by individual aggregate limits, *id.* § 441a-1(a)(1)(B), and to coordinate with a political party on party spending that would otherwise be prohibited, *id.* § 441a-1(a)(1)(C).

94. *See* Jennifer A. Steen, *The Millionaires' Amendment*, *in* LIFE AFTER REFORM: WHEN THE BIPARTISAN CAMPAIGN REFORM ACT MEETS POLITICS 159, 160–62 (Michael J. Malbin ed., 2003) (discussing self-financed candidates and the legislative background of the Millionaires' Amendment); *see also* 147 CONG. REC. 3964, 3975 (2001) (statement of Sen. DeWine) (arguing that the amendment "will move toward a more level playing field and does address a problem . . . when, because of a constitutionally protected loophole, the wealthy candidate is the only person in the country who can put an unlimited amount of money in a particular campaign"); *id.* at 3970 ("Our purpose is to level the playing field so that one candidate who has millions, if not billions, of dollars to spend on a campaign will not be at such a significant advantage over another candidate who does not have such means as to create an unlevel playing field."); 147 CONG. REC. 3840, 3870 (2001) (statement of Sen. Domenici) (characterizing the amendment as "an equalizer amendment; it is a fair play amendment"); Adam Liptak, *Justices Hear Case of the Millionaire's*

reinforced the electoral advantages of the incumbents in Congress who enacted it into law. Under *Buckley v. Valeo*,[95] federal campaign-finance law permits self-financed candidates to contribute freely to their own campaigns, outside of the restrictions that apply to contributions from other individuals, parties, and organizations.[96] The amendment neutralized this capacity of self-financed candidates to match incumbents' fundraising power by lifting campaign-finance limitations on incumbents facing such challenges. Senator John McCain, a supporter of the amendment, admitted that the amendment addressed the concern of incumbents that "they wake up some morning and pick up the paper and find out that some multimillionaire is going to run for their seat, and that person intends to invest 3, 5, 8, 10, now up to $70 million of their own money in order to win."[97] During congressional debate, even supporters of the larger McCain–Feingold bill[98] (of which the amendment was only one part) criticized the amendment as motivated by incumbent self-interest. The late Senator Paul Wellstone, an otherwise stalwart advocate of campaign-finance reform, argued that the amendment is "a step backward and is blatant incumbent protection."[99] Senator Chris Dodd added that the amendment "ignores the fact that many incumbents who face wealthy challengers are sitting on healthy campaign treasuries," and thus that in many cases the amendment "serves as an incumbent protection provision."[100] Nonetheless, courts and commentators do not necessarily frame campaign-finance problems, such as those presented in *Davis v. FEC*, in terms of incumbent entrenchment. *Buckley* approached federal regulation of campaign finance predominantly as a question of individual rights and free speech under the First Amendment.[101] The central question in campaign-finance law, as a result, has been the degree to which the state can restrict the ability of individuals to deploy financial resources in the service of political expression, rather than a structural analysis that recognizes the partisan motivations and consequences of campaign-finance regulation.[102] Just so,

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Amendment, N.Y. TIMES, Apr. 23, 2008, at 15 (describing the amendment as a "law meant to level the financial playing field").

95. 424 U.S. 1 (1976).

96. *See id.* at 52–54.

97. 147 CONG. REC. 3965, 3969 (2001) (statement of Sen. McCain); *see also* Pildes, *supra* note 80, at 140 n.449 ("Self-financed opponents are today's incumbents' nightmares.").

98. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2, 28, and 47 U.S.C.).

99. 147 CONG. REC. 5193, 5219 (2001) (statement of Sen. Wellstone).

100. 148 CONG. REC. 5193, 5193 (2002) (statement of Sen. Dodd); *see also* 147 CONG. REC. 4487, 4507 (2001) (statement of Sen. Reid) ("The American people believe we are taking advantage of a broken and corrupt system to keep ourselves in power. In my personal opinion, the 'millionaire' amendment . . . was just that; it was more legislation to take care of us.").

101. In fact, the Court in *Buckley* expressed skepticism about the risks of entrenchment from campaign-finance regulation. Buckley v. Valeo, 424 U.S. 1, 30–33 (1976).

102. *See, e.g.*, Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1080 (1985) (discussing campaign-finance reform's advantage to incumbents as part of larger First Amendment concerns); Elena Kagan,

when the Court decided *Davis v. FEC* and reviewed the constitutionality of the Millionaires' Amendment, the Court did not refer at all to its possible impact on incumbent entrenchment. The Court was focused squarely on the question of whether the substantial burden on self-financers' individual rights to use personal funds in campaigning could be justified by a compelling government interest in eliminating corruption or the perception of corruption.[103] The majority decided that the amendment was unconstitutional under the First Amendment because it could be understood only as an attempt by Congress to equalize the financial resources of candidates and therefore exceeded the government's rightful authority to regulate campaign finance.[104] Nowhere did the Court acknowledge or consider that the amendment would equalize the financial resources of candidates only in the most theoretical supposition.[105]

In other words, the Court properly struck down the amendment but failed entirely to identify the threat of incumbent entrenchment in campaign finance.[106] The Court deemed the amendment to be an improper attempt by Congress to equalize the financial competitiveness of candidates, rather than recognizing it more plausibly as an attempt by members of Congress to lock in permanently the financial disadvantage of challengers against them by offsetting the resources of self-financers—the subset of challengers with the

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Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. 413, 464–70 (1996) (analyzing the decision in *Buckley* as a free speech issue, only later noting the advantage that incumbents would receive from campaign-finance reform); Kathleen M. Sullivan, *Political Money and Freedom of Speech*, 30 U.C. DAVIS L. REV. 663, 685–87 (1997) (giving little attention to the problems of entrenched incumbents while largely focusing on free speech issues); Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400–03 (1994) (noting that campaign-finance reform might help incumbents in individual cases but dismissing the framing of the problem as a systemic concern).

103. Davis v. FEC, 128 S. Ct. 2759, 2773, 2771–74 (2008) ("[I]t is hard to imagine how the denial of liberalized limits to self-financing candidates can be regarded as serving anticorruption goals sufficiently to justify the resulting constitutional burden.").

104. *Id.* at 2773–75.

105. Richard Pildes argues that "[t]he specter of incumbent self-entrenchment is central" to *Davis v. FEC*. Posting of Rick Pildes to Balkinization, http://balkin.blogspot.com/2008/06/sympathy-for-millionaire-self.html (June 26, 2008, 11:37 EST); *see also* Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After* Randall v. Sorrell, 68 OHIO ST. L.J. 849, 869 (2007) (describing Pildes's view of *Randall v. Sorrell*, which is similar to his opinion about *Davis*). Although I agree with the rest of Pildes's claims regarding the Millionaires' Amendment, I find it difficult to agree that the entrenchment rationale is central to the Court's decisions when there is no mention of that risk in the opinions themselves, and there was hardly any mention of it during oral argument. Pildes seems to believe that concern about entrenchment operates in the background of the decision, *sub silentio*, but it is exceedingly difficult to evaluate the truth of his claim about the internal reasoning of the Justices apart from analyzing their written opinions.

106. *See* Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 60 (2004) (arguing that the Court "abdicated [its] responsibility . . . to police legislatively enacted campaign-finance regulations for self-interest"); *see also* McConnell v. FEC, 540 U.S. 93, 249 (2003) (Scalia, J., dissenting) ("[*A*]*ny* restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents.").

greatest ability to match them financially. Not only has the Court neglected the risk of incumbent entrenchment in campaign finance, but a segment of the Court actually has gone further to suggest that the judiciary should defer to Congress and other legislatures on campaign-finance law.[107]

With respect to election administration, it is therefore fitting that Gerken does not mention once in *The Democracy Index* the institution usually of greatest interest to law professors—the judiciary. Diverging from the court centrism of her profession and the usual structuralist focus, Gerken does not concentrate on how courts can best regulate the political process and the role that constitutional law plays in that process. Gerken does not appeal to courts as a neutral watchdog, insulated from politics, regulating politics from the outside. In truth, courts have hardly embraced what Richard Pildes urges on them as "a distinct calling, recognized already on occasion, to address the structural problem of self-entrenching laws that govern the political domain."[108] Judicial reluctance to consider incumbent entrenchment as a motivation for and effect of campaign-finance law is typical of the judicial attitude toward election law. If anything, as Pildes admits,[109] courts have endorsed the protection of incumbency as a government interest on multiple occasions.[110] Even in areas like partisan gerrymandering, where the risk of entrenchment is the central question, courts have balked at checking legislative prerogatives.[111] As a consequence, Gerken may be right to ignore courts almost entirely in her analysis and prescriptions for the problems in election administration.

It is ironic that election-law scholarship tends to concentrate on the judiciary. Scholarly commentary regularly castigates court decisions for failing to understand and manage the structure of politics, but perhaps does not sufficiently consider the institutional weaknesses inherent in the judiciary

107. *See generally* Hasen, *supra* note 105, at 862 (characterizing a segment of the Court as the "Deference Justices"); *see also McConnell*, 540 U.S. at 137 (noting the "particular expertise" of Congress in setting contribution limits); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 403–04 (2000) (Breyer, J., concurring) (arguing that the legislature has greater institutional expertise in the field of election regulation and proposing greater judicial deference); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting) (arguing for deference to the legislature in campaign finance where "the expertise of legislators is at its peak and that of judges is at its very lowest").

108. Pildes, *supra* note 80, at 54.

109. *See id.* at 55 (recognizing that courts have enabled current officeholders to manipulate the system to their advantage).

110. *See, e.g.*, Gaffney v. Cummings, 412 U.S. 735, 754 (1973) (holding that judicial scrutiny should be at its "lowest ebb" when gerrymandering divides political power proportionate to the major parties' electoral strength, even though it insulates incumbents); *see also* Abrams v. Johnson, 521 U.S. 74, 101 (1997); Bush v. Vera, 517 U.S. 952, 964 (1996); Karcher v. Daggett, 462 U.S. 725, 740 (1983); Connor v. Finch, 431 U.S. 407, 414–15 (1977); White v. Weiser, 412 U.S. 783, 795–97 (1973) (all holding that deference should be given to state legislatures in redistricting issues).

111. *See* Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1098 (2007) (discussing judicial paralysis on partisan gerrymandering).

when it comes to deciding cases with political ramifications. Judges may decide political cases badly, at least in part, because they possess liabilities that compromise their judgment and few assets to help them manage politics astutely. Lifetime tenure insulates federal judges from politics and democratic input,[112] while the judiciary is equipped with few compensatory resources for understanding politics empirically. When judges are required to decide political cases, they appear to fall back on their personal attachments, as figures of the establishment, in favor of both major-party duopoly and their respective partisanship.[113] True, courts presented with political cases must decide them one way or another, even if their decision is to abstain.[114] But, as *The Democracy Index* implies, election-law scholarship may profit in both theory and practice from looking beyond courts for proper regulation of the political process.

Embodied in Gerken's "here to there" emphasis for election law is this decided shift away from court centrism. It may be too easy, and unsuccessful thus far, to propose that healthy political regulation flows from political neutrality on the part of courts and similarly insulated institutions.[115] *The Democracy Index* instead offers the daring suggestion that *more* politics is the most hopeful means to reforming politics. In Gerken's account of election administration, and election law more generally, political self-interest is a fact of life in American politics but is not an unequivocal good or bad—

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112. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980) (arguing that judicial insulation "does not give [courts] some special pipeline to the genuine values of the American people: in fact it goes far to ensure that they won't have one"); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 747 (1995) (observing that federal judges "have no incentive to please supporters" nor "have any incentive—at least none related to job security—to consider how their decisions in particular high-profile cases will be received by the citizenry").

113. *See* GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 97–100 (2002) (finding that federal judges in the 1960s tended to decide certain congressional-redistricting cases in a partisan manner); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 21–29 (2008) (finding that Democratic appointees are significantly more likely than Republican appointees to find liability under Section 2 of the Voting Rights Act); Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 417–18 (1995) (finding that federal judges appointed by one political party were more likely to strike down redistricting maps drawn by the other party).

114. *See* Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 IOWA L. REV. 131, 183 (2005) (arguing that judicial abstention is not neutral and in fact actually discourages accommodation, favoring leaders with closer access to legislative power who can use state law as a trump card in intraparty disputes).

115. *See, e.g.*, OVERTON, *supra* note 2, at 38 (endorsing Richard Hasen's proposal for a chief elections officer "immunized from political pressure"); Christopher C. Confer, *To Be About the People's Business: An Examination of the Utility of Nonpolitical/Bipartisan Legislative Redistricting Commissions*, 13 KAN. J.L. & PUB. POL'Y 115, 138–41 (2004) (advocating nonpolitical redistricting commissions); John C. Courtney, *Redistricting: What the United States Can Learn from Canada*, 3 ELECTION L.J. 488, 499–500 (2004) (arguing that the United States should adopt independent commissions for redistricting). *But see* Kang, *supra* note 87, at 690–96 (explaining the risks of seeking apoliticism).

what Gerken has called a "double-edged sword" in other work.[116] On one hand, political self-interest as the motivation for entrenchment is responsible for the quagmire of contemporary election administration. On the other hand, the most promising reforms in election administration may be, ironically, new institutions that identify and cultivate political self-interest. The Democracy Index, in this fashion, seeks not to suppress or deny politics through outright prohibition, but instead to redirect political self-interest so that elected politicians will pursue healthier ends.[117]

Gerken's plan for the Democracy Index features just such a careful and, in my view, proper focus on the political dynamics among political leaders. The politics of the Democracy Index depend as much on changing the balance of power *among* political leaders as on changing the balance of power *between* political leaders as a class and voters. A key, underemphasized piece of the Democracy Index is that it not only empowers voters, but also empowers political leaders within a party who push for election reform, for a variety of motivations, against other intraparty factions. Parties are diverse coalitions containing pro-reform and anti-reform elements.[118] The Democracy Index would not confront monolithic parties unified against election reform that might unsettle incumbent power, as might be assumed. The new electoral incentives of the Democracy Index could instead provide critical leverage for the pro-reform elements in what might otherwise be difficult intraparty fights right now. Gerken focuses less attention on these intraparty dynamics, but they are an important component of any successful Democracy Index.

Proposals such as the Democracy Index therefore may represent a natural Madisonian extension of a structural approach to election law and point the way for future work. I once described a hydraulic process of party regulation in which party leaders, faced with legal restrictions, like water finding its level, strive to circumvent those restrictions through new channels and often accomplish the same ends.[119] Similarly, one might expect elected officials in election administration, and elsewhere in election law, to continue pursuing their interests through new strategies when restricted by command-and-control oversight by courts. Although such oversight attempts may be more or less successful in different areas, proposals such as the Democracy Index point in a different direction. To the degree that there is a hydraulics of election administration by which political leaders always attempt to maximize electoral advantage, the Democracy Index applies a Madisonian

116. Heather K. Gerken, *The Double-Edged Sword of Independence: Inoculating Electoral Reform Commissions Against Everyday Politics*, 6 ELECTION L.J. 184, 185 (2007).

117. *See supra* text accompanying notes 52–53.

118. *See* Kang, *supra* note 114, at 142–45 (describing parties as diverse, heterogeneous coalitions prone to internal division).

119. *See id.* at 134, 146–55 ("Like water, the party seeks a hydraulic return to its own level of influence, seeking gaps and openings in the regulatory edifice, whether they exist in the public or private domain.").

approach. It redeems the political context such that maximizing electoral advantage induces political leaders to compete in the public interest. The structuralist project may likewise turn in other areas of election law toward conspicuously political institutions that set "[a]mbition . . . to counteract ambition" in the Madisonian tradition.[120] I myself have proposed what I call a "distinctly political solution" for partisan gerrymandering by likewise trying to harness politics, rather than turning away from politics.[121] The next extension of a structural approach's emphasis on process-oriented attention to political leadership is the development of these nonjudicial institutions that contemplate politics as the remedy for politics.[122]

These process-oriented solutions may prove more consistent and durable in the long run than reliance on courts or other watchdogs. Process-oriented solutions do not depend on the vigilance, good faith, and neutrality of courts, independent commissions, or nonpartisan overseers of elections. Nor do they place democratically vulnerable adjudicators in the difficult position of deciding political disputes or dividing up spoils. Instead, process-oriented reforms like the Democracy Index may be naturally self-maintaining once set into motion. I am not sure that the Democracy Index would be easier to implement than other reform proposals,[123] given the aforementioned challenges of data collection, cost, value dissensus, and legislative inertia that plague election administration as a general matter. But the Democracy Index, having channeled partisan self-interest in the direction of election reform, should reinforce good governance in a way that command-and-control regulation, particularly by courts, may struggle to achieve.

IV. Conclusion

The Democracy Index is a thoughtful, creative advance in the discrete area of election administration that embodies converging themes in the field of election law as a whole. What is more, unlike so many academic proposals, the Democracy Index itself is already getting from here to somewhere as a policy proposal. It has already been the centerpiece of a 2007 conference, titled "Implementing the Democracy Index," sponsored by the AEI–Brookings Election Reform Project, the Pew Foundation, and the

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120. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

121. Kang, *supra* note 87, at 668. I argue that requiring direct democratic approval of competing redistricting maps would introduce partisan competition into what otherwise has been an entirely unrestricted process when left to the legislature completely. *Id.* at 668–69. The public can serve as a disciplining force on elected officials, inducing them to compete for the median voter's approval and thus serve the public interest in the process. *See id.* at 707, 699–713 ("Legislators would be forced to construct a redistricting proposal that could survive public scrutiny and attract the median voter's vote.").

122. Heather Gerken herself has alluded that "election law scholarship has recently taken an institutional turn." Heather K. Gerken, Rashomon *and the Roberts Court*, 68 OHIO ST. L.J. 1213, 1236, 1236–37 (2007).

123. *See supra* note 2.

Joyce Foundation.[124] It was introduced last year in Congress by then-Senator Clinton, and also by then-Senator and now-President Obama.[125] President Obama, himself a former teacher of election law at the University of Chicago Law School, may be prepared to move forward with further legislation in the same direction. Obama's presidential campaign counsel, Bob Bauer, noted immediately following the election that the "serious work . . . to be done" in election law includes devising "measures of actual performance on lines, staffing, supplies, machine readiness, and operation, etc., such as would be provided by a Democracy Index."[126] Beyond its academic impact on election-law scholarship, *The Democracy Index* may be a rare example of the best hopes of scholarship, transcending theory into practice as a meaningful political reform where it is badly needed.

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124. GERKEN, *supra* note 1, at 130.

125. *See supra* notes 10–11 and accompanying text.

126. More Soft Money Hard Law Web Updates, http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/election_administration.html?AID=1368 (Nov. 6, 2008).