

“Supposing is Good, But Finding Out is Better”
Data’s Vital Role in “Fixing” Election Administration
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The 2012 election has brought renewed attention to the field of election administration, thanks in large part to President Barack Obama’s observation that “we need to fix” issues related to the long lines at the polls experienced in some jurisdictions on Election Day.¹ The general sense is that these long lines—and the lengthy waits for voters they entail—are symptomatic of underlying election problems that need to be fixed.

Accordingly, the President announced during his State of The Union Address,² and established by executive order, a bipartisan Commission on Election Administration tasked with “identify[ing] best practices and otherwise make recommendations to promote the efficient administration of elections in order to ensure that all eligible voters have the opportunity to cast their ballots without undue delay.”³

But what exactly should the Commission examine? And how specifically can we decide how to “fix” election administration?

I believe the answer comes from another well-known American: Mark Twain. Twain once observed that “[s]upposing is good, but finding out is better.”⁴

I’ve always liked Twain’s quote because it puts a witty face on a topic that is gaining adherents in the field: evidence-based election administration, which I define as an effort by which election administrators collect a wide range of data on the voting process and then use that data for assessment and improvement of the election system. Momentum for the concept is growing, sparked in large part by Yale Law School’s Heather Gerken and her idea of a Democracy Index⁵ and brought to life most

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¹ Washington Post Staff, *President Obama’s Acceptance Speech (full transcript)*, WASH. POST, Nov. 7, 2012, http://articles.washingtonpost.com/2012-11-07/politics/35506456_1_applause-obama-sign-romney-sign.

² Richard Wolf, *Obama Proposes Commission to Address Long Lines at Polls*, USA TODAY, Feb. 12, 2013, <http://www.usatoday.com/story/news/2013/02/12/obama-voting-election-commission-lines/1914249/>.

³ Exec. Order No. 13,639, 50 Fed. Reg. 19,979 (Mar. 28, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/03/28/executive-order-establishment-presidential-commission-election-administr>.

⁴ MARK TWAIN, MARK TWAIN IN ERUPTION 324 (Bernard DeVoto ed., 3d ed. 1940).

⁵ The Democracy Index, YALE L. SCH., <http://www.law.yale.edu/faculty/democracyindex.htm> (last accessed July 19, 2013).

recently by The Pew Charitable Trusts through their initial Election Performance Index based on data from the 2008 and 2010 elections.⁶

We are also seeing increasing interest in other methods of obtaining data about elections. MIT Professor (and fellow symposium participant) Charles Stewart has, for two consecutive presidential elections, conducted a Survey of the Performance of American Elections, which asks voters about their experiences at the polls.⁷ He has also helped to develop a key metric, the “residual vote,” which measures the proportion of ballots cast that are actually counted in a given election.⁸ Finally, the U.S. Election Assistance Commission, created in 2002 with passage of the Help America Vote Act, has since 2004 been collecting data from state and local election authorities as part of its clearinghouse responsibilities.⁹

All of these sources—and more at the state¹⁰ and local¹¹ level nationwide—have begun to allow the field to harness election administration data to improve the voting process. Even better, it is happening in a wide variety of ways:

1. *Data raises awareness—and thus salience—of key aspects of election.* Quite simply, it is human nature to mind what you measure; whether it is a dieter keeping a food diary or a new business tracking expenses, focusing on a topic raises its salience in our everyday activities. The result is akin to the phenomenon where you meet someone at a party and suddenly begin to see them all over town. So, too, with election administration—by focusing on a topic like lines or residual votes, election officials can begin to see the connections between that data and all the different aspects of the voting process.

⁶ Election Performance Index, THE PEW CHARITABLE TRUSTS, <http://www.pewstates.org/research/reports/elections-performance-index-85899445029> (last accessed July 19, 2013).

⁷ Charles Stewart III, *A Voter's Eye View of Election Day 2012*, ELECTIONLINEWEEKLY, Dec. 20, 2012, <http://www.electionline.org/index.php/2012/994-electionlineweekly-dec-20-2012>.

⁸ CALTECH/MIT VOTING TECHNOLOGY PROJECT, VOTING: WHAT IS/WHAT COULD BE 20 (2001), available at http://www.vote.caltech.edu/sites/default/files/voting_what_is_what_could_be.pdf.

⁹ Election Administration and Voting Survey, U.S. ELECTION ASSISTANCE COMM'N, http://www.eac.gov/research/election_administration_and_voting_survey.aspx (last accessed April 5, 2013).

¹⁰ See, e.g., *G.A.B. Releases 2012 Local Election Data and Costs*, STATE OF WIS. GOV'T ACCOUNTABILITY BD., Feb. 19, 2013, <http://gab.wi.gov/node/2760> (Wisconsin data from 2012 election).

¹¹ See, e.g., Stephen L. Weir, Contra Costa Cnty. Clerk-Recorder Dept., *November 6, 2012 Presidential Election Absentee and Provisional Ballot Voting Report*, available at <http://www.cocovote.us/getdocument.aspx?id=810> (Contra Costa County, Cal. data from 2012).

2. *Choosing and formulating a data metric requires a useful attention to process.* It is not enough simply to start measuring numbers; the trick is to choose data that capture one or more important attributes, desirable or undesirable, and be clear about how—and more importantly, why—the data are saying what they do. This attention to the relationship between the election process and the data it generates is useful in focusing attention on long-running or well-established practices. In turn, this allows everyone concerned to ask whether “the way we’ve always done it” is still the way to go.
3. *Data can allow comparisons between jurisdictions and over time.* One of the most powerful aspects of the new emphasis on evidence-based election administration is the ability to compare performance from place to place and election to election. The decentralized nature of American election administration is well-established—I often joke that the only uniformity exhibited is the stubborn insistence on each community going its own way—yet, as data becomes more and more prevalent, it is possible to compare a measure, such as line length, across jurisdictions and ask why the numbers are different from place to place. Similarly, jurisdictions committed to data collection can also monitor their own operations from election to election, identifying improvement or emerging problems over time. These comparisons, geographic or over time, are not in and of themselves dispositive; however, the opportunity for diagnosis and further inquiry are invaluable.
4. *Data provides a “way in” to resolving difficult questions for policymakers—and courts.* Steve Weir, who recently retired as Clerk-Recorder of Contra Costa County, California, once observed at a meeting I attended that “election data is the perfect antidote to an anecdote.”¹² What he meant was that most discussions about election policy we usually hear are driven by stories about individuals—like 102-year-old Desiline Victor, who was held up as an example of the need for reform during the State of Union for her lengthy wait to vote

¹² See PEW CENTER ON THE STATES, *DATA FOR DEMOCRACY: IMPROVING ELECTIONS THROUGH METRICS AND MEASUREMENT 2* (2008), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Election_reform/Final%20dFD.pdf.

on location in 2012.¹³ The problem with such stories is that they often lack context—in Ms. Victor’s case, the fact that her wait was on the Sunday before Election Day at an early voting location—and hides the complexity of any question involving election administration.¹⁴ This lack of a firm footing can make policymakers—and more importantly, courts—unsure of how to intervene when problems arise. While legislatures often respond with high-volume rhetorical disagreements (as I like to say, politics adores a factual vacuum), courts are usually far more reticent to get involved absent what the U.S. Supreme Court calls “judicially discoverable and manageable standards” for resolving conflicts.¹⁵ Readily-available data not only gives policymakers something substantial to discuss, it allows judges to evaluate arguments and make decisions about election controversies based on evidence instead of rhetorical conjecture.

What, then, does this emerging emphasis on evidence-based administration mean for those brave souls in the legal community who wish to litigate or follow election administration cases?

First and foremost, it requires lawyers to get comfortable with a level of numeracy that is not always emphasized in the profession. Years ago, *Saturday Night Live*’s Chevy Chase lampooned then-President Gerald Ford in a debate sketch by responding to a complicated economic question, “it was my understanding that there would be no math.”¹⁶ That approach simply will not work in the new era of evidence-based election administration; while it is not necessary for attorneys to perform multivariate regressions, it will be crucial for them to become comfortable with concepts like confidence levels and measures of central tendency. Those ideas will, increasingly, provide compelling storylines in election cases that rival that of Ms. Victor.

In addition, it will require attorneys to listen to—and ask—their election clients about different data elements in a given case and to use those

¹³ Nadege Green, *At Age 102, Her 15 Minutes of Fame Comes from Hours of Waiting to Vote*, MIAMI HERALD, Mar. 13, 2013, <http://www.miamiherald.com/2013/03/12/3282440/north-miami-dade-woman-102-becomes.html>.

¹⁴ Doug Chapin, *102 Year-Old Desilene Victor Highlights Complexity Facing Election Reform*, HUMPHREY SCH. OF PUB. AFFAIRS ELECTON ACAD., Feb. 12, 2013, http://blog.lib.umn.edu/cspg/electionacademy/2013/02/102-year_old_desilene_victor_h.php.

¹⁵ *Baker v. Carr*, 369 U.S. 186, 217 (1962).

¹⁶ See Video embedded in Ed Driscoll, *High School Kids, NYT Confused by Definition of ‘Caveat Emptor’*, PJMEDIA (May 17, 2012, 7:28 PM), <http://pjmedia.com/eddriscoll/2012/05/17/high-school-kids-nyt-confused-by-definition-of-caveat-emptor/>.

discussions to drive decisions about what arguments to pursue. Sometimes, the attention to process (as described in point 2, above) can be useful in uncovering helpful evidence to support a client’s case or identifying a serious hole in the opponent’s argument. In other words, it is no longer enough to consult statutes and casebooks: Lawyers must also be willing to wade into the numbers.

William Edwards Deming, the godfather of the evidence-based management movement, is reported to have once observed that “in God we trust, all others bring data.”¹⁷ That same spirit now drives the emergence of evidence in elections. As policymakers, including the new presidential commission, begin to grapple with the issues raised by the 2012 election, they will need to acknowledge and embrace the new role that data plays in the field of election administration.

¹⁷ TREVOR HASTIE ET AL., *THE ELEMENTS OF STATISTICAL LEARNING* vii (2d ed. 2009), available at http://www-stat.stanford.edu/~tibs/ElemStatLearn/printings/ESLII_print10.pdf.