The Mismatch Problem: Why Election Law Isn't Always Built for the Electorate

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- David Schleicher, *Why Is there No Partisan Competition in City Council Elections? The Role of Election Law*, 13 **J. L. & Pol.** 419 (2007), available at SSRN.
- David Schleicher, *What if Europe Held an Election and No One Cared?* (work in progress, available here).

Two articles by David Schleicher fit nicely into the *Jotwell* category of "things I like (lots)." Schleicher is an assistant professor at George Mason Law School and a rising star in the field of election law. Both pieces explore what he calls the "mismatch" problem—what happens when we ask voters to perform a constitutional role without the tools they need to do so. The first piece explains why local elections in the U.S. don't do much to hold local officials accountable. The second piece explains why the European Parliament lacks "any semblance of democratic control" despite regular elections.

How is it possible to have elections without accountability? Schleicher isn't making any of the by-now-familiar arguments about incumbents' use of gerrymandering, campaign finance, and other election devices to keep their seats. Instead, he makes a far more provocative claim: election laws interact with the voters' own shortcomings to produce elections that are, in Schleicher's view, meaningless.

Schleicher begins with the simple proposition, firmly rooted in the political science literature: most voters are quite ignorant about political issues. (Here Schleicher joins his GMU colleague, Ilya Somin, in thinking hard about the problem of political ignorance). Drawing upon the work of Morris Fiorina, Schleicher argues that such "low information" or "rationally ignorant" voters nonetheless manage to make pretty good decisions in casting their ballots because they rely on the party label as a heuristic, keeping a "running tally" (Fiorina's term) on the performance of the major parties.

The problem is that national politics dominate the political system in the U.S. and Europe. National parties thus determine what each party "brand" signifies in the eyes of voters. That means when an average voter casts a ballot at a local U.S. election or the EU elections, she's really voting on her opinion about the national parties. To offer some crude examples, city council members in the U.S. might get elected because city residents are thrilled to vote for Obama; EU members might get elected based on whether voters are outraged by an expenditure scandal confined to the national parliament (Great Britain) or what they think of the prime minister's battle with his wife (Italy).

You can see the problem, of course. Whether the parties are doing a good job running the country may have little or nothing to do with whether things are going well at the local or supranational level. That's why Schleicher makes some rather strong claims about accountability in each instance. His basic view is that votes cast based on the performance of a different set of actors at a different level of governance can't possibly provide democratic accountability.

Schleicher's idea provides some nifty payoffs in both contexts. The first paper, for instance, casts serious doubt on a conventional wisdom among a fair number of political scientists—that local elections are noncompetitive in the U.S. because local issues are non-ideological and thus can't give rise to party politics. Nonsense, says Schleicher, in a pretty spectacular academic take-down of some big names in

political science. He argues that there's no reason to think that parties couldn't fight about how to run local governments, which preside over such highly salient issues as local taxes, school funding, and crime prevention. The problem is that we don't have enough media or campaign spending in local elections to make local party brands meaningful. Voters thus turn to the best heuristic they have—national party ID. Schleicher notes, for instance, that no matter what is happening locally, in most places votes in local elections roughly track votes in national elections. Schleicher bolsters his argument by identifying the instances where this isn't true—where local parties manage to differentiate themselves from their national counterparts. Those examples tend to occur in places like New York City, where there is enough media coverage and campaign spending for mayoral candidates to create a distinctive local brand. Rudy Giuliani can escape the negative effects of the GOP label and win in heavily Democratic New York, but he would be stuck if he were running for mayor in New Haven. (For those who think that the absence of partisan competition in local elections isn't a problem because competition takes place in the primary or in a nonpartisan election, Schleicher's paper will provide a healthy reminder of what happens when voters don't have access to party labels—they tend not to show up or rely on less desirable short cuts, like the race or gender of the candidate, campaign spending, etc.).

If Schleicher is right, then the absence of local competition isn't something that is "natural" or innate to local politics, as many academics have argued. Instead, election law is the source of the mismatch problem. After all, we could in theory structure elections so that voters have a shorthand that works at the local level. For instance, we could ban national parties from running in local elections so that local parties could develop their own brand. Election law, however, creates massive incentives to connect local parties to national ones. Further, the First Amendment itself would pose a significant challenge to any effort to remedy this problem.

Schleicher also has interesting things to say about the EU. There, he notes, scholars who study the EU's democratic deficit either try to downplay its significance or suggest massive changes to the EU's institutional structure to remedy it. Schleicher's proposal is more modest. He suggests changing EU's election requirements in order to give rationally ignorant European voters a better heuristic. Schleicher proposes that the EU follow the lead of a handful of countries and "require[] political parties to get a certain threshold amount of the vote in a majority of EU countries in order to get any members elected from any country." Such a rule, argues Schleicher, would "force campaigns to be waged at the European, rather than Member State, level."

These two papers are bubbling over with ideas, and that's more than enough to qualify for a Jotwell entry. But there's one, additional reason to admire them. Schleicher is trying to frame a research agenda for the field, one that would unite the work of a number of law professors (some of my research, here and here; work done by Michael Kang; and articles by Beth Garrett, here and here). Schleicher is pushing on a core question for the field of election law: *how do electoral rules interact with a rationally ignorant electorate?*

This is, of course, a question that has long obsessed political scientists. Indeed, arguments in favor of a "responsible party government" (some of which hinged on the importance of providing voters better heuristics) were explicitly endorsed by the American Political Science Association in 1950. It's a wonder there's anything left to say on the subject. But political scientists have largely focused on improving existing heuristics rather than creating new ones where, as here, cues are unavailable or disserve the interests of voters. Perhaps that because political scientists generally don't think of themselves as agents for reform. Perhaps it's because they tend to eschew strong normative claims or are more interested in informal power than formal rules. Law professors have stepped into the void. Papers like these suggest that there's more to say on these topics, and that Schleicher will play a leading role in these debates.

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