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FIXING THE U.S. ELECTION SYSTEM:

IS A DEMOCRACY INDEX THE ANSWER?

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P R O C E E D I N G S

MR. MANN: Thank you all for coming. I'm Tom Mann, a Senior Fellow here at Brookings, and co-director of the AEI-Brookings Election Reform Project, along with my colleague Norman Ornstein from AEI. We are so pleased to join Yale Law School in hosting this event which is centered around the publication of a wonderful new book called *The Democracy Index: Why Our Election System is Failing and How to Fix It* by one Heather K. Gerken who is Professor of Law at Yale Law School, the J. Skelly Wright Professor of Law, and a colleague in a community of election reform scholars and practitioners and students of the process more generally.

I have to admit, as moderator of this session I'm biased. I read the book in manuscript and concluded the following. Gerken has written a compelling and practical plan for improving the conduct of American elections. *The Democracy Index* offers a politically sophisticated strategy for converting those forces that typically frustrate reform, partisanship and localism, into engines of reform. Given the evident shortcomings in the ways in which citizens register to vote, cast their ballots and have their choices counted, the subject of this book could not be more important, and Gerken's lively and engaging prose makes it a genuine pleasure to read. Right outside the door our friends from Politics

and Prose are selling this book. It makes a perfect holiday gift. In any case, I'm very happy to recommend it to you.

As I say, our session features Professor Gerken and her book and we will shortly hear from her. We are fortunate to have with us Harold Koh who is Professor of Law and Dean of the Yale Law School, a former Assistant Secretary of State for Democracy, Human Rights and Labor, and we are all looking forward to Harold returning to Washington sometime in the very near future. And as I've already indicated, my long-time friend and colleague who is a Resident Scholar at AEI, co-directs this project and has been deeply involved in the issues of election reform and political reform more generally.

The meltdown in Florida in November 2000 opened the eyes of members of the public and certainly law professors and political scientists about the shortcomings of our system of election administration. As Professor Gerken puts it at the beginning of her book, ballots are discarded, poll workers are poorly trained, registration lists work badly, lines can be too long, machines malfunction, partisan officials change the rules of the game to help themselves and hurt their enemies, election administrators cannot agree on what constitutes a best practice or even whether there is any such thing. Efforts to remedy these flaws have had some successes over the last 8 years, but I think it's fair to say that every one of the problems that emerged out of the 2000 election is still very

much with us and in most cases frustrated by intense partisanship. The lenses through which politicians view the problems of election reform and their solutions tend to lead to political standoffs and localism. We have a highly decentralized system for the administration of elections, something no other democracy in the world can understand.

The question is how to fix it. We haven't done so well. Professor Gerken has an idea. It's an idea built around the whole notion of using transparency rather than commands and in that sense is very much a part of the genre of political reform that is data driven, that relies on competition and shame rather than explicit top-down rules. We can see it in ideas for amicus courts, independent electoral and ethics commissions and in the whole idea of shadow redistricting commissions. The question before the house today is can a democracy index actually be built? And if it can, will it work as Professor Gerken postulates it will? There are the questions. Heather?

MS. GERKEN: I just want to start by thanking Tom and Norm who through the AEI-Brookings Election Reform Project have basically served as sort of a nursery for ideas from scholars all across the way. So I think it was 2 years ago when I first pitched this idea to a group of really smart political scientists and law professors and they sort of helped move the idea along the way and provided sunshine and water as necessary. So thank you to you both.

The idea I want to talk about is one that has been put into a bill by then Senator Barack Obama and then Senator Clinton. You may wonder, that sounds great, why isn't the bill in law? This is just before Barack Obama decided to run for the presidency so I think it falls under the category of be careful what you wish for. But the idea is to create a democracy index that would rank states and localities based on how well their election systems are run. So imagine a U.S. News and World Report ranking based on basic questions. How long did you spend in line? How many ballots got discarded? How many machines broke down? Did the registration system work? The index would not only tell voters how well things are working in their own state, but show them how well their state is doing compared to its neighbors, and it's premised on the simplest of ideas which is that nobody wants to be at the bottom of the list.

In my view, this is the first and most useful step that we can take toward improving our badly administered election system because while many people think that election problems exist only in Florida or Ohio or now Minnesota, in fact the problems we see there afflict election systems across the country. So I'm going to spend a little bit of time describing the problem which is what I call the invisible election. I'll then identify the main reasons why it has been hard to fix. Political incentives run against reform when elections are invisible. And I'll argue that the democracy index is the right way to realign political incentives to put

partisan politics and local competition to work for voting reform rather than against it.

So while my proposal is extremely concrete, it's animated by a larger theme, because to me the central question in election reform is one that we actually haven't thought enough about -- how to get change passed in this country. That's a tendentious claim given that there are an awful lot of people spending an awful lot of time thinking about how to make our election system better, but the problem is they're fighting this fight on hostile terrain and almost no one is thinking about how to change the terrain itself. We have a here to there problem in election reform. We spend a lot of time on the problems that exist now, the here, we have a lot of plans for what the election system ought to look like, the there, but we spend less time than we ought to thinking about the here to there. We spend too much time identifying the journey's end and not enough time figuring out how to smooth the road that leads there, and the democracy index is a quintessentially here to there solution.

So the problem is probably familiar to you, a Washington audience. Tom just named some of the problems that we have. It's not that there's a crisis that's coming around every bend in our election system, but that is only because most elections aren't close enough for the problems that Tom just described to matter, and unless we fix these underlying causes of the crises, problems can occur almost anywhere.

So take the 2008 election. We heard reports from the media that the 2008 election ran smoothly and then many were shocked to learn from a recent MIT study that about as many voters encountered problems in casting a ballot in 2008 as they did in 2000. So just think about that for a moment. How is it we have made so little progress in fixing our election system? Because 2000, as you might remember, was a fairly substantial crisis. It was a time in which Fidel Castro who's admittedly not a man cursed with self-awareness actually threatened to send election monitors to Florida.

Reform of course is a crisis-driven industry. I don't have to tell a bunch of people from Washington anything about that. But we've actually had plenty of electoral meltdowns to prompt reform. In fact, election law professors like myself have gone from obscurity to being commentators on CNN. We're like a tweed-clad plague of cicadas that come to feed on whatever feast is there every couple of years. Moreover, election reform is an intuitively popular cause because who exactly is against making our democracy work better?

The source of the problem is this, what I call the invisible election, and the solution I think is the democracy index which would make problems and solutions visible to voters, to policymakers and to election administrators who are the key leverage points for reform. So let me just

say a quick word about the invisible election which I think is the main source of the problem.

In a decentralized election system like our own, we expect states and localities to compete against one another to win the hearts and minds of citizens to run the best systems, to find the best policies, to generate a healthy race to the top. But states will only invest in improvements that voters can see. And in a system like ours we would similarly expect partisan officials who actually run most of our system, they are people who voters can hold accountable, to do the same thing as localities, to compete against one another to win voter support. But here too politicians will only compete on the dimensions that voters can see.

The dilemma in the United States is that election problems are virtually invisible to voters. While lost ballots and badly administered registration systems and machinery breakdowns occur all the time, they become visible to voters only when the election is so close that these problems threaten to affect the outcome. The episodic way in which problems become visible to voters means that we only have a haphazard sense of how well election systems are run and we have no comparative data to tell us which states are working and which aren't. It's a little bit like measuring annual rainfall based on how often lightening strikes.

So just think about 2008 for a moment. It was one of those remarkable moments when everyone was paying attention. We had a

riveting primary, a raucous general election, and then the race ended with the first black man accepting the presidency before millions of people. But there was an invisible election in 2008 and that's the nuts and bolts of election administration that journalists rarely report on and citizens rarely see. Even election experts like myself rarely glimpse the invisible election. In the immediate wake of the election we rely on reporters and reporters are only going to report where there is a story, that is, where the election is close. And the data available are so sparse that even political scientists have a hard time after the election giving us even a rough sense of what happened.

I'm actually one of the few people who got a very good look at the invisible election, and I'll just say that the reality does not match the reports of a smooth, problem-free election. I was part of Obama's Election Protection Team in which I spent 18 hours holed up in the boiler room, the spare office where 96 people manned Obama's national election day operations. So Obama's election protection efforts were more generously funded, more precisely planned, better organized than any in recent memory. We had thousands of lawyers and staffers and volunteers reporting over the course of the day as election problems arose and we in the boiler room could watch our computer screens as these reports rolled across. It was an amazing moment to see what was going on.

Now, in some places things went smoothly just as the media reported. There were glitches, of course, but there were enough poll workers and election administrators and volunteers to smooth away those problems. But other jurisdictions simply fell apart as wave after wave of voters crashed down upon them. Thousands of people had to wait 3 hours or more to vote. In some places there weren't enough machines to process all the voters. In other places, agonizingly enough, there were plenty of machines, but they stood empty behind the lone poll worker who was trying to check people in. Machines broke down, parking lots were full, polling places were hard to find or moved at the last minute, poll workers didn't even know the basic rules about giving out provisional ballots or whether voter I.D. was required. Far too many people showed up at the polls only to discover that they had not been properly registered. A bewildering number of polling places actually needed pens by midday because they had run out of ink. And many polling places simply ran out of ballots.

These problems occurred even though an estimated one-third of the electorate voted early, thus relieving a lot of the pressure on the system, and occurred even though everybody knew that turnout was going to be high, and occurred even though at least one of the campaigns recognized that its ability to win the election depended on the election system registering hundreds of thousands of new voters. That campaign

had done an extraordinary amount in working with election administrators to get them ready for the turnout tsunami that was approaching.

There was one secretary of state who said in the wake of the election that elections in her state were a success and that the cameras turned off at 9:00 p.m., but that of course gets the analysis exactly backwards. The cameras turned off because we had a clear winner, not because there weren't any problems. And it is only when the cameras don't turn off, when there is no clear winner that we see what problems actually occurred, how ugly elections really look close up. If you want to talk to anyone about it, just ask the poor people of Minnesota right now.

So the reason the election system is invisible is that election administration is a world without data. We lack even the most basic sense of how well our election system is functioning. We know more about the dishwashers we buy, the baseball teams we root for, even God help us the companies in which we invest than we do about how our election system is working. One out of five states can't even tell you how many people showed up on election day. Most states can't tell you how many registered voters they have, how many poll workers showed up to work, whether voters find it easy to register and vote, or even what kind of ballots people used. And so I ask you for those of you who still have any money to invest, would you invest in a company that couldn't tell you how many people it employed, how many customers it had, what percentage of

its business came from internet sales, one that had never once surveyed its customers on their preferences?

Data-driven analysis is so common that Wal-Mart can tell you that when a hurricane approaches, people purchase not just generators and flashlights, but remarkably strawberry Pop Tarts, and yet we have less information now on our most precious non-commodity, the vote, than Wal-Mart has on strawberry Pop Tarts.

When voting problems are hard to see, of course the election system suffers. States put their money into projects that are visible to voters, roads and new schools and cops on the beat, rather than upgrading our underfunded balloting process. In a world where election problems are largely invisible, federalism creates an incentive for a race to the bottom, and that's just what we see today. Moreover, when elections are invisible, partisan officials who often run our election system, these are people who usually care a lot about what voters think, have no reason at all to care about performance. So just think about the dilemma faced by a secretary of state, the most common overseer of elections in our country. Political junkies know that being secretary of state is widely thought to be as a jumping-off point for higher office. The problem is that what matters for secretaries of state who want to run for higher office is that it's not professional performance that matters, it's political support. In a world where voters have no idea whether the system is working or not, the fate

of the secretaries of state depends entirely on her party, who provide her resources and support for her next campaign. You can imagine why the person refereeing the game ought not have such incentives. And the same is true of the many partisan officials at the local level whose jobs similarly depend on their standing within the party.

The democracy index would help harness partisan incentives and local competition in the service of reform because right now voters don't even see the problem, and even when they think that there is a problem, they have no metric for refereeing the inevitable fights that take place between reforms and election officials because those fights involve details about counting ballots and jargon-filled evaluations of election machinery and nitty-gritty registration requirements. I am an election junkie and I rarely have the stomach for it.

In some ways for voters, these fights resemble that "Far Side" cartoon called "What Do Dogs Hear?" So there's a picture of a guy talking to his dog, okay, Ginger, we're going to go for a walk, Ginger. Then after that we're going to go outside. And what the dog hears is blah, blah, blah, Ginger, blah, blah, blah, Ginger. So voters have the same problem. They hear these debates and all they hear is blah, blah, blah, vote, blah, blah, blah, democracy. It's not that voters are stupid, but none of us are born into the world with a strongly held intuition about whether DRE machines are a good idea or whether provisional ballots should be

counted only if they were cast in the correct precinct. Voters need a yardstick to help them figure out who's right.

A democracy index would help address this problem because, first, it would make problems visible to voters. It allows voters to hold state officials accountable for their missteps, to reward them for good performance, and to encourage states to compete against one another to design the best system. Just imagine for a second how different these debates would look in a world with a democracy index. Rather than bogging voters down in technical details of election administration, reformers could just let the numbers speak for themselves. In places where there are debates about which tabulating machine is better or whether the state could do more, we would actually know the results of each state's choices. How many long lines were there? Which states discard the most ballots? Which state has the worst registration problems? Because election administrators can talk all they want about what they have done, but they can't talk around the stark reality which is how is the system working and how come the state next door is doing so much better?

So just to give you an example of how this works in another context, there is something called the environmental performance index designed in part by my colleague at Yale, Dan Esty. It ranks nation-states based on simple questions, How good is the water? What kind of air

pollution do you have? How high are your child mortality rates? So when the first EPI was released, it had a really interesting effect on Belgium. Belgian environmentalists had spent a very long time trying to convince politicians and voters that Belgium was far behind on the environment, and it's not hard to imagine why this turned out to be really hard, because without any concrete comparative information, environmentalists in Belgium could only ask people to do better, to do more, or have really complex discussions about environmental policy. We are back in other words to a differently accented version of the "Far Side" cartoon, blah, blah, blah -- when the EPI showed that Belgium fell well below its European counterparts in the ranking system, roughly in the range of Cameroon and Albania, the conversation changed. The story made headlines in all the major newspapers, and reformers suddenly found themselves with a rather large stick to beat legislators into doing something, because government officials could go on and on about the merits of what they'd done, but they couldn't get around the bottom line, Belgium was not keeping up with its neighbors.

Second, the index would actually give voters the metric they need to evaluate reform debates. It takes advantage of the power of data-driven comparison, something that I think is quite familiar to anyone here who is affiliated with a university. Voters may not have strong intuitions about what kind of reform policies they want, but they do know what they

don't want. They don't want long lines, they don't want discarded ballots, they don't want machine breakdowns. People may not have an opinion about what constitutes a best practice or what's the right kind of funding level, but they do know they should be doing better than the state next door. The democracy index actually gives voters something to have an opinion about. In this way the democracy index addresses the two central obstacles to election reform, partisan self-interest and local competition. Most reform proposals ask the foxes to stop guarding the henhouse. They tell partisan officials that what they really ought to do is just give the whole thing over to nonpartisan bureaucrats and, perhaps unsurprisingly, this hasn't been a terribly successful strategy. The index though doesn't ask politicians to act contrary to their self-interest. Instead, it realigns their interest to the interests of voters. It harnesses policies to fix policies.

The democracy index also harnesses localism in favor of reform because when problems are visible, states and localities can compete against one another. If the index works as it should, we should see something like a race to the top that federalism is supposed to produce. You might worry of course that the only states that are going to do anything are those who are ranked low on the index, leaving the higher-ranked states to sort of rest on their laurels. Now, I would be perfectly content with that because that's at least an improvement on the status quo. It would be nice to know that somebody was competing to

move up the rank. But it's actually possible that a ranking system will encourage top-ranked states to compete among themselves. So again I refer you to the environmental performance index. When the environmental performance index was released, Norway was ranked second in the world in terms of environmental performance, and as soon as the rankings came out, Norwegian officials invited the EPI team to come out and visit. I talked to them and they sort of expected they'd be wined and dined with press releases and red carpet treatment talking about this incredible accomplishment of Norway. Au contraire. They were actually brought into closed-door sessions with top-level officials with one purpose, to figure out how Norway could do better, because Norwegian officials didn't care that they were ranked ahead of 120 other nation-states. They cared about one thing and one thing only, Finland was number one.

The democracy index provides the right kind of shortcut for voters. It's a yardstick for judging debate, something concrete to wrap their hands around, something for them to have an opinion about, but it should also work for the two other main leverage points for reform, policymakers and bureaucrats, by doing exactly the same thing, giving these folks decision-making shortcuts, making problems and solutions visible to them.

So I've been talking a little bit about policymakers in a harsh way. I've talked about legislators and secretaries of state as if they were just craven politicians motivated entirely by self-interest and sometimes that is true, but a lot of times these are folks who just want to actually figure out what the right policy is, but they are sort of in the same situation that voters are. They are either constantly having reformers knock on their door and telling them that this thing or that thing is a priority or that we should adopt this or that policy, but they have no idea about what is really a priority and what's not. And even if they think they have a problem, it's very hard to identify the right solution, to find that policy innovation needle in the haystack of widely varying local practices.

The index would help policymakers do the right thing. It would help them figure out where they have a problem by showing them how they compare with their neighbors. And second, if it was properly designed, a democracyindex.com ought to show not only how states rank, but what is it that the high-ranked states are doing differently, highlighting the solutions and putting them in an easily accessible place. Policymakers in essence would have a shortcut both for identifying a problem and figuring out a solution, and that shortcut is especially likely to work among states that think of themselves as peers because if the social science research is in any way true, the one thing that is clear is that people think about how they rate next to their neighbors. So if a state

learns for example that one of its neighbors is doing a better job at something, it will often simply just adopt that policy virtually wholesale, and the reason is simple, no one has time to do a full investigation of any policy, no one has time to reinvent the regulatory wheel, so legislators often look to the peers that they trust, basically they say as in "When Harry Met Sally" I'll have what they're having, and so they think about what their peers do and import that policy wholesale. For example, legislators in New York and Pennsylvania might ask, if I may be flip for a moment, not what would Jesus do, but what would Jersey do?

But I think the democracy index could serve a useful role for fostering professional norms among election administrators because when we think about improving a system we generally assume that pressure to reform comes only from the outside. But the long-term health of a system really depends on bureaucrats policing themselves based on shared professional norms, on a system that is robust enough to fix problems before they occur. For a bureaucracy to function well, however, it has to be run on the basis of a set of professional norms. Professional norms affect our conduct even when there is no sanction involved at all. First, they provide again a useful shortcut, the distilled wisdom of experts in the field. No one has time to think through all the practical moral considerations involved in every decision so we all do the same thing, we

actually look to a professional consensus because it's as good a shorthand as you can find as to what the right answer is.

But professional norms work for another reason, peer pressure. Our sense that we are doing a good job on something often tends to depend on our sense that we're actually doing what other members of our profession are doing. We care about what people think about us, and we tend to care most about what our professional peers think about us. And for those of you trying to suppress memories of high school, it's nice to see the hard instinct do a little bit of good in the world.

Now, unfortunately the type of professional norms and networks that could shape individual behavior and spur policy diffusion in the elections arena are simply absent. There is no accreditation system or widely used training program for election administrators. There is not even a trade magazine. There are some election administration groups but they're mostly local and they don't really talk about these things. For example, the National Association for Secretaries of State is a really wonderful organization run on a shoestring, but when I went on their website I called them up and I said I notice you don't have any best practices up there. Why is that? And they gave me a speech on local variation and said we like to call them shared practices. I hope you'll forgive me for being slightly skeptical but maybe the reason is because

once you call it a best practice, reformers will use it and beat up on any secretary of state who doesn't follow it.

While the index is a poor substitute for a vibrant professional association, it at least should provide a focal point for election administrators' attention because I think it would be hard to resist checking how a state or locality is doing on the ranking. Administrators would want to peek at the index for exactly the same reason that people Google their names or give a book a Washington read, looking at the index and seeing if you're in it. If the index were well designed and put out by a credible group, there is good reason to think that one's professional prestige would be increased by a high ranking, something that would be useful in a world where we tend to imitate high-status people. The index in other words might be the beginning of establishing a professional touchstone in the field.

So I'll just say by way of conclusion the following. The democracy index probably looks like a pretty modest idea when compared to calls for a nonpartisan election system or efforts to take money completely out of politics, but you'll note that these calls for reform have been met with a deafening silence. The democracy index is the kind of reform that smoothes the path for other effective reform. It doesn't create national performance standards. It doesn't take power away from partisan officials. It doesn't even endorse a set of best practices for administering

elections. But what it does do is push in the direction of better performance, less partisanship and greater professionalism. The index does so not by trying to resist the fierce push against change that is generated by our system's twin engines, partisan warfare and local competition, but by enlisting partisanship and localism in the service of reform. It harnesses politics to fix politics. So while the index may seem quite modest in comparison to other proposals, it is the kind of reform I think that makes bigger and better reform possible. Thank you very much.

MR. MANN: As you can see, Heather is absolutely determined to shatter the stereotype that election administration is inherently boring. Well done. Thank you so much. Harold, we turn to you.

MR. KOH: I come here wearing three hats. First, I'm a trustee of Brookings and I'm delighted therefore to have this opportunity for a joint Yale Law School-Brookings event, and especially one that involves AEI and our dear friend Norm Ornstein who's of course married to a graduate of the Yale Law School from which flows all of his success.

Second, I'm here as Dean of Yale Law School to comment on the book. And third, I'm here as the former Assistant Secretary of State for Democracy, Human Rights and Labor. When Fidel Castro offered to send election monitors to Florida, it actually reminded me of a number of other missions that I had gone on myself and it brings to mind ways in

which we can comment on Heather's proposal. So let me divide my remarks into three, Heather Gerken the professor, Heather the book, and Heather the bigger project.

Heather the professor. Let me paraphrase John Kennedy, I am the man who brought Heather Gerken to Yale Law School. It's true, and I take full credit for it. I was bragging about Heather recently to someone and they said, Why is Heather so great? And I said, Why is Willie Mayes so great? He's a natural. You just watch him. I don't even have to describe it. Everything works. It's fantastic. And it's just a thrill to see this book which is the product of her work.

Now, Professor Heather Gerken has been at the law school for a while but only recently did she become Heather Gerken the J. Skelly Wright Professor of Law which brings even more poignancy to this. J. Skelly Wright was not only a great and courageous man who himself was involved in enforcing electoral rights, but also inspired a great and courageous cohort of law clerks who later endowed a fellowship and then ultimately now a professorship in his name, and they include some of the folks here in the audience, Sally Katz and Kara Lee, David Martin, Cliff Sloan, David Stern and others, if I can see them. I think that the important point is that Judge Wright himself wrote a famous article called I think "Politics and Markets" or -- "Money and Politics." I'm sorry about that. And that it is his own thinking about it as an academic as well as well as a

judge -- Heather was the one who told me the answer on that as usual -- that makes her the ideal first chair holder of this fantastic new chair at the law school.

Now let me turn to Heather's book which I think is brilliant in its simplicity, and she just described it to you. The problem, a broken system; a solution in her perspective, a democracy index. It's really Moneyball meets electoral politics. The basic idea is you need a single metric of performance. She analogizes it to the U.S. News rankings or global climate rankings. And then she creates a blueprint for quantification, and then thus shifts to a data-driven system which has many advantages. It's information-forcing, it forces verifiable outcomes, and dramatically improves over the alternative which as she points out is essentially nothing.

Heather's book is worth it just for the diagnosis, how the system is broken -- inadequate funding, amateur staffing, localism, partisanship -- and then a big idea that she puts out there, the here to there problem, no way to get from here to there. And she argues in favor of this particular solution on the grounds that it realigns incentives, makes other solutions possible. It affects key leverage points so that voters get information, it puts pressure on policymakers to do the right thing, helps administrators to police themselves.

Now what I think she suggests is not just the ways in which it works, but the ways in which it might be problematic, and here my law dean's hat is helpful because not only do I serve as Dean as the Yale Law School, but I also regularly watch how the U.S. News rankings are used and addressed, and this is a famous example of when you can't measure what's important you make important that which you can measure. There are so many deans who spend much of their lives adjusting their own statistics to make sure that they meet the metric, and that in fact their concern is far less about actual performance and much more about whether the performance that is seen by the U.S. News metric is the one that makes them rise in the ranking.

And so let me just put to Heather, and she can address it later, a couple of the obvious problems that could arise. She recognizes many of them, but one is what you could call the Joe Torre problem. At a certain point when your performance is poor, you just fire the person in charge and put in somebody else. It's not that they did anything wrong, it's just that the number hasn't moved. Another is the so-called turnaround administrator problem. There are some managers whose job it is to improve the rankings slightly and then they leave. In U.S. News terms there are many law deans whose job it is to come into a law school and improve the rankings not actually by changing the substance of their performance but with better public relations, et cetera.

A third issue that jumped out at me in reading her book was on page 55, the example of South Korea, which in the environmental performance index assembled $5 million a year, 30 people, in an effort to figure out how to do better. My frank reaction to that was that explains the Koreans, they're so competitive, but what about normal people? You think the Norwegians who compete with the Finns. The Finns have comparable internet penetration and broadband penetration and cell phone use to the Koreans and they hate that. Why? Because they're so competitive. There are a lot of people who just don't care or who give up. I'll give you an example. Heather has for years since she's been here been the very best teacher in the school. It's all ranked. My solution to that is to leave the law school and go into the government, not to try to improve my performance to match Heather's which is of course impossible, but to leave the game altogether. What this means in terms of the ranking is it could have the perverse effect that some engage in the competition and some essentially give it up and just wallow around in the low areas.

Now I think from the third perspective that I have on this which is the perspective of an international democratic election monitor, the mantra of international democracy promotion is that democracy is about much more than just elections, that fixing elections may be part of it, but at the end of the day the core of democracy is civil society, the media, various groups, et cetera. And one complicated question which is now

emerging is exactly how does new media, civil society, ground organizations connect to this model that she's describing. An example from the most recent election, my daughter who has just graduated from college went to work for Obama in Florida and my wife and I appeared and we quite literally arrived with 100 volunteers and were sent a series of text messages over the course of the day in which we performed various tasks that were sent to us by our electronic handler. We never saw this person. At the end of the day we learned that he was 18 years old. He sent us to watch the last polling booth to make sure that everybody who was there voted. So we were there and when they closed the voting, it was 7 o'clock. We were wearing Obama buttons. We were ready to leave. Then suddenly in comes a late voter. Frankly, it was after the deadline. He shouldn't have been allowed to vote, I'll admit, but what happened was the polling place manager came out and said, Are there any lawyers here? And we raised our hands and he looked and he saw that we had Obama buttons and he said, Come on in. This is certainly a great change in the way elections are being done. Heather's book describes the extraordinary legalization and lawyering of elections that has now become the norm, and one interesting question would be how does the basic democracy index that she describes connect with many other changes in civil society, the voting process, et cetera, that are coming in this day and age.

Let me finally though say that when you read Heather's book, and I urge you all to buy it in hard back, it is one of those things where you start reading it and say I don't know if I believe this and at the end you say, as they say in the movies, it's so crazy it just might work. And the reason is because you can't beat something with nothing. Heather's closing line, As opposed to what, is what I think is really the answer. It is brilliant in its modesty. What she describes as making invisible elections visible is to me what you could call the drained swamp problem. When a swamp is filled with water you don't see any of the problems. It's only when the water level is incredibly low, when the elections are incredibly close, that all the obstacles emerge, and then when the water level goes up people don't worry about it anymore.

What Heather does is to sketch a larger project. If you've read Heather's other work, she is the leading scholar I believe right now on the issue of pluralism and democracy in the age of the empowered individual, the role of dissent in forcing better decisions in a better pluralistic society. Her book, if you look at it, while proposing a simple policy solution in clear lay person's terms is actually a classically Yale Law School product. It is process focused, it is policy focused, it's empirical and data driven, it's a question about how to shift from the top-down model to a bottom-up model, it uses less the rhetoric of rights than the rhetoric of how to use intelligent data to achieve better policy, how to empower

individuals to stimulate debate, to encourage competition, to realign incentives, and in the classic Yale way looks at veritas to cast light by putting some focus on the truth.

I love her basic ideas, harnessing politics to fix politics. And the most remarkable part of the book I think is the last afterword, the essay about the Obama election, which shows the generosity of spirit that is pure Heather. Never attribute to partisanship, she says, what can adequately be explained by inadequate resources. She finds cause for optimism in the middle of some of the most demoralizing information that you could possibly see. Which reminds me, and this is where I close, with a story that reminds me of Heather. When I was a college student way back when, I read a music review of a guy who was the music reviewer for something called the Boston Phoenix, and he writes, I went to a concert last night and I saw a guy play. And then he has the headline, Ladies and gentlemen, I have seen the future of rock and roll and it is Bruce Springsteen. Now, this person, David Landau, subsequently quit as a reporter, became Bruce Springsteen's agent, and is now extremely wealthy I think.

Let me tell you that in this book and its simple ideas by the J. Skelly Wright Professor of Law I have seen the future of American public law, the process focus, the policy orientation, the pragmatic idealism, the idea of not trying to change people to fit systems but of designing systems

that fit the people in the politics that we have. So ladies and gentlemen, I've seen the future of American public law and it is Heather Gerken.

MR. MANN: Norman?

MR. ORNSTEIN: Thank you, Tom, and thank you, Heather, for a terrific book and a terrific presentation. Harold, you've left me a little bit disoriented here to tell you the truth. When you compared Heather to Willie Mayes and not to Ted Williams or Carl Yastrzemski, this kind of threw me off. Harold is perhaps the biggest Boston Red Sox fan on the East Coast.

This is a terrific book with a lot of provocative ideas, and it starts with something that all of us who followed elections have known for some time. There are flaws in every election system. No election is run perfectly. We have had some very deep flaws that we ignored for a long time until we saw that close presidential election in 2000. We've had close elections before. Nobody paid a whole lot of attention to them. Now we are paying a lot of attention to close elections as we did to the gubernatorial race in Washington a couple of years ago, as we are doing now to the Senate race in Minnesota, as we will soon be doing to what may be an even closer race in a congressional district in New York. And each one of those not only raises all of these issues of whether or not elections that are within the margin of error can easily be adjudicated or decided. Now of course unfortunately with the precedent of Bush v. Gore

we automatically take them to the courts. But what also is a more troubling set of issues is we are steadily undermining a sense of legitimacy in the election system every time we have one of these close elections occur.

Large numbers of people believe that either their votes haven't been counted when they should have been counted or that the outcome was driven by politics. Once you begin to undermine the very legitimacy of an election system, you then also attribute it to other elections that may not be so close and you can undermine the whole legitimacy of a political process. So this is not just a matter of either the dry issues of election administration or the issues of election administration made lively by Heather's book and her presentation today, but something far more fundamental. And yet we also know that dealing with these problems is extraordinarily difficult because there is no money and no political incentive to deal with the set of problems that can be made at least easier. You are never going to solve a problem of having an election that is within a margin of error and having everybody satisfied that the outcome is a legitimate one, you're not going to solve a set of problems where many of the decisions that are made are basically judgment calls made by local officials and they're not all going to be the same judgment calls and then somebody is going to have to adjudicate

those. But you've got to at least create a stronger sense that this is a system that is on the up and up, that it's legitimate and that it's workable.

How do you do that when every local official who makes a budget decision is faced with a choice between whether you're going to put more money into garbage collection where people see the results every single day or more money into election administration where maybe they'll see the results every year or every 2 years and most aren't going to care about those results unless you have the even rarer event of a very close election where you pick the rock up and look at what's underneath? And yet if you don't begin to move to solve those problems, then we're going to have a continuing cascading set of issues that flow from close elections and that larger sense of illegitimacy that flows, and a sense of illegitimacy that flows now because we have political forces mobilized to try and make it clear as they put pressure on officials or on judges to come out with the right outcome, or as they use the process to raise money for their own purposes to create a sense of alarm that an election is being stolen. If you look at the fundraising appeals and the blogs that have been out there, much less the cable television shows or even the editorials about the Minnesota Senate race, you know what I'm talking about. Now there's a very interesting piece in the "Minneapolis Star Tribune" about how many people have an interest in keeping that Minnesota Senate race

going longer and longer because it's a way for them to raise money or to make money.

So there's an urgency in many ways to moving in a direction of reforming this process as much as we possibly can that bumps up against the political problem. And it's a political problem that's exacerbated by another set of issues which is that the election officials who one would think would welcome this kind of change in many cases will be the ones resisting it most in part because pragmatically they know that if we do get an index that can measure their performance and the performance doesn't measure up, they will go to a set of other local election officials who will still resist giving them the money to do things and they'll be faced with a set of increasing responsibilities and no resources to pay for them. So they'd just as soon avoid anything that sheds light on their particular performance. That's not true of all, but it's true of many. And one of the major obstacles to making this happen is in fact going to be the election, at least a good portion of the election official community, the same impulse that keeps the National Association of Secretaries of State from having a best practices index or getting very prickly whenever we talk to them about potential changes that may take place.

Now I think there is another obstacle here which is that our election reform issues have also become divided very much along partisan lines, and we've seen this play out with the dichotomy between

access and integrity. The focus of most Democrats on the flaws in the election system are on access of voters. It is the long lines, but it's also people who have trouble getting registered, people who are legitimately registered being turned away from the polls, being pushed and forced to do provisional ballots where there's no real sense of whether they're going to be counted. And a whole series of other problems, some of which of course get to more sensitive issues of discrimination and purging people from voter rolls who shouldn't be purged from voter rolls and the like.

For Republicans, the issue overwhelmingly in the last few years has been that of integrity, of corruption, of fraud at the polls, of people going to vote multiple times, of being registered wrongly, of going out there and handing out money so that you can get more people registered. And one that led even during the campaign to John McCain in a moment of rhetorical flourish basically suggesting that what ACORN was doing was going to perpetrate the largest election fraud in the history of the world practically speaking.

We have some significant evidence to suggest that fraud at least in terms of people going to the polls and voting illegitimately deliberately or voting multiple times is almost nonexistent in the country, but it doesn't stop that dichotomy from occurring. And we also know that there are instances of fraud, many of them through absentee balloting where it's much easier and much less costly to have a widespread fraud

take place. But it almost doesn't matter whether there are legitimate problems of access that overwhelm the legitimate problems of integrity. What does matter is that if you don't construct a reform process that includes people on both sides in believing that it is a step forward, then you're going to have great difficulty getting something enacted or carried out.

Heather is sensitive to this in her book, but the focus of the democracy index is on things that at least are measurable or more easily measurable which tend to fall overwhelmingly on the access side of the ledger, and until we can come up with something that is going to be widely accepted as a quantitative measure to look at how jurisdictions are doing in terms of integrity, it's going to be difficult to have this reach across and become a significant bipartisan compromise.

If we do manage to make that happen, we've got to start with the preliminary step which is also difficult, which is finding a way to in effect coerce local jurisdictions and states to collect this data. That is at the root of a lot of the problems, and the fact is we cannot begin to construct a democracy index until we get data that simply don't exist. As Heather said, the horror story, the notion that a fifth of our states can't tell you how many people voted tells you how difficult this problem is. It's rooted in some cases in the fact that our election system is so totally decentralized and in many states they leave leeway to local communities

and towns that have been doing it a particular way for generations and have no interest or incentive in changing. There's little incentive or power at the state level necessary to collect that data. The only way we're going to make this happen is frankly through the stick of a denial of federal funds to states that don't manage to get out there and collect the appropriate data, and that's a prerequisite for moving forward with the next step. Heather appropriately does not want to see this index done by a government agency. There are lots of reasons why it shouldn't be done. It should be done by some legitimate nonprofit organization that has broad credibility across ideological and party lines, but that can't work unless you can get the data. And when you do get the data you run into another problem which is whatever you include in this index is going to then define whether jurisdictions to themselves, to their competitors, to the larger world, measure up. But there are going to be many other areas in the election process that are very, very important including, just to pick one example, in Minnesota which has a very different process for adjudicating the outcome of close elections than most other states do. You could argue whether it's better or worse. It's extended much further than anybody would have suggested.

But if that's not included in an index then you're going to have a lot of states which will have no incentive to change or improve that particular process, and we may end up either getting a democracy index

that ultimately expands to include a whole lot of things which is going to make it a little bit more unwieldy, or that's going to define performance in a fashion that's not complete. So we've got to think through a little bit more over the long run how we can make this work with a different balance and also how we can manage to get other kinds of reforms implemented that would improve a process that are not necessarily going to be ones we would want to include here. Florida is doing better in many indicators than one would have thought based on the results of 2000, but we also know that we had another enormous embarrassment in Florida in a congressional race where a large number of votes weren't counted because it appears now of bad ballot design. How do you start to measure those kinds of things, and maybe we should be moving toward a different kind of reform? I favor for example a separate federal ballot which would be a very simple thing. You'd only have two or three races at any given time and you could design ballots and come up with federal standards for them so you wouldn't have to worry about the butterfly ballot or some of these other unwieldy problems, but we need a parallel process for moving toward other kinds of reforms that could bolster the democracy index.

The bottom line though is that the only way we're going to create an incentive for all of these officials to start to move toward improving this process, instead of just waiting for train wreck after track

wreck to occur until we're finally embarrassed into it but at a point where we've already paid much too high a price with illegitimacy, is to create something that channels the political process in an appropriate direction. That's what Heather has done. It really is in the best tradition of those who can bring scholarship to bear but move it toward an actual change in the system to improve it, and that's why this is such an important book.

MR. MANN: Thank you, Norm and Harold. We are going to just momentarily turn to your questions. I want to give Heather a max of 5 minutes to respond to one or two of the items that Harold and Norm raised, and just picking up on Norm's side, is there anything you've seen thus far in the reaction to the idea and the book among members and officials of both political parties that give you some reason for encouragement that we might be able to get beyond this sort of intense partisan division on matters pertaining to election administration?

MS. GERKEN: It's a great place to start. One of the things that I -- I interviewed a ton of election administrators and secretaries of state in doing this work and one of the things that was interesting about it was secretaries of state actually would really love a ranking of their localities because they have these recalcitrant counties and localities who won't do anything and they would actually have a stick to beat up on them. And some of the local administrators who highly resent that the legislatures or the county commissions won't give them a dime actually

would like a democracy index as well because they could use that money to essentially say we're in real trouble here. We're just one election away from you guys being Columbus, Ohio, or Florida, and you guys need to sort of pay attention to this. So there's ways in which the incentives are actually quite complicated, the bureaucracy. And Norm is exactly right, nobody likes to be measured and so there will be some resistance to it. Although the interesting thing even there, what election officials are starting to realize is that they're getting measured no matter what they do so that they're having a bunch of people breathing down their necks in the forms of campaigns watching everything that they're doing now that people have realized what a big election administration is, and if they ever get caught up in a close election, they are going to be excoriated. So it would be interesting -- one of the people I talk about in my book is Matt Damshroder, a highly respected election official in Ohio who on the web, if you read the web, the guy is election administration's Karl Rove. The guy apparently could engineer any sort of evil political plot. So why does it happen to someone like Matt Damshroder? It may happen because he is election administration's Karl Rove, we don't really know, I suppose, but one begins to suspect this has happened over and over. Here's what happens. People see a problem. They have no idea that the problem exists elsewhere. They see that the person has a partisan affiliation which is what they almost inevitably do. And they immediately assume a plot to

defeat one candidate or another. And what these savvy election administrators are starting to do is they're starting to realize that data is not just a sword to be used against them, but a shield, because one of the things that good data will tell you is, one, the problem that you see here is happening everywhere, two, we actually are a high-performing state. For all we know, Ohio, Florida are, some of the best performing states in the country. We really have no idea. And so in many ways, election administration is starting to come to grips with the fact that these comparisons are inevitable, people are going to measure them, and better to be measured along something that's fair and reasonably data driven than the kind of atmospheric claims that get made already. So I think in some ways this is the wave of the future and I'm riding it.

The other thing about the partisanship question is this. It is in fact true that virtually everything that could go in the index is likely to have a partisan effect one direction or another. No one is naïve about this. But as it turns out, I actually think that when you talk to voters, talk to your dad, go talk to your mom, your sister or whoever it is that you would consider the normal person in your family, you ask them about these questions, they're not partisan. Having long lines is not partisan. Not wanting to have a bunch of ballots discarded is not a partisan question. Even the question of access versus integrity, I think of this debate as it has been keyed up by politicians as sort of the rough equivalent of tastes

great versus less filling and it's just about as illuminating. That is, voters want both access and integrity and a democracy index ought to include both of these things in there. So I'm quite open to measuring fraud. I agree that it's hard to figure out how you're going to measure it, but, this is the last thing, it would be very useful for these debates not to be cast in terms of atmospheric and wild claims on both sides. That is, the one thing that data tend to do is they sort of cool off the discussions because most people sort of will start at least on the idea that numbers are a place to begin and you can't throw around these ridiculous accusations on both sides because you'll actually have data that will show you what the answer is to it. So I have a little bit more faith in the nonpartisan piece of it over time, and also on just the wave of the future question, just to link it up to what Harold asked, Harold says how are these sorts of broader issues related to democracy? I mean I'm a deep believer in the Voting Rights Act and the cause of civil rights, but I've begun to think that actually the most useful civil rights cause in the context of election administration is not to create one right or another, not to bring another lawsuit, but it's simply just to have well-run systems. I think black and Latino voters and poor voters are going to do better in a system that is professionally run than they are having no matter what stick you might give them because all of those votes are getting pushed away and it is really a lack of resources and a lack of professionalism rather than partisan malice on the most part that's

causing these lost votes. So in some ways I think the next generation of reformers as far as I can tell, I always use my students as a gauge, but they're kind of pragmatic about this stuff. They believe in data, they're actually kind of eclectic in what means they're willing to pursue, and that sort of middle of the road, third way approach isn't such a bad approach in this context.

MR. MANN: Thank you, Heather. We have microphones, and please identify yourselves. Bob?

MR. PASTOR: I'm Bob Pastor from the Center for Democracy and Election Management at American University. Thank you for putting together such a stellar cast right now. Just as a point of fact by the way, in 1992 when I was at the Carter Center we invited Castro, Cuba, and the Mexicans to observe the U.S. presidential elections, and in fact got Jeb Bush and George Bush to agree to allow the Cubans to come, and in the end Fidel chose not to come or to send anybody. And he didn't come for the same reason the Mexicans did, that he wasn't ready to allow observers in, the Mexicans were, and by the year 2000 the Mexicans produced a better election than we did in 2000. But I went around that time after having done election monitoring in about 30 different countries, all over the U.S., with the Mexicans and discovered all of the problems that we've discovered again in 2000.

One of the things that I discovered then and in subsequent times of election monitoring was that almost, no, in fact I could say no polling station had a poll book which I'd seen in almost every election abroad which wrote down every single problem or concern that occurred during the entire course of the day. So even if you collect that data, in the absence of that poll book, the most you have to deal with is either the hard data or the impressions of a very long and difficult day, not nearly as good as what the poll book would represent.

The one thing missing from your conversation was the index itself, and my question, having tried to find and develop some indexes for Common Cause elsewhere and knowing how difficult it is, I'd like very much if you could lay out what you think are the major questions that should be in the index. Just one more point, and that is I agree with you on the importance of a well-managed system. My experience however is that is actually less important than a system that's perceived as nonpartisan which is something we don't have anywhere in this country because the secretary of state is a partisan individual officially in charge of it. So independent of that, my major question is if you could lay out for us what the questions are that you think we need the information on.

MS. GERKEN: There's this dilemma in thinking about the index because of course there's this tale about economists and how they hypothesize a lot or (inaudible) to change the light bulb, so I could

hypothesize -- to you and say that there's all this data that we could just put together magically and I'll wave my magic wand. We don't really have any idea what data we can collect. I'll tell you here's what I would like to collect. Fasten your seat belt. We're going into the weeds for a second. MIT has this really magic measure that they came up with called the residual vote rate. What does that mean? It's a very simple number. You just look at how many people put a ballot into a machine and then how many ballots actually got counted. Because you can see why it works. It tells you how many ballots are not getting counted by the machine. It's a very useful metric and it lets you sort of measure things across jurisdictions. It's incredibly simple. It's elegant. It actually turns out that once they initiated it, people have been competing along that measure almost instantaneously even though I suspect none of you who aren't involved in this stuff actually have ever heard of it. But they compete anyway because they want to do better. So I would like to imagine something like the residual vote rate for each stage of the process. So in the registration process the question would be how many eligible voters, Norm, eligible voters, who tried to register to cast a ballot were unable to do so. That would be the sort of model for thinking about that. And then in the second section, how many people tried to cast a vote but weren't able to do so. And then how many votes that were -- again keeping the eligibility running through it, and then at the end how many ballots were

cast but not properly counted. That would be great if we could find that measure. That's very hard to measure at this moment. So you have to start looking to proxies. So let me just give you a couple examples of proxies in the registration process. One of the reasons why we know registration doesn't work is because the data is not inputted correctly. It's just a disaster. So you could imagine just some simple metric like why don't we compare the data that gets inputted against a commercial database which are cheap and extremely well done and compare them to see how many errors are in the registration lists. It's a very simple metric that would give you a rough proxy for that question. You could use testers. This is the De Soto solution. Send a couple people. How long does it take someone with a high school degree to figure out how to register? How long does it take for someone with a disability to register? You could have Nielson voters. I call them Nielson voters. You could imagine somebody in there who could just simply record their voting habits, a bunch of families who say here is what happened as we went through the voting process, sort of a random sampling version.

At the next stage, the balloting stage, we know what it is that are problems. Why people believe the lines are long, so you can imagine some kind of way of measuring if the lines are long. My favorite solution is what I call the Wal-Mart solution. One day I'm in Wal-Mart and I'm paying with my credit and it says, Do you accept your signature? And you say,

yes. Then a little question pops up, Was the store clean today? Just a simple question and you can answer it yes or no. Well, it turns out if you just imagine giving a card to everyone who comes in, one question, just ask them one question, you would generate a tremendous amount of information about how well the system is working. It wouldn't be randomized, but nonetheless it would actually give you a pretty good sense. So there's a lot of ways in which we can use even private proxies to get out some of this information.

I should just say there are some things that the states are going to have to disclose. This is where Norm is right. If we can't get the states and localities to disclose basic questions like how many voters on your registration lists, how do people cast their ballots, why do ballots not get counted, it will be hard to get a good index going, although I think it is possible to image the states getting into the habit of collecting that data. Whenever I talk to election administrators they say to me I'll collect whatever data you want. We do this all the time. No one is telling me what data to collect or how to define it. If there's a Google millionaire in here, I keep looking for a Google millionaire who will just write the Linux version of collecting data, free software that everyone could download that would standardize the information across jurisdictions and that you could just build in prompts, because all you need is the prompt. Once the prompt is in there, this is the lesson of Wal-Mart and McDonald's and

everything else, as long as the prompt is there, even someone who may not know a ton about this could measure it. So that's what it looks like roughly.

To address Harold's concerns, I say that first, maybe you can't capture everything and that's certainly a problem. And two, the worry is that they're only going to compete along the things that you measure. I think that's exactly right, and you just have to face up to that question. But I feel about rankings the way that I do, Meg Greenfield actually wrote in "The Washington Post" that everyone's in favor of democracy, it's just in practice that people start to divide. I actually think it's just the reverse of rankings. Everyone is against rankings in theory, but in practice they start to look awfully good because of the as opposed to what question. So when we look at how we're making decisions now, it's disastrous. It's either based on no information or partisan heuristics. That's what guides our decisions. A good ranking is a whole lot better than the things that we're using as shortcuts for decision making right now. The only thing that beats a good ranking is a better ranking. Even U.S. News and World Report, if you're in an academic audience and you say the word, it's like throwing chum into the water. The sharks come out and everyone's got a silly story about U.S. News and World Report, but let me say two things. First of all, if you imagine the kind of idiot things that students make decisions about going to school on other than that, what

else are they going to do? What dad said what's the most prestigious? Which one they happen to see --

MR. MANN: Talk to the dean.

MS. GERKEN: -- the "Dawson's Creek" episode? Who knows what it is that they're going to decide on? So it's a pretty good heuristic if you need one. And it is true that there is silly competition, but if you're going to do ranking, you got to know that you have to review it and police it and change it as time goes on. But I still believe on the as opposed to what question that it's hard to beat a decently designed ranking.

MR. MANN: Yes, right here, please.

MR. STEPHANOPOULOS: My name is Nick Stephanopoulos. I'm an associate at Jenner & Block and a former student of Professor Gerken's also.

MS. GERKEN: He's not a plant. I swear.

MR. ORNSTEIN: How did you do?

MS. GERKEN: Makes me more nervous. I'm more nervous about students turning the tables on me at this moment than anything else.

MR. STEPHANOPOULOS: Actually I was in Heather Gerken's first ever Yale Law School class so I'd like to think that we in addition to Dean Koh had something to do with Professor Gerken deciding

to go to Yale. My question relates to Dean Koh's concern that if you have a democracy index whether that could create enough of an impetus for lower ranked states to do much about their poor ranking because I think in other areas you've had poorly ranked states do nothing for generations. If Alabama has been number 50 in education for 100 years, why is Ohio going to suddenly take lots of steps to improve its election administration? So I guess I was wondering did you consider linking any sticks or carrots to states' rankings within the index? Because you can imagine that there might be more federal funding if you score really well or there might be some sort of federal observer presence in your state if you score very poorly, or maybe a new preclearance requirement for states that score very poorly. So I'm just wondering what steps have you thought about that might create more sort of utility and more impetus with this ranking.

MS. GERKEN: It's a great question. I have to say even in my wildest day dreams I just hope there would be federal funding for the idea let alone carrots and sticks for the results. That would be great. Although I'll just say this about this. One of the things I've been doing is talking to all these people who do indices and there's sort of a puzzle about them which is why do they work at all? The odds are except for the U.S. News and World Report where people are going to go send their kids to college it really matters, there are wild variety of indices that have a real effect on policy and you can't figure out if you're just acting in a totally self-

interested why that's so. My favorite is the government performance project. If there's anything more boring than election administration, it is the government performance project which analyzes the way that states manage themselves. It turns out even poor states actually really pay attention to it. So part of it is this performance peer pressure piece of it and part of it is that almost inevitably there's a political entrepreneur somewhere who wants to whip the place into shape. So there's a governor who gets elected and uses the index to beat on the state bureaucrats to get something done. So even with the poorest states, they don't always use it. It's true. I don't want to overclaim. It may not have an effect on everyone. It may have an effect only on sort of pieces of the system. But they do use it. Even if the poorest states don't even care, they say there's another one where we're ranked fiftieth, although I'll just say one ranking in the book and what it shows you is the poor states do just as well as the rich states about collecting election information. In fact, my state of Connecticut in New England, the good governance state of Minnesota, are ranked pretty low on my ranking. I think that will prompt them to move. But let's say it just maps out exactly as you might guess, that even if the poorest states are doing the worst, they still benefit from the index because one of the things that you ought to do is tell us what the drivers of performance are and what policies work well. So reformers are making guesses about those things, but nobody really knows what works

well because nobody knows who is performing well. So in some ways there's going to be a free set of information out there about cheap and easy policy changes that can be made that these states can take advantage of. So maybe they won't go that much further up the ranking, but at the very least they'll have access to a set of information that they don't have, not about how to make the system better.

MR. MANN: Harold?

MR. KOH: I think where Heather has a completely winning argument is that the ranking, the number gives people something to focus on. In Moneyball it was on base percentage. What on base percentage has actually done is it's led to people walking more because they take more pitches, swing less and it's --

MS. GERKEN: You're asking me a baseball question, Harold?

MR. KOH: But I think there are two points which is Heather's assumption will generate a lot more data which I think is clearly true and a lot more data is better than zero data. But where I challenge Heather a little bit is that her assumption is having a ranking which is a single ranking will force people to compete within the system, but there are at least two other alternatives which I've personally observed, and others in this room have as well. One is that people challenge the ranking because it underweights the thing that they think is important (inaudible) is the head

of equal justice works, they look at the ranking and they say it doesn't do enough about public interest. So what they do is they generate an alternative ranking and you see it in business schools, et cetera. Then there starts to be a proliferation of rankings where everyone is doing well in whatever ranking system they value which values the thing that they do. So the question is how do you create a single ranking which becomes the coin of the realm and which everybody has to deal with?

Then the other example I have from my own personal experience is the human rights reports of the State Department where as you know every year the United States rates or evaluates the human rights situation in different countries. Some NGO reports like Freedom House actually rank countries more free, less free, 1 to 100. We never did that because we found that it's very hard to measure in this country they torture less, but there's more freedom of the press or something like that, that these are unmeasureables, so we never got around to it. And what we ended up doing instead was using a common terminology. So somebody is good or poor at which point the regional bureaus and interests would always come back and say, Can we be improving? Everybody wants to be improving. So before you were abyssal, but now you're improving, and we'd say, no, you must be poor or good or whatever. Now this goes back to Nick Stephanopoulos's point which is the reason for this is sanctions are attached to the human rights

performance, economic sanctions, et cetera. What ended up happening was the attachment of the sanctions actually drilled back into -- put a lot more pressure to lie, or to not lie but not tell the full truth with regard to human rights performance. So I think that's part of the difficulty, is how do you avoid a multiplicity of rankings which dilutes the effect you're describing? Or how do you prevent the consequences of the ranking to lead to people feeding in the kind of information that distorts it and makes it less trustworthy?

MS. GERKEN: I love because he's a Yale Law professor he asks three questions instead of one embedded in it, so if Tom will give me the minute.

MR. MANN: Sure.

MS. GERKEN: The first question of how do you not have more than one ranking, I mean I think if you design a ranking this is where you should act like an academic. You should be completely honest about its limits, that it's not objective. The trouble with the ranking is that everyone just assumes a level of objectivity that is never true. Everything that you publicize you have to talk about why it's not objective. You have to explain exactly how you do it from top to bottom from the weighting at the top to the metrics in the middle. Actually if I had my view, I would like a sort of election geek equivalent to choose your own adventure. That is, if you don't think the ranking is working, you can go and rejimmy it which is

what the EPI does. Interestingly enough, although people try to rejimmy it, usually what happens is, because as long as you measure enough stuff you're getting a pretty good read on the system, so as long as it's an extensive enough measure you can't just jack up one number and think you're going to change your ranking. In fact, you really have to move up on everything for it to really have it change meaningfully which means that if they want to choose their own adventure they end up having to do rankings that everyone will just think are silly because you have to jimmy the numbers so much to get themselves the ranking they want. Whether they'd be competitive rankings, glory day, I would like a competitive ranking because it would suggest that it was working and that people cared about it. A happiness problem.

MR. MANN: Someone cared. Right.

MS. GERKEN: Then on the question of cheating, I'll just say two quick things about it. We measure a lot of things that are very hard to lend themselves to measurement so I see why in looking at a country you would say use good and poor. Same with election quality. It's hard to put a number on it. Election administration, it's a funny thing, it all but lends itself to numbers yet it's the one place we don't measure because most of the stuff in there is just strict nuts and bolts stuff that pretty much everyone agrees on and it's pretty easy to capture in a number, not everything, but a good amount of it. I would hope there would be cheating. I would feel

much better if they were cheating because if they were cheating it would suggest it was actually taking hold. But there are good ways to police cheating. For example, if you talk to anyone who runs an index, they know the difference between bad data and good data and they toss out the bad data. So when they can smell someone cheating, for example, let me just give you -- if the registration system numbers from the state suggest it's working perfectly and yet you know that a lot of people are showing up at the polling place and finding they're not registered, you know that that data is suspect. The example in the book that I use is a bunch of election officials turned in information to the election assistance commission and miraculously enough even though we all know thanks to actually Bob Pastor's report that no state has enough poll workers show up on election day, that everyone is really understaffed in terms of poll workers, we know this to be true, miraculously all the states proposed -- 49 states proposed that they had exactly the right number of poll workers as required by state law because people obviously had a calculator. So number of jurisdictions times number required by state law equals, and they report that magic number. Ohio reported that they didn't have enough poll workers on election day and that's the kind of thing that if you're actually thinking about these questions you give them not just points for honesty but you go back and push everyone else on getting better data. So everyone who ranks has this problem, and I don't want to

deny that it's a problem, but the better the ranking gets the harder it is to cheat and the more means you will have for policing it. There are a billion political scientists out there who run studies all the time about how the election system is working. You can find out from them, get a pretty good read from them, whether or not states are cheating on these numbers.

MR. ORNSTEIN: We are going to put up on the Brookings website the ranking from that class you took with Heather.

MR. MANN: Yes, the young lady right here?

MS. SCHNEIDER: My name is Monica Schneider. I have a question more about roadblocks to getting the system started in the first place. In my experience, partisanship is not the only issue at getting this started, but incumbency. Those people have gotten elected because the system in place works for them and they don't have a lot of incentive to effect a system that has worked for them so far. How do you deal with that? To begin with I know once a ranking is in place you can use that to encourage it, but to get it started in the first place.

MS. GERKEN: The question of partisanship, this is one of the things the more I spend on this the more I think that we should subscribe to some version of Hamlin's Razor if you're a computer geek. Hamlin's Razor says never attribute to malice that which can be adequately explained by stupidity. In election reform I actually think for the vast majority of problems ever attribute to partisanship that which can

be explained by inadequate resources. Nonetheless, partisanship is a factor and it's a factor in exactly the way you've described. So if you talk to any political official, their ideal voting pool is precisely the pool that showed up the last time, no one more, no one less, just those numbers, unless of course you're Al Franken, then you'd like a few more people to show up next time. So the question of how do you get those people to move on this? Once the index is in place, I think the incentives actually change pretty dramatically for those who are involved in administering the election. When you're secretary of state it's very hard to distinguish yourself. People don't even know what you do. Having a ranking I think is actually a real political weapon. It's a political weapon in two places. One, during campaigns because the person running against you or you are going to be touting that number depending on how good or bad it is. And two, during recount wars. So lawyers fight recount wars on two fronts. One is in the courtroom trying to get ballots counted and not counted, and one is in public space where they're trying to cast doubts or not on the results. And I just can't see how a ranking wouldn't come into that. All that means is that all of these sorts of ugly pushes that politics brings in some ways are a good method of disseminating the information and of course once you start disseminating the information, you attach yourself to it in some ways. So if you're a secretary of state and you're beating on Kenneth Blackwell because Ohio was ranked forty-seventh, then you're

going to actually be responsible for moving that number up. So there's ways in which you can sort of take advantage of these cycles. It's not perfect. I don't want to -- you're right. Partisans are going to resist this for lots of reasons, but they resist improvement already for lots of reasons. This at least changes the calculus a little bit to reduce some of that resistance and push them in the right direction. It doesn't get rid of all that other stuff but at least adds something else to the equation in an equation that's never added up to any meaningful reform.

MR. MANN: Yes, this woman right here. Our final question I'm sorry to say. We're running out of time.

MS. BONNER: I'm Rebecca Bonner. I'm a Yale Law School grad. I never had you, Heather, but I wish I had.

MR. MANN: Speak up a little.

MS. BONNER: My question goes to legitimacy concerns and potential chilling effects on voters. There was a World Bank index that was done that the World Bank thought would actually be helpful in encouraging foreign direct investment in countries so they put an index together of countries saying basically here are the countries where conditions are best for foreign direct investment. And one of the unintended consequences of the index that it became a self-fulfilling prophecy for those that fell at the bottom and they ended up running into a problem where corporations that ran into information costs that are

unacceptable to them didn't bother piercing the veil of the index to say maybe Zimbabwe is a good place for us to do something because even though they're on the bottom of the index, let's still make some profit there. So as we move to your index, how concerned are you that the state that ends up falling fiftieth on the index is going to have that number come out and then those voters saying my gosh, my state does terrible. Why bother? Did you ever consider the potential for truncating the list and saying maybe here are the top 30 or maybe even saying in those places where they're still falling at the bottom, we are also as we publish this index publishing standards that say at minimum these are the minimum number of poll workers we think a state needs, things that a process needs so that it can do well and everyone on this list at least meets that minimum floor? What would be your response?

MS. GERKEN: There are no investors involved or anything like that, so the two things that would most likely happen, one is that voters will actually vote on this basis in which case bully for them. I think that you're never going to solve these problems unless voters actually start really caring about these things and occasionally punishing someone at the ballot box. And because politicians are so risk adverse, the odds of any one of these indices or anything actually making them not get elected the next time is like lightening striking. It's very hard not to get elected when you're an incumbent. But these guys are terrified of this stuff. So,

fine, one election where someone gets taken down because of the index, that will be great.

The other possibility I take it is that you're worried that people won't turn out because they won't trust the system itself. Here I'll just say two things. There are various questions about the relationship between turnout and confidence in the system. The relationship is not nearly as tight as I think we tend to assume. In fact, political scientists are now at war over this. Some people think you can't even find any correlation at all, that is, there is just a generic distrust of the system that we all have and it has almost no effect on this kind of stuff. So it's not clear to me that it will have any effect on turnout. But even if the voters are paying enough attention for them to think about this, the one thing that those guys would find I think is that when these numbers come out they're going to find out that the problems that they have in their state is true in lots of different places and so at the very least it's going to take the paranoid version of why they shouldn't turn out which is that we won't get counted because the partisans aren't counting it -- our vote may not get counted because we haven't given enough resources to the system. I think that's actually a much better outcome because right now what people think are -- the people that Norm was talking about, they think it's just partisan officials who are taking their ballots out of the box and not counting them. That is far more damaging. The index I think would reveal

it's absence of resources, and while that's an unappetizing conclusion, I think it's actually less likely to depress turnout than the kind of crazy partisan theories that people have now.

MR. MANN: Norm or Harold, do you have any parting comments you'd like to make?

MR. ORNSTEIN: On that last point, before we started I joked that this would have a real incentive, if Louisiana found that it had moved from fiftieth to forty-eighth it would have an enormous incentive to get back to its legitimate spot at the bottom. Where in fact that's unfair because if you look at what they did in Louisiana after Katrina, you actually had somebody who came in who managed the next election extraordinarily well because that person fighting against a lot of odds in the state really saw a tremendous responsibility. And while you might well have a couple of states that would end up either with the perverse effect of falling to the bottom and losing any popular support or political support to move forward, you would probably have much more the opposite effect. You would end up with maybe even a Governor Jindal who doesn't like to take federal money for anything but also rails against corruption running on a platform of improving the election process. Now that might not work particularly well, but you'd also have at many other levels an incentive to kind of move up a little bit. So I think on balance you're not going to have everything work in a positive direction, but you want to have them ranked

in a fashion where there is some potential for shame hitting even if it's individual officials to improve.

MR. MANN: Harold?

MR. KOH: Just to repeat thoughts I had in my initial remarks, buy the book and read it. But second, it is just so crazy it just might work because what Heather is really saying is this is not the solution to end all solutions, this is a solution that starts to make other solutions possible and that moves off of the current status quo which is not looking for solutions. And so just the fact that we had this discussion and that people are talking about how to design it could lead to something being adopted that once it's adopted then people try to find something better and that creates a positive dynamic toward improvement which is what I think is at the core of it. When I said this is the future of American public law, in Judge Wright's day it was about courts and legislation and it wasn't about institutional design or process and litigants had to get groups to represent them and go in and challenge things and you knew that they were really dealing ultimately with the symptom and not the underlying systemic problem, and this one is saying let's gather data about the system as a way of starting to make it healthier and I think that that's a very promising way to begin.

MR. MANN: Heather has done everything to advance this cause except in this volume produce a finished democracy index. You will

not find it there but you'll find a lot of extremely useful exploration of how it might be done and what the consequences might be. It's important to note that there are developments in Congress, there are efforts in some of the states to begin putting together better measures. There are large private foundations that have launched some efforts in this last election, a really interesting project with problems of overseas military voting is producing new measures of states that will be quite useful. So I think Heather you've started something and it will unfold in the months and years ahead and we'll look back with pride to having sponsored this session. Thank you all very much.

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