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Sanford Levinson

MELIORISM V. "BOMB-THROWING" AS TECHNIQUES OF REFORM

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It is always a pleasure to return to the University of Tulsa College of Law. I have been here for several earlier iterations of the program for which Heather Gerken is this year's honoree, including one in which my own work was the focus.[1] I was (and remain) extremely grateful, and I am sure that is true for Heather. It is no small matter to have one's body of work selected for acknowledgment and, just as importantly, serious discussion. But a second reason makes me feel some special bond with Tulsa and its law review; three years ago, I wrote a screed for the *University of Texas Law Review* bewailing the ever-diminishing interest, on the part of most student-edited law reviews, in publishing book reviews.[2] It turns out, for example, that the modal number of book reviews in the so-called top-twenty law reviews is zero.[3] The meaning of this weekend, of course, is that scholarship is important, but it is obviously the case that much scholarship, even increasingly within the world of the legal academy, takes the form of books instead of, or in addition to, law review articles.

Almost immediately after publication of the *Texas Law Review* article, I received an invitation from the editor-in-chief of the *Tulsa Law Review* to organize a full issue of the *Review* that would be dedicated to book reviews.[4] I gladly accepted the invitation, contingent on my friend Mark Graber's joining me in being the impresario for what both of us thought was a potentially important contribution to the world of legal scholarship — that is, the evaluation of books on issues important to the law.[5] Two of those symposium issues have now come out,[6] and the *Review* is currently receiving, I hope, the last submissions for this year's issue, which I assume will come out sometime during this academic year.[7] Few law schools, therefore, can match Tulsa in taking legal scholarship, in

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* W. St. John Garwood and W. St. John Garwood Jr. Centennial Chair in Law, University of Texas Law School; Professor of Government, University of Texas at Austin. The text sets out some of the reasons for my gratitude to the *Tulsa Law Review* for having been invited to participate in this occasion. I do want to acknowledge the meticulous organization and hospitality of everyone on the *Law Review*, especially Rachael Hughes. I have chosen to modify only slightly the remarks delivered in September 2012, even though we obviously now know the results of the November election.

1. Symposium, *The Scholarship of Sanford Levinson*, 38 TULSA L. REV. 553 (2003).
2. Sanford Levinson, *The Vanishing Book Review in Student-Edited Law Reviews and Potential Responses*, 87 TEX. L. REV. 1205 (2009).
3. *Id.* at 1208–09.
4. Mark A. Graber & Sanford Levinson, *Selection Biases*, 45 TULSA L. REV. 575, 575 (2010).
5. *Id.*
6. Book Review, 47 TULSA L. REV. 1 (2011); Book Review, 45 TULSA L. REV. 575 (2011).
7. Book Review, 48 TULSA L. REV. 169 (2012).

its various forms, with consummate seriousness. Just as all of us join in honoring Heather Gerken, we should equally join in honoring the Tulsa College of Law and the *Tulsa Law Review.*

I mention this not only to indicate my links with, and fondness for, the Tulsa College of Law— and I have not even mentioned that its Dean is my cousin! — but also to put into context the particular form that my ensuing remarks will take. For I will be focusing on a book that Heather Gerken published in 2009, *The Democracy Index: Why Our Election System is Failing and How to Fix It.*[8] No doubt other contributors will focus on one or another of her excellent articles; I will be ignoring them in favor of her book. In addition, I will also discuss another book only recently published by an Oklahoman who for many years represented Oklahoma City and its environs (depending on gerrymanders) in the U.S. House of Representatives. I refer to Mickey Edwards, who has just published a book titled *The Parties Versus the People: How to Turn Republicans and Democrats into Americans.*[9] Gerken is known to be a Democrat; Edwards is a Republican. Both agree, though, that all is not well in our political system.[10] As it happens, I strongly agree with them, as evidenced in the titles of my two most recent books: *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)*[11] and, more recently, *Framed: America's Fifty-One Constitutions and the Crisis of Governance.*[12] And I agree with much of their analyses. However — and this will be the central thrust of my contribution to this symposium — there is a distinct difference in sensibility between both of their books and my own.

All of us are looking for ways to make the existing political system function better. I think, however, it is fair to describe both Gerken and Edwards as *meliorists*, searching for solutions that might well appeal to those currently exercising political power, including, for that matter, voters who might, however critical they may be of aspects of American politics, be fearful of anything labeled as "radical" responses.[13] A central theme of *The Democracy Index* is that we must always be concerned with, as Gerken puts it, "Getting from Here to There in Election Reform."[14] And quite often the answer is indeed by finding sympathetic allies within the existing political system who agree that some relatively limited measure of reforms is necessary. One should, it is true, always recognize that an idealized best is often the enemy of what might be an achievable good; another way of putting this is that even half-filled glasses, though, by definition also half-empty, are more sustaining than empty ones.

My own sensibility is, for lack of a better word, more radical. So part of me rejoiced two years ago when I read the remarks of former Ohio Republican Senator George

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

9. MICKEY EDWARDS, THE PARTIES VERSUS THE PEOPLE: HOW TO TURN REPUBLICANS AND DEMOCRATS INTO AMERICANS (2012).

10. *Id.* at x; GERKEN, *supra* note 8, at 1.

11. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW THE PEOPLE CAN CORRECT IT) (2006).

12. SANFORD LEVINSON, FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE (2012).

13. *See* EDWARDS, *supra* note 9, at xvii–xix; GERKEN, *supra* note 8, at 2–3.

14. GERKEN, *supra* note 8, at 6.

Voinovich, who chose not to seek re-election in 2010 out of disgust with what he saw in the Senate: "I think," he told Washington Post reporter Dana Milbank, "we have to blow up the place."[15] I presume that Senator Voinovich was speaking metaphorically; I am sure that neither of us in fact wants to blow up the Senate. That being said, I am also sure that both of us, from decidedly different perspectives, believe that we must question basic assumptions we make about the operation of our political institutions and perhaps countenance the possibility of quite drastic changes that would leave the Senate, in important ways, fundamentally unrecognizable to those who know well the present institution.[16] One's propensity to be a meliorist or a bomb-thrower may in part be dispositional, going back to the way one was raised as a child or, if one is more fatalistic, the particular genes we might have been dealt even earlier.

It may also be the case, though, that these differences might be explicable by looking at the extent to which one believes that we really *do* face what James Madison repeatedly called "exigent" circumstances or "crises."[17] After all, as law students learn in first-year constitutional law courses, "compelling interests" may sometimes require drastic, even what would otherwise be near-unthinkable, solutions.[18] But, as law students also learn, there is often vigorous disagreement on the actual circumstances of a given situation. To take an obvious example, even if one thinks that "national security" is indeed a fundamental interest, one might still be altogether skeptical that the detention of over 100,000 Japanese resident aliens and their American-citizen children was necessary in 1942 as part of a justified war effort against Japan.[19] That is, there is always an *empirical* dimension in the recognition of a genuine "compelling interest," in addition to agreement on the abstract importance of values such as national security. As Gerken's Yale colleague Dan Kahan has often suggested, it may well be that personal or cultural predispositions more often explain how one frames even empirical evidence, so that it is fruitless to believe that we will all agree even on basic facts of the matter, let alone the weight we should assign given values.[20] And, even should we reach agreement on both weight and empirics, it remains far easier to imagine drastic change, especially if one is an academic, than to suggest plausible ways to bring it about.

In any event, all of us should recognize, and celebrate, the fact that Heather Gerken wears many hats. Most obviously, she is a superb analyst of American election law — what some have taken to calling the "law of democracy"[21] — as well as, more recently, of how we might structure political institutions to assure that minorities within larger populations have the opportunity to enjoy some measures of genuine decision-making

15. Dana Milbank, *As Voinovich Leaves Senate, He Sees a Deficit of Good Sense*, WASH. POST (Dec. 6, 2010, 8:00 PM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/06/AR2010120605913.html.

16. *See id.*

17. See, for example, THE FEDERALIST NO. 40 (James Madison), as discussed in LEVINSON, *supra* note 12, at 354–56.

18. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

19. *See id.*

20. Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. 741, 754–56 (2008).

21. *See, e.g.*, SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (4th ed. 2007).

authority within smaller enclaves.[22] "Dissenters" should receive the opportunity, at least on occasion, to be genuine "deciders" with regard to at least some dimensions of their public lives.[23] This latter body of work is essential reading for anyone interested in "decentralization," "subsidiarity," or the legal controversies surrounding such central concepts as "federalism" within the American polity. Indeed, one important implication of her recent work is that we must think more seriously than we often do of the implications of "home (or other sub-state) rule" *within* America's fifty states.[24] If one takes seriously some of the initial arguments for preserving federalism against the centralizing tendencies of a national government, then one should grapple with the relevance of centralized *state* power in such contemporary states as California or Texas, which are, respectively, roughly nine and six times the entire population of the United States in 1790.[25] These are the subjects of other presentations as we honor her important body of work.

I want to focus on one aspect of that work that, however linked to these topics, is nonetheless somewhat orthogonal to it inasmuch as she moves from the traditional scholarly role of the (relatively) detached analyst to that of the unabashed er.[26] Although *all* of her work can be viewed as profound acts of citizenship, inasmuch as her topic is the working of America's democratic (and not so democratic) institutions, only some of it partakes of what can be described as "proactive" citizenship. But that is precisely the attribute one finds in her book *The Democracy Index*.[27] Although the title is somewhat anodyne, that is certainly not true of the subtitle: *Why Our Election System Is Failing and How to Fix It*.[28] There is, to put it mildly, nothing detached about the subtitle or of the body of the often stirring text. The book, from its title to its last page, is a call, if not to arms, then to action by her fellow Americans to help fix an election system whose failures threaten to make a mockery of our claim to call ourselves a genuinely "democratic" political order.[29]

She begins her book by stating forthrightly that "[t]he best evidence we have suggests that our election system is clunky at best and dysfunctional at worst."[30] Though she rejects the metaphor of "Russian roulette" as excessive, she does say, altogether convincingly, that "we aren't prepared for the electoral equivalent of a Category 4 or 5 hurricane,"[31] which presumably is bad enough. "It's hard to tell where disaster will strike, but it doesn't make sense to bet against disaster in the long haul."[32] Quoting Rick Hasen, she rejects reliance on "the election administrator's prayer: 'Lord, let this election not be

22. *See* Heather K. Gerken, *Dissenting By Deciding*, 57 STAN. L. REV. 1745 (2005).

23. *See id.* at 1750.

24. *See* GERKEN, *supra* note 8, at 5–6.

25. *U.S. Population by State, 1790 to 2011*, FACT MONSTER, http://www.factmonster.com/ipka/A0004986.html (last visited Mar. 1, 2013) (showing the population of Texas in 2011 to be 25,647,681 and California's as 37,691,912, while the population of the United States in 1790 was 3,929,214).

26. *See* GERKEN, *supra* note 8, at 5–6.

27. *See id.*

28. *See id.*

29. *See, e.g.*, *id.* at 27–36.

30. *Id.* at 1.

31. *Id.* at 12.

32. *Id.* at 12–13.

close,'"[33] a prayer most spectacularly rejected in the presidential election of 2000 and the senatorial election in Minnesota in 2008, where Minnesota went several months without its second senator because of long delays necessitated by the recounting of ballots and, as one would readily predict in the modern world, what threatened to be endless litigation about decisions as to particular votes.[34]

It is worth noting that we gathered in Tulsa approximately six weeks before the 2012 elections, and the race between President Obama and Governor Romney, not to mention a host of Senate and House races, was still well within the famous "margin of error" used by poll-takers.[35] Later readers will have the benefit of knowing whether the "prayer" was answered in all of these races or whether there are indeed acrimonious challenges to the legitimacy of the selection process in particular states. Certainly the late summer and early fall featured a number of law suits, most prominently in Pennsylvania, Ohio, Florida, and Texas, challenging a variety of recent changes in election laws that, it has been alleged, were backed by Republicans precisely for the purpose of diminishing the Democratic vote.[36] Some of these suits have been successful, some of them not.[37] The ones in Ohio and Florida are especially significant for the presidential race inasmuch as both of these states are, thanks to the Electoral College mechanism, "battleground" states, which means that the stakes attached to turnout are especially high.[38] But control of the Senate might also ultimately turn on possibly disputed results in one or two states.[39] (As it happens, that turned out not to be the case, though several elections for the House of Representatives remained undecided until well after Election Day.)

These lawsuits highlight, incidentally, the fact that all elections in the United States are local, not simply in the sense once evoked by the late Speaker of the House Tip O'Neill's proclamation that "all politics [are] local,"[40] but, rather in the far more legalistic sense that elections are conducted by *states,* not by the United States. Jeff Rosen once

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33. *Id.* at 13 (quoting Richard Hasen, *Voting System is Haunted by Democratic Meltdown*, ELECTION L. BLOG (Jan. 21, 2008, 3:20 PM), http://electionlawblog.org/?p=9174).

34. For more on these stories, see Dan Balz, *Up By 930, Bush Side Assails Recount*, WASH. POST, Nov. 19, 2000, at A1, *available at* http://www.washingtonpost.com/wp-srv/onpolitics/elections/election19.htm and Manu Raju & Josh Kraushaar, *Norm Coleman Concedes Minnesota Senate Race to Al Franken*, POLITICO (July 1, 2009, 11:02 AM), http://www.politico.com/news/stories/0609/24383.html.

35. Tom Foreman, *Margin of Error: Two Candidates, Two Journeys, One Race of Lost Dreams*, CNN POL. (Nov. 5, 2012 10:29 AM), http://www.cnn.com/2012/11/04/politics/margin-of-error-campaign-foreman.

36. Ethan Bronner, *A Tight Election May Be Tangled in Legal Battles*, N.Y. TIMES, Sept. 10, 2012, at A1, *available at* http://www.nytimes.com/2012/09/10/us/politics/legal-battles-on-voting-may-prove-a-critical-issue-in-election.html?pagewanted=all&_r=0 (discussing the legal battles in each of these states and the effects on the presidential election).

37. Ne. Ohio Coal. for the Homeless v. Husted, 696 F.3d 580 (6th Cir. 2012) (affirming the district court's decision that held the state's new election laws violated equal protection); Texas v. Holder, No. 12 Civ. 128 (D.D.C. Aug. 30, 2012) (striking down the state's new election laws); League of Women Voters of Fla. v. Browning, 863 F. Supp. 2d 1155 (N.D. Fla. 2012) (striking down the state's new voting requirements); Applewhite v. Commonwealth, No. 330, 2012 WL 5374328 (Pa. Commw. Ct. 2012) (denying plaintiffs' motion for an injunction against the state's new election laws). *See also* Shelby Cnty. v. Holder, 679 F.3d 848 (D.C. Cir. 2012), *cert. granted*, 81 U.S.L.W. 3064 (U.S. Nov. 9, 2012) (No. 12-96) (challenging Section Five of the Voting Rights Act).

38. Bronner, *supra* note 36.

39. David Catanese, *Top Senate Races Tighten Up*, POLITICO (July 2, 2012, 6:08 PM), http://www.politico.com/news/stories/0712/78078.html (discussing the races that could determine control of the Senate).

40. *Biography: Thomas P. "Tip" O'Neill*, PBS, http://www.pbs.org/wgbh/americanexperience/features/biography/carter-oneill/ (last visited Mar. 1, 2013).

pronounced this aspect of the Constitution to be its most "stupid" feature.[41] My only disagreement with Rosen concerns its place in the list of such "constitutional stupidities" inasmuch as others may be even worse. To be sure, as illustrated by the lawsuits, states may be constrained by the U.S. Constitution[42] or by relevant statutes passed by Congress.[43] States, however, retain perhaps all too much discretion concerning such issues as eligibility to vote in the first place — just think of the millions of disenfranchised former felons; the period of time during which one can cast a vote, including both "early voting" prior to election day and then the length of time that polls will be open on election day itself; or, a specially contentious subject in 2012, the requirement that would-be voters have the requisite identification to prove to a suspicious (and partisan) poll watcher that they are in fact legally qualified to vote.[44]

The thrust of Gerken's short and immensely readable book is to suggest that we should begin building levees against possible electoral hurricanes by establishing what she calls a "democracy index."[45] This refers principally to gathering a wealth of information, much of which is lacking in our remarkably (and unfortunately) decentralized system of elections, about such variables as how easy (or hard) it is, as a practical matter, first to register to vote, then to cast a vote after registration, and, finally, to ascertain whether every vote cast is in fact counted accurately.[46] With regard to the second, for example, important "proxies" for ease or difficulty can include how long it takes to wait in line for an average voter to get to the ballot box.[47] This is no small matter, especially in the United States; unlike many countries around the world, which have elections on the weekend, the United States persists, because of an 1845 law passed by Congress, in conducting its elections for national office on a single Tuesday in November.[48] Not only is there a greater risk, in at least some states, of bad weather that might diminish turnout; there is also the obvious fact that anyone who works for hourly wages or runs a small business of his or her own must balance the time involved in voting against the potential loss of wages or business. Voting early in the morning or after work is obviously easier if one does not have small children or is otherwise weighed down by family responsibilities.

Gerken suggests that amassing the relevant data would allow us to compile an "index" by which states could be compared with one another along the relevant dimensions.[49] One can think of such analogues as the annual Freedom House reports on the state of democracy across the world,[50] or a somewhat similar set of annual evaluations

41. *See* Jeffrey Rosen, *Divided Suffrage*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 81 (William Eskridge, Jr. & Sanford Levinson eds., 1998).

42. *See, e.g.*, U.S. CONST. amends. I, XIV, XV, XIX, XXIV, XXVI.

43. *See, e.g.*, The Voting Rights Act of 1965, Pub.L. No. 89–110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2012)), *amended by* Pub. L. No. 94-73, 89 Stat. 400 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982).

44. Deborah Charles, *Voter ID Laws Spark Heated Debate Before Election*, REUTERS (Apr. 5, 2012, 6:35 PM), http://www.reuters.com/article/2012/04/05/us-usa-campaign-voterid-idUSBRE83400W20120405.

45. GERKEN, *supra* note 8, at 12–13, 26–37.

46. *Id.* at 131–32.

47. *Id.* at 131.

48. 2 U.S.C. § 7 (2012).

49. GERKEN, *supra* note 8, at 26–30.

50. *See Reports*, FREEDOM HOUSE, http://www.freedomhouse.org/reports (last visited Mar. 1, 2013).

by *The Economist*.[51] The latter, for example, ranked Norway as the most democratic country in the world in 2011;[52] the United States comes in at nineteenth,[53] a drop of two from the previous year.[54] Ahead of the United States were not only all of the Scandinavian countries and such British commonwealth countries as Australia, New Zealand, and Canada (as well as Great Britain), but also Ireland, Germany, Austria, the Czech Republic, and Uruguay.[55] Only 1/100th of a point separated the United States from Costa Rica at number twenty.[56] Presumably, we are — or certainly should be — embarrassed to be so low, especially given the public stance of the United States as the very instantiation of democracy. One might believe, albeit contrary to fact, that we would be collectively motivated to try to increase our ranking by changing at least some of the ways we do things. Those who shout "USA, USA" should, one assumes, want the United States to rank "number one" in these indices as well as in soccer or gymnastics. Instead, one might well expect the 2012 elections to manifest even more problems than its twenty-first century counterparts, whether because of the financially straitened circumstances of many states and localities actually charged with conducting elections or, as already suggested, highly partisan changes in election law that skeptics explain far more as efforts to discourage turnout of potential oppositionist voters than as good-faith attempts to cure genuine problems with the American electoral system.[57]

There is, it should immediately be acknowledged, an obvious problem with comparing indices on proficiency in soccer, gymnastics, golf, or tennis, with proficiency in democracy. As Gerken fully recognizes, evaluations of the latter will inevitably involve what political theorists call "essentially contested," often bitterly disputed, concepts that have deep emotional and ideological valence within the wider culture.[58] What, after all, *does* constitute "democracy"? We have been debating this question for at least twenty-five hundred years, and the debate has only grown sharper since the time, as recently as the nineteenth century, that "democracy" turned from a term of relative opprobrium to a purportedly desirable attribute of a polity. Or, to take a very different example linked with my last visit to Tulsa, which honored former Israeli Justice Aharon Barak, how precisely do we define "torture"?[59] Here too, the question generates a panoply of intellectual challenges, not least because our culture regards a regime as distinctly bad if it can be described as engaging in "torture." So anyone interested in compiling a "democracy index" must be highly sensitive to the possibilities for rancor by those who believe that it has been skewed to favor one political side. What, for example, would a full-fleshed "democracy index" say about the role of money in politics and whether the Supreme

51. THE ECONOMIST INTELLIGENCE UNIT, DEMOCRACY INDEX 2011: DEMOCRACY UNDER STRESS 3–8 (2011), *available at* http://www.sida.se/Global/About%20Sida/S%C3%A5%20arbetar%20vi/EIU_Democracy_Index_Dec2011.pdf.

52. *Id.* at 3.

53. *Id.* at 4.

54. *Id.* at 11.

55. *Id.* at 3–4.

56. *Id.* at 4.

57. *See* Balz, *supra* note 34; Bronner, *supra* note 36.

58. GERKEN, *supra* note 8, at 78–79.

59. Sanford Levinson, *To What Extent is Judicial Intervention Against Torture a "Hollow Hope"?: Reflections on the Israeli and American Judicial Experiences Since 2001*, 47 TULSA L. REV. 363, 366–72 (2011).

Court's decision in *Citizens United*[60] is itself enough to significantly lower the ranking of the United States among the nations of the world? And the crux of my own recent work is to argue that the U.S. Constitution itself disables us from counting as a robust illustration of twenty-first century conceptions of democracy.[61] Perhaps wisely, Gerken avoids such questions.

Instead, she convincingly argues that even a relatively modest "index" could prove immensely valuable, not least, she suggests, because states might be embarrassed to be exposed as fundamentally deficient in comparison to other states.[62] Such exposure might, for example, give local officials, who are often burdened by state officials with the actual tasks of conducting (and paying for) elections, additional clout with state legislatures who have proved stingy in providing the money needed to alleviate problems that have already occurred and are easily foreseeable in the future.[63] Who, for example, should pay for "new and improved voting machines," or, just as importantly, who should be charged for testing those machines to make sure that they have not been rigged in ways that would deprive some voters from actually having their votes counted?

Failure to reform, in turn, might provoke local political movements. Or perhaps some states might become rightfully embarrassed at the patent conflicts of interest present in allowing the chief election official, often the secretary of state, to be a highly partisan (and often elected) official. Thus, notoriously, the infamous Katherine Harris, in charge of Florida's debacle following the 2000 vote, was also the co-chair of the Bush-Cheney campaign in that state, just as Ohio's secretaries of state in recent years have also been active Republicans who often have further political ambitions of their own that may depend on being good "party men and women" when overseeing the election process.[64] Thus, Gerken quotes the "straight-shooting" South Dakota Secretary of State: "[b]eing nonpartisan doesn't earn a lot of points with the party faithful."[65] One does not have to embrace the full Madisonian critique of "factions"[66] in order to believe that partisan decisionmaking during the process of elections themselves undercuts their basic legitimacy. If one is disturbed, as former Justice O'Connor is, at the phenomenon of state judges chosen in highly partisan (and increasingly expensive) elections,[67] then one might ask why we should be any more accepting of putting elections in the hands of officials selected in overtly partisan elections.

I am fully on board with Gerken's critiques and proposals. I admire the book greatly and certainly hope it has the impact it deserves. This is true as well of Mickey Edwards's sharply written and perhaps even more anguished book. Edwards might be described as more Madisonian than Gerken is, for his book is full of denunciations of what

60. Citizens United v. FEC, 558 U.S. 310 (2010).

61. LEVINSON, *supra* note 12, at 5.

62. GERKEN, *supra* note 8, at 76–78.

63. *See id.* at 77.

64. *See* Kevin Bohn, *Ohio Secretary of State Defends Election Decisions*, CNN POL. (Nov. 5 2012, 9:48 PM), http://politicalticker.blogs.cnn.com/2012/11/05/ohio-secretary-of-state-defends-election-decisions/; Editorial, *The Return of Katherine Harris*, N.Y. TIMES (Sept. 16, 2004), http://www.nytimes.com/2004/09/16/opinion/16thu2.html?_r=0.

65. GERKEN, *supra* note 8, at 16 (citation omitted).

66. THE FEDERALIST NO. 10 (James Madison).

67. *See* Republican Party of Minn. v. White, 536 U.S. 765, 788–92 (2002) (O'Conner, J., concurring).

he recurrently describes as "the private power-seeking clubs known as 'parties.'"[68] He obviously strikes a distinctly Madisonian chord when he declares that "'[p]arty' has become a synonym for rigid, uncompromising, narrow 'faction.' And we are paying a very steep price for it."[69] He declares that "the party-driven politics of the past century must disappear . . . if Americans are to regain a sense of common identity and work together to solve the problems of the twenty-first century."[70] Although he became part of the House Republican leadership before leaving the House, he is clearly disillusioned with the present state of political polarization and the degree to which elected officials think only of the interests of their own parties and not in terms of, as Madison would have put it, the "public good" of America at large.[71] As I have written in my own book, Republican Senate Minority Leader Mitch McConnell, having stated that his overriding commitment was depriving President Obama of a second term,[72] behaved entirely rationally in attempting as well to deprive the President of anything that could be conveyed to the electorate as an accomplishment.[73] If one believes, as I do, that George W. Bush's election in 2004 was considerably aided by the decision of the late Senator Ted Kennedy to work with Bush on — and therefore allow him to take credit for — what became the two signature domestic achievements of Bush's first term, the No Child Left Behind Act regarding education and the coverage of prescription drugs by Medicare, then it cannot surprise anyone that McConnell was determined not to emulate Kennedy's role as the de-facto enabler of an opposition President.[74] What McConnell might say, of course, is that it *is* in the public interest to return the White House to Republicans, and that short-term costs attached to non-cooperation (such as the lowering of America's credit rating following the debt-limit fiasco) is a small price to pay for the good attached to evicting Obama and replacing him with any Republican at all, in this instance Mitt Romney.[75] What Edwards writes is that we must "reclaim our democracy, not from an invading army but from the parasitic destruction waged in the name of partisan interest."[76] Strong words indeed!

Like Norman Ornstein and Thomas Mann, whose recent book is even more tellingly titled *It's Even Worse than It Looks*,[77] Edwards is disgusted by what he observes in Congress.[78] One suspects that all three of these authors — I am most confident of Thomas Mann, who contributed an enthusiastic blurb endorsing Gerken's "compelling" book[79] — would also agree with Gerken that we are ill-served by the present way we conduct

68. EDWARDS, *supra* note 9, at 86.

69. *Id.* at 6.

70. *Id.* at 31.

71. *See* THE FEDERALIST NO. 10 (James Madison).

72. *See, e.g.*, David Edwards, *McConnell: Stopping Obama's Re-election Still 'Single Most Important' Goal*, RAW STORY (July 10, 2011, 11:30 AM), http://www.rawstory.com/rs/2011/07/10/mcconnell-stopping-obamas-re-election-still-single-most-important-goal/.

73. LEVINSON, *supra* note 12, at 234.

74. *Id.*

75. *See id.*

76. EDWARDS, *supra* note 9, at 177.

77. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM, at xii–xiv (2012).

78. EDWARDS, *supra* note 9, at 8–9.

79. GERKEN, *supra* note 8 (including Thomas E. Mann's review on the back cover).

our elections.[80] It can occasion no surprise then, that many pundits, across the political spectrum, describe the American system of government, particularly at the national level, as "dysfunctional," or even as does Tom Friedman of the *New York Times*, as "pathological."[81]

Consider, after all, the fact that decidedly less than 20 percent of the American public approves of Congress.[82] A summation of polls taken through mid-September 2012 found that only 13.8 percent of the public "approved" of Congress, while 79.6 percent "disapproved," which is a gap of nearly 66 percent.[83] As I have suggested elsewhere, I suspect that more people living in the American colonies approved of the British Parliament in 1776, given the number of Loyalists who refused to join the "patriots'" insurrection.[84] It is hard to argue that the "state of the Union" is good, given the remarkable number of Americans, of all political persuasions, who can be described as having utter contempt for our basic institutions and many of our national leaders. Even the Supreme Court, for the first time, has fallen below 50 percent with regard to its level of public esteem.[85] A June 2012 Gallup Poll, for example, found that only 44 percent of those polled "approved" of the Court,[86] though a more recent Gallup Poll in early September found that "approval" had climbed five points to 49 percent, while 40 percent indicated their "disapproval."[87] Interestingly enough, Democrats were more inclined to approve,[88] either as a tribute to the long-departed Warren Court or, more likely, in gratitude for the Court's not having overruled *Roe v. Wade* and moving toward various recognitions of gay and lesbian rights. The only national-level institution that enjoys the widespread confidence of the American public is the military, which may or may not be reassuring to those who believe in what the Constitution calls a Republican Form of Government.[89]

So there is definitely a spirit of discontent — and a call for at least some reforms — in the air, at least if we look only at diagnosticians of the contemporary American polity, ranging from full-scale academics like Heather Gerken to disillusioned former politicians like Mickey Edwards; from respected think-tank commentators like Mann and Ornstein to professional pundits like David Brooks and Tom Friedman, to name only two distinguished pundits who write for *The New York Times*. Friedman, for example, has

80. EDWARDS, *supra* note 9, at 36; MANN & ORNSTEIN, *supra* note 77, at 132–33.

81. LEVINSON, *supra* note 12, at 8–9; *World to U.S.: Will You Control Guns Now?*, NEWS LATITUDE (Dec. 16, 2012), http://www.latitudenews.com/story/world-to-us-will-you-control-guns-now/.

82. *Congressional Job Approval Poll*, REAL CLEAR POL., http://www.realclearpolitics.com/epolls/other/congressional_job_approval-903.html (last visited Mar. 2, 2013).

83. *Id.*

84. *See, e.g.*, MAYA JASANOFF, LIBERTY'S EXILES: AMERICAN LOYALISTS IN A REVOLUTIONARY WORLD 8–14 (2011).

85. Adam Liptak & Allison Kopicki, *Approval for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 8, 2012, at A1, *available at* http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html?pagewanted=all.

86. *Id.*

87. *Supreme Court*, GALLUP, http://www.gallup.com/poll/4732/supreme-court.aspx (last visited Mar. 2, 2013).

88. Jeffrey M. Jones, *Party Divide Still Evident in Supreme Court Job Approval: Fifty-Seven Percent of Democrats, 36% of Republicans Approve*, GALLUP (Sept. 28, 2012), http://www.gallup.com/poll/4732/supreme-court.aspx.

89. *See* LEVINSON, *supra* note 12, at 76–83.

repeatedly written of "the failure of our political system to unite, even in a crisis, to produce the policy responses America needs to thrive in the 21st century,"[90] and even suggested in a later column that the United States might need its own version of an "Arab spring."[91] Indeed, in a 2011 book, Friedman and his co-author Michael Mandelbaum write of the "pathologies of [our] political system."[92] Friedman concluded his "Arab spring" column as follows: "We can't be great as long as we remain a vetocracy" — by which he means "a system in which no one can aggregate enough power to make any important decisions at all," because there are simply too many vetopoints along the way — "rather than a democracy. Our deformed political system — with a Congress that's become a forum for legalized bribery — is now truly holding us back."[93]

The patient is sick. Something must be done — and quickly — at least according to Friedman and, it seems, Edwards.[94] Gerken, perhaps because she wrote her book a few years earlier, adopts a less urgent tone even if, as already indicated, she is warning us about the possibility of hurricanes ravaging our already-vulnerable election system and thus calling the basic legitimacy of our political system into ever increasing question.[95] So one question that must be directed at any analyst of our political system, even if willing to emulate Richard III (not perhaps the happiest of sources) by speaking of "the winter [and spring, summer, and fall] of our discontent,"[96] is the extent of the discontent and the seriousness of the diagnosis. To stick with the medical analogy, has the political biopsy found the equivalent of a stage one cancer that can be alleviated, perhaps even completely cured, by what is in context an easily endurable treatment protocol? Or are we confronted with a worst stage diagnosis, where the only hope, if indeed there is any hope at all, is found in radical, basically untested, experimental procedures?

One must always ask Lenin's question — "what is to be done?"[97] — even if one, for very good reason, rejects his specific answer. But what *is* to be done? How *do* we get from here — a condition of significant, but perhaps not truly measured (even if, a separate question, measurable), systemic sickness — to there, what some would regard as a restoration of what we would like to think is best about the American political system, and what others, like, perhaps, the proponents of the aptly named "Reconstruction amendments," might believe is necessary to *change* a system that is defective at its core?[98] Here, I confess, is where I may depart from my good friends Heather Gerken and Mickey Edwards, however much I both agree with their diagnoses and respect them as astute and patriotic diagnosticians. For better or (possibly) for worse, neither can be described as a "bomb-thrower" (in the metaphorical, Voinovichian sense), and this neces-

90. Thomas L. Friedman, *An X-Ray of Dysfunction*, N.Y. TIMES, Oct. 10, 2010, at WK8.

91. Thomas L. Friedman, *Down With Everything*, N.Y. TIMES, April 22, 2012 at SR11.

92. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK 243 (2011).

93. Friedman, *supra* note 91.

94. *See* EDWARDS, *supra* note 9; Friedman, *supra* note 91.

95. GERKEN, *supra* note 8, at 12–13.

96. WILLIAM SHAKESPEARE, RICHARD III, act 1, sc. 1.

97. VLADIMIR IL'ICH LENIN, WHAT IS TO BE DONE?: BURNING QUESTIONS OF OUR MOVEMENT (N.Y. Int'l Pub. 1969) (1902).

98. *See* ALFRED AVINS, THE RECONSTRUCTION AMENDMENTS' DEBATES: THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS (1974).

sarily means, as is true, incidentally, also of Ornstein and Mann, whom I also admire, that their diagnosis, for all of its acuity, is not followed by the perhaps scary advice that drastic measures may be necessary.

Gerken is admirably forthright in this regard. She explicitly notes that she is "pragmatic in [her] approach."[99] One of the things this means, and I agree wholeheartedly, is that we must rely less on abstract, often empirically unverified "ideals," and more on what we can learn from the data we need to collect on the actualities of our election system.[100] But another meaning is that we need to figure out imaginative ways to create incentives that will lead *existing* political officials to change their behavior. Thus one premise of a Democracy Index is that it will generate a virtuous competition by which states — and localities within states — will compete in a "race to the top" once they are exposed as seriously deficient in one or other measure of what we mean by a democratic election system.[101] Like Cass Sunstein, who also offers an enthusiastic endorsement of her book,[102] she wants ultimately to rely on markets and "nudges" rather than radical redesign of basic institutions and/or centralized law-making that would invariably bring in its wake the need for strong command-and-control systems,[103] including, one presumes, active judicial enforcement of the kind seen over the past near-half-century with regard to the Voting Rights Act of 1965.[104] As Gerken puts it, "[r]ather than focus on proposals that require the foxes to stop guarding the henhouse or imagining that our centuries-old tradition of localism will vanish overnight, we should think more about how to domesticate the foxes and harness the power of local competition."[105] She recognizes that "this type of here-to-there strategy may not seem as grand as an overhaul of the system," but "it offers a more realistic hope of effecting change in the long run."[106] For Gerken, what may well be fantasies of an unattainable best are definitely the enemies of what may be attainable improvements.[107]

Perhaps because Edwards focuses on Congress rather than the election system, many of his proposals would require, if not "overhaul," at the least changes in the ordinary way we do things.[108] Most dramatic for many readers will be his suggestion that the House select its speaker from outside its confines.[109] The Constitution does not require that the Speaker be an elected member of the House;[110] it would be a truly important political change, but not one requiring a constitutional amendment, if both parties were forced, through, say, a two-thirds election rule, to select a person of proven stature who could be counted on to administer the House on a public-regarding, rather than party-

99. GERKEN, *supra* note 8, at 135.
100. *Id.*
101. *Id.* at 24.
102. *See id.* (including Cass R. Sunstein's review on the back cover).
103. *Id.* at 135.
104. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1(2012)).
105. GERKEN, *supra* note 8, at 36.
106. *Id.*
107. *See id.*
108. *See* EDWARDS, *supra* note 9, at xiii.
109. *Id.* at 103–04.
110. *See* U.S. CONST. art. I, § 2, cl. 5 ("The House of Representatives shall chuse [sic] their Speaker . . . .").

regarding basis.[111] No longer, for example, would a Speaker feel free to follow the practice of former Speaker Dennis Hastert, who, according to Edwards, "thought his job was to serve as de facto floor leader for the Republican president, thereby diminishing the role of the House of Representatives as an independent and coequal part of American government."[112] During his tenure, Hastert initiated the unprecedented policy of bringing to the House floor for votes only measures that had received the support of a majority of the House Republican caucus.[113] Described as the "majority of the majority" requirement, this meant, by definition, that bills that might have the support of a majority of the House, in a coalition that included a minority of Republicans with a majority of the Democrats, would never stand a chance of passage.[114] Newt Gingrich is often cited as the source of the hyper partisanship afflicting the present House of Representatives, but not even Gingrich formally adopted such a basically anti-democratic and partisan conception of his official duties.[115]

Adopting Edwards's suggestion would have the added benefit of increasing substantially the likelihood that a Speaker, if asked suddenly to take leadership of the Executive Branch because of the deaths or incapacities (or impeachments) of a President and Vice President, would actually be someone one might trust to be Commander in Chief of the armed forces and otherwise to make the kinds of decisions that, for better or worse, we ask our contemporary President to make. No one can seriously argue that any recent Speakers have been "presidential material." The only recent former Speaker to seek the Oval Office was Newt Gingrich in 2012, who was dismissed even by most of his own party as the equivalent of a clown, though without a typical clown's benignity.[116] The last Speaker to be taken seriously as a presidential candidate was John Nance Garner in 1932; because of the two-thirds rule under which the Democratic Party then operated at its national conventions, he forced multiple votes by the delegates before throwing in the towel to Franklin Roosevelt.[117] He later accepted Roosevelt's invitation, sincere or otherwise, for the Vice Presidency — an office he later memorably described as "not worth a bucket of warm piss."[118]

Edwards offers other thoughtful suggestions as well, including limiting the ability of House and Senate majorities to dominate the committee process and, importantly, to deny to minority legislators the ability to use subpoenas to compel testimony of those they suspect of chicanery or who might otherwise throw valuable light on the administration of our multi-million member (and multi-trillion dollar) federal bureaucracy.[119] The only time a modern Congress actually engages in genuine oversight of the Executive

111. EDWARDS, *supra* note 9, at 103–04.

112. *Id.* at 91–92.

113. Charles Babington, *Hastert Launches a Partisan Policy*, WASH. POST, Nov. 27, 2004, at A01.

114. *Id.*

115. *See* EDWARDS, *supra* note 9, at 93.

116. John Helton & Alyssa McLendon, *Gingrich's 2012 Campaign Leaves Him With Mixed Legacy*, CNN POL. (May 2, 2012 5:24 PM), http://www.cnn.com/2012/04/25/politics/gingrich-campaign-obit.

117. *See* Lionel V. Patenaude, *Garner, John Nance*, TEX. ST. HIST. ASS'N, http://www.tshaonline.org/handbook/online/articles/fga24 (last visited Mar. 4, 2013).

118. Patrick Cox, *John Nance Garner on the Vice Presidency — In Search of the Proverbial Bucket*, BRISCOE CENTER FOR AM. HISTORY, http://www.cah.utexas.edu/news/press_release.php?press=press_bucket (last visited Mar. 4, 2013).

119. EDWARDS, *supra* note 9, at 104–11, 136–37.

Branch is when we have "divided government," which means not what Madison meant — the formal division of national government into separate divisions or institutions[120] — but, rather, the capture of one or another of these institutions by a political party different from the one occupying the White House.[121] Of course, the oversight is of a distinctly partisan character, designed to develop points that might be useful in the next election. And, for reasons already suggested, it is extremely unlikely in the modern era that divided government will lead to productive legislation, lest, as with Kennedy and Bush, the "opposition party" in fact enables the re-election of a President by collaborating in statutes that can be labeled as genuine accomplishments and testimony to the ability of the President in question to "work well with others," as it were.[122]

But does Edwards, for all his justified anger and genuinely stimulating suggestions for reform, truly want to "blow the House up"? The answer, for better or worse, is no. Although he offers an altogether merited critique of partisan gerrymandering,[123] by which political officeholders are in effect allowed to choose their voters rather than the other way around, he does not confront the possibility that the United States might well emulate most of the rest of the world and stop relying exclusively on single-member, geographically-based, districts. The Constitution does not require this; a congressional law dating to 1842 is the culprit.[124] "My goal," Edwards writes, "is not to determine 'who' voters vote for, but to give them a greater range of choices: in other words, to expand democracy."[125] Well, one way of doing this is to adopt systems of proportional representation, which would allow minorities who now correctly feel frozen out of the political process, even in a voting system that might score very high in Gerken's "democracy index"[126] — i.e., they are allowed to vote and their votes are counted; they simply will never actually be able to elect anyone they prefer — to discover after election day that they have in fact voted for a winner. There were good reasons for Congress's 1842 decision to prohibit state-wide winner-take-all ballots where, for example, a 51 percent majority could elect all ten representatives in a given state.[127] But correcting for that problem does not entail adopting, and then sticking resolutely with, our present scheme for electing representatives.

Even more volatile is the possibility we might learn from many states and adopt certain procedures of *direct democracy* to complement the exclusive reliance on *representative democracy* chosen by the Constitution's framers, almost all of whom were pro-

120. THE FEDERALIST NO. 40 (James Madison).

121. *See* EDWARDS, *supra* note 9, at 3–4.

122. This is, it should be acknowledged, a debatable assertion. Yale political scientist David Mayhew, for example, insists that divided government is no worse for the nation, measured by the passage of significant legislation, than is unitary government (and it brings with it as well the greater likelihood of genuine oversight). *See* DAVID R. MAYHEW, DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002 (2d ed. 2005). Edwards, Mann, and Ornstein would obviously disagree. I offer my own critique of Mayhew in LEVINSON, *supra* note 12, at 235–36.

123. *See, e.g.*, EDWARDS, *supra* note 9, at 67.

124. Earl M. Maltz, *Power in Numbers: Reapportionment and the Constitution* 4 NAT'L CONST. CTR. 3, 6–7 (2011) (discussing the Apportionment Act of 1842).

125. EDWARDS, *supra* note 9, at 14.

126. *See* GERKEN, *supra* note 8, at 26–36.

127. *See* Maltz, *supra* note 124, at 6–7.

foundly suspicious of the actual capacity of people to rule themselves.[128] I confess that I thought that Edwards was signaling his possible support for such reforms when he ended his book by calling for citizens in states that allow popular initiative and referenda to take the lead in forcing electoral system changes when entrenched partisan representatives were unwilling to do so.[129] Why stop at changing the election system? Why not address the possibility that there should be a more general power, at the national as well as at the state level, for disgruntled electorates to do end-runs around their ostensible "representatives" by taking the initiative and then passing legislation in general? A more moderate version of this initiative is to adopt as a national policy the kind of "citizen review" — an analogue to "judicial review" — whereby the electorate, as recently occurred in both Maine and Ohio, in effect "overrule" legislation passed by the respective state legislature and signed by the governor.[130] Alas, Edwards may in fact limit his interest in direct democracy only to reforms of the *process* itself.

Or perhaps our problem is that we assume that "representative democracy" requires *elected* officials at all. A number of recent political theorists have rediscovered the ancient Greek reliance on selection of officials by *lottery.* Why not choose at least some, if not all, members of the House of Representatives the way jurors are chosen? We trust jurors in many states literally with the power to decide whether criminal defendants will live or die. To the extent that many basic issues addressed in the House of Representatives involve basic value choices rather than the technical means of implementation that we increasingly delegate to administrative agencies to create, there is no particular reason to believe that men and women chosen under the current system as delineated by Gerken and Edwards will do a better job than a random sample given the opportunity to study and hold their own hearings on important issues of the day.

One might well believe that these latter proposals, unlike Edwards's or, even more so, Gerken's, are, even if intellectually defensible, quixotic or "flakey." That is surely a winning argument if the considerably tamer proposals offered even by such patriotic and worried citizens as Gerken and Edwards (or by Mann and Ornstein) would suffice to put us back on the right track. One certainly hopes that is the case precisely because, among other things, the Constitution's most truly egregious feature, Article V, makes it impossible, as a practical matter, to amend the Constitution should we conclude that only some fairly radical treatment will suffice to cure our political disease.[131]

None of my concerns about the limits of a meliorist approach to political reform should be taken to detract from my genuine admiration for the concerned citizenship and truly imaginative suggestions that are to be found in Gerken's and Edwards's books. Gerken especially represents the kind of civic engagement that should be celebrated within the legal academy. For much too long, such engagement was basically limited to

128. *See* LEVINSON, *supra* note 12, at 78.

129. *Id.* at 179–81, 183–86.

130. *See* Maria Sacchetti, *Maine Voters Overturn State's New Same-Sex Marriage Law*, BOSTON.COM (Nov. 4, 2009), http://www.boston.com/news/local/maine/articles/2009/11/04/maine_voters_overturn_states_new_same_sex_marriage_law/; *Ohio Issue 2: Controversial Anti-Union Law Defeated by Voters*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/11/08/ohio-issue-2-_n_1083100.html (last updated Nov. 9, 2011, 12:38 PM).

131. *See* U.S. CONST. art. V.

the writing of quasi-briefs directed at litigants and judges, in the mistaken belief that judges were the only decision makers that law professors should be truly concerned with. Thus, articles on the "law of democracy" became ever more arcane examinations of the Ptolemaic epicycles of legal doctrines as enunciated in often opaque 5-4 decisions. The principal message of many of these decisions was that, as a matter of fact, seven or even eight of the Justices might well agree that the current doctrine was indefensible, but, for better or worse, they split 4-3 or 4-4 on what the defensible doctrine should be. This meant, of course, that the fabled "median Justice," whose particular views were solidly rejected by the rest of the Court, would, nonetheless, supply the all-important fifth vote (and, even worse, write the majority opinion) that attempted to make sense of a series of decisions that everyone else agreed were, at a deep level, senseless. Heather Gerken is not writing for judges and their law clerks. Instead, she is doing something far more important. She is addressing her fellow citizens, in language devoid of the professional mumbo-jumbo we are too often prone to use, about a truly serious problem that threatens our political order. They should read her, and they should listen to her.