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AMERICA'S DYSFUNCTIONAL POLITICS: IS THE CONSTITUTION TO BLAME?

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PARTICIPANTS:

Moderator:

WILLIAM GALSTON
Ezra K. Zilkha Chair and Senior Fellow
The Brookings Institution

Author:

SANFORD LEVINSON
Professor of Law and Political Science
University of Texas, Austin

Respondent:

LOUIS MICHAEL SEIDMAN
Carmack Waterhouse Professor of
Constitutional Law
Georgetown University Law Center

DONALD L. HOROWITZ
James B. Duke Professor of Law and
Political Science
Duke University

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P R O C E E D I N G S

MR. GALSTON: Well, if I can call this entirely too ruely crowd to order, let me begin by introducing myself. I'm Bill Galston, a senior fellow in governance studies here at Brookings, and on behalf of Brookings and Governance Studies I'd like to welcome you to the latest episode in our long-running hit series entitled, "Governing Ideas".

Today's session poses what is perhaps our most fundamental political question. Is the Constitution adequate to the exigencies of contemporary governance, and consistent with the animating principles of our republic?

In his latest book just out and available for entirely affordable purchase at the back table and if you're really good, the author will even sign for you. At any rate, this latest book which is entitled, *Framed: America's 51 Constitutions and the Crisis of Governance,* Sanford Levinson renews and deepens the negative reply to my opening question that he bluntly laid out in his previous book entitled, *Our Undemocratic Constitution: Where the Constitution Goes Wrong, and How the People Can Correct It.*

Levinson's professional biography is available in your packets. In the interests of time, suffice it to say that he's one of the most thoughtful, original, and may I say bold Constitutional scholars to be found anywhere, and all of those attributes are a good thing because among his other challenges he's taking on James Madison and Abraham Lincoln. Madison talked about veneration of the Constitution and in his first major address delivered at age 28, Abraham Lincoln advocated, "reverence for the Constitution as the only bulwark against errant anarchy and tyranny." For Levinson, I think it's fair to say reverence is the problem, not the solution. And for the reasons why, stay tuned.

After Professor Levinson makes his case, two outstanding commentators

will join the fray. Their professional biographies are also available in your packets, so I'll just hit the highlights. Louis Michael Seidman is the Carmack Waterhouse Professor of Constitutional Law at Georgetown. He's the co-author of a widely used Constitutional law casebook. I'm not sure whether it's the most widely used, but it's very widely used. And also, of several books, of which the most recent is entitled, *On Constitutional Disobedience*, out this year, the title of which will give you, I think, a sense as to the cut of Mike Seidman's jib.

Donald Horowitz is the James B. Duke Professor of Law and Political Science at Duke University. The author of seven books, he's one of the world's leading experts on comparative Constitutionalism and Constitutional design.

Now after these three scholars have had their say, I'll moderate a brief conversation among them and then turn to questions from the floor. So, Sandy, without further ado the podium is yours.

MR. LEVINSON: First, I want to express my tremendous gratitude to Bill and to the Brookings Institution for inviting me back. This is actually my second visit. The first, about five years ago, was to talk about this book, *Our Undemocratic Constitution: Where the Constitution Goes Wrong and How We the People Can Correct It.*

It's worth talking for a moment about the title of that book and why the new book is twice as long, and I would hope both wider and deeper. I originally wanted to call the book, *Our Broken Constitution,* and the Oxford Press which is kind enough to publish the book told me, in effect, they could only publish one "broken" book a year and Tom Mann and Norm Ornstein had gotten there first by their book, *The Broken Congress.* So, I had to find another title and decided, well, I do think the Constitution is undemocratic, so let's go with that.

Well, titles can have consequences because what I discovered from the response sometimes kindly, sometimes not so is that a lot of people don't really care that the Constitution is undemocratic. I was reminded over and over again -- and I have to say sometimes quite condescendingly -- some version of, Professor Levinson, you call yourself a Constitutional scholar. Don't you realize that we're a republic, not a democracy? And of course, I'm old enough to remember when Robert Welch created that catch phrase, interestingly enough on Constitution Day, around 1960 or 1961, and that became the mantra of the John Birch Society. And in fact, I have no doubt that none of the people who corrected me about the status of our Constitution were John Birch-ites. Rather, there is something very deep in our Constitutional culture that is -- not to put too fine a point on it -- anti-democratic. Whatever the status of contemporary civic education is, one of the things that children simply learn from an early age is the dangers of tyranny of the majority. Nothing can be more dangerous, most Americans think. And of course, that does translate into a fear of democracy.

And at times, I'm quite willing to join in that fear. I am not an unabashed majoritarian Democrat in the sense of believing that 51 percent of the people can do just whatever they want whenever they want, but quite frankly that's not what most of my critics were willing to settle for. Rather, they like -- many of them like the fact that the United States Constitution is wildly democratic because that is thought to protect us from very, very real dangers.

Five or six years ago, even though there was a certain measure of dissatisfaction with the American system of government, from the perspective of today and 2012, those are almost the good old days. Congress probably had an approval rate somewhere in the 20s, or even the 30s. (Laughter) And if you asked most people, were they optimistic or pessimistic about the future, it was probably nearer to a 50/50 sort of

split than it was to the current roughly 75 to 80 percent who are pessimistic about the future, I believe for very good reasons.

The most recent approval rate of Congress, I think, is 11 percent. More ominous, I think, are some Gallup polls asking about basic confidence and trust in America's basic institutions, and you may or may not find it comforting that the only American institution today that really generates a very high level of confidence is the United States military. If you add very confident and confident, you get up to 94 percent.

The United States Supreme Court, which usually leads the pack of national institutions gets, I think, into the low -- the book has the exact figures -- gets, I think, into the low 70s if you add up the very confident with confident, but very confident is actually lower than 50 percent. And of course, if you ask about the Presidency and the Congress, especially if you look at the very confident, they are very, very low indeed.

So, in any event the first book, *The Constitution is Undemocratic*, basic response is, who cares? The new book tries to take on some of these questions of why we should care about the Constitution because I think it makes its own contribution to the malaise that is now widely felt. But also, the new book unlike the earlier one takes seriously the commitment to Republicanism, historically, and therefore goes I hope quite deeply into the assumptions underlying the 1787 Constitution.

And it ends up asking a deceptively simple question. To what extent do we in 2012 share the assumptions of 1787 that are used to justify the 1787 Constitution? Do we share, for example, Madison's mistrust of popular government, which runs through the Federalist papers, and his belief that ideally we will be governed by virtuous elites who will not be partisan, who will not be part of a party system which he viewed basically as a recipe for faction and for the disintegration of a Democratic or Republican republic.

There are many, many other assumptions that I go through at length,

and the argument is that by and large we don't share them in 2012. And if we don't share them, that should lead us not to bash James Madison. As with the earlier book, I would like to think that there is not a sentence of founder bashing in the book. That is true, even with regard to the two so-called great compromises that gave us the Constitution. One of them, of course, was the Senate, which is usually taught in civics courses, usually with a capital G and a capital C. It is the compromise that gives Wyoming the same representation as California, or Vermont the same representation as my home state of Texas.

Madison actually didn't like this. I think it's fair to say he detested it, perhaps as much as I do, given that we now have lived with it for some 225 years, but he accepted it as the extortionate price that could be exacted by Delaware and other small states in order to get a Constitution at all. And if you think it was important to get a Constitution at all, if you shared the view in 1787 that the United States was faced with real dangers from a Great Britain that had only incompletely accepted the results of the Revolutionary War -- after all, they burned down our capitol. They burned down your capitol, you know, in your city 200 years ago this year. There was France, there was Portugal, there was Spain, and there were lots of Indian tribes who had, in fact, for very, very good reason not supported the cause of independence because, quite rightly, they didn't see what was in it for them whereas the British at least made overtures to protecting tribal autonomy, especially West of the Alleghenies. So there really were good reasons to want a Constitution. There were good reasons to believe that the Articles of Confederation weren't working, and Constitutions require compromise. There's a chapter in the new book which there was not in the earlier book for the need for compromise, but compromise can sometimes be quite terrible and there's no doubt that Madison thought that the compromise over the Senate was, at best, a lesser evil.

But of course there was another great compromise on slavery, which was, as the Israeli philosopher Avishai Margalit calls it, a truly rotten compromise in the way that the Senate compromise was simply terrible but not truly rotten. But I am willing, for sake of argument, to defend the compromise of slavery the same way I would defend aligned Stalin against Hitler. Politics often asks you to make pacts with the Devil, and the question is: what is the alternative? And again, if you view no Constitution in 1787 as a truly dreadful outcome, then you swallow hard and accept the 3/5 rule, which entrenched slave states -- including Virginia, right across the border, Maryland -- in the House of Representatives, made it far more likely to elect slave owners as Presidents, and because Presidents get to nominate members of the Supreme Court, explain in a fairly easy fashion the reason that the Supreme Court of the United States was a vigorous ally of the slave-ocracy through Dred Scott.

But as I say, I'm not willing to bash the people who made that decision because they were, in good faith, trying to figure out what the new country needed if it was to maintain itself against genuine -- the phrase today might even call them existential --dangers. I think good faith people might say, especially with regards to slavery, that better not to make this pact with the Devil and roll the dice and see what happens. But still, it's an issue on which reasonable people all ask and disagree. It would be much easier if you could just say, well obviously they should have said no slavery and accepted the prospect of what they viewed as repeating the European pattern of endless war on the North American continent.

That was then, now is now. What I object to is not revering the founders. I think we do too much of it, but I don't mind saying that they were, in fact, by and large admirable people who were doing the best they could. Rather, the people I want to bash are ourselves because we don't step into their shoes, as it were, and ask what do we

need today? What are our assumptions today? To what extent do we accept their views of how politics works, of how society works, the kind of world we live in, the kinds of things we've discovered?

And in fact, I can quote Madison. My favorite Federalist is the last paragraph of Federalist 14 where he praises Americans because we're willing to strike out anew. We're not trapped in tradition. After all, you couldn't possibly defend the American Revolution if you were a traditionalist. He thinks we should learn the lessons of experience, and that's what I want us to do. To ask, well what might we have learned over the last 225 years about the way the Constitution operates and whether today it is a net plus or a net loss with regard to the operation of the country.

One of the central conceits of the new book is the distinction I draw between what I call the Constitution of conversation and the Constitution of settlement. What do I mean by this? Well, easiest example of the Constitution of conversation is the Affordable Care Act, which the Supreme Court of the United States is going to devote 6 hours of argument to in 2 weeks, as lawyers metaphorically shout at one another about what the one true meaning of the Commerce Clause is.

Now the one thing all of us know, regardless of where we are in the political spectrum, is that a matter of empirical fact the Commerce Clause doesn't have a single true meaning. It has a wide degree of competing meanings that have instantiated themselves over our history where the result at a particular time is a function, in large part, of who wins elections and who appoints the judges. One need not have a completely cynical view that the court files the election returns. All one has to believe is that Presidents tend to appoint members to the Supreme Court on the basis of whether they share their Constitutional vision. And this is a sincere sharing. Nobody is bribed. You look out for people who look at the conversational features of the Constitution the

way you do. You put them on the Court and hope for the best, and we will find out presumably in about four months or so what the Supreme Court thinks.

But the point is that the Commerce Clause and what is taught in law school is endlessly the subject of argument and conversation. There is no real hard rock stability of meaning, and the conversation continues ad infinitum. Whatever we teach in law school is the constitution of conversation.

I am now even more interested than I was five years ago in what I call the Constitution of settlement, because these are the parts of the Constitution that we never talk about in law school, frankly, because there's nothing for lawyers to argue about. What does two mean? (Laughter) How many Senators does Wyoming get? When is Inauguration Day? I have a fixation on Inauguration Day, because I think it's an unusually stupid and sometimes dangerous feature of the Constitution, in as much as it regularly creates a situation of de facto non-government insofar as the incumbent may have legal authority but has lost all political authority, often by being defeated in election, and the winner has lots of political authority but has no whit of legal authority.

This also leads, I think, to a danger that we're seeing played out right now and frankly we saw in the 2008 election where two non-incumbents were running, that we elect basically monarchs who will grace us after the election with the announcement of who the cabinet will be. One doesn't have to be a devotee of complete Parliamentary government, which I'm agnostic on, to believe that however important the identity of the President it is it's also important who the Secretary of State, Secretary of Defense, Secretary of Treasury, and Attorney General are for starters -- National Security Advisor. I am one of those people who would be very curious as to whom Governor Romney might appoint to these. And I think this is one of the consequences of the Constitution of settlement that we've developed this institution of the transition that

means we simply don't know many of the most important facts before we cast our ballots.

Now, let me explain the title of the new book, *Framed: America's 51 Constitutions and the Crisis of Government.* Crisis of government is easy enough to explain. Framed has many evocations, including "We was framed", but I actually don't believe that "We was framed" in the way that it's usually meant because I don't think that the framers were rogues, but they were framers and they did create an institution that we live with today in a remarkably unchanged way.

What about 51 Constitutions? Well, one of the things that I wish more people knew -- and it is appalling how few people realize -- this especially, I might say, graduates of our leading law schools. That we actually have 51 Constitutions in this country, not only the one United States Constitution. One need not be a complete Brandeisian and refer mystically to states as little laboratories of experimentation in order to believe that these 51 Constitutions are really quite interesting and we might learn something if we looked at them.

Let me simply mention two or three of the things one learns. First of all, if you listened only to the arguments about the U.S. Constitution, you would hear a great deal about the so-called unitary executive and whether the Constitution correctly understood Article 2 to create a President who has complete authority over the entire Executive Branch or not. This is an interesting debate, but I think it's even more interesting to note that the American political tradition has rejected the unitary executive about as strongly as anything has been rejected in American politics. 48 of the 50 states, for example, separate the Governor and the Attorney General. Most interesting one, in a sense, is Tennessee, where the Attorney General is appointed by the Governor.

But the point is that if you are concerned about an independent judiciary, for example, and believe that it would be rather a mistake for the President to have

complete control over who gets on the Supreme Court. That in fact, Senate confirmation serves a valuable kind of role, then you can certainly believe that it would be important to have a certain amount of independence between the President and the Attorney General. In many ways, the most disgraceful of the 20th century was John Kennedy's appointment of Robert Kennedy. Now that turned out well, but that's not really a good standard for designing a Constitution. That occasionally the cote duo will appoint a talented brother.

Now, I'm also very happy to bash Richard Nixon for naming his campaign manager to be Attorney General. The fact is that it would be important, I think, were we designing the constitution anew or even thinking about the Constitution very seriously to ask, well, even if we accept the proposition that the unitary executive is the one true theory of the United States' Constitution. That doesn't tell us anything about the wisdom of the unitary executive.

And one of the central themes of my book is to say that the Constitution of conversation gets us into endless debates about meaning, about interpretation. The Constitution of settlement, unless you're teaching a very, very high theory seminar, doesn't get you into interesting debates about meaning or interpretation. Rather, it ought to get us into debates about wisdom. Are we well-served? And this, I think, is the debate we're not having.

Let me conclude with two points. Who is this book written for? What is its target audience? And then in some sense, who might be specific targets, in a quote different sense of the book? Well, the target audience I must say is this audience. That my hope is that it's read by my fellow academics and even assigned in courses, but this is a book that is written -- naively or not -- for fellow citizens out of the belief that we really are facing a crisis of governance. Our political system is not responding effectively to the exigencies of the day. And as somebody who now has three grandchildren, I care very

much about whether we have a government that will respond to exigencies and I find it very scary to think that the answer is, no.

So then, who are the targets in a different sense? Well, let me name two. Possibly the leading political scientist in the country with regard to sheer knowledge of American government, that's David Mayhew at Yale who has written a number of marvelous books on American government. But the ultimate thrust of those books, I think, is that the system is working quite well. He has a very well-known book on divided government that simply counts up the number of statues passed and says, what's the worry?

Well, David Mayhew really is an extraordinary, capably political scientist. My difference of opinion with Mayhew is not his empirical analysis but his enormative analysis. That is to say, even given all of these bills, are they really adequate to face the challenges? So, I have no doubt, for example, of the Constitutionality of the Affordable Care Act. Like most people, I don't think it's very good legislation, but it's the best you could get out of the terrible Senate that we've got. So, my hope is that it sets the basis for future conversations on our healthcare system, but nobody could possibly take seriously President Obama's assurance at one point that if we pass this Act then the medical care issue would be resolved unto the generations and we could turn our attention to other things. So my dispute with Mahyew is not over facts as such. It's over the normative implications to be drawn from the facts.

The other target is Tom Friedman, who certainly has to count as one of the leading pundits in the world. Now, Friedman's normative take I rather like. He has written a litany of columns over the last two years or so denouncing the American political system as paralyzed, pathological, dysfunctional, and the like. He has just published a book with Michael Mandelbaum carrying out some of this argument. So, I certainly prefer

Friedman's normative take to Mayhew's normative take.

So why, then, am I so upset at Tom Friedman? The answer is really quite simple. In his new book with Mandelbaum, the only two times he mentions the Constitution of the United States is to say it's basically been a great Constitution that explains why we got to be the great country we are and then the rest of the book suggests certain things we have to do in order to renew our greatness, but Constitution reform isn't one of them.

From my perspective, Friedman -- who is an unusually smart and acute analyst of other countries -- is simply remarkably obtuse in his inability or unwillingness to connect the dots with our own country.

Now, let me conclude by saying that there are two potential criticisms -- devastating criticisms of my argument. One is to say that I'm simply wrong normatively. We really are operating in a wonderful way. The 20 percent or so of the country who believes we're going in the right direction are right. The 11 percent who think Congress is terrific, well they're right, too, and lighten up. There's just nothing to be concerned about.

The other critique, which in some ways is much more interesting, is to say that Constitutions don't matter. This is a debate that has been pervasive in academic political science since I was a graduate student literally 50 years ago. Is it political culture, is it economy, is it this, that, or the other as against the formalities of Constitutions?

I think this is a serious debate, but what I think that debate suggests is that if you believe that Constitutions are irrelevant then you can't possibly say what Friedman says, which is that the Constitution gets praise for the country we've become because irrelevant Constitutions deserve neither praise nor blame.

If you do believe that constitutions at least occasionally are relevant, then it is wildly unlikely that they only contribute and never have any downsides. And so, I'm willing to concede that the Constitution might have made some contributions to the development of the United States in an attractive way, but it seems to me important that we also ask, well what about the costs of the Constitution? And in the year 2012, how does the balance come out?

Now from a political science perspective, we still might be talking only about 2 percent of the variants, 5 percent of the variants. I don't believe that constitutions explain everything. The question, though, is whether constitutions explain anything and whether the United States Constitution does help to explain why we are in the present dilemma we are at the national level, and indecently with regard at least to some states -- see, for example, California -- whether state constitutions could also help to explain why, say, the economist has labeled California as ungovernable.

Now, this might have to do with certain East Coast prejudices about California, but it also has to do with certain constitutional rules of California. The fact that it requires 2/3 to raise taxes, coupled with the way direct democracy has been used.

Direct democracy, incidentally, is a feature of 49 of the 50 American state constitutions. One of the ways that the United States Constitution is so wildly undemocratic in comparison to the state constitutions is that by design there's not a scintilla of an iota of direct democracy.

And let me confess that I think there ought to be at least as much direct democracy at the national level as there is in Maine, a state that we usually don't identify as one of the wild and crazy states but that does have an interesting aspect of direct democracy that perhaps we can talk about later. (Applause)

MR. SEIDMAN: It's a great pleasure out on Sandy Levinson's fine new

book. The book is beautifully written, deeply learned, relentlessly fair-minded, and profoundly troubling.

Levinson is part of an honorable counter-tradition in American political thought that emphasizes Constitutional skepticism. His distinguished predecessors include the anti-Federalists, who very nearly defeated the Constitution; Thomas Jefferson, who thought that being ruled by a past generation was like being ruled by a foreign country; the great abolitionist William Lloyd Garrison who considered the Constitution a covenant with Hell; and Justice Robert Jackson, who told his colleagues that he could not justify ending segregation on Constitutional grounds, but voted for Brown v. Board of Education anyway because he thought it was a moral and political imperative.

The tradition of Constitutional skepticism deserves to be nurtured. Levinson does so by emphasizing what he calls the Constitution of settlement. He does a brilliant job of pointing out the baleful effects, not to mention the sheer bizarreness of many of the hard-wired, unambiguous provisions that structure our government.

Moreover, he brings to bear his exhaustive knowledge of state and other national constitutions to demonstrate the huge range of constitutional possibility, of constitutional choice available to us if only we got over our disabling veneration of the Constitution.

If I have a qualm about Levinson's argument, it's that he has not taken the project of Constitutional skepticism far enough. At the end of the book and in his previous book -- although not here, actually -- he proposes a constitutional convention that would revisit many of the choices made in the 18th century. But if one believes, as I do, that constitutionalism itself is a veiled project, then organizing a convention would take time and make effort -- organizing a constitution that would take the time and make

the effort to write a new constitution is a step in exactly the wrong direction.

So, my position raises two questions. Why do I think constitutionalism is a veiled project, and what alternative do I propose? With regard to the first question, constitutions pose embarrassing questions about political legitimacy because they begin where the law runs out. Every new constitution has its origin in an act outside the law. Constitutional authors are forever demanding that we do what they say, not what they do. They ask us to obey the document they produce as a matter of law, even as they themselves are tainted by the original sin of lawlessness.

Now advocates of constitutionalism try to get around this problem by insisting that constitutions represent a kind of meta agreement that achieves legitimacy through the will of the people or by universal asset, or at least by universal assent by all rational people. But in fact, there was no such agreement at the beginning of our constitutional history and there is certainly not any such agreement now. Our disagreements go all the way to the bottom. That's why liberals and conservatives alike read the Constitution tendentiously to embody their positions on contested issues. Instead of settling arguments, constitutional law often merely reproduces our disagreement at a higher level, and to the extent that the Constitution does settle arguments it does so by an authoritarian move, much as fundamentalist religion does -- a point, by the way, that Levinson brilliantly demonstrated in another book -- when it, too, insists that things have to be a certain way just because an ancient text says so.

Okay, so what then should we do about the hard-wired constitution of settlement? The answer is actually quite simple. The alternative to trying to write a new constitution is to ignore the one that we have. Lest people think that this proposal is fanciful or that the heavens would fall if we adopted, let me hasten to point out that we followed exactly this course many, many times in our history, perhaps most dramatically

when the framers themselves violated the Articles of Confederation.

Here, I want to confine myself to just one contemporary example -- although it happens to be my favorite at the moment. Article 1, Section 3, Clause 1 of the Constitution as amended by Amendment 17, Clause 1 provides that the United States Senators serve for 6 years. Now that provision is about as unambiguous and hard-wired as constitutional language gets. To be sure, Article 1, Section 3, Clause 2 makes an exception to the general rule for the first set of Senators who served 2, 4, or 6 years in order to provide for staggered terms. But that exception only emphasizes the general law for all other Senators. They serve six years.

And yet, ever since Vermont was admitted as the first new state in 1791, we have regularly violated that provision whenever we've admitted a new state. On each occasion, one Senator has served for less than six years in order to provide for staggered elections. To my knowledge, there's only one occasion in our history when someone has made an issue of this. When the Senate was debating Alaska's admission to the Union in 1959, a back-bend Senator had the poor taste to break our conspiracy of silence and he stood up and he pointed out that this was blatantly unconstitutional. The floor manager of the Bill, in effect, told him to shut up, please. Shut up, he explained, and that was the end of the matter.

Now, it's worth pondering the fact that the country doesn't seem to be the worse for this egregious violation of constitutional obligation. We haven't devolved into Hobbesian chaos, our republic hasn't failed. Even if it's true that our civil liberties are at serious risk -- and maybe they are -- this is surely not the source of the danger.

If we can disobey this provision, then we can disobey others. But wouldn't widespread as opposed to occasional disobedience lead to chaos or tyranny? Well, actually no. Non-tyrannical, non-chaotic countries like New Zealand and the United

Kingdom have gotten along just fine for years without a written constitution. Chaos and tyranny are, after all, bad state of affairs and people with or without constitutions have strong incentives to avoid them.

Many of the procedures outlined in the Constitution should be followed not because they're in the Constitution but because they're sensible. Many others may not be sensible when considered as an initial matter, but they're nonetheless settled and sometimes it makes more sense to have an argument settled, even if it's settled the wrong way.

The point is, though, that we need to make contemporary, all-things-considered judgments about when it is wise to do things the way the Constitution demands and when it's not. When it's not, there's no good reason to subordinate our contemporary judgment to the judgment of a bunch of people long-dead who have absolutely no knowledge of contemporary conditions, and who thought, among other things, that is was perfectly fine to own other human beings and that women had no role to play in public affairs.

Now, writing a new constitution would solve some of these problems because it would be a contemporary document. But precisely because we disagree all the way to the bottom, I'm very skeptical that we would be any more successful in coming up with a trans-substantive agreement than the framers were in 1787.

More to the point, though, even if the new constitution were approved by some voting mechanism, it would not solve the basic problem of constitutional obligation. We would still have to figure out a satisfactory explanation for why that document should trump our all-things-considered judgment about what's to be done. Were still, even a new constitution, would purport to be authoritative. That is, its terms would be taken to pre-empt other reasons to act or not to act.

As such, like the constitution we have it would short-circuit the kind of unfettered, uncontrolled, un-programmed debate that is the authentic hallmark of a free society. (Applause) (Pause)

MR. HOROWITZ: Well, it's hard to know where to begin. If constitutional disobedience is being taught at Georgetown, it seems to me what can Brookings contribute to this discussion? (Laughter)

In any case, it's nice to be back at Brookings, my former employer, and to discuss such a splendid book, even though I can only hit a few high points here this afternoon.

Sandy and I go back a long way, to graduate school where we were both teaching assistants in a course called, SocSci 4, a Harvard undergraduate course on constitutionalism. And we've both found our way back to constitutional design; only I apply that trade principally outside the United States.

In this really interesting book with which it is nevertheless possible to disagree, Sandy emphasizes as he did in his earlier book the hardwiring of governmental institutions as opposed to disputes over the meaning of more cryptic constitutional provisions, the kind that constitute a grist for the mill of constitutional law courses -- and for the courts, for that matter. I think this emphasis on relatively fixed structural elements of governmental institutions is very well justified, and it's long overdue in the United States. After all, what's routine is at least as important as what is exceptional, and the hard-wired provisions dictate what our constitutional routines are.

I also agree with many of Sandy's particular emphases. You'll see in the book if you read it carefully that he gives great importance to preambles, and I agree with that. Because preambles are often thought to be not judiciable, they're ignored. But in point of fact, preambles are terribly important because they actually can change the

structure of the state. Let me give you a far-flung example.

In Indonesia after Suharto fell, the secular nationalists, Christians and other minorities were afraid to change the old Sukarno constitution because they feared that observant Muslims would amend the five principles, the Pancasila, the five principles in the preamble by adding some Sharia features to the amended constitution. And it took a long time for the secular nationalists and the minorities to get used to the idea of extensively amending the constitution – essentially producing a new one with the exception of the preamble.

In fact, no one succeeded in adding anything to the preamble but they did add very broad guarantees of freedom of religion to the documents -- sorry about this. I'm not choking on Sandy's book. But Pancasila, the five principles, had one pillar that referred to belief in the one and only god. That is to say, Indonesia wasn't going to be a state that was completely neutral to religion. And the secular nationalists and the Christians were quite accustomed to that part of the preamble, and they were at home with it as long as it didn't get amended.

But it's been construed, subsequently, to imply that Indonesia is not really a strictly secular state at all, and the result has been among other things prosecutions for blasphemy and enforcement of some Sharia provisions. Actually, ultra vires Sharia provisions, some of which are -- most of which are binding on Muslims, but some of which have been applied at the local levels to Christians and to others.

The preamble has been for minorities the sting in the tail -- or perhaps I should say, in the nose. It's at the outset. The sting in the nose of the Constitution. So you see that paying attention to preambles can be a very important exercise, and I think Sandy has done very well with that. That brings me to the two points I really want to make here, on which I do have some differences with Sandy. The first has to do with the

causes of our present predicament, and the second has to do with the aptness of constitutional remedies for our present difficulties.

The framers did try to make it difficult, but not impossible, for the United States government to get things done, and over time a great many things have gotten done, so many that the shape of our regime has changed in quite significant ways in the last 220 years or so. And that leads me to wonder whether the Constitution is really a major cause of our present predicament. Since it's difficult to explain a variable -- the one Sandy wants to explain -- by a constant -- namely the Constitution, if you consider the hard-wiring in the Constitution to be a constant, and it comes as close as we can find in this field -- then we ought to look first at other sources for the current predicament.

For me, the most obvious cause of the current dysfunction is political polarization, which several studies have found to be greater among politicians than among the public at large. And that polarization has causes, in turn. One of them is gerrymandering, especially that back scratching version of it that favors incumbents. By purifying legislative constituencies of opposing voters, the incentive of representatives to move to the center is diminished.

Now to be sure, the remote cause of gerrymandering is the provision giving states the power to portion constituencies without any safeguards, such as an independent boundary and electoral commission of the kind that people like me uniformly recommend to newly-democratizing countries. And if we wanted to go further, we might even attribute a bit of causation of polarization to an unintended side effect of the Voting Rights Act. When you create majority/minority constituencies, generally these end up Democratic. So, it leaves other constituencies more Republican. Again, the center suffers when the representative doesn't need to worry about voters who are of many different stripes. The greater the homogeneity of constituencies, the worse the

polarization is likely to be.

It would take a lot more than this to demonstrate that the current dysfunction is due to polarization than has something to do with the way representatives are elected, but I'd start there. And if after that investigation we still thought we needed a thorough re-vamping of the Constitution, well, I'd like to enter some caveats about that, too.

Let me begin with an illustration. The Presidency, which Sandy says was almost inevitable when the Philadelphia Convention was deciding on institutions. But in point of fact, it was not at all inevitable in the Constitution. There's an old book by Charles Thatch called, *The Creation of the Presidency*, which traces the way in which the Presidency got into the Constitution.

The first impulse in the convention was anti-monarchical. There was a considerable residual dislike for the Colonial governors, and their successors were very, very weak officials for this reason. In some cases, there was government by a counsel rather than by a single governor, in some certain states. The result is that most governors were subordinated by their legislatures, and this flows from the anti-monarchical bias of influential people of the time. Both the Virginia plan and the New Jersey plan proposed an executive accountable to the legislature with legislative supremacy. In other words, a Parliamentary regime.

The New Jersey plan had a plural executive for the United States in it, but a countervailing strain was drawn from the capitulation of the Massachusetts legislature to demands of the rebels in Shay's Rebellion for debt relief. So while some people were afraid of monarchy embodied in a presidency, others were equally afraid of legislative supremacy. And the constitutional convention drifted back and forth on this so long that by the time the final draft was being created, the matter still wasn't settled.

Two delegates, Governor Morris and James Wilson, both of whom drew on a model that they happened to know, namely the governor of New York who was a much more effective governor than the other governors under the Articles, conspired to smuggle it into the Constitution. Wilson did his work in the committee on detail, he shaped the powers of the Presidency in the committee on detail, and Governor Morris did his work in the committee on unfinished business. (Laughter) He shaped the four-year term and the Electoral College.

Had there been an up or down vote on the presidency, it's very doubtful that the presidency would have been adopted. Even with George Washington in the wings, the presidency was not foreordained.

Now, the moral I want to draw from this story goes something like this. The Constitution may have a lot of hard wiring, but the behavior of the software engineers who designed the operating system cannot actually be foreseen. And neither can an array of unintended consequences of any design before seeing. That's why they're unintended consequences.

And before we embark on major revisions, we should remember the example of the Indonesian preamble, which the people who were happy with it thought that it was simply innocuous at the time, and the indeterminacy that's possible even when a provision looks as though it conveys a settled meaning. I'm not saying if it isn't broke, don't fix it. I'm saying once something one step beyond that -- I'm saying something more skeptical. If it is broke, it can still be even broker. People in this building have imagined other forms of government for the United States. My former colleague, Jim Sundquist, writing at the time of Watergate thought that a Parliamentary system would do us much better and that certainly there are respectable arguments for that.

But polarized countries have a very hard time making legitimate

constitutions, and if the source of our current gridlock is polarization, now is not the time to try to agree on new rules of the game, even if the current rules actually abet the polarization.

Thank you very much. (Applause)

MR. GALSTON: Now, just to prove that I did my homework in the interest of being a competent, effective moderator, you know, this is the long list of provocative questions that I had prepared for our panel, in an effort to generate cross-talk so brilliant that we would be talking about it for months if not years afterwards.

However, an elementary principle of fairness dissuades me from going down this road, namely fairness to a large and extremely distinguished audience that has crowded into this room to participate in this event. And so, I am going to suppress all the better angels of my nature and eliminate the cross-talk section in the name of maximizing the exchange that goes this way. I will reserve five minutes at the end for Sandy to reply to any and all of what he's heard from the panel.

So, straight to you. I have three requests. Number one; begin by stating your name and your institutional affiliation. Number two; actually have a question embedded in what you say. And number three; please be brief because in the same way that I'm disciplining myself in your interest, each of you should discipline him or herself in the name of everybody else's interest. And with that prelude, the floor is open.

Yes, sir. And wait for just a minute; I should have said there are roving microphones that will reach you quickly.

MR. SCHNEIDER: Jim Schneider from Isolon and Harvard University's Edmond J. Safra Center for Ethics. Question for Sandy -- or, two actually, questions.

What relevance does your analysis have for the 50 states and their state constitutions conventions?

SPEAKER: Your mic is not on.

MR. SCHNEIDER: Oh, can you hear me now? Okay.

SPEAKER: Now we can.

MR. SCHNEIDER: Okay. What relevance does your analysis have for the 50 state constitutions? And also, why among your colleagues is there such indifference to state constitutions? Just to give you a motivating example, in Maryland about a year ago there was a 54.4 percent vote in favor of a constitutional convention, the highest in a generation. The legislature basically just ignored the vote and the constitution hasn't convened. I've had op-eds in the *Washington Post*, the *Baltimore Sun*, today in the *Washington Examiner* print edition about this. There's just been no interest in the national community -- and there is really no local community that would be interested in this historic event, and the ignoring of the Maryland constitution.

Why is this? Why is there such institutional indifference to what could be viewed as a major event, but unfortunately the state level doesn't want it resolved.

MR. GALSTON: Fair enough. Sandy?

MR. LEVINSON: Yeah.

MR. GALSTON: And into the microphone, please.

MR. LEVINSON: The relevance of the state constitutions -- I mean, it obviously depends on the state. But California really is Exhibit A because actually what some newspapers call thoughtful people are actually trying to get a new constitutional convention in California, to no avail.

I think that a large part of the explanation for that -- and even more so, the proposals of myself, Larry Lessig, and John Harris, you know, I think are the only three more or less mainstream law professors who like the idea of a constitutional convention -- is that people are extraordinarily mistrustful of the possibility of democratic

decision making. And what I discovered a couple of months ago at a convention in Cambridge that was co-sponsored by the Harvard Law School and the Patriot Tea Party -- which was an interesting event in itself -- was the mirror image on both sides. From my perspective, unaccountably Tea Party people believe that I and my friends will take over a convention and get rid of the Second Amendment and do all sorts of dire things. My friends and family, you know, are scared to death that the convention will be taken over by the Tea Party. That will also wreak havoc. There is simply no confidence, I think, by many people in their fellow Americans.

Now, my quick solution for this -- and then I'll go on others -- is that I would like the principle of selection of delegates to be by lottery, a citizen jury, because that would suggest that you would get, you know a certain number of people -- call them "wackos" if you wish -- single-issue fanatics. But you wouldn't get more than the percentage they are in the population. There really aren't that many. I mean, I guess it was Don who pointed to the fact that political scientists find less polarization among the public than they do among public officials, in part because of political gerrymandering.

One very last point. Elite law professors don't talk about state constitutions because it's states. And it's not even that most of us are politically liberal, and thus nationalists, but that's probably true. But it's much more fun to visit Madrid than Harrisburg. (Laughter)

MR. GALSTON: Don Horowitz, if I bring you into this for just a minute. Would a constitutional convention whose members were selected, in effect, by lot in the good old Athenian fashion assuage any of your reservations about the exercise?

MR. HOROWITZ: No, I actually don't think that's a good idea. I understand the animating impulse and the animating impulse is a very good one, but I actually don't think it's a good idea, because there's a tradeoff between participation and

expertise, and to draft a constitution you really do need quite a lot of expertise. And there's also the phenomenon of rational ignorance. For most people, it doesn't pay to become too knowledgeable about the intricacies of constitutional design, and even those who are getting salaries for the year or two they were serving wouldn't invest what they would have to invest in order to produce a sensible document. And that's all quite apart from the difficulties of reaching agreement in the convention, because most conventions in polarized societies tend to require something close to consensus, not just 2/3. And I'm not sure the random sample of the population could get anywhere close to that.

MR. GALSTON: I'm going to stay in the front for a little while, but those of you who are farther back, be of good cheer and not a faint heart. I will reach you.

MS. RIVLIN: Alice Rivlin, Brookings. I wanted to see if Professor Levinson would expand on what he would like to see this constitutional convention do. And particularly if polarization is a problem what, if you were asked to testify before this convention, would you say they ought to do about it?

MR. LEVINSON: Well, let me explain briefly why I think polarization actually is an opportunity rather than a problem, with regard to structure, not with regard to rights. That if we got into a constitutional convention that was going to focus on abortion, guns, affirmative action it would fail spectacularly. But if people actually were persuaded by the argument, the structural constitution is important, and we really had to do something about it, it would be a debate about structure. And let's assume that there would be a sunrise provision. That is to say, whatever the convention today decided would not become effective until a minimum of 2017, and to play it safe 2021.

Okay. One of the things I'm very critical of is the Presidential veto. Not necessarily that the President has a veto, but that the 2/3 override makes it one of the most effective vetoes in the world. It has turned our government into a tri-cameral

government rather than a bi-cameral government.

Now, this is actually a product of history. Don is absolutely right. That one could not necessarily have predicted this at the convention. But believe it or not, I was actually reading a book that talked about William Henry Harrison's ill-fated inaugural address where he promises a good wig, that he would use the veto power only if an act was clearly unconstitutional, but that otherwise he thought it was up to Congress to pass legislation. So the modern notion of the Presidential veto was not necessarily pre-ordained, but today we believe that Presidents participate at every level, including the ability to kill legislation that actually got through the bi-cameral hurdles.

Now, if we were going to say today, okay, should Barack Obama lose the veto for the rest of the term? Or even, should the President inaugurated next January lose the veto, we would all game the system. I have no idea who is going to be President in 2017. I certainly have no idea who is going to be President in 2021. I think the most rabidly-partisan people in the country would have no choice but to be good Madisonians, trying to figure out what a sensible system is regardless of who gets in power. And one could go down a bunch of other examples.

You know, I think the irony of the polarization is that it puts us as close behind a veil of ignorance as we're ever going to be, precisely because we can't predict the future and everybody is scared of the other side. So, you behave as Rawls said you would behave. You'd be risk-averse and try to figure out that best blend of institutions -- assuming you like institutions, which is another matter -- that would give your people the ability to govern if we won some elections. But also, you know, run the risk that the other side could govern, but you also would say, not trample on everything we hold dear.

We've not had that conversation. The only think we talk about are rights.

MR. GALSTON: Did you want to jump in here, Mike?

MR. SEIDMAN: This may come as a surprise, and maybe disturb Don, but I think I'm on his side about this. (Laughter)

Sandy's assumption here is that somehow we can separate out the procedural stuff by which government operates, and our normative views about them, from what it is we want government to do. I just don't think that's possible. The procedures are there for a reason. They're meant to mold what government does, and we are divided about what we want government to do. So, I think it's just completely predictable that our polarization about the merits of current events would bleed into polarization and a constitutional convention.

People might not -- you know, as we go out in time peoples' guesses might be less accurate, but what the delegates of this convention would do would be try to mold procedures to get the substantive results that they favor. I just think that's inevitable.

MR. GALSTON: There are two more questions up front and then I'm going to move back. Ben Wittes.

MR. WITTES: Hi, Ben Wittes from Brookings.

MR. GALSTON: Bring you microphone a little closer to you.

MR. WITTTES: Sorry. I'm interested in the 50 states as well. It seems to me that if you start with a set as large as 51 constitutions, some of them ought to be working pretty well, assuming a certain level of diversity in the constitutional fabrics at issue. Or else, you're making a very good argument for Professor Seidman's point that actually they don't matter very much.

And so, on the theory -- taking your assumption that constitutions actually do matter and therefore we should care about and re-write the Federal one -- I'm interested in what the state constitutions are that are working well, and what if anything

they have in common with one another. And other than California and its crazy populism, what are the features of the state constitutions that make them work badly?

MR. SEIDMAN: I'm embarrassed to say that I can't answer your question with the detail it deserves, not only because of the time. Perhaps this should be the next book.

But let me suggest that one state that appears to be working well is Nebraska. Nebraska is the splendid example in American state government of a unicameral legislature.

Now in fact, I think as societies become of a certain size there are good arguments for bicameralism at the national level and at the state level. I see no reason in the world why any state smaller in population than New Zealand or Nebraska needs a second House. For better or worse, one of the things that the Supreme Court did in 1963 and 1964 was to reduce any truly interesting difference between the two Houses. So why do you need it, unless you think that two heads really are better than one? Which may be the case depending on certain assumptions, depending on size, but unless somebody tells me differently, Nebraska seems to be working pretty well and there's no reason to think -- but you know, at the very least there's no reason to think that going unicameral hurt it.

Now, much more controversial is judicial systems. Because of course, most judges in the United States are elected or subject to retention elections. This horrifies Justice O'Connor, but it is certainly an interesting question whether all things considered states with elected judiciaries are judicially government to the extent that judges govern worse than the United States is, and some political scientists have written some very interesting stuff saying the answer is, no. That with regard, say, to state litigation and school finance, which I have written about, state courts -- including courts

whose judges are former governors, former state legislators -- they actually know something about the local politics, the local situations, in a way that the Supreme Court today may have many qualities but knowing anything about practical politics isn't one of them.

And so, you know, we could actually have a serious discussion about selecting judges or, you know, even putting constitutional requirements for judges -- the Belgian constitution, and I would not put Belgium forth as a model of a particularly well-functioning country these days. But the Belgian constitution requires, I think, that half of its constitutional court be drawn from members of the legislature. It has an interesting sort of thing that, you know, we could talk about.

MR. GALSTON: Well, if I may break my vow of silence and interject myself into this conversation, I think Ben is making a fair point analytically. If you connect the dots in your book, you are, for example, I think presumptively committed to the proposition that all other things being equal, states that include a higher measure of direct-ness in their governing processes are functioning better than states that don't.

And I'm not sure whether empirical inquiry would bear out that proposition or not. I'm not sure it wouldn't.

MR. LEVINSON: Very quick. Are we better off having the Supreme Court after six hours of argument delivering -- if they strike it down -- a five to four opinion with incredibly bitter dissent? Or, doing what Maine and Ohio did, which over the last couple of years the Maine electorate has twice taken advantage of the Maine constitution to have a referendum on laws passed by the Maine legislators, signed by the governor. I'm very sorry that 53 percent of the voters voted to repeal the same-sex marriage law. I'm very happy that a majority of Maine voters voted to get rid of a voter law designed to suppress turnout, I think. I am thrilled that the voters in Ohio overturned the anti-labor

law that the Republican legislature got through, and you didn't have to go to court to do this.

So, I think that there's something to be said for direct democracy. You can go overboard. Maybe California has gone overboard, but there is a reason why direct democracy historically has been viewed as a progressive cause and it's something that we might think about. Most foreign countries include some aspect of direct democracy.

MR. GALSTON: Now, for a word from the Mitchell report.

MR. MITCHELL: I think the emphasis was on the "word", so I'll be brief. Not having read this book or its predecessors but listening to this today, here's the question that your, I think, thesis raises for me. Was the Constitution right for its times but wrong for ours? Or, was the Constitution wrong for its time and wronger for ours? And given Professor Seidman's observation, or is a constitution either a vestigial organ or worse?

MR. GALSTON: Lean forward, please. Otherwise people won't hear you.

MR. LEVINSON: I mean, the honest answer is that I don't know whether I would have voted against the Constitution. I mean, the Constitution got us up and running. So from one test it was right for our time, even though it was a pact with the Devil. And so, to the extent that you're truly anti-slavery, you have to say it was wrong the first time, depending on certain empirical assumptions.

I'm convinced that it is wrong for our times in some respects, and of course it was wrong even for that time putting slavery to one side, brining the Senate to one side. The Electoral College was a disaster, it almost brought us to civil war in 1800, and we got the 12th Amendment, which solved the 1800 problem but didn't solve the

pathology of the Electoral College.

MR. GALSTON: Are you leaning forward, Mike, because you want to get in here?

MR. SEIDMAN: Just very briefly. In its own time, the Constitution probably would have been defeated but for the agenda control sought by the Federalists. There was a majority of the country and probably a majority of the states that preferred either a new constitutional convention or amendments to the Constitution, rather than adopting the Constitution as it was. And the reason it won was because that possibility was taken off the table and the only choice was between the new Constitution and going back to the Articles of the Confederation.

So when people sort of say, we the people adopted the Constitution -- never mind the fact that, you know, African Americans, Indians, women, most people without property and so on didn't vote, even the people who were allowed to vote we can't know for sure, but it's probably that most of them would have preferred something other than the constitution that they were presented with.

MR. GALSTON: Okay. I will now honor my geographical pledge. Yes, sir. And then we'll go right across the aisle to the woman in the white sweater.

MR. SCHECKER: Thank you. Larry Schecker, Schecker Communications. I just want to start off by saying I'm pleased and proud to be an American who can stand up in a forum like this, regardless of the constitution or not. So, it's a privilege. It really is.

But, to my question. I'm surprised that no one really emphasized the amendment process or activist judges as a part of -- are activist judges a part of the problem or are they the problem? For example, we do have this present Court that said corporations have the same rights as individuals under the First Amendment. Is that a

good thing or bad thing?

MR. LEVINSON: With the exception of one technical issue, the United States Constitution is the most difficult to amend constitution in the world. The exception is that the German and, depending on how you read it, the Indian constitution -- and Don can tell me about other examples -- have un-amendable provisions, have so called eternity clauses with regard to certain aspects. But otherwise, their constitutions are amendable.

Our constitution is meant to be very difficult to amend and has certainly to turned out to be that way. Again, looking at state constitutions most law professors knock state constitutions because they're often long and ungainly, but that also speaks to the fact that they are easy to amend, for better and for worse. There's no free lunch. But with regard to this issue, we focus only on what's for worse.

You know, I think judges are kind of important. Sometimes they're more important than they are at other times. But I think that to understand the current disaffection with the American government, judges don't really have much to do with it. Fred Schauer wrote a wonderful article in the *Harvard Law Review* now about four or five years ago where he simply looked at Gallup poll data about what it is that concerns most Americans and then what it is that's before the United States Supreme Court. And you discover extraordinarily little overlap. That what concerns most Americans is: can we get a job? The price of gas. Are they going to have medical care? Now, medical care is relevant, but if and only if the Court strikes it down, which I don't think they're going to do.

The reason the Affordable Care Act is inadequate and something to be supported, if you do support it, only as a first step is because of the structure of Congress. It's not because of anything Courts have said. And so, if you don't like American foreign policy, Courts really have almost nothing interesting to say about that.

They say that most of these things are (inaudible). I mean, they do touch on some issues that Ben has written about, but in the great scheme of things they're not that important. Whether we attack Iran or not, the Courts have nothing to say about.

And so, I think that law professors and lawyers grotesquely overestimate the importance of courts and judicial activism, which usually simply means judicial decisions I don't like, because the judges writing the decisions always write opinions which one should believe are written in good faith, to say that the constitution of conversation best understood requires -- or at least allows -- this outcome.

MR. GALSTON: Don, as the real expert on comparative constitutionalism across national borders, do you concur with Sandy's proposition that the American Constitution gauged cross-nationally is one of the most difficult if not the most difficult to amend? And if so, do you agree with the normative conclusion that he draws from that fact? Namely, that's a very bad thing?

MR. HOROWITZ: It's very difficult to amend. I'm not sure it's the most difficult, but most constitutions are amendable. Can you hear me now? It's very difficult to amend, there's no doubt about it. By comparative standards, whether it is the most I don't know. There are way too many constitutions to know the answer to that question off the top of your head.

But many constitutions provide for amendment by 2/3 vote of legislature. So, that's a much simpler process than the American process, which is designed to be difficult.

MR. GALSTON: Well, now there's the second half of the question. Is there anything to be said for the American system that makes it more difficult?

MR. LEVINSON: The national system.

MR. GALSTON: The national system. I'm sorry.

MR. LEVINSON: Yes.

MR. HOROWITZ: I don't know that I have a real position on this.

MR. GALSTON: All right, I won't force you to generate one.

MR. HOROWITZ: I'll say one sentence. It seems to me that constitutions that have lasted this long ought to be, on the one hand, easy to amend because times change. And on the other hand, difficult to amend because you certainly don't want the possibility of overthrowing something that is part of the guarantees that underpin stability.

So in the end, I'm quite torn on the normative side.

MR. GALSTON: Yes.

MS. EUTIS: Karen Eutis, just retired from the World Bank legal department. I wanted to try to place your thesis in context with a question derived from Saskia Sassen's work. She's a sociologist at Columbia who has analyzed the international financial system, and it is her thesis that in the nature of the current financial system where the executives are responsible for agreements on the international financial system, aren't we pretty much saddled with the level of dysfunctionality that you've pointed out?

MR. LEVINSON: That's a terrific question. Two points come to mind. The first involves my hobbyhorse of inauguration day, because one of the things that was notable about the United States between November and January of 2008/2009 is the same thing that plagued us between November 1932 and then March 1933. It was worse. That there was not somebody who could really enter into binding international negotiations. You know, there was a President but he was certainly on his way out, having been repudiated -- even though he wasn't on the ballot -- and Barack Obama, like Franklin Roosevelt before him, said, we only have one President. Wait until I'm

inaugurated to see what I do. I don't even know if he had named Tim Geithner as his prospective Secretary of the Treasury then.

The other point has to do with something I presume is close to your heart, which is the role of central banks. And one of the things I think we have to have a very, very serious conversation about -- and when I say conversation, this simply indicates that I don't know where I come out. I mean, I don't have the Levinson constitution in my pocket that I would want the convention to adopt, because a lot of these issues what irritates me is that they're really not discussed.

Presidents are amateurs. The last President in retrospect I have genuine confidence in as Commander in Chief was Ike for readily explicable reasons. With regard to the world economy, Jett Bartlet was my President. (Laughter) To the Presidents we get, then we think about the economy. So then, you rely on their picking good advisors but then taking the advice.

I thought one of the really interesting things about the David Wessel book on -- I forget the name of it right now, but on the meltdown -- was that basically George W. Bush, for whatever reason, retired from the scene and it was Ben Bernanke and Hank Paulson who made decisions, sometimes split-second decisions, on what to do. It also may very well be the case that they didn't have the legal power to do what they did. This is why one of the differences between this book and the earlier book is that it has a chapter on emergency power and the fact that emergencies come in all kinds. We think mainly of national security emergencies, but actually financial emergencies may often require split-second decisions, 3 in the morning decisions, more often than national security decisions. Then, there are natural disaster decisions, and there are emergencies that are public health emergencies.

In none of those areas do I think Presidents have any particular capacity

to decide whether we really do face the pandemic, whether we do or do not need to bailout banks or a country or whatever, or whether we do need to respond to, you know, some ostensible enemy.

And so, I think that with regard to designing a government for emergencies we need to do a far, far better job than the United States Constitution does. You look at -- I mean, here state constitutions aren't going to be of any help because they really don't think in terms of emergencies. But certainly any constitution drafted after World War II has been drafted against the background of the Weimar Constitution, which is not a happy precedent. But it doesn't mean there aren't going to be emergencies and, you know, the South African Constitution is extraordinarily interesting in this regard. Canada has passed a whole set of framework statutes to respond to emergencies of a kind.

So, you know, what I take your point to be is that a globalized economy will inevitably centralize decisions in an executive branch, because there's just not going to be time enough to consult or negotiate with Congress. The decision on Bear Stearns or the decision on Lehman Brothers had to be made literally overnight. Then the question is, who do you want to make these decisions, and would you really say, well I want the person elected as President of the United States on the basis of a platform that may never have talked about this stuff without any demonstrated capacity to make judgments with this regard?

MR. GALSTON: So, Karl Schmidt saved us from the Great Recession. Fair enough.

MR. LEVINSON: Well, yes.

MR. GALSTON: I will give the last question to a distinguished gentleman -- or at least a gentleman with distinguished hair, which I very much appreciate -- in the back of the room. Would someone get a microphone to him please?

MR. GANS: Well, you, I, and Sandy all have the same hair. Curtis Gans. We are not going to have a constitutional convention in your lifetime or my lifetime. If you had the power to amend the Constitution yourself, what are the three most important amendments that you would propose?

MR. LEVINSON: Inevitably the answer to that question is going to be time-bound. Kind of what I'm most worried about now, which is -- because, you know, I'm not thinking simply of 2021.

Certainly what I said during the Bush Administration -- and quite frankly, I'd say it even today -- is that I wish that we didn't have a rigidly fixed four-year term for the Presidency. I think we'd be far better off if there were some mechanism to vote no confidence, in part so you could actually test levels of confidence but also so you could fire a President in whom you really had lost confidence on matters of war, peace, life, and death.

I was talking about this last week with a friend of mine, a former Federal judge who is now teaching at Stanford. Some of you can identify him, who said that he's become interested in a six-year fixed term. That one problem with the four-year term is that Presidents start running for re-election the day they're elected, and in the second term they're lame ducks. And a six-year term would at least solve the first problem of the endless campaign. It doesn't solve the lame duck problem. And I'd be quite amenable to that, if it's combined with some procedure for votes of no confidence.

I would certainly make the Constitution easier to amend, there's no doubt about that, though I'm not sure how much easier. Here you know, I'd want to hear various proposals, but 2/3 means House of Congress and 3/4 of the states, especially given that we treat Wyoming and California as equal, is ridiculous. So, I suppose that's number two.

I've already mentioned the veto power. Another one -- I don't think it's a great cause of our present discontents, but I don't think in 2012 there's any good argument for life tenure, particularly for Supreme Court judges. Single 18-year non-renewable terms would give us, I think, more than enough stability on the Court. It would also provide a mechanism whereby each President would be guaranteed four appointments, assuming two four-year terms, but no single President could pack the Court simply by getting lucky as, for example, William Howard Taft did. The most important aspect of his four-year Presidency was that he got a remarkable number of Supreme Court appointments that turned out to be important.

I'd also get rid of the Electoral College and replace it with a popular election with some sort of run-off or the alternative transferable vote. The complaint I have about the fair vote proposal by which, you know, the 10 or 11 biggest states would simply agree to vote for the person who gets the most votes is that this would give us both Richard Nixon and Bill Clinton, Nixon in '68, Clinton in '92, with 43 percent of the vote and give them the powers of the modern President and the symbolic role of the modern President. I would like a President who can make a plausible claim to have been picked by a majority of the electorate, which a run-off or an alternative transferable vote would do.

So, I think this is probably more than three.

MR. GALSTON: Five for the price of three. I've been counting.

MR. LEVINSON: And it may be that if and when, you know, my grandchildren participate in the convention, that they would recognize, you know, other more pressing needs. I would also include some mechanism for voter referenda on legislation, including the Affordable Care Act.

MR. GALSTON: Six for the price of three. Well we've run a bit over, but

almost nobody has left, which I take as eloquent testimony to the intrinsic interest and high quality of what you've been hearing for the past hour and a half. Before we adjourn, let me remind you that there will be books for sale in the back and the author will be sitting in a chair at the table ready to sign copies.

And with that, please join me in thanking this splendid panel. (Applause)

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CERTIFICATE OF NOTARY PUBLIC

I, Carleton J. Anderson, III do hereby certify that the forgoing electronic file when originally transmitted was reduced to text at my direction; that said transcript is a true record of the proceedings therein referenced; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were taken; and, furthermore, that I am neither a relative or employee of any attorney or counsel employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.

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