The Constitution in 2020
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What will the Constitution look like over the next decade? What are the issues that will arise, and how should they be handled? Four Yale Law School scholars discuss constitutional issues of the future, including the challenge of new technologies, Presidential power, voting, economic rights, and freedom of speech. Moderated by Linda Greenhouse, Distinguished Journalist-in-Residence and Senior Fellow in Law, the panel included professors of law Jack M. Balkin and Reva B. Siegel, co-editors of The Constitution in 2020, and Robert C. Post, dean of Yale Law School.

GARY STERN: Good evening. I want to welcome you to the National Archives and our beautiful McGowan Theater for this very distinguished panel discussing the Constitution in 2020, and I also want to wish you a Happy Constitution Day. I'm Gary Stern, General Counsel of the National Archives, and I have a really great job. Not only do I get to deal with so many cool historical documents—the 9 billion or so pages of them that we have in this building and building all over the country, starting, of course, with our founding Charters of Freedom: The Declaration of Independence, The Constitution, and The Bill of Rights, which are housed just two flights above in this building—but I also get to come to these great events that we have in this theater, and every once in a while, I'm asked to make the introductions, so I'm enjoying this opportunity.

Tonight's event is particularly dear to my heart because I am a graduate of the Yale Law School, class of 1987, and all of tonight's guests, of course, teach at the law school and each of whom I feel some connection to. One of them was a classmate of mine. Another is the new Dean of the Law School. Third hosts my favorite legal blog, and the fourth covered the supreme court of the "New York Times" which I avidly followed and enjoyed. So, without further ado, let me turn the evening over to our moderator Linda Greenhouse, who, since retiring from the "New York Times" in 2008 after covering the supreme court for 30 years, is now the senior research scholar in law, the knight distinguished journalist-in-residence, and the Joseph Goldstein lecturer in law at the Yale Law School. Please welcome Linda Greenhouse.

LINDA GREENHOUSE: Thank you, Gary, and thank you for spending part of your Constitution Day with us. So, we're going to spend the Constitution Day of 2009 imagining the Constitution in 2020, which, of course, is the title of the book. I'll introduce the

panelists just really quickly. They all have endowed chairs at the Yale Law School, and I won't give the titles of their endowed chairs, but Jack Balkin, who, as Gary mentioned, is also the host of a leading legal blog called "Balkinization" which I recommend to all of you. Everybody should check it a couple of times a day. You never know what pops up there. Jack and Reva Siegel are the co-authors of "The Constitution in 2020." Robert Post is Dean of Yale Law School. So, with those very brief introductions, I think I'll give Reva the chance to tell us a little bit about the book and the origins of the book. Why "Constitution in 2020", Reva?

REVA SIEGEL: So, the genesis of this book, I guess I would locate it a little bit after 2000. A number of us were convened to discuss changes in the Constitutional interpretation of Congress' rights to enforce the 14th amendment, and at this meeting, someone named Dawn Johnson, who is now a nominee to head the Office of Legal Counsel, told us about documents that dated from the Justice Department during the Reagan years, and they set forth a blueprint for the Constitution in 2000, and the Constitution in 2000 in these documents—it was a vision at the time they were made; they were made in the 1980's-was described as a document that was to be interpreted rightly and wrongly, and the Reagan administration really had a conception of lines of cases that faithfully and that unfaithfully interpreted the Constitution.

The documents distinguished between lines of cases in the area of federalism, separation of church and state, areas of privacy, the rights of the criminally accused and talked about the way in which the law rightly understood might change. They did so under the guise of correcting the law, and they were devised, basically, to guide judicial appointments and possibly even governmental litigation, and the picture set forth was of Constitutional change but of Constitutional restoration. The documents invoked the original understanding as a corrective to the way in which the law was being interpreted, and when we heard about these documents in and around a bit after 2000, what was remarkable was that the law had changed from the time at which they had been written in the late 1980's, and it was fascinating to see the extent to which the law had changed in the direction that the authors of the documents had contemplated. This was a provocation. Someone had seen law, thought law wrongly decided, and acted in such a way that over the time, the law had changed-to a degree, at least-in conformity with this vision, and thinking about this and thinking about the direction the law was headed, a number of us began to imagine something of a Constitution of 2020. The 2000 documents had conceived of this as a matter of conforming law with a vision of right reason and the Constitutionally truly understood, and those of us who thought about the Constitution in 2020 in the ensuing years—this was during the Bush Administration, actually understood the Constitution differently that the authors if the 200 document had, and the book that-ultimately, there was first a conference and then a book, and there are now some 27 brief essays collected in this book that explore how the law is presently understood.

It might be understood in a range of areas, and I guess a core theme of the book concerns in a deep way a picture of how it is the Constitution develops over time, and to describe

that understanding which is concerned with the dynamics of Constitutional change, I'm going to turn this over to Robert Post who will be talking to you about this key theme in the book, the notion of Democratic Constitutionalism.

GREENHOUSE: Reva, can I back you up for a minute?

SIEGEL: Sure.

GREENHOUSE: When you say that the earlier project, the Constitution 2000, set out to change the law and it was effective and the law changed, do you mean the Constitution changed?

SIEGEL: I mean that prevailing interpretations of the Constitution changed, and they changed both in civil society and as understood by officials charged with enforcing the Constitution, be that officials in the Executive Branch or officials, judges, sitting in the Nation's Courts, and it would be wrong to say they change of a piece and suddenly, but they changed incrementally and yet steadily in directions that were at least visible from those who talked about changing law in conformity with the original understanding.

Those who began to talk about the need for intervening in the law, as propounded by the Warren Court, were concerned with issues, of, say, the law of privacy or the law of, in some cases, speech, obscenity, and they had a picture of the original understanding which they used to critique the way judges had interpreted the Constitution to that point. Now, whether the law that emerged from this process of intervention itself reflected an historically accurate incarnation of the understandings of the documents framers-either in the 18th century in the 19th century, if we're talking about the reconstruction amendments-is another matter altogether. What emerged was probably something that was quite 20th century or 21st century modern that was shifted in the image or in the understanding of our founders, not the same things as the work of the founders.

GREENHOUSE: Framed, as you say, as a restoration. That's how it was presented.

SIEGEL: Certainly the intervention was a chief-actually, initially, in the first years of the Reagan Administration, there was a lot of talk of Constitutional Amendments, of using Article V to change the Constitution, and progressively over time, I believe, Republicans and Conservatives began to abandon the idea of change through Constitutional Amendments.

GREENHOUSE: Because it's very hard to do. It's very, very hard to do, but there were initially movements for school prayer. There were amendments for a human life amendment. There was a fair amount of talk of change through Article V, and over the course—I mean, I've done some reading on this time period over the course of the 1980s, the idea of change through Constitutional Amendment recedes, I think, overall, and what instead emerges is a notion, potentially, of change through corrective judicial nominations,

and also, I suppose, in measure, through litigation, that is to say, suits filed claiming breach of the Constitution, that sort of thing, and this process is energetically pursued and ultimately with significant consequence in areas of federalism and areas of, for example, privacy law, in the ways in which we now understand the meaning of equal protection in issues concerning race discrimination. The law has changed significantly and consequentially. The rights of criminally accused, all of these areas, there's been demonstrable change in that time period, none of which was accomplished through Article V Amendments, but much of which was accomplished in the name of the original understanding. It's a matter of a longer conversation whether the law that was enforced over this time period, the ways in which the law changed, could be best accounted for in that logic or whether the idea the founders was more hortatory or exemplary of values that those who intervened in the law sought to effectuate. That's not a charge of bad faith, but rather to say that the law that emerged remained, I think, distinctively modern. No one repealed the size of the federal government. No one sought to return to the Founders' understanding of race or even to the founders of the reconstruction amendments' understanding of race, nor did anyone, in the end, try to repeal law that guaranteed women equal protection under the laws.

During the failed nomination hearings of then-judge Bork, these questions were debated, and the question of how far change in the name of the original understanding would be pursued was considered and debated in the Congress in ways that involved, I think, the whole nation in a conversation about an understanding of what it meant to keep faith with the Constitution and with the understanding of the founding, and what emerged from that great national conversation was a conception of fidelity and a concrete picture of fidelity that made sense of our history through the lens of our long history as a people. That is to say, made sense of the founding history and of reconstruction itself through the lens of our long history and experience as a nation, made intergenerational sense of it rather than historical restorationist sense of it.

GREENHOUSE: Right. So, that was one vision, and I'll ask Robert Post to talk about the vision that's encompassed in the book.

ROBERT POST: So, one idea in this book that has been taken up in a number of reviews of the book-you might have seen Jeffrey Toobin's in the "New Yorker" or Jeff Rosen's in the "New York Times Magazine"—is this idea of democratic Constitutionalism, and I thought I would take a few moments just to describe to you what this concept might mean. If you think about it, democratic Constitutionalism seems to be a contradiction in terms because the idea of a Constitution is the thing which fixes politics and controls politics.

The Constitution says what you can and can't do in the political system, and yet democracy is the idea of politics. It's the idea of self-ownership. I make it. So, how can a Constitution which limits what I can do democratically be itself democratic? and the idea of democratic Constitutionalism is the idea of how, on the one hand, our Constitution can have political legitimacy, political legitimacy because it's our Constitution, and on the other

hand, have the property of a Constitution, which is to say, the property of legal constraint, of being binding on us as we act in politics, how those two contradictory ideas can live together.

That's the crux of the problem to be explained. So, if you think about Constitution day, we're very proud of our Constitution today, and we're very proud of it, in part, because it's a good Constitution but I think also proud of it because it's our Constitution. We made this Constitution, and that's why it has authority for us, because it's we, the people. It's the Constitution that we constructed some time ago, and, you know, we can look at the Constitution of Canada, and we could say, "that's a great Constitution", but we're not exactly proud of it in the same sort of way. We don't take ownership of it in the same sort of way, and if someone would come along and say, "You know, we're bound by the Constitution of Canada, we'd say, "wait a minute. Wait a minute." you know, "that's not our law. we didn't make that law." so, a lot depends on this notion of how we make this thing, that we recognize it as ours take it that no one in this room voted for the Constitution that you see under glass upstairs. Not one of you did, and probably very few of you had ancestors who voted for that Constitution, so in what sense, exactly, is it yours? In what sense, exactly, is it mine?

My grandparents came to this country at the beginning of the 20th century, you know? They had no part in making that Constitution or even the reconstruction amendments, and yet they came to view it as theirs. How is that possible? Well, one mechanism by which the Constitution becomes our sis, we amend it. we say, "if we don't like it, we'll amend it," and you've heard Reva talk about article v. article v says in the Constitution how we go about amending the Constitution--very complicated, very arduous process. We have very, very few amendments.

Before I moved to New Haven I lived in California, and the Constitution there looks like the IRS code because they amend it every election, very long, lots of amendments, and no one in California really identifies with the California Constitution the way we identify with our rather stable Constitution. It turns out, if we really want to make the Constitution ours, the amendment process is too clumsy, too awkward, takes too long, and is too unresponsive. There are too many things we want to believe are Constitutional for the amendment process to encompass them.

Now, that may sound too paradoxical, but I'll give you a simple example. Most of you believe and the United States Supreme Court believes that the equal protection clause of the 14th amendment prohibits discrimination based upon sex, so the federal government can't pay a woman less wages than a man for the same job, and that you would think of as a Constitutional right, not to be discriminated against under the equal protection clause, but probably, you don't know that right didn't exist until the 1970s. Before that time, discrimination based upon sex was routine in the United States, and for the framers of the 14th amendment, it was routine. It was expected. There were decisions in the 19th century saying, "of course states could prevent women from becoming lawyers," for

example, because the appropriate place for women was in the home. That's where women were supposed to be, not at the bar, not practicing law, not practicing medicine, or whatever. Now, how is it that our Constitution comes to prohibit sex discrimination?

How did that happen? Well, you would say the process by which we make the Constitution ours--we amended it--and you might remember we tried to amend it. Remember the era, which was an amendment to the Constitution prohibiting--

GREENHOUSE: Equal Rights Amendment era.

POST: Equal Right Amendment prohibiting discrimination based on sex, goes out to the states, and it doesn't succeed. It fails. so, we tried to amend the Constitution to prohibit discrimination based upon sex, and we failed to do it, and nevertheless, we consider it part of our Constitution that it prohibits discrimination based on sex. How did that happen? How, exactly, did that happen? That's the issue of making the Constitution ours.

We, as a society, believe that men and women are equal, and we believe, therefore, that our Constitution, any Constitution that would represent us, would prohibit discrimination of this kind, yet we couldn't do it through Article V, so how did we do it? Well, we did it through processes of interpretation of the Constitution by justices of the Supreme Court, but how did they come to do that? And that turns out to be a very complicated process, and there are many, many paths of influence that affect the way that justices of the Supreme Court interpret the Constitution. One of them, of course, is the appointments process presidents tend to appoint justices who believe as they do in certain Constitutional rights and not other Constitutional rights.

For many years, you might remember, the Reagan administration believed that it would appoint justices who would oppose the right to abortion in Roe vs. Wade, and that was part of the campaign to become president that certain kinds of justices would be appointed who would interpret the Constitution a certain way. So, that's one pathway. It's called partisan entrenchment, and Jack Balkin has written a great deal about that, but that isn't what happened with respect to sex. There was no president who campaigned to appoint justices to reinterpret the equal protection clause to prohibit discrimination based upon sex.

So, how did that happen? Well, it turned out it happened because there were social movements. You might remember second-wave feminism. Feminism emerges in the 1970s as a force in our society where people debated, you know, what is the role of women in this society, and we, as a society--through this process of norm contestation, of arguing with each other about what should be the role of women--we came to the belief that women should be discriminated against, and because we changed our cultural beliefs, the people on the court--who are, after all, just like us, members of the American public--came to change their beliefs, and they came to read the Constitution in light of these changed beliefs. Well, that tells you something deep about how Constitutional

interpretation changes. It changes as the beliefs of the American public change, and we all participate in changing the beliefs of the American public, every one of us. First amendment guarantees your right to do that, right? We take part in this context. We voice our opinions, and as we, as a culture, change, so does the interpretation of the Constitution. So does the meaning of that document under glass which hasn't changed upstairs changed its significance, and democratic Constitutionalism is an effort to describe the very complex relationship between contestation--debates, arguments—about the meaning of the Constitution outside the courts--in the congress, in the presidency, in social movements, in town halls, in families--and the way that the Constitution comes to acquire meaning. There's a very dynamic, very dialectical process between the way we talk to each other and the way the Constitution is interpreted, and that's how we keep it our Constitution. That's why we can still recognize it and take pride in it as ours and not as an alien, 18th-century document.

GREENHOUSE: But it's obviously a rather problematic concept because it's taken us--well, I'll ask Jack. So, you go down a road that can take you pretty far from the Constitution of 1789, so how do you reconcile the Constitution that was written and the Constitution that evolves through this process of dynamic contest?

JACK BALKIN: The thing that most people don't realize or suspect, about the Constitution when it was originally drafted is that it was actually designed to be self-enforcing. People think, "well, supreme court enforces the Constitution "when Chief Justice Roberts famously said he thought that judges were like umpires--they make sure the game was played fairly, and a lot of people criticized him for that--but in another sense, the problem with that analogy is that that's actually not how the system ever worked or works today. The framers assumed that people would struggle in politics and that they would try to push and bend and change the law to suit their own needs and interests--so it is today just as it was then--and so they assumed that what you had to do is, you had to design a system in which people would struggle with each other, and through their struggling with each other in politics, over time, that would enforce the Constitution.

So, if you think about how the Constitution is designed--there's separation of powers, which invites different branches to struggle with each other. You have federalism, which invites the federal government and the states to struggle with each other, right? You have checks and balances, which keeps any particular group from getting too powerful, and so that was their idea. Their idea was that it would be self-enforcing through this back and forth, this contestation, and finally, if things really got out of hand, they assumed that the people themselves would, in fact, discipline government through elections and through protest. So, the whole idea of the system--which included the judiciary, by the way; it's not that judiciary was thought as the backstop--the whole system was thought to be self-enforcing.

Now, the thing that's interesting about such a system is that it inherently will add things to it over time. It will change over time because people will push and pull each other. They'll

build out institutions. They'll add things. So, for example, the federal government and the state governments are so much larger and do so many more things than was imagined in 1787. All these institutions got built up over time, and as they built up over time, they changed the ways in which people argued with each other about the Constitution. That also changed things over time. So, here's some examples, some very simple examples. There were no political parties assumed in 1787. Framers thought political parties were a bad idea. It turned out; political parties became essential to aggregating people's views and expressing popular will. They developed very quickly. Framers thought there would never be a standing army. They had no idea that we would ever build up our defense forces in such a way that we would have troops stationed all over the world and battleships everywhere so that we could defend ourselves and so we could exert our power in the world. They didn't understand America can be a world power at all. They thought it would be an isolated power.

The administrative state, so all the government benefits that you enjoy, those are made possible by the administrative state. They didn't assume there would be anything like an administrative state. Each of those things got built up over time, and as they built up over time, it changed the way in which the system reinforced itself. Judicial review, which was contemplated at the beginning, becomes increasingly important, especially after the civil war, when it becomes clear that you have to prevent states from violating people's rights. It was assumed the federal government would violate people's rights.

By the time of the civil war, it's clear the states are likely to be violating people's rights, as well, so the federal judiciary becomes increasingly important, and then what happens is, the federal judiciary starts getting pushed and pulled in different ways, and that's part of the stuff that Robert was commenting on. He was telling you in a certain way the kind of mechanisms that we've developed over time to keep judges in line. As judges become more important, you have to keep them in line. How do we keep them in line? Through the appointments process, through rotation of judges in office, and through changing the general political culture in sense of what's fair and what's just and what we understand by the Constitution.

You may think that the courts are completely isolated from public opinion and politics, but it isn't true. It's not true at all. What you do in politics, what you do and how you express your views, how you make your views known, how you argue with people about what's fair and what's just, eventually that change show courts interpret the Constitution. That's the key mechanism of self-enforcement. In a world image, courts are as important as they are in our situation, and the other thing you have to understand about this is, people who draft the Constitution understood it was imperfect. They understood that it would have to change over time. They understood it as an experiment that would have to be worked out by later generations. That idea is really crucial here.

GREENHOUSE: So, the very tightly contested Supreme Court nomination battles that we've lived through in recent years, that was part of the original design, do you think?

BALKIN: No. absolutely. This comes out much later. Supreme Court is a part of the system, but, again, once you have the 14th amendment, which basically creates a whole new set of rights against states and once you have the civil rights revolution and once you start applying the bill of rights to the states, right, so that the states can now be held liable if they violate your free speech rights or the rights of defendants or other kinds of rights, at that point, courts become increasingly important, and it's no accident that after the civil rights revolution of the 1960s,the fights over judicial nominations become really important.

Why? Because now the courts are tasked with a role that they didn't have as much previously, and so you need to have checks on them. They need to have ways for the people to enforce the meaning of the Constitution against this particular element of the Constitutional system.

GREENHOUSE: So, I'll just toss out to the panel this notion of democratic Constitutionalism. How is it different--I assume it is different, but how is it different from this shibboleth of the living Constitution, the idea that the warren court had elaborated on, the Constitution just changes along with policy preferences?

BALKIN: Well, so let me just say that there's one sense in which nobody really disagrees with the idea of a living Constitution. Even originalists--I'm an originalist myself--they don't disagree with the fact that we live in a very different kind of system than we had in 1787 or 1868.

That's not the issue. The issue is, is there any obligation on the part of judges to keep the Constitution in line with the times, which is often thought to be the statement of living Constitutionalism? No. There isn't. There isn't, but there doesn't have to be because that's not the way a self-enforcing system works. The Constitution can't help but, in some sense, keep up with the times because people are constantly struggling over it. People are saying, "Look. Women deserve equal rights, "and they persuade other people, and they persuade politicians, and politicians appoint judges, and judges live in the same world that everybody else does, and so what happens is, they start to see the world in that way, too, and that's how doctrine changes. It's not because somebody told the judge, "Hey, you need to keep the Constitution up to date with the times. That's just the wrong way to think about it."

SIEGEL: Well, one way of understanding the term "living Constitutionalism" is that it was a term that some may have used in justification of rulings of courts in the 1960s that became part of the arsenal of critique of the courts. I think it was Justice Rehnquist who said that a good Constitution was a dead one.

POST: Scalia.

SIEGEL: Well, I think they each have had their shot at it.

In any event, it certainly became a term of opprobrium, of criticism. It was coupled with the idea of activist courts, or another sort of term of critique was "legislating from the bench," the idea that judges were deciding cases in a way that exceeded their appropriate role and strayed into a domain that should properly otherwise have been left for democratic deliberation, was properly the domain of politics, but judges ceased applying law and, on this critique, began engaging in political reasoning. that was part of the critique of those who helped elect judges--excuse me—presidents who appointed judges who helped change the law as the judges--the president--excuse me—did through the justice department's Constitution in 2000 project, and in thinking about all of that, one can say that it was a term of objection aimed at a range of decisions which looked lawless to those who objected to them because they disconfirmed with their understanding of what our Constitution is, and yet one could look at, for example, current interpretations of the equal protection clause to prohibit any form of race-conscious government action and, therefore, to limit the government action that is concerned with indicating diversity or achieving the integration of institutions, those rulings, as new forms of living Constitutionalism. It's hard to find the warrant in original understanding to account for the current interpretation of the equal protection clause by conservative justices who call themselves originalists.

There's also interesting ways in which even the gun decision, the Heller decision of 2008, this is the first time that the supreme court has struck down a gun control law, reasoning that it restricted an individual right to bear arms. We're not going to go into the providence of that decision, but I'll just observe as an historical fact that this was a new place for the Supreme Court to be, and we can ask ourselves, in what respect is the Heller case an example of living Constitutionalism? In what ways are the judgments of the court restricting affirmative action examples of living Constitutionalism? In these cases, they're vindicating values that are generally associated with conservative members of the judiciary, and certainly held Constitutional values, I mean, in absolute and utter sort of sincerity and earnestness understood to be the meaning of the second amendment, the meaning of the 14th amendment's equal protection clause without an utter drop of doubt, and yet one could also see them as instances of change.

So, there's a striking question of perspective here. Is the problem the idea of Constitutional change, or is the problem the areas in which the Constitution changes? And it could turn out that many Americans, if you began to interview them, would believe that some of these changes are sensible and consistent with Constitutional principle and others are outrageous and in derogation of Constitutional principle. The only problem is that if you put us all in a room with one another ,we wouldn't really all agree on which cases were which, and so one way of thinking about what's going on here is that what we're seeing happen is Americans arguing about what the true meaning of the principles of the document might be, arguing with one another, electing officials who ultimately appoint justices who have to deliberate with one another in deep and utter earnestness and fidelity about the meaning of the document, and they give it sense over time that shifts in a way that some of us will see to be absolutely the outworking of key principles and others to be diverging from them, and then we're still in a space of argument with one

another, and the Constitution, we can understand as sitting in the midst of all of that being what joins us in argument with one another, the document to which we appeal in deep conviction, that it's what it is we share in common as a people, even as we know we disagree with one another about its meaning.

POST: You know, there is a sense in which the idea of living Constitutionalism is completely uncontroversial, so you take any historian of America and you read a history of United States political developments or Constitutional developments, there's change. No historian, no political scientist for a minute would say that the meaning of the Constitution hasn't evolved since 1789, just wouldn't even begin to think of that as a question. So, if we look at this from the outside, of course the meaning of the Constitution evolves and changes in time, and no one would think anything else.

Now, when you look at it from the inside, when you look at is as a lawyer and you say, "Well, I'm supposed to be bound by it. How can this change if I'm bound by it and there's the text and the text hasn't changed?" That poses a little bit more of a problem, so I do a lot of work, for example, on the first amendment, and when movies first appeared, it went to the Supreme Court, and Supreme Court said, "Well, movies aren't within the first amendment because movies are like circuses, and circuses aren't protected by the first amendment. That's not a medium of communication. That isn't how people debate with each other," and now, of course, we think entirely differently. Now, is that because the text has changed or circumstances have changed or the meaning of movies? We live in a social world in which the value which the first amendment is there to protect now encompasses movies.

You can parse that many ways, but the point is we give meanings to the first amendment now which would've been inconceivable to the framers of the Constitution. A famous example of that is that the Constitution gives authority to Congress to make rules for the Army and the Navy, but it doesn't mention the Air Force, and I guarantee you that the framers didn't contemplate, didn't have in their mind or intentions the Air Force, and yet do they have power to make rules for the Air Force? Of course they do. So, how you begin to think about the development of these things as circumstances change is, I think, what this metaphor of the living Constitutionalism, in essence, captures.

Now, that means to say that you have to adjust to changing circumstances is to say there's going be controversy because some people will say you should adjust one way, and other people say you should adjust a different way, and so the minute you have this problem of change and adjustment, you're going to have also the problem of controversy, and then you have the paradox that Reva is pointing to, namely, we're bound by our Constitution. We're arguing about the meaning of our Constitution, and yet we're making that meaning, and we're disagreeing about that meaning, and the Constitution emerges from that disagreement. As those parts of our values that we agree somehow through the complex processes of judicial interpretation and backlash and reinterpretation, the values that we agree to live by, that becomes the Constitution itself, and that changes in time.

GREENHOUSE: So, just to take one recent example, I'd like to get your response to the process that was revealed by the trajectory from the second half of the 1980s, when the Supreme Court had the chance to enunciate a Constitutional framework for the claim to gay rights and dismissed it out of hand--well, 5-4, Justice Byron white saying for the majority the claim was, at best, facetious--and not 20 years later, in 2003 in Lawrence against Texas, the court votes 6-3 that there is a Constitutional basis for the claim to gay rights. So, discuss that within the framework of democratic Constitutionalism because it was a very dramatic and, I think, unusually short and explicit, not kind of the bubbling up as the de facto equal rights amendment, but the court said one thing one day and not 20 years later said the opposite.

BALKIN: Well, I mean, Lawrence is actually a very good case. It's interesting to compare Lawrence with Brown vs. Board of Education in '54.

Here's a point. In 1986 when the court takes Lawrence, half of the states have already decriminalized same-sex sodomy, half of them, so there's already a changing public view about homosexuality, but it's also, as you remember, right at the time of the AIDs crisis, and that, I'm sure, had an effect on the way the court dealt with it, and the court was a very close case, 5-4. Originally, Justice Powell goes the other way, and then he decided he'd swing both ways in the court, and he finally comes down on the side of allowing criminalization. Later, he said he regretted it. It was very close case then.

What happens between 1986 and 2003? Well, several things. First of all, almost all states decriminalize same-sex sodomy. There are only 13 left, and it was never enforced. "Will & Grace" becomes a number-one TV show, which is both a cause and a reflection of how Americans' attitudes about homosexuality have changed. And homosexuality becomes more open and public and more accepted in life. And in that sense, it's just--it makes no more sense anymore for the Supreme Court to say that you can throw homosexuals in jail really essentially for being homosexuals. And so in a sense, Lawrence is just a confirmation of where the country had already headed. One of the things that's so interesting about Lawrence is that when the case was decided, there was almost no outcry about the decision per se.

GREENHOUSE: There was a big outcry from, say, Justice Scalia.

BALKIN: Justice Scalia. But he was not making a claim about that. What's interesting is the moral majority, and they said, "Well, you know, we don't really have--you know, this is not so important to us, but we really hate the fact that the court is doing it, and we really are worried about gay marriage," You see? That's what Justice Scalia was writing about in his dissent. It was as if by the time the case had been decided, everyone had said, "Okay, that's it. Let's move on. Now let's fight about gay marriage." And that tells you that the Supreme Court actually came rather late to the party—that is, that it finally came to the place where the country already had been for some time.

Now, if you compare that with Brown, it's a very different story. In Brown, what happens is, at the time Brown is decided, about half the states have outlawed de jure segregation, and outside the deep south, almost all of them have—where it still exists, in a small number of states, it's local option. Topeka is a local option case. And the White House is opposed to Plessey and wants to overturn Jim Crow. The State Department thinks we're getting killed by the Russians. Bad propaganda. And national attitudes and World War II and the fight against fascism, which is a form of institutionalized racism, changes Americans' minds about all this. All these G.I.'s come home from Europe--black G.I.'s come home from Europe. They'd fought for our country. And so by the time that Brown was decided, there's been a sea change in attitudes, and Harry Truman asked the court to overturn Plessey in 1950, 4 years before Brown, and the Court says no. They wait 4 more years before doing it. but what's interesting about Brown is, Brown the Court acts a little sooner than it did in Lawrence, and there is massive opposition in one region of the country, the South. And then if you think about the sex equality cases, by the time the Supreme Court decides the sex equality cases in the seventies, what happens is, even the opponents of era.

Reva has written about this, she can talk about it--basically sort of hedge their bets and say, "Okay, we believe in equal pay for equal work. We believe in equality but not all this crazy stuff," right? And so in a sense, they already cede ground by the time the court decides it. These were all actually 3 examples of the Court in some sense following rather than leading and that the real battle is being fought out in American politics over what equality means.

SIEGEL: I think there's actually in the "Constitution in 2020" book a variety of voices speaking about the ways those courts enforce the Constitution. There are some voices, some of the authors, contributors to the book view the courts in the way that jack is describing, as essentially majoritarian institutions. They reflect public opinion or even, on this account, lag behind public opinion.

GREENHOUSE: So their job is to sort of ratify.

BALKIN: To ratify changes that have already happened in social morality. There are other voices in the book--and I should point out that that picture of courts as majoritarian institutions merely mopping up and recording changes that are already consensual and agreed upon by all Americans--that's not the image of the Court that, for example, Americans are concerned about when they talk about the counter majoritarian difficulty. They're worried about the idea of unelected judges who lack democratic warrant intervening in matters and laws that are the outgrowth of democratic politics and essentially preventing Americans from doing what otherwise they have concluded to do as a matter of collective deliberation.

There are other voices in the"2020" book that actually see courts as potentially more active players in the elaboration of Constitutional meaning, and it's an interesting case to think about the stories that jack was just setting out there. There is a deep and important

sense in which the Court in Brown and the Court in Lawrence, the court that dealt with issues of race and the equal protection clause and the court that recognized the freedom of same-sex couples to be free from criminal prosecution—that those courts were reflecting common views. And yet as they struck down state laws to express this understanding and as they justified those decisions, they were giving an account of Constitutional guarantees that have the ability to call into question other practices other than the ones that they struck down. We now think of the court's ruling in Brown as calling into question not only school systems that were explicitly segregated by race by law but also other social practices that might be understood to discriminate on the basis of race, all the way out to, for example, affirmative action cases. Some view the meaning of the clause in that way; others do not. And similarly, the scope of the Court's ruling in Lawrence, striking down criminal sodomy statutes, is unclear, was claimed upon by Americans who were contesting the restriction of the institution of marriage to cross-sex couples.

And this picture of courts intervening is viewed by some authors in the book as potentially a good, even if counter majoritarian, because ultimately, in the end, still part of democratic Constitutionalism. How and why? It’s not going to be possible for any court ultimately to disturb the marriage relationship or to disturb the ways in which Americans relate along lines of race if there are not in civil society and in government others prepared to take up and defend those judgments. And so one can see what courts are doing in these instances as in part making visible a particular and possibly contestable account of our commitments and asking Americans, what, truly, do Constitutional guarantees mean in matters about which Americans are still in uneasy if not sometimes quite excited dispute with one another? And it could well be that courts engaged in that process of intervention and reflection, while it's not wholly counter majoritarian--the issues got put on their plate in a way that emerged out of public conversations about norms and was grounded in many forms of popular culture and the media--nonetheless are themselves voices in that conversation and quite audible voices in that conversation because they're high visibility actors. We fight over who our judges are. We give great honor to our courts, deciding our Constitutional matters. And we have practices of great deference to their rulings. So they're big, high-stakes decisions, and they can actually, in turn, influence norms if there are Americans who are prepared to stand up and say, “yes, as a matter of principle, that's a ruling in deep fidelity to our agreements." The Second Amendment decision could well be understood as such a decision.

POST: You know, in the traditional idea of the judge coming out of the Warren Court and the Brown era is exemplified in a decision called Cooper vs. Aaron, which some of you might remember, in which they ordered the desegregation of the Little Rock Schools, and Faubus stood up and said, “No. Over my dead body," and Eisenhower has to call out the National Guard, and the Court is seen as standing steadfast for Constitutional rights against a wayward democracy.

So this idea of the judge as hero, of the Warren Court as standing up for the rights of those who have no political backing--and think here of the criminal defense rights, Miranda warnings, the right to a lawyer if you are arrested and so forth and so on—these created an image of the judge as a kind of hero standing up against the political tide and protecting the rights of those who were otherwise defenseless. And that was a very traditional sort of liberal idea. It was critiqued as an imperial judiciary, and there's been a rather large reaction to it, so much so that many believe, as jack has just stated, that in fact if you look closely at these opinions, really the judges are just ratifying what people believe anyway.

Another way to look at this question would be to say that the courts are themselves a voice, as Reva has suggested, one voice within the political symphony that we sing out our Constitutional values in, and as one participant, it can be more or less ahead of the crowd. It can have more or less influence. It all depends on the circumstances. I just wanted to say that one implication of that, to build upon your question, about the recent decision in Lawrence about--I think Jack's absolutely right that the real question that was so--that Lawrence posed to the country was gay marriage, and you can see how the country has, state by state, fought out this issue of gay marriage.

In California, you get a decision of the California Supreme court, and then you get it overturned by a Constitutional amendment. Now there's a lawsuit about whether that amendment is itself Constitutional, and so on. We are fighting these out, and we're interestingly fighting it out in state venues--in the state of Connecticut and the state of New York and the state of California, in the state of Massachusetts--and as a technical legal matter, these state decisions have nothing whatever to do with the United States Constitution that's in this building. But if you accept the image of democratic Constitutionalism that we're putting forward, actually it does because that means that state by state, we're changing the way we look at the marriage relationship. State by state, we're changing what constitutes the sort of relationships to which we want to give Constitutional protection and honor. And even though people are, as a technical matter, fighting about Massachusetts law or they're fighting about California law, they're really fighting about our law, and that's going to ultimately be reflected in however the court is going to decide this issue of gay marriage, if not now, then. And there is no barrier to entry. You don't need life tenure, and you don't need to be confirmed by the senate to participate in those debates state by state, and it will have an impact on how the Court ultimately interprets the Constitution in this regard. Sorry.

SIEGEL: I just wanted to say that earlier, Linda had asked about the relationship of democratic Constitutionalism and living Constitutionalism, and if you imagine judges as just engaging in managerial control of Americans and their daily lives, just top-down ordering people around, the idea of Constitutional change is a somewhat threatening one because it's a loss of democratic autonomy. But when you look at judicial review in this picture that we're setting forth about the way--you know, in response to your question about same-sex marriage, you can see that it's a much more dialogic process, that there's

a decision, and certainly in the state decisions, there are state decisions which have had that effect for the relevant community. There's been huge argument over them but also evolving sense about right and wrong as the issue has moved across state borders. If nothing were at stake in a judgment, meaning if anyone were free to ignore it, no one would pay particular attention to the rulings of courts. But something is at stake. The initial first courts to make these kinds of rulings had their judgments overturned by state Constitutional amendments, and then gradually they've begun to stick in some places and get flipped in others, and you're seeing a very serious public conversation taking place that judges have played a role in putting on the agenda but in the end are not themselves going to settle. And neither was that the case in Brown. I mean, the court made a ruling, but it ultimately was not forced in law until the congress itself played a very significant role in giving that ruling bite. so that's a much more dialogic picture of courts.

GREENHOUSE: We have a few minutes left before we open it up to questions from the audience, so I'll ask each of you to look ahead to 2020 and anticipate what might be Constitutional--in the definition of Constitutionalism that we've been using here—a Constitutional issue coming down the pike then.

BALKIN: Well, we each have different specialties, and so we'll talk about our specialties, but--so let me say, obviously one of the things that's going to be litigated over the next decade is going to be how we build out the various surveillance systems that we have generated. A lot of people associate all this surveillance that we have with 9/11, but in fact it predates it, and in fact we've developed what Sandy Levinson and I called a National Surveillance State, which is the successor of the National Security State, in which we increasingly try to use information, collate it, analyze it, in order to stop problems in advance, stop threats in advance, and deliver social services using information data collection. and at the same time this is happening, I think privacy has, for many Americans, become one of the most precious and valued civil liberties. And it's not an accident that these two things happened at the same time. As government becomes more powerful in a certain kind of way, then people start to focus on questions of liberty and freedom in the same area, at the same time. So it's not an accident, by the way, that when the new deal starts, the administrative state starts, people start thinking more heavily about civil liberties. It's not an accident that the civil liberties revolution really follows on the new deal, follows after it. The same thing is happening now. We're developing all these state capacities for analyzing information and collecting it, and it's going to lead to a lot of questions about how we protect privacy in this new world where government not only collects lots of information about us but works with private organizations that aren't bound by the Constitution and shares that information. And many of those solutions are not going to be from courts. They're going to be through statutes, through the way you design the executive branch to prevent abuse, and through technological design.

Another really important area, technologically--so I'll talk about technology because I have a center on law and technology--is going to be freedom of speech. Freedom of speech is going to depend on how we design our technology, how we design our broadband

networks, whether or not you have access to talk to people using that. Technology is going to matter in terms of genetics, right? The next kind of big discrimination issue coming down the pike is going to be about genetic discrimination, and we're going to face all sorts of difficult questions about genetic engineering, which already exists to a very limited degree in the way in which we use in vitro fertilization. The Supreme Court has actually never decided a case about in vitro fertilization, which is very commonly used, but in fact it raises all sorts of difficult moral and interesting questions and Constitutional questions. And as the science gets more advanced and the technology becomes available to more people, all of these questions are going to be in front of us, but the important thing to understand is that we shouldn't think that the Court is going to tell you what the answer is. The important thing to understand is that as technology changes and poses new problems of freedom and liberty for us, the American people have to think about what they think the principles behind the Constitution mean in these contexts. They shouldn't use the courts as the guide. They should understand that--the way I like to put it is this: courts are bad at tackling, but they're great at piling on.

[laughter]

We have to do the tackling ourselves.

GREENHOUSE: Reva?

SIEGEL: Well, I guess to draw out a theme of this conversation, we've been talking about the way in which the Constitution is enforced by multiple actors in our country, not only by courts, but also by elected officials in the representative branches of government, in the executive branch and the congress and state legislatures, as well as by citizens who don't hold government office and thinking about that theme and the general notion of the Constitution's multiple enforcers, I guess I would draw attention to ways we might see Constitutional questions where we hadn't seen them before if we looked to the actions of, for example, the congress or to the legislative branches and considered the work they do within Constitutional—within a Constitutional lens. So one big example might be this big national conversation that's going on over healthcare. We know this is not a question that the court or any court we now know is about to take up as an initial matter, but when we look at what's going on on the hill right now, there's a big conversation going on about whether we're prepared to say, as a nation, that these are the kinds of ways that we are going to commit to one another about what it means to be a member of this polity. it might be understood in proto-Constitutional terms.

Or we could move to issues that we do think to be in the province of courts—for example, issues of equal protection and race discrimination or choice, for example, and again, shift our lens away from what it is that courts take up on these questions and think what it is that legislatures might add to the business of enforcing Constitutional guarantees. Legislatures have different forms of legitimacy and warrant and capacity and institutional skills and abilities, and so when we're thinking about, or we're worrying about the ways in

which the criminal justice system may have racial bias in it, maybe this is a question that we ought to make more systematically, a question for the legislative branch. Congress certainly, in various ways, takes it up under sentencing. This is something that could be a part. It's hard to take it up in democratic politics because we're all from new haven, where there's a very highly covered crime that's being covered right now. People have security issues domestically as well as internationally, and it makes it hard to take up in politics, but there's also something, I think, deeply true about our worrying about what it means to enforce the equal protection of the laws when we worry about communities, significant percentages of whose children find themselves entangled with the criminal justice system. Or yeah, the third question I had put on the table--the issue of freedom of choice. If we're worried about sort of liberty to fashion one's family life, what does it mean if legislatures were worried about guaranteeing that? What does it mean for legislature to worry about freedom of choice where the issue may be a family's ability to raise children in health? That may be enforced and defended differently by courts--excuse me, by a legislature than it might be by courts, and it would alter what's at stake when we're talking about standing by freedom of choice. In fact, the ability of people to have children they want as well as to refrain from having children is part of that question, and it really sort of presents different questions to us as members of a common community to ask how it is we help people realize that--that is, the desire to bear children and have a family and not merely to refrain from it. So those are 3 I'd put on the table.

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POST: If I had to think of the most powerful secular trend in Constitutionalism now would say it has something to do with globalization—that is to say, the boundary between the outside and the inside. I think we're becoming very confused about that.

Traditionally, when we dealt with matters as quote un quote "security matters," we had a set of rules that we dealt with them by, and the sections of the FBI that dealt with security were partitioned off from those that dealt with crime. The CIA was given its jurisdiction outside of the country. So security issues were put to the outside of the borders of the country, and when they came in as security issues, they were dealt with in a very gingerly way, and mostly when we had problems of social control on the inside, we dealt with them as crime problems. And we have very particular and stringent rules about how we deal with crime--when you can be investigated, when you can be indicted, what sort of rights you have, how you can be punished, how you can be secured. We don't allow detention--preventive detention because you might be dangerous--that sort of thing. Now, I think as security begins to come to the inside, as the threats that we normally thought of as coming from foreign countries begin to be felt domestically, and as we blur the line between war and crime, between what's a security issue and what's a criminal issue, all of these very elaborate dichotomies that we've built up in our Constitutional law to which attach many of the protections of the fourth, fifth, and sixth amendments, are going to become undone, and we're going to face serious conceptual problems of how we deal with social control at home, why it is we allow ourselves to do great freedom of action when we classify something as a security issue inside, call it terrorism or whatever, and we put such handcuffs on law-enforcement officers when we call it a crime.

Well, these are conceptual categories that are very ancient, and they mean something to us, and we're in the process of watching them dissolve before our eyes, and this is going to be one major area of Constitutional reconsideration that we will not be able to avoid, I think, in the next 15 years. And we have to think about what we're going to do about this.

GREENHOUSE: No, I didn't mean to cut you off. I was going to say that's a very provocative note, maybe, on which to end our part of the program and to turn it over to questions, if there are any. There are mikes, and because this is being recorded, you have to ask a question into a mike if you have a question, or else we're happy to keep musing about this. Give people a chance to get to the mikes.

MAN: All right. My question for Dean Post and the other members of the panel--I think I understand the notion of democratic Constitutionalism when over a long period of time that confrontation among norms is converging. But what happens if over a very long period of time, the confrontation among norms diverges, and especially if it becomes a sectional, regional issue where some states are going in one direction, other states in another. How do you resolve that in terms of your view of the role of the court?

POST: Well, I'll speak very briefly, and then I'll turn it over to Reva and Jack on that. You know, Brown could be an example of that. One of the ways that historians understand Brown is as a question of you had a sectional exceptionalism—the south was that extraordinary, special, peculiar institution, as they call it, and the rest of the country had had enough. So it imposed national norms on a section, and it took 2,3 generations. We still, in some ways, are in the middle of that reconstruction. So when there is ongoing controversy of that great and deep nature, there are no rules. I mean, what happens is, you see emergent--you see the struggle continue, and you see the terms of the struggle change. So no one any longer defends overt racism. No one any longer defends overt segregation. But race is omnipresent in our Constitutional issues. It's just been displaced onto other issues. It comes up in the gun control questions that Reva talks about. It comes up in issues of criminal defendants. It comes up in many, many guises. It comes up in affirmative action, and so the same struggle morphs in its form and continues. It's not like it disappears, and it will continue so long as there are divergent views on the question in society, and courts are no magic bullet for that. The Constitution is no magic bullet. The Constitution by itself can't solve our problems. We have to solve our problems and make those solutions have the shape and solidity of Constitutional values.

SIEGEL: You know the account of democratic Constitutionalism that we're giving and that appears in the "2020" book is not on its face normative—normative in the sense of telling a court how to decide a case. It's not a theory of interpretation. It has implications for our reasoning about what it is we ought to do as a people, but it doesn't, for example, directly tell you what to do in a particular conflict. If we're looking at the question just descriptively, how has the system that we're describing here, our Constitutional order, dealt with this kind of question, it has a variety of devices that recognize regional variation, recognize entrenched differences of views, and respect the heterogeneity of views that Americans

have, devices that recognize some matters are for state control and keep the federal government out of it, whether it's a matter of the power of the congress to legislate or a matter, even, of the court to declare rights.

But in the end, this is a union that does understand itself bound under one Constitution, and there are matters that become of sufficient concern that there are just junctures at which courts are prepared to enforce norms against dissenting members of the community, even where it causes resistance or resentment, and there are norms of that kind whether you want to think about Brown as one of them, as an example of one of them, or Lawrence as an example of one of them, or Heller, the gun case that we talked about as an example of one of them. There are actually areas of the country that are very passionate about having gun control legislation, including the District, and their ability to have it was altered fundamentally by the enforcement of this individual right by the Court in 2008. So, what that tells us is that while we have a variety of mechanisms for leaving states to go their own way and for leaving localities to govern themselves and we define rights, often, more narrowly through judicial review in order to preserve and respect that space, when something deep enough is at stake, there comes a point where courts intervene, and we actually live in a world in which we want courts to do that when the fundamental ultimate values are at stake. If a school were saying, you know, "we believe" in racial segregation. It's our way," it's part of this system of government, ultimately, To step in and to say no, and if that community feels sufficiently wronged and it can explain its wrong to the rest of us in terms that make that wrong intelligible to us as a matter of our Constitutional values, we may be, in the end, moved to give more room to them, but it's going to take a very, very long process of argument at this point in our national history.

BALKIN: And I see it slightly differently than Reva does, so this is my analysis of it. Basically, federal courts are nationalist institutions. That's really what they are. They basically get their power and authority from being courts of the United States as a whole. In essence, they're not counter majoritarian with respect to the nation. They're usually only counter majoritarian with respect to a particular region or a set of regions, and if it turns out that you get significant push-back regionally with respect to a certain issue, then what tends to happen, historically, is either you get nonenforcement in that region, or you get a compromise through another doctrinal means. My example is school prayer. Basically, the Supreme Court, in the early sixties, says you can't have school prayer anymore, right? In the public schools. Completely unenforced in large parts of the country, for decades. Slowly changing. By the 1980s, what happens is that religious conservatives find a new way to guarantee the right to school prayer through the free speech clause of the first amendment. They do this by holding school prayer after hours on school property, and the Supreme Court hears a series of cases in the 1980s which now—not under the establishment clause, but under freedom of speech. Essentially says this is speech, and it should be protected, and so in essence, you now can have school prayer after hours in schools, with school students, right? That is the way in which regional conflicts get compromised through doctrine.

The other example is abortion, right? The Supreme Court starts out with Roe vs. Wade, which has a relatively inflexible model of regulation, and by 1992, it develops a much more flexible model of regulation which allows certain jurisdictions to come up with regulations which, in effect, block the ability of a large number of women to gain access to abortions. If they have enough money to go out of state, they can still do it, but in large parts of the country, and Mississippi is an example that I know about, it's very, very difficult to get an abortion, not because it's illegal to do so but just because the regulations, which the courts uphold, essentially make it very difficult. And that turns out to be—that kind of mechanism turns out to be the way in which we manage regional differences.

GREENHOUSE: We'll take another question over there.

MAN: Yes. I was wondering if the panel could address the role of democratic Constitutionalism in defining the boundaries of what we consider the polity or the community, the "We, the people," and I speak as a local person. I know there's a couple of us here who have found ourselves from very early on defined out of the polity in the sense that we have not gotten the same rights to vote and to decide upon the rules upon which we all--under which we all live--D.C. voting rights, to be very short and to the point. What is the role of democratic Constitutionalism in defining what is the boundary of "We,the people" and what are the fundamental bedrock principles and rights of persons belonging to the polity, and can we define certain people as having less rights simply because of where they live?

BALKIN: I'm not going to talk about the theoretical question. I can just give you a very simple answer about the Constitution. If Congress wanted to give the residents of the District of Columbia representation in Congress, they could do it tomorrow. They would not necessarily be able to do it through the bills that are currently being offered, but they could do it very easily. They could do it, for example, though retrocession, virtual retrocession, by which they could say that the District of Columbia could be treated as a district of the state of Maryland or the state of Virginia, which it originally was, and so it could create an extra house district that way, and it could also give them the right to vote for senators in Virginia or Maryland. This is completely Constitutional. There is no problem with it. There is all sorts of historical evidence--in fact, the residents of Arlington voted--when Arlington was part of the District of Columbia before it went back into Virginia--there was no problem with it at all. The reason why it hasn't happened is not because the Constitution forbids it. The reason why it hasn't happened is because you can't get a sufficient coalition of people who are willing to do this thing, which it seems to me they ought to do, since it seems to me ridiculous that the residents of the District of Columbia should have no representation in Congress.

GREENHOUSE: Why don't we take--we have time for one more question. I see one more question.

MAN: Speaking about judicial activism, what do you think of this situation in New York between the Bank of America and Merrill Lynch where the federal judge has tossed out the agreement made between the United States and the Bank of America, and now it looks like Attorney General Cuomo is going to indict everybody there?

GREENHOUSE: Yeah, I guess one coming issue that none of you addressed was the whole economic framework in which the courts used to deal a great deal with the national economy.

BALKIN: It's coming back.

GREENHOUSE: It's coming back, so do you want to address that question?

BALKIN: Do you want to say something about that?

POST: Well, unfortunately don't know the case well enough to comment on it, so I can't really talk. It was Judge Rakoff, if I remember correctly. I haven't read the ruling, so I couldn't tell you. But on the economic question, the new deal compromise was courts would get out of the business of economic regulation and protect human rights, and the issue that is coming up before us is, will courts stick to that? I mean, it's been part of an agenda of a good number of people to have courts protect economic rights under the takings clause and under the due process clause, regulatory takings and so forth and so on. So one issue will be, will certainly be controversial--the extent to which you can regulate financial institutions and be consistent with the Constitution and not be taking their property. That you will see an increase in litigation as the government becomes more involved, entangled with the private economy as it has now.

SIEGEL: There's also just interesting strands of, you might call it, popular Constitutionalism that are present here in that the government has made certain arrangements to negotiate the upheavals in the market, and there's been popular skepticism and rage at certain features of those arrangements, and there's been interesting stories in the press about certain cases where judges have begun to sort of poke at--for example, mortgage foreclosures. I don't know if people--there's a judge in New York state that was written up in the *Times* as invalidating certain numbers of these foreclosures on technical legal grounds but in part responding to a felt sense of inequality in who had gotten bailed out after the upheavals of the market last year, and so there's sort of both questions of the role of courts in the national economy and the ability to preserve the sort of—restrict government from taking property of the wealthy, and then there's the other side of it, which is the sort of ways in which poor people are--the less strong are protected in the process and the interesting ways in which judges can be voices on both sides of this.

POST: Can I just make a comment on the last question before, though? It's always said about democracy that it means government by the people, but the interesting thing about

democracy, it doesn't define who the people are. You know, who are "We, the people"? And there's not a democratic way of answering that particularly, and so that question about D.C. representation is really also very much the question about the participation of undocumented and immigration issues and the relationship of population flows to Constitutional rights. These are all questions that we're going to see more and more of. My own intuition here is that at its root, democracy means that the government is subject to public opinion, and what's very interesting is, whatever your status, whether you're in D.C. and cannot vote for a senator or whether you're an undocumented immigrant and can't get social security--either one--you still have the right to speak, to demonstrate, to hold demonstrations in the streets, and in that way affect public opinion, and as you affect public opinion, you affect--you exercise part of democratic sovereignty, even though as a technical legal matter, you're not part of the polity. So it's a very complicated question, how one actually gets representation here. It's very much like the issue of democratic Constitutionalism that we were talking about with respect to courts.

GREENHOUSE: That's a terrific note to end this on. I thank the panel. Jack and Reva are going to be signing the book up, So feel free to go up and get a book and get their signature and thank you all for spending part of your Constitution day with us.