Katherine Beckett:

Welcome, thank you for being here today. My name is Katherine Beckett, I’m on the faculty in the department of sociology and the Law Societies and Justice Program and I’m also adjunct in the Law School as of this year. I am delighted to welcome you here to this panel discussion of and reflection on the US Constitution. I’d like to briefly thank Deans Testy and Howard. Dean Testy of the Law School, Dean Judy Howard of the College of Arts and Sciences for their support in putting this together. I’d also like to thank the Law School for hosting the event and for podcasting it.

As you may know, the University has been commemorating Constitution Day here at UW by having public readings of The Constitution in the library each year. And that event just took place, I believe, yesterday. This year Deans Howard and Testy decided that they would like to add an additional component to the commemoration of The Constitution by having us organize a panel of researchers whose work invites to reflect in a deep and powerful way on the nature and meaning and fate of the US Constitution.

So that’s what we’ve done for this first inaugural panel. And I’m delighted to introduce our speakers for today in just a moment. I just want to briefly say that my introductions of these researchers in no way captures their many accomplishments. This is an extraordinary group and I can’t in the interest of time do all that I should to capture and convey to you the extent of their accomplishments but you’ll get a sense of it I think very quickly. So, thank you to all of the panelists for agreeing to participate and being here today. I guess I do know the order of thee speakers now so I will try to imitate that order.

I’ll begin with Patricia Novotny here on your right. Patricia Novotny earned her J.D. from the University of Washington and teaches a course called Women and Law in the Gender, Women, and Sexualities Department here at UW. And she also teaches feminist jurisprudence in the Law School. She’s a Seattle attorney and has practiced appellate law with an emphasis on family law for the past fifteen years. She is co-author of The Family Law Desk Book and has been involved in innumerous cases concerned with the rights of women including reproductive rights, juror rights, sexual privacy rights, as well as cases involving domestic violence, parenting rights and same-sex couple marital and property rights. She was lead appellate counsel in Anderson v. King County which seeks the right to marry for same-sex couples in Washington State and argued the case in front of the Washington State Supreme Court. And the title of her talk today is “Marriage, Same-Sex Couples and The Constitution.”

Moving down that way, I’ll say. Katheryn Watts earned her J.D. from Northwestern, the Northwestern University School of Law and joined the Law School here in 2007. She teaches administrative law, constitutional law, and Supreme Court decision making. She’s also currently serving as Associate Dean for research and Faculty Development. Professor Watts’ research focuses on the interaction between the Federal Courts and other government actors with a particular emphasis on the interaction between the judiciary and administrative agencies. She also writes about US Supreme Court decision making. And her work has been published in a number of top

I’m going to skip Clark. Well actually I’ll just go ahead and do Clark. Clark Lombardi is sitting in the middle and he’s the moderator for today so he doesn’t have a talk title, but he’s graciously agreed to facilitate the discussion that I hope we will have after the speakers present their talks. Professor Lombard earned his PhD in religion and his J.D. from Columbia and he joined the University of Washington’s Law School in 2004. His research focuses on Islamic law and constitutional law and he teaches courses on these topics as well as on federalism, comparative law and development law. Professor Lombardi’s current research and writing focuses on the evolution of Islamic law in contemporary legal systems. He also studies comparative judicial institutions and the way that constitutional systems deal with religious organizations and religious law. And in recognition of his scholarship he was recently named a Carnegie Scholar.

Continuing on down we have George Lovell. Professor Lovell teaches in the Political Science Department as well as the Law Societies and justice Program here at the University. He studies American political institutions, American political development and constitutional theory. His research examines how people and organizations use legal processes to achieve their political goals. His forthcoming book, This is not Civil Rights analyses how ordinary people construct and respond to legal and constitutional arguments and how discourses of law and rights impact politics and society. He is currently working on a book on Filipino cannery workers in the Pacific Northwest that examines how colonialism, migration and violent lawlessness by government official shaped patterns of US worker organization over the twentieth century. The title of George’s talk is “The Decline of Democracy as a Constitutional Crisis.”

Finally, we have Jamie Mayerfeld who teaches in the Political Science Department as well as the Law Societies and Justice Program. He teaches a variety of courses on political theory and human rights. His current research focuses on the justification for international human rights organizations and the origins of US torture policy. He is published in a variety of leading journals including Public Affairs Quarterly, Harvard Human Rights Journal and the Human Rights Quarterly. And the title of his talk today is “The Constitution After 9/11.”

So I’m really delighted to be here with these speakers and with you all today and I’m also delighted to turn it over to Patricia Novotny who will start us off. Thank you.

Patricia Novotny:

Thank you Katherine. I think we agreed we would do questions at the end of everything. Is that right Clark? So yeah, I have a cold and if at some point, you see my lips moving but you don’t hear anything, give me a signal and I’ll see if I can make an adjustment.

I did argue the marriage case here in Washington so although I will try my best to reflect deeply on the constitutional issues, if at some point it sounds like I have a formed opinion it’s because I do, so I just wanted to give you some disclosure on that. And although we are talking about the Federal Constitution, the first thing I want to note is that most of the prominent litigation in the area of marriage and same-sex couples has arisen by way of state constitutions. That is, that most of the cases until recently have laid claim to state constitutional protections. And both for reasons strategic and doctrinal, those cases are very unique to each state. I just want to put that out there because I am going to henceforth ignore it for the most part as we talk about the US Constitution. And to note to that several cases now burbling up of course do have their eyes on the prize on each coast laying claim to Federal Constitutional rights.
So what I’ve done is I’ve tried to synthesize the various constitutional arguments made around the country into three. I’m just going to go through each of those in order and talk a little bit how they dovetail. They are simply first off, the right to fundamental right to marry. That is, if some of you may have noticed in my title I did not use the phrase same-sex marriage and that was quite intentional. And although I may drop into using it as I proceed, I try to avoid it whenever possible because I think often of law as a language art. That is like Carlos Williams I think a lot depends or so much depends on the red wheelbarrow or how you say something or how you phrase a particular question. And so when we talk about the fundamental right claim that has been brought in the various cases involving marriage and same-sex couples, a lot depends on whether you ask the question, ‘do same-sex couples have the right to marry?’ Or ‘Is there a right to same-sex marriage?’

The United States Supreme Court a long time ago identified that there were certain fundamental rights including the right to marry not explicitly mentioned in The Constitution but recognized by the court as being fundamental because they possess two qualities. They are implicit in the concept of ordered liberty such that you can’t imagine being free without them. And they are deeply rooted in our nation’s history and traditions. So with the right to marry, the court recognized it as being one of our fundamental rights, ironically initially a divorce case. But it is well recognized now that we have a fundamental right to marry. But because this is the test for whether a right is fundamental, what I just ordered liberty, and deeply rooted in our nation’s history and traditions, the way you identify the right is critical. It really can determine the outcome. So again the difference between the right to marry for same-sex couples or the right to same-sex marriage. You may think I’m joking or making too much of this, but in 1986, as some of you may know, the United States Supreme Court upheld a Georgia sodomy statute after framing the question presented to it as whether or not there was a fundamental right to homosexual sodomy. Once you put the question that way, it must come as no surprise that a majority in the court said emphatically, ‘No there’s no fundamental right to homosexual sodomy.’ And Justice Berger in his concurrence hysterically said, ‘no, there isn’t.’ The dissent in that case, the four justices in dissent in Bowers versus Hardwick in 1986 said, ‘that’s not the question. The question is whether or not there is a fundamental right to privacy which encompasses the right of consenting adults to engage in sexual activity without the state’s interference.’ Seventeen years later, the United States Supreme Court majority in Lawrence versus Texas said, ‘yes that was the right question ask.’ And led to the answer that yes the dissent was right and overturned Bowers versus Hardwick. So with respect to marriage where the fundamental rights argument had prevailed such as in Massachusetts, the court framed the question as whether same-sex couples should enjoy the fundamental right to marry on equal terms as different-sex couples. Where the argument has failed such as it did in Washington, the court framed the question in terms a right to same-sex marriage as if it was a different species of marriage. So, so much depends on the red wheelbarrow. And that always reminds me even at the time when we were arguing Anderson, there was this great joke in The New Yorker, a great cartoon. The word same-sex marriage kept coming up as we were talking. We kept trying to avoid it. It was just invariably we’d fall into this. There’s two guys sitting in a bar, slouching over their drinks, one of them pointing at the other one, ‘What I’m not for is no-sex marriage.’ So the modifiers are very important.

The fundamental rights claim often dovetails with the other two claims. Both of which are equality arguments arising either from the equal protection clause or its state constitutional variant or the state equal rights amendments of which there are many, including one in Washington. With equality arguments, necessarily you are comparing classes or categories, something on either sign of an equal sign. In the marriage cases the argument is made that excluding same-sex couples from marriage operates only by way of a sex-based classification. That is you have to discriminate, tell the difference between, people on the basis of sex. So I can marry Clark or I can’t marry Kathryn because of their sex or because of my sex. Now sex discrimination is not as popular as it once was and it’s not really tolerated very well by The Constitution in most respects. The state if it seeks to classify by sex has to come up with an exceedingly persuasive justification for doing so. We are
very suspicious of sex-based classifications. So for example, when this argument about denying marriage licenses to same-sex couples was a discrimination based on sex came before the Hawaii Supreme Court, the Hawaii Supreme Court said, ‘Yes we see that.’ And by the way back in 1992 when the court said that it sparked this enormous reaction and Congress rapidly passed and President Bill Clinton instantly signed the defense of Marriage Act. So if ever you hear people say Congress can’t act or can’t act quickly, you just have to remind them it’s all a matter of properly motivating them. If you scare them enough, they can move very quickly. The Federal domo was followed quickly by many, many state domos, mini domos we often call them. The Hawaii court said we have an equal rights amendment here, guarantee sex equality to our citizens. And by refusing to issue marriage licenses to Nina Baer and her partner at that time, another woman it was no different, the court said, than from Virginia for prosecuting Richard and Mildred Loving for marrying one another, an interracial couple from marrying. In 1967 the United States Supreme Court said you can’t do that, they have a fundamental right to marry and you can’t discriminate against them in their choice of marriage partner based upon race. And it didn’t do any good to argue that they each could marry another person of the same race as they were. The court said not this is race discrimination it violates the equality guaranteed to them under the equal protection clause and Hawaii said that looks a lot like our case here. The Washington Supreme Court didn’t think so some years later, disagreed with that analysis and said, not we see them being treated the same. Yes it’s true a woman can’t marry another woman, but it’s also true that a man can’t marry another man. So I can’t marry Kathryn, but Clark can’t marry Jamie, so everything’s okay. This is a kind of separate but equal argument in a way but one we often refer to as equal application. It applies equally to everybody so there’s no discrimination. That worked for a while with race, but it’s not quite as useful or favored anymore. Maybe it is because we like to think that our right to be treated equally as an individual right. It doesn’t really do me any good that Clark can’t marry Jamie. It doesn’t really do me as an individual any good. But maybe I am editorializing now.

So two arguments, our third argument is that there is an unequal treatment here also isolating equal protection clause based on the classification of sexual orientation. Now the various statues that have been passed that require that a man may only marry a woman always speak in terms of sex but never speak in terms of sexual orientation. But the courts seem to recognize implicitly that sexual orientation is at issue. Now when addressing this kind of classification, the courts have been much more deferential. So law students will know this but maybe other won’t realize, unless you’re talking about race or sex or some other suspect classes for the most part the courts let the executive and the legislative bodies classify as they like. So, you know, age, and marital status and wealth and things like that. So a much deferential review, but still the state has to have a purpose when it does anything and the purpose has to be at least legitimate. They can’t just be out arbitrarily acting. You can’t just be out to be mean to people, that can’t be the state’s purpose. So you have to talk about the purpose and here again, for the last time, I promise you, the framing is critical. That is in thinking about how to answer the question you have to decide what your question is. Are you talking about the purpose of marriage or the state’s regulation of marriage? Or are you talking about the purpose in excluding some people from marriage? Whichever of these questions you focus on, again, in the courts tend to determine the outcome. And again, I’m not trying to just annoy you; it really does make a difference. The Washington Supreme Court majority addressed itself to the first question and they said the purpose of marriage is procreation. And because same-sex couples cannot procreate without the assistance of a third person, marriage is properly limited to different-sex couples. Indie Adam vividly said, I’m embellishing just a little bit, said, ‘marriage is a catch basin into which the passions of heterosexual intercourse can be channeled. The consequences plop into the catch basin of marriage.’ Again, I’m embellishing just a little bit not much though really. The dissent on the Washington court said no, the question is what purpose is served by DOMA excluding same-sex marriage? What’s the purpose there? They could see none except prejudice, indulging the prejudice of the majority. Certainly, it doesn’t help different sex couples to marry or to procreate. It’s true there was no evidence that anyone declined to marry
because of the prospect same-sex couples could marry or certainly didn’t have much effect on people procreating. Massachusetts went one step further, where of course the court did allow couples to marry and so the purpose of marriage was to foster intimacy and to promote stability between the adults who may or may not have children. But it’s the adult unit that is of consequence to the state and yes, the benefits that flow to them from the state’s involvement in marriage will flow also to their children if they have them. But denying marriage to same-sex couples on the basis of some procreative notion didn’t cut it with the Massachusetts Supreme Court and moreover, they said if you’re doing it for that reason, how do you justify treating the children of same-sex couples whether they arrive with the help of a third party or not, you have now denied them the benefits that flow through their parents. So these are the three constitutional claims again in brief, the fundamental rights argument and two equality arguments, sometimes receiving warm and sometimes cool receptions in the courts. And so questions I guess for later. Thank you.

Kathryn Watts:

Thanks. Your comments Patricia are a nice jumping off point for me because I think that your talk in focusing about rights is very much in some ways emblematic of where a lot of popular constitutional discourse lies right now which is very much a rights based focus. We talk a lot in the media when you pick up your morning paper in the morning or you turn on the morning news, you see a lot of talk about rights-based issues. The right to an abortion, and whether it is or isn’t protected by notions of due process or, as Patricia just talked about, the right to engage in same-sex sexual conduct that was addressed in Lawrence and bowers. And whether that is or isn’t protected by notions of equal protection or substantive due process. The right to be free from cruel and unusual punishment, does that protect against juveniles being sent away for life in prison? Does it protect in certain ways, certain states’ three strikes you’re out laws? All of this rights-based discussion in our popular culture, I think, is very understandable because of the significant importance of rights at issue. But I find quit interesting that in recent years, I think sneaking into the popular discussion has been more of a structural focus. I think that we might be at a t a point, we perhaps are at a point where we’re going to start to see more of a shift in terms of the popular discussion to focus on structural issues as another way of protecting rights. So not to say that the spotlight will be taken off of rights but that there will be more popular understanding, more understanding of again, the modern media of the importance of structural government, the importance of constitutional provisions and how structures are erected to protect rights in the end. So, although constitutional structural issues often aren’t viewed as quite as sexy, right, as individual rights. That’s where I wanted to go with my talk today in thinking about the reach of federal power because I really do think that the reach of federal power is one of the most heated and one of the most important constitutional issues that our country is grappling with right now. And I think that at the moment we might be at a point of rediscovery of something that our founders seemed to recognize long ago when they framed The Constitution in terms of the fact that structural governmental controls and structural checks are a real prime way to get at protecting individual rights in certain circumstances.

So for example, to start out with one example, when Congress passes a law that allows the civil commitment of mentally ill sex offenders, for example, after the completion of their criminal sentences, this of course, could be attacked through a rights-based lens. It could be attacked as violating notions of due process, for example. Or alternatively as it was teed up in a recent case decided by the US Supreme Court last term, the Comstack case, it could be teed up through a structural lens, which is to say that Congress exceeded its bounds, it over-stepped its bounds and it didn’t have the authority to pass this law. So both of those mechanisms, the more overtly rights-based mechanism and the structural mechanism are ways in the end are ways of getting at trying to protect rights.
So in terms of what I wanted to talk about today of focus on structural protections and how I think they get at protecting rights I thought I’d talk mainly about two points. One is a lot of discussion going on today about the limits of congressional power, the reach of congressional power. I assume you’ll hear later a bit more from Jamie about the reach of executive power, I’m guessing from the title of his talk. So first focus on congressional power. And second I wanted to talk about a doctrine of preemption, something I think is viewed as highly technical and arcane, but that really speaks to some of these underlying rights-based issues as well.

So in terms of the issue, limits on congressional power, we all know of course our framers sought to elect a government of limited enumerated powers. And we know that the tenth amendment which expressly reserves all powers not given to the federal government to the states or to the people, it helps reaffirm this principle. But it’s a lot easier to just simply say well the government has limited and enumerated powers than it is to decide where those limited and enumerated powers end. A federal district court judge as he recently put it in grappling with a case involving a challenge to the Affordable Care Act, he said, ‘To say that the Federal government has limited and enumerated powers does not get one far.’ That’s because it can be a real challenge to decide whether a particular federal action falls within or without those powers delegated to the Federal government. And indeed in recent years, we’ve seen many examples of issues. Again, issues that I think are creeping their way into everyday American dialogue that deal with these questions about the balance of congressional power. So for example, to give some examples, guns in schools. All of my com-law students that I see in the room, you all know Lopez, the Lopez case. Where the question was, did Congress to prevent the possession, the mere possession, not the sale, but the possession of guns near schools as it did in the gun-free school zones act. And my com law students know that in a 5:4 decision, the split 5:4 decision down ideological lines, the court said that Federal government, that Congress lacked this power. In another recent significant commerce clause case Morrison, involving the Violence Against Women Act, the question was whether Congress had the power to pass a civil remedies provision, allowing remedies for victims of gender motivated violence. And in that case, too another split 5:4 decision down ideological lines, we see the Supreme Court holding that the Federal government lacked this power. More recent involving the reach of congressional power, involving the Controlled Substances Act: Gonzales versus Raich. The key question in that case, did Congress have the power via the Controlled Substances Act to prevent a woman or women but one of the plaintiffs in that case, Angel Raich a woman who suffered from an inoperable brain tumor and other serious medical ailments did Congress have the power via the Controlled Substances Act to prevent her from using homegrown medicinal marijuana that state law, California law permitted her to use. And in a 6:3 opinion there, we saw the Supreme Court holding that Congress did have the power to regulate the use of intrastate medicinal homegrown marijuana in that particular case. Of course another example to throw into the list of questions in terms of the reach of congressional power is the Affordable Care Act itself. The question of whether Congress has the power via the Affordable Care Act passed in 2010 to mandate that all Americans purchase health insurance or pay a penalty. We of course don’t have the Supreme Court’s answer to this question involving congressional power yet, but the lower Federal courts have begun to weight and have split on the issue and certiorari petitions have been filed with the US Supreme Court so perhaps we’ll get that answer from the court sometime soon.

So I think all of these examples help to raise basic examples of this basic question of how far federal governmental power goes. And helps to show how beginning with cases like Lopez and Morrison, the Rehnquist courts started us down the path of pulling back the reins on congressional power, something that was a significant shift from the post New Deal era, where we had a very lenient very liberal reading of congressional power.

And so today in thinking about where we might be going and reflecting on The Constitution I think this issue of congressional power is one to keep an eye on in terms of what the current Roberts
court, what future supreme courts under future justices will do with these issues of congressional power. Will they try and run with the pulling back with the reigns as the Rehnquist kind of federalism revolution attempted to do or will they continue along the path of what generally has been our post New Deal trend of enabling Congress to exercise and wield broad, broad powers.

So to turn briefly to the second structural issue that I said I wanted to flag today: the issue of preemption. Even of course when we’re faced with a Federal law that’s valid and a law that Congress did have the power to pass, we’re often faced with some very very messy questions about whether that Federal law should be allowed to displace or to oust or to preempt state law from operation. Georgetown’s professor Larry Gostin recently said something about preemption that I think is quite useful. He said, ‘Most people think of preemption as a technical constitutional doctrine but it is pivotally important to health and safety while also opening the door to broad judicial discretion.’ So why does he say this? Well because federal preemption is all about whether federal law in a variety of areas in areas of health, safety, the environment, whether it can oust state regulations from the field. And in many ways the current Roberts court in terms of Gostin’s reference to judicial discretion is a court that has been very focused on preemption, in fact it could be thought of, as Professor Lombardi was reminding me of in terms of discussions we’ve had in the past could be thought of as the preemption court. In terms of the Roberts court today, the court has decided eighteen different statutory preemption cases. So preemption has certainly been a hot topic on the court’s docket. And many of the preemption cases have raised some fairly heated issues. So for example failure to warn claims, does a woman named Diana Levine who lost her arm after being infected with a drug Phenergan via IV push, doe she have an ability to raise a state law failure to warn claim? Or is her claim preempted by federal law? The Supreme Court in 2009 Wyeth versus Levine said that federal law did not preempt her claim. She could sue 6:3 opinion. Then if you look forward a little bit to another case involving injury caused by drug or device, but here it was actually a vaccine. It was the National Childhood Vaccine Injury Act. And the question was whether an individual Hannah Bruesewitz and her family, could they sue? When what happened to Hannah Bruesewitz is she was given a routine childhood vaccine at her six month checkup, parent’s worst nightmare, right? And their child suffered severe seizures that impacted her for the rest of her life. She’s now a teenager and needs constant care. So the question was could Hannah and her parents, could they sue the drug manufacturer or not? Was their claim preempted by the Federal National Vaccine Injury Act? In a 6:2 opinion the court held that her claim was preempted a new opinion handed down just last term. We’ve got a variety of issues percolating up in the lower courts on many many issues not involving drugs or vaccine or devices but for example heated politically divided issues like immigration. With all of these very aggressive state attempts to regulate immigration at the state level-states like Arizona and Alabama. We just recently had a Federal district court for example weigh in the Alabama law that says that school officials are required to determine the immigration status of students before they enroll in school. So here to, preemption questions raised in terms of whether federal law preempts/ousts those state laws from operating. So all of these sorts of various preemption issues that the courts are dealing with and that the Roberts court has been dealing with quite prominently I think help to illustrate how preemption really gets at the heart of allocation of power between our federal system and our state system. And so when Americans are picking up the papers as I know they are reading about people like Diana Levine when she’s on the front page of the New York Times without her arm holding her instrument. Or they’re reading about the Bruesewitz family and what happened to Hannah. Or they’re looking at the images of the school children impacted in Alabama by this Alabama law they may not realize that they’re reading about preemption issues and about some of these structural constitutional law issues but they are. And so in my brief remarks today, that was really my goal was just to highlight for you two aspects of structural constitutional law: the reach of congressional law and preemption issues and to highlight how these sorts of structural issues shouldn’t be overlooked as we focus on our end goal of protecting individual rights. Because after all structural
protections, structural controls and checks that’s what they’re really designed to do is to in the end protect individual rights. Thank you.

Jamie Mayerfeld:

Okay thank you everybody for coming. My remarks are about The Constitution after 9/11 and the question I want to as is how well has The Constitution weathered the shock of 9/11, specifically has it affectively protected individuals from government abuses committed in the war on terror? Now this is a question a lot of people have been asking and some people say that The Constitution has fared pretty well. They point to a series of Supreme Court cases which blocked certain counter-terrorism vigorously pursued by the executive branch. There are four big Supreme Court cases dealing with counter-terrorism policies. They are Hamdi versus Rumsfeld, Rasul versus Bush, Hamdan versus Rumsfeld and Boumediene versus Bush. And in these cases, the supreme court ruled among other things that US citizens detained as enemy fighters must be given a fair opportunity to rebut their designation as combatants before a neutral decision maker. A supreme court ruled that detainees in Guantanamo Bay have a constitutional right to habeas corpus. The Supreme Court ruled that the use of military commissions by the executive branch must comply with laws passed by Congress. And the Supreme Court ruled that common article three of the Geneva Conventions requiring humane treatment of prisoners and fair trial of prisoners accused of war crimes applies to prisoners who are members of AL Qaeda. Members of AL Qaeda are protected by Common Article Three of the Geneva Conventions. So these were highly visible, highly charged cases and the supreme court showed considerable courage in standing up to the executive branch on matters of national security in the wake of 9/11. And some people say look these cases show that the constitutional system of checks and balances and separated powers designed among other things to protect individual rights and freedoms from executive overreach has succeeded, has weathered the shock of 9/11 quite well. We see this for example in a recent essay by Trevor Morrison in the Harvard Law Review. His essay is called Constitutional Alarmism and his essay is a warning against constitutional alarmism. He cites these Supreme Court cases to argue that we should not be ringing alarm bells over the state of our Constitution. And the essay is a book review and a criticism of Bruce Ackerman’s recent book The Decline and Fall of the American Republic saying that actually The Constitution is in crisis.

Now I think these Supreme Court cases are indeed significant. They’re significant for law and they’re significant for policy. They did place a significant check on government policies. But I want to argue that the check was a decidedly limited and partial check and that those Supreme Court cases have allowed many abuses to continue undisturbed. They allowed some abuses to continue under the Bush administration, some of which have continued under the Obama administration. So in brief I want to look at ways in which The Constitution has failed after 9/11. I’ll call attention to about four human rights violations that have been committed as a matter of policy by the US government. And in the end I’ll invite us to think about what we can do about the problem.

First, the US government adopted a policy of clandestine imprisonment and torture after 9/11. The fact that the government adopted this policy in the first place is a constitutional failure. The Constitution should have prevented that from happening. But even more striking is the fact that policy continued even after we learned about it. Now the first thing I want to say is that the US torture policies under the Bush administration were in violation of the law. Laws prohibiting and criminalizing torture were in place and they remain in place. The problem was that those laws and they were not effectively enforced. And torture continued even after the Abu Grebe revelations calling the attention of the world to this policy. I think it’s striking in particular that not court ever acted to stop torture. No victim of torture was ever able to use a court to stop the use of torture.
against him. And one would think that in a functioning system of checks and balances the judiciary would stop executive officials from using torture. That didn’t happen.

Second human rights violation is indefinite detention without charge or trial. President Bush authorized the use of indefinite detention without charge or trial in the first few days after 9/11. President Obama announced that he would continue that policy shortly after he became president. In May 2009 he delivered an important speech on Guantanamo Bay announcing that he would continue the practice of indefinite detention which he called prolonged detention and that would apply to individuals in Guantanamo Bay who would not be brought to trial but whom it would be too dangerous to release and he has continued to maintain that policy until the present day. Meanwhile, Congress has acted to reinforce and also expand the indefinite detention policy. There is now legislation before Congress that would authorize the indefinite military detention without charge or trial of US citizens and residents suspected of terrorist activity abroad. And the same legislation also says that Guantanamo detainees must be kept in Guantanamo regardless of their past conduct. If the receiving country, the country that would otherwise receive them has failed to guarantee that they would never threaten the United States or its allies. And also if another detainee formerly at Guantanamo returning to that country subsequently engaged in an act of terrorism. This legislation was voted out of Senate Committee in a vote of 25 to 1. It hasn’t been approved yet. Some of us have been asking Senators Murray and Cantwell about this legislation for months but they still will not say whether they will oppose this legislation.

The third human rights issue is unfair trials. And here I’m referring to the use of military commissions in Guantanamo Bay. First authorized by President Bush himself then authorized by Congress in the military commissions Act of 2006 and then reauthorized in the military Commissions Act in 2009 under legislation drafted by the Obama administration. And there are a lot of criticisms of the military commissions but I think the most significant ones is that they give rise to unfair trials. They are heavily rigged in favor of the prosecution so much so that I think they can be legitimately referred to as show trials that is to say trials that have predetermined outcomes. And the most dramatic example of the unfairness of these trials is the recent trial of the child soldier Omar Kadar in which the judge ruled in statements issues by Omar Kadar that were elicited under torture. Said that those statements could be used by the prosecution. After which, Omar Kadar was forced to accept a plea bargain confessing to the crime of which he was accused.

I guess there are two more issues that I want to call attention to. The fourth is the refusal of civil remedies to victims of torture and other serious human rights violations. So many victims of US human rights abuses have sought to seek some kind of relief in the courts, have sought to bring law suites. And both the Bush administration and the Obama administration have vigorously fought their right to do so arguing that those suits must not be allowed to proceed. And so far the courts have ruled pretty consistently in favor of the government using a variety of doctrines including the sovereign immunity doctrine, the political question doctrine but most effectively the state secrets doctrine. So the courtroom doors have been slammed to victims of US human rights violations. This is significant not only because denies civil remedies to the victims of these violations but also as is pointed out by Stuart Streichler in his article “The War Crimes Trial That Never Was” recently published in the University of San Francisco Law Review. It means that the courts are prevented from issuing important legal rulings on recent practices by the US government.

The fifth issue is the issue of impunity and that is the fact that architects of the CIA torture program or enhanced interrogation program have not faced criminal penalties for their actions and almost assuredly will not despite the fact that they violated the US Torture Act, The US War Crimes Act, The Geneva Conventions and The Torture Convention.
So the puzzle then is how were these practices allowed to occur given The Constitution’s protection to individual rights and liberties elaborated in particular detail in the bill of rights? And that’s a big question. But I think part of the answer is a defense on behalf of these policies in the name of The Constitution saying that under The Constitution, the government has certain war powers, for example the government has the power to kill and capture enemies in wartime. And the government has argued with some success that therefore the war powers exception shields certain practices by the US government and shields other practices from review by the courts and those arguments have been largely successful. So I think when looking at the failure of The Constitution what we need to pay attention is to the war power exception. And Justice Robert Jackson is famous for saying that, “The war power is the Achilles heel of The Constitution.” And it’s an exception that’s ever expanding after 9/11 and is I would say, swallowing up ever-larger parts of The Constitution. Is there anything that we can do about this problem?

And I want to suggest very briefly in my final remarks that we should make greater use of another source or another body of law and that is International Human Rights Law for protecting individual rights at times of national security threats and war, because International Human Rights Law among other things has been written largely with those circumstances in mind. There are four ways I’ll mention here in which International Human Rights Law can be useful in shoring up individual rights and liberties and therefore I would argue in protecting our Constitution. First and most importantly, Human Rights Law deals directly, explicitly with the issue of exceptions in a way that the US Constitution doesn’t do as systematically. International Human Rights Law says yes from time to time countries will face emergencies and may be permitted to suspend certain rights under those emergencies but only subject to certain procedures and there are certain rights that can never be suspended. It’s very carefully articulated in that the rule of the exception under International Human Rights Law would be very helpful to the United States at the current juncture. Second, International Human Rights Law makes it quite clear that coercive interrogation is always prohibited under any circumstances without exception even when the national security is threatened. Third, there’s a growing recognition under International Human Rights Law of the inviolability of the right to habeas corpus. It’s becoming increasingly an inviolable non-suspendable right. And fourth, there’s a lot of case law and a lot of treaty law dealing with the issue of indefinite detention or preventive detention. Under what circumstances is preventive detention justified? And what kind of due process rights must be extended to individuals subjected to indefinite detention? For example there’s a very important case that was recently decided by the European Court of Human Rights A and others versus the United Kingdom which confronts this issue head-on and had some very helpful conclusions basically arguing that the right to habeas corpus must come close to the right to a fair trial where the individual is facing the prospect to a long prison term and that departures from the right to a fair trial must be carefully justified, subject to certain limitations.

To conclude, I would say that after 9/11 The Constitution has not withstood the shock of 9/11. It needs help, we all need help. And some help may be available from international human Rights Law. Thanks.

George Lovell:

Okay when Katherine asked me to do this I was a little worried I would sound like a bull in a china shop given what I have to say relative to other things. But I actually think it dovetails quite well with some of the other talks as I was listening to them. But I am here to sound the constitutional alarm bells that Jamie was referring to. I want to make basically two points. One is that we’re facing a pretty serious constitutional crisis right now that’s related to our system of democratic checks on government and the way in which those checks are broken. And the second point is that this crisis has a constitutional dimension. It reflects certain flaws in the constitutional design and
outmoded features in the constitutional design that have contributed to this breakdown in
democratic accountability and have also made it a lot more difficult for us to have hope that we can
get out of it. It’s not constitutional in a sense that this is about particular issues of constitutional law
that are facing the Supreme Court although there are some of those that are implicated into it. I
think the reason why I think of it as constitutional is not because the Supreme court is going to
decide but because it’s ultimately raising fairly profound existential questions about what kind of
society we are, what kind of voice we the people are going to have in that society and what kind of
compact our ongoing project of constitutionalism is going to be.

So first a little bit about the crisis itself. I think it can be described in terms of some familiar
symptoms of the crisis that are happening that shouldn’t be happening in a robust, responsive,
democratic system. One is that very visibly we have gridlock in our national political institutions.
They are incapable of responding to some pressing crises that really need attention. These include
things like the ongoing destruction of the environment and more recently very, very high levels of
unemployment. That’s a human catastrophe that has been going on now for a few years and that’s
been projected to go on for more years. We also have crumbling infrastructure. These last two
problems are actually fairly easy to solve. We have a point the interest rates are so low, the
government can almost borrow money for free at this point and yet there’s no response at all to
these things. There’s also a lot of policy responses that have majority support that are not even on
the active agenda and objects of discussion as part of this process. A second symptom I think is that
we have increasing visible and direct, this sort of trend to normalize efforts to manipulate the
political process. But diluting votes that people do have and also by disenfranchising people who
do have the votes. We see this for example on processes of redistricting. Now this has always been
part of the political system but we now have mid-census redistricting in Texas early in the 2000
decade and also now the Justice Department is investigating them for deliberate race dilution of the
vote. We also have efforts to selectively manipulate the Electoral College to change the outcome in
the upcoming presidential election. We also have this alarming trend for these indefensible voter ID
laws which the Brennan Center has calculated is going to disenfranchise five million people in the
2012 election. That’s compounded by an ongoing problem of felony disenfranchisement which is
raises the issue of the one distinctive thing about the United States, the land of the free, is that we
put a lot more prison than any other advanced society. And what people are starting realize is all
this disenfranchisement and imprisonment is having real effects on the political system. It’s
affecting the apportionment of state legislatures in a way that’s changing the outcome state
legislative elections and it’s also just disenfranchising people. And a lot of this is tinged with the
great element of inequality historically in our society. It’s tinged with racism and racial animosity
and that’s part of the reason why these policies are even tolerable in our society is because of the
underlying racism in our society. A fourth symptom and this is one that’s getting a lot of attention
lately is the shocking inequality in the distribution of wealth in our society. This is not a long term
trend or something that’s always been there, or something that’s inevitable, or that’s just what
happens in capitalist societies. This is something that marks a profound change from past practices
that has emerged in the past thirty years. I’m not going to belabor this I think anyone who has the
internet has seen these various charts that have been floating around. But what’s happened is that
there’s a very, very narrow elite that’s extracting a lot of wealth from the rest of the society. And
this is not happening because of market forces. It’s happening because of policies that the
government has pursued that have enabled people to do this and allowed this to happen. Now
inequality may not be desirable. You may believe that that 0.1% actually works harder than
everyone else and deserves it and that what they’re doing is productive. But, it does raise questions
of legitimacy and stability of the political system. And I think if just from the perspective of
political theory what the expectation is is there’s a tension between having an economic system that
allows inequalities however desirable it may be and having a political system that gives people
political equality. And that tension is usually worked out by and what’s expected to happen is that
are sorts of redistributive policies that are pursued when the society starts to perceive the inequality

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as being intolerable or undesirable and that’s what happens everywhere but it doesn’t seem to happen to here because we have more inequality and higher rates of inequality than other democratic countries. And at the outer limits the inequality becomes hard to defend on substantive grounds and becomes unpopular and if the supposedly democratic system doesn’t lead to adjustments in the form of redistribution or a couple of other adjustments that I’m going to mention, then that does produce a certain threat of instability and uncertainty. I think another thing; it’s not just about redistribution. I think other societies have responded by doing things to ameliorate some of the cost of these things like a social safety net, health insurance for people, old age insurance so that people don’t live in constant uncertainty and risk and that’s sort of the deal as part of the social compact. But of course those are very much under attack in the United States as well. Another thing is equality of opportunity which helps to give people faith that the inequality is justified and that can be done through aid to education, another thing that’s very much under attack in the United States as well. So this does raise problems independent of whatever the economic wiseness, it does raise costs. Otherwise, efforts to correct this are being blocked by some of the less majoritarian features of our political system.

Now a couple questions all of this raises is what ultimately is going on? What does this mean? Why is this happening? Why is it happening in the last thirty years? And then I think for the question that I raise since I’m doing this rant on Constitution Day, what does all of this have to do with The Constitution? And I think as far as why it’s happening and what’s happened in the last thirty years? I think both the causes and actually the implications of it I think are things we don’t really understand. There is some work by political scientists increasingly. Some interesting work, I think. The leading people on the issue are Hacker and Pearson who have a book called Winner Take All Democracy that explores some of this. And I’m going to crib some of this stuff in talking about it from that book. But I don’t really think we have the answers yet.

Now one easy suspect for all of this in terms of lack of democracy is The Constitution itself. And you can raise the issue that well we have this system that designed in the eighteenth century for an agrarian society and we’re still trying to use it to govern a twenty-first century society and there’s all sorts of features of The Constitution that are undemocratic and majoritarian most profoundly the United States Senate which I would call the world’s worst deliberative body. But you can’t say it’s simply The Constitution. I’m not going to blame The Constitution because The Constitution’s been there for a long time. Part of the point that I’m trying to make is these are not permanent or inevitable problems but they’re things that have happened relatively recently. So I would characterize it as there are other developments and challenges and things that have arisen that have made some flaws in The Constitution more consequential and more dangerous in terms of thinking about the social compact and thinking about the society. Another thing I would say just to point out, this is tied to US politics and policy. It’s not just about more sort broadly universal forces of technology and globalization and world capitalism or something like that. Those forces are operating on other countries with very different consequences that are more in line with what you would expect from democratic theory but those ameliorating effects aren’t happening in the United States in the same way and so the problems that those challenges create are not being responded to.

So a couple of things just about constitutional foundations, I’m not going to rehearse all of the nondemocratic features of The Constitution. It’s by design that way. The founders, and I think they were really progressively democratic for their day, but intolerably undemocratic by today’s standards, but things like the Senate, which I mentioned and I’ll mention again, the electoral college which profoundly affects every single presidential election not just the ones where the winner doesn’t get to become president. As well as the retention of elements of state sovereignty that Kathryn talked about, that related to what Kathryn was talking about. One thing to say about these things is that while they were part of the constitutional design every single one of them has been moderated by a constitutional amendment which makes it more responsive and more
democratic. So that’s the constitutional issue that’s in the background. But among the shorter term factors that are affecting this, a lot of political scientists have noticed increased polarization of the political parties. There are of course really important changes in the way that elections are funded and paid for and the way that money flows in to politics. And this is a trend that’s of course changing and being accelerated by some Supreme Court decisions that have decimated the efforts to provide campaign finance reform. It’s also been affected by changes in civil society. Political scientists have noticed that there’s been a dramatic decline in membership of all kinds of organizations, fraternal organizations, other kinds of social groups and that this effects on the people participate in politics. Some of this is related to technological change but other things as well. And one of the most important of these is the decline of labor unions and labor organizations. It’s very difficult to form labor organizations in the United States relative to other places. And a lot of people have focused on the economic effects of that in terms of distribution. And this is from Hacker and Pearson, the political effects of it may be more profound. There’s nothing that has filled the void in terms of a voice for working class people in our political system to take the place of unions that used to be filled by unions. That’s a problem. Also the unions did a lot to educate people independently of what they might be hearing from parties and the media about what the consequences of policy are. Other factors there have been changes in the way that the media works. The thing to emphasize about all of this is that the dysfunction of the political system augments all of these trends. Gridlock is not something that’s just neutral and an equal opportunity destructor. It favors all those already holding entitlements and already at advantage and reinforces those advantages. So the fact that you can’t change the law means things like you can’t change the minimum wage. It means you can’t update labor laws that were written for an industrial economy to the way our economy is now. It means you can’t tax hedge fund managers at the regular rate rather than the capital gains rate. The problem is that when there is existing inefficiencies, it creates political resources to protect those. So if you look at something like healthcare. The story there is that every one of the inefficiencies in the system created a profit center and each of those profit centers was then drained off of two block health care reform that would have threatened that ability to skim money out of the system. Okay, so the other thing to emphasize is that there’s a ripple effect of this dysfunction. It increases a lot of alienation and dissatisfaction and frustration with politics. Polls show very, very high rates of dissatisfaction with our political institutions and lack of trust in our political institutions. And the fact that elections don’t seem to have consequences and the outcomes of popular things can be blocked then that encourages that. So in terms of this as a constitutional threat, I think that what it’s leading to is a lack of legitimacy that reflects, that ultimately threaten stability of our society and the commitment that people have to this ongoing project of constitutionalism. And the resolution of the crisis is something that has to be done as part of the constitutional order where people have to take seriously the fact that some of these things are raising existential threats and are not just part of the give and take of politics.

Now there’s a couple past models for this in the face of constitutional dysfunction or failure. One model is the Civil War which is probably something to avoid but that was the result of the failure of the original constitutional order. Another one is the one that occurred in the 1950s and 60s in response to the failure of The Constitution to live up to the basic promise of racial equality and there was a civil rights movement. And the Supreme Court played not the central role but an important supportive role in that process. But I don’t think we expect the current Supreme Court to play a very constructive role in the process that we’re going to have to go through to resolve this crisis. So I think what has to happen is that the people themselves have to insert themselves. They have to somehow come up with a mechanism for getting outside of the existing dysfunctional party system and division getting beyond the current spectacles that we stage that involve so few such a small percentage of the people because so many people don’t vote. And things like disenfranchisement laws and efforts to obstruct the political system and the responsiveness of the political system. Those can’t be approached simply as the ordinary give and take of partisan politics and partisan advantage, but as really a pretty profound threat that crosses party lines and that gets to
the very core of the legitimacy of our political system. And more generally, people just have to
develop stronger commitments to democracy as a control on governing institutions and as a
mechanism for both enriching communal life and drawing people into it.

It’s hard for me to be optimistic in closing on Constitution Day in part because I’m not confident
that the mechanisms that are provided by our constitution necessarily provide a way out.

Clark Lombardi:

Okay so we have about twenty minutes. I have a very hard job because I’m supposed to be the
moderator and we heard a lot of extreme stuff and if I’m supposed to moderate it then I have a hard
road to hoe. But I do think there are some interesting things to think about. It’s a time of
remarkable pessimism about the American Constitution. It’s quite an interesting Constitution Day
to live in. By and large I think the pessimism we’ve heard today would be characterized in the
popular media as coming from the left but there is actually on the right an enormous amount of
pessimism as well. The Occupy movements that we see all over the country are responses to an
extraordinary populist movement and modes have been coopted and organized in a way that it
wasn’t initially in the Tea Party. But there seems to be more discussion about The Constitution and
its failings at this point than pretty much at any point that I can remember because it seems that
everyone’s ox, or at least among the vast majority of Americans everybody feels that their ox is
being gored. That’s actually the most productive time to engage in constitutional change. If only
one person’s ox is being gored, then the other side will entrench themselves. So I think it’s actually
a very exciting constitution Day to think about The Constitution as a way to structure political
discussions to think about constitutional communities as discursive communities-people who agree
on certain mechanisms by which they will hopefully talk productively but at some point act.

George seems to suggest that revolution is in the offing and I don’t know that we’ve gotten that far.
But I do think that evolution is clearly in the offing. It is very hard to have so much systemic
dissatisfaction and as he puts it as a legitimacy crisis, but it’s not a uniform legitimacy crisis. This
isn’t the masses rising up against, at least as I see it, it’s not the masses rising up against the French
king, but it’s rather a lot f people who would agree with George at the basic problem that The
Constitution is not grappling with the challenges that the society, or doesn’t give us the right tools
with which to address the challenges that this society is facing even though they may disagree
deeply about both what the problems is that need to be addressed at least in prioritizing them and
disagree about the solutions. One thing that’s come up in so many of these discussions today
involves the role of politics in The Constitution either explicitly or implicitly. We have moved
away in the United States and I really think that this has begun to happen. It’s something I only saw
glimmers of when I was in law school but it’s snow-balled. The Constitution is not something that
begins and ends in the courts or the meaning of The Constitution. We heard from the very first
discussion today that there are certain traditions or guarantees both in the Federal constitution and
state constitutions about which people can disagree, about the contours of them. One can
conceptualize a right in different ways and how one conceptualizes that right is going to affect the
robustness with which you protect a certain group of people or not. Reasonable, when I say
reasonable I suppose that some people might disagree that anyone who disagrees with them is
reasonable, but I don’t think anyone’s taken that position here. We’re simply in a mode in which
there are several possible answers to constitutional questions and the answers that one comes up
with have enormous consequences for real people. And if that’s true then the question of who
makes the decision becomes dispositive. And who makes the decision is going to be a function at
some point of politics. And that’s not true only in the United States, but it’s true all of the countries
that I’ve studied from a comparative perspective. Sooner or later when you have enough
complicated problems about which society disagrees and about which different answers can come
up with the question of who appoints judges and who trains judges and how are they taught to
think, these become dispositive. Now one thing Professor Watts talked about and was also implicit
in Professor Novotny’s talk is that in the United States which is a federal system we have a peculiar circumstance or at least it was peculiar when the US Constitution was written in which there are different governments operating under different constitutions many of which sound remarkably like each other but are interpreted very differently. If you look at US state constitutions, the wording clearly bares family resemblances. They clearly are informed by each other as one would expect and they sound a lot like each other. At the same time the way that they are interpreted is remarkably different so we have a living example of different judges interpreting more or less the same language in very different ways with very significant consequences. Now the intriguing thing about that, and this goes more to professor Watts’ talk is that then the question of who decides becomes not only who is a judge sitting on a particular court but which court are you going to go to? Because if you can get an answer resolved in the courts of the Federal government you’re going to get one answer because the Federal government has a certain political cast to it. If you go to the state governments you may have a very different one and that is in fact been very much the case with a whole range or rights that are deeply important to a number of people. So the question of preemption as Professor Watts points out is extremely important. We can think of it as important for a whole range of interesting conceptual reasons but it’s also interesting because it hammers home once again the importance of politics undergirding the way a constitution is interpreted. Quite simply the question of where you go and trying to get a court case into either federal court or state court is a question to go to a court in which people have been appointed by a certain group of people and have a certain political cast. Or to go to an institution where the judges have been appointed through a different process, by different people perhaps beholden to a different party and will interpret these same words very differently. Professor Mayerfeld is pointing again to I think a political failure or what he perceives as a political failure and I think many people would although it’s of a slightly different cast because it involves what we might think of as horizontal, people use this jargon word “horizontal separation of powers” rather than vertical separation of powers. That one of the ways the US Constitution was drafted and specifically and consciously so was to make sure the power was not only divided between different governments in different regions of the country the roots of our federalism, but that within at least within the Federal government itself there would be very different institutions. Some of which were majoritarian democratic some of which were less majoritarian democratic and some of which were entirely un-majoritarian democratic, this being the judiciary. And the hope was that however weak the central government was it would continue to be even further weakened by this division between groups of people who were elected different and therefore had different political commitments. Everybody knew that the Senate would have different political commitments than would the House of Representatives, than would the President. They would have different priorities, that they would be elected in different ways by different people. What Professor Mayerfeld is pointing out is that the balance between these seems to have broken down in the post 9/11 era. So not only do we have tensions between the idea that will the Federal government be so strong that it can override all of these regional dissenting views about what The Constitution means but that within the Federal government itself power has been arrogated to the executive. That is a serious issue and one that has to be grappled with. And we finished with a claim that nothing could be done about these problems and that the government will collapse into a pit of illegitimacy. And there is in fact some, there is empirical evidence to suggest that more than a few people agree that that’s the direction that we’re going in and that this is where we’re stuck. But I would challenge everyone to think about; however pessimistic we are about the possibility, how would one go about fixing it? Because as I said I really do believe that moments at which everyone is unhappy are the moments at which one has the most likelihood of changing anything. It is no accident that after the civil war the US Constitution was not only amended, but was entirely re-conceptualized. So not only were the words changed but the way people thought about the words that weren’t changed was quite profound. And the same thing happened in the Depression when everybody was unhappy and at this point we may be witnessing another time in which so many people are so unhappy that it’s a good time. So with that in mind I throw out to each one of the panelists if they have one suggestion about how one would,
and it has to be a practical situation, about how one would improve the situation even if not to save it and that can be of different sorts. It may involve changes in civil society which is something that I find particularly interesting because in parts of the world that I study changes in civil society are in fact dispositive more so than changes in court structure. It may involve changes in the media. It may involve calls for a deliberative constitutional convention or not, which has been floated to show how far we’ve come towards revolutionary proposals for change. But I’d like to hear one from each of the people on this panel and then we can throw it all to you either for your suggestions or further questions.

Patricia Novotny:

I hate pop quizzes. Well I’m going to borrow mine from Justice Sandra Day O’Connor and suggest that maybe we start teaching our children civics again. Because I practice family law and I know that I encounter in my practice and what I hear and what everyone else has said that to a certain extent, we are in a system where naturally somebody else is going to decide issues of great consequence to us. I have experienced that as a litigator I have to give up my case and what I think is right to judges. And I’ve had clients say terrible things about how unfair that is and how much they hate the judges and one even suggesting things about a gun. And I said it’s a lot better than deciding things with a gun even if you get screwed. It’s still a lot better and that is that by teaching the value of civics I think people can understand why this is happening to them. And understand that even on a bad day when they get a result they don’t like they might be able to live with it a little better because they understand there’s a greater good. That is that we have agreed to disagree in this way, reasonable people seeing things differently, so civics, civics lessons.

Kathryn Watts:

While you were speaking, I leaned over to Clark and said that was mind. And so I would ditto you on that I would ditto you on that I think civics would go a long way. But if I have to pick something different continuing with my theme that’s somewhat court focused. I would probably focus on the judicial conformation and try and de-politicize the process. I think that would go a long way to restoring Americans’ faith in the judicial system and in The Constitution if that’s achievable and maybe it’s not achievable. I’m a bit more of an optimist than a pessimist about the strength of our Constitution and our country and I think that’s one way we could all get there.

Clark Lombardi:

What would that look like? The public confirmation is a fairly new phenomenon and it was designed to open up and make more transparent and give people ownership over the courts. It seems to have had quite unpleasant consequences both in terms about what people know about the judges who were appointed and in their happiness with the judges who are eventually appointed.

Kathryn Watts:

Yeah, you go back to Justice Stevens appointed in 1975 before cameras were right in their faces, before this was such a public process. You know sailed through 98 to 0, that wouldn’t obviously happen today. I think certainly part of it may be the media. Now I don’t know how I feel about stripping the media from the process entirely but that I’m sure would make a difference. Whether it’s a good difference or not, I don’t know. Certainly there could be some structural aspects to how we organize and how we structure the confirmation procedures. I think a lot of it has to come from the Presidents that are doing the nominating themselves and of course the way our country has become so politicized that’s not very likely to occur. But you think about Justice Stevens one of his proudest mementos is a letter that hangs on his wall in chambers from President Ford a Republican who appointed him. Who basically says on Justice Stevens’ thirtieth anniversary in the court says,
‘If I had to hang my hat,’ the hat of my presidency, ‘on one thing I would pin it on having appointed you.’ And that made Justice Stevens feel so wonderful that this president is a Republican. After seeing how things played out and how Justice Stevens turned into a very liberal member of the court as the court evolved, none the less was very proud at that appointment. I don’t think a Republican Ford today would appoint a Stevens. So in the end if it’s going to change it comes down to um…

Clark Lombardi:

Jamie, yeah?

Jamie Mayerfeld:

So my suggestion is that the US should incorporate its International Human Rights Law obligations and its Law of Armed Conflict obligations into domestic law and empower judges to enforce those obligations.

Clark Lombardi:

It’s supposed to be a practical suggestion.

Jamie Mayerfeld:

Yeah, that’s my suggestion.

George Lovell:

It’s hard for me to answer the pop quiz because partly because when Clark finished I don’t think I meant to be quite as pessimistic as he made me out to be.

Clark Lombardi:

I’m sorry.

George Lovell:

I don’t think it’s impossible for it to be solved but I think that we are at a cross-road and that bad and dangerous things can happen. But I think my frustration. I’m not usually a ranter actually. But the reason why the whole situation is so frustrating for me is it’s hard for me to see what the way out is. But that doesn’t mean that people can’t imagine it. But I do think it’s a matter of sort of not engaging in the terms of the politics that we have and that our political system is giving us. And that’s what I mean by talking about it as constitutional. Getting outside of that and taking seriously the role beyond being voters but of being citizens of an ongoing collective project and really thinking about it. If we could talk better I think we’d come up with better solutions and if we could talk to one another better we could probably come up with better solutions. So it’s not unsolvable, but I don’t have a direct path out.

Clark Lombardi:

Anyone have a direct path out?

Audience:

Inaudible (1:19:22)
Jamie Mayerfeld:

My understanding from the press reports was that he was afraid that he might be arrested if he went to Switzerland that’s why he canceled his trip to Switzerland. And there was an attempt to arrest him in Canada where he is now or recently about to arrive. That attempt has not been successful so far.

Patricia Novotny:

But if Will Ferrell is right, President Bush is afraid of pop-up books too, so.

Audience:

Inaudible (1:20:07)

Clark Lombardi:

Well I’m just intrigued. No one says the text of The Constitution is timeless I mean we’ve had constitutional amendments regularly put forward in fact we’ve had a remarkable number of calls for amendments to The Constitution…

Audience:

Inaudible (1:21:01)

Jamie Mayerfeld:

I think we all think about that. Does The Constitution deserve our allegiance and how should we think about The Constitution? I think that the values underlying The Constitution are timeless, that the aspirations and purposes are permanently valuable and so that’s why I think it deserves our allegiance. And when I think about The Constitution and its flaws and mistakes and the intentions of the framers, the way I like to think about it is a kind of dialogue with the framers who were trying to create a system that would prevent the misuse of power and guarantee the responsible of power and I imagine being in dialogue with them and saying look in the last two hundred years here’s what we’ve learned about what’s worked and what hasn’t worked and enlisting them to agree that certain things and certain new interpretations are required in light of subsequent experience.

Clark Lombardi:

I’ve just been reminded that we have a class that comes in here at 3:30 so I think we’re probably going to have to wrap up at this point. And I apologize if I talked too long and kept any important questions, but everyone here is to be found on the campus of the University of Washington and it’s events like this that make me so happy to teach here where there are so many people talking about things that I find important and interesting from so many different perspectives. So a big round of applause for everyone here and thank you for coming.