SHOWCASE PANEL III

JUDICIAL DECISIONMAKING: JUDICIAL ENFORCEMENT OF THE BOUNDARIES OF GOVERNMENT POWER

Sponsored by: Federalism & Separation of Powers and Administrative Law & Regulation Groups

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Mr. Elliot Mincberg, *Executive Vice President, People for the American Way*
Hon. Lee Liberman Otis, *General Counsel, U.S. Department of Energy*
Hon. David Sentelle, *U.S. Court of Appeals, D.C. Circuit (moderator)*

JUDGE SENTELLE: Good afternoon. If I may impose on your time just a little, as we come to follow Ted Olson, I was reminded a little bit of a few years ago when Dick Halbertson, the esteemed Chaplain of the Senate passed away.

At his memorial service, one of the eulogizers rose to point out that he had been forced to follow Billy Graham. And preaching after Billy Graham was not something the man wanted to do. Coming here after Ted Olson is perhaps not what we had in mind in, I hope, not too dry an academic discussion — Judicial Decisionmaking: Judicial Enforcement of the Boundaries of Government.

We once again have a panel that illustrates the diversity and breadth for which the Federalist Society aims, and for which we are at least internally known in our panel selection. In allocating position and time, I will remind you that we review federal agencies for being arbitrary and capricious. Nobody is reviewing me and I am arbitrarily and capriciously going to give each speaker about 12 minutes to begin with. Thereafter we will have their critique of each other or their discussion of each other, and then questions and answers, in such time as is left.

The order is equally arbitrary and capricious. I'll introduce everyone now so that we don't have the Punch and Judy Show, popping up and down. Introductions will be short because you largely know most of these people.

Cass Sunstein, Professor of Law at University of Chicago Law School, Professor of Jurisprudence. He also serves in a political science capacity, as well as the law school. Among one of his many accomplishments is that he worked for Ted Olson at the Department of Justice.

Kenneth W. Starr, of whom you may have heard. Ken worked with me on the United States Court of Appeals for the District of Columbia Circuit. He attended Duke Law School, which has the honor of being within 15 miles of a very fine law school and is at least one of the two finest basketball programs in the ACC; and whose wife probably has my picture on a dartboard for something else I got him into later.

Elliot Mincberg, who is the Legal Director for People for the American Way. You heard a quote from that group about the Federalist Society. I don't remember what it was. Previously, he was with Hogan & Hartson. He served on the Advisory Committee for the Center for Democracy and Technology, among a long list of other legal accomplishments and public service.

Finally — and you may have seen her come rushing in late — our fourth panelist, Lee Liberman Otis. If you know Lee, which most of you do, you know that the only time she's not late is when she does not show up at all. We're glad to have with us Lee Liberman Otis, the General Counsel for the U.S. Department of Energy, whose contributions to this Society and to public service are way too long to undertake today. So I will leave it at that, and we will bat in the order in which I have read into the record, beginning with Professor Sunstein. Cass.

PROFESSOR SUNSTEIN: It is a great pleasure to be here, and to see so many friends and some students and colleagues from long ago. The only people I cannot see are right there because the light is shining. It's a little like a Steven Spielberg movie.

I have an epigraph, which is from a very short speech by Learned Hand in the midst of World War II, which was a speech called "The Spirit of Liberty". And Hand wrote — and here's the epigraph — "The spirit of liberty is that spirit that is not too sure that it is right." Hand was a great critic of judicial oversight of the democratic process. He was nervous about judicial power, and there was a link between his caution about judicial involvement in overseeing what the political process and his conception of what the spirit of liberty was.

What I am going to offer substantively is a separation of powers perspective on Federalism. It is a cousin to a separation of powers perspective on individual rights, which perhaps will not be unfamiliar.

The separation of powers perspective on Federalism has two components. My first suggestion is, in the absence of clear authorization from Congress, the Supreme Court ought not to permit the executive branch to intrude on the powers of the states, at least if the intrusion would raise serious constitutional problems. My suggestion then is that the President ought to be required to have a clear mandate from Congress, if there is going to be an intrusion on ordinary

understandings of the federal structure. So, this is a plea for federal judicial protection of state autonomy in the absence of clear congressional permission.

The second part of the separation of powers perspective on individual rights is that, if the President and Congress have agreed, or if the Congress has clearly authorized the President to intrude on individual rights, and if the President has undertaken the task voluntarily with congressional permission, the Court ought not to intervene, unless we have a really clear or egregious basis for intervention.

Now, that separation of powers model of how courts ought to approach Federalism cases is easily transferred to the area of individual rights in a time when national security is at stake. In fact, it is, I believe, the subtext of Chief Justice Rehnquist's book on civil liberties in wartime. The upshot of this subtle and nuanced book is that courts ought to be very cautious about bucking the shared judgment of Congress and the President — yet not so cautious when individual liberty is at stake in requiring Congress to have spoken clearly if the President is intruding on what would otherwise be a constitutionally protected liberty.

So, what I am basically trying to do is give a conception of the judicial role in the domain of Federalism. It is a close cousin to the Chief Justice's conception of individual rights in a time when national security is endangered. I would like to highlight the distinction, which is emerging now, between cases in which Federalism has been intruded on without clear congressional authorization and cases in which Federalism has been intruded on with clear congressional authorization, I'm basically going to give you a map to what the Supreme Court has been doing over the last decade or so. I will try to make a sharp distinction, sharper than the Court has done thus far, between cases in which the Court has said the Executive Branch cannot do it because Congress has not specifically authorized the Executive Branch to do it, and cases in which the Court has gone much further and said the President cannot do it, even though Congress has specifically said the President can do it. That is the distinction I am going to be drawing.

In 1991, in an overlooked but very meaningful decision called *Gregory v. Ashcroft*, a sharply divided Supreme Court ruled that the Age Discrimination in Employment Act could not be applied to state judges, even though there was indication that the Executive Branch wanted to do that. What the Court said in this divided case was that the Age Discrimination in Employment Act probably is more naturally read to apply to state judges.

Justice O'Connor, writing for the Court, did not urge that she was following the natural reading of the statutory text. But she urged the statute is ambiguous, and in the face of ambiguity, we are not going to take Congress to have spoken in a way that would disrupt ordinary understandings of state sovereignty. So, she urged, probably Congress could impose an age discrimination act on state judges. But this would not be authorized unless Congress had been unambiguous. This is a clear statement principle – requiring Congress to produce a clear statement — in a way that would tend to reinvigorate political safeguards against insufficiently deliberative federal intrusions onto the states.

The second example is from last term, in another Federalism case, which is often grouped with the Federalism cases in which the Supreme Court has actually struck down enacted legislation. It involved a solid waste agency, of an interstate body of water, and the Army Corps of Engineers, in a landfill case, in which migratory birds went on to the water that was interstate waters. The question was whether the fact that migratory birds were involved was a sufficient predicate for exercise of federal authority by the U.S. Army Corps of Engineers. I hope that is a sufficiently clear statement of the factual situation.

A lot of ink was spent on the briefs on the constitutional question whether the federal government had the power, under the Commerce Clause, to reach migratory birds that were not on what were ordinarily thought to be navigable waters of the United States.

The Supreme Court, in an opinion by Chief Justice Rehnquist, urged that, because the statute was ambiguous, the Army Corps of Engineers would not be allowed to exert authority over this intrastate water — even though there was some possibility that if Congress had been unambiguous, the exertion of authority would have been constitutionally acceptable.

There's a little bit in this case which is exciting for administrative law types — and I do detect three of you in the room. That little bit actually has tremendous policy importance and legal importance, even outside of the administrative law domain.

There's an idea. It is called the Chevron Principle, which says, in the face of ambiguity, agency interpretations of the law prevail. That idea created a problem for Chief Justice Rehnquist because he acknowledged that the Army Corps of Engineers' assertion of authority was under an ambiguous statute. In a very important passage of the opinion, he suggested that, "We are not going to indulge this principle, allowing agencies to interpret ambiguous provisions, where the interpretation compromises the federal structure in a way that is constitutionally problematic." So, no matter what the Executive Branch says, we are going to require not just executive but legislative deliberation about a question of the borders of constitutional authority with respect to Federalism.

Now, just a little notation about the grandpa of these cases. It is an old decision called *Ken v. Dulles*, in which, during the Cold War, the Attorney General of the United States tried to stop a Communist from traveling abroad. The Court ruled in that case not that the federal government lacked the authority to prevent a Communist from traveling abroad

under those circumstances, but that Congress would not be lightly taken to have authorized the Attorney General to deprive an American citizen of the right to travel because of his political convictions. Hence, the Court would not allow the Attorney General to do that without congressional authority. The Court subsequently made it clear that where there was congressional authority, the restriction on travel would be just fine.

Now, what may be emerging here is that the principle I am discussing — which is a requirement of congressional and not merely executive authorization for an intrusion on the federal structure — is a non-delegation principle. The non-delegation doctrine is familiarly thought to be dead. But this idea is real life in the non-delegation principle.

I am not speaking of the idea that Congress has to delegate with detail, the old non-delegation doctrine, which has little life now. I am speaking of a new Non-Delegation doctrine, which says that where the Executive Branch is moving up against a constitutional boundary line, congressional, and not merely executive, deliberation will be required on the point in question. In fact, the Court, in abandoning the non-delegation doctrine last term, has reaffirmed the narrower non-delegation doctrine, which I am now endorsing.

Those are the cases I mean to approve. But a different approach is taken in the case *United States v. Lopez*, the first case since the New Deal in which the Supreme Court struck down a statute under the Commerce Clause. This came, in a way, as a shocker because it seems as if the Court would not be limiting congressional power under the Commerce Clause. But there is a lot of reason for us to approve the *Lopez* case because the relevant statute, the Gun-Free School Zones Act, was passed without even a congressional nod in the direction of limits on its own constitutional authority. There were no findings; there were no hearings. There was nothing. There was basically just a vote.

The Court took a shot across the bow, insisting that ours is a national government of limited authority and that there has to be, at a minimum, some kind of legislative deliberation about the connection between what it is doing and interstate commerce. For the Court to indicate that is different, but not so terribly different, from the requirement of clear congressional authorization I mean to approve.

In a very different category is a trilogy of cases from recent years, in which the Court has struck down statutes that have commanded bipartisan approval after extensive congressional investigation of the issues of fact and law involved. As an example in chief, consider the *Boerne* case, in which the Supreme Court struck down the Religious Freedom Restoration Act, passed by a unanimous House of Representatives, approved by 97 of 100 members of the Senate, reflecting a recognition of the Constitution that the Court itself had endorsed for decades — reflecting a recognition of the Constitution that four members of the Court now believe is correct. And this reflected the view of a bipartisan consensus of academic observers, including Professor McConnell, President Bush's nominee for the Court of Appeals (one whom we hope, those of us who know him and love him, will be confirmed shortly).

For the Supreme Court to strike down that statute was an act, I submit, of hubris, when Congress was purporting to act under Section 5 of the 14th Amendment.

In the same camp as the unfortunate decision in *Boerne* are two recent decisions involving 11th Amendment immunity, one involving the Age Discrimination in Employment Act and the other involving the Americans with Disabilities Act, both of which the Court held were not legitimate exercises of authority under the 14th Amendment. Justice Thomas, I believe, took the correct route in the Age Discrimination in Employment Act case, finding not that the Act was beyond constitutional power but, in accordance with the decisions I mean to approve, that Congress had not clearly indicated its intention to apply the Act to the states. Justice Thomas took the narrower, more cautious route. The Court's majority, nonetheless, invalidated the statute.

In invalidating the Americans with Disabilities Act, as applied to the states, the Court rejected congressional judgments that reflected, over 13 years, over 300 examples of cases in which state government had discriminated against people with disabilities, including cases in which state governments had refused to employ people with cancer on the theory that coworkers thought that people who had cancer were contagious. There, Congress had really done its work. Where there is a plausible congressional judgment on the facts, based on extensive hearings and findings, rooted in an objectively reasonable view of the meaning of the Constitution — indeed, one that many of the Justices accept, and we could easily imagine a responsible Supreme Court itself accepting — where those conditions are met, it is exceedingly aggressive for the Court to intervene. And all three of these decisions, I suggest, are incorrect.

If we think that the Supreme Court of the United States or Article III judges have no monopoly on wisdom, including constitutional wisdom, the level of aggressiveness manifested in this trilogy of cases is extremely disturbing. We might make a nod here towards James Madison who insisted not on principally judicial but mostly broadly institutional checks to protect Federalism.

If we believe, with Learned Hand, "The spirit of liberty is not too sure that it is right," we might hesitate before continuing in the path indicated by the latter cases and maintain faith with the more cautious and modest path signaled by the *Army Corps of Engineers* case.

JUDGE STARR: Let me begin at a very high level of generality, and return, as appropriate for this Society, to the founding

itself.

The construct within which I would like to present some thoughts is the construct or idea of balance so important to Mr. Madison. It is what, more modernly, Robert Jackson, in his concurrence in *Youngstown*, called "equilibrium" — equilibrium within the government.

The idea at the founding, as we in this Society know is the importance of structural protections, most prominently, separation of powers and Federalism. But other important ideas are prominent, including bicameralism and the Presentment Clause and the like. Madison so vigorously emphasized this quite persuasively in The *Federalist*, and, particularly, *Federalist* 51.

We have over the years, and especially by virtue of the Warren Court's decisions, increasingly become a constitutional culture built upon what Mr. Madison deemed parchment barriers — the enumeration of individual rights receiving judicial protection, and then those almost universally accepted, such as the institutions of marriage and parenting that fit comfortably within the protections of the common law, running back to ancient times. The results, however, of the growth of this constitutional culture of individual liberty is a somewhat reduced sensitivity within the legal culture, generally, to these structural arrangements and foundational principles, seen as more reliably protective at the end of the day of human freedom.

In my judgment, *Morrison v. Olson*, which I blame much more than I do Judge Sentelle. Judge Sentelle was only doing his duty, acting arbitrarily and capriciously in the process.

But there is no such excuse for *Morrison v. Olson*. It does represent, to me, a painful example — a quite personally painful example — of the impoverishment of our culture of care and respect for structural principles. If I may be forgiven this broadside, even a court that says that it's sensitive, even in the constitutional arena, to principles of *stare decisis*, swept away at the alter of balancing. So weak was the structural principle of separation of powers, the appointments clause, and the like, that even that which was solidly within *Humphreys Executor* was swept away, along with *Myers v. the United States*.

My point is that deference can be quite dangerous to our constitutional order because, at the end of the day, it promotes congressional supremacy. That, of course, is a system of parliamentary Democracy; a perfectly fine system, but it's not ours. We did not think well of it at the time of the founding, and thus far there has been no cry for a constitutional convention to rearrange our structure so that we can have a Parliament and have question time and have a jolly good time watching C-SPAN, rather than endlessly boring stuff that we see on our current separation of powers version. But that is our system and we love it well. The system, we believe, has served us quite impressively. I point to *Chada*, and *Boucher v. Synor* (phonetic) from yesteryear. Both are seen as useful policing devices as increasingly dated but reassuring examples that the police, the cops, are on the street to prevent congressional supremacy and other forms of what, could be viewed as structural disequilibrium. By the very thinnest of delicate five-to-four margins — and Professor Sunstein has ably pointed to the issue broadly — Federalism lives. Three cheers for it, in my judgment. It is Federalism triumphant by virtue of the police being on the street and, in fact, doing their job — achieved, as we all know, by the slimmest of five-member majorities willing to carry out their policing function, and saying what the law is, including the law of Federalism. I think it is undilutedly a good thing.

And I cheer unapologetically when the Court stands for the vindication of these principles, at least when it is in the context of a *bona fide* Article III exercise of power in a real, live case or controversy. It is, in short, emphatically the province of the judicial department to say "no", and to say "no" with some regularity, and particularly to Congress. See, once again, the warnings of Mr. Madison and the Federalists.

There are many doubters in our midst. They are, like Professor Sunstein, who is somewhat agnostic, quite formal in their critiques of the Court's muscular exercise of the police power. And so, drawing from Professor Sunstein, my reference is the Kennedy-O'Connor concurrence in *Lopez*, that dramatic departure from the past. The gun-free zone — who can be opposed to gun-free zones in and around schools?

Justices Kennedy and O'Connor searched openly — quite eagerly — for a limiting principle. If Congress could, by virtue of the strength of the Commerce Clause, as interpreted since the New Deal, control the evil (and let there be no mistake that it is an evil) of violence in and around schools, then it could, under a *Wickard v. Filburn* kind of analysis, control all of education. If it can control and regulate the evil of the violence against violence then it can control the law of marriage, divorce, child custody and the like.

Now, we hear either the response, oh, you've got to be kidding? A reasonable Congress would never do that. Parliament doesn't take leave of its senses, and that sort of thing. It just is not going to happen here. Suffice it to say that is unsatisfying. That will not do. Imagine what Mr. Madison might think of the United States Code as it presently stands, much less the Bank of the United States.

If the latter troubled him, then you can imagine what the Deadbeat Dads Act would do to him or, more commonly, that this really is more appropriately a matter simply entrusted to the dynamics of the political process. The message is — and justices have essentially made this argument: "Oh, we know they are no longer designated by the state legislatures, but trust your popularly elected United States Senators to protect the prerogatives of the states. Failing that, encourage Governor Keating and his counterparts to just spend much more of their time in Washington".

But, I think it's somewhat odd to bring up Libertarian-inspired visions of judicial policing of liberty. For example, policing to protect flag burning against congressionally ordained protections. I do not know why I always mention the cases that I lost. I should mention a case or two, if there is one, that I won. But nonetheless, to just entrust Federalism as, essentially, a political question and separation of powers in turn, as is not uncommonly articulated, as essentially an aspiration. It is something to bear in mind as we go about our work.

Now, I know that there is tension here. I feel it within myself, and some might, in fact, say we are downright schizophrenic. We want our courts essentially to invalidate that which we do not like. And otherwise, we want them to keep their powder dry. Say, if there is a taking or a violation of the First Amendment, we rise up in righteous indignation. At the same time, we want the political process to work. We want the foundational liberty, consistent with Learned Hand, of self-governance through representative democracies, to flourish and to prosper.

Now, if this is, as I think it is, the dilemma, then I think the answer — and it is an imperfect one, but it is our answer in a constitutional democracy — is calling upon our judges and justices to render sober judgments, designed even-handedly to protect both structural arrangements and individual liberty. It should by no means be taking a pass or submerging structure as too unimportant. It seems to me that tugs at not just the text but the structure, as well as the history, of the Constitution.

So, it means, by my lights, that the Court is pretty much getting it right these days, save, again, for its unforgivable lapse in *Morrison v. Olson*. Certainly, it is sensible to guard against oddly shaped interpretations of law, as in the Migratory Birds Act case, which Cass mentioned. And I think it is right to decline instinctively to defer to informal articulations of law, as in *Mead*, with all due respect to Justice Scalia. Chevron, after all, did clarify in step one that everyone is equally bound by the law, the great unifying principle of equality. Thus, we can echo the ideal of Rule of Law, and we are not going to allow law by bureaucracy without a perfectly aggressive muscular judicial check. And so, too, *Garrett*, with the ultimate meaning that non-consenting states may not be sued, even by private individuals in federal court, each individual having a very poignant and moving and sympathetic story. But unless Congress is acting under a valid exercise of the Section 5 power, as has been aggressively interpreted by the Court over the years, *Garrett* is, indeed, of a piece, as I see it, with *City of Boerne*. It is, as the *Garrett* Court put it, the responsibility of this Court, not Congress, to define the substance of constitutional guarantees. That is exactly our system, as I see it.

Is the Court willing to be the policeman? It did so in *Bush v. Gore*, and asserted its supremacy over a runaway state supreme court that was simply ignoring the structure of federal law, as well as a specific mandate in round one.

What we are left with is a question. Why don't we be satisfied if Congress gives adequate consideration, sort of an administrative law model, like Justice Stevens' dissent in Philalob [phonetic]. Let us be satisfied, if we know that Congress was deliberate and careful. I think that is good. We should hope that Congress will be deliberate and careful. For my part, I would rather the judiciary say, please, if you choose, be deliberate and careful. But whether you are deliberate or careful or not, do not violate the structure of the Constitution, and we are the police to tell you that.

Thank you very much.

MR. MINCBERG: To quote myself the last time I appeared at Regent University —

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MR. MINCBERG: (in progress) — reading into the simple text of the 11th Amendment the notion, even of the same state, cannot sue the state or a state agency for damages in federal court — a leap to sovereign immunity that was never intended by the founders.

But even if it were, (and this gets to the second problem, with *Garrett)* it is totally abrogated by a little technicality that many who talk about Mr. Madison often forget, which is, there were amendments that took place long after he left the pale. I cite particularly the 14th Amendment, which gives Congress the power to do more than what the original Constitution states. And a second serious problem with *Garrett*, as Justice Breyer points out in his dissent, is that even though the majority of the Court gives lip service to the notion that Section 5 of the Fourteenth Amendment allows Congress to go a little bit further than the Constitution does in prohibiting conduct that may violate civil rights, that lip service is very often only lip service indeed, once proportionality and congruence (coming from the *City of Boerne* case) are applied to the law.

And third, to refer again to Justice Breyer, the decision in *Garrett* really does treat Congress like an administrative agency that does not get any Chevron deference. The extent to which the Court reviewed, or purported to review Congress' findings, or lack thereof, was truly astonishing and reflects a lack of deference to our elected branches that I would think would trouble significantly those that are concerned with judicial constraint.

One foot that I should note, by the way, in *Garrett* that is little noticed but may give some people some pause. The Court says that the rule in *Garrett* applies only to state governments, not to local governments. So, for those who are concerned about Federalism issues as they apply to local governments, as I understand *Garrett*, the Court is suggesting they can be sued under the Americans with Disabilities Act, and that may take away some of the joy that those

who support the *Garrett* case will find in it.

Let me talk for a minute or two about the American Trucking Associate case that squarely presented Non-Delegation doctrine. Here the Supreme Court found that some of Judge Sentelle's colleagues on the D.C. Circuit went just a little bit too far in trying to re-invoke the Non-Delegation doctrine, involving an EPA statute that gave the EPA power to set standards requisite to protect the public health. That, according to the D.C. Circuit, was an improper delegation of power.

Justice Scalia, who wrote the majority opinion himself, pointed out the Supreme Court has approved many situations where administrative agencies have been given authority under much broader delegations, including, for example, a number of statutes that give agencies the authority to regulate "in the public interest". The fact that it was Justice Scalia himself who wrote that opinion I think gives a bit of pause to those who hope to use that particular tool to roll back the New Deal. Justice Thomas is still there to examine the Intelligible Principle doctrine, the doctrine that the Court has ordinarily applied saying that if there is an intelligible principle behind the words that Congress uses, it is not an improper delegation. Justice Thomas, in any event, is certainly willing to consider or reconsider that doctrine in the future.

Another interesting sidelight I thought about in that case was the notion that, even if an administrative agency interprets a statute in a way that would clearly not cross the Delegation doctrine, Justice Scalia's point, contrary to the D.C. Circuit, is that that is a decision for the court to make, not an agency to make. Here is another example of, clearly, giving additional authority to the court.

On the solid waste agency case, I agree in part and disagree a little bit with what Professor Sunstein suggested. I do agree very much with the overall principle that he suggested and that the Court was adhering to in that case, the principle that when action by the Congress or the Executive really does come close to encroaching on violating rights under the Constitution, be they individual rights like the First Amendment or structural issues like commerce power and separation of powers, that a clear statement ought to be required of the Congress or the Executive Branch before the Court will interpret the law in that way. That does make sense. It is a principle I use all the time in First Amendment cases.

The problem I think I have is the notion that in the solid waste agency case, the Court was, in fact, close to those boundaries. I commend the dissenting opinion in that case, which I think explains it, much better than I possibly could. What the Army Corps was doing in that case is the quintessential example of a situation where the benefits of action are local: creating a new landfill somewhere. But the detriments of that action are interstate: destroying habitats of migratory birds that go across state lines from one place to another. If there is a quintessential area where the federal authority ought to be exercised, it seems to me that is it.

Finally, let me say a few words about the *Mead Corporation* case, which does not quite fit into these paradigms, but is an interesting one, nonetheless, because of what it says about judicial review of administrative agencies. I really do not think that it is fair to say, as Justice Scalia tried to, that the majority of the Court in the *Mead* case was abandoning Chevron. Indeed, what I think the majority was doing was really, as Justice Souter explained it, trying to pay some attention to Congress' will, saying, yes, it is appropriate to defer to administrative agencies, but it is not one or the other. It is not an either-or proposition. It is not Chevron deference or no deference at all. There may be other kinds of deference that may be appropriate to administrative agency decisions, which depend — as it ought to — on Congress' intent in enacting the law in terms of setting up what it is that it expects an administrative agency to do. Is it rulemaking? Is it adjudication? What kind of action is it? What did Congress say? Those are important issues. But what, in fact, the *Mead* case has in common with some of the other issues is that, although it does defer to Congress' role, the body that ultimately decides what Congress intended is, of course, the Court.

And what all of the cases that we have talked about today and the others that my colleagues have talked about have in common, no question, is an assertion of significant judicial power to make the decision. That's an assertion that sometimes is an important one, that sometimes is critical to protecting the individual rights that our Constitution intended to be protected.

But, there is no question that there are also occasions — and I would count *Garrett* and some of the other decisions that Professor Sunstein talked about among them — where what the Court, by a narrow five-four majority in the last few years, has done is to significantly harm the ability of our elected branches to protect civil rights and liberties that are critical to our society. James Madison would have said it is perfectly appropriate for the elected branches to do without the interference of judges, who too often in these instances may be, in fact, substituting their own policy preferences.

Thank you.

HON. OTIS: I guess I'm going to start with something obvious and tedious in a certain sense, which is *Marbury v. Madison*. In a certain sense, I think that *Marbury* answers key questions. Also, people who understand *Marbury* will tell you a lot about where they're going to come down on a number of these questions.

I do not know what the vote was in the enactment of the Judiciary Act of 1789. I do not know how much deliberation there was on the question of whether to confer original jurisdiction on the Supreme Court over the categories that were at issue in *Marbury v. Madison*. And I do not think that Justice Marshall was the least bit interested in that question. You I do not think he cared whether Congress held hearings. I do not think he cared whether there was a lively

debate on the question. I do not think that he was interested in what the duration of the debate was. At least, none of that appears in any of the briefs that were filed in *Marbury*, and none of that appears in anything that Justice Marshall had to say in *Marbury*.

Justice Marshall thought there were two questions before him. But, in relevant part, he thought the question before him was whether, when the Constitution described the scope of the original jurisdiction of the Court, it had provided an exclusive list or whether it had provided Congress with authority to add to that list. It had not and, therefore, the act of Congress was unconstitutional. End of story.

In other words, he thought that this separation of powers question, like the other separation of powers question that he addressed in the case, was a simple matter of taking the Constitution as if it were any other kind of law, reading it and comparing it to see if it was consistent with the statute, and if it wasn't, figuring out which one carried the day. That, and not a lot of theories about institutional competence, was the basis of the decision in *Marbury*.

He also said that the Court should not get involved in what he called "political questions". By that, he did not mean questions that were controversial, quite obviously, because the questions that the Court addressed in *Marbury* were intensely controversial. Essentially, he was getting in the middle of a fight between the outgoing Administration and the incoming Administration about whether a judge had or had not been successfully appointed when his commission was signed but not delivered to him in the course of the appointment. And this was after the first big party fight in the history of the Country.

So, he did not mean things that were politically disputed. What he meant were things for which there was not a legal standard, things that were not of a traditional legal character. In saying that those were not his problem, what he meant was that he understood the judicial powers conferred by Article III of the Constitution to be the traditional judicial power: the power to make traditional legal decisions. The core of *Marbury v. Madison* is the proposition that interpreting provisions of the Constitution is just like interpreting other kinds of legal documents. Therefore, when the Court has a case before it, the Court is properly the decision-maker on what the Constitution does and does not require.

If it happens that what the Constitution requires is different from what Congress has provided, the Constitution wins, not because the Court says so but because the Constitution is the supreme law listed in the Constitution, and because justices take an oath to abide by it and, therefore, they apply the authorities in the order listed. That, I would submit, is basically the theory of judicial review for constitutionality of the decisions of other branches and, indeed, of any decisions that it is reviewing.

If that is the case, then essentially everything becomes pretty easy. There is not a question about whether the Court, if it has a proper case before it, should decide whether a statute was a proper exercise of Congress' authority under the commerce power. It follows from *Marbury v. Madison* that it should.

As to whether it should defer to Congress' judgment, if this is a question of law, like any other question of law, the custom is for it to give weight to congressional judgment. Congress knows something about the Constitution, too, and Congress takes the same oath of Office that the justices do in deciding what laws to enact. The Court should treat them seriously and with respect, as other people who have intelligent opinions and who are charged with a constitutional obligation, just as the justices are.

But at the end of the day, in deciding a case, they have to figure it out for themselves. They cannot just say, "There were lots of Committee hearings, and so that shows that they thought hard about it and that is good enough for us."

Learned Hand, of course, was a skeptic about judicial review. That is a respectable, understandable position. But he was a skeptic about judicial review across the board. The issue that Justice Marshall drew in *Marbury* is not an inference that is necessary. You could have a regime, and it could be, since the Constitution is silent on the subject, that the regime that was set up was really supposed to be a regime in which Congress was the arbiter of the constitutionality of its own actions.

But, I think on the whole, Justice Marshall has the better of that argument. And if he does, then the only argument is whether the Court is right or wrong in its conclusions about what the Congress power's limits are, and so on, which are questions about which reasonable people can disagree.

I think that the Federalism provisions are especially difficult in some ways. The limits on congressional power and the allocation of powers between Congress and the states are especially difficult legal questions in some ways because they are artificial. They were something that the Framers were making up with no background. And so, it is a little bit harder to figure them out than some other provisions. I do think *Marbury* answers this question.

Now, just a few words about Congress and the Executive Branch. I think the Delegation Doctrine question is really, and in a certain way a misnomer. And the reason that it is a misnomer is that the assumption behind it is that the executive power was intended to be a purely ministerial power. That is to say that we go to all this trouble of electing presidents and, you know, the most central activity of our life is democracy, only to have the President just mechanically carrying out congressional commands. That seems like an improbable construction of what the executive power is supposed to be.

Rather, one thinks that the executive power is more likely to have included some element of policy discre-

tion, as well, in which case there is nothing wrong with Congress enacting laws that leave the Executive Branch some room for exercising policy discretion, in which case the Intelligible Principles doctrine is probably the right approach. Really, the question is whether Congress has sufficiently made what it is doing clear to have legislated. But, if that is correct, then SWANU is likely wrong on the point that Cass is praising it for. That is to say, Congress probably did provide an intelligible principle in deciding that the EPA had authority over navigable waters — that is to say waters of the United States. There is some internal inconsistency with defining navigable waters as waters of the United States, but Congress is allowed to come up with artificial definitions of terms that are not impossible to understand, in which case EPA's interpretation of it was as reasonable as anything. And probably, the Court should have reached the harder question of whether Congress had the authority to act in this fashion.

I think I'll leave it there.

JUDGE SENTELLE: I want to thank all out panelists for the depth of their initial presentations. And now, they're going to have a chance to speak in reflection upon what each other said.

Cass, you had to go first. I'll make you go first again, but you can hit again at the end, if you like.

PROFESSOR SUNSTEIN: I thought this was an extremely good and quite remarkable discussion. I do not know if you picked up on the strands of the disagreements because they were kind of obscured by details.

During the height of the Warren Court, many people, defending that Court, said, "Well, look at *Marbury v. Madison*. It is emphatically the province of the judicial department to say what the law is. You oppose the Constitution to the practices that the Warren Court is invalidating, and the Constitution is supposed to be interpreted by the judiciary, and what's the problem?"

The critics of the Warren Court — and I count myself among them — responded by saying that judges have no monopoly on wisdom with respect to constitutional meaning. It does not work like that. You do not oppose the Bill of Rights to the practices the Warren Court invalidated and come up with easy, simple solutions. That is just not a plausible view of interpretation.

I do agree very much with Judge Starr in supporting an aggressive muscular judicial check in those cases in which it is clear that Congress has transgressed a constitutional boundary. And the *Lopez* case is plausibly an example of that. We do have a government of enumerated powers, and if Congress is creating agencies that unconstitutionally mix traditionally separated functions and there are not precedents that we need to respect that support that practice, by all means, strike it down.

Where the questions are serious ones are cases where there is a reasonable disagreement about what the Constitution means. And, if the spirit of liberty is that spirit that is not too sure that it is right, then we should not blink away reasonable disagreement. Now, we have to be particular about that poin6 to make it not fail in a cloud of abstractions.

Think about the *Boerne* case, where the question is whether a practice that discriminates against someone's religious practice has to be justified by reference to a legitimate reason, even if it is not intended to discriminate. Now, four Justices of the Supreme Court believe that discrimination against religion has to be justified, even if it is not intended to discriminate or facially discriminatory.

A unanimous vote of the House of Representatives — pause over that one, if you would — a unanimous vote of the House of Representatives said that justification is required. Now this point is not rendered irrelevant because Chief Justice Marshall didn't investigate the congressional record in *Marbury v. Madison*. What the House vote shows is the considered view of people who have also taken an oath to uphold the Constitution. Ninety-seven members of the Senate thought the same thing. Four Justices of the Court thought the same thing. And the Court's doctrine had been, for decades, the same thing. And, commentators thought the same thing. For the Court to strike that down in the name of — what? — the Constitution, suggests a kind of monopoly over constitutional meaning, which is the most cartoonish picture of the abuses of the Warren Court. That is not something we should be celebrating, if we believe in democracy and liberty. We're talking about the Religious Freedom Restoration Act, mind you.

It is a little harder, but I believe the *Garrett* case was exactly the same case. We are talking about the Americans with Disabilities Act, which Congress applied to states, not on a whim but on a basis of factual findings that in 300 instances documented, there was discrimination against disabled people, including against people who had cancer. I am sure there are people in this room, by the way, who have had cancer. That is a very safe statement. And there are people in this room who are doing just fine, having had cancer. There are state governments that would not employ them because they were afraid of coworkers. This point was not just made up by Congress; it was a fact found by Congress.

In cases in which discrimination against handicapped people is based on nothing other than prejudice and animus, the Supreme Court itself, by an overwhelming majority, in a case called *Cleburne*, said that violates the Equal Protection Clause. The Congress tried piggy-backing on *Cleburne* to adopt a prophylactic rule saying that states are going to have to stop discriminating on the basis of handicap. This was a judgment about the meaning of the Constitution that was reasonable, as a matter of fact, and also reasonable as a matter of law, because supported in the Supreme Court's Cleburne

opinion. But the United States Supreme Court, by a hubristic five-four majority, struck it down.

The big authority here is certainly not me and it is not the Warren Court. It is Chief Justice Marshall in his greatest opinion — not his second greatest opinion — *McCulloch v. Maryland*. What I fear in the enthusiasm for a muscular judicial role in a context in which there is reasonable disagreement about the Constitution's meaning is that we are identifying the meaning of the Constitution with what five members of the Court think. And that is a mistake. That was the Warren Court's own mistake.

So long as Congress purports to be acting under an enumerated power and is making a reasonable judgment on both the facts and the law, and that judgment is reasonable by reference to constitutional history and the Supreme Court's own precedents, there ought not to be a problem.

JUDGE STARR: Several brief points. First, I believe someone owes an apology to Elliot. That cynical view — we are just kidding; we are just instrumentalists; we're just using arguments — that person Elliot deserves our heartiest disapprobation. That person is a shabby thinker. That person is a hypocrite and should be treated that way. But I do not think that is what is really going on. I hope that you will not think that that is what is really going on. I would like to think that is human frailty exposed in a very unfortunate way.

Point two, ATA and legislative delegation of power. This is the Court at its cautious circumspect self. Careful, not wanting to sail into waters that might prove to be treacherous, perilous. Knowing full well that they are within the safe harbor of arbitrary and capricious review, which gets them exactly to the same place — namely, EPA — is, once again, wrong.

Third, the ideal of deference to the representative branches, especially in light of the events post-September 11. I would feel remiss if I did not flag the customary and traditional deference that the Court continues to show with respect to the President. The President stands, as John Marshall said, as a member of the House of Representatives — the sole organ of the Nation in respect of external affairs. Then, with the modern-day insight of jurisprudential thinking embodied in Youngstown, with the gloss placed upon those powers by the influential concurrence of Robert Jackson, and seeing, as we have, the President reaching to the Congress of the United States and accepting a resolution thereby maximizing the power of the President in respect to the conduct of the war — as to that, the Court will have nothing to say and will be in its highest mode of deference.

Finally, with respect to the Warren Court, are we essentially saying we now, after having thought it through, after thinking that perhaps the Warren Court was simply neglective of certain individual rights, accept that it was right after all? This is very crude and primitive, but it seems to me that the gravamen of the complaint against the Warren Court was that it was imposing and not checking. It was, in fact, crafting rules, most dramatically in the arena of criminal procedure. It was not simply stating a rule or reaffirming a principle but fashioning a rule of criminal procedure in *Miranda*, saying even if the suspect in custody is John Gitti there is an irrevocable presumption that that person's will will be overborne. Legislating at its strongest — *Mapp v. Ohio* — so much for *stare decisis. Wolf v. Colorado* — gone, five to four. Five to four. And to what end? To impose an instrumentalist rule, an exclusionary rule, on the states.

It seems me to that *City of Boerne* is quite different from that; that rather, Congress stepped in there and said, "We, in effect, disagree with Smith, and we intend to supercede the rule articulated by the Supreme Court of the United States with a restoration of *Sherbert v. Verner* and the like." That strikes me as quite different than the world in which the Rehnquist Court has been operating.

Thank you.

MR. MINCBERG: Somebody left their copy of the Declaration of Independence and the Constitution up here, and I don't want to deprive whoever it was of it.

JUDGE SENTELLE: It is certainly worth fighting for.

MR. MINCBERG: Absolutely.

A couple of points. I do think it is interesting to hear Ken and Lee saying, it is one thing for the Court to start questioning the legislative branch but when it comes to the Executive Branch we really need to give them a lot of deference. I did not hear them saying that two years ago. It is kind of interesting.

But, to return again to the *Garrett* case, I think in a number of different ways, beyond what we said before, it proves the truth of my point about what in large measure is going on.

As Justice Breyer pointed out, the result in *Garrett*, far from actually meaning less federal involvement with respect to the Americans with Disabilities Act, could well mean more because the Court, by its analysis, allows injunctions, which are potentially much more intrusive than money damage judgments. It also allows federal agency enforcement, which again can be much more intrusive.

But second, I think what is really particularly troubling about *Garrett* in this respect — and again, Breyer

points this out very well in his dissent — is not only treating Congress like an administrative agency but treating Congress like a lower federal court. The Supreme Court says, "Our problem with these three hundred instances of proof (that Cass talks about), of the states discriminating against people with disabilities is that they do not meet judicial standards. You could not bring a lawsuit and prove that was an Equal Protection violation." Well, of course not. That is not Congress' function. Congress' legislative function is to determine, in that context, is there evidence that there are problems that warrant Section 5 enforcement power under the 14th Amendment? It is a critical mistake, it seems to me, for a court, in reviewing Congress, to hold Congress in its evidentiary capacity to the kinds of standards to which it would hold a lower court. Congress is not a court; it should not be a court. And if anything violates separation of powers, it is the Supreme Court essentially turning Congress into one, to say that is what Congress needs to justify actions that it wants to take pursuant to its enumerated powers.

Related to that, frankly, is the shifting standards we have seen by the Supreme Court since *Lopez*. This is traced again very well by Breyer and by Stevens' dissent, as I think I recall, in the case. First, you have the *Lopez* case, where, as Cass points out, it's at least arguable that Congress did not do too much in the record to prove the Commerce clause was being properly invoked. I may disagree, but at least there is an argument on that. Then, Congress, next time, tries to do better. In *Morrison*, there was extensive testimony put into the record relating to the relationship to interstate commerce. Well, that does not meet the Court's next standard. Then go to *Garrett*, where, again, there is extensive testimony; the appendix to Justice Breyer's dissent frankly is longer than the majority opinion. On the evidence adduced by Congress to prove its case that there in fact was justification for what happened, the Court shifts standards a little bit again and says, you know, that is not good enough. That kind of action, it seems to me, by the courts, invalidating successive acts of Congress that protect civil rights and protect civil liberties, I think undermines confidence in the courts as truly neutral arbiters of separation of powers.

Thanks.

HON. OTIS: It may be simple-minded to think that you can figure out that you can interpret words and figure out what they mean. But that is a simple-mindedness that is basic to the legal system. If you do not believe it, then essentially you are saying that you are relegated to the execution of people's will against you every time they purport to be interpreting a contract or interpreting a will or interpreting the Constitution. If you do not believe it, it is a pretty good argument for getting rid of judicial review because, really, there is no reason to have courts coming in and interfering with the actions of elected officials, if they are not capable of engaging in interpretation.

As to the fact that this can be hard, absolutely it can be hard. As to the proposition that people can be tempted to find what they want in words, rather than what the words actually say, I think that is impossible to argue with, too. But, either one thinks that those problems are so serious as to make the enterprise hopeless, or one does not. I do not think they are so serious as to make the enterprise hopeless. In that case, I think we retain judicial review, and we retain it in the classic *Marbury* form — assuming, again, there is a judicial step in there. But, I'll leave it out for the sake of simplicity.

I have no doubt also that people can disagree in good faith. It is easy to suspect the motives of the person that you disagree with, so it's easy to attribute to the Court, reaching various conclusions, bad motives rather than intellectual honesty.

I do not think there is anything obviously disingenuous about some of the decisions that Elliot is criticizing. For example, I think that the reason the Court does not worry about the length of the appendix about affecting commerce in *Lopez* is that the majority thinks that ii the wrong question. What it thinks is the right question is whether the object of the regulation is in any way a commercial activity.

One thing that's important to do is try to assume, in understanding a court decision, what the good-faith argument for it is and what the answer to that good-faith argument is, assuming that everybody is talking in good faith.

It is also true that the legal profession is a profession of advocates and, therefore, we should not be surprised if it turns out that attorneys, in their advocacy role, go into court and take what they like from decisions to argue for something that they are trying to achieve. That is par for the course for lawyers, but that does not mean that is an intellectually respectable way to go about interpreting the Constitution. It is not. It is not an intellectually respectable approach to doing any kind of law, and so we need to distinguish between our role as advocates and our role in honest efforts to understand what something means.

JUDGE SENTELLE: Thank you, Lee.

Now, while you are going to the microphones, I will give Cass a minute for rebuttal, since he had to go first both times. It is only fair he get a minute.

PROFESSOR SUNSTEIN: Thank you. I think this has been a terrific discussion and I am eager to hear what you all think.

JUDGE SENTELLE: Okay. We seem to have questions on this side of the room right now. So, Tom.

AUDIENCE PARTICIPANT: Thank you. I am somewhat surprised at the emphasis that is being placed on *Kimel* and on *Garrett* as 14th Amendment cases, when we realize that we still have the ADA, which is still federal substantive law. There has been no change in the way they apply to private-sector employers.

The only change with respect to public-sector employers is that one possible remedy, private causes of action brought for money damages in federal court, is unavailable. It seems to me they do not establish a great foundation on which to characterize a whole line of what the Supreme Court is doing, and I would like to suggest a different one.

The common thread between *City of Boerne*, *Kimel* and *Garrett* is that these are three areas where, before Congress acted, the Supreme Court had already addressed the issue and had already provided a rule of law. We already had the *Smith* case; we already had Supreme Court case law saying that age is not a suspect class, disability is not a suspect class. And so, when you talk about hubris, can't one very much look at this as the hubris of Congress saying, in the face of these decisions, that we reject that and we propose our own view?

JUDGE SENTELLE: Elliot, you want first bite on that one?

MR. MINCBERG: Sure. In terms of the history, it is certainly true that RFRA, the law in *Boerne*, was on the heels of the decision in *Smith* and was arguably most guilty of that kind of hubris. Although, I will say, as one of those who was involved along with Mike McConnell in putting it together, that some efforts were made to make clear that no one was truly attempting to restore the constitutional rule that was, we think, changed in the *Smith* case. But instead, it was an attempt by Congress to create new statutory rights that go beyond what the Constitution does.

That has been, until some of these recent decisions, the accepted rule of law: that Congress can, even with respect to the states, do things that the Constitution does not do in terms of their having to respect civil rights and civil liberties.

That, it seems to me, is what Congress was doing in all of those instances — particularly in *Garrett*, where it is clear that it was not a *quid pro quo*: Supreme Court issues a decision today; tomorrow, Congress comes along to tries to reverse it. Instead, it was a much more comprehensive effort by Congress to enact rules across the board that apply to disabled employees. Rules that say to the cancer victim that Cass is talking about, whether you try to work for a private company or for the state government right next door, you have essentially the same rights, and your rights should not vary from one place to the next, given the powerful evidence before Congress, that there was a problem to deal with. It was that appendix I was talking about, Lee; not any appendix in the Commerce Clause case.

JUDGE SENTELLE: Anybody else want to bite on that one?

If not, then, we will go to Roger.

AUDIENCE PARTICIPANT: Thank you, David. My question — I'll direct it to Ken Starr, because your remarks, Ken, were most on point. One of the things that concerns many of us who have supported the Court's new Federalism jurisprudence is that it is still a good ways from having gotten it right and, in a sense, that may undermine it in time. Then again, if it did get it right, it might undermine it, too, from a political perspective. That leaves us with a real dilemma.

Take *Lopez* and the part of *Morrison* that dealt with the Commerce Clause, because they are the two simplest examples. There, as you know, what Chief Justice Rehnquist did was try to square his holding with recent Commerce Clause or post-New Deal Commerce Clause jurisprudence by saying Congress had gone too far. And so he set forth a three-legged stool of the Commerce Clause, the third leg of which some would argue whether it affects commerce or substantially affects commerce (there's a debate over that).

But the real question is that others from the other side can come along and say, well, look, if it's a question of whether this activity substantially affects Commerce, who is in a better position to judge that? Congress or the Court, five people on the Court? You know the standard arguments.

Yet, if the Court gave us a theory of the Commerce Clause, which it should do — something like Justice Johnson did in his concurrence in *Gibbons v. Ogden* — then we would have to find the New Deal unconstitutional. Cass Sunstein would be apoplectic because he believes the Constitution began in 1937. And, you know, since the Constitution was not written in 1937, there's our dilemma.

How do you go about answering? It's a question I often get, and I'd be interested in going to school on your answer.

JUDGE STARR: The Court frequently engages in acts of judicial statesmanship.

AUDIENCE PARTICIPANT: A statesman-like answer.

JUDGE STARR: And I think therein lies the answer. They knew full well that there was a certain unsatisfying quality to the approach, and the best that they could do would be to point to language in *Gibbons v. Ogden* and *Wickard v. Filburn*, to the effect, 'but there is a limit, you know; Congress can't just do anything and everything.'

But, even Justice Thomas noted that it was unlikely at this late date and, thus, the barnacles of history and the heavy weight of history — which I happen to respect. I guess that's one of the reasons I accepted the assignment from Judge Sentelle.

JUDGE SENTELLE: I don't know whether he's saying I'm heavy or old.

JUDGE STARR: Neither — let me clarify.

I have been grossly misunderstood. Because you see, Judge Sentelle, the Court had spoken in *Morrison v. Olson*, and just as — Cardozo suggested, were the issue to come to him as a matter of first impression, he would doubt that the Due Process clause had substantive bite, but it was 40 years into the process and he, for one, was not going to be a judicial revolutionary. Respect, whether one agrees or not, forthe wisdom of the generation, is required unless one is convinced that it is profoundly wrong.

Roger, I happen to think you would say, they are profoundly wrong, so say it and get on with it.

SPEAKER: And amend the Constitution, if that is what you want to do.

JUDGE STARR: Well, to go back to Lee's point concerning the meaning of "Commerce." What is, in fact, the meaning of "Commerce,?" One can mount very reasonable arguments, it seems to me, that gives the word Commerce a very great reach.

JUDGE SENTELLE: Question to my right, in a directional sense.

AUDIENCE PARTICIPANT: Thanks. Todd Gaziano. Roger teed up my question very well, but I want to add that Cato didn't go far enough, so I'm representing the Heritage Foundation.

I want to take it much further.

Because he was a teacher and a recommender of mine, I want to defend Cass Sunstein's formulation. But because he's profoundly wrong — and dangerously so in what was implicit, I want to suggest how to undermine his results.

Even in Lee Liberman's brilliantly simplistic but correct formulation of a judge's role, there is room for a clear statement doctrine adopted as a prudential one by the Supreme Court that says, we will not reach constitutional questions unless we think Congress really meant to trammel on the states. I do not know that is compelled, but that seems to be permissible.

I also think that it was Madison who wrote about the duty of each coordinate branch to give comity to the others so that, if a truly reasonable interpretation of the Constitution's enumerated powers were reached by the two other branches, the third branch ought to think long and hard. But let me suggest two limits —

JUDGE SENTELLE: Suggest it quickly.

AUDIENCE PARTICIPANT: One, Congress need not find facts that a lot of constituents want, something they need to have engaged in a reasonable debate about the constitutionality. And that, Congress doesn't do anymore. They punt with severability clauses and they clearly say this is up to the Court.

Second, they've got to at least be close. And this is where I challenge Cass Sunstein. I think we're misguided about what the role of the Court is.

JUDGE SENTELLE: I would like to get one more, so if anybody would like to come in on what we've heard so far from Todd —

AUDIENCE PARTICIPANT: Can Cass identify two statutes that Congress clearly has debated as constitutional, that a court should strike down, that are unreasonable in interpretation of their power?

PROFESSOR SUNSTEIN: In the nation's history, that they've debated, that they should strike down?

Well, the Independent Counsel Act is not the worst candidate, and there was a constitutional debate about that; the statute that was invalidated in *Bowsher v. Synar* there was a constitutional debate about that. So, those are two reasonable possibilities off-hand. The Legislative Veto case is a third. We could go down the list, but you'd probably get really bored.

JUDGE SENTELLE: Okay, I was told to get through at 4:15. I'm going to take one more question, even though it is 4:15, and then we're going to close it out. One more question.

AUDIENCE PARTICIPANT: My question's directed to Judge Starr. If judicial deference to the legislature promotes congressional supremacy, then what safeguards are there to prevent judicial supremacy?

JUDGE STARR: Thoughtful appointments to the Supreme Court.
And we have seen some of those, but don't ask me to name them.

PANELIST: I think I would agree with that, but we might disagree on which ones are thoughtful and which ones aren't.

JUDGE SENTELLE: And no appointments occur without confirmation. Although I'm being handed notes about what fine people are in line, it is, nonetheless, a minute past the time when I was told I had to end, so we are going to call it quits at this moment.