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DISCUSSION: THE ROLE OF THE LEGISLATIVE AND EXECUTIVE BRANCHES IN INTERPRETING THE CONSTITUTION

HARRISON: I want to make one sort of diagnostic suggestion based on what Burt Neuborne said to help show where our opinions differ. Neuborne said that you do not want to have a naive version of right answerism. I subscribe to a fairly naive version of right answerism, not so naive as to think it is easy to find the right answers, but strong enough to hold that it is meaningful to say that there is a right answer even if we do not know exactly what it is. I think that how hard your notion of law is and how much you believe in right answerism is a barometer of where you will put considerations like the two he urged, which are very real ones, about certainty and about possible unfairness to people who cannot afford to go to court to get the executive overruled. The harder your concept of law, the more likely you are to put those considerations on the prudence side of the law/prudence line. The softer your notion of law and the more kinds of considerations you allow into what is law and what is legally correct, the more likely you are to allow considerations like that to influence your judgment of what is or is not a legal obligation.

NEUBORNE: That is an exceptionally perceptive diagnosis of what often differentiates people, like me, who think that the Supreme Court's decisions (and possibly the decisions of the circuit courts as well) carry with them some positivist sanction; and people, like John Harrison, who think that they do not. The issue really turns to an almost paradoxical degree on how sure you are that you know what the right answer is in a given case. I harbor a good deal of skepticism about the notion that there is a single right answer to almost any difficult judicial problem. There are easy cases, to be sure, but the hard cases that often confront the Supreme Court, both in statutory and constitutional questions, seem to me to almost always carry with them powerful arguments on both sides. The hard cases require more than a dogmatic assertion that there is a single objectively existing external barometer that tells you when a court is right or wrong. It seems to me that the great challenge of modern jurisprudence is to deal with error deflection in those cases where there is genuine doubt as to what the right answer is.

If there is really a single right answer, then all the branches of

government should have an equal right to look for it. If what we are doing is looking for the law of gravity, everybody should be able to look for the law of gravity. But if, as I think, in a much, much more sophisticated conception of law, law is an interplay between text, intent, and the institutional organ given the responsibility of making final determinations and breaking ties, then we have a situation where the very indeterminacy of law cries out for some form of authoritative voice to speak it, and that authoritative voice in our system is the Court.

ROSS: I will try to bring a note of practicality to our discussion. These questions, as to whether or not the President is bound by the law, come up in the real world. What it boils down to is whether the President or, more often, someone else in the executive branch, will follow a law as enacted by the Congress or whether they will refuse to follow the dictates of the Congress. The President had a recent confrontation over the Competition in Contracting Act of 1984,¹ a bill that was designed, perhaps ill-advisably to cut the cost of defense contracting by bringing a greater degree of competition into the contracting process. The President thought that certain aspects of the bill were unconstitutional. Notwithstanding those constitutional concerns, he decided to sign the legislation into law. The Attorney General wrote an opinion discussing what the executive branch thought was unconstitutional about the law, and the director of the Office of Management and Budget instructed all departments of the executive branch to ignore the law. Now, I do not believe that is a power prerogative that is within the ken of the executive department.

The President, when faced with what he or she believes is an encroachment by the Congress into constitutional prerogatives, has two alternatives. The first, which the President foreswore in this case, would be to veto the bill, and to see whether Congress could have mustered the super-majority necessary to pass this objectionable law into statute. The second would be to wait for an appropriate case to arise where there were people to challenge the law, and to hope that the Court would agree with his view of the law as opposed to the Congress' view of the law under our Constitution. It is, however, dangerous to any system based on the rule of law for the executive to believe that a third option exists which is simply to ignore those laws which he or she does not agree with on constitutional terms, regardless of whether it is a law which is intended to have the executive do something or whether it is a law that is intended to prevent the executive from doing something.

¹ Pub. L. No. 98-369, 98 Stat. 1175 (1984).

HARRISON: That is certainly an important issue in this context because it points up our differences in approach. Suppose an earlier President had signed the law and then a new President comes in and refuses to apply it. (There is a difficulty in the same President signing it and then not applying it.) What the President is saying is that this law that Congress passed is a statute of the United States but it is contrary to the Constitution and he cannot follow it. Formally, that is exactly like what John Marshall did in *Marbury v. Madison*.² To say that the courts can do this and that the President cannot is to appeal to the notion that the courts have this special role, and that is exactly the issue on which we are differing.

NEUBORNE: Suppose that the President said that the statute was contrary to the Constitution and that the case was brought and the President lost. What does he do in the next case? Does he say in the next case, I lost the last time, but that was just the last time, and since I have a continuing right to construe the Constitution my own way, I can continue to refuse to enforce this law? Can the President force anybody who wants a contrary result to drag him into court to get a court order? Is that not what the real, practical problem is in ascribing to the President or the executive branch an autonomous power to construe the Constitution and law even after the courts have spoken?

HARRISON: Absolutely. I think that if the President thinks that the constitutional issue is important enough or that the political issue is important enough, then he or she has a legal right to force those with contrary interpretations to get a court order. The President has to be prepared to take the political heat resulting from such actions, but it is legally entirely permissible for the President, just as it is for an individual, to say, "Okay, sue me."

ROSS: I would disagree with that because under the Constitution the individual does not have the obligation to enforce the law that the President does. Our constitutional system does not intend the President to become a lawbreaker.

QUESTION: My question is for Mr. Ross. I work for the Secretary of Health and Human Services, enforcing statutes that have been passed by your client. Most of my life is controlled by, and the battles I fight are in defense of, statutes that the House compromised and worked out through very elaborate and time-tested procedures with some very clear and specific language. I do a lot of work with the Social Security Act of 1935,³ and the House spends a lot of time, periodically, amending it or fine-tuning it. Is there any

² 5 U.S. (1 Cranch) 137 (1803).

³ 42 U.S.C. §§ 301-1397f (1982).

kind of outrage or even sophisticated notice being made that, from a Jeffersonian point of view, the courts are intruding very viciously on those kinds of hard fought compromises and specific details that not only the Speaker, but the other 434 representatives, have worked so hard on? Do you notice any kind of legislative outcry against judicial intrusion, or is it strictly something that we should only expect the President to defend?

ROSS: There are a number of instances in which the mood in the House after a particular decision is "How could they do that? We made it clear, we said what we wanted, and they've done the exact opposite." Now, those sentiments are not always well founded, but they are there. I am not sure that I would ascribe any Jeffersonian motive to it.

QUESTION: I have a question for Professor Neuborne and Mr. Ross. Imagine that there had been a decision of the Supreme Court saying that the Alien and Sedition Acts⁴ were constitutional and did not violate the first amendment. Jefferson becomes President, and he did not sign this bill. He decides that he is going to bring no cases under the Alien and Sedition Acts because he thinks that they are unconstitutional. Is he doing something bad? Or is there perhaps something to be said for pluralism in constitutional interpretation as in other matters?

NEUBORNE: I guess you are really asking that if my political ox gets gored, am I willing to say the same thing. I have the luxury of sitting in a room this afternoon and not having my political ox gored, so I can say yes, I am the world's most principled individual, and I never compromise principle. Whether, in the real world, I will compromise it, I do not know, but I think that the principled answer to your question is that if the Supreme Court had passed on the constitutionality of the Alien and Sedition Acts, and had made it very clear that those acts were constitutional and that the President believed that there were appropriate acts to bring within the discretion that any prosecutor has of allocating scarce resources among lots of cases, it would be inappropriate for the President to not enforce the law simply because he disagrees with it.

ROSS: I would agree with that. The law is the law whether we like it or not. There are ways of changing the law, but, just because an individual does not like a law does not provide the individual with an excuse to ignore it. Similarly, the executive branch is not excused from enforcing it.

NEUBORNE: It is one thing to make a judgment as a prosecutor that the allocation of your scarce resources is best used in en-

⁴ 50 U.S.C. §§ 21-24 (1982).

forcing another law because it would be socially defeating, an improper allocation of resources, or inefficient to enforce a particular law. There are a host of reasons why a good prosecutor makes hard judgments about where to put the resources of his or her office. But it is an illegitimate form of argument to say: "Even though I know that I could enforce that law, I know I could make it stick, I know that it is something that is within my capacity to do, I simply choose not to do it, because I disagree with what the Supreme Court says the law is in this area."

QUESTION: Would you urge that more obscenity prosecutions be brought?

NEUBORNE: No, I think that they are socially self-defeating. But if a prosecutor thought otherwise, I would not go up to him and say: "Look, let's talk outside, maybe I can persuade you that the Supreme Court is all wet in these things and even though you would be able to go get the bookstores and close them down, let me see if I can give you a brief which will persuade you that the Supreme Court decisions are wrong." If I could persuade the prosecutor, then I could make a private deal with him about whether those laws get enforced. That is not the way a prosecutor should act.

ROSS: I would simply add that I took the question to have factored out things such as prosecutorial discretion, and my argument is not against there being any prosecutorial discretion; it is simply based solely on a question of constitutionality.

NEUBORNE: The prosecutor can have reservations because, often, there is legitimate doubt about whether something is or is not constitutional. But if you have the very same statute that was upheld the day before by the Supreme Court, and the prosecutor's reservations are strictly personal reservations and not the reservations of what the Supreme Court of the United States says the law is at a particular time, then those are not appropriate reservations to take into account. Could the prosecutor hide them? Sure. In the real world would the prosecutor be able to do something? Sure. Is it right? No.

QUESTION: In the period between the *Schechter* decisions of 1935⁵ and the *NLRB* decisions of 1937,⁶ the Roosevelt administration seemed to take the attitude of legislating first and litigating later. In other words, the administration pushed statutes that it

⁵ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Schechter v. United States*, 295 U.S. 723 (1935).

⁶ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *NLRB v. Fruehauf Trailer Co.*, 301 U.S. 49 (1937); *NLRB v. Freidman-Harry Marks Clothing Co.*, 301 U.S. 58 (1937); *Associated Press v. NLRB*, 301 U.S. 103 (1937); *Washington, Virginia & Maryland Coach Co. v. NLRB*, 301 U.S. 142 (1937).

knew the Supreme Court would invalidate with the secret purpose of shifting the blame for the Roosevelt administration's lack of ability to come up with reforms consistent with the Constitution onto the Supreme Court. I wanted to ask the panel if they believe that the executive or the Congress has the duty to at least consider the constitutionality of a bill before passage? If so, does the passage of a bill which obviously violates the Constitution, or which the Congress or the executive or both reasonably should realize will be invalidated by the Supreme Court, violate a public trust, in that public officials take oaths to uphold and support the Constitution?

HARRISON: I will start by saying that I think that Congressmen have a legal obligation under the Constitution not to vote for bills that they think are unconstitutional. Also, it seems to me inappropriate for a member of Congress to vote *against* a bill on constitutional grounds where the Court says it is unconstitutional but he disagrees; I do not think that counts as a vote based on constitutional considerations. Moreover, although this is not the official opinion of the executive branch necessarily, I personally have serious reservations about whether the President can get off the hook on this question—whether he can sign a bill that he thinks is unconstitutional just because he knows that the Supreme Court is going to uphold it. I am certain that he can do what Andrew Jackson did which was veto on constitutional grounds something that the Supreme Court had already upheld.

NEUBORNE: My sense is that it is the duty of the legislative branch to take into account what they believe the Supreme Court says the law is and, based on that good faith judgment, determine whether or not they are passing a constitutional act. Since that is almost always a question of very serious doubt, I think the practical consequences of it are very, very slim. You would have to almost be repassing the same act the day after the Court upheld it before you got a really tight issue. Most of the time there are arguable distinctions between the statutes. If there are arguable distinctions between the statutes that the legislators in good faith feel distinguish the statute, then I think that is the end of the question; it is up to them.

NAGEL: I think that if you put the question in terms of a public trust, then yes, the legislature that passes a law that they think is unconstitutional under judicial standards is breaching a public trust because they are bringing on a certain amount of unpredictability and disorder. Sometimes, however, there are other considerations that are more important than that. If they are convinced that the Court's judgment or predicted judgment is wrong, then they also have an even greater public trust to pass the law under their own

judgment of the Constitution. Let me add just one additional factor to support that conclusion. The question that much of this discussion is skirting around is: what are the sources of law? It seems to me that one of the sources of law, of constitutional law, even a source of traditional legal meaning of constitutional law, is, as Judge Posner said this morning, the political culture. I think that the political culture should not be disabled from participating in that system because if it is, even traditional legal indicators of meaning like text are going to be impoverished.

ROSS: I would say that as a theoretical matter, members of Congress have an obligation to vote against legislation that they believe to be unconstitutional. However, as a practical matter, it is very rarely that clear-cut when the matter is on the floor of the House. One good example is the Gramm-Rudman Deficit Reduction Act,⁷ in which there were many people expressing the opinion that certain provisions of that statute were unconstitutional. Well, we all know that portions of that statute were held unconstitutional; however, it was not these portions that people were warning about. Thus, it may be expecting too much for the Congress to have a crystal clear idea of what will be held constitutional when you are talking about the types of legislation that are normally being considered.

QUESTION: If the President thinks something is unconstitutional, how can he sign it even if the Court will uphold it? How can he administer the law according to the Court's view rather than his own, when he sincerely believes in his own?

HARRISON: I do not have a final answer to that, but the answer that I am satisfied with for the moment is that the President is really no different from any other citizen. Legal obligation is legal obligation: the duty to take care that the laws are faithfully executed has various consequences, but they are not consequences that create any obligation upon the President different from any other subject of the legal system. If we know that a citizen can ignore his own conscientiously formed view of the law and follow the courts, then I think that the other branches can do the same. The other branches are placed in the situation of the citizen; they can either stand on their own view and litigate, and probably lose, or they can tell their consciences that they are going to go along with the courts instead.

NEUBORNE: That begs the question of my position. The whole question is whether or not a member of the governmental family is to be treated identically with a private person in that situation.

⁷ Balanced Budget & Emergency Deficient Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985).

QUESTION: I have a question for Professor Neuborne. Did I understand you correctly, that from your position, you would reject Abraham Lincoln's position on *Dred Scott*⁸ given in his first inaugural address?

NEUBORNE: Well the Lincoln position on *Dred Scott* is a complex one. Much of what Lincoln rejected in *Dred Scott* was dictum, and that makes it quite easy. I know of no theoretician who believes that dictum has any self-executing, binding quality, and ninety-five percent of *Dred Scott* is dictum. To the extent that Lincoln was urging that the holding of *Dred Scott* be disavowed by the federal government and not be complied with, rather than having it be overturned by some more constitutional means, the answer is, I think, yes, I do disagree. In fact, *Dred Scott* was dealt with by the thirteenth and the fourteenth amendments and not by executive non-acquiescence.

QUESTION: I would like to ask Mr. Ross how he can reconcile two of the propositions in his speech. One position seemed to be that Congress had the right even against a Supreme Court decision on a particular bill simply to pass the bill again in the hopes that the Supreme Court would change its mind. The other position, one that I open with, is that the executive is incorrect, in a case like the Competition in Contracting Act of 1984,⁹ to refuse to carry a statute out on the grounds that it was unconstitutional when there was no Supreme Court case clearly on point. Why would the President's oath to uphold the Constitution not give him this power, a power that you assert that the Congress has even in the face of a particular Supreme Court decision. So, I am trying to avoid the question of whether this is a Supreme Court decision particularly on point and put the question to you just starkly in terms of Congress' greater power to interpret the Constitution in legislating than the executive has in executing the law.

ROSS: I will answer that two ways. First, the power that I claim for the President is in the legislative process. One should not confuse that process with the implementation of the law once it is passed. During the legislative process, when an idea is being enacted, it is entirely appropriate for the President or the Congress to state what they believe they want the law to be. However, when you get outside the legislative process and you have an enacted statute, the President and the executive branch then have other obligations that they must carry out, which is to implement that law as it has been enacted. Let me suggest to you that the idea that the President's authority and duty to the Constitution would excuse nonen-

⁸ *Dred Scott v. Sanford*, 60 U.S. 393 (1856).

⁹ Pub. L. No. 98-369, 98 Stat. 1175 (1984).

forcement of a statute that he believes to be unconstitutional is a very dangerous toy to give to any executive. All of us on the panel have agreed that the President may keep his view of the Constitution and its impact on a particular statutory scheme, notwithstanding a Supreme Court decision on the subject, and that the President can seek to have that decision overturned. If we were to allow the President's belief that the statute is not constitutional to serve as an excuse for nonenforcement of the statute, then we would have a situation where no matter what happened, no matter how many times a statute was passed, no matter how many times it was upheld by the Supreme Court, a recalcitrant executive could simply ignore the law. That is not the system of government that we have.

HARRISON: It would be an extremely dangerous power in the hands of the President not to enforce the law that the Congress had passed because he thought it was unconstitutional. That is the same power as judicial review, which is also extremely dangerous.

NEUBORNE: Until the Supreme Court speaks, I think that the President has equal providence with Congress on the issue of constitutionality, and if he has a conscientious scruple about enforcing that statute, then that is what you have courts for. It is only after the courts have spoken that I would be troubled by a President that continued to ignore the statute.

QUESTION: Professor Neuborne, I think, correctly pointed out that what we are primarily discussing here is a question of philosophy of law with implications not so much for disposition of individual controversies, but for the effects of an idea on society and on government. Professor Nagel pointed out some of those effects, suggesting the possible increased arrogance among the judiciary and increased timidity among the other branches or citizenry. Professor Neuborne made this concession on the grounds that the practical consequences between a *realpolitik* approach to this question and a duty to obey the resolution of it were not very different, and then proceeded to address the philosophical issue. Both of his justifications for finding a duty to obey, however, were profoundly practical, and if his assertion about duty to obey and *realpolitik* producing very similar results is true, then the point he made really should not be valid in practice. There should not be much difference in prevent behavior because, as he asserted, the incentives set up under the *realpolitik* and duty to obey approaches are so similar, and there should not be that much difference in the equality of protection that people with and without resources get in these two situations. Given that, is he not in fact granting enormous philosophical power to the Court essentially for no reason?

NEUBORNE: First, I do not really think that there is all that

much difference between philosophy and practicality. Pragmatism has a very important role to play in philosophy. Philosophy is not divorced from the real world, and I do not consider it a sin to make an argument about legal theory which takes into account the implications in the real world of that legal theory. It is one of the things that good philosophers should do. But second, I think you misstate the position. In the vast bulk of situations the issues would come out the same. The problem is what do we do about those potentially very important situations where they do not come out the same.

I should have made this disclosure at the beginning because I think it is appropriate at a forum like this for you to know what my biases are: I am counsel in a case in which I challenge the executive's failure to acquiesce in established precedent in the context of Social Security Administration cases.¹⁰ You know, a real world situation. Suppose that the Supreme Court construes the Social Security Act as giving entitlement X, and the President believes it gives only entitlement Y. The Supreme Court's decision is unequivocal. Is it then lawful for the President to continue to administer the Social Security Act so that individuals applying for the entitlement do not get it and have to take the government to court in case after case after case? Those people who do not have the sophistication to get to court do not get the entitlement. Now that is not an ivory tower problem, that is the problem of hundreds of thousands of people over the last couple of years in the context of administrative non-acquiescence. That is a very important practical question, and I think there is only one answer to it: "The rule of law means that everybody gets the same benefits whether or not they can afford a lawyer."

QUESTION: My question is for Professor Neuborne. All of the remarks since your presentation make it pretty clear that there are all sorts of constitutional norms and levers which avoid some of the worst consequences both you and Mr. Ross point to. What I would like to know at this point is what are the precise constitutional nightmares that we face if we do not accept your position that decisions in the Supreme Court should be treated as positive law?

NEUBORNE: The constitutional nightmare is dual. In large numbers of situations—in National Labor Relations Board settings, in settings involving the Society Security Act, in settings involving the administration of the entitlement programs, to the extent that the executive believes its obligation to comply with Supreme Court precedent is essentially a prudential one—the executive picks and chooses based on, I am sure, good faith judgments about whether it

¹⁰ *Steiberger v. Bowen*, 801 F.2d 29 (2d Cir. 1986).

should or should not comply. That means that it is then purely a function of the resources available to the group affected by the statute. The wealthy will live under a set of laws that are enforced in the courts because they can afford to take the executive to the next step. The poor, unless we provide them with vastly increased resources, must abide by the executive law. Many of you, I think, would agree that it would be absurdly inefficient to create an expensive machine to enforce something which should have been done in the first place. But unless we are willing to create that machine, then the consequence of not giving the poor those resources is to say that there are two systems of law in the country: one for the rich, and one for the poor. That is a constitutional nightmare.

QUESTION: Do not the so-called underprivileged or underclass have recourse to the legislative system to make up for that imbalance that you would say would occur in the advocacy system?

NEUBORNE: Would that it were so.

ROSS: If I could just follow up on that, I think, not to denigrate the nightmare that Professor Neuborne identifies for individual citizens, that if you are talking of constitutional nightmares, the system that you suggest would also emasculate the legislative branch from being able to enact policy. The entitlements that Professor Neuborne is talking about are entitlements which were guaranteed by the passage of a statute, and what you would be doing is you would be giving the President a non-reviewable ability to negative a law which goes far beyond the legal authority he is given.

NEUBORNE: Exactly. It is a *de facto* extension, expansion, of the veto power to enormous proportions.

HARRISON: To claim that much for it is to omit, I think, the requirement that the view taken of the law by the executive has to be one sincerely held. In the correct case, we are talking about a situation where the executive really disagrees with the courts about what the law really means or the courts disagree with some members of Congress about what the law really means. This is simply a consequence of separation of powers, where one group of people pass the law and somebody else executes it. For the President to execute the laws incorrectly is a violation of constitutional responsibility, but for him to execute them as he best understands them and with an eye on various powerful considerations of prudence, is precisely what the constitutional arrangement contemplates.

NEUBORNE: In fairness to the current administration, I should make clear that I know of no situation in which they have refused in good faith to comply quickly and expeditiously with a decision of the Supreme Court in the area of entitlements. The litigation we have going on now involves the self-executing power of

circuit court precedent within the intra-circuit geographical area. That is a much harder question and we did not get a chance to discuss that here.

QUESTION: Mr. Ross drew a distinction that I thought was interesting between a President's power to interpret the Constitution in legislative and non-legislative situations. I would be interested to know whether Professor Neuborne agrees in this context. Assume that the Supreme Court has been confronted with a Draconian quota system, challenged as reverse discrimination under the fourteenth amendment, and the Supreme Court says it is not offensive to the fourteenth amendment. Shortly thereafter, the Congress passes some bill which proceeds to legislate along the same lines, and codifies the Supreme Court decision. It is presented to President Reagan who vetoes it on the grounds that it is his judgment that this is an unconstitutional bill. Do you think that is an appropriate exercise because this is the legislative process?

NEUBORNE: The answer, I think, is this. It is clear, at least to me, that the President is not obliged to sign the bill under those circumstances. The President does not have to subordinate his judgment about what is good policy to the judgment of the Supreme Court or to the courts, or to the Congress. It would, however, be intellectually dishonest for him to couch his veto message on the grounds that the bill is unconstitutional. I think it would be much more intellectually honest for the President to say: "The Supreme Court and I have a principled disagreement about what is constitutional here and what is not. I profoundly believe that they are wrong. I recognize that they have spoken, and therefore, I cannot say to you that this bill is unconstitutional. I can say, however, that it is my judgment that it should be unconstitutional, and therefore, as President, I will not sign it." I think that is appropriate.

COMMENT BY DOUGLAS H. GINSBURG (Judge, United States Court of Appeals, D.C. Circuit): I notice that the discussion glided very smoothly from one of prosecutorial discretion to one of a situation described by the non-acquiescence policy. I offer a distinction for your consideration that I think the hypertrophied sensitivities of a law professor can overcome, but that practical judgment might embrace. The President's decision, because of his own constitutional views, not to enforce a particular law necessarily because he believes that it is unconstitutional, stands on a very different footing than placing impediments or burdens on citizens exercising a right or claiming an entitlement under an Act of Congress. This is true even if that burden is placed where it is thought to be constitutional, for constitutional reasons.

The difference is that in the non-prosecution case the President

is deciding not to bring the coercive power of the state to bear on the individual. That, I think, puts the decision on a very different footing than one where he decides to burden the individual, notwithstanding a congressional determination upheld by the Supreme Court to the contrary. I think that we should err on the side of tolerating that decision because as a practical matter the alternative is not that the force will be exerted, but rather that the President, assuming that this is an act of conscience, will have to dissemble as to the grounds for the non-enforcement. That strikes me as an unhealthy result.

NEUBORNE: I wish I could buy into that distinction because it would make my position a lot easier. Although I do not disagree, I think that the force of the distinction you make between the difference in not imposing government power versus putting a burden on a citizen has force, but the force that it has for me is not to allow the President to justify what he is doing based on constitutional grounds when the Supreme Court has completely undercut that position. It seems to me that it ought to allow a law enforcement official to say: "Look, I'm not enforcing this within my prosecutorial discretion. I can't pass the buck and say that it's unconstitutional. I take full responsibility for the judgment not to enforce this law and if you want to do something to me, you can. You can vote me out of office. But I'm not going to hide behind the Constitution in making my judgment." That would be much more intellectually honest, and I think theoretically more correct.

GINSBURG: But I think you can say that the President would not, could not hide behind the Constitution, while in fact he can. In fact he exposes himself to further legislative response by invoking the Constitution. We saw that in the impoundment situation. If the President were to say, for reasons of constitutional interpretation, that a particular law would not be enforced during his administration, then you would get a new kind of law. What you would have instead of a law saying X is unlawful, is a new law passed by the Congress saying that the Attorney General and the United States Attorneys must expend the following sums in the furtherance of this law and report back on all complaints received under the statute every six months and so on and so on, and the tussle between the two branches would have been played out. That strikes me as a very unhealthy way of resolving the matter.

COMMENT BY FRANK EASTERBROOK (Judge, United States Court of Appeals, Seventh Circuit): I have been troubled throughout this discussion by the fact that no one has articulated what he sees as the basis of judicial review. We have been trying to make comparative judgments about the extent to which particular

branches are bound by constitutional constructions without having articulated what that basis might be. It came out most forcefully in the exchange between Mr. Harrison and Professor Neuborne in which Professor Neuborne ended up saying: "Well if it's true, as Mr. Harrison says, that there are right answers to constitutional questions, then obviously it follows that the executive, legislative, and judicial branches can give different answers." So from the fact that there are right answers, there are multiple answers. From the fact that there are many possible answers, it must follow that there is only one answer, that is, whatever answer the judge gives. It seems to me buried in that is a very unusual theory of judicial review under which what the judge is doing is sorting from a large variety of permissible answers, announcing one, and that one becomes binding. It seems to me that as soon as one says that there are a large variety of permissible answers, it ought to follow that no choice from within the permissible zone is necessarily binding on everyone else, in other words, that Mr. Harrison and Professor Neuborne have everything exactly backwards: if there is one right answer, everybody had better follow it, but if there are multiple permissible answers, we do not have a theory under which everyone must follow one answer.

HARRISON: Since we have everything backwards, let me answer for Professor Neuborne. As I understand it, his position—which seems to me a different and very interesting form of right answerism—involves a two-stage theory of law. At the first stage, law is relatively clear and definite, but it does not take you all the way to one right answer. Instead, the first step imposes a constraint, it narrows you down from thousands of possible answers to, for example, ten possibilities. The second stage is driven by the need to come up with a right answer, but it is limited by uncertainty and complication: no one of the ten possibilities can be said to be correct just on the basis of its content. So instead of a rule for identifying the right answer based on the content of the answer, at the second stage you have a rule based on the identity of the answerer: what the Supreme Court says is correct by definition. Thus, for Professor Neuborne, the reality of multiple plausible answers combined with the need for one, single rule leads to the conclusion that only one person can have the right answer: from many truths, one view of the truth. My approach, which defines correctness entirely in terms of content and not at all in terms of the identity of the answerer, leads from one truth to multiple permissible views. In response to Judge Easterbrook, I think that our positions naturally lead to that outcome and that it is only paradoxical on the surface.

NEUBORNE: In a very interesting way, the debate between the two of us and the paradox that Judge Easterbrook has pointed

out, is the paradox between Protestant theology and Catholic theology in terms of the interpretation of the holy writ. I have felt for some years now that the great discussion about using literary texts as a paradigm for talking about the Constitution is somewhat beside the point. As an ACLU lawyer, it has always seemed to me that there have been three groups that really know what constitutional adjudication is all about: Talmudic scholars, Jesuit seminarians, and ACLU lawyers. We each have a holy text; we labor over it for a great deal of time, and we spend a good deal of time worrying about how the authoritative answer comes out. Each group has evolved a theory of an "answerer." What I am saying is, given my perception that law is essentially indeterminate in many, many settings; and that a false determinacy is intellectually dishonest in many situations; and if, as I believe, society requires that there be an authoritative voice so that we can have pre-event ordering and post-event equity, then you need a theory of an "answerer" that will allow one of the potential answers to become the authoritative one. I believe *Marbury* gives us that. Judge Easterbrook's perception that this whole debate begins with legitimacy of judicial review is exactly right. It is in the necessity of deciding a case or controversy that I believe that the judicial branch assumes the legitimate mantle of the "answerer." It is the mechanism that gives us the authoritative voice that breaks us out of the trap of cacophony. I believe that cacophony in the law is the terrible price that we would pay if we went any other way. I do not contend that the Constitution compels my view. I say merely that the Constitution permits it. And it is so clearly better, that it is the path we ought to go down.

HARRISON: What Professor Neuborne just said is a consistent application of his view of the nature of law: we can say with confidence that the Constitution permits only a certain limited number of answers, but we cannot necessarily determine with confidence which of those is the right one, so it is not correct to say that there *is* a right one. I hope that line of argument sounds familiar, because it leads into the final metaphor I want to suggest about classical law (and I will call my view classical): classical law is classical as classical theories are distinguished from quantum theories. In quantum theories, there is not a right answer about a lot of questions. Certain complementary characteristics of systems are simply not defined. In a classical theory there are answers to all the questions even if we are not sure what they are.