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PANEL 5: FEDERALISM AND SEPARATION OF POWERS

MODERATOR: ERIC SEGALL

PANELISTS: STEPHEN GRIFFIN, NEIL KINKOPF, AND ILYA SOMIN

Professor Eric Segall: It is Friday, it is getting late, but we do have two excellent panels to go. Thanks for bearing with us for the rest of the day. We have Ilya Somin from George Mason, I'm sorry, Antonin Scalia, School of Law, we have Steve—

Professor Ilya Somin: Law School.

Professor Segall: Law school, right. We have Steve Griffin from Tulane, and we have Neil Kinkopf, who most of you know, from GSU. This panel is going to be about federalism, and it's going to be about separation of powers. We're going to start with federalism, though these topics may bleed together in some cases. There used to be a lot of talk about the Rehnquist Court's new federalism once Justice Thomas replaced Justice Marshall in 1991. Can we talk a little bit about what that new federalism was and what role Justice Kennedy played in that new federalism?

Professor Somin: From the 1930s until the 1990s, the Supreme Court, by and large, made almost no effort to restrict the scope of federal power in a structural way, on the basis that Congress or the President had exceeded the scope of what the federal government is allowed to do structurally. Beginning in the 1990s with cases like *New York v. United States* in 1992, which I think was the first really significant modern case in this area, and then going on to *Lopez* and other cases later, the Supreme Court did begin to revive federalism in several ways.

One is, they said, it is not the case that the federal government's power to regulate interstate commerce means the power to regulate

pretty much anything. There are going to be some limits. It's not easy to specify exactly what these limits are, but in several cases, beginning in *Lopez*, they said there are constraints. They also said, more firmly, that the federal government at least as a general rule, is not allowed to commandeer state and local governments. That is, it's not allowed to say, "We're going to force state and local government officials to help enforce federal law and carry out other functions."

They have also, most notably in *NFIB v. Sebelius*, the Obamacare case, ruled that there are constraints that are meaningful on the kinds of conditions that can be imposed on the state governments—as a condition of getting grants from the federal government. Some constraints were there even before the so-called "Rehnquist Revolution," but I think it's fair to say that the Rehnquist Court, and later the Roberts Court, clarified these conditions and restrictions and enforced them more tightly than before.

With respect to the Eleventh Amendment, they've taken a tougher line on protecting the state sovereign immunity against the federal government. Then finally, with respect to the Fourteenth Amendment, Section 5, which says the Congress has the power to enforce the restrictions on the state and local governments of the Fourteenth Amendment by appropriate measures, beginning in 1993 in an opinion written by Kennedy in the *City of Boerne*, the Supreme Court has said that there must be "congruence and proportionality here. That is, there must be some strong connection between the violation of the Fourteenth Amendment by state and local governments that's being remedied and whatever measure Congress is enacting,. Things that go beyond that can be struck down and indeed have been in at least a couple of major Supreme Court cases.

There are some other issues as well, but these are the big ones. I think it's fair to say that, in every single one of these areas, Kennedy played a crucial role, either by writing important opinions, as in *City of Boerne*, or by providing a crucial fifth vote for what were often five-four majorities. Most of these cases were decided 5–4, or 6–3, or

in a couple of instances, by 7–2. Kennedy was absolutely crucial to the majority. In various cases, he articulated some important rationales for aspects of the so-called “federalism revolution,” as well.

So, he played probably as big a role in all of this, as any single Justice, perhaps bigger than Rehnquist, who helped begin it, arguably bigger than O’Connor, if only because he was around for longer of it than O’Connor was, and probably bigger than Scalia as well, in that he articulated more of the dominant doctrines. Clarence Thomas would have gone further, I think, than Kennedy was willing to do. But Thomas rarely, if ever, managed to write either significant majority opinions, or highly influential concurring opinions in this area of doctrine.

Professor Segall: Let’s talk about Kennedy’s rationales, because I think his view of accountability, which Justice O’Connor mentioned first in *New York* but Justice Kennedy definitely leaped on, played a big role here. What was Kennedy’s view of accountability between the states the federal government, and the people?

Professor Neil Kinkopf: Sure. Before we get to that, sorry to object to the question.

Professor Segall: I’m used to it.

Professor Kinkopf: Eric and I object to each other all the time. I just want to add one thing to Ilya’s very fine description of the new federalism. That is, crucial to Justice Kennedy and Justice O’Connor was the assertion of judicial power. So, not just that there are limits but that it is the role of the Court to articulate and enforce what those limits are, which you mentioned at the outset that we were going to blend together federalism and separation of powers. So, here we are, the first question I think does that.

So, Justice Kennedy, I think along with Justice O’Connor, articulated a privity theory of federalism. That is that our system of

federalism, where we split the atom of sovereignty, envisions in Justice—

Professor Segall: You don't think that's as good as Mike's—

Professor Kinkopf: It's fine, it's fine. I just don't want to be in the blast radius.

Professor Segall: Okay.

Professor Kinkopf: So, for Justices O'Connor and Kennedy, but really for Justice Kennedy, what that meant is there are supposed to be distinct lines of communication, of accountability, of sovereignty between the federal government and the people distinct from the lines between the state government and the people. Neither of those two governments should interfere with the relationship—direct relationship—between the citizen and the state government if it's the federal government doing the interfering or between the citizen and the federal government if it's the state government that's doing the interfering.

So, what Justice Kennedy says in case after case, across the whole range of doctrinal categories that Ilya laid out, Justice Kennedy tries to apply this theory. He brings it up in every one of the cases, and says, “The problem with what”—usually it's the federal government—“the problem with what the federal government has done is it interferes with the relationship between the state government and its citizens in a way that renders accountability problematic.” So ultimately, his theory went back to the idea that the federal government and the states are supposed to compete with one another for the affection of the people, and that would preserve liberty.

That system can only work if the people know who to hold accountable for telling them they have to buy health insurance or for telling them that a low-level radioactive waste disposal facility is going to be sited in their backyard. If the federal government can impose that but trick the people into thinking the states ought to be

held accountable, well that's problematic, that undermines our system of federalism. So, that idea of accountability is crucial to Justice Kennedy. I think more than any other Justice, more than Justice O'Connor, who first articulates that in *New York v. United States*, Kennedy adheres to it across the whole range of federalism cases, and he does it when it's the inverse.

So, in term limits, a case that you didn't mention, where the claim is that the states are interfering with the federal government by states imposing term limits on federal members of Congress, Kennedy adheres to his accountability theory, his divide-the-atom-of-sovereignty theory and says, "Well in this case, the states are interfering, and we shouldn't understand their power as allowing them to do that." Justice O'Connor and the other conservative Justices all just ignore that in the term limits case. But Kennedy, we've talked a lot about his inconsistency or his capaciousness, in this respect anyway, he was relatively consistent through the cases.

Professor Stephen Griffin: Well, I was thinking in terms of this panel, and some of the others, when you're dealing with a Justice who's been in the majority side so much, are you talking about only his opinions, his work product, or are you talking about the Court as a whole? You need to look at both, probably. But when I look at federalism, Commerce Clause, I see some distinctions because in *Lopez*, which is both federalism and Commerce Clause, and by the way, I agree that these cases merge over into separation of powers. It's hard to talk about federalism and then Congress's power vis-a-vis the states without talking about Congress's power generally. That's the judiciary versus Congress, separation of powers.

In *Lopez*, it seems to me, he carved out a little more of a distinctive position, where he said a little more clearly than Rehnquist, "We're not interested in questioning the New Deal, but what we see here is a clear involvement of the federal government, and a matter of traditional state concern." So, he makes *Lopez* a little more about federalism than the Commerce Clause simplicitor. But I'd have to

say, then I was taken aback by the realization that this *Lopez* concurrence was almost as long as the *Lopez* majority opinion. But, I can't really quite reconcile his approach in *Lopez* with what happens in the Affordable Care Act case.

Professor Segall: A couple of more questions about accountability because I think that's really an important topic here about federalism. The first one is, it didn't seem to play a big role in the *Raich* case, where Justice Kennedy agreed that the use of homemade marijuana that was legal under state law could be regulated by Congress. That case presented accountability, I think, more than any other case, except for maybe term limits, because there the federal government was prohibiting something the state government expressly allowed in a very politically loud way. What happened to accountability in the *Raich* case?

Professor Somin: I think Kennedy just screwed up and violated his own principles, not just on accountability but on the overall structural approach to the Commerce Clause and federalism generally that he took. He had said didn't want to upset the existing major New Deal precedents, which he noted in that concurring opinion with O'Connor that you just mentioned in *Lopez*. But otherwise, he was going to be skeptical about policing new federal intrusions and ones that were not required or not specifically upheld by the New Deal cases. Also, as he said in another case, *Bond v. United States I*, Federalism is about protecting the liberty of the individual, not just the dignity or the rights of state governments.

Of course, in *Raich* we have a person who needed medical marijuana, it was sanctioned by state law, she and others like her arguably needed this for their liberty, dignity, and health, and he just didn't care. Moreover, he signed on to the majority's extremely broad definition of what counts as "economic activity" that could be regulated under the Commerce Clause, which they defined as anything that involves the production, consumption, or distribution of a commodity, which they got from a 1966 dictionary. That definition

occurs nowhere in the Constitution or in the Supreme Court's previous precedents.

So, why did Kennedy screw up in this, to my mind, very egregious way? Maybe it's just that we all screw up egregiously sometimes, including Supreme Court Justices. That's the null hypothesis. The scuttlebutt however, and I don't know if it's true or not, but the scuttlebutt was that he worried about upsetting the War on Drugs." He may have worried, and the federal government actually argued this, that if you allow this with respect to marijuana sanctioned by state law, there'd be a slippery slope to other marijuana and then maybe to other kinds of drugs as well.

While he did have something of a libertarian instinct, it was not fully and systematically articulated, so he may well have had a non-libertarian take on the War on Drugs." I think this may also account, at least in part, for Scalia's concurring opinion here. Though Scalia at least said in his concurring opinion, that you cannot do this under the Commerce Clause alone. You have to bring in the Necessary and Proper Clause, too. So, he tried to cabin the damage at least a little bit. I think he only partially succeeded in that, but at least he tried.

Kennedy didn't even bother to join Scalia's concurring opinion, which would then have been the law, because those two were the swing justices. He joined the majority's, to my mind, extremely egregious and largely indefensible opinion, saying that the power to regulate interstate commerce includes the power to forbid possession of marijuana that was never sold anywhere on any market and also never crossed state lines. You have to be aware of—

Professor Segall: I'm going to take a wild guess that Steve is going to object that it's indefensible.

Professor Griffin: Yeah. Well, I would just defend *Raich* on Kennedy's own terms. Kennedy says in *Lopez* that, regulating guns in school zones, regulating guns in such a specific way, this is simply not a traditional matter of state concern. But, you just can't say the

same thing about the effort to control drugs nationwide, whether it's a product of the war on drugs or not. Federal efforts to control drugs that flow easily across state lines is something the federal government's been trying to do for a long time.

So, if you're looking at—if you define it super-specifically, maybe the provision of medical marijuana as a traditional matter of state concern, maybe you cause a problem for Kennedy. But otherwise, it flows fairly naturally from what he says in *Lopez*, that he's not going to interfere with the federal government, at least as long as they stick to their previous knitting.

Professor Kinkopf: The one point I would add to that is, with respect to accountability, I think the public generally understands who it is that's making their marijuana illegal. In that case in particular, the sheriffs were there with the feds until they realized that Raich and Monson were possessing their marijuana pursuant to California law, at which point the sheriffs and the feds stood off against one another. So, it was very clear who wanted to take the marijuana plants away. It was the federal government. This is an area of traditional federal regulation, of longstanding federal regulation. So, I think, to Kennedy, it just wouldn't have implicated those accountability lines.

Professor Segall: Before you respond, I just want to close out this accountability—and I'll give you the last word—accountability discussion with I think what Neil said about the *Raich* case is true in almost every case. I think that politicians—Justice Stevens said this several times in dissenting opinions—that the people know who's ruling and who's running their government. I would just very quickly, moderator prerogative, tell a very brief story that when I moved to Atlanta in 1983 from Nashville, emission control stickers on cars weren't a thing yet in cities below a certain population, Nashville didn't have them. So, I came to Atlanta, and I called the DMV and said, "What do I do?" "Get a license," they told me, said nothing about emission control sticker. I got a ticket for not having

one. I appealed it to the judge, to the traffic court judge, and I was doing well, and I was about to win. Then I made the mistake of saying, “I’m clerking for a federal judge. I would follow the law.” He said, “This is a federal requirement and a federal mandate, and I hate it, and you’re guilty.” They, not just federal judges—people know who is making the laws that govern them. So, I’m not sure the accountability doctrine has as much weight as O’Connor and Kennedy thought it did, but I’ll give you the final word on this.

Professor Somin: Two very quick points on this. Federal regulation of guns dates back at least to the 1930s, roughly the same era as federal regulation of marijuana. So, you can’t really distinguish these cases based on tradition. On accountability, there is actually a great deal of survey data which says that the public is often confused about which level of government controls what, which officials control what. I actually have a whole book devoted to these kinds of questions called *Democracy and Political Ignorance*. But I do agree with you that I don’t think accountability is ultimately the best basis for federalism doctrine, and it’s not easy for judges to determine where the public really understands who’s accountable for what and where they don’t.

Professor Kinkopf: So, Ilya, I agree with your point completely, and I do think it’s interesting to point out that the Court never seems concerned about whether the accountability arguments they make are right or not. There’s empirical data out there. The Court just asserts, “This is, or isn’t, accountable.” In case after case, the Court does that.

Professor Somin: I agree with you. Do I think O’Connor was probably more guilty of this than Kennedy? I think Kennedy, in his opinions, was more concerned with either the extent to which this creates a federal leviathan that suppresses individuals and the extent to which the federal government might be taking over the machinery of state governments. But, O’Connor, I think, was more explicit in saying that it’s really about confusion of accountability.

Professor Segall: So, it's hard to talk about federalism without talking about *NFIB*, the big Obamacare case. I guess I do want to bring in the dignity concept that was discussed earlier. Arguably, people having—especially elderly people and poor people—not having healthcare seems to be a matter of dignity. It wasn't to Justice Kennedy. Steve, do you want to say something about how that case fits into his overall federalism jurisprudence?

Professor Griffin: Well, I quail to think what would have happened—

Professor Segall: You quail to? Is that a verb?

Professor Griffin: Quail, yeah. I quale to think what would have happened if the joint opinion, as I understand it, that would have rendered the whole law unconstitutional, if that had had its sway. As I understand, that the joint opinion objected to the actual outcome, which means Kennedy objected to the actual outcome, where Medicaid became an option. Still, they were going to interfere in a quite severe way with how Medicaid was delivered.

For those of you, I guess everyone, living in Georgia, this is still an issue, because Georgia's one of the states that hasn't expanded Medicaid. I can safely report from Louisiana that we did expand it two years ago and without ill effect. Without ill effect, except a couple of hundred thousand people did get medical care where they didn't have it before and found out they had things like colon cancer and diabetes, which they're now getting treated for. That's safely in the record.

It's not really chargeable, as I understand it, directly to Kennedy, but there is an insouciance behind the joint opinion that doesn't sound much like Kennedy, but he signed on to it. That is not characteristic of what he says in *Lopez*. So, something got to him. It could be—there are these narratives we construct. Ilya gave you an example of a narrative, I've heard it from Randy Barnett, where we're going in the right direction, we're going back to constitutional

liberty and limits starting with *Lopez*, and *Gonzales* was a horrible deviation. That's one narrative.

Another narrative is, *Lopez* and *Morrison* were limited interventions on Scalia. I heard Scalia once say, "Why are we striking down Commerce Clause laws? Because Congress is sending us stupid laws." That was Scalia in his heyday. There's other evidence saying that the Justices didn't really have that a high opinion of the Gun Free School Zones Act, or what they were presented with in the record, and they could have thought maybe the same thing of the Violence Against Women Act. But something else had to happen here because, clearly, their opinion of the administration or what it did sunk to some new low for Kennedy to sign on to a joint opinion that to me is not consistent with the approach he set out in *Lopez*.

Professor Segall: I do think, without being too super-legal realist, we could say that the Court upheld the "War on Drugs," the court struck down a gun law, the Court didn't like the Violence Against Women Act statute, and the Court didn't like Obamacare.

I want to talk about term limits for a minute because, as I've mentioned earlier today, the term limits decision, when it came down, was absolutely huge. I actually think an argument could be made it is one of, if not the most, important decisions of the Rehnquist Court because if it goes the other way, we live in a different country. If the Court upholds term limits, and I think there would have been fifteen, twenty states at least that would have done them, we live in a country that's very different than the one we lived in before. Because that would make a big difference to how the Congress operates. I'm not saying it's good or bad. I have no idea. But, it would make a huge difference.

Is that going to come back to us? There might be five votes. That was a five-four decision, and Justice Kennedy was the swing vote. I think we know how four people on the Court would vote on that again. Is there a chance that case is coming back?

Professor Griffin: I have one speculative thought on that, but I—

Professor Kinkopf: My speculation is no because of 1994. So, what fueled that was the sense that the Democrats had a majority in Congress for decades and seemed to have a lock on it. Even going into the wave election, the tidal wave election of 1994, there wasn't a lot of sense that Democrats were going to lose the House that year. So, the only way for Republicans, that they saw, to get the Democrats out was through term limits. Republicans eventually—Newt Gingrich came up with the Contract with America, and Republicans actually won the House the old-fashioned way. Since then, I really haven't heard a peep about term limits.

Professor Segall: Democrats are going to start talking about it.

Professor Kinkopf: Democrats will talk about gerrymandered districts all day long, but I don't hear Democrats talking about term limits.

Professor Griffin: I think, at the very least, it would all have to be recalibrated, both parties, if they thought it was a good idea because—each state would have to be recalibrating, “How will this affect us and our relative power in Congress if we unilaterally disarm in terms of seniority?” Back then, before the decision, there was much more a sense of, “Well, this might sweep across the whole country.” The whole country would be participating, and no state would be necessarily disadvantaging itself if it adopted term limits and others did not. But, that would all have to be recalibrated, and I don't know how the politicos would come out on that.

Professor Somin: A couple of points on this. First, as you suggested, obviously this thing has moved way down the priority list of Republicans and conservatives, probably for exactly the reason that you suggested. Second, I do think it's possible that at some point, one or two states, maybe for idiosyncratic reasons, would try to do this, and maybe it would come back to the Court. But if it did, and the Court did uphold term limits, I doubt that it would be this big sea

change, partly because fewer states would do it than might have done it in the '90s, and partly because it might not make very much difference if they did do it.

Political scientists find that incumbency advantage has been going down in recent years in terms of how significant it is to elections. We see that with the House of Representatives changing hands multiple times in recent years, possibly again a month from now. So, it'll matter less for that reason.

Also, with a political system that is more polarized between more homogenous parties, at least more ideologically homogenous parties, there's less room for discretion by individual members of Congress than there might have been before. So, even if it did happen, it wouldn't make a huge difference in terms of governance. At least that's true for the near future. We can imagine, if twenty, thirty, forty years now we're back in a party system more like that of the period before 1994, maybe things would be different then. But, we're a long way away from that.

Professor Segall: I'm going to throw a question out at you all that I did not advise you about, so I apologize. But, in this last term, Justice Kennedy apparently gave up on the redistricting issue, which is, I think, one of the biggest issues we have as a culture and a country today, the whole gerrymandering issue. I think it can be phrased in many different ways, it can be phrased as a First Amendment issue, it could be phrased as a federalism issue, it could be phrased as a justiciability issue, which is pretty much how—were we surprised how Kennedy gave up on that? Because once he gives up on it, and he retires, we know that this issue is probably going to be gone for a long time, and the Court is saying to the political system, “You guys work it out.” Was that a surprise?

Professor Kinkopf: Not to me. I wouldn't go so far as to say he gave up on it. He occasionally would hint that he might be able to see his way to something, and he kept this kind of tease going and then eventually just decided, “Well, no.”

Professor Griffin: That's the way I would put it as well. I'm not sure he was ever that seriously interested. Well, it didn't surprise me that he didn't go for it.

Professor Segall: Do you think he should have?

Professor Griffin: I think it would be—there, I would have to defer to the voting rights experts on whether there was a standard. You'd have to have a standard people could understand. At the same time though, it seems to me, the fact that the Supreme Court maybe can't make up its mind, or he couldn't make up its mind, that is not stopping this litigation because there are just some especially egregious circumstances still going on there in the states.

Professor Segall: Let's move to separation of powers. Neil, do you think that Justice Kennedy had a coherent approach to separation of powers across the board? If he did, what was it?

Professor Kinkopf: Well, I don't know if I'd go that far. But, I do think his opinion for the Court in *Zivotofsky* is really important and will continue to be important. So, until very recently, the Court used to operate in one of two modes in separation of powers cases. Either it was quite formalistic, which tended to be pro-President, or it would be highly functional: look at how the law actually operated in the world, do a balancing test, and overwhelmingly defer to Congress. It would be one or the other. So, you can think *INS v. Chadha* is formalism. *Morrison v. Olson* is functional balancing.

Justice Kennedy in *Zivotofsky* was not formalistic at all but, rather, was highly functional, highly attuned to what was going on in the case, the facts and circumstances of the case.

Professor Segall: Give the quick background, give the quick background.

Professor Kinkopf: I'm sorry. *Zivotofsky* is the case where Congress had passed a law giving individuals a right to have their passport—well, their certificate of birth or passport—designate their place of

birth as “Jerusalem, Israel” rather than just “Jerusalem.” U.S. policy up until that time—up until Trump took office—was that we have no position on what country Jerusalem is in. It’s just Jerusalem. We’re neutral as to the sovereignty relating to Jerusalem.

So, the statute is contrary to that determination. Parents of a child born in Jerusalem ask that the passport be designated—bear the designation “Jerusalem, Israel.” The case went to the Supreme Court as to whether or not the President had to comply with the statute because the President directed the State Department not to put that designation on any passports or conciliar records of birth.

Justice Kennedy wrote the opinion for the Court, striking down the statute. He employed a highly functional balancing test to get there. So, that’s unusual. He employed a functional balancing test but did it in a way that was not deferential to Congress, to Congress’ power, but rather was highly attuned to the needs of the President. So, the case recognizes, in the President, a recognition power, which resides in the President by implication from the Reception Clause. The Constitution authorizes the President to receive ambassadors, and the act of reception is an act of recognition of the country that sent, and the government that sent, the ambassador. So that, coupled with a lengthy review of history and historical practice, for Justice Kennedy, synched the case that the President holds the recognition power.

But still, the Court had to determine whether or not this designation on a passport was inconsistent with the President’s recognition power. In dissent, Justice Scalia made a powerful argument that it’s not, that the President can recognize or not recognize anyone he wants to. Congress has the power over passports just like Congress has the power over tariffs. Congress can say that goods imported from Jerusalem shall be taxed as goods imported from Israel, or taxed as goods imported from Palestine, or taxed as goods imported from Uzbekistan, right? It has complete authority to say how they will be taxed.

Nothing in that determination reverses, as a formal matter, the President's recognition decision. Justice Kennedy didn't go that way, and I think it's important that he didn't. I think he recognized something that the dissent really doesn't take up, but if that line of thinking is right, then Congress—

Professor Segall: Scalia's, Scalia's line of thinking.

Professor Kinkopf: Right. Then—Congress holds the spending power. Congress could pass a law then, fully within its spending authority, that says, “No money shall be spent to issue a pardon.” Congress has the spending power, “Go ahead, Mr. President. Try to issue a pardon, but you need paper.” That paper is going to be purchased, and that's the spending power. At some point, Congress's own authorities come into conflict with Presidential power in such a way as to undermine the President's ability to exercise that constitutional power.

Now, where that happens is a very difficult question, and whether Justice Kennedy got it right in that case we can argue. But, I think it's an important way to think about separation of powers questions. I will say, it's not the only case where the Court has done that. If you look at the Court's opinion in *Free Enterprise Fund*, which is a case involving the removal power with respect to a board within the Securities and Exchange Commission. The Court in that case—it's an opinion written by Chief Justice Roberts, but it applies functionalism. Justice Roberts begins the opinion by lamenting, “No one has asked us to overrule *Humphrey's Executor* and *Morrison v. Olson*, so we don't do that. We apply that framework.” He seems to want to do that, but, “No one asks, so we won't.”

Professor Segall: Yet.

Professor Kinkopf: Right. “We won't, yet.” So, he does the functional balancing test that *Morrison v. Olson* had offered, but he does it not with an eye toward deferring to Congress' judgment or deferring to the outcome of the political process. The President

signed the law, after all. Instead, he does it with an eye toward preserving Presidential power. So, it's this new functionalism that replaces deference to Congress with deference to the President.

Professor Griffin: I wanted to say, I divide up the cases a little differently, but I do see some strong consistencies. Usually, when we talk about separation of powers, we imagine we're talking about cases where the Court is coming in between two other branches of government, and they're resolving things just like *Zivotofsky*. But, there was another very important theme for Kennedy's service on the Court, already mentioned by quite a few people, which is a reaffirmation of the judiciary's role.

This was not only important to cases like *Boerne*. Arguably, it undergirds his approach to the detainee cases, where he's against the Bush administration, and the Bush administration got tired of losing, but they kept losing, and they kept going back to Congress. Congress arguably—and the President—were cooperating. Arguably at the zenith of their power is a case like *Boumediene*. But, Kennedy kept a part of the majority, kept turning them down.

So, that deserves its own comment, but there is a consistency in *Boerne* and *Dickerson*, *United States v. Morrison*, even I add in *Bush v. Gore*, which is a strong reaffirmation that the judiciary is a player here, “We're going to wait—we're going to weigh in.” Kennedy was always on that side all the way through.

The other consistency, to me, is that Kennedy was always a fan of Justice Jackson's concurrence in *Youngstown*. There's a slightly earlier case involving, I believe, the use of the death penalty in the military, *Loving v. United States*. It's useful for laying out his approach to separation of powers. To me, especially when you add on the foreign policy function, I don't divide up the cases so much formalist or functionalist. I look at them in terms of, “Are you talking about a shared power approach, or an exclusive power approach?”

Zivotofsky arguably rests on the recognition of an exclusive power, the recognition power. But Kennedy's general approach, perhaps I'm operating on a high theoretical plane here, but Kennedy's general approach in that case is very clear, it's a shared power approach. He says, "I'm resolving this case totally consistently with Jackson's concurrence. I'm adhering to my earlier line, but this just happens to be a very rare situation where, actually, the President does have an exclusive power." But the general framework is still one where he's not going to decide the case just on that basis. He is going to look at Congress's role and consider those interests in tandem. I see that as a very consistent approach on his part.

Professor Segall: Steve wrote me an email talking about the festival of judicial supremacy that Justice Kennedy championed. I wish I called this conference that. The festival of judicial supremacy would have been about the most accurate title for this. Do you want to weigh in on that?

Professor Somin: Yes. I'm not as much of a separation of powers scholar as I'm a federalism scholar. It may be for that reason that I see less consistency in the separation of powers jurisprudence of Kennedy than in the federalism jurisprudence. I can see how sometimes he says the President has a really important power and we defer to him for formalist reasons and sometimes functional ones as well. On the other hand, the detainee cases don't seem to fit that very well, particularly in *Boumediene*, where he goes against not only the President but Congress also.

So, at the very least, there's another variable here, which is whether he thinks that there was some important individual right that needed to be protected, like habeas, or whether he thought that the political process was prone to abuse, as he quite correctly probably thought that it was in this instance. Neither Congress nor the President was likely to care about the interests of non-Americans, or even perhaps sometimes American citizens captured in the War on Terror..

I don't think he had a clearly integrated vision of how separation of powers was supposed to work in the way that, I think, he did, to some extent at least, have a clearly integrated vision of federalism. So, you see inconsistencies. You also see that in the travel-ban case, which was discussed on the previous panel. That was a case where, first, what the President was doing in some ways went against what Congress had said, that you can't discriminate on base of nationality in issuing visas. He was willing to go along with the majority in sweeping that under the rug.

Second, even more egregiously, he went against the whole pattern of his prior jurisprudence in other discrimination cases, including other cases where discrimination was a matter of intent and not necessarily a matter of what was in the text of an order or a statute. As Eugene Volokh suggested in a previous panel, he may have done that because he thought there's a difference between immigration and other things. But, that's not only a formalistic distinction, it's a formalistic distinction that is nowhere to be found in the text of the Constitution. It is another somewhat ad hoc consideration relative to the rest of his jurisprudence. I think it further reinforces how his separation of powers jurisprudence did not have the kind of consistency that at least a lot of his federalism jurisprudence did.

Professor Segall: I don't think anyone today, and I might be wrong, has suggested that Justice Kennedy cared much about the text of the Constitution. Steve, did you want to—?

Professor Griffin: Well, I just think the detainee cases are really interesting. Why does—if especially once the Bush administration teams up with Congress, something that didn't happen initially—why do they keep losing? My understanding is there are high level officials in the Bush Administration who seriously considered after *Hamdan*, telling the Court, “Go soak your head. We're not interested in complying with your vision.” But part of it, from a Kennedy point of view, would be, they're not simply making detainee policy, they're also attacking the judicial sphere by refusing to allow us to

put our oar in. There could be a theme there of liberty and rights, but, to me, it's subsumed, in at least *Boumediene*, to a fear on his part that the sphere of the judiciary is being compromised. It was an aggressive attack, an encroachment, an obvious encroachment on the power of the judiciary.

The other thing about the detainee cases, I think, that's very important to keep in mind is, true, other political branches are acting together, but how much explanation are they really giving, to the Court or the American people, for the course of action they're taking at Guantanamo? Souter points this out. Other people point this out. From the Court's point of view, these detainees, whatever you think about them, are just languishing. They don't really have—especially early on—they don't really have any plan. They deserve a plan. They don't really have any plan, and furthermore, they're not really explaining to the American people, not only what's going on at Guantanamo but what's going on with respect to the War on Terror. I think that's still causing us problems, actually.

Professor Segall: Go ahead, Neil.

Professor Kinkopf: So, I think *Boumediene*'s a really important case for these purposes, and it ends with this pay-in to *Marbury v. Madison*, that the Constitution—the government cannot turn the Constitution on and off. Clearly, I think, Justice Kennedy has in mind the torture memo, which was released after oral argument in *Hamdi* but before the Supreme Court issued that decision. I can't imagine overstating the impact that must have had on the Court. Clearly, that's what he has in mind with *Boumediene*, that the plan in that and other documents that had come out is, “We want to hold people in places where they won't have constitutional protections.”

So, you have an executive branch that's trying to dodge the law, which seems problematic on a host of levels, not the least of which is the one you're pointing out: judicial supremacy. So, Kennedy thinks, “They're hiding them from us. We have to be here to uphold individual rights, and that's our authority and our power.”

But then, you contrast that, as Ilya does, with the travel-ban case, where Justice Kennedy writes his separate statement saying, “Well, that just makes it all the more important that the executive branch takes seriously the idea that the Constitution applies here, that we’re out of it.” There are real echoes between that and his opinion in *Alden v. Maine*, where he upholds sovereign immunity in both federal and state court for state employees, bringing Fair Labor Standards Act claims. But he notes, “Of course, *Garcia* is still good law, the Fair Labor Standards Act still applies to state employees, and I’m sure the states won’t violate it.”

Professor Segall: I want to talk about *Boumediene* just in a more practical sense. Lee Epstein—and Lee’s in the next panel—Lee Epstein, Erwin Chemerinsky, and I were on a panel in March of the year that *Boumediene* came out. We were all asked what we thought about *Boumediene*, how it would come out. We all said, “Well, ask Justice Kennedy.” Then, I suggested that he was going to take a very anti-formalist, functionalist approach and rule against the executive branch. But in fact, isn’t it true that much of *Boumediene* is symbolic, in the sense that—what the Court did in that case is it said, “The prisoners at Guantanamo Bay have more rights than the Congress had given them to appeal to the D.C. Circuit,” but they didn’t spell out what they were, not a burden of proof, not on how they’re going to establish their innocence.

Then, the D.C. Court of Appeals, for years, and years, and years, dismisses almost every claim and doesn’t give anybody any rights, and, it gets worse, the Supreme Court never takes cert. again, of any prisoner case in the face of public statements by D.C. Circuit judges, that, “You need to take responsibility for the decision you issued, and tell us what to do with these cases because we’re not going to let alleged terrorists go.” They never took a case again. So, is it judicial supremacy or is it judicial symbolism?

Professor Griffin: Well, you’re talking about Judge Randolph, I think.

Professor Segall: Among others.

Professor Griffin: Yeah. Well, I have a great deal of sympathy for that position. That used to be my position. Then I ran into Steve Vladeck. He has some good evidence that, right, the Supreme Court didn't take another case, but there were multiple levels here. One level is, there was action in the district courts, and another level is, in the executive branch, my strong impression is that, executive branch lawyers and the White House got tired of losing. So, they started to wind the whole thing down. It can't be a coincidence that the number of detainees at Guantanamo starts winding down, and down, and down after *Boumediene*.

I think Vladeck makes a strong case that the Supreme Court's reaffirmation of what I'm normally cynical about, the rule of law, did in fact make a difference.

Professor Segall: Or President Obama coming into office.

Professor Griffin: Right. But, he had some of the same incentives—incentives, in other words, not to let these people go at all because then you're worried. The fact is that the numbers kept dropping, just as they kept dropping in the Bush administration.

Professor Somin: A couple of points on this. One is, before *Boumediene* but after the previous detainee cases, the executive branch did, in response to previous cases, set up so-called—I may get this terminology wrong—but I think it's "combatant status review boards," which did release a good many people. Scalia actually complains about this in his *Boumediene* dissent, and says some of those people may even have gotten back into the fight for the terrorists. I think it did have an effect.

Even if you do explain those decisions as just symbolism, there's still a deep contradiction with the travel-ban case. Why didn't he at least issue a symbolic striking down of the travel ban? Trump might then have come back and had a more limited travel ban with less-

egregious rhetoric, and maybe they could have upheld that down the line.

Even on symbolism, there's a tension there, but also, all these other elements that were mentioned were in tension. One is judicial supremacy, or the threat to judicial supremacy, was definitely there in the travel ban, too. The administration was saying, you have to defer to us nearly absolutely.

Also, the rationale for the policy, frankly, was far more laughable and far more obviously pretextual in the travel-ban case than in these detainee cases. The travel ban rationale, frankly close to fraudulent and contradicted Trump's own repeated statements of what the real purpose was. Whereas, in the Bush administration, I think many of them, perhaps wrongly, but many of them did genuinely believe that this was necessary to prevent terrorists from getting back into the fight.

So, the concerns that led him to make one decision in *Boumediene* and other detainee cases were ones he was willing to sweep under the rug in the travel-ban case, except to the extent that he said these are concerns, but we can't do anything about them. So it's all up to the executive.

Professor Segall: I do want to tell everybody that Ilya, who is a devoted member of the Federalist Society, has written a tremendous amount of great scholarship, blog posts, and other things about the travel ban and has been very critical right from the beginning of the travel ban. I think that's admirable because it may go against your normal politics.

Professor Somin: It doesn't actually, but thanks.

Professor Segall: Okay. We have fifteen minutes before questions, and I'm dreading the next topic, but we simply have to do it. There was a case, a very, very important case, that raises both federalism and separation of powers questions. That's the *Boerne* case. It is so hard—we've discussed this—it is so hard to teach to students. It is so

hard to communicate what this case is about. But, it is an unbelievably important case, and it has to do with, or it should have to do with, what the word “appropriate” means in § 5 of the Fourteenth Amendment, which gives Congress the power to enforce the Fourteenth Amendment through appropriate legislation.

In the early and mid-1960s, in a series of voting rights cases, the Court said that appropriate more or less meant rational basis, very deferential. As long as Congress has any reasonable reason for regulating under § 5, it could do so. Then we get to the *Boerne* decision, and everything changes, and Justice Kennedy writes it and ratchets up the level of review quite a bit in striking down how the Religious Freedom Restoration Act applies to the states.

With that background, how important—and then going forward the Court struck down a bunch of federal laws on the same rationale. How important is this case? Is it consistent with the rest of Kennedy’s jurisprudence, and is that going to remain the law for a while? Those are my questions.

Professor Somin: I think it is a very important case, at least potentially. I don’t think it’s actually that difficult to explain in that Kennedy, and I think the other conservatives on the Court, were very concerned that you don’t want to let the federal government have nearly unlimited power, whether it’s based on the Commerce Clause, and the idea that everything interstate commerce, or by the mechanism that almost anything can be brought through as a way of enforcing the Fourteenth Amendment. What I think this is really about, and this is the phrase that I use to my students, maybe you guys teach it in a different or better way, but I think what the real principle here is that you can’t use an elephant gun to shoot a mouse.

In the 1960s, when you had the Voting Rights Act and other civil rights legislation, there really was a massive, elephant-sized violation of the Fourteenth and Fifteenth Amendments going on: Jim Crow segregation, suppression of black voters, and so forth. Therefore, the Court was quite properly willing to let Congress take pretty drastic

measures because there really was a huge elephant out there, and they needed a lot of buck shot to bring him down.

By contrast, in *City of Boerne v. Flores*, what you have is the Religious Freedom Restoration Act saying that any state laws that burden religious observance substantially would be struck down unless they could be justified by a compelling state interest. At least as interpreted by the Supreme Court in the *Smith* decision, which was talked about in a previous panel, only a tiny fraction of those state laws actually violated the Free Exercise Clause of the First Amendment. So essentially, a huge number of state laws were potentially threatened in order to get at a very small number which, in the Supreme Court's view, actually violated the Constitution. I think that's the better way to understand that decision, and arguably subsequent decisions, in this vein as well.

I think it makes a good sense, and it is consistent with the rest of his federalism jurisprudence, unless you just generally believe as some people still do, that federalism issues should just be left to the political process, which Kennedy I think, correctly, did not believe.

Professor Griffin: I just have two observations about the Religious Freedom Restoration Act. I was lucky enough—at the same time it was being passed, I was able to have a long conversation with Doug Laycock, who I believe was sort of the brains—a lot of the brains—behind it. I was very taken aback by the way it was written, and I was lucky—I didn't really have any strong convictions about it. I was just wondering, I'm not sure it's reprinted in the—I think it was reprinted in the case that literally, the statute said, “We don't like employment of—we want to restore *Sherbert*,” but then, they actually cited—I've never seen a statute written like that before.

Now, Laycock explained that he wouldn't have written the statute in that way if he had been in total control, but he explained the Voting Rights Act rationale behind it, so that it was a civil rights measure. I too didn't see as much reason for it, but then, I draw a connection. I don't often do interest group analysis, but I draw a

connection between asking just a basic question that bothered me in *Zivotofsky*, which never got answered to my satisfaction, why did Congress pass that law about passports? Why did Congress pass RFRA? To me, the most straightforward answer is kind of a sop to interest groups who were very, very upset. It's not clear that they had strong reason for being very upset, but there's no doubt that their version of the legal status quo was grossly violated by *Employment Division v. Smith*.

They were very, very upset, but they weren't able to develop a strong rationale in the hearings, and so on. I never got a straight explanation from anybody why they passed the law in *Zivotofsky*. Sometimes Congress just does things because interest groups are bothering them. That doesn't create a very strong record for the Supreme Court. Whereas Voting Rights Act, of course, the efforts to register people weren't just recent, they extended back decades. There's a strong record there.

Professor Kinkopf: Well, in connection with *Zivotofsky*, the statute says, "Declaration of the status of Jerusalem as part of Israel." So, I don't know about the motive behind adopting that policy, but when it comes to the Court's review of whether this conflicts with the President's recognition power, there it is in black and white, that that's what Congress meant to do with it. They weren't just saying, "We're exercising our power in our sphere. You can recognize as you see fit."

With respect to *Boerne*, I think the important point is, first, the Court saw what Congress was doing as a threat to its own power, first and foremost.

Professor Segall: Absolutely, I agree.

Professor Kinkopf: So, much of the opinion is devoted to a discussion of substantive versus remedial legislation. That, it's the Court's job to declare the substance of what it is that the Fourteenth Amendment protects, not Congress's. Congress can then enact

remedial legislation that provides, in a prophylactic way, protections of the rights that the Court has found and declared, which is why the statute saying we mean to overrule *Smith*, is a big problem for the statute.

So really, I think fundamentally, it's a separation of powers case much more than a federalism case, and that is how the Court sees it. Although in the course of deciding *Boerne*, Justice Kennedy articulates, once again, his privity theory of federalism, that the federal government now is interfering in the relationship between states and their citizens in a way that he found problematic.

Professor Segall: I would like to point out that in all three of these answers, including yours, and I think I might agree with your policy description of the case, but the reality is—my legal realism coming out—that the text of the Constitution uses the word “appropriate” in § 5 of the Fourteenth Amendment. We knew prior to *Boerne* what appropriate meant, and it meant reasonable and rational, not congruent and proportional. I think that most historians would agree that the purpose of § 5 of the Fourteenth Amendment was to give Congress the primary responsibility, not the Court, of enforcing the provisions of the Fourteenth Amendment.

All I'm suggesting there is text, history, and, of course, precedent, which the Court basically reversed in *Boerne*, all mitigated in one direction, and the four conservatives, plus Justice Kennedy, eventually went in future cases in the other direction. Go ahead and respond to that. Talk about appropriate—talk about the word appropriate.

Professor Somin: Sure. I do agree that the precedent used words like “reasonable” and “rational.” Those words are not actually in the Constitution. They certainly, I don't think, were intended or understood to be adopted in the 1860s. It is true that Congress is supposed to have a lead role in enforcement, absolutely. But a lead role in enforcement does not mean a lead role in defining the scope of the actual substantive rights. It just means a lead role in enforcing

those rights that actually are protected by the Amendment, as opposed to chopping down a whole lot of other state laws and activities that are not related to the amendment.

Now, by the way, I do actually disagree with *Employment Division v. Smith*. So in a certain sense, Congress was right to complain about that. But, unless we want to say that the Supreme Court not only doesn't get to define the scope of rights under the Fourteenth Amendment but also doesn't get to define the scope under the Bill of Rights, then Congress is essentially saying, "This right is vastly broader than the Court has said it is, and we can adopt legislation on that basis." That's extremely problematic, and not just in the case of the word "appropriate" but in other parts of the Constitution, as well. To my mind, "appropriate" means appropriate to enforcing those particular rights, not appropriate in the sense of anything the Congress might think is rationally desirable or useful.

I think the '60s precedents, while they used words such as "rational," it is important to understand that it was in the context of the big elephant that was out there that they were hunting. When the elephant is not there, this rational basis approach seems much more questionable.

Professor Kinkopf: I guess I would just put in with saying who gets to decide whether the problem is a mouse or an elephant? I think the term appropriate indicates that that is Congress's judgment, and the Court ought to defer to it. The Court requiring proportionality and congruence gives the Court a far greater role, far more power, makes them, to use the popular terminology, far more activist than I think the use of the word appropriate in the text of the Amendment itself envisions.

Professor Segall: Thank you, because I was going to say that. It is time for questions.

Professor Eugene Volokh: So, I wanted to ask a few questions to Steve—

Professor Segall: Introduce yourself again.

Professor Volokh: Sorry. Eugene Volokh, UCLA Law School. So, I believe that *City of Boerne v. Flores* was the only case, at least the only one that I know of, in which Justice Ginsburg or Justice Stevens ever concluded that a congressional act was beyond the enumerated powers of Congress, setting aside the Bill of Rights. So, I wanted to know what thoughts you've had about that because, for the conservatives, minus Justice O'Connor, who agreed with them on the federalism point but just thought that it was because she was a dissenter in *Smith*, it was just enforcing what effects the Free Exercise Clause means all along. So, I'd love to hear what you have to say about it.

I wanted to turn briefly to the *Raich* case, though. It's true, seven of the nine Justices, conservative and liberal alike, actually voted the same way in the medical marijuana case as in the gun free school zones case. But at least as to the eighth, Justice Scalia, he offered an explanation, and I think it was touched on, I think Steve by you, but I think it just seemed pretty plausible, not necessarily right, but at least plausible, which is that once you allow some people who have medical marijuana cards, and in my recollections, they're very easy to get in California.

Professor Segall: How would you know?

Professor Volokh: That was just my sense of it. I have never gotten one or needed one. So, once you do that, everybody can say, "Oh yeah, I've got these drugs on me officer. Here's my medical marijuana card. I'm growing them." I suppose you could say, "Well, you can grow this much but no more," but Scalia, I think, makes a very powerful argument. Also, Scalia, he wasn't a hardcore drug warrior. He had a few years before and *Von Raab* mocked that drug wars raises everything point. He had done later—had later opinions as well. So, why just assume that they don't like women, they like guns, they don't like marijuana?

Again, for seven of the nine, that doesn't seem to explain it, but on top of that, why not just think that there may be a difference there?

Professor Segall: On that point, since you're directing it at me, and it's late in the day—

Professor Griffin: I thought it was directed at me.

Professor Segall: No, no, the Scalia point, you have to then put back in *NFIB* and ask yourself why the federal government has the power to regulate the private, non-commercial use of marijuana that is never going to cross state lines. That part of it is not part of a commercial enterprise. But then, Scalia votes that the federal government does not have the power to regulate a \$1 trillion industry affecting the commerce and the economies of every state in the country. I'll throw that back at you because I can't possibly see a reason Congress can do the former but not the latter.

Professor Volokh: If Justice Scalia were here, I think he would say, "Of course they have the power to regulate the industry. They have the power to regulate the industry in lots and lots and lots of different ways." Just for various reasons, which you may not find terribly persuasive—I didn't find terribly persuasive—but he articulated, not this particular way. You might think of it as it's necessary and proper is the requirement, that this is not proper.

But, when it comes to the marijuana, you say, regulate medical marijuana that will never be shipped across state lines, he talks about this. He says, "We have no idea, we have no way of knowing whether a particular piece of medical marijuana is going to be shipped out." When you're talking about contraband, the easiest, the most effective, probably the necessary, under the loose sense of necessary, way of regulating contraband is ban it all together. That really makes perfect sense whether or not one thinks it's good practice.

Professor Somin: I've written about this quite a good deal, let me very briefly summarize. What Scalia says, unlike Kennedy, who

simply joined a ridiculous definition of interstate commerce in the majority, Scalia says that the Commerce Clause by itself doesn't reach this, but it can be reached with the help of the Necessary and Proper Clause. I agree with you that it may match the word "necessary," which the Supreme Court has defined as just useful or convenient. But, in both the *Raich* concurrence and later, again, in *NFIB*, Scalia says that proper is a separate constraint. Something can be necessary but not proper.

He says that the reason why the individual mandate is not proper is because the logic of it implies this massive additional great and independent power to mandate the purchase or doing of any activity that Congress might want to force people to do. Similarly in *Raich*, he doesn't even consider the possibility that this restriction might be improper even if it's necessary. But by his logic, I think it pretty clearly is, because his logic implies—

Professor Segall: You're saying that it is improper?

Professor Somin: It's improper, yes.

Professor Segall: So, he's inconsistent in two cases.

Professor Somin: Yes.

Professor Segall: So, it might be about guns and pot and—

Professor Somin: It might be. But my point is that the logic of the argument that he endorses in *Raich* is that Congress can ban the possession of pretty much anything for fear that, if they don't completely ban it, it might cross state lines. Banning even the in-state possession of anything is as much a great and independent power as requiring the purchase of things. So, it seems like his logic in the two cases is inconsistent. And especially egregious is that, even though in *Raich* he says that "proper" is an independent limitation, he doesn't even give any real consideration to the question of whether this is improper, even though Randy Barnett's brief for *Raich* actually does

discuss why this would be improper under the Necessary and Proper Clause.

Professor Segall: So glad you're here.

Professor Volokh: The agreement and kind of subtle and interesting and complicated questions of how to interpret those terms, rather than real proof that he just doesn't like drugs.

Professor Somin: I don't know whether he just didn't like drugs or not. I think he made an egregious mistake in *Raich* by not even considering the possibility that this might be improper, given that he himself clearly thinks that a distinction between "necessary" and "proper" is extremely important.

Professor Segall: Do you guys want to address the silliness of proper being a serious limitation on the necessary and proper power of Congress because—talk about a standard-less standard, which Scalia would normally object to.

Professor Kinkopf: Right, although, it depends where the Court goes with proper. Certainly from Chief Justice Robert's opinion, proper means unconstitutional or inconsistent with our constitutional system of federalism. Now, maybe in some future case that's going to be expanded in a way that's problematic, but if it just means violates principles of federalism then okay you say that the law is improper. But, I don't want to pass on this without noting that the joint opinion that Scalia and Kennedy signed in *NFIB* says that the individual mandate is not necessary. It doesn't just say it's not proper. It says, there are all kinds of other ways Congress could do this, which would be a radical departure from our understanding of what necessary means from *McCulloch* on up to the present day, if the Court actually takes that and runs with it. I think there's every reason to expect that they might.

Professor Segall: Steve, do want to—?

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PANEL 5: FEDERALISM & SEPARATION OF POWERS

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Professor Griffin: Well actually, Eric, I wanted to take a point of personal privilege to thank you, again, not only for inviting all of us here to this great conference but for somehow moderating four panels by yourself. It would cause me to expire. So, I hope it's okay with everyone if I just say thank you. Thank you, Eric.

Professor Segall: With that—the program doesn't say we're going to take a break now, but we'll take a quick, five-minute break and come back for our last panel of the day. Thank you very much.