

## *Congress & the Court*

The United States in recent years has been drifting toward an important confrontation over constitutional limits on the power of the federal government. Three years ago, Supreme Court Justice Antonin Scalia took the extraordinary step of publicly accusing Congress of “increasingly abdicating its independent responsibility to be sure that it is being faithful to the Constitution.”<sup>1</sup> More recently, New York Senator Hillary Clinton has sharply warned against “the imperial tendencies of the current Court.”<sup>2</sup> Amid the charges and countercharges, one thing is clear: In a series of landmark decisions over the past decade, the Rehnquist Court has overturned understandings of constitutional structure that have been in place since the New Deal.<sup>3</sup>

The looming crisis is formidable, even by the standards of a relationship that is historically fraught with controversy. The framers of the U.S. Constitution, fearful that the “encroaching nature” of political power would overwhelm merely “parchment barriers,” deliberately separated the new federal government

into three distinct branches, “so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.” With exquisite practicality, the framers sought to make “ambition . . . counteract ambition,” thereby “supplying, by opposite and rival interests, the defect of better motives.”<sup>4</sup> Congress and the U.S. Supreme Court were thus designed to face each other at arm’s length, with the abiding suspicion that the opposite branch might potentially overreach its rightful bounds.

This tension has waxed and waned, but the controversy now building be-

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1 Justice Antonin Scalia, quoted in the editorial “A Shot from Justice Scalia,” *The Washington Post*, 2 May 2000, A22. Scalia added, “My court is fond of saying that acts of Congress come to the court with the presumption of constitutionality. But if Congress is going to take the attitude that it will do anything it can get away with and let the Supreme Court worry about the Constitution . . . then perhaps that presumption is unwarranted.” See also Robert Stacy McCain, “Scalia Disses Congress,” *The Washington Times*, 19 April 2000, A6; and Tony Mauro, “Court Declares Constitutional War on Congress,” *The Legal Intelligencer*, 22 May 2000, 5.

2 Hillary Rodham Clinton and Goodwin Liu, “Separation Anxiety: Congress, the Courts, and the Constitution,” *Georgetown Law Review* 91 (2003): 439, 449.

3 See John T. Noonan, Jr., *Narrowing the Nation’s Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002).

4 The Federalist Papers, Nos. 48 and 51.

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tween Congress and the Court threatens to reach historic proportions. Until the 1930s, the premise of American civics was that the federal government in Washington, D.C., was to have only limited powers; it was confined to the specific forms of authority granted it in the Constitution. State governments, by contrast, were considered plenary; they had all powers except those that had been taken away by the Constitution. How to ascertain the proper balance of power between the federal government and the states was understood to constitute “the cardinal question of our constitutional system.”<sup>5</sup> The U.S. Supreme Court would from time to time seek to answer that question by articulating the constitutional limits of congressional power. For example, in 1918 it decided that the Congress had exceeded the bounds of proper national authority when it sought to regulate child labor within the states.<sup>6</sup>

The Great Depression destroyed this vision of constitutional structure. In the crucible of that crisis the Court and the country reinterpreted the Constitution to authorize the national government to legislate as necessary to meet national needs. The Court accordingly redefined its function: Instead of policing the limits of federal authority, it would seek to ensure that the exercise of national power did not violate individual constitutional rights. Congress consequently emerged from the Great Depression and from World War II essentially unbound by the old constraints of federalism. Generations of Americans have since grown up assuming that national power is effectively plenary. For many years, the students to whom I taught constitu-

<sup>5</sup> Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908; reprint, 1921), 173.

<sup>6</sup> *Hammer v. Dagenhart*, 247 US 251 (1918).

tional law regarded as merely quaint absurdities earlier Supreme Court decisions that had applied principles of federalism to limit national authority.

All this changed dramatically in 1995 when five justices appointed by Republican presidents elected on platforms dedicated to resurrecting the values of federalism joined together to decide what for the previous fifty years had been almost inconceivable – that a congressional statute was invalid because it exceeded the limits of national authority transferred to Congress by the Constitution.<sup>7</sup> These same five justices have now coalesced into a solid voting bloc that has embarked upon the remarkable task of circumscribing federal power in the name of federalism.<sup>8</sup> The result has been fairly characterized as a constitutional revolution.

It is of course serious business to hold that our national legislature cannot enact such legislation as is deemed necessary to meet national needs. The Court’s

<sup>7</sup> *United States v. Lopez*, 514 US 549 (1995) (striking down the Gun-Free School Zones Act of 1990). The Court had not struck down a congressional statute on this ground since *Carter v. Carter Coal Co.*, 298 US 238 (1936). The five Justices were Chief Justice William H. Rehnquist, Sandra Day O’Connor, Antonin Scalia, Anthony M. Kennedy, and Clarence Thomas.

<sup>8</sup> For the Court’s decisions limiting congressional power under the Commerce Clause, see *United States v. Lopez*, 514 US 549 (1995); *United States v. Morrison*, 529 US 598 (2000); cf. *Jones v. United States*, 529 US 848 (2000); *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 US 159 (2001). For the Court’s decisions limiting congressional power under Section 5 of the Fourteenth Amendment, see *City of Boerne v. Flores*, 521 US 507 (1997); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 US 627 (1999); *Kimel v. Florida Board of Regents*, 528 US 62 (2000); *United States v. Morrison*, 529 US 598 (2000); *Board of Trustees of the University of Alabama v. Garrett*, 531 US 356 (2001).

new decisions may not be dismissed simply as conservative disapproval of past liberal legislation, for the Court has struck down many statutes, like the Religious Freedom Restoration Act<sup>9</sup> and the Patent and Plant Variety Protection Remedy Clarification Act,<sup>10</sup> that were enacted with virtually unanimous support. What is most fundamentally at issue in the Court's recent opinions is the structure of the constitutional relationship that will obtain between the Court and Congress.

These opinions have created real confusion about exactly what the Court wishes Congress to do in order to validate the constitutionality of federal statutes. Some language in the Court's opinions seems to point to the need for more detailed congressional fact-finding; other language seems to point toward a categorical and judicially enforced "distinction between what is truly national and what is truly local."<sup>11</sup> It is not clear what leeway the Court will grant Congress to interpret and enforce constitutional rights.<sup>12</sup>

In the complex structure of checks and balances created by the framers, judicial

review is an important means by which the Court can limit an overreaching Congress. But the force of judicial review is countered by the constitutional mechanisms given to Congress to restrain judicial excess. There are numerous such mechanisms, which range from determining the scope and nature of judicial jurisdiction to the setting of judicial salaries. By far the most important avenue of congressional influence is the confirmation process. Because the Senate must approve the appointment of all Article III federal judges, it can ultimately control the complexion of the federal judiciary.

Confirmation hearings for Supreme Court Justices have always carried the potential to turn highly contentious. But political discord has sharply accelerated in the years since the Senate's rejection of President Reagan's nomination of Robert Bork in 1987. Each nomination to the Supreme Court is now an impending bomb waiting to explode in the Senate Chamber. Senators are divided about the nature of the confirmation process. There is profound disagreement about the questions that can appropriately be posed to a nominee and about the criteria of judgment that ought to be applied in deciding whether or not to confirm a candidate. These sharp divisions are now affecting the confirmation hearings of lower federal judges, most especially of nominees to the U.S. Courts of Appeals. This is an entirely new historical phenomenon.

Although there are means by which the Court can check Congress and means by which Congress can check the Court, in most circumstances the federal government works best when Congress and the Court pull together, cooperating in the smooth and efficient articulation and enforcement of federal law. The idea is that Congress enacts legislation, which is then seamlessly interpreted and

9 See *City of Boerne v. Flores*, 521 US 507 (1997).

10 See *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 US 627 (1999). The Court has also struck down Title I of the nearly unanimous Americans with Disabilities Act as beyond the power of Congress under Section 5 of the Fourteenth Amendment, which in effect means that Congress cannot authorize its enforcement by private damage actions against the states. See *Board of Trustees of the University of Alabama v. Garrett*, 531 US 356 (2001).

11 *United States v. Morrison*, 529 US 598, 617–618 (2000).

12 Robert C. Post and Reva Siegel, "Equal Protection by Law: Federal Antidiscrimination Legislation After *Morrison* and *Kimel*," *Yale Law Journal* 110 (3) (2000): 441.

applied by the judiciary. The orderly operation of the federal government depends upon this continuous and quotidian cooperation.

Even here, however, the relationship between Congress and the Court is in disarray. Vigorous disputes have arisen among the justices about how exactly they should go about the process of construing and applying federal legislation. Some justices contend that courts ought never to review legislative history when seeking to interpret statutes, whereas others deliberately look to all available forms of information that might help a court understand the meaning of legislation.<sup>13</sup> It has become unclear, therefore, what, in addition to the actual text of a statute, will count as authoritative indicia of legislative intent and meaning. The smooth cooperation of Court and Congress is correspondingly undermined.

These are unsettling developments to anyone who cares about the effective operation of the federal government. As a nonpartisan witness of recent developments, with a strong independent interest in promoting principles of good governance, the American Academy is using its good offices to facilitate a constructive dialogue to reach across the chasm now separating Congress from the federal courts. It has launched a project to identify and study the current tensions between the Court and Congress, with an eye to ameliorating whatever tensions disinterested scholarship might properly address. The steering committee of the project consists of Jesse Choper, Linda Greenhouse, Abner Mikva, Nelson W. Polsby, and Robert Post, together with

<sup>13</sup> For a survey of the field, see Philip P. Frickley, "Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger," *Minnesota Law Review* 84 (1) (1999): 199.

Leslie Berlowitz and Alexandra Oleson. There is in addition an advisory committee that consists of members of the Court and Congress.

The project is currently pursuing two initiatives. The first is to host a series of private, off-the-record conversations between members of the federal judiciary and members of Congress. These meetings promote mutual understanding and permit a broad range of issues involving the ongoing relationship between Congress and the federal courts to be ventilated and examined. Constructive solutions to particular problems can be proposed and vetted; cooperation can be encouraged. The second initiative involves bringing the disinterested expertise of the American Academy to bear on issues that currently divide Congress and the federal judiciary. To the extent that these issues might be clarified by the exercise of such expertise, the American Academy can assemble an interdisciplinary team of scholars whose work would be valuable to both sides.

One area of investigation has already been identified. The American Academy is working to assemble a group of scholars to investigate the subject of statutory interpretation. The study will select a sample of judicial decisions that involve controversial questions of statutory interpretation and will compare how the relevant legislation was actually enacted, on the one hand, with how it was interpreted by the courts, on the other. By closely examining these cases, the study will assess the empirical plausibility of the premises of the various theories of statutory interpretation now in play. The study will also examine how the procedures of Congress, and the working processes of the federal courts, have changed in the past decades in ways that might affect the task of statutory interpretation.