

# Bulletin

Summer 2002

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## Annual Fund Again Seeks to Top \$1 Million Mark

The Development Committee, cochaired by Louis Cabot and Robert Alberty, continues to meet monthly. It is planning the 2003 Annual Fund Campaign, which begins in the fall and will seek to surpass the \$1 million mark first achieved two years ago. Reporting to the Council at its April meeting, Cabot noted the \$1,065,908 raised in 2002 as another record. The success of the campaign is due to the involvement and generosity of Fellows, Foreign Honorary Members, and friends at increased levels over the past year. Cabot expressed his appreciation to all who have made the Academy's fundraising success possible.

For information about making a gift to the Academy, please contact the Development Office at [dev@amacad.org](mailto:dev@amacad.org) or 617-576-5057.

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## CALENDAR OF EVENTS

All members of the Academy are cordially invited to participate in any listed event, as space allows. Special notices are sent to Fellows who reside in areas where specific meetings are held. This feature of the *Bulletin* informs all members of upcoming events, not only in their own regions but also in locations they may plan to visit. A list of forthcoming Stated Meetings appears on the back cover.

### October 5, 2002

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#### National Induction Ceremony—Cambridge, Massachusetts

The Induction Ceremony for newly elected Fellows and Foreign Honorary Members will take place at the 1861st Stated Meeting, to be held on Saturday, October 5, 2002, at Sanders Theater on the Harvard University campus. The event will begin at 3:30 p.m. and conclude with a reception at the House of the Academy at 6:00 p.m. Because Sanders has a large seating capacity, there will be no limitations on attendance this year. All Fellows and their guests are welcome.

A morning orientation session at the House of the Academy, introducing new members to the Academy's projects, programs, and publications, will precede the ceremony.

*Information and reservations: 617-576-5032.*

### October 26, 2002

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#### 1862nd Stated Meeting—Minneapolis, Minnesota

*“The Comedy of Errors as Early Experimental Shakespeare”* will be the subject of the communication at the next Stated Meeting of the Midwest Center. The talk will be presented by David Bevington, Phyllis Fay Horton Distinguished Service Professor in the Humanities at the University of Chicago, and an authority on early English, Stuart, and Tudor drama. Bevington is the author of *From “Mankind” to Marlowe and Action Is Eloquence: Shakespeare’s Language of Gesture*, as

well as the editor of the *Norton Anthology of Renaissance Drama*. The meeting will be held at the Minneapolis Institute of Arts.

Prior to the meeting, Fellows and their guests are invited to visit the Guthrie Theatre for a matinee performance of *The Comedy of Errors* and a backstage tour.

The Midwest Center will also welcome newly elected Fellows from the region at this meeting.

*Information and reservations: 773-753-8162.*

## November 2, 2002

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### 1863rd Stated Meeting—Napa Valley, California

The Western Center's fall Stated Meeting will take place in the wine country of Napa Valley, California, on Saturday, November 2, 2002. It will include a tour of the Robert Mondavi Winery and dinner in the winery's Vineyard Room. The featured speaker is Carole P. Meredith, professor of viticulture and enology at the University of California, Davis. Meredith is a renowned specialist in the DNA and genealogy of grapes. Academy Fellow Francisco Ayala, Bren Professor of Biological Sciences at UC Irvine, will provide a commentary. Ayala plays an important role in the wine industry of California as a scientist and as a vineyard owner. Additional activities are being planned to enhance this wine country event.

Newly elected Fellows from the region will be welcomed at this meeting.

*Information and reservations: 949-824-4553.*

### New Officers

#### ***Councilors Gerald Early and David D. Sabatini***

Gerald Early of Washington University in St. Louis and David D. Sabatini of New York University have been elected to the Council of the Academy.

Gerald Early is Merle Kling Professor of Modern Letters, professor of English and of African and Afro-American studies, and director of the International Writers Center at Washington University in St. Louis. He received his B.A. from the University of Pennsylvania and his doctorate from Cornell University. Early is the author of *The Culture of Bruising: Essays on Prizefighting, Literature, and Modern American Culture* (winner of the 1994 National Book Critics Circle Award for Criticism) and *Tuxedo Junction: Essays on American Culture*. He has also edited several volumes, including *The Sammy Davis, Jr., Reader* and *The Muhammad Ali Reader*. A Fellow of the Academy since 1997, Early was a consultant for Ken Burns's documentaries on baseball and jazz for the Public Broadcasting System.

David D. Sabatini is Frederick L. Ehrman Professor and chair of the Department of Cell Biology at New York University. He received his medical degree from the University of Litoral, Argentina, and his Ph.D. in cell biology from Rockefeller University. In his research, Sabatini uses the combined tools of biochemistry and fine structural analysis to further understanding of the functional and biogenetic relationships between subcellular organelles. He is a former president of the American Society of Cell Biology, a member of the National Academy of Sciences, a Foreign Associate of the French Academy of Sciences, and a Fellow of the Academy since 1980.

### **Midwest Center Vice President Martin Dworkin**

University of Minnesota microbiologist Martin Dworkin has been elected Chair of the Midwest Center Council and Vice President of the Academy. He succeeds Roger Myerson (William C. Norby Professor of Economics, University of Chicago).

In welcoming Dworkin to his new office, Academy President Patricia Meyer Spacks said, "As the Academy has increased its national presence, the Midwest Council has become an important link to our Fellows based in the region. We know that Martin Dworkin will provide strong leadership for the Midwest and valuable advice and counsel to the American Academy as a whole."

Dworkin is an authority on the developmental biology and genetics of myxobacteria, the most sophisticated soil bacterium known. He received his B.S. from Indiana University and his Ph.D. from the University of Texas, Austin. Dworkin joined the University of Minnesota faculty in 1962 and is currently professor of microbiology. He has been a visiting professor or scholar at various institutions, including Stanford, Oxford, and Tel Aviv Universities and the University of Washington, and has held a number of leadership positions in the American Society of Microbiology. He is the recipient of a National Institutes of Health Career Development Award and a Fellow of the Academy since 1997. Dworkin has written numerous books and articles, including *Developmental Biology of the Bacteria* and *Microbial Cell-Cell Interaction*.

### **Reelected Officers and New Committee Members**

The following officers have been reelected to a second term: Secretary Emilio Bizzi (MIT), Editor Steven Marcus (Columbia University), and Librarian Morton Keller (Brandeis University). Open positions were also filled on the Committee on Meetings, the Committee on Membership, and the Nominating Committee:

## **Committee on Meetings**

Glenn Loury, *Class III, Section 2*  
*Boston University*

## **Committee on Membership**

### ***Class I: Mathematical and Physical Sciences***

William Happer, *Section 2*  
*Princeton University*

Michael Turner, *Section 4*  
*University of Chicago*

### ***Class II: Biological Sciences***

Joan Brugge, *Section 1*  
*Harvard Medical School*

G. David Tilman, *Section 4*  
*University of Minnesota*

### ***Class III: Social Sciences***

Elinor Ochs, *Section 1*  
*UC Los Angeles*

Jerome Kagan, *Section 1*  
*Harvard University*

Thomas Mann, *Section 3*  
*Brookings Institution*

## **Nominating Committee**

Denis Donoghue, *Chair*

### ***Class I: Mathematical and Physical Sciences***

W. Carl Lineberger  
*University of Colorado*

### ***Class II: Biological Sciences***

Thomas Cline  
*UC Berkeley*

### ***Class III: Social Sciences***

Kenneth Prewitt  
*Columbia University*

### ***Class IV: Humanities and Arts***

Frances Oakley  
*Williams College*

### ***Class V: Public Affairs, Business, and Administration***

John Biggs  
*TIAA-CREF*

## **New Project on Watershed Protection**

The Committee on Studies has approved a small planning grant to develop a new Academy study on “Transboundary and Regional Watershed Management in the United States and Europe.” The goal of the proposed study is to gather insights into transboundary water management using a targeted, comparative analysis of approaches in the United States and Europe. An initial planning meeting, led by project chair Charles Haar (Harvard Law School), was held at the Academy on May 22, 2002.

Transboundary air pollution and protection of watersheds whose areas straddle national boundaries have emerged as critical international environmental issues. There are 261 watersheds that cross political boundaries. Decades of efforts to craft legal guidelines that can apply to activities among nations have led to a plethora of national, bilateral, and multilateral laws, declarations, and treaties governing transboundary pollution and protection of the environment.

In his opening remarks at the May planning session, Haar observed that “a comparative study can offer a fresh outlook on how different legal, social, and economic systems approach environmental law, and suggest which solutions might be transferable.” The meeting, convened to identify a number of issues that would benefit from the broad perspective that an Academy study can provide, in-



cluded experts from economic, legal, scientific, and environmental policy fields, with both academic and applied experience. The participants recommended a set of questions for further examination and clarification over the summer, in conjunction with the planning of a joint meeting with European counterparts to pursue a more focused discussion of selected issues.

Fellows with a special interest in this study should contact project director Margaret Goud Collins at [mcollins@amacad.org](mailto:mcollins@amacad.org).

### **Tribute to Howard Hiatt and Frederick Mosteller**

At the April Stated Meeting, the Academy honored two distinguished Fellows—Howard Hiatt and Frederick Mosteller—for their successful efforts to place the health and welfare of children on the Academy’s agenda.

In 1990 Hiatt established the Academy’s Initiatives for Children (IFC) program, a ten-year effort that encompassed a number of interrelated studies, ranging from an intergenerational literacy tutoring project to an analysis of diversity in higher education. Whenever possible, IFC collaborated with groups in government and the private sector that were in a position to translate research findings into policies and programs benefiting children.

From the beginning, IFC participants insisted that all programs they undertook would be subjected to rigorous evaluation. Fred Mosteller, a leader in the evaluation of education reforms, agreed to join IFC as chair of its Center for Evaluation. Now an independent Academy project, the Center continues to examine the techniques available for evaluating educational interventions and to test the effectiveness of such reforms as skill groupings and smaller class size.

Presiding over the ceremony, Patricia Albjerg Graham (Harvard University) expressed “the Academy’s deep gratitude to Howard Hiatt for initiating the Academy’s commitment to the needs of children and



Fred Mosteller (Harvard University) and Howard Hiatt (Harvard Medical School).

to Fred Mosteller for bringing his expertise and experience to the Center for Evaluation.”

Hiatt is a professor of medicine at Harvard Medical School and a senior physician at Brigham and Women’s Hospital. His early research focused on the application of molecular biology to medical problems, particularly cancer, and he was a member of the Pasteur Institute team that first identified and described messenger RNA. His current research focuses on the social aspects of health.

In citing Hiatt’s accomplishments, Jerome Kagan (Harvard University) observed, “The increasing pace of events in contemporary society has enhanced the background din that makes it impossible for those who wish to speak more softly to be heard. Fortunately, there remain some whisperers among us. Howard Hiatt is a member of that small, elite group.” Kagan noted that “as director of the Initiatives for Children program, Howard continued his role as a crusader in raising the consciousness of scholars and community leaders about the condition of children. . . . The program could not have succeeded without Howard’s zealous concern for the next generation and his ability to create mechanisms to satisfy that concern.”

The tribute to Fred Mosteller was presented by Richard J. Light (Harvard University), who directs the Academy project on the educational impact of changing student demographics in higher education—another continuing study originally developed under IFC.

Mosteller is Roger I. Lee Professor of Mathematical Statistics Emeritus at Harvard University, where he has served as a teacher, researcher, and administrator for over fifty years. His research has involved both theoretical and applied statistics, with a focus on public policy, health, and education. Mosteller is the only person in Harvard's history to have chaired four departments: the Department of Statistics, which he founded, and the Departments of Biostatistics, Social Relations, and Health Policy and Management.

Light recalled that on his first day of graduate school at Harvard, his advisor, Fred Mosteller, asked for his comments on a manuscript. "I was panicked," said Light. "I hadn't even started my first course yet, and already my advisor was asking for my opinion on a draft chapter for the *International Encyclopedia of Social Sciences*. When I told him that the chapter was superb, he very kindly but directly replied, 'I trusted you as a colleague, but



Jerome Kagan and Henry Rosovsky (both, Harvard University).



Richard J. Light (Harvard University).

you didn't trust me. Praise doesn't help me at all.' I took back the document and returned with a manuscript covered in red ink. Fred and I sat down and went over every single suggestion. He rejected most of them, but he took a few and explained his thinking about the rest. . . . In my first two weeks at Harvard, Fred taught me not only about the difficulty of writing but also about the importance of collegiality. In Fred's mind, working and debating with another person about a work in process is a way or paying them a great compliment."

On behalf of the officers, councilors, and Fellows of the Academy, Executive Officer Leslie C. Berlowitz thanked Hiatt for "bringing his deep commitment to children to the Academy and inspiring studies that link empirical research to policy objectives," and Mosteller for "demonstrating that clinical trials can extend beyond medicine to bring new understanding to educational practices and innovations."

Mosteller's Center for Evaluation and Light's study of diversity in American colleges and universities continue their work under the auspices of the Academy.

With its new project on Universal Basic and Secondary Education (UBASE), the Academy has strengthened its commitment to children's issues.

Under the leadership of Joel Cohen (Rockefeller and Columbia Universities) and David Bloom (Harvard School of Public Health), participants in the study are examining the means and consequences of educating every child in the world between the ages of 6 and 16.

The health and welfare of children, nationally and internationally, maintain an important place on the Academy's agenda.

### **Update on Academy Website**

From May 2001 to May 2002, there has been a 500 percent increase in average page requests per month, which have risen from 14,000 to 73,937. The most frequently downloaded single file is the Occasional Paper on *Evaluation and the Academy: Are We Doing the Right Thing? Grade Inflation and Letters of Recommendation*. The most popular file is the list of Academy members.

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## ACADEMY POSITIONS OPEN IN 2003

### Call for Fellows' Recommendations of Candidates

DEAR FELLOWS:

The Academy's Nominating Committee is responsible for preparing the list of candidates for officers, councilors, and members of standing committees. The list will be drawn up by the Committee when it meets in the fall. Our objective is to develop the largest possible pool of candidates, with a special concern for balancing the disciplines, institutions, and geographic areas represented within the Academy.

I encourage you to assist the Nominating Committee by recommending Fellows as candidates for the open positions indicated on the following pages. Suggestions should be sent to me in care of Executive Officer Leslie C. Berlowitz at the Academy's Cambridge office. Your response should arrive in Cambridge **by September 4, 2002**, so that your recommendations can be distributed to the Nominating Committee in advance of its meeting.

A list of officers, councilors, and members of standing committees for 2001–02 is printed in the *Records 2001*, which was sent to you last fall. Please feel free to contact a representative of your class if you have any questions. Leslie Berlowitz will also be pleased to respond to any inquiries you might have about the nominating process.

The Academy was founded “to provide a forum for a select group of scholars, members of the learned professions, and government and business leaders to work together on behalf of the democratic interests of the republic.” To enable us to serve society in this way, we need individuals willing to commit the time and energy to our programs and activities. We look forward to receiving your suggestions for filling the positions that will be open in the coming year.

DENIS DONOGHUE, *Chair  
Nominating Committee*

## Academy Positions Open in 2002

Fellows are asked to submit the names of recommended candidates by September 4. Please direct suggestions to the Nominating Committee, in care of Executive Officer Leslie C. Berlowitz (mail: American Academy of Arts and Sciences, 136 Irving Street, Cambridge, MA 02138; phone: 617-576-5010; fax: 617-576-5055; e-mail: [lberlowitz@amacad.org](mailto:lberlowitz@amacad.org)).

## OFFICERS

**President**

**Treasurer**

## COUNCILORS

*(Contested election; two nominees needed for each of the three open positions)*

**Class I: Mathematical and Physical Sciences**

**Class III: Social Sciences**

**At Large**

## REGIONAL CENTER COUNCILORS

Each year, openings occur on the councils of the Midwest and Western Centers. These regional center councils propose and develop activities for Fellows in their areas, subject to the approval of the Academy Council. Nominations of candidates in any class are welcome.

## **MEMBERS OF STANDING COMMITTEES**

### **COMMITTEE ON MEMBERSHIP**

**Class I: Mathematical and Physical Sciences**

**Class II: Biological Sciences**

**Class III: Social Sciences**

**Class IV: Humanities and Arts**

**Class V: Public Affairs, Business, and Administration**

### **NOMINATING COMMITTEE**

**Class I: Mathematical and Physical Sciences**

**Class II: Biological Sciences**

**Class IV: Humanities and Arts**

### **FINANCIAL COMMITTEES**

**Auditing and Financial Review Committee**

**Budget Committee**

**Committee on Investments**

*Members of the following committees are customarily drawn from the Boston area:*

### **HOUSE COMMITTEE**

### **COMMITTEE ON MEETINGS**

**Class I: Mathematical and Physical Sciences**

**Class II: Biological Sciences**



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## STATED MEETING REPORT



### A World Changed? Art Museums After September 11

**James Cuno**, Elizabeth and John  
Moors Cabot Director, Harvard  
University Art Museums

The 1855th Stated Meeting of the Academy was held at the House of the Academy in Cambridge on February 13, 2002. Speaker James Cuno is completing an 11-year tenure as both a professor of the history of art and architecture at Harvard and the Elizabeth and John Moors Cabot Director of the Harvard University Art Museums. In January 2003 he will assume the directorship of the Courtauld Institute of Art at the University of London.

Immediately after the events of September 11, commentators, politicians, journalists, heads of security, celebrities, and even folks on the street began to say easily, almost reflexively, that the world had changed and that things would never be the same again. We felt guarded, secretive, even afraid. Our confidence was shaken, and our optimism about the future was judged naive. We were a changed people—and we weren't very happy about it.

We can see now that in many ways, this was an exaggerated response—an understandable display of hyperbole in the wake of events too horrible to imagine and made all the more horrible for having been captured on television, close-up and in real time.

I want to refrain from hyperbole tonight and reflect on the condition of our art museums since September 11. I want to try to mark just how much they've changed since the tragic events of that day and to judge their current condition in the context of a decade of extraordinary growth and stability. For this, I think, is a better way to consider the impact of September 11: as a challenge, to be sure, and as a reason to pause and rethink our



James Cuno (Harvard University Art Museums).

museums' course of action, but not as a threat to their success or true value as public institutions.

Since September 11, journalists have frequently asked art museums about the effect of those events on our attendance, finances, and building projects. Is our attendance down? Does this have a significant effect on our budget? Are we confident we can continue to raise monies as once we had? Will our building projects continue, be scaled back, or be put on hold? Has our bubble burst? Were we mistaken in our popularizing strategies of the 1990s? Having lived by the numbers, will we now die by the numbers?

We've all read of the immediate effect of September 11 on New York's museums. Initially, people came to the museums in surprisingly large numbers. Perhaps, for stranded tourists, there was little else to do. But also it seems that people just wanted to be there, in the company of others looking at rare and beautiful things, and the museums responded appropriately to the needs of those living in and stranded in the city. Museums were open free of charge and with extended hours. They offered special lectures, poetry readings, and concerts. They even drew their visitors' attention to

relevant works of art—not only Islamic pieces but also works that represented themes of (or originally functioned as instruments in acts of) healing, mourning, and meditation. Soon enough, however, the tourists began to go home, and local residents began rebuilding some kind of normalcy, with a renewed focus on economic and personal stability, if not survival. The number of visitors to New York museums began to drop off. And while the numbers remain lower than last year at this time, and lower than projected, they have begun to increase over those of November and December.

The Metropolitan Museum has admitted to a decline in attendance, with a consequent loss of revenue from admissions, restaurants, and retail shops—and so have the Museum of Modern Art, the Whitney, and the Guggenheim. But the two financially stronger museums, the Metropolitan and MoMA, can absorb the revenue loss, at least for this year. They intend to continue with their building projects and capital campaigns; the Modern even announced that it was increasing its campaign, so successful has it been in reaching its original goal. Only the Whitney and the Guggenheim, each with surprisingly small endowments compared with those of the Met and the Modern, have released figures of real impact.

In a December 1 article in the *New York Times*, the Whitney announced a package of layoffs and budget cuts, described as necessary because of the sudden and drastic drop in out-of-town visitors. It canceled an exhibition of works by Eva Hesse, to have been loaned by the San Francisco Museum of Modern Art. It put on hold an exhibition by contemporary artist Michal Rovner while it continued to search for sponsorship of that exhibition. It also announced a layoff of 12 full-time and two part-time employees, or 6 percent of its staff, mainly in administration and support services, including the staff of the Whitney's website, which is now managed outside the museum.

The museum's director, Max Anderson, explained that the cuts would save about \$1 million in the

museum's \$23 million operating budget and were due to a significant drop in the number of visitors who pay the \$10 admission fee. He said, "Attendance is up, but what is strange is that admission income is down to a dramatic extent." Evidently, although the Whitney was getting an average of 14,000 visitors a week, many were members, students, and others eligible for discounted admission. In other words, as half of the Whitney's attendance was typically from non-New Yorkers, and as admissions accounted for 11.4 percent of the museum's operating income, a 40 percent drop in paid admissions accounted for a loss of about \$1 million. Still, the director asserted, "We have no intention of keeping the institution from growing just because of a short-term problem." And the Whitney Biennial will open as planned later this spring.

The Guggenheim's problems were more severe. A few weeks after the Whitney's announcement, the Guggenheim announced in a *New York Times* article that it would lay off 80 employees, or almost 20 percent of its staff, from almost every department of the museum, in what the museum described as an initial round of layoffs. This attracted a great deal of attention, as the Guggenheim's director, Tom Krens, was widely known as an aggressive risk-taker and promoter of the museum's global ambitions. To quote the *Times*, he "has always been



Bruno Rossi (MIT) with Secretary Emilio Bizzi (MIT).

something of a high roller, a larger-than-life character who rides around on a BMW motorcycle and challenges conventional notions about art, money and museum management.” The *Times* noted that admissions were down by almost 60 percent (not distinguishing between the Guggenheim New York and the global Guggenheim, although implying that it was referring to the former) and that revenue was about half of what had been projected for that point in the budget year. Besides the staff cuts, which the *Times* reported may ultimately reach 40 percent, the museum scaled back its exhibition schedule, postponing exhibitions by Matthew Barney and Kasimir Malevich; announced the closing of its SoHo branch; and threw into question the fate of its \$20 million website, *guggenheim.com*.

With this news, the *Times* took delight in speculating whether “Mr. Krens is in part to blame for having reached too far too fast.” To this, Krens responded, “I think it is appropriate for an institute to reexamine its core mission. This is an opportunity for us to do that, triggered, perhaps, by September 11,” adding, “I think the things we are doing are extremely prudent.” The *Times* put the Guggenheim’s current plight in the context of the museum’s larger ambitions—described by the paper, referencing the opinions of Krens’s peers, “as a house of cards, a global empire with colonies in Venice, Bilbao, Berlin and, most recently, Las Vegas that is fatally addicted to new streams of revenue to cover old debts and risky gambles.” The newspaper further noted that some of the museum’s latest ventures were particularly vulnerable, especially its two “minimuseums” in Las Vegas, which opened on the October weekend when the war in Afghanistan began. Attendance at the Las Vegas sites in their first month of operation was only 3,000, or about 40 percent of expectations.

Although Krens insisted that all the Guggenheim operations were self-sustaining, the *Times* pointed out that in each of the past two years, the Guggenheim Foundation, which runs the museum’s global operations, shifted money from its

endowment to meet both operating costs and debt payments. The reported total amount that was shifted over the two years was \$23.3 million, of which \$10.5 million was taken just in the year 2000 to help dramatically reduce the museum's outstanding debt from \$42 million to \$28 million. This, together with the dramatic decline in attendance-generate revenue and the museum's dependence on foreign tourists' expenditures, raised many eyebrows among museum professionals. Almost 70 percent of the Guggenheim's visitors are from out of town, and 50 percent are from abroad. Admission fees account for 25 percent of its total revenue, as compared with 12 percent at the Metropolitan Museum.

Typically, museums, like other nonprofit institutions, dip into their endowments rarely and only as a last resort. By using the endowment for operating expenses over many years, the Guggenheim has been left with a relatively modest endowment for a museum of its stature and scope. As of December 31, 2000, its endowment was \$37 million, having increased by only 54 percent over the past decade—when, in contrast, the Harvard Art Museums' endowment increased almost 300 percent, from \$90 million to \$360 million, largely because of the performance of the stock market and other investments during that period. In other words, because of what must be judged as risky fiscal strategies, the Guggenheim found itself ill-prepared to take on the sudden and unanticipated economic impact of September 11.

Obviously, the dramatic drop in tourism to New York affected not only the museums but also the city itself, making it unlikely that the city will be able to respond to help the museums as it had in the past and as it had promised to do in the near future. Each major museum was affected substantially, two more than the others, and one especially. All of New York's arts institutions, large and small, were affected, some of them critically. The Mellon Foundation and the Andy Warhol Foundation have stepped in to help with grants totaling more



Charlotte and Irving Rabb.

than \$50 million. But as helpful as this will be, it will not be enough to turn things around anytime soon. The economic impact of September 11 is making New York museums rethink their reliance on tourist revenues. They are looking instead to more stable sources of support and, evidently, in the case of the Guggenheim, to more prudent financial practices and planning.

What about the rest of the country? The Association of Art Museum Directors, an organization representing 175 of the largest art museums in North America—museums with a large majority of the art museum visitorship in Canada and the United States—conducted a survey of its members. The 134 respondents (three-quarters of the AAMD membership) represent all kinds of art museums and markets. While not scientific, the survey provides a snapshot of current trends and thus is helpful when considering the larger impact of September 11.

To the question of how the events of September 11 affected attendance, 80 percent of the AAMD respondents reported current attendance at or above levels prior to that date, and 20 percent reported a sustained increase in attendance since that date. Included in these figures are the New

York and Washington markets, where not only admissions-paying tourists were down in number; so were non-admissions-paying school groups (since September 11, school groups from around the country have been kept from visiting cultural centers in big cities; such is the fear among parents and school administrators). As for revenues, half of the reporting museums saw no change, or even an increase, in revenue levels since September 11; of these, almost half saw an increase. It is not surprising that the decrease was greatest in corporate funding: two-thirds of the museums either reported a decline in funding or noted that it was too early to tell. After all, September 11 came in the midst of an economic downturn, and corporations, wishing to be seen as good and responsible citizens, rushed to donate their dwindling available funds to charities directly involved in the recovery of our cities; art museums were, and still are, a lower priority. Equally not surprising, the funding source for which the greatest number of museums reported an increase was individuals: 21 percent of museums reported an increase in individual gifts, as opposed to 8 percent each in donations from corporations and foundations, and 5 percent in government funding. Individuals are most closely identified with their local institutions, are least likely to seek a burnished public image, and have always been the greatest source of support for art museums.

Perhaps most interesting, and surprising: of the 104 museums responding to the question of how September 11 affected their building projects (the other 30 museums must not be in the midst of planning or executing renovations or new construction), 102 reported that they are continuing with their plans, with three-quarters of *those* reporting that they are doing so without any changes, and the rest reporting that they are continuing after modifying the scopes or time frames of their projects. Art first this seems extraordinary, especially when one recalls that over 100 museums in the United States alone have building projects for which they are raising almost \$3 billion in capital



campaigns. The only answer to this is that building projects are generally undertaken only after years of self-study to determine the institution's programmatic needs and fundraising capability. If the needs are judged appropriate and the capability thought sufficient, then and only then do art museums embark on months, if not years, of the so-called quiet stages of their campaigns, in which they test their capability and constantly review and adjust the scope of their program. By the time museums go public with their plans, they are typically confident in both the scope of their projects and their fundraising capability, and even have as much as half or more of the necessary funding in hand. The events of September 11, while certainly not anticipated, were not likely to derail an art museum's building project—only, at worst, to modify its scope or stretch out its schedule for completion. One can even imagine that funders, individual and otherwise, saw continuing to invest in museums' building projects as a sign of support for their cities, a much-needed expression of optimism.

When the results of the recent AAMD survey are set against a comparison of surveys conducted by the organization in 1990 and 2000 (it does such surveys annually), we see a picture of sustained growth among art museums. These ten-year trends show that despite the story of the Guggenheim, art museums experienced a doubling of their endowments between 1990 and 2000. Over the same period, their investments in capital improvements increased almost 500 percent, their attendance increased 22 percent, the number of family and individual memberships increased 29 percent, and the number of works of art donated increased 50 percent. At the same time, our art museums increased their investments in their core mission of curatorship, conservation, and public education by 85, 93, and 96 percent, respectively. In other words, in the context of the past ten years, the impact of September 11 has been slight overall, although much more severe in our nation's cities and tourist destinations.

This said, the events of September 11 have had a real impact on the way our art museums go about their business and even see themselves and their role in their communities. The first impact—just now being felt, and one hopes only briefly so—is in the area of insurance. Almost immediately after September 11, insurance companies notified museums that they would no longer be covered for acts of terrorism (because they themselves were no longer being covered for terrorism by their reinsurers) and that such acts would be an exclusion to their insurance policies, just as acts of war have been for some time. Art museums that wanted terrorism insurance, if they could find it, would have to pay very high premiums for policies with very high deductibles and very little coverage. Some museums expressed alarm about this, saying that they were worried that they couldn't get loans of rare and valuable works of art for their exhibitions because either their boards of trustees or the potential lending institutions were demanding terrorism insurance. Either way, the high cost of such insurance, if they could even find it, was thought to be prohibitive and likely to curtail lending and to render extinct the major exhibition.

Of course, this is true for everything from hydroelectric plants to skyscrapers. Insurance companies took a beating on September 11 and are acting quickly to reduce their exposure and to recoup losses. And like everything from hydroelectric plants to skyscrapers, art museums are being approached by the insurance industry with all kinds of proposals for remedying the situation. One recent proposal would add insurance capacity to the federal government's Indemnity Program. Funded through the National Endowment for the Arts, this program indemnifies exhibitions that include works of art coming into this country from foreign countries when the loaned works are judged to be important to the exhibition in question and when the exhibition itself is judged to be in the national interest—that is, when it is thought to significantly benefit the communities it is scheduled to visit.

This proposal claims that there is an excess capacity in the Indemnity Program—perhaps as much as \$500 million, although some say it is closer to \$250 million (an excess is the result of exhibitions in the aggregate not requesting the sum total of the coverage set aside by the government). Some insurers are proposing that the excess be set aside as terrorism insurance and matched by reinsurers. This would provide a pool of up to \$1 billion in terrorism insurance for half the cost (the first half would be covered by the government and the second half purchased by the insured).

The rub here is that even at half the cost, the premium would be prohibitive (hundreds of thousands of dollars, typically), insurance would be limited to one claim annually, and any changes to the Indemnity Program would require congressional approval. Not only are most of us loath to have Congress review the Indemnity Program—what an easy thing it would be to reduce or eliminate it, in this day of budget cuts and fears about a slower-than-expected economic recovery—but Congress has already considered a bill to make the federal government responsible for terrorism claims above a certain amount (while it passed in the House, it failed in the Senate). The insurance industry will continue to press its case this term, but some of us see such efforts more as a way to enrich the insurance industry, which of course was badly battered by the events of September 11, than as a way to help museums. After all, we wonder, what's the risk? Wasn't this more than likely a dreadful but isolated incident? And doesn't the risk pertain to relatively few museums in relatively few locations across the country? Still, in the short term, fears are out there, and many exhibitions may be affected.

Of course, most museums will address the threat of terrorism by changing and increasing their security. Any of us who have gone to art museums in New York or Washington have already seen this. Our bags are checked individually on entry, we are allowed to carry fewer things into the galleries, and more and more obvious security attendants are

everywhere. But this has been standard practice for many museums in Europe, especially in London during the years of the IRA troubles. We all had our bags checked then, and security was vigilant and visible. Once, in London's National Gallery, I left my daughter's baby carriage unattended while I held her and walked around; a security guard quickly barked at me to never leave the carriage unattended, as it could be confused for a means of hiding a bomb and be taken away and destroyed. Just as in London, we will see increased security rise and fall over the next few months, though any increase will have a real and negative affect on museum budgets (additional expenses at a time of reduced revenue).

The real and, one hopes, lasting effect of September 11 is how art museums are beginning to talk about how they see their role in their communities changing as a result of those tragic events. People are rightfully questioning the role of museums as tourist destinations. During the 1990s, museums often described themselves as "economic engines" and commissioned reports to show just how much money they brought into their cities by way of tourists traveling by plane and train, occupying hotel rooms, going out to lunches and dinners, buying goods in the museums and elsewhere, attending other cultural activities, such as plays and concerts, and paying taxes everywhere they went. Museums even developed special travel packages with their cities' tourist bureaus and leading hotels. Museums meant tourist dollars, so the argument went, and thus ought to be supported by increased city government support.

To cater increasingly to tourists, museums have to allocate more and more dollars to specific kinds of public amenities, like restaurants and souvenir shops (as opposed to book shops; have you noticed that in some museum shops, it's even hard to find the books, shelved as they are in the back of the store, behind the knickknacks and luxury goods?), and to promotion and advertising. After all, out-of-town visitors have to be attracted to museums

(they want to know *what's on*; hence the success of the magazine-format series (*Museums New York*, *Museums Boston*, *Museums Houston*) and the special advertisement vehicles in the *New Yorker* and the *New York Times*, in which museums from most major cities and elsewhere feature upcoming temporary exhibitions). Tourists have to plan their trip and plot out their visit, given their limited time. Once attracted to the museum, they are likely to stay a few hours to get their money's worth, and they will need to eat and want to buy something to take away as a reminder of their visit. They aren't likely to stay for classes or attend lectures or symposia. They are retail customers, attracted more to the museum's temporary exhibitions than to its permanent collection.

The Guggenheim Museum knew this, and its director codified the successful twenty-first-century museum experience accordingly: "great collections, great architecture, a great special exhibition, a great second exhibition, two shopping opportunities, two eating opportunities, a high-tech interface via the Internet, and economies of scale via a global network." Over the past ten years, he developed a museum that, as noted earlier, was increasingly dependent on tourist dollars: almost 70 percent of its visitors were from outside New York City, and 50 percent of them were from abroad; admission fees accounted for 25 percent of its total revenue (twice that of the Metropolitan Museum); and when the tourists began to stay away after September 11, the Guggenheim was forced to lay off 20 percent of its staff.

Attracting tourists, while appropriate and perhaps necessary, is a dangerous principle on which to depend financially. As New York is showing us, not only are tourists staying away from big-city museums; they are staying away from big cities too, making it less likely that the affected cities will be able to help their museums with direct funding as once they had. A downturn in tourism hurts at least twice: in direct tourist dollars and in city government support. It is likely to hurt in corporate

support too, as corporations give to maximize the exposure on their investment: before, a grant to a big-city museum meant that not only the city's residents but also its tourists saw the corporate funder's name. It was a concentrated and relatively inexpensive way to maximize exposure in affiliation with a fixed entity like a museum—as opposed, for example, to a form of print or television media that is mobile, appearing in any number of markets simultaneously and, for that reason, more expensive.

A better, surer strategy for museums is to cultivate their host communities. Local visitors don't disappear in the same numbers as tourists. Also, they are more likely to develop life-long relations with their museums, becoming contributors to both their museums' annual appeals and their capital campaigns and endowments; as such, they are, in principle, more stable sources of income. Local visitors are also dependable defenses against the kind of crisis dollars that have plagued museums in the recent past—dollars typically sought in support of exhibitions, and therefore dollars that, in addition to being risky, do not permanently enrich the museum. By "risky" dollars, I mean those sought (all too often) in response to an urgent, deadline-determined need—those that come with restrictions or expectations that prove not to be in the best interests of the museum and that are negotiated under the pressure of time, when the museum is most desperate. Most obviously and most recently, one thinks, in this regard, of the various funders of the Brooklyn Museum's "Sensation" exhibition, but there are plenty of other examples. Under the pressure of bills coming due, museums, like all of us, entertain risks they wouldn't otherwise—and that's typically not to their advantage.

It's not just exhibition dollars that carry such risks. Operating dollars can as well, and again under the pressures of time and bills coming due. Here one thinks of the multimillion-dollar gift to the Guggenheim Museum by fashion designer Giorgio Armani, which was followed by an exhibition

heavily criticized by the press and which, in the end, didn't prevent the museum from suffering its current financial crisis. The most celebrated recent example, however, may be the Smithsonian Institution, which faces \$1 billion in current needs and has, under secretary Lawrence Small, reached out to donors and offered them levels of involvement in the programmatic affairs of the Institution that are unparalleled in recent memory.

You may remember that Catherine Reynolds offered the Smithsonian \$38 million if it dedicated a 10,000-square-foot hall to a theme of her choice, in which her foundation would have a considerable say. The so-called "hall of achievement" was to be devoted to "life stories of eminent Americans," in keeping with the standards of the "Steps to Success" of the American Academy of Achievement—an organization run by her husband and intended to include, according to Ms. Reynolds herself, such individuals as Oprah Winfrey, Sam Donaldson, and Martha Stewart. A similar and overlapping purpose was a big part of the reason that another donor, Kenneth Behring, gave the Smithsonian an even larger gift. The Institution's curators revolted. Directors of the National Museum of American History, the National Portrait Gallery, the Hirshhorn Museum, and the Freer and Sackler Galleries left. Letters of opposition were written.

Just last month, Milo Beach, the departing director of the Freer and Sackler Galleries, wrote a "Special to the *Washington Post*" article entitled "Why I Think the Smithsonian Is Misguided." According to the article, a "head of a major research activity at the Institution" had reported to Beach that Secretary Small had directed him to no longer use the word *research* but to speak only of *education*. When Beach reported his own research projects to the secretary, Small instructed him not to pursue any of those interests or even to think about them until after he retired. "I was to concentrate," Beach wrote, "solely on fundraising and bringing more people to the galleries."

Other problems have plagued the secretary. He tried to shut down the National Zoo's Conservation and Research Center, but after a very public campaign of opposition by Smithsonian and non-Smithsonian scientists alike, he reversed his decision. Recently, the federal government has stopped or delayed various building projects because they were badly over budget and judged to have been mishandled. Then Catherine Reynolds withdrew her \$38 million gift to the Smithsonian, saying that "apparently, the basic philosophy for the exhibit—'the power of the individual to make a difference'— is the antithesis of that espoused by many within the Smithsonian bureaucracy, which is 'only movements and institutions make a difference, not individuals.' After much contemplation, I see no way to reconcile these diametrically opposed philosophical differences." Money comes and money goes—sometimes, when accompanied by controversy, leaving the institution for which it was intended much the weaker.

Endowments are the safest way to avoid these crises while raising money. They are not intended for immediate effect. They can't even be spent until they have earned enough income to fund their purpose in perpetuity, and then only a part of their income is spent; the rest is reinvested to keep the endowment fund's capital ahead of inflation. Endowments do not offer quick fixes. They are rarely raised against the pressure of time. They are long-term investments raised to permanently enrich the institution. Generally, they are raised from long-term friends of the museum and rarely, if ever, from occasional visitors. Indeed, the long-term cultivation of donors—typically, the course of action when seeking endowment funds—means that over time, a museum has made its case often and clearly and has sold that case to someone the museum judges to have its (not his or her) best interests in mind. There are always exceptions to the rule, but less so in endowment fundraising than in exhibitions and current-use fundraising.



One hears this a lot lately, whenever museum directors gather. They are talking about increasing their museum's endowments, stabilizing their finances, and strengthening their relations with long-term friends—not only because of recent embarrassments among museums but also because of the changes that have come over museums since September 11.

Now museum directors often talk about deepening their visitors' experiences of their museums, searching for ways to slow their visitors down, seeking their frequent return, and cultivating long-term relations. One hears less about multiple retail opportunities in museums and more about permanent collections and sustained engagements with works of art. This change is remarkable. The mantra for much of the 1990s, when it wasn't about earned income and the potential magic of electronic commerce, was about community outreach and the museum as an agency of social therapy. It was about after-school programs for at-risk kids and about teaching all kinds of things, from analytical and computational skills to ways of building better self-esteem and self-discipline. Rarely was it about the varied mysteries of art or the aspects of art that have no immediate application or presumed efficacy. Even more rarely was it about museums standing back and letting their visitors search about on their own, at their own pace, among the permanent collections. Everything had to be predicted and determined, and the visitor had to be served, and the results had to be verifiable and quantifiable. That was how public value was measured in the 1990s; it seems to be measured less in that way now.

Whereas one once heard museums described as contested sites, where ideas and social identities were in contest, one now hears museums described as sanctuaries, places of retreat, sites for spiritual and emotional nourishment and renewal. Surely, this is a caricature of the changed museum—a case of the pendulum swinging too far to the other side: the new, inwardly directed museum in place of the

old, outwardly directed museum. But there is something to it. It is about the deepening of the museum experience, in the way the painter Elizabeth Murray meant it when she replied, in response to a question about how September 11 affected her, “Everything went deeper.”

I don't think that September 11 alone has led the change of feeling about art and the experience of museums. Something was already at work in this direction as early as 1998, when Elaine Scarry gave the Tanner Lecture on Human Values at Yale University, which was later included in her book *On Beauty and Being Just*. It was evident in the recent exhibitions at the Hirshhorn Museum in Washington and at SITE Santa Fe that explored and celebrated beauty as a condition of art, and in James Elkins's recent book, *Pictures and Tears*, which explored the phenomenon of people finding certain paintings so beautiful, sad, or otherwise deeply affective that they become overwhelmed and begin to cry (evidently, this happens most often in front of paintings by Mark Rothko and Fra Angelico). The National Gallery of London mounted an enormously popular exhibition last year, entitled “Seeing Salvation: Images of Christ in Art,” that spawned not only a catalog but also another book and a very successful television documentary. In the catalog's introduction, exhibition curator and museum director Neil MacGregor wrote, “Because every life was held to be in some measure divine, the language of Christian art still allows Leonardo and Rembrandt, Michelangelo and Rubens, to speak to us of love and suffering, loss and hope.” Such a sentence would never have appeared in the hardboiled exhibition catalogs or academic texts of most of the 1990s. But toward the end of that decade, for any number of reasons, things began to change, and all of a sudden, an author's feelings could be more openly expressed. September 11 was not the beginning of a change in museums; it was the confirmation that the change was justified and well under way.

In my view, this post–September 11 way of thinking is not only justified but also necessary. It encourages museums to put works of art front and center and to trust that art is what the museum-going public wants most. Before, museums put all kinds of other things front and center: retail operations, exhibition promotion, social agency, outreach efforts, and, above all, words—all kinds of words proscribing the visitor’s experience by any number of verbal aids. Now there’s a sense that a quieter, more personal experience of works of art is okay too—that the museum’s job is at least, and perhaps at best, to provide the visitor with unfettered (or at least less fettered) access to works of art, leaving the whole educational apparatus at the ready only if and when it should be requested by the visitor. Museums are, after all, and *pace* Horace, “to delight as well as to instruct.”

This is not, I hasten to say, meant to do away with the role of the curator. It is only to redirect the curatorial role to matters of collection building and research and away from auteurship, away from the idea of the curator as “producer,” as one curator recently described herself in a *New Yorker* profile. This is about putting the art and the artist ahead of the museum. It is to propose a much more modest role for art museums (at least in terms of public, headline-grabbing attention) than they once sought for themselves. I think it is also the basis for a renewed sense of trust between the public and the art museum.

As some of you know, we at the Harvard Art Museums have been exploring “Art Museums and the Public Trust” this year in a series of lectures by leading art museum directors. The idea for this series preceded September 11, as did all of the books and exhibitions I just mentioned. But like those, our series has taken on new meaning as a result of the tragic events of that day. This, I think, is necessary. The real change in museums since September 11 is that museums care more about their visitors’ experience of works of art in their collections than they do about increasing the num-

bers of their visitors and attracting them to various retail options.

The bloom is off the rose of museums' 1990s expansionist ambitions, and that is good. Of course, museums still have to worry about making ends meet and diversifying their income streams. But these seem to be less ends in themselves than they once were and more means to an end—an end that is less determined and proscribed than before.

So, at least as far as art museums go, things *have* changed since September 11, but they were changing already. The events of that day only drew our attention to that change and heightened our regard for it. The impact of September 11 on our New York, Washington, and other big-city, tourist-destination museums is real, but it is more isolated than news reports might suggest—and even that impact has to be measured against the decade of real growth our museums enjoyed during the 1990s. The good news—and the real news, at least as I see it—is that despite September 11, and in part because of it, our art museums are stronger than ever.

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### Congress and the Court

**Senator Charles Schumer,**  
US Congress

**Chief Judge J. Harvie Wilkinson III,**  
US Fourth Circuit Court of Appeals

The 1857th Stated Meeting of the Academy took place in Washington, DC, on March 21, 2002. Librarian of Congress James Billington welcomed Fellows and their guests, noting that the library is the repository of extensive material documenting the complex history of the relationship between Congress and the Supreme Court.

The Stated Meeting program was organized by the Academy's Committee on Congress and the Court, cochaired by Jesse Choper, Earl Warren Professor of Public Law at UC Berkeley, and Robert C. Post, Alexander F. and May T. Morrison Professor of Law at Boalt Hall School of Law, UC Berkeley. Other committee members include Linda Greenhouse, Supreme Court correspondent for the *New York Times*; Abner J. Mikva, visiting professor at the University of Chicago Law School; and Nelson W. Polsby, Heller Professor of Political Science at UC Berkeley.

Mikva, who has served as a five-term US congressman and as chief judge on the US Court of Appeals for the District of Columbia Circuit, introduced Schumer and Wilkinson. Both speakers addressed the potential impact of the changing relationship between Congress and the Court on the balance of power. Among the topics considered were the Court's new jurisprudence of federalism, which has begun to circumscribe congressional power, and questions about the criteria for evaluating presidential nominees to the federal bench. A panel discussion, including the speakers and Committee members, followed the presentations.

Prior to the Stated Meeting, the committee held an informal discussion with members of Congress and the Supreme Court to identify a number of issues that would form the basis for a scholarly analysis of the critical interaction between the federal legislature and judiciary.



Librarian of Congress James Billington welcomes Academy Fellows and guests.

## Charles Schumer

When I asked what the Academy wanted to hear from me, I was told that you wanted my thoughts regarding the interplay between Congress and the courts, the new-federalism jurisprudence that has risen to the fore in recent years, and the state of the judicial confirmation process. As I thought about whether I could keep my remarks on these three subjects to under three hours, you asked me to limit myself to fifteen minutes. So, basically, you've asked a New Yorker to speak his mind as bluntly and concisely as possible on some pretty hot topics. Well, ask a New Yorker to tell you what he thinks, and you get what you wish for. With the direction you've given me, with the warning I've given you, and especially in light of all the important legislation we've enacted recently and all that's to come, let's get to it.

I'd like to start by talking about something that deeply concerns many of us here on the Article I side of government. Specifically, there has been a judicial trend of diminishing deference to Congress's power to find facts and then legislate pursuant to

those findings. I take up this subject with some trepidation, being fully aware that the courts must be able to assess—with total independence—when and where Congress has exceeded its constitutionally authorized powers. There have been times in our history when the courts have been the bulwark against Congress's efforts to undermine constitutionally protected rights, and that's one of the reasons I respect and revere our judicial system. So when I discuss this issue, especially in front of such distinguished justices and judges, I caution that no one should take from my remarks any suggestion that our courts should not remain vigilant in upholding the Constitution.

With that in mind, I do want to make you aware of my views from within the legislature. Frankly, as someone elected by the citizens of my state to legislate, I am profoundly troubled by the extent to which the judiciary has abrogated Congress's powers in the past few years. Starting with *Lopez*, the guns in school zones case, running through *Morrison*, the Violence Against Women Act case, and including most recently *Garrett*, the disability discrimination case, the courts—most significantly, the Supreme Court—have been steadily eroding Congress's power to legislate, with the effects felt and often suffered across the nation.

While some of the federalism decisions from recent years have fairly noted Congress's failure to establish a nexus between a piece of legislation and a source of congressional power, several of the cases ignore serious, studied, and diligent efforts by Congress to make the necessary findings and establish a proper constitutional exercise of power. We hold hearings—for some laws, years' worth of hearings. We take testimony from citizens, from academics, from state lawmakers, state attorneys general, and an array of other interested parties. In passing many laws that the courts have then struck down on federalism grounds, we have specifically solicited input—and received a green light—from the states on the question of whether there is a need for the national legislature to act.

Generally, our actions are not attempts to violate or weaken the states' authority; they are the product of what we were elected to do. It's a simple proposition, but we seem to have lost sight of it recently. The fundamental role of Congress is to make laws. The executive implements them, and judges are nominated and confirmed to interpret and apply those laws. That is the balance the framers struck, and since *Marbury v. Madison*, the balance has worked. But now, as at no time in our past, we are seeing a finger on the scale that is subtly but surely altering this balance of power between Congress and the courts.

As Justice Breyer wrote in his eloquent dissent in *Morrison*, "Since judges cannot change the world, [it] means that, within the bounds of the rational, Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance." For better or worse, we are charged with making policy. The judiciary's role, while just as important, is quite different. It appears to me that with increasing frequency, the courts have tried to become policymaking bodies, supplanting court-made judgments for ours. That's not good



Senator Charles Schumer (D–New York).



for our government, and it's not good for our country.

Of course, it was the conservative movement that first took issue with what they perceived as the Warren Court's judicial activism and willingness to make social policy judgments from the bench. For decades, conservatives—often convincingly, in my opinion—argued that elected officials, as opposed to unelected judges, should get the benefit of the doubt with respect to policy judgments, and that courts should not reach out to impose their will over that of elected legislatures. Even many non-conservatives, myself included, have significant sympathy with that position. It's easy for judges to express their personal views in their opinions. While that might be appealing for some to do, it's not what the founding fathers intended. Ironically, now we have the mirror image of that activism being practiced by some of the very same conservative judges who initially criticized it.

Ten years ago, Judge Robert Bork characterized the Warren Court as a “legislator of policy” that reasoned backward from its desired results when ruling to expand equal protection, the right to vote, criminal defendants' rights, and the right to privacy. Today, similar criticisms of the Court—acting as a social policy maker, actively rejecting the will of Congress—exist, and with good reason. Many of us in Congress are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve. These decisions affect, in a fundamental way, our ability to address major national issues like discrimination against the disabled and the aged, environmental concerns, and gun violence.

The role of Congress is to make laws. The role of the judiciary is to ensure the constitutionality of those laws. In part, the balance is guaranteed through the process of nominating and confirming federal judges. As many of you know, I have three simple standards for federal judges: excellence, moderation, and diversity. Excellence simply means they should be among the best the bar has

to offer. I don't think that's a controversial proposition. Diversity means that in the selection of federal judges, we should seek racial, ethnic, gender, and experiential diversity to ensure that the federal bench is as reflective of America as possible. I don't think that's a very controversial notion either. Moderation seems to be the sticking point these days. Personally, I look for moderate judges. I don't like judges to be too far to either side, whether too far left or too far right. While I'd rather our judges share views with the mainstream of the American people, I have no problem voting in favor of right-wing nominees when there is balance on the other side.

But on many of our courts, there is no balance. The Fifth Circuit, for example, is one of the most conservative courts in the country. President Clinton nominated three eminently qualified moderates to that court, and none of them even got so much as a hearing, much less a vote, in the Republican-controlled Senate Judiciary Committee. President Clinton nominated almost exclusively moderate judges to the federal bench. To the chagrin of some, he did not send up legions of liberal legal-aid lawyers and American Civil Liberties Union advocates. Instead, he mostly nominated moderate prosecutors, state court judges, and law firm attorneys. In the case of Charles Pickering, whose nomination was turned away last week, confirmation would have thrown the Fifth Circuit even more out of balance.

During the campaign, President Bush told us he'd pick judges in the mold of Justices Scalia and Thomas, and he's following through with that promise. One or two Scalias or Thomases is one thing, but a bench full of them would drive our courts way out of the mainstream—and that's unacceptable.

The administration is willing to take some casualties in this fight. They are sending up waves of Scalias and Thomases. If a couple of controversial nominees get shot down, it's a small price to pay, because they still win; they still stack the courts. It's

a bad strategy, both for the courts and for the American people.

Our country is divided ideologically. The last presidential election was as close as they come. Both houses of Congress have narrow majorities, and control is split between the parties. There's clearly no mandate from the American people to stock the courts with conservative ideologues. So if the White House persists in sending up nominees who threaten to throw the courts out of whack with the country, Democrats have no choice but to vote no. This is especially the case in an era when the courts are implementing a conservative agenda through unprecedented judicial activism from the right.

We need to fill the bench with judges who represent all Americans, not just those with hard-line conservative views. Moderate nominees who are among the best lawyers the bar has to offer are being confirmed rapidly. In fact, the Judiciary Committee has voted in favor of 42 of them in just eight months, despite September 11 and the shutdown of congressional offices due to anthrax.

Our numbers are pretty good, but we can do better with the president's cooperation. We're spending a lot of time vetting nominees, like Judge Pickering, for whom red flags were raised. I can tell you, it's a heck of a lot easier when everyone agrees that a nominee is legally excellent and ideologically moderate, and when issues of diversity are properly accounted for.

Congress is certainly imperfect—I sure am—but our laws are entitled to a presumption of constitutionality, and I wonder whether the current spate of conservative judicial activism hasn't eroded some of the constitutional respect Congress deserves. Ideologues, not surprisingly, tend to come with an ideological agenda. Most moderates bring to the bench simple but essential goals of upholding the Constitution and doing justice.

The legislature is elected to legislate, to address pressing national problems. I hope that in the decades to come, we will see a renewed vigilance

aimed at giving legislation the benefit of the doubt in the first instance, combined with a dedication to striking down those laws, no matter how popular, that go too far and violate the Constitution.

Fair-minded, moderate nominees are, in my mind, the best candidates to restore the proper balance of power between Congress and the courts and to refrain from engaging in judicial activism. If we see more of those kinds of nominees, we won't need any more lengthy addresses on the problems with the new federalism and the problems with the nomination and confirmation process. They simply won't be problems anymore.

### **J. Harvie Wilkinson III**

We gather amidst signs that the congressional-judicial relationship is frayed, but I do not believe that it is broken. Sometimes the positive things about the relationship don't grab headlines. For instance, Congress has frequently been responsive to the judiciary's budget requests and courthouse security needs, and open to discussion on bills affecting the judicial function.

Even the best of relationships have their up and down periods. Communication of the kind that the Academy is sponsoring is one way to restore a relationship to health.

Separation of powers is an important part of American government. Yet when I hear the phrase "separation of powers," it suggests only apartness. Surely, we are all in this together. After September 11, the lesson of our common destiny has come home to us in all too profound a way. I have spent much of my life as an academic, a journalist, and a judge—three professions that by nature must maintain a degree of independence and even distance from many mainstream events. But it has always been clear to me that we are Americans above all. Senator, as an American citizen, I wish to thank you for the patriotism and leadership you have shown in the aftermath of our national tragedy.



J. Harvie Wilkinson III, Chief Judge, US Fourth Circuit Court of Appeals.

Obviously, one of the recurrent trouble spots in congressional-judicial relations is the process of Senate confirmation of judicial nominees. I do not think it would be appropriate for me as a judge to revisit the long history that has left bruises on both sides of the congressional aisle. Suffice it to say that the judiciary respects the fact that the Senate has a special constitutional duty to perform in judicial confirmations. Its role requires both care and inquiry before approving what are, after all, significant lifetime appointments.

I do, however, perceive two special dangers to the judiciary from the present state of affairs. Both dangers, if not attended to, will have serious adverse impacts on the judicial function.

The first danger is that over the past decade, nominees of real distinction have had an increasingly difficult time with the Senate confirmation process. I have often spoken about the dangers that growth in judgeships poses to the functioning of the federal appellate courts. Regardless of one's views on the issue of increasing the number of judges on the circuit courts, no one can reasonably dispute that we absolutely must maintain the qual-

ity. It is often said that stagnant judicial salaries pose the greatest threat to the quality of the bench. Perhaps, but I think a graver danger is a newly emergent skepticism on both sides of the aisle toward professional distinction of all sorts.

It sometimes seems as though the more distinguished the nominee, the less likely he or she is to receive a hearing or actually be confirmed. By “distinguished” nominees, I refer to those whose careers have commanded great respect in one or another aspect of the legal profession. Some have achieved prominence in private practice, others in academia, still others in public service. Some have become premier oral advocates, held high elective office, or served with distinction in state government or within the federal executive branch. Indeed, the quality of their professional records is not even in dispute.

By all rights, this kind of career record would appear to enhance one’s credentials and prospects for service on the federal bench. Yet it too often appears to have become an almost insurmountable obstacle. This is neither proper nor fair. Any career of distinction will involve its share of risks and controversies. That comes with having been in the arena. The sad development is that honorable positions taken in the course of honorable professional service are regularly becoming an impediment in the confirmation path.

I am not talking about extreme positions, and I am not pointing the finger in anyone’s direction, because there is blame enough to go around. But I ask you to consider the consequences of what we are doing, which is effectively blocking the real leaders of our profession from service, even on the lower federal bench. Surely, our judicial heritage would be all the poorer if the Learned Hands and Henry Friendlys had not made it to the bench due to this or that rough edge in their previous careers. The same could perhaps be said of many of my present colleagues.

Suppose, for example, that a comparable bar were put in place with respect to service in Congress. Senator Schumer and I might have some disagreements—perhaps that is why we have been asked to speak—but I respect him as a public servant of great energy, commitment, and idealism. Just as a legislature would be a poorer place without its more dynamic members, so too will a court suffer without members of intellectual breadth and high-level professional experience.

Let me be specific and begin with some hometown examples. Merrick Garland is one of the finest circuit judges in our country, as everyone who knows him predicted he would be. Yet his confirmation was protracted, and through no fault of his own, his nomination attracted a floor fight with 23 no votes. Allen Snyder, another of President Clinton's nominees, was Justice John Marshall Harlan's last law clerk and Chief Justice Rehnquist's first. I clerked for Justice Powell at that same time, and I found Allen a reflective and thoroughly decent person with extraordinary legal skills. Everything about Allen's later career bore out this early promise, but he never even received a vote. John Roberts and Mike McConnell are two of the most distinguished nominations that any president could make. John is clearly among the half-dozen ablest appellate advocates in America, and Mike is among a small handful of the country's most respected



*Left to right:* Richard Meserve, chair of the Academy Governance Committee (US Regulatory Commission); Supreme Court Justices David Souter and Ruth Bader Ginsburg; Academy Vice President Louis Cabot (Cabot Corporation); Supreme Court Justice Stephen G. Breyer; Samuel Bodman (US Department of Commerce).

legal academics. They were nominated last May, and neither has had a hearing scheduled.

So what are we to make of these four nominees, whose professional credentials are nowhere in dispute? One had a prolonged confirmation, one was never confirmed, and the fates of the other two remain very much in doubt. I worry that we have reached the point in the confirmation process where both sides of the aisle consider intellectual distinction a threatening characteristic in a judicial nominee. There could not be a more unfortunate long-term development from the standpoint of the judicial branch.

The examples above are meant to be illustrative, not exclusive. Obviously, many able persons have been nominated to the appellate courts by presidents of both parties. In emphasizing distinction, I am also not making an elitist point. The sole mission of the courts is one of public service. The range of cases that reach us is staggering—in fields of law ranging from the criminal, to securities and antitrust, to labor and civil rights, to tax and admiralty, to administrative and constitutional. The cases involve questions of both state and federal law, complex statutes, and byzantine regulations. They require an appreciation of the dynamics of government and the workings of sometimes inscrutable federal agencies. Not only that; rapidly changing technologies often underlie the most challenging disputes. This is a bad time to be disqualifying the most distinguished nominees from judicial service. In a period when many cases are just plain demanding, the public deserves the best intellectual resources and professional experience that this country can provide.

The second danger pertains to the role accorded ideology as a criterion for confirmation. While presidents have traditionally consulted judicial philosophy in the broadest sense in making appointments, ideology has often taken a back seat to integrity, experience, and temperament in the confirmation of lower court judges. I know my distinguished cospeaker has indicated that ideology



should be a significant criterion in appointments to the federal bench. To the extent that extreme views should raise red flags, he makes a valid point. There are two problems, however, with raising ideology to an express criterion for confirmation.

One is that the role of ideology in lower court decision making is frequently exaggerated, and the role of simple professional craftsmanship is too frequently overlooked or ignored. Whatever strong feelings may be generated by Supreme Court appointments, the courts on which Judge Mikva and I have sat—the courts of appeals—should not become ideological battlegrounds. I have had the pleasure of serving with judges with a wide variety of views in almost eighteen years on the court of appeals. What one comes to appreciate in a colleague is not so much ideology but dedication, preparation, intelligence, humanity, and above all, legal mastery and competence.

With proper discussion and reflection, good appellate judges will reach agreement on cases in the lower federal courts 80 to 85 percent of the time. Even disagreements cannot always be attributed to philosophical or ideological differences. When they can, and sometimes they can, there are often two reasonable and debatable views on the law. I worry, then, that this emphasis on ideology will cause us to overlook the fact that professional habits of mind are what will serve the public best, day in and day out.

There is a second problem with making ideology a confirmation criterion. The coin of the judicial realm is our impartiality and independence. If judges are appointed and confirmed for their professional distinction, then they will be perceived as performing a public trust. If, however, ideology becomes a paramount consideration in the confirmation process, then it will only be a matter of time before the public perceives courts to be ideological bastions rather than the repositories of impartial judgment. We will all lose if the rule of law and the role of courts come to be perceived as mere extensions of politics. When we talk of ideol-

ogy, we are playing with fire, and who knows which way the winds will blow the flames.

It is sometimes said that ideological considerations have been forced upon Congress by ideological decisions from the courts. Critics point to Supreme Court invalidations of congressional legislation not only under the Commerce Clause but also under Section 5 of the Fourteenth Amendment, in which Congress has been held to have the authority to enforce but not to redefine basic Fourteenth Amendment rights. Many of the most controversial decisions have been 5-to-4 votes. Then too, the argument goes, with capital punishment, affirmative action, abortion, and church-state relations on the judicial docket, Congress can hardly afford not to take ideological considerations into account, especially if the executive branch itself is hardly blind to them.

I hope I understand the point of view of many in Congress on these issues. They raise legitimate concerns. The judicial guidepost that Congress can regulate only subjects with “substantial effects” upon interstate commerce is not altogether clear. The same goes for some of the Section 5 and Eleventh Amendment tests as well. This lack of clarity must be a source of frustration within the legislative branch. I also agree fully with those in Congress who argue that self-restraint should be the hallmark of the judicial function, and that activism of the right or left poses the grave and unacceptable danger of displacing the judgments of the democratic branches of our government with the policy preferences of unelected jurists. I have expressed concerns about the dangers of unbridled activism; I have warned that a wholesale assault by the courts on civil rights and environmental protections would be perceived as pure judicial partisanship. Competing brands of activism are in no one’s interest, least of all that of the judiciary.

I also hope, however, that Congress will accord the Supreme Court’s work a commensurate level of respect. The judiciary is not at liberty to walk away

from its duty to interpret. Whether it be the Bill of Rights or the structural dictates of our founding document, the courts have been charged, since *Marbury v. Madison*, with the obligation to state what the law is. I profess I do not wholly understand the bifurcation between structure and rights that has pervaded much of modern constitutional law. Indeed, it is the structure of our government that makes possible many of the rights we now enjoy. The courts must be attentive to both structure and rights. The same document that confers our rights also establishes our governmental structure. The maintenance of structure and the protection of rights are the shared responsibilities of Congress and the courts, and the executive branch too, for that matter. Questions of structure are not off bounds for the courts any more than questions of rights are off bounds for Congress.

So I find it unfortunate that the Supreme Court would undergo so much criticism for taking structural questions seriously. I do not believe that anyone would want to divest the courts of ultimate authority to interpret the Constitution, even as we express the hope that intrusion into the affairs of the coordinate branches will be held to a minimum. We cannot escape the basic fact that our federal government is one of enumerated and thus limited powers, and that the framers set in place a system of dual sovereignties. The courts cannot ignore those structural dictates without rejecting the sum and substance of the Constitution itself.

Much about the relationship between the courts and Congress will come down to questions of degree. As I read the Supreme Court's decisions, the justices have flashed at most an amber light to Congress, but certainly not a red one. The speed limit at a maximum has been cut from 75 to 65. The essential congressional functions of taxation, appropriation, oversight, confirmation, ratification, and prescriptive legislation and rulemaking remain vigorously intact. September 11 was a reminder of the need for a strong national authority. It struck me as healthy that in the aftermath of

those tragic attacks, the political branches of our government stepped forward to address the national crisis, and the judiciary seemed for a time to have receded from the national consciousness. This is as it should be. Those of us in the judicial system profoundly respect the primacy of the political process. I ran for Congress once, and I received 30 percent of the vote. I took it as a mandate to return to law school. But I carried away from that election a profound respect for those who succeeded where I had not.

Politics is often a messy, rough-and-tumble, half-a-loaf business, but it is with the political process that America has placed its faith. And we hope in turn that Congress will continue to respect the important role the courts play in a constitutional democracy. The courts are guarantors of many important national values—the liberty, equality, opportunity, security, stability, and order that flow from faithful adherence to the rule of law.

## Panel Discussion

*Linda Greenhouse:* I thought I'd throw out a question that was inspired both by Senator Schumer's description of the criteria that he thinks are important for selecting judges and by Judge Wilkinson's admission of his stunted political career—something that would bridge both halves of what we're talking about: the selection and confirmation process and the doctrinal debates over federalism.

It certainly has seemed, in these recent cases, that the majority is positing a level of congressional fact finding and congressional thinking about its role and its legislation that may be at variance with the reality of life in a legislature. I wonder if one kind of long-term solution for this might be to add some criteria for at least some judicial nominations—for example, to look for somebody who has had political experience in the way that was the case in earlier days, when it was quite common for people to make the leap from elective office and



*Left to right:* Panelists Charles Schumer, J. Harvie Wilkinson, Jesse Choper (UC Berkeley), and Abner J. Mikva (University of Chicago). *Not shown:* Linda Greenhouse (*New York Times*), Robert C. Post (UC Berkeley), and Nelson W. Polsby (UC Berkeley).

political life to the judiciary. That's no longer the case, perhaps for good reasons. Maybe jurisprudence has become so finely tuned that somebody who came to an appellate court without judicial experience really wouldn't have the doctrines at his or her command to be a substantial player. But it seems to me that these two paths are diverging to such a degree that it's increasingly difficult to maintain a conversation based on any shared experiential life among people like our panelists and speakers.

***Jesse Choper:*** My part of the subject concerns the Supreme Court's recent federalism decisions. Within the past decade, the Court has struck down nearly a dozen acts of Congress on the ground that they abridged states' rights.

My view is somewhat that of a contrarian. On the one hand, I side with the four dissenters on the Court in these cases, who contended that Congress should not be denied the power to pass these laws, and consequently ally myself with Congress. Indeed, my position is more extreme, in a sense, than that of the dissenters. I believe that the issues presented in drawing the line between national and state power generally involve considerations of practicality rather than principle, that it is extreme-

ly difficult for the judiciary to articulate manageable standards in respect to this matter, and that there is therefore a sharp distinction between judicial review of individual rights and judicial review of states' rights. I have urged that state interests are forcefully represented in the national political process, that Congress is peculiarly capable of fairly reconciling the competing interests in federalism disputes, and that its constitutional judgment on that issue is entitled to a great deal of deference, much more so than a congressional judgment respecting individual rights. As a result, I conclude not that the dissenters were right in reasoning that Congress possessed the authority to enact the challenged statutes, but that the Court should not have taken the cases at all—that is, that the issues should have been held to be nonjusticiable. Many disagree with me on this, but I have advocated it for more than 25 years, and I continue to do so.

On the other hand, I greatly sympathize with the arguments made by critics of Congress in respect to at least some of the laws that the Court has held to be beyond Congress's authority. For example, if I had been asked by members of the legislative branch whether Congress had constitutional power under the Commerce Clause to pass the Gun-Free School Zones Act or the civil remedy granted by the Violence Against Women Act against those who commit gender-motivated violence, I would have said that this was not within the spirit of Congress's power under the Commerce Clause. It seems to me that the major purpose of the Commerce Clause was to enable Congress to deal with great national problems that the states are separately incompetent to handle in an efficient and effective way. There is no reason to believe that states cannot pass laws preventing guns near schools—indeed, more than 40 states have done so. States also have full capacity and good reason to provide civil remedies for violence against women. I favor both sets of laws but do not think Congress ought to be enacting them. I have not given enough thought to some of the other laws that the Court has recently held to be unconstitutional in

the name of states' rights, but I have a fairly clear view about the two I have just discussed.

To return to my original point, however, I do not believe that the fact that states can and do pass laws like the Gun-Free School Zones Act and the Violence Against Women Act leads to the conclusion that the Court should hold similar acts of Congress unconstitutional. Rather, I would have the Court defer to congressional judgment, whether a given issue presents a national problem or a local problem; I think the Court shouldn't even agree to hear such a case. Still, I seriously question whether Congress is exercising an intelligent judgment as to its special capacity in these cases and the inability of states to deal with them, or simply passing "feel-good" laws.

I will close by noting a certain irony in respect to the Supreme Court's renewed protection of states' rights. One would expect that the group that would be most against Congress's exerting national power to enact such laws would be the states. But that is not so. Rather, it is the members of the federal judiciary who are most strongly opposed, because of the added, and unnecessary, cases placed on their dockets. Moreover, those who most favor federal criminalization are state prosecutors, who are very happy to have the cooperation of national law enforcement officers or, perhaps even better, to get the cases out of their files and into the US attorney's office. For me, that irony tends to confirm the good sense in the contrarian position that I hold.

**Robert C. Post:** I come at this from the point of view of a historian. At present I am writing Volume X of the *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, which will cover the period when William Howard Taft was chief justice, from 1921 to 1930. In reference to the concerns that Linda has articulated, the Supreme Court at that time was highly distinguished. It counted among its members an ex-president, a senator, a secretary of state, and three attorneys general, as well as jurists of the stature of Oliver Wendell Holmes and Louis Brandeis. In the 1920s the

Court was in constant contact with the political branches of the federal government. Today the personal and institutional relations that characterized the Court's connection to Congress and the executive during the 1920s would be thought improper because of norms of separation of powers and of conflicts of interest. But in the 1920s Chief Justice Taft and associate justices met on a regular basis with the president and members of Congress. Members of the Court were politically sophisticated and carefully considered the political consequences of their decisions.

In his remarks, Judge Wilkinson referred to the crucial distinction in American constitutional law between questions of structure and questions of rights. It is fascinating to note that in the 1920s, the Supreme Court did not view this distinction as fundamental. In fact, the Court self-consciously defined individual rights in ways designed to attain structural ends, and, conversely, it defined congressional power in ways designed to protect individual rights. The modern sharp division between structure and rights actually emerged from the settlement of the constitutional crisis of the New Deal.

At that time, you may recall, the Supreme Court, articulating a nineteenth-century vision of American constitutional law, struck down important New Deal legislation. President Roosevelt fought back by attempting to pack the Court. When the dust settled, the country opted for an arrangement in which, roughly speaking, Congress would be allowed to define the scope of national power while federal courts would be authorized to scrutinize the exercise of that power, so as to protect rights. This division of labor lasted until the mid-1990s. Historically speaking, the past decade has witnessed the unraveling of the New Deal settlement.

The question of national power is about the capacity of the national government to meet national needs. When we put constitutional restrictions on the ability of the federal government to meet what it regards as a national problem, the country faces a vacuum of power that could have potentially seri-



ous consequences. So it is extremely important how we conceive the question of limitations on national power.

Traditionally, limitations on national power were conceived within the framework of American federalism as expressing the concept of dual sovereignty. Dual sovereignty held that the states and the federal government occupied distinct and exclusive spheres of authority. The states were constitutionally forbidden from regulating within the federal sphere—as, for example, by passing laws that restricted interstate commerce. Conversely, the federal government was constitutionally prohibited from regulating within the sphere of the states—as, for example, by enacting laws that restricted intrastate commerce.

Dual sovereignty remained the master trope of American federalism until the mid-1930s. At that time the concept of dual sovereignty largely disappeared, because the rapid *de facto* expansion of federal power, and the more or less complete integration of interstate and intrastate commerce, made it exceedingly difficult to draw any coherent or useful boundaries between federal and state spheres of authority. Today there is no aspect of American life that is categorically free from federal influence and control. There are also very few spheres in which we categorically exclude state regulation. The Supreme Court, for example, no longer uses the metaphor of dual sovereignty to deny states the power to regulate interstate commerce, because it realizes that any such holding would strip states of virtually all important regulatory authority.

The contemporary Rehnquist Court has nevertheless sought to revive the concept of dual sovereignty. In a recent opinion, for example, the Court has stated that “dual sovereignty is a defining feature of our Nation’s constitutional blueprint.” The Rehnquist Court must therefore determine how the distinct spheres of federal and state power should be defined and separated. It has approached this problem through two distinct methodologies.

This first has been to focus on issues of process. The Court has held that the federal government can invade the distinct sphere of state sovereignty only if it makes appropriate findings of fact. Recent Supreme Court decisions have struck down national legislation on the ground that Congress had failed to compile a sufficiently detailed and convincing record. This methodological approach forces us to ask how Congress can or should function as a fact finder. Unlike courts, legislatures do not create impartial, disinterested, comprehensive factual records. In order to impose process norms on Congress, the Court needs to decide how it wishes legislative fact finding to function. It must determine whether it is proper or realistic to force Congress to act like a court before it can legislate to meet national needs.

The Court's effort to impose process norms on Congress reflects a lack of respect for the independent imperatives of a coordinate branch of the federal government. This lack of respect may reflect deep changes in the structure and functioning of Congress itself. In the last 65 years, Congress has not only moved to legislate many more laws; it has also become far more bureaucratic. Congress has become less deliberative; its debates have become less spontaneous and influential; its hearings have become far more scripted; its staff have become more important to essential institutional functioning. These changes have been recognized within the world of scholarship, which has also moved in the direction of according Congress less respect. Much academic study of Congress has come to be dominated by public choice models, which postulate that senators and congressmen do not act primarily to serve the public good but instead to ensure their own reelection. The popularity of these models within academia tells us something about the changing nature of Congress and about the way in which these changes have affected attitudes toward Congress itself.

The second methodological approach adopted by the contemporary Rehnquist Court has been to

postulate the existence of distinct spheres of life that should constitutionally remain within the exclusive purview of the states. The Court has mentioned such spheres as the family, local crime, and education. It remains puzzling, however, how the Rehnquist Court will be able to distinguish between permissible and impermissible federal regulation of such matters, given the fact that even these spheres are presently permeated with federal influence and regulation. The question is how the Court can accomplish its stated ambition of separating a domain of the “truly local” from the domain of national regulation.

The only answer that I can see is that the Court must articulate a substantive sense of national identity that will offer standards to guide the Court’s efforts to cabin federal power. When the Court seeks to limit national authority on the grounds of a vision of national identity, however, it directly contradicts Congress, whose legislation also advances a sense of the national identity. In a recent case in which the Court struck down certain provisions of the Violence Against Women Act, for example, the Court asserted that the federal government should remain outside the sphere of domestic violence. This assertion forcefully challenged Congress’s quite different determination that discrimination against women was a national problem. In essence, the Court and Congress faced off on a question of national identity.

How does the Constitution mediate this conflict between the Court and Congress? One way in which the Court has sought to justify the priority of its decisions is to argue that judicial containment of federal power is required by the ancient and venerable case of *Marbury v. Madison*, which established the institution of judicial review. In my view, however, the Court’s argument does not hold water. *Marbury* stands for the proposition that courts must decide cases by reference to law, and that the Constitution is a form of law that courts should use to decide cases. What follows from *Marbury* is that when the courts apply the Con-

stitution to decide a case, they apply the Constitution as law, and they are justified in so doing.

Very few lawyers would disagree with this logic. But this logic does not establish that the Constitution is merely law. *Marbury* does not exclude the possibility that the Constitution also contains important political dimensions. Many presidents, including Woodrow Wilson, have observed that the Constitution is not “a mere lawyer’s document.” Underlying the observation lies the notion that the Constitution represents what “We the People” have collectively made and what we aspire to make in the future. The Constitution stands for our commitment to democracy and for our ability to constitute ourselves as a nation.

There is thus a conflict between the Constitution understood as law and the Constitution understood as a charter of self-government. The Constitution as a legal document sets limits on how we can govern ourselves; the Constitution as a representation of our collective commitment to self-determination authorizes our continual political evolution as a nation. Each of these two images of the Constitution has a strong and established history within our constitutional culture. We believe in both aspects of the Constitution. In its recent cases limiting the exercise of federal power, the Court has set one of these images, the Constitution as law, against the other, the Constitution as a charter of self-government. It has argued that the legal dimensions of the Constitution must have priority, and that they must circumscribe the nation’s political sense of the proper scope of federal authority.

To understand the Court’s recent decisions, therefore, we must understand the relationship that ought to obtain between the legal and political aspects of the Constitution. The Rehnquist Court has imagined this relationship as a zero-sum game. If Congress is given authority to interpret the scope of its constitutional powers, the Court will lose authority. The Constitution is either political or

legal, and to the extent that it is seen as a political document, it can no longer function as a legal one.

I would suggest that this is a profoundly misleading image. The Constitution is both legal and political, and how far it is one rather than the other is a matter of degree. The Supreme Court has in the past developed many doctrinal ways of mediating the conflict between the Constitution's legal and political dimensions without unduly damaging either. In the 1950s and 1960s, for example, the Court both proclaimed judicial supremacy in the interpretation of the Constitution and announced that it would defer to Congress's democratically informed judgment about the limits of national power. This implies that the conflict between the legal and political dimensions of the Constitution can always be redefined in terms of how much deference the Court is willing to extend to congressional articulations of national identity and national power.

Conceived in this manner, we ought to be able to move away from the bright lines favored by the contemporary Court, and toward a relationship between the Court and Congress in which both aspects of our constitutional culture can thrive. From this perspective, the articulation of limits on national power should be seen as a matter of statesmanship rather than a matter of law compelled by the text or history of the Constitution. We can begin to judge the relationship between the Court and Congress as an entire ecology rather than a series of discrete issues that are "correctly" or "incorrectly" decided.

So, for example, we can ask about the implications of the Court's recent federalism jurisprudence for the confirmation process described by Senator Schumer. If Congress really wanted to establish its power to define the boundaries of the national interest, I would expect that that the Senate would begin to use a nominee's attitude toward federalism as a relevant criterion for confirmation. Does the Court truly wish to articulate a form of constitutional law that gives the Senate a perfect

Madisonian incentive to confirm judicial nominees on the basis of their view of national power? If the Court continues to paint Congress into a corner, it seems clear that there will be profound implications for the confirmation process, and we will have to ask whether these implications would be acceptable or unacceptable.

I happen to agree with Judge Wilkinson that the Court has not yet entirely trammled Congress. The traffic light, to use Judge Wilkinson's image, is amber, not red. But we need to inquire just how far the Court is requiring Congress to slow down. Are we now in a 15-mile-an-hour zone or a 25-mile-an-hour zone? Much depends upon questions of degree. Precisely because Judge Wilkinson is right to aspire to regard our judges as disinterested professionals, and precisely because he is also right that moving the confirmation process into the domain of outright political confrontation would undermine this aspiration, I think it exceedingly important that the Court pause to consider the larger consequences of its present line of decisions limiting national power.

On the surface of things, federalism may seem quite removed from the confirmation of justices; ecologically understood, however, they are very much interconnected. We must begin to consider the entire web of interdependencies that ties the Court and Congress to each other.

**Nelson W. Polsby:** As a political scientist, I suppose I should mention that confirmations have been problematic when Congress (particularly the Senate) and the presidency have been politically split. There is, in other words, a political context in which a fair amount of this conflict has taken place. And it doesn't do to be too tacit in analyzing the conflict without mentioning politics and political commitments directly, because that points to a cure—which is to say, the next election, and the one after that, and so forth. At the Academy, we're beginning a process of inquiry, and I'm certainly not ready to prejudge the conclusions, but I'd simply like to say, in thinking about these things, that

the political context is one thing that obviously needs to be factored in. I think Senator Schumer's aphorism about consent without advice is probably the key to understanding something. That is to say, communication—not between Congress and the Court, but between Congress and the presidency—is probably a key to some of the problems that exist between Congress and the Court with respect to the confirmation process, among other things.

The second big point would be that something that lawyers call judicial craftsmanship is frequently explicitly understood to be an important factor in analyzing and dealing with the output of appellate courts. Maybe we have to be more explicit and understand better and in a more systematic way something about the administration or management of the judicial process—such as how many judges appellate courts need, why they need them, what are the gains and costs of following management procedures that are basically unknown to the public and unknown mostly to scholarship. Once every generation or two, we get an article like “A Time Chart of the Justices,” by Henry M. Hart, Jr. (*Harvard Law Review* 73 [1959]: 84), and it's a revelation. We need more systematic inquiry so that something like that is less of a revelation and more factored into our understanding of what courts need in order to function properly—and our understanding of what the people who staff the courts ought to be paying attention to in making their nominations and their confirmation decisions.

**Abner J. Mikva:** Judge Wilkinson mentioned the fact that Merrick Garland, a very distinguished jurist in the DC Court of Appeals, had 23 votes against him. He brought up a sore point in my history: I had 31 votes against my confirmation. I can give you the names of all 31 if you want them. At the time it seemed a most awful example of the relationship between the branches of government. Over the years since then, I have thought about it more, and while I would not want to go through it again, I'm not so sure that the political process that was going on, and continues to go on in confirmations,

is necessarily bad. Maybe that is the way the confirmation process ought to work. Maybe it sometimes means that you don't end up with the very best judges on the courts of appeals or on the Supreme Court. But the other side of the issue is that maybe that is the right way for the political branches to express a point of view about the way a judge is going to behave, because once that judge is confirmed, the political branches should keep hands off the way that judge performs. I've thought about that many times, and I realize—if I may use the great phrase of Justice Jackson—that it does not appear to me now as it appeared to appear to me then, as far as the confirmation process is concerned.

I now invite Senator Schumer and Judge Wilkinson to respond briefly to anything that's been said or to state any further views they care to express.

**Charles Schumer:** I know that we would all like to say, "Let's not let ideology be a part of the judicial selection process," but I think we're fooling ourselves if we do so. Judge Wilkinson's first point is one of the things that brought me to the view that ideology *should* be part of the process: most nominees we look at have very fine minds, but sometimes they're not approved, or they're made to go through all sorts of rigors, because of something they said or did a long time ago. We often look for these little moral offenses, whether it is smoking pot or buying a certain book, in order to justify our position. In the case of a liberal nominee, the conservatives seem to think such an offense is a valid reason to vote against that nominee, and in the case of a conservative nominee, the liberals vote against him or her. We all know what's going on; it's really ideology that is at issue. But you can't talk about ideology today, for some reason, even though in the first 100 years of the republic, ideology was what everybody talked about. Somehow, particularly during moderate eras, such as the Eisenhower era, ideology goes under the table, but it keeps popping its head back up in ugly ways, creating a "gotcha" politics that's demeaning to the bench.



Merrick Garland was my classmate; he was a very fine man. Let's ask ourselves about the fight over his confirmation. Is it really that we're looking for excellence, or is it that we object to the ideology or the philosophy of the judge who has been nominated? I've never seen one of these battles in which half the Democrats and half the Republicans think what they did was a good thing and the other half think it was bad. We're fooling ourselves if we think ideology doesn't play a role.

The only other point I'll make is what Mr. Polsby alluded to: real problems exist right now in the relationship between the executive branch and the legislative branch in the nomination and selection of judges. What am I to do as a legislator when I believe that the president is choosing judges on the basis of ideology—indeed, when he stated that he would do so in his campaign? Do I just say, Okay, I don't agree with any of them; they will change fundamental laws that my constituents expect me to uphold (*Roe v. Wade* comes to mind); but because they are legally excellent, I shouldn't let their ideology enter into my decision or ask them any questions about their judicial philosophy? No. First, it's asking too much of the political process to do that. Second, what's good for the goose is good for the gander, and if the executive branch is not making any bones about introducing ideology into the nomination process, and is making it one of its top two or three concerns, if not its number one concern, I don't think Congress has any choice but to look at it as well. I would go further and say that it would be a dereliction of my responsibility as an elected representative, as much as I respect legal thinking and legal reasoning, if I did not view ideology as a serious consideration when reviewing a nominee.

That is not to say, however, that I won't support conservative nominees. I have voted for some very conservative judges with great minds, but I did so taking into account the balance of the entire Court. Unfortunately, now, when we have before us people of great mind, like the two nominees Judge Wilkinson has mentioned, we do not have

any people of great mind on the opposite side whose philosophy is different, balancing theirs. I'd love to see every bench have a Justice Brennan and a Justice Scalia, but I don't think I can sit idly by if there are going to be nine Justice Scalias or nine Justice Brennans.

I yield to the standard of moderation. Even in the 1960s and 1970s, I felt that something was wrong, and I'm still troubled by certain cases that many of my ideological confreres think are great, because I don't think the Court should have decided them as they did. Moderation is a way out of this—and by that I don't mean moderation of each individual; I mean moderation of the bench. I must say that at certain infrequent political times, when we have a moderate president and moderation is in the air, ideology doesn't have to matter, because the executive is choosing a range of people—but I don't think these times call for that. I don't think we, as senators, have much of a choice today. I think those who say that ideology should not be part of the process are fooling themselves. It *is* part of the process, and the only question is whether it is above the table or below the table.

**J. Harvie Wilkinson:** First, I'd like to express my agreement with a point that Linda Greenhouse made a while back regarding the value of having judges with real-life electoral experience and some real-life experience in public office. I think it would be a mistake to have the ranks of the judiciary filled with people who come only from the judiciary. That would make the courts pretty insular. I've had the pleasure of serving with a great many judges who have been in the state legislature and who have run for elective office; one judge on our court was a former governor and senator. I think some wonderful characteristics transfer from the political process to the judicial process: a sense of trust, an understanding of keeping one's word, an ability to not take disagreements personally. It's important, on a court, to understand that you may disagree with somebody on one issue but find yourself in firm agreement with that same person

on another issue down the road. The rough and tumble of politics also confers the ability to separate what's important from what's marginal and to understand that all disagreements, however heated, end when the school bell sounds.

I continue to believe that this assertion of ideology and the prominence that it's achieving are doing great damage to the courts. One can say, Well, this is the way it is; let's remove the fig leaf; the president's doing it, so I'm going to do it; they did it in the past, so I'm going to do it in the future. It's just the Hatfields and the McCoys. Where does it ever end? Is it always true that what goes around comes around? Where is the termination point? This bitterness has been welling up over the years; it's going to have a spillover effect on the judiciary and, I think, leave the public with a less confident image of it. Historically, the model has been this: the president has indeed consulted philosophy in a broad sense in making appointments (I worked in the Reagan administration, and Reagan did), but there weren't litmus tests to determine how to rule on different sorts of issues. The executive branch never got into that kind of detail. On the other hand, it seems to me entirely proper for a president to look at a judge's general outlook on the law and take that into consideration. That's been the historic model, and I don't think it's changed a great deal. The historic confirmation role was to take experience, character, integrity, and professional distinction into account. In that sense, the Senate was a check. Historically, however, ideology did not play the prominent role that it has come to play in the past 10 to 15 years.

If you were a litigant before a court, what would you want in a judge? Would you want somebody for whom ideology is paramount, or someone whose appointment was based primarily on his or her ideology? I don't think that's what you would want. Yet that's what litigants are going to think they're getting if ideology becomes a paramount consideration in the confirmation process. Litigants are going to say to themselves, Well, this judge was

opposed or supported on the basis of ideology, and that's what's going on in that judge's mind on the bench, and I think that's really unfair to those who come before courts. Maybe the fact that in the confirmation process, we have historically concentrated on experience and integrity and professional distinction and have not made ideology an explicit criterion, maybe that was something of a fig leaf—but it was a useful fig leaf. And sometimes, by making everything too bare and too naked and too explicit, you're stripping from the courts some of the mystery and aura that are important for them to possess and important to public acceptance of their rulings. I fear that the current emphasis on ideology is not going to stop. It's going to move from one Senate to the next Senate to the next Senate to the next Senate, without end. This is not a good development from the standpoint of the federal judiciary or from the standpoint of the public perception of what's going on.

**Schumer:** I agree with Judge Wilkinson that we shouldn't ask nominees about any explicit cases. In the Reagan White House, they didn't do it; they asked about judicial philosophy, which included, for example, the nominee's view of the First Amendment and how expansive it is, or the Second Amendment, or the right to privacy. We're simply saying the same thing now. And we get criticized in places like the *Wall Street Journal* editorial page—the epitome of neutral, nonideological thought—for daring to ask questions like that.

I thought it was interesting that Judge Wilkinson said the focus on ideology will change from Senate to Senate. How about from president to president? It is our current president, not the Senate, who has made use of ideological litmus tests; just look at his nominees. Back in the 1960s and 1970s, the conservative movement felt that the courts inappropriately usurped power, and since then it's been a part of every Republican president's credo, from Ronald Reagan to George W. Bush, to nominate ideologically conservative people—not exclusively, but very predominantly. As a result, we've been pushed into our current position of opposing many nomina-

tions. So when you say ideology will change from Senate to Senate, you need to acknowledge that the White House started this focus on ideology, and we're expected just to ratify whoever they send us. I simply can't see the logic of the argument that the White House should be allowed to use ideological, philosophical criteria in determining who to nominate to the bench, but the Senate should not be allowed to use them in determining whether to consent.

**Wilkinson:** I'm an outsider on understanding what White Houses do. My sense is that White Houses occupied by both Democrats and Republicans have taken judicial philosophy in a broad sense into account, year in and year out. That's been the traditional model. It hasn't been my sense, from the outside, that one party has pursued a particularly different path from the other. Without pointing the blame in any direction, I do worry, because I think that what has happened in the past decade has been a departure from the traditional confirmation model with lower court judges, and I'm genuinely fearful of where it will lead.

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AMERICAN ACADEMY OF ARTS AND SCIENCES

*Main Office* Norton's Woods  
136 Irving Street  
Cambridge, Massachusetts 02138  
Telephone: 617-576-5000  
Fax: 617-576-5050  
E-mail: [aaas@amacad.org](mailto:aaas@amacad.org)  
Website: <http://www.amacad.org>  
*Daedalus* Telephone: 617-491-2600  
Fax: 617-576-5088  
E-mail: [daedalus@amacad.org](mailto:daedalus@amacad.org)

*Western Center* 3000 Berkeley Place  
University of California  
Irvine, California 92697-7425  
Telephone: 949-824-4553  
Fax: 949-824-8022  
E-mail: [aaaswest@uci.edu](mailto:aaaswest@uci.edu)

*Midwest Center* Lillie House, University of Chicago  
5801 South Kenwood Avenue  
Chicago, Illinois 60637  
Telephone: 773-753-8162  
Fax: 773-702-1115  
E-mail: [amacad@uchicago.edu](mailto:amacad@uchicago.edu)

*Bulletin Staff* Alexandra Oleson, *Editor*  
Carol Leach, *Associate Editor*

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## FORTHCOMING STATED MEETINGS

### House of the Academy

October 5, 2002

*National Induction Ceremony*

November 13, 2002

*John Holdren (Harvard University)*

December 11, 2002

*Persi Diaconis (Stanford University)*

February 12, 2003

March 12, 2003

April 9, 2003

May 14, 2003

*Annual Meeting*

### Midwest Center

October 26, 2002

Minneapolis, Minnesota

*David Bevington (University of Chicago)*

### Western Center

November 2, 2002

Napa Valley, California

*Carole P. Meredith (University of California, Davis)*