



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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