Charles E. Schumer

Congress & the court: restoring balance

The judicial trend of diminishing deference to Congress's power to find facts and then legislate pursuant to those findings deeply concerns many on the Article I side of government.[1] To be sure, courts must be able to assess – with total independence – when and where Congress has exceeded its constitutionally authorized powers. Indeed there have been times in our history when the courts have been the bulwark against Congress's efforts to undermine constitutionally protected rights. However, in recent years the judiciary has abrogated Congress's powers to a troubling degree. Starting with *United States v. Lopez*, the guns in school zones case, running through *United States v. Morrison*, the Violence Against Women Act case, and including *Board of Trustees of the University of Alabama v. Garrett*, the disability discrimination case, the courts – most significantly the Supreme Court – have steadily eroded Congress's power to legislate, with the effects felt and often suffered across the nation.

While some recent decisions 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, of the new-federalism jurisprudence ilk, ignore serious, studied, and diligent efforts by Congress to make the necessary findings and establish a proper constitutional exercise of power. Congress holds hearings – for some laws, years' worth of hearings – and takes testimony from citizens, academics, 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, Congress has specifically solicited input – and received a green light – from the states on whether there is a need for the national legislature to act. Generally, actions of the Congress do not attempt to violate or weaken states'

Charles E. Schumer is a Senator for New York State, reelected in 2004 for a second six-year term. He sits on the Senate Finance Committee; the Committee on Banking, Housing, and Urban Affairs; the Rules Committee; and the Judiciary Committee. He is the author of "Positively American: Winning Back the Middle-Class Majority One Family at a Time" (with Daniel Squadron, 2007).

1 This paper is taken from a talk given at the 1857th Stated Meeting of the American Academy of Arts and Sciences held on March 21, 2002.

authority; they are the product of what legislators 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 that address pressing national problems. The executive implements laws, and judges are nominated and confirmed to interpret and apply them. 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. That's not good for our government, and it's not good for our country.

With increasing frequency the courts have tried to become policy-making bodies, supplanting court-made judgments for those of Congress. For better or worse, Congress is charged with making policy. The judiciary's role, while just as important, is quite different. 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."

Of course, it was the conservative movement that first took issue with what it perceived as the Warren Court's judicial activism and willingness to make social policy judgments from the bench. For decades, conservatives – often convincingly – 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. While it might be appealing and easy for judges to express their personal views in their opinions, 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.

Sixteen 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 in Congress are acutely concerned with the limits that have developed on legislators' power to address the problems of those who have elected them to serve. These limitations affect, in a fundamental way, Congress's 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. The three simple standards for federal judges should be excellence, moderation, and diversity. Excellence simply means they should be among the best the bar has to offer – not 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 – not a very controversial notion either. Moderation seems to be the sticking point these days.

Charles E. Schumer on judicial independence

On many of our courts there is no balance. The Fifth Circuit, for example, is one of the most conservative courts in the country. (If Charles Pickering, whose 2002 nomination and subsequent 2003 renomination by President Bush hadn't ultimately been turned away, the Fifth Circuit would have been thrown even more out of balance.) 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. Indeed, 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 contradistinction, President Bush, during his first campaign, told us he'd pick judges in the mold of Justices Scalia and Thomas; he has followed through with that promise. One or two Scalias or Thomases is one thing, but a bench full of them drives our courts way out of the mainstream – and that's unacceptable. This administration has been willing to take some casualties in this fight. They have sent 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 been a bad strategy, both for the courts and for the American people. 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.

Congress is certainly imperfect – I sure am – but our laws are entitled to a presumption of constitutionality, and I wonder what part conservative judicial activism plays in eroding 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.

Our numbers of moderate nominees are pretty good, but we can do better with the president's cooperation. Much time is spent vetting nominees like Judge Pickering, for whom red flags were raised, but when everyone agrees that a nominee is legally excellent and ideologically moderate, and when issues of diversity are properly accounted for, the vetting process becomes much simpler.

Fair-minded, moderate nominees are 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 processes; they simply won't be problems anymore.