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Congress & the court: the scope of national legislative power

At the beginning of the twentieth century, constitutional law did not sharply distinguish between questions of structure and questions of rights.[1] To the contrary, the Court self-consciously defined individual rights in ways designed to attain structural ends, and, conversely, defined congressional power in ways designed to protect individual rights. The modern divide between structure and rights did not emerge until after the constitutional crisis of the New Deal.

That crisis was triggered by the Court's attempt to restrict legislative efforts to respond to the Great Depression. President Roosevelt responded by seeking 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 whether that power had been exercised in a manner that violated constitutional rights. This division of labor lasted until the mid-1990s, when a new generation of justices, intent on establishing constitutional limits on what had become a virtually unchecked expansion of federal power, began to unravel the New Deal settlement.

The question of national power concerns the capacity of the national government to meet national needs. When the federal government is constitutionally prevented from addressing what it regards as a national problem, the country faces a vacuum of power that can have potentially serious consequences. For this reason, judicial limitations on federal power raise the most urgent questions of national well-being.

Americans have traditionally understood the division of power between federal and state governments to express the value of federalism. Until the New Deal, the concept of dual sovereignty lay

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at the heart of American federalism. Dual sovereignty regarded state and the federal governments as occupying distinct and exclusive spheres of authority. States were constitutionally forbidden from regulating within the sphere of federal authority; they could not, for example, enact laws restricting *interstate* commerce. Conversely, the federal government was constitutionally prohibited from regulating within the sphere of state authority; it could not enact laws directed at *intrastate* commerce.

Dual sovereignty disappeared as the master trope of American federalism after the mid-1930s, largely 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 boundary 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 areas in which state regulation is categorically excluded. The Supreme Court no longer uses the metaphor of dual sovereignty to analyze state regulations of interstate commerce because it realizes that approaching the problem in that way would strip states of virtually all important regulatory authority.

Recent efforts to limit national power have once again revived metaphors of dual sovereignty. In 2002, for example, the Rehnquist Court proclaimed that "dual sovereignty is a defining feature of our Nation's constitutional blueprint." The Rehnquist Court used two different jurisprudential methods to distinguish the sphere of federal power from that of state power.

The first focused on issues of process. The Rehnquist Court held that the federal government could invade the distinct sphere of state sovereignty only if it first made appropriate findings of fact. The Court struck down national legislation on the ground that Congress had failed to compile a sufficiently detailed and convincing record to justify encroachment on the sphere of state sovereignty. This methodological approach raised the question of the constitutional obligations that could appropriately be imposed by judges on Congress's fact-finding function.

Courts decide particular cases, and they must accordingly determine the "adjudicative facts" necessary for such decisions. But legislatures, unlike courts, do not determine what occurred in particular cases. What does it mean, therefore, for the Court to hold that Congress cannot exercise its constitutional power to "enforce" the Fourteenth Amendment unless Congress first identifies "a history and pattern" of state action violating Fourteenth Amendment rights? How can Congress determine whether constitutional rights have been violated? Must it make its findings, based upon adjudicative facts, about what has happened to particular persons?

Like any legislature, Congress is neither equipped nor authorized to engage in such a task. Like all legislatures, Congress typically acts based upon broad and sweeping social scientific data. Stripped to its essentials, the Rehnquist Court sought to protect states from national legislative encroachment by forcing Congress to act like a court before it would be constitutionally authorized to enact statutes as a legislature.

This approach essentially discounts the independent *legislative* judgment of Congress. This disrespect may reflect deep changes in the structure and functioning of Congress. During the last sixty-five years, Congress has become far more bureaucratic. It has become less

deliberative and increasingly dependent upon its staff. These changes have been associated with a corrosive loss of respect for Congress within the world of scholarship. Academic study of Congress has come to be dominated by public-choice models postulating that senators and representatives do not act primarily to serve the public good but instead to ensure their own reelection. Why would the independent legislative judgment of such persons merit respect?

The Rehnquist Court used a second jurisprudential method to sustain its newly invigorated commitment to the value of dual sovereignty. Concerned lest "the boundaries between the spheres of federal and state authority would blur," the Court insisted upon giving especially careful scrutiny to federal efforts to regulate "areas of traditional state concern, areas having nothing to do with the regulation of commercial activities." The Court mentioned such "areas of traditional state regulation" as family, local crime, and education. Each of these areas, however, is pervaded by federal influence and regulation, ranging from President Bush's "No Child Left Behind" program to the "war on drugs." It was thus puzzling how the Rehnquist Court believed it could distinguish between permissible and impermissible federal regulation of such matters. How could the Court separate the domain of national regulation from the domain of what it termed the "truly local?"

Because this distinction is normative, rather than empirical, its application essentially rests on the interpretation of national values. Yet the Court's interpretation of these values would necessarily occur during judicial evaluation of congressional statutes expressing Congress's view that sufficient federal interests were present to justify national legislation. When the Rehnquist 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 domestic violence against women posed a national problem with broad ramifications for the entire country. In essence, the Court and Congress faced off on a question of national values.

How does the Constitution mediate this conflict between the Court and Congress? The Court has sought to justify the priority of its decisions by arguing 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. *Marbury* stands for the proposition that courts must decide cases by reference to law and that the Constitution is a form of law which courts should use to decide cases. What follows from *Marbury* is that when courts apply the Constitution to decide a case, they apply the Constitution as law and are justified in so doing.

Very few lawyers would disagree with this logic. But this logic does not establish that the Constitution is only 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. Viewed from this perspective, the Constitution stands for our commitment to democracy, for our ability to constitute ourselves as a nation.

There is 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. The Constitution as law limits the political power established by the Constitution as a charter of self-government. Each of these two visions of the Constitution boasts a strong and established pedigree within our constitutional history: we firmly believe in both aspects of the Constitution. In cases limiting the exercise of federal power, the Court has set the Constitution as law against 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 Congress's political sense of the proper scope of federal authority.

To understand these recent decisions, therefore, we must analyze the relationship between the legal and political dimensions of the Constitution. We must put to one side cases involving individual constitutional rights; whenever we recognize the presence of such rights we signify the priority we attach to the safeguard of legal protections. In decisions involving only the scope of national power, by contrast, these two dimensions of the Constitution are in pure and unmediated conflict. The Rehnquist Court imagined the relationship between these two dimensions as a zero-sum game: if Congress were given authority to interpret the scope of its constitutional power, the Court would lose authority to articulate the limits of the legal Constitution, even perhaps in cases involving individual rights. The Court assumed that the Constitution was *either* political or legal, so that if the Constitution were once seen as a political document, it could no longer function as a legal one. This is a profoundly misleading image.

The Constitution is always *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. 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 values and national power. Judicial limitations on national power thus tend to pose questions of statesmanship rather than of technical law. For the most part, judicial limitations on national power cannot plausibly be understood as compelled by the text or history of the Constitution.

This suggests that issues of national power do not raise discrete legal issues that can be "correctly" or "incorrectly" decided. They instead raise issues that must be determined by a far more subtle ecology. The Court may or may not agree with the political values driving congressional legislation; it may or may not trust Congress truly to speak for national values; it may or may not respect processes of congressional decision-making.

It follows that Court decisions limiting national power raise important questions for the confirmation process of

judges nominated to the federal bench. A Senate seriously committed to national values embodied in legislation struck down by the Court as beyond congressional power would surely begin to use a nominee's attitude toward federalism as a relevant criterion for confirmation. The Rehnquist Court's decisions have thus inadvertently handed the Senate a perfect Madisonian incentive to confirm judicial nominees on the basis of their view of national power.

I do not mean to imply that the Court's decisions to date have entirely trammeled Congress. Recent decisions limiting federal power have been largely a shot across the congressional bow. But those who aspire to promote the image of judges as merely disinterested professionals, as neutral "umpires" calling balls and strikes, ought to be aware that further restrictions of federal power risk transforming the confirmation process into the kind of outright political confrontation that would radically undermine this aspiration.

Although issues of federalism may superficially seem quite removed from the senatorial confirmation of justices, especially when compared to the urgent political controversies that swirl around issues of constitutional rights like abortion, such issues actually express potentially seismic tensions between coordinate branches of the national government. These tensions were well-understood by the authors of *The Federalist Papers*, who conceived separation of powers as a continuous and serious play of ambition against ambition. We are presently only one appointment away from turning these tensions into a scene of mortal combat, with consequences that may well radiate into the entire web of interdependencies that tether the Court and Congress to each other.