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# "Meet the New Boss": The New Judicial Center

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*A document entitled* Guidelines on Constitutional Litigation *published in 1988 by the Reagan era Department of Justice is the springboard for Professor Tushnet's discussion of the Supreme Court's "new center." The* Guidelines *urged Department of Justice litigators to foster a nearly exclusive reliance on original understanding in constitutional interpretation and to resort to legislative history only as a last resort. The* Guidelines *also advised Department of Justice litigators to seek substantive legal changes including more restrictive standing requirements, an end to the creation of unenumerated individual rights, greater constitutional protection of property rights, and greater limits on congressional power. The discussion begins by viewing the* Guidelines' *characterization of Supreme Court jurisprudence as an indication of the Court's "old center." The discussion then examines the Court's subsequent development to reach an understanding of the Court's "new center." Professor Tushnet finds that although the Court at times seemed to entertain some views espoused by the* Guidelines, *the present Court's center is remarkably like the Court's center in 1988. Original understanding remains only one method of constitutional interpretation—not even the most important one—and legislative history continues to play a role in statutory interpretation. Furthermore, changes in Court's jurisprudence involving standing, unenumerated rights, and congressional power remain limited (though there appear to be greater constitutional protections of property rights). The only notable difference is that the present Court has developed doctrines that could swing constitutional interpretation toward the approach taken by the* Guidelines *should newly appointed Justices want to endorse that approach. But for now the current Court is much the same as before.*



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## INTRODUCTION

In 1988 the Office of Legal Policy in the Department of Justice published a document, *Guidelines on Constitutional Litigation*,[1] which identified what then Attorney General Edwin Meese regarded as the principal issues of interpretation on which the Department's litigators should focus.[2] The Department of Justice policymakers wanted to reinvigorate constitutional interpretation based (nearly exclusively) on "original understanding."[3] They also believed that legislative history should be used in statutory interpretation only when no other methods of interpretation resolved interpretive ambiguity.[4] In addition, the *Guidelines* suggested that the Department of Justice seek new rulings in a wide range of substantive areas.[5]

As Professor Dawn Johnsen has suggested, the *Guidelines* can be taken as a roadmap indicating the areas of constitutional law where, as the Reagan Department of Justice saw things, the practice of

1. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) (Sup. Docs. No. J1.8/2:C76/4) [hereinafter GUIDELINES].

2. Edwin Meese III, *Preface* to OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) ("The primary purpose of these Guidelines is to help government litigators think clearly about issues of constitutional and statutory interpretation that arise in the course of their litigation.").

3. *See* GUIDELINES, *supra* note 1, at 3 (citing Robert Bork, *The Constitution, Original Intent and Economic Rights*, 23 SAN DIEGO L. REV. 823, 824 (1986)). The *Guidelines* used the terms "original understanding" and "original meaning" rather than "original intent," arguing that the term "intent" might misleadingly focus on the subjective understandings of the Constitution's drafters, whereas the other terms focused attention on how the Constitution's words were understood by the public that ratified them. *See id.* at 3–4 ("[T]he aim of any *extratextual* analysis is only to elucidate the meaning of the actual constitutional text at issue."). This distinction, while important as a matter of constitutional theory, has never played any role in Supreme Court decisions. The term "original intent" was more widely used when the *Guidelines* were written, but the alternative "original understanding" has become more common recently, and I use the latter term throughout this Article.

4. *Id.* at 99 (providing as the fourth and final guideline on statutory interpretation, "if an appeal to legislative history is necessary, legislative history can be used only to give meaning to the words found in the statute").

5. *Id. passim.*

constitutional interpretation—primarily by the Supreme Court—had diverged from the Constitution's true meaning.[6] I want to use the *Guidelines* to explore what the "new center" on the Supreme Court is, by first taking the document's identification of what had gone wrong as equally an identification of the Court's "old center," and then comparing where the present Court is with respect to those issues to define the Court's "new center." I argue that the Court has actually moved only a small distance away from its "old center" on most of the issues the *Guidelines* identified, although the Court now has available doctrines that *could* be invoked were new Justices interested in substantially transforming the constitutional landscape.

For convenience, I divide the document's concerns into two not entirely distinct classes: method and substance. What position has the Supreme Court taken on the issues of method—using original understanding and ignoring legislative history? First, the Court has not relied exclusively on original understanding. Instead, the Court has—as it always has done—included original understanding as one of the sources of constitutional interpretation, but not as one having a particularly privileged place in interpretation. Second, after a brief period in which the Court abjured reliance on legislative history, it has reverted to its historic practice of using legislative history when doing so helps resolve statutory ambiguity.

I do not intend to survey the entire range of substantive issues discussed in the *Guidelines*. I consider only issues relating to standing, the enforcement of unenumerated individual rights, constitutional protections of property rights,[7] and the scope of congressional power. In each of these areas the pattern is the same: early modest successes in moving away from the then-existing center, with doctrinal formulations that held out the prospect of more substantial transformations, followed by decisions halting the movement.[8] The doctrinal formulations the Court devised, which

6. Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 389–93 (2000) (describing the origin and scope of the *Guidelines*).

7. The *Guidelines* did not discuss property rights generally, largely, I believe, because the national government's regulatory interests conflict with strong constitutional protections for property rights.

8. The *Guidelines* expressed general hostility to the development of a federal common law. GUIDELINES, *supra* note 1, at 62–67. They did not focus specifically on the Alien Tort Statute ("ATS"), which in the next decade became the focal point of concern among conservatives about federal common law. The Supreme Court has now held that the ATS authorizes the federal courts to develop a common law of torts which violate customary international law, Sosa v. Alvarez-Machain, 124 S. Ct. 2739, 2765 (2004), and to that extent has not followed the tenor of the *Guidelines*. I note, though, that at least one

have been neither repudiated nor extended, remain available for use by a future Court inclined to change the center's location, but the Court as constituted today seems happy to confine doctrines embodying larger transformative projects to a relatively narrow domain.

## I. METHOD

There is nothing unusual about invoking original understanding in constitutional interpretation. Justice Hugo Black was a strict textualist.[9] Chief Justice Earl Warren's opinion in *Powell v. McCormack*[10] discussed the case of John Wilkes and its impact on the debates in the Constitutional Convention and the ratification process, and gave a prominent rhetorical role to Alexander Hamilton's statement to the New York ratifying convention of the fundamental principle "that the people should choose whom they please to govern them."[11] The only interesting analytic issue raised by the *Guidelines* is whether constitutional interpretation should be based solely on original understanding, or whether, alternatively, original understanding is merely one of several tools of interpretation.

The contemporary Supreme Court has clearly chosen not to rely solely on original understanding. Some cases give originalist approaches a larger role than others.[12] Few, if any, pay no attention to other interpretive approaches and many ignore originalist approaches altogether.[13] Indeed, the failure of originalism to take

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of the *Guidelines*' statements might be read to approve of the use of customary international law in cases involving the ATS. *See* GUIDELINES, *supra* note 1, at 66 (asserting that the Supreme Court has approved the development of federal common law "where Congress vests jurisdiction in the courts and empowers them to create governing rules of law").

9. *See, e.g.*, Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874 (1960) ("The phrase 'Congress shall make no law' is composed of plain words, easily understood.").

10. 395 U.S. 486 (1969).

11. *Id.* at 547.

12. For examples, see generally Printz v. United States, 521 U.S. 898 (1997) (devoting a great deal of attention to statements made at the time of the Constitution's framing and ratification, and to events occurring at that time); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (same).

13. The absence of discussion of original understanding is particularly evident in what might be called "doctrinal" opinions, which take as their focal points previously decided Supreme Court cases and simply "apply" the prior doctrine to the problem at hand. For an example, see generally Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (formulating the holding based upon prior Supreme Court decisions). I should note that originalism might play a subterranean role in these cases, to the extent that the *first* few cases in the doctrinal stream might themselves have relied on originalist approaches. *But cf. infra* text accompanying notes 15–19 (discussing the "level of abstraction" issue in originalist

hold of the Supreme Court is so evident that there seems little more to say.

Except perhaps this: it seems worthwhile to distinguish between an interpretive approach that takes original understanding seriously and engages in detailed inquiries into the relevant historical sources, and interpretive approaches that merely gesture in the direction of original understanding. Supreme Court practice is dominated by the latter nearly to the exclusion of the former, and for good reason. As originalist scholarship developed,[14] two related issues became apparent. First, one could describe original understanding on various levels of abstraction.[15] Outcomes might turn, not on whether one paid attention to original understanding, but on the level of abstraction at which one characterized that understanding.[16] And, second, originalist approaches could not in themselves dictate the level of abstraction on which originalism should operate.[17] There *were* answers to the "level of abstraction" problem, but they were not originalist answers.[18] Originalism therefore could not become the exclusive method of interpretation. One would have to go outside originalism to resolve the "level of abstraction" problem, and having done so one, lost the ability to claim that originalism was the only permissible method of constitutional interpretation.[19]

The story of legislative history's role in statutory interpretation is the story of two Justices, Antonin Scalia and Stephen Breyer.[20]

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interpretation).

14. Originalist approaches have developed more prominently in the legal academy than in the Supreme Court.

15. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 19 (2d ed. 2002) (distinguishing between "strict" and "moderate" originalism).

16. The standard illustration of this proposition is *Brown v. Board of Education*, 347 U.S. 483 (1954). The drafters and ratifiers of the Fourteenth Amendment almost certainly did not specifically intend that the Amendment outlaw school segregation, but they used language consistent with their intention to constitutionalize some general ideas about racial equality with which school segregation was incompatible. For a good discussion, see Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1090–92 (1981).

17. This is not to say that no one tried to find resources within originalism to define the level of abstraction at which originalism should operate, but only that none of those efforts were successful in the end. For a brief discussion, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1062–63 (1990).

18. *See id.* at 1063 (describing the way in which the Takings Clause of the Fifth Amendment "appears to mark as special a quasi-metaphysical view of private property").

19. *See* CHEMERINSKY, *supra* note 15, at 22 (arguing that defending originalism as required by democracy requires a definition of democracy that itself cannot be originalist).

20. Prior to Justice Breyer's appointment in 1994, Justice Stevens had consistently opposed Justice Scalia's approach, but with less success than he and Justice Breyer

Justice Scalia forcefully advanced the position that legislative history should not play any role in statutory interpretation.[21] As far as one can tell from the public record, no one else on the Court cared very much about the issue, and a sensitive reader of Supreme Court opinions can pick up some hints that even those Justices who were willing to go along with Justice Scalia found his position more than a little odd. The cases in which legislative history turns the case around are rare indeed.[22] This meant that Justice Scalia's insistence that opinions refrain from invoking legislative history sometimes met little resistance because it made little difference.[23] With Justice Breyer's arrival on the Court, Justice Scalia had a real adversary—and one with more relevant experience to draw on.[24]

The effects can be traced in the Court's opinions.[25] At first the opinions did not rely on legislative history and sometimes even stated that it was irrelevant.[26] Then the opinions referred to legislative history as supporting the outcome indicated by the more text-focused methods of interpretation. These opinions set their discussion of legislative history apart, sometimes in subsections, sometimes in footnotes, thereby giving Justice Scalia the opportunity to concur in the opinion except for the subsection or footnote discussing legislative history.[27] When Justice Scalia disagreed with the result, the

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achieved after 1995.

21. For a recent statement of Justice Scalia's position, see United States v. Booker, 125 S. Ct. 738, 789 n.1 (2005) (Scalia, J., dissenting in part) ("I would not resort to committee reports and statements by various individuals, none of which constitutes action taken or interpretations adopted *by Congress*.").

22. The relevant cases are ones in which the statutory language, taken in its context and read with a lawyer's attention to possible technical meanings of words sometimes used in non-technical contexts, is ambiguous, and the "natural" reading of the statutory language points in one direction while the legislative history on balance points in another.

23. It should be noted, though, that Justice Stevens was a consistent opponent of Justice Scalia's position on statutory interpretation.

24. Justice Scalia had served in various positions in the executive branch, whereas Justice Breyer had been Chief Counsel to the Senate Judiciary Committee and knew what the legislative process was like from the inside. MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW 66 (2005).

25. *See* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 769 (3d ed. 2001) ("Since 1995, the Court has tended to follow the approach pressed by Justice Breyer . . . and by Justice Stevens . . . ."). *See generally* Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205 (2000) (providing an overview of the development of "institutional legislative history" used by Justices Breyer and Stevens in Supreme Court opinions beginning in 1995).

26. *See, e.g.*, Deal v. United States, 508 U.S. 129, 136 (1993) (relying solely on a statute's text and rejecting recourse to policies asserted to underlie the statute); Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (rejecting recourse to legislative history).

27. *See, e.g.*, Sullivan v. Finkelstein, 496 U.S. 617, 628 n.8 (1990) (confining the

discussion of legislative history could be integrated smoothly into the opinion, and his dissenting opinion could chastise the majority for its use of legislative history.[28] The final stage was reached when the Court came to a result with which Justice Scalia agreed, and the opinion's author did not separate the discussion of legislative history out from the rest, forcing Justice Scalia to concur only in the judgment.[29]

Those who oppose the use of legislative history in statutory interpretation regularly invoke the fabled brief that said in effect, "The legislative history being unclear, we turn to the statute's text."[30] No Supreme Court decision, even in the old days, appears to have done *that* when looking at legislative history. What remains a conceptual possibility is a case in which the text-based sources of interpretation point reasonably clearly in one direction, while the legislative history taken as a whole points reasonably clearly in another. Refusing to rely on legislative history in such a case might actually affect the outcome. But, although I am not a scholar of statutory interpretation, I am reasonably confident that over the past fifty years the number of cases in which this conceptual possibility was actualized is, at most, extremely small.[31]

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discussion of legislative history to a footnote that Justice Scalia did not join). There was also a parallel practice in which opinions used formulations like, "[f]or those of us who think legislative history relevant" to introduce the discussion of legislative history. Justice Scalia could join such opinions *in toto*. *See, e.g.*, United States v. Labonte, 520 U.S. 751, 774 (1997) (addressing the use of legislative history in the Court's opinion, authored by Justice Thomas and joined by Justice Scalia, with the phrase, "the statute's legislative history, insofar as it is relevant . . ."); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 380 (1988) (discussing legislative history in a unanimous opinion authored by Justice Scalia himself: "If it is at all relevant, the legislative history tends to subvert rather than support petitioner's thesis . . .").

28. *See, e.g.*, O'Gilvie v. United States, 519 U.S. 79, 97 (1996) (Scalia, J., dissenting) (referring to the Court's reliance on a "snippet" of legislative history); Babbitt v. Sweet Home Chapter of Cmtys. for a Greater Or., 515 U.S. 687, 730 (1995) (Scalia, J., dissenting) ("The neutral language of the amendment cannot possibly alter that interpretation, nor can its legislative history be summoned forth to contradict, rather than clarify, what is in its totality an unambiguous statutory text.").

29. *See, e.g.*, Intel Corp. v. Advanced Micro Devices, Inc., 124 S. Ct. 2466, 2484 (2004) (Scalia, J., concurring in judgment) ("[I]t is not only (as I think) improper but also quite unnecessary to seek repeated support in the words of a Senate Committee Report . . . .").

30. *See* ANTONIN SCALIA, A MATTER OF INTERPRETATION 31 (1997) (quoting a brief as saying "[u]nfortunately, the legislative debates are not helpful. Thus, we turn to the other guidepost in this difficult area, statutory language"). I note that it may be significant that the best evidence for the eclipse of statutory language by legislative history appears to be a brief rather than a Supreme Court opinion (although of course one might respond that the brief writers must have picked up some indication from court opinions that their form of argument would meet with judicial approval).

31. As I understand the literature on statutory interpretation, *United Steelworkers v.*

On interpretive method, then, the Supreme Court is roughly where it was in 1988: original understanding is relevant to constitutional interpretation, and is one—but only one—of the methods the Court uses; legislative history is relevant to statutory interpretation, although it plays a somewhat smaller role today than it did two decades ago.[32]

## II. SUBSTANCE

I turn now to some of the substantive areas of constitutional law the *Guidelines* addressed. As indicated earlier, I consider only a portion of the subjects the *Guidelines* addressed—enough, though, to indicate the degree to which the Supreme Court over the next decades concurred or disagreed with the positions taken in the *Guidelines*.

### *A. Standing*

The *Guidelines*' discussion of standing was basically pablum—a recitation of the holdings of relevant Supreme Court cases.[33] Its import was clear, though: standing should not be afforded generously. And, for a while, the Court seemed to be moving to adopt restrictive standing rules.[34] Then the movement stopped.

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*Weber*, 443 U.S. 193 (1979), is often taken to be a modern case in which the majority conceded that the text-based sources of interpretation pointed in favor of finding that voluntarily adopted affirmative action programs violated Title VII of the 1964 Civil Rights Act and relied on legislative history and purposes identified at a rather high level of generality to justify a result contrary to that concededly suggested by the text-based sources. *See, e.g.*, Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417, 1517–21 (2003) (discussing the Supreme Court's interpretation of the *Weber* case). I do not read the majority to be making the supposed concession, nor do I believe that the argument that the text-based sources point to the anti-affirmative action result as strongly as the literature suggests.

32. Eskridge et al. provide a slightly different summary, different, in my view, primarily in tone from mine:

> We do not think the Supreme Court has *entirely* returned to the pre-Scalia days .... First, the text is now, more than it was 20 or 30 years ago, the central inquiry .... Second, the "contextual" evidence the Court is interested in is now statutory as much as or more than just historical context.... Third, the Court will still look at contextual evidence and is very interested in the public law background of the statute.

ESKRIDGE ET AL., *supra* note 25, at 770–71.

33. GUIDELINES, *supra* note 1, at 16–20.

34. *See, e.g.*, Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 109 (1998) (denying standing because the relief sought by plaintiffs, namely an order requiring those who caused past environmental damage to pay a civil penalty into a government fund, would

Today, standing as a legal doctrine will rarely impede a well-advised litigant seeking to challenge almost any statute enacted by Congress or action taken by an executive official[35]—and, more to the point of the present discussion, will do so no more frequently than would have occurred in the 1980s.

Standing issues arise in two contexts: where the litigant relies on the general law of standing, which requires a litigant to suffer a cognizable injury caused by the challenged action that can be remedied by the judicial order the litigant seeks,[36] and where the litigant relies on a specific grant of standing to him or her (usually as a citizen) by Congress. The restrictiveness of standing doctrine in the first category will depend on the definition the Court gives to injury and the scope it gives to causation. *Allen v. Wright*,[37] decided before the *Guidelines* were written, used narrow versions of both concepts. It held that injury to what the Court called "dignitary interests" is not sufficient to support standing, and that injuries flowing from decisions by private actors responding to prices affected by government policies are not caused by those policies in a constitutionally meaningful sense.[38]

The Court has, however, recognized a rather wide range of other

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not adequately address the alleged harm); Lujan v. Defenders of Wildlife, 504 U.S. 555, 566, 578 (1992) (denying standing for wildlife enthusiasts to challenge government actions overseas as harmful to endangered species despite plaintiffs' asserted plans to visit affected areas and despite a federal statute conferring standing on "any person").

35. Three qualifications to this statement are appropriate. First, not every individual litigant will have standing to challenge any particular statute or executive action. But, a group (interest or otherwise) seeking to challenge a statute or executive action should be able to identify someone who will have standing and can challenge the government conduct on their behalf. Second, sometimes timing considerations—often discussed under the heading of ripeness—will mean that challenges will have to be brought later rather than sooner. From the point of view of someone interested in judicial supervision of legislation and executive administration, timing questions, while of some interest, play a secondary role to standing. Third, there is a residual aspect of standing as a technique used to avoid deciding contentious or particularly difficult constitutional questions. Here, standing is less a doctrine than a technique of judicial administration or politics. It remains available to the Court, and the only question—to which there can be no general answer—is whether today's Court is more willing, or less willing, than earlier ones to use this avoidance technique. This is, though, a question of judicial politics rather than a question about constitutional law. For a recent example, see *Elk Grove Unified School District v. Newdow*, 124 S. Ct. 2301, 2305 (2004), which dismissed a challenge to the words "under God" in the pledge of allegiance for lack of standing rather than ruling on the merits of the claim.

36. *See* Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 663–64 (1993) (summarizing these standing requirements).

37. 468 U.S. 737 (1984).

38. *Id.* at 756–59.

injuries, including harm to the environment, aesthetic injuries,[39] and impairment of public access to information,[40] as constitutionally cognizable injuries. The definition of "injury," then, has not been particularly narrow. *Lujan v. Defenders of Wildlife*[41] found that the litigants before the Court lacked standing to challenge decisions said to adversely affect the preservation of endangered species outside the United States, but with an analysis that indicated that minor changes in the litigants' position—in particular, allegations that the litigants had actually purchased airplane tickets to observe the endangered species—would have been sufficient to support standing.[42] And *Lujan* was the high water mark of restrictive standing rules.[43] The causation requirement is also not particularly restrictive, except with respect to the narrow category of claims of injury flowing from government policies that affect market prices, the private response to which adversely affects a constitutionally cognizable interest.[44] Obviously, litigants can sometimes be trapped by surprising applications of standing doctrine, as those in *Lujan* might have been, but the doctrine in itself does not pose serious barriers.

The Supreme Court struggled to develop a coherent doctrine dealing with the second category of standing cases, where Congress specifically confers standing on a litigant. Justice Scalia seemed to get the Court to agree that a statute conferring standing adds nothing to the analysis of injury, causation, and redressability that would occur in the absence of such a statute,[45] and gained four votes for the position that such a statute unconstitutionally interfered with the

39. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 734 (1972) ("Aesthetic and environmental well-being, like economic well-being, are important ingredients of the quality of life in our society, and the fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process.").

40. This interest is the basis for allowing standing in ordinary Freedom of Information Act cases, none of which have questioned the standing of those requesting information.

41. 504 U.S. 555 (1992).

42. *Id.* at 564, 579 (Kennedy, J., concurring).

43. *See, e.g.*, Friends of the Earth v. Laidlaw Envtl. Servs., 528 U.S. 167, 173–74 (2000) (qualifying the restrictive approach of *Lujan* by allowing South Carolina residents to bring a claim of a violation of the Clean Water Act, basing standing on plaintiffs averred use of the affected area for recreational activities).

44. *See* Allen v. Wright, 468 U.S. 737, 756–61 (1984) (denying standing to parties challenging the IRS's grant of tax exempt status to some racially discriminatory schools because "[t]he line of causation between [the IRS's] conduct and desegregation of respondent's schools [was] attenuated at best").

45. *Lujan*, 504 U.S. at 576–78 (holding that the "cases and controversies requirement of Article III of the Constitution mandates that these elements be present to establish standing, and that Congress may not expand the Court's power to hear cases beyond the scope of Article III").

president's obligation to take care that the laws be faithfully executed. But, in the end, neither position could be sustained. The Court had to acknowledge that Congress could create standing by creating new substantive rights, an insight that went back to the 1970s.[46] And, having done so, it could not explain why one could not infer from the statute conferring standing the new substantive right Congress had created. Directly faced with the question of citizen standing pursuant to a specific statute, the Court found such standing consistent with the Constitution.[47]

In short, there are restrictive doctrines out there, which have not been expressly repudiated, but those doctrines are in severe tension with the analysis and holdings of more recent cases. The Supreme Court has not, of course, recognized the pure public action in which any person can challenge any governmental action. Neither did any Court in the past. Instead, the Court has constructed a doctrine of standing that comes quite close to authorizing the pure public action—indeed, perhaps closer today than in the 1970s and 1980s.

### *B. Unenumerated Constitutional Rights*

Some conservative opposition to *Roe v. Wade*[48] was based on the view that the fetus had a right to life protected by the Fourteenth Amendment. This view could take several forms. The strongest form argued that the unborn person had a right to life protected by the Fourteenth Amendment, that the woman bearing the unborn person had no constitutionally protected interest in choice at all, and that the government therefore had a constitutional obligation to enact and enforce restrictive abortion laws.[49] A slightly weaker version accepted the proposition that the woman had a constitutionally protected right to choose, which nonetheless had to be balanced

46. *See, e.g.*, Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 212 (1972) (holding that the Fair Housing Act properly confers standing to sue on any resident of a housing complex who alleges injury from racial discrimination in the management of the complex).

47. Fed. Election Comm'n v. Akins, 524 U.S. 11, 20 (1998) (holding that the Federal Election Campaign Act properly conferred the right of any voter to file a complaint with the Federal Election Commission upon a mere belief that the act had been violated).

48. 410 U.S. 113 (1973).

49. *See The Human Life Bill: Hearings on S. 158 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 97th Cong. 1065–69 (1982) (Sup. Docs. No. Y4.J89/2:J-97-16/v.1–2) [hereinafter *Hearings*] (statement of John C. Willke, M.D., President of the National Right to Life Committee); Charles E. Rice, *Abortion, Euthanasia, and the Need to Build a New "Culture of Life,"* 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 497, 497–503 (1998); Robert Bork & Nathan Schleuter, *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS: MONTHLY J. RELIGION & PUB. LIFE, 28, 29–33 (Jan. 2003).

against the fetus's right to life, and that the Constitution struck the balance in favor of the fetus, with the consequence, again, that states were required to enact and enforce restrictive abortion laws.[50] A still weaker version was that women's right to choose and the fetus's right to life had to be balanced, that the Constitution did not itself dictate what the outcome of the balancing was, but that the Constitution did allow states to decide as a matter of policy to strike the balance in favor of the fetus's right to life.

Each of these analyses pushed constitutional interpretation in a direction the *Guidelines* opposed. As a purely textual matter, one *could* locate the fetus's right to life in either of the Fourteenth Amendment's guarantees that no "person" could be deprived of life without due process of law or be denied the equal protection of the laws.[51] Neither course under the Fourteenth Amendment was entirely satisfactory from an originalist point of view. The *Guidelines*' position on judicial "creation" of fundamental rights counseled against relying on the Due Process Clause to generate a substantive right to life.[52] The equal protection argument might have made more headway: if fetuses were persons within the meaning of the Fourteenth Amendment, one could contend that a fetus was denied the protection of the law equal to that provided to other persons if the state did not enact and enforce laws protecting fetuses against the deprivation of their lives equivalent to the laws protecting adults against murder. That, though, was precisely the problem. As a matter of history, laws against abortion never treated it as an offense as serious as murder.[53] In light of that history, the equal protection argument for the right to life generated results that were unsustainable analytically (not to mention politically).

The *Guidelines* took a different tack. Instead of challenging *Roe v. Wade* for striking the wrong balance of constitutionally protected rights, they denied that there were *any* rights in the premises.[54] The challenge took the form of generally rejecting the proposition that the Constitution authorized the courts to protect any rights other than

50. *See Hearings*, *supra* note 49, at 775–77 (statement of David Wilkinson, Attorney General of Utah); Stephen H. Galebach, *A Human Life Statute*, HUM. LIFE REV. 3, 23–24 (Winter 1981).

51. U.S. CONST., amend. XIV, § 1.

52. *Cf.* GUIDELINES, *supra* note 1, at 80 ("[A]ttorneys . . . should attack arguments . . . for creating new fundamental rights not found in the Constitution.").

53. *See* EVA. R. RUBIN, ABORTION, POLITICS, AND THE COURTS 13–15 (1987).

54. GUIDELINES, *supra* note 1, at 82 ("The right of privacy cases [including *Roe*] . . . provide other examples of judicial creation of 'fundamental' rights not found in the Constitution.").

those specifically enumerated in the document.[55] As the *Guidelines* indicated, *Bowers v. Hardwick*[56] came close to endorsing the proposition that the courts should not protect unenumerated rights with its statement that "[t]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[57]

Notwithstanding *Bowers*, the Supreme Court has continued to endorse a jurisprudence of unenumerated rights. Conservatives tried to persuade the Court to overrule *Roe v. Wade*, but they failed.[58] Moving in the other direction, the Court overruled *Bowers* without any concession to the marginal legitimacy, as *Bowers* had put it, of protecting unenumerated rights.[59]

The remaining question was whether the jurisprudence of unenumerated rights could somehow be limited and its advances halted. For a moment it seemed as if the *Guidelines*' approach might have succeeded. *Bowers* did little to develop a strong analytic structure of the sort the *Guidelines* sought. Justice White's opinion merely identified two standards that the Court had used in the past to identify unenumerated rights[60] and asserted that neither one would "extend a fundamental right to homosexuals to engage in acts of consensual sodomy."[61] The difficulty was that each (or both) of the two standards might yield different conclusions depending on how the claimed unenumerated right was characterized.

When the Court later rejected one substantial effort to enforce an unenumerated right in *Washington v. Glucksberg*,[62] it seemed to have developed a suitable doctrinal approach. The case involved the

55. GUIDELINES, *supra* note 1, at 79 ("The federal courts are not free to create fundamental rights not specified in the Constitution."). Here the *Guidelines*' concerns for substance merged with its concerns about appropriate interpretive method.

56. 478 U.S. 186 (1986).

57. *Id.* at 194.

58. *See* Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 845–46 (1992) ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

59. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

60. *Bowers*, 478 U.S. at 191–92. According to Justice White's analysis, unenumerated rights are "those fundamental liberties that are 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,' " or "those liberties that are 'deeply rooted in this Nation's history and tradition.' " *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325, 326 (1937); Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)).

61. *Id.* at 192.

62. 521 U.S. 702 (1997).

claim that individuals had a right to obtain assistance in committing suicide.[63] According to Chief Justice Rehnquist's opinion for the Court, the Court's unenumerated rights cases had two key components. First, unenumerated rights had to be "objectively, 'deeply rooted in this Nation's history and tradition,' "[64] and, more important, the claimed right had to be carefully described.[65] The "careful description" requirement, it seemed, would ensure that the right would not be described on such a high level of abstraction that it *could* be found deeply rooted in our traditions, in the way that a generic right to liberty might be.[66]

This method of identifying unenumerated rights seemed to place substantial limits on the Court's power to protect novel unenumerated rights. Yet, its genesis suggests that the Court's approach was less stringent than it seemed. The "careful description" requirement was actually a watered down version of the more structured test proposed by Justice Scalia and, at the time, endorsed only by the Chief Justice.[67] According to Justice Scalia, the description of the claimed right should be at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[68] Notably, Justice Scalia's test is more precise than the "careful description" test.[69]

The apparent victory for a *Guidelines*-like approach lasted no more than a year. The next term the Court decided an obscure case, *County of Sacramento v. Lewis*.[70] The plaintiff there sought damages for injuries sustained in a high-speed automobile chase, arguing that the Constitution protected people against injuries resulting from outrageous government conduct.[71] Although the Court rejected the

63. *Id.* at 708.

64. *Id.* at 720–21 (quoting *Moore*, 431 U.S. at 503).

65. *Id.* at 721 (citing Reno v. Flores, 507 U.S. 292, 302 (1993)).

66. The issues associated with the problem of the level of abstraction in the context of substantive due process are obviously quite similar to those associated with the related problem in the context of originalism. *See supra* notes 15–19 and accompanying text.

67. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989).

68. *Id.*

69. After all, one can describe a right to liberty quite carefully at a high level of generality. For a useful demonstration (not, I think, intended as such by its author) of the flexibility of the *Glucksberg* test, see Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1164 (2004) (arguing that the description of the right in *Lawrence* was "broader . . . than that conceived in *Hardwick*, to be sure, but it is hardly unlimited"). If the "careful description" requirement means only that "unlimited" rights are ruled out, the requirement will never do much work.

70. 523 U.S. 833 (1998).

71. Lewis was killed in the chase; he had been a passenger on a motorcycle whose driver attempted to evade the police. *Id.* at 837.

claim that Lewis had been the victim of such conduct, it did assert that the Constitution protected individuals against government behavior that shocked the conscience, even if the government behavior did not fall within any of the rights enumerated in the Constitution: "[F]or half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience."[72]

The standing cases at least created some doctrinal possibilities for restrictive rulings in the future. The unenumerated rights cases did not. *Roe v. Wade* remained on the books, a model for the identification of unenumerated constitutional rights. The limiting approach taken in the assisted-suicide case had no staying power whatsoever. Today the jurisprudence of unenumerated rights is perhaps even more vigorous than it was two decades ago.

### C. *Property Rights in Constitutional Law*

The revival of constitutional protection of property rights has been reasonably successful.[73] Formal doctrine has reached the point where those who invoke property rights against government regulations are unlikely to prevail in the end. Yet, the Court has given such litigants resources whose effect is to increase the government's cost of defending regulations against challenge—thereby deterring government entities with constrained budgets from imposing the regulations in the first place. Here the new judicial center may have prevailed doctrinally but failed practically. And, as in nearly every other area I consider in this Article, the Court's property rights doctrines might be used in the future far more expansively than they have been so far.

A comprehensive survey of constitutional property rights would be exceedingly complex, and I oversimplify for expository purposes.

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72. *Id.* at 846. The majority's approach elicited an unsurprisingly harsh response from Justice Scalia, who noted the difference between the approach taken in *Lewis* and that taken in *Glucksburg*:

> The atavistic methodology that Justice Souter announces for the Court is the very same methodology that the Court called atavistic when it was proffered by Justice Souter in *Glucksberg*. ... [T]oday's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Celophane of subjectivity, th' ol' "shocks-the-conscience" test.

*Id.* at 861 (Scalia, J., concurring in judgment) (footnote omitted).

73. As noted above, *supra* note 7, the *Guidelines* did not deal with property rights questions, probably because those questions implicated a wide range of the government's activities, not only in regulating property but in acquiring property for purposes of construction and the like.

The key issues center on when a government regulation, or a condition required to obtain the government's permission to engage in a regulated activity, amounts to a taking of property for which compensation is required. The black-letter rules are that a regulation effectuating a permanent physical occupation of property requires compensation,[74] and a regulation that diminishes the value of property requires compensation only when, on balance, the impact on private property is substantially more significant than the public benefit the regulation confers.[75]

The Court began with what turned out to be one of the easiest cases. *Nollan v. California Coastal Commission*[76] involved a requirement imposed by the Coastal Commission on homeowners who sought to demolish an existing structure and build a larger home on the state's shoreline.[77] As a condition for obtaining a building permit, the Coastal Commission required the homeowners to allow the public to walk across a strip of their beachfront property.[78] Had the Commission simply required public access to the beach, there would clearly have been a permanent physical occupation of the property requiring compensation. According to the Court, the fact that the access came by means of a condition on obtaining a building permit did not matter, because the connection between the activity for which the permit was required—the construction of a larger house—and public access to the beach was too attenuated.[79] A later case held that the standard for determining when a condition was sufficiently connected to the permit's purposes was "rough proportionality."[80]

In practice, this standard means that the government must be

74. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982). The cases mostly involve real property, but conceptually the rules apply to intellectual property as well.

75. *See* Pa. Coal Co. v. Mahon, 260 U.S. 393, 415–16 (1922). Not surprisingly, only a small number of regulations fall into this second category.

76. 483 U.S. 825 (1987).

77. *Id.* at 828.

78. *Id.* at 827.

79. *Id.* at 837. The Coastal Commission argued that the new house would block the public's view of the beach, thereby limiting the public's ability to learn that there were indeed *public* beaches on either side of the new house, and that giving the public the right to walk along the beach would somehow offset the reduced visual information about beach access. *Id.* at 835. I find it difficult even to put the Coastal Commission's argument in a form that makes modest sense. The Court later referred to the Coastal Commission's argument as a "gimmick[]." Dolan v. City of Tigard, 512 U.S. 374, 387 (1994).

80. *Dolan*, 512 U.S. at 391 (imposing an additional requirement that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development").

prepared to produce studies—ecological, economic, and the like—that demonstrate the requisite connection.[81] For political reasons governments often do develop such studies, but now they must be sure that the studies can also satisfy the courts.[82] Many of these studies will do so, but only at an increased cost which reduces the supply of regulations, in turn.

The other important branch of doctrine involves what has come to be known as the "denominator problem."[83] It arises in limited form in ordinary real property cases, but its subversive implications become apparent when those cases are placed in the larger conceptual framework of property law. Complete deprivation of the right to use property requires compensation.[84] To know when such a deprivation has occurred we need to know what the property is. Consider a regulation that completely precludes a property owner from using ten percent of her real property. The issue is whether the regulation constitutes a complete deprivation of her right to use that portion of her property, or merely a diminution of her property's value from one hundred percent to ninety percent.

From the outset of the Court's foray into property rights this problem identifying the denominator for determining when a complete deprivation occurred was a serious one. As Justice Stevens put it, "A landowner whose property is diminished in value ninety-five percent recovers nothing, while an owner whose property is diminished one hundred percent recovers the land's full value."[85] The problem becomes even more serious if we move away from the conception of property as physical things to the modern idea of property as a bundle of rights. When a regulation takes one stick out of the bundle, the issue becomes whether there is a total deprivation

81. *See, e.g.*, Brenda Jones Quick, Dolan v. City of Tigard: *The Case that Nobody Won*, 1995 DETROIT C.L. REV. 79, 103 (1995) (reporting an interview with a city mayor who noted that his city would now have to pay for impact studies).

82. *See generally* Kathryn C. Plunkett, Comment, *Local Environmental Impact Review: Integrating Land Use and Environmental Planning Through Local Environmental Impact Reviews*, 20 PACE ENVTL. L. REV. 211 (2002) (describing such studies and their uses).

83. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987) ("[O]ne of the critical questions is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' " (quoting Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967)).

84. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

85. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1064 (1992) (Stevens, J., dissenting). Actually, the first landowner might recover something, depending on how the balancing the Court called for comes out. That, however, is independent of the denominator problem that Justice Stevens was identifying.

of *that* property right (of course it is) or only perhaps a small reduction in the size of the bundle (of course it is).

One apparent solution to the denominator problem could be found in the balancing branch of property rights law. There the courts are supposed to take "distinct investment-backed expectations" into account.[86] How, though, were a person's "expectations" determined? In particular, were a person's expectations determined by the state of the law at the time she acquired the property at issue? If so, the constitutional limits on property rights, going forward, would be slight indeed. The Court waved its hands at the problem, saying that the mere existence of a regulation at the time property was acquired did not eliminate the need to balance the regulation's adverse impact on the new owner's rights.[87] The Court's opinion was notably uninformative on exactly how the regulation's existence should be placed into the balance. Justice O'Connor offered a particularly incoherent dissertation on the question.[88] But, as John Echeverria, a defender of state land-use regulations put it, the Court's decision meant that "most long-established environmental and land use regulations will be largely immune from takings challenges."[89]

In the sense that regulations remain largely immune from successfully litigated challenges, the Court's property rights jurisprudence is not much different from what it had been a generation earlier, when regulations were similarly immune from such challenges. Yet the cost of winning the cases is undoubtedly greater today than it had been in the prior period. Here the impact of legal doctrine "on the ground" might be more substantial than the analytics of the doctrine standing alone would suggest. Of course, the flexibility and incoherence of the Court's analysis makes anything

86. Penn Cent. Transp. Co. v. New York, 438 U.S. 104, 124 (1978).

87. Palazzollo v. Rhode Island, 533 U.S. 606, 627 (2001).

88. Justice O'Connor stated:

> [O]ur decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred.

*Id.* at 635–36 (O'Connor, J., concurring) Justice Scalia offered a cogent criticism, arguing that "the fact that a restriction existed at the time the purchaser took title . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking." *Id.* at 637 (Scalia, J., concurring) (internal citations omitted).

89. John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL L. REP. NEWS & ANALYSIS 11,112, at 11,114 (Sept. 2001).

possible in the future.

### D. Congressional Power

The *Guidelines* foreshadowed the Supreme Court's so-called Federalism Revolution in an extensive discussion of "the limited power granted to the federal government."[90] The Court has indeed invalidated federal statutes because they exceeded the power of the national government, as it had not done for a generation before the 1990s. Even so, the invalidations so far have a strikingly limited scope. Furthermore the doctrines they articulate seem ill-suited to substantially transforming the regulatory reach of the national government. The Court's federalism cases are so familiar that I will simply summarize the high points.

(1) *Congress's power to regulate interstate commerce.*[91] Congress cannot justify regulation of non-commercial activities on the ground that the effects of those activities, when taken in the aggregate, have a substantial effect on interstate commerce. But, Congress can regulate a commercial activity that itself has no significant effect on interstate commerce if that activity, taken together with similar ones, has a substantial effect on interstate commerce. In addition, Congress can regulate the instrumentalities and channels of interstate commerce, and such regulations can include a prohibition on the possession and use of items that at one point crossed state lines and were, in that sense, once "in" interstate commerce.[92]

(2) *Congress's power to enforce constitutional rights protected against the states by the Fourteenth and other Amendments.*[93] Congress may not itself "enforce" constitutional rights other than those the courts would identify. But, Congress has the power to devise remedies for violations of judicially identified rights that go beyond the elimination of only such violations by developing remedies that are congruent with and proportional to the record of actual violations. The standards of congruence and proportionality

90. GUIDELINES, *supra* note 1, at 36–69.

91. This paragraph summarizes the holdings in *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000). Here and in the succeeding paragraphs, including citations to the places where the Court develops the holdings would be unnecessarily obtrusive.

92. Or, at least, the Supreme Court has not indicated that these two justifications for regulation are now unavailable in some circumstances, and dicta in its decisions seem to indicate that they *are* available.

93. This paragraph summarizes the holdings of *City of Boerne v. Flores*, 521 U.S. 507 (1997), *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721 (2003), and *Tennessee v. Lane*, 541 U.S. 509 (2004).

are easier to satisfy when the underlying rights violations either are fundamental rights or are designed to benefit groups whose members have suffered substantial discrimination in the past or who have restricted access to the political process to obtain legislative relief from persisting discrimination. The effect of these rules is that Congress can sometimes impose obligations on state and local governments that do more than eliminate unconstitutional actions.

(3) *Congress's power to utilize institutions of state and local government to implement national policy.*[94] Congress can insist that state courts enforce national laws but cannot "commandeer" state and local legislative and executive officials to implement national policy. This "anti-commandeering" principle rests not on any specific constitutional text but rather on principles of state sovereignty that are implicit in the nation's institutions.[95] The scope of the "anti-commandeering" principle is unclear. It is in some tension with the principles authorizing Congress to force state and local governments to comply with national rights-protective legislation, at least to the extent that such legislation goes beyond the elimination of unconstitutional actions. One possibility is that the "anti-commandeering" principle applies to the congressional powers enumerated in Article I, but not to congressional powers embodied in constitutional amendments whose very purpose, the Supreme Court has told us, was to work a substantial change in the structure of national and state power.[96]

(4) *Limitations on Congress's power to require monetary remedies for violations of national law.*[97] Congress can require states to pay damages for violations of rights protected by the Fourteenth Amendment but not for violations of national statutes that rest on

94. This paragraph summarizes the holdings of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997).

95. The *Guidelines* rest the constitutional protection of state sovereignty in the Tenth Amendment, whose text—not quoted fully in the *Guidelines*—is unsuitable for the purpose. *See* GUIDELINES, *supra* note 1, at 54–55. The standard citation for this proposition is *United States v. Darby*, 312 U.S. 100, 124 (1941) ("The [Tenth A]mendment states but a truism that all is retained which has not been surrendered.").

96. *See* Mitchum v. Foster, 407 U.S. 225, 238 (1972) (referring to "the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment"). One difficulty with this interpretation is that the "basic alteration" would appear to be in the structure of relations between the nation and the states as a whole, not simply their relations with respect to the rights created by the Reconstruction amendments.

97. This paragraph summarizes the holding of and statements regarding other remedies in *Alden v. Maine*, 527 U.S. 706 (1999).

Congress's powers under Article I.[98] Congress can require states to comply with the substantive obligations imposed by statutes enacted pursuant to those powers, unless the statutes are unconstitutional for reasons discussed above. The obligations can be enforced by actions by the national government. More important, individuals facing future injury from state violations of national law can obtain injunctions against those violations by suing, in their official capacities, the individuals in state government charged with complying with national law.

What, then, is the overall effect of the Court's new federalism doctrine? Consider first the private economy. The Court has given no hint that it intends to limit in any significant way the power of the national government to regulate activities fairly characterized as commercial. On the margins, the Court might limit the application of some environmental laws, perhaps through constitutional rulings but more likely through statutory interpretation influenced by constitutional concerns.[99] But nothing in existing doctrine threatens the laws characteristic of the modern regulatory state: environmental, occupational safety and health, and other extensive regulatory schemes.

Second, the Court has not indicated that Congress lacks the power to require state and local governments to comply with general regulatory requirements applicable equally to their commercial activities and the commercial activities of private actors. It has restricted the remedies available when states fail to comply with those commands, but prospective relief—even at the behest of adversely affected individuals—remains available. Third, the Court has indicated that Congress has the power to compel state and local governments to comply with regulatory requirements even when commercial activities are not involved, when the activities implicate substantive constitutional rights, or when the regulations seek to benefit groups who are protected more than minimally against government discrimination. These are large categories, though not of course all-encompassing ones.

Finally, the Court has invoked its anti-commandeering principle

98. This restriction does not apply to remedies to be obtained by local governments. State law determines whether a government agency is an arm of the state protected against these remedies or is instead is a local government subject to monetary liability.

99. *See, e.g.*, Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159, 174 (2001) (reading the statute at issue "to avoid the significant constitutional and federalism questions raised by respondents' interpretation"); Jones v. United States, 529 U.S. 848 (2000) (construing a federal arson statute narrowly to avoid potential constitutional violations in a broader reading).

only twice. That principle needs to be fleshed out before we can really know what it means. In particular, it is at least conceptually possible that the Court could apply the anti-commandeering principle to all national statutes imposing regulatory requirements on state and local governments. I think this highly unlikely, and that the real issue is identifying the set of national statutes to which the principle will apply. The Court's early stab at the problem involved identifying integral or traditional governmental activities.[100] That task proved impossible, to the point where the Court in an opinion by Justice O'Connor in 2004 unanimously rejected the proposition that a legal rule could be predicated on determining whether such a governmental function was affected.[101] *Printz v. United States*[102] emphasized the novelty of the regulatory requirement there,[103] and perhaps *novelty* will come to identify the set of regulations to which the anti-commandeering principle applies, notwithstanding the obvious manipulability of that standard.[104]

Real revolutionaries would laugh at the accomplishments of the Federalism Revolution. The cases are available for more substantial development in the future, but for now the Court has moved back only inches from where the Warren Court left it. For all practical purposes, the expansive national government that is the constitutional legacy of the New Deal and the Great Society remains with us.

## CONCLUSION

My theme has been simple and boringly repeated. The *Guidelines* envisioned a constitutional law radically different from the constitutional law of the 1970s. For a while some Court initiatives seemed to portend judicial endorsement of a similar vision. Those initiatives eventually failed, leaving the law pretty much as it had been. "Pretty much" is not "the same as," of course, and there is no

100. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976).

101. Justice O'Connor stated:

> We rejected as "unsound in principle and unworkable in practice" a rule of state immunity from federal regulation under the Tenth Amendment that turned on whether a particular state government function was "integral" or "traditional." CFTB has convinced us of neither the relative soundness nor the relative practicality of adopting a similar distinction here.

Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488, 498 (2003) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546–47 (1985)) (internal citations omitted).

102. 521 U.S. 898 (1997).

103. *Id.* at 918.

104. Akin, it should be noted, to the problem of the level of generality in identifying unenumerated constitutional rights. *See supra* notes 15–19 and accompanying text.

doubt that legislators can no longer be confident that some of the things that would have easily passed muster in the 1970s will do so today. Most of them will, but after more effort than would have been required earlier. And, some of the Court's restrictive doctrines have been ignored or restricted but not formally repudiated. They remain available for a future Court to take up and expand. For the present, though, Pete Townsend and The Who appear to be pretty much correct: "Meet the new boss, same as the old boss."[105]

105. THE WHO, *Won't Get Fooled Again*, *on* WHO'S NEXT (MCA Records, remastered 1995).