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Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change

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Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change

DAWN E. JOHNSEN*

I. INTRODUCTION 363
II. CONGRESSIONAL POWER AND FEDERALISM PRIOR TO 1980 370
A. Congress's Power to Regulate Interstate Commerce 370
B. Congress's Authority to Enforce the Reconstruction Amendments 377
III. THE REAGAN REVOLUTION 383
A. The Reagan Administration's Agenda for Constitutional Change 387
1. Commerce Clause 392
2. State Sovereignty 393
3. Reconstruction Amendments 395
B. Constitutional Change through Judicial Selection 396
C. The Rehnquist Court on Congressional Power 399
1. Commerce Clause 400
2. State Sovereignty 401
3. Reconstruction Amendments 402
IV. LESSONS REGARDING CONSTITUTIONAL CHANGE 406

I. INTRODUCTION

Over the last decade, a five-Justice majority of the United States Supreme Court has adopted new limits on congressional power as the grounds for invalidating an extraordinary number of federal laws. The diverse range of laws declared unconstitutional (in whole, significant part, or application) include congressional efforts to: allow the victims of rape and other gender-motivated violence to sue their attackers;[1] allow state employees to sue for disability and age discrimination;[2] impose federal criminal penalties for the possession of guns near schools;[3] direct local law enforcement officers to do background checks on prospective gun purchasers for possible criminal convictions;[4] and preserve the uniformity of our intellectual property laws by making states liable for the intentional infringement of patents.[5] The Court has

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* Associate Professor of Law, Indiana University—Bloomington. I am grateful for the advice and support of colleagues and friends, including Patrick Baude, Jeannine Bell, Daniel Conkle, Charles Geyh, Martin Lederman and Lauren Robel, and the other participants in this Symposium. I also thank my research assistants, Michelle Branigan, Cyril Emery, and Jacob Sheehan, for their excellent work.

1. United States v. Morrison, 529 U.S. 598 (2000) (the Violence Against Women Act).

2. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (the Americans with Disabilities Act); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (the Age Discrimination in Employment Act).

3. United States v. Lopez, 514 U.S. 549 (1995) (the Gun-Free School Zones Act).

4. Printz v. United States, 521 U.S. 898 (1997) (the Brady Handgun Violence Prevention Act).

5. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (the Patent and Plant Variety Protection Remedy Classification Act); *see also* City of Boerne v. Flores, 521 U.S. 507 (1997) (the Religious Freedom Restoration Act); *infra* text accompanying

derived these limits, which are not found in the constitutional text, from the Court's conceptions of state sovereignty and judicial supremacy.

The Court's recent cases contrast sharply with its precedent of more than fifty years, during which the Court adhered to broad and deferential views of congressional power and rarely found a law even close to Congress's constitutional limits. Professors Jack Balkin and Sanford Levinson place the Rehnquist Court's contraction of congressional power at the core of a "constitutional revolution."[6] Judge John T. Noonan, Jr. describes these cases as "boldly innovative" and "extraordinary"—as well as illogical, unprincipled, unworkable, and unjust.[7] Professor Mark Tushnet suggests an alternative to what he describes as "alarmist" assessments: a "modest" view that emphasizes both the limited practical impact of the Court's rulings thus far, and also that Congress, at least at present, retains powers that would permit it to achieve almost all of its objectives.[8]

Whether or not a "constitutional revolution" is under way, all signs to date suggest that the Court has embarked on a course of substantial changes in the structure of our constitutional government.[9] The structural changes most widely discussed relate to

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notes 213-55 (discussing the Court's decisions in the cases cited *supra* notes 1-5).

6. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); *see also* Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 U. CIN. L. REV. 367, 370 (2002) (critiquing the "federalism revolution" in which "a bare majority of the Supreme Court seeks to reverse six decades of settled federalism jurisprudence"); Linda Greenhouse, *The High Court and the Triumph of Discord*, N.Y. TIMES, July 15, 2001, § 4, at 1 (discussing record number of five-four Supreme Court decisions, and concluding "[t]here is a revolution in progress at the [C]ourt").

7. JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 2-11, 156 (2002).

8. *See* Mark Tushnet, *Alarmism Versus Moderation in Responding to the Rehnquist Court*, 78 IND. L.J. 47, 49-52 (2003). Professor Tushnet, though, devotes Part II of his article to explaining why Congress is unlikely to exercise those powers to enact new legislation. *See id.* at 56-63. The Court also has emphasized the limited nature of its rulings. *See, e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 374 n.9 (2001) (quoted *infra* note 240).

9. The Justices themselves have acknowledged the extraordinary nature of the Court's recent federalism decisions, with the dissenters pledging not to accede to the majority and to disregard the standard rule of stare decisis. Justice Stevens, for example, wrote in dissent in *Kimel*:

> Despite my respect for *stare decisis*, I am unwilling to accept *Seminole Tribe* as controlling precedent. First and foremost, the reasoning of that opinion is so profoundly mistaken and so fundamentally inconsistent with the Framers' conception of the constitutional order that it has foresaken any claim to the usual deference or respect owed to decisions of this Court.

Kimel, 528 U.S. at 97-98 (Stevens, J., dissenting) (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1889 (2002) (Breyer, J., dissenting) ("Today's decision reaffirms the need for continued dissent . . . ."); Linda Greenhouse, *5-4, Now and Forever: At the Court, Dissent Over States' Rights Is Now War*, N.Y. TIMES, June 9, 2002, § 4, at 3 [hereinafter *5-4, Now and Forever*] ("There are dissenting opinions at the Supreme Court, and then there are declarations of war. These days, federalism means war.").

Then-Associate Justice Rehnquist set this tone back in 1985 when he predicted in dissent that a future Court would overrule the Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), which overruled *National League of Cities v. Usery*,

federalism—that is, the allocation of powers between the national government and the states. Equally at stake, and increasingly noted, are the relative authorities of the three branches of the national government.

The Court has significantly limited Congress's ability to legislate, especially in ways that effectively bind the states, through the adoption of narrow views of Congress's powers under the Fourteenth Amendment and the Commerce Clause and through expansive views of state sovereignty. Regarding the Fourteenth Amendment, the Court has held that only the judiciary, and not Congress, may define the substantive reach of the Amendment's provisions. Moreover, the Court will carefully scrutinize congressional attempts to protect even those rights recognized by the Court. The Court held, for example, that because it had interpreted the guarantee of equal protection to afford only minimal protection for persons with disabilities, Congress had exceeded its authority to enforce that equal protection guarantee when, through the Americans with Disabilities Act, Congress provided far greater protections against disability discrimination.[10] At the same time, the Court has narrowed Congress's commerce power by creating new limits on Congress's ability to regulate what the Court views as noneconomic activity.[11]

Even where the Court continues to recognize affirmative congressional power to legislate, it has erected new barriers to Congress's ability to impose national standards on the states, through new sovereign immunity[12] and anticommandeering doctrines.[13] For example, because the Court both narrowly construed Congress's power to enforce the Fourteenth Amendment and also declared in 1996 that Congress may not abrogate states' sovereign immunity pursuant to its commerce power, Congress may not authorize state employees to seek money damages for disability or age employment discrimination.[14]

The Court's new direction thus involves issues of both federalism and the separation of powers: two pillars of our constitutional structure. The end result is a judiciary with expanded, self-proclaimed authority to say what the Constitution means, and a Congress significantly diminished in its ability to set national policy, to protect important rights and interests, and to participate in the process of constitutional interpretation. Most immediately threatened is Congress's ability to protect certain civil rights and environmental interests, in general and especially as against state entities (including public universities). Again, future decisions will determine the full extent of the constitutional change,[15] but at this point even more striking than the

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426 U.S. 833 (1976). *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting).

10. *Garrett*, 531 U.S. at 365-74; *see also Boerne*, 521 U.S. 507.

11. United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). Significantly, the Court continues to recognize broad congressional power to regulate the national economy, including intrastate economic activity with interstate effects.

12. *Seminole Tribe*, 517 U.S. 44 (in federal court); Alden v. Maine, 527 U.S. 706 (1999) (in state court).

13. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

14. *See generally Garrett*, 531 U.S. 356; *Kimel*, 528 U.S. 62.

15. The Court may provide additional guidance this Term in its review of Congress's Section 5 authority to enact the Family and Medical Leave Act ("FMLA"). *See* Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom.*, Nev. Dep't of Human Res.

immediate practical ramifications of the Court's specific holdings is the Court's substantially changed stance on fundamental questions of the constitutional allocation of powers.[16]

Most directly engaged in constitutional struggle are the Court and Congress. The relationship between these two branches understandably has dominated academic and public debate about the Court's congressional power jurisprudence. Far less examined and appreciated is the role in this conflict of the remaining branch of the federal government: the Executive. Presidents possess many powers that require interpretation of the Constitution and that thus may be used to influence the development of constitutional meaning. Most generally, the President is obliged to "preserve, protect, and defend" the Constitution.[17] With regard to the development of the law of congressional power and federalism, Presidents have played multiple, sometimes contradictory roles. The executive branch, for example, defended Congress in the litigation before the Court that resulted in the new limits on Congress. The Solicitor General, the President's top litigator, urged the Court throughout much of the 1990s—albeit unsuccessfully—to adhere to the post-1937 Court's broad, deferential views of congressional power.

And yet, the most notable recent presidential roles were those of architect and promoter of these very limits on congressional power. Ironically, the Rehnquist Court's adherence to a strong version of judicial supremacy, which seeks to deny Congress and other nonjudicial actors (including the President) a significant role in determining constitutional meaning, can be traced to a President who did challenge the Court's constitutional views—a President who ultimately was quite successful in substituting his own views for what he saw as the very wrong views of the Supreme Court of his time. In particular, the roots of the Rehnquist Court's new direction, at least in significant part, can be found in the "Reagan revolution."[18]

President Reagan's administration, and most notably his Attorney General, Edwin Meese III, advocated and pursued a strong and independent presidential voice in the development of the law. Some, but not all, of the Reagan campaign to change the law was very public and at the time provoked considerable controversy and academic commentary. Reagan, for example, pledged to appoint judges who would practice

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v. Hibbs, 122 S. Ct. 2618 (2002) (holding that the FMLA was within Congress's Section 5 authority to remedy and prevent gender discrimination). *But see* Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) (reaching opposite conclusion).

16. *See, e.g.*, NOONAN, *supra* note 7, at 12 (describing "the very large numbers potentially affected adversely by the court's decisions—for example, the 4.5 million employees of the fifty states and state-related entities; the over 5 million holders of patents; the 10 million holders of trademarks; the 100 million holders of copyright; the over 150 million believers in faiths whose requirements can transcend the interest of government; and the one-half of the population distinguished by gender as women"); Law, *supra* note 6, at 402 (examining "practical effects of the Supreme Court's federalism revolution").

17. U.S. CONST. art. II, § 1, cl. 8.

18. *See* President Ronald Reagan, Farewell Address to the Nation, II PUB. PAPERS 1718, 1720 (Jan. 11, 1989) (referring to the "Reagan revolution"); *see also* CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT (1991) (describing legal aspects of the "Reagan revolution").

"judicial restraint" and who understood the "danger" of "judicial activism."[19]

Not generally known at the time was the extensive work of Reagan's Department of Justice, which set forth in great detail the administration's vision of the law, as well as strategies to attain that vision, in a series of official reports. These reports analyzed a wide range of constitutional and other legal issues and identified Supreme Court doctrine the administration viewed as wrong. One report even included lists of Court decisions "inconsistent" with the Reagan administration's interpretations.[20] The constitutional doctrines targeted for change involved the most pressing and controversial issues of the day, including abortion, affirmative action, religion, and, the subject of this Article and a centerpiece of the Reagan agenda, congressional power and federalism. The Reagan administration sought to limit Congress's most significant powers—the commerce power, the authority to enforce the Reconstruction Amendments, and the spending power—and to expand judicial protection of state sovereignty.

Officials in the Reagan and George H.W. Bush administrations promoted these views in various ways. By far the most successful means was through their judicial appointments and especially appointments to the Supreme Court. Together, Presidents Reagan and Bush appointed four of the five Justices sometimes referred to as the "federalism five," and elevated the fifth to Chief Justice. Since 1995, the Rehnquist Court has begun adopting theories of congressional power and federalism strikingly similar to those developed in the reports of the Reagan Justice Department. One of those reports was devoted to the critical role of judicial appointments in shaping the development of the law.[21]

Reagan, of course, was not the first President to attempt and achieve a substantial shift in important judicial doctrine. Even at the time some compared his efforts to those of Franklin D. Roosevelt, though some earlier assessments emphasized Reagan's relative failure, as of that time, to promote his views.[22] Some prominent recent

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19. SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT TO REAGAN 301 (1997); Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 324, 326 (1987); Bernard Weinraub, *Reagan Says He'll Use Vacancies to Discourage Judicial Activism*, N.Y. TIMES, Oct. 22, 1985, at A1; *see also* GOLDMAN, *supra*, at 285-345.

20. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION (1988) [hereinafter GUIDELINES].

21. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, THE CONSTITUTION IN THE YEAR 2000: CHOICES AHEAD IN CONSTITUTIONAL INTERPRETATION (1988) [hereinafter THE CONSTITUTION IN THE YEAR 2000].

22. For example, Professor Bruce Ackerman wrote in 1988:

> Like Ronald Reagan, Franklin Roosevelt won re-election on a political program that repudiated a complex body of constitutional principle developed by a generation and more of Supreme Court justices. Like Reagan, Roosevelt despaired of changing the Constitution by mobilizing the people to enact formal amendments in the way described by article V. Instead, he sought to change the path of constitutional law by making transformative judicial appointments.

Bruce A. Ackerman, *Essays on the Supreme Court Appointment Process: Transformative Appointments*, 101 HARV. L. REV. 1164, 1166 (1988). Professor Ackerman at the time concluded that "[u]nlike Reagan, Roosevelt succeeded." *Id.* Ackerman in 1998 again compared President Roosevelt's and President Reagan's attempts to change constitutional meaning

assessments continue to decline to credit Reagan for the constitutional change adopted by the Rehnquist Court. Judge Noonan, for example, wrote in 2002 that "Presidents and parties will not explain the votes"[23] of the five Justices for what he describes as the Court's usurpation of congressional power.[24]

The little-examined Reagan reports of the late 1980s and the Rehnquist Court decisions since 1995 permit a more complete evaluation of Reagan's efforts and degree of success. They confirm that the comparison between Reagan and Roosevelt is apt: Reagan was among the handful of presidents most critical of judicial exclusivity in constitutional interpretation and most supportive of presidential interpretative independence (even as he sought to diminish Congress's interpretive role). The Court's current hostility toward congressional constitutional interpretation itself is a remarkable example of successful nonjudicial—here, presidential—efforts to remake constitutional law. Although Reagan's success was not as immediate as Roosevelt's, and even today remains substantially less complete, congressional power and federalism were central targets of change for the Reagan administration, and on these issues the Rehnquist Court's decisions closely match the positions detailed in the Department of Justice reports.[25]

Before I turn to the Reagan/Rehnquist constitutional changes in the law of congressional power, I will describe in Part II the modern development of the Court's views on congressional power and federalism prior to President Reagan's election. I

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through transformative appointments. *See* 2 BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 389-403 (1998), and discussion *infra* note 263; *see also* JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 11 (1995) ("This is the story of a conservative judicial revolution that failed. It was led by the chief justice of the United States, William H. Rehnquist, and actively encouraged by two conservative Republican presidents, Ronald Reagan and George Bush."); Christopher E. Smith & Thomas R. Hensley, *Unfulfilled Aspirations: The Court-Packing Efforts of Presidents Reagan and Bush*, 57 ALB. L. REV. 1111, 1113 (1994) ("Although the fortuitous timing of five Justices' departures enabled conservative Republican Presidents to pack the Court with carefully selected appointees, Reagan and Bush ultimately failed to achieve complete fulfillment of their objectives. . . . [T]he opportunity for and appearance of 'Court packing' do not necessarily produce the intended results . . . ."). *But see* Balkin & Levinson, *supra* note 6; discussion *infra* notes 258-64 and accompanying text.

23. NOONAN, *supra* note 7, at 8. More fully, Judge Noonan wrote: "Newspapers like to predict outcomes of cases in terms of the president who appointed the judges. It's a crude predictive device. Far more important is the life experience of each judge. . . . Presidents and parties will not explain the votes . . . ." *Id.*

24. *Id. passim.*

25. When asked in 2000 what he regarded as "the Reagan Administration's biggest originalist success in litigation," former Attorney General Meese cited the Rehnquist Court's treatment of congressional power and federalism, and also affirmative action. Edwin Meese III, *Dialogue, Reagan's Legal Revolutionary*, 3 GREEN BAG 2D 193, 199 (2000). This Article will not assess the success of the Reagan administration on the many other constitutional issues targeted for change by the Reagan Department of Justice reports, but notes the record is mixed. Meese cited as "the Administration's most disappointing loss," its "failure to persuade the Court. . . to overrule *Roe v. Wade*." *Id.* Meese also noted that litigation was but one way they advanced their constitutional agenda, and listed among the others, judicial nominations and "a number of Justice Department publications." *Id.*

review this background as well as recent doctrine at some length despite its familiarity in certain circles. The Court's doctrine in this area is extremely complex and its relative inaccessibility to a broader audience diminishes its political saliency in ways harmful to both democratic values and the development of constitutional meaning.[26] The significance of the Court's new direction generally is underappreciated, even among "opinion elites" who shape public discourse, elected representatives whose power is at stake, and most lawyers (the vast majority of whom studied constitutional law when the Court interpreted congressional power expansively and with great deference to Congress).[27] A large gap thus exists between constitutional scholars and almost everyone else with regard to the importance attributed to the Rehnquist Court's federalism decisions.

Part III is the heart of this Article. Section A details the Reagan administration's agenda for constitutional change particularly with regard to Congress's commerce power, Congress's enforcement authority under the Reconstruction Amendments, and other issues of state sovereignty. Section B examines Reagan's use of judicial selection to effect constitutional change, and especially a Department of Justice report that expressly supported the use of legal ideology in selecting judges. Section C compares the Reagan vision to the positions since adopted by the Rehnquist Court.

Part IV concludes with some lessons we should take from Reagan's success. I consider the Rehnquist Court's treatment of congressional power in light of some recent literature on democratic influences on constitutional change. The connections between the Reagan revolution and what may be the Rehnquist Court's "revolution" illustrate the ways in which judges, for example, represent popular understandings about the Constitution.[28] Above all, Reagan's success points to the need for improved

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26. Judge Noonan recently observed: "The results are incomprehensible without an understanding of the legal doctrines on which they are based. The doctrines are abstract. Abstractness gives them an appearance of depth they do not deserve." NOONAN, *supra* note 7, at 2. He also stated:

> The results I criticize were reached largely, although not wholly, by means of the doctrinal devices—state sovereign immunity, congruence and proportionality of legislation, and a record of evils to be eradicated—that have no footing in the constitution. Remove these obfuscations, it will be clear that the court's decisions do not survive the test of serving constitutional purposes.

Id. at 12.

27. For example, when compared with the robust academic literature inspired by the Rehnquist Court's treatment of congressional power, press coverage and commentary for a more general audience has been sparse. Notable exceptions include federal judge John Noonan's remarkable book, NOONAN, *supra* note 7; several speeches by Senator Hillary Rodham Clinton, in particular *Separation Anxiety: The Intersection of Congress, the Courts, and the Constitution*, Address Before the Georgetown Law Center Chapter of the American Constitution Society (Mar. 12, 2002), *available at* http://www.acslaw.org/hrctranscript.htm; and numerous articles by Linda Greenhouse, who covers the Supreme Court for *The New York Times*, including: *Battle on Federalism*, N.Y. TIMES, May 17, 2000, at A18; *5-4, Now and Forever*, *supra* note 9; *At the Court, Dissent Over States' Rights Is Now War*, N.Y. TIMES, June 9, 2002, § 4, at 3; *Supreme Court: The Justices Decide Who's in Charge*, N.Y. TIMES, June 27, 1999, § 4, at 1; *The High Court's Target: Congress*, N.Y. TIMES, Feb. 25, 2001, § 4, at 3.

28. *See, e.g.*, ACKERMAN, *supra* note 22; Balkin & Levinson, *supra* note 6. *See generally* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND

public understanding regarding constitutional change: understanding of the substantive import of the Rehnquist Court's decisions, of Reagan's role in effecting the Court's significant changes in the law of congressional power, and more generally, as the Court moves toward judicial exclusivity in constitutional interpretation, of the appropriate roles of nonjudicial actors and processes in the development of constitutional meaning.[29]

II. CONGRESSIONAL POWER AND FEDERALISM PRIOR TO 1980

This Part describes the modern development of Congress's powers pursuant to the Commerce Clause and Section 5 of the Fourteenth Amendment, prior to the time President Reagan took office and sought to promote his views of these powers. My aim is two-fold. First, the judicial doctrines reviewed here were the target of the changes advocated by Reagan and adopted by the Rehnquist Court, the subject of the next Part. Second, the pre-Reagan evolution of the meaning of both of these important constitutional sources of congressional power not only is relevant doctrinal background, but also provides two of our Nation's strongest historical examples of how the nonjudicial branches of the federal government actually have influenced the development of constitutional meaning. They therefore prove helpful in evaluating the extraordinary efforts of President Reagan to do the same.

A. Congress's Power to Regulate Interstate Commerce

Certainly one of the most widely known and dramatic instances in which a U.S. President sought to fundamentally change the way in which the Supreme Court interpreted the Constitution was President Franklin D. Roosevelt's 1937 proposal to increase the number of Justices on the Court. Roosevelt's "Court-packing" plan, as it is popularly known, would have added to the Court an additional Justice for every Justice over the age of seventy and would have allowed Roosevelt immediately to make six new appointments.[30] The proposal resulted, in significant part, from a disagreement between the President and the Court over the scope of congressional power and the constraints of federalism—the same issues at the core of the Reagan administration's plans to change the course of constitutional interpretation, and thus an apt focal point for this review of Congress's commerce power.

Nineteen hundred and thirty-seven, of course, was a watershed year in constitutional

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POLITICS (2002) (discussed *infra* notes 267-71, 275 and accompanying text).

29. Professor Larry Kramer recently wrote of the "paradox of constitutional democracy" and "the indispensable insight of popular constitutionalism:" "Institutions immune or removed from politics may be vital to secure principles that are prerequisites for democratic rule . . . . Yet ultimately nothing can vouchsafe the rightness of what these institutions do, nothing can save them from partiality and blindness, other than democratic challenge, scrutiny, and revision." Larry D. Kramer, *Foreword: We The Court*, 115 HARV. L. REV. 4, 15-16 (2001).

30. *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT 134 (1995). Roosevelt's proposal was not unprecedented. Congress, for example, reduced the number of Justices to seven to prevent President Andrew Johnson from making an appointment, and then expanded the number back to nine after the election of President Ulysses S. Grant. *See* ACKERMAN, *supra* note 22, at 239.

history, and our understanding of the events of that time benefits from continuing dynamic scholarship.[31] President Roosevelt, fresh from a landslide reelection, enjoyed strong public support for his New Deal policies but faced a hostile Supreme Court. Beginning in the late nineteenth century, the Court had interpreted various constitutional provisions to preclude much of the new governmental regulation of the economy. Most relevant here is the pre-1937 Court's relatively narrow reading of Congress's commerce power.

Among Congress's legislative powers enumerated in Article I is "the power . . . [t]o regulate Commerce . . . among the several States."[32] Over the centuries the Court has varied in its interpretations of "commerce" and "among the several States," with substantial implications for Congress's ability to legislate. A central and recurring question throughout has been whether the Court should interpret the scope of Congress's commerce power as limited by federalism concerns, including the Tenth Amendment[33] and a conception of state sovereignty not express in the text but inherent in the constitutional structure. Early on, the Marshall Court in *Gibbons v. Ogden* answered no. In that 1824 decision, the Court identified the political processes of congressional action and elections (rather than judicially imposed limits) as the appropriate check on Congress.[34]

The Court of the late-nineteenth/early-twentieth century, by contrast, imposed substantial judicial limits on Congress's constitutional authority to legislate pursuant to its commerce power. The Court invalidated unprecedented numbers of acts of Congress—laws that, also for the first time, imposed substantial economic regulations at a national level, including by prohibiting child labor and setting maximum hour and minimum wage requirements for the purpose of advancing social justice. The Court, citing the need to protect state sovereignty,[35] created new doctrinal limits on the scope

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31. *See, e.g.*, ACKERMAN, *supra* note 22; BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION (1998); LEUCHTENBURG, *supra* note 30; Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000).

32. U.S. CONST. art. I, § 8, cl. 3.

33. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

34. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). The Court, while noting that Congress's power did not extend to commerce completely internal to a state that "does not extend to or affect other states," *id.* at 194, defined Congress's power as otherwise plenary:

> This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in single government. . . . The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are . . . the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

Id. at 196-97.

35. In *United States v. E.C. Knight Co.*, the Court explained:

> If it be held that [the commerce power] includes the regulation of all such

of Congress's commerce power. Among them, the Court excluded from the constitutional meaning of "commerce"—and thus found beyond Congress's power to regulate—the manufacture, production, or mining of products.[36] The Court also found that Congress could regulate certain transactions within a state if they had a "direct" effect on interstate commerce, but not if the effects were "indirect."[37]

The Court relied on these distinctions to strike down federal laws even when Congress was careful to regulate only those goods actually shipped in interstate commerce. For example, the Court found that Congress lacked the power to prohibit the interstate shipment of goods produced by children, because the regulation was aimed at the use of child labor in production, not "commerce."[38] The Court characteristically cited the need to avoid otherwise-dire consequences for state power:

> [I]f Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed.[39]

And yet, while the Court cited state sovereignty to justify its invalidation of federal laws, the Court also invalidated state laws that imposed the same types of economic regulations on the grounds they violated the Fourteenth Amendment guarantee of (substantive) due process, and specifically, the liberty to contract.[40]

> manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the States, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate . . . market? . . . [T]he duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are and must be local . . . .

156 U.S. 1, 14-15 (1895).

36. *E.g.*, *id.* (holding that the production of refined sugar was not commerce within the meaning of the Commerce Clause).

37. *E.g.*, A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 546 (1935). The Court, though, was not entirely consistent in its imposition of judicial limits on the scope of Congress's commerce power. *See, e.g.*, Houston E. & W. Tex. Ry. v. United States, 234 U.S. 342 (1914) (upholding the regulation of intrastate rail rates because of their effect on interstate commerce); Champion v. Ames, 188 U.S. 321 (1903) (upholding the 1895 Act for the Suppression of Lottery Traffic through National and Interstate Commerce and the Postal Service, which prohibited the interstate transportation of lottery tickets).

38. Hammer v. Dagenhart (The Child Labor Case), 247 U.S. 251 (1918). The law prohibited the transportation in interstate commerce of goods produced in companies in which children under fourteen were employed or children between fourteen and sixteen were employed more than eight hours a day or six days a week or between seven in the evening and six in the morning.

39. *Id.* at 276.

40. *See, e.g.*, Morehead v. New York *ex rel.* Tipaldo, 298 U.S. 587 (1936) (holding unconstitutional a state law that set a minimum wage for women); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (holding unconstitutional a D.C. law that set a minimum wage for women);

Illustrative of the Court's interpretation of the commerce power during this period was its invalidation of two pieces of New Deal legislation during the two years before Roosevelt announced his "Court-packing" plan. The Court in 1935, in *A.L.A. Schecter Poultry Corp. v. United States* (the "sick chicken" case),[41] struck down the Live Poultry Code, designed pursuant to the National Industrial Recovery Act. The Code regulated the sale of poultry and also the conditions of employment. Specifically, it prohibited child labor, set maximum hours and a minimum wage, required collective bargaining, and prohibited sellers from requiring buyers to purchase sick chickens along with the rest of the coop of chickens. The Court relied on a distinction between the "direct" and "indirect" effects on interstate commerce to hold the Code unconstitutional; even though virtually all the chickens in question were shipped interstate, the Court held these types of regulations of the sale and slaughter of chickens while they physically were in one state did not have a sufficiently "direct" effect on interstate commerce. The Court found this distinction necessary to protect state sovereignty:

> If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the State over its domestic concerns would exist only by sufferance of the federal government.[42]

The next year, the Court held that Congress also had exceeded its commerce power in enacting the Bituminous Coal Conservation Act of 1935.[43] Under the law, local coal

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Lochner v. New York, 198 U.S. 45 (1905) (holding unconstitutional a state law that set maximum hours for bakery workers).

The Rehnquist Court similarly can be criticized for its selective attention to state sovereignty. *See, e.g.*, Barbara K. Bucholtz, *Gestalt Flips by an Acrobatic Supreme Court and the Business-Related Cases on Its 2000-2001 Docket*, 37 TULSA L. REV. 305 (2001) (discussing preemption cases in which the Court was quick to find state regulation of business preempted by federal schemes); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 81-82 (2001) ("The Rehnquist Court has not been as solicitous of states' rights as one might expect if it were operating primarily from a federalism perspective."); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) (discussing numerous inconsistencies in what is described as the Court's "categorical federalism" approach). It is, though, beyond the scope of this Article to seek a coherent explanation for the jurisprudence of either the pre-1937 Court, *but see* sources cited *supra* note 31, or the Rehnquist Court, *but see* Colker & Brudney, *supra*, at 81-87 (suggesting the Court's disrespect for Congress better explains its decisions than respect for state sovereignty); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 489 (2002) ("[T]he Rehnquist Court's jurisprudence is one of decentralization and private ordering of social norms."); Jed Rubenfeld, *The Anti-AntiDiscrimination Agenda*, 111 YALE L.J. 1141, 1142 (2002) (suggesting the "unifying thread behind the Court's innovative constitutional case law" is "an anti-antidiscrimination agenda").

41. 295 U.S. 495 (1935).

42. *Id.* at 546.

43. Carter v. Carter Coal Co., 298 U.S. 238 (1936); *see also* United States v. Butler, 297 U.S. 1 (1936) (holding Congress had exceeded its spending power in enacting the Agricultural Adjustment Act of 1933).

boards, after collective bargaining, would set prices for coal and minimum wages and maximum hours for employees. The Court held that Congress lacked the power to regulate the conditions of employment for those who mined the coal, even though the coal would be sold interstate; Congress could regulate only commerce, which the Court held meant trade, not production. Again, the Court saw its role as encompassing the identification and enforcement of limits on Congress's commerce power in order to protect spheres of state sovereignty:

> Every journey to a forbidden end begins with the first step; and the danger of such a step by the federal government in the direction of taking over the powers of the states is that the end of the journey may find the states so despoiled of their powers . . . as to reduce them to little more than geographical subdivisions of the national domain.[44]

Professors Bruce Ackerman and Barry Friedman, writing separately, have provided insightful accounts of the period. Of particular interest here are the reactions of the President, Congress, and the general public to the pre-1937 Court's limited reading of congressional power, and then to Roosevelt's Court-packing plan and other proposals to deal with what was widely viewed as the problem of the Court.[45] With the country then still struggling with years of devastating economic depression, the Court's invalidation of New Deal efforts to improve the economy met strong public opposition. At the end of 1935, "newspaper editors voted the debate about judicial review and the Court's encounter with the New Deal the year's 'biggest' news story."[46] Roosevelt thus made his proposal to increase the size of the Court at a time of widespread dissatisfaction with the Court's constitutional interpretations. The political and public response at that time contrasts sharply with the relative lack of attention to the Rehnquist Court's admittedly less-momentous shifts in the same direction.

President Roosevelt's personal leadership in responding to the Court's decisions undoubtedly contributed greatly to the high degree of popular understanding. Roosevelt, certainly more than most Presidents, pressed his own views about how the Constitution should be interpreted and believed his role as President included participation in the development of constitutional meaning.[47] In his first State of the Union address, he said, "[M]eans must be found to adapt our legal forms and our judicial interpretation to the actual present national needs of the largest progressive democracy in the modern world."[48] He reportedly said that when he took the presidential oath of office and swore to uphold the Constitution, "I felt like saying,

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44. *Carter*, 298 U.S. at 295-96.

45. *See* ACKERMAN, *supra* note 22, at 279-344; Friedman, *supra* note 31.

46. Friedman, *supra* note 31, at 993 (quoting *Biggest News Rose in Supreme Court*, N.Y. TIMES, Dec. 26, 1935, at 19).

47. President Roosevelt demonstrated a strong interest in presidential autonomy in constitutional interpretation in other areas as well. *See, e.g.*, Friedman, *supra* note 31, at 1032-34 (discussing Roosevelt's views on judicial supremacy and planned reaction in the event of a negative decision in the Gold Standard cases); Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353, 1357-58 (1953) (memorializing Roosevelt's personal view that a legislative veto provision in the Lend Lease Act was unconstitutional).

48. Friedman, *supra* note 31, at 1019 (citing Turner Catledge, *Basic Law Upheld*, N.Y. TIMES, Jan. 7, 1937, at 1 (quoting Roosevelt)).

'Yes, but it's the Constitution as I understand it, flexible enough to meet any new problems of democracy—not the kind of Constitution your Court has raised up as a barrier to progress and democracy.'"[49]

Roosevelt responded to the Court's 1935 *Schecter Poultry* decision with a presidential press conference that Professor Ackerman describes as a remarkable instance of "a President actually engaged in genuine constitutional thought."[50] Roosevelt spoke for an hour and a half, offering his own views on a decision "more important than any decision probably since the *Dred Scott* case."[51] He identified the key issue as follows:

> Is the United States going to decide, are the people of this country going to decide that their Federal Government shall in the future have no right under any implied power or any court-approved power to enter a national economic problem, but that that economic problem must be decided only by the states?[52]

Roosevelt's proposal was only one of many proposals aimed at altering the Court's constitutional interpretations.[53] Leading Senate alternatives included proposals to amend the Constitution to limit the Court's power to review the constitutionality of federal statutes: one version would have required a two-thirds vote of the Supreme Court for invalidation, and another would have allowed Congress by a two-thirds vote, after an intervening election, to override a judicial invalidation.[54] The very public debate over the merits of these proposals—as well as the Court's ultimate response—provides an extraordinary instance of dialogue among the President, Congress, the Court and the American public over constitutional meaning.

Congress, of course, ultimately neither expanded the Court nor amended the Constitution.[55] Instead, after vociferous debate and opposition even among some New

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49. *Id.* (citing LEONARD BAKER, BACK TO BACK: THE DUEL BETWEEN FDR AND THE SUPREME COURT 33 (1967)).

50. ACKERMAN, *supra* note 22, at 298. "The most striking feature of Roosevelt's presentation was its high constitutional seriousness." *Id.* at 297.

51. *Id.* at 297 (quoting Roosevelt, 5 Complete Presidential Press Conferences 315 (May 31, 1935)).

52. *Id.*

53. "'The years 1935-1937 . . . saw more 'Court-curbing' bills introduced in Congress than in any other three-year (or thirty-five-year) period in history.'" LEUCHTENBURG, *supra* note 30, at 102 (quoting Michael Nelson, *The President and the Court: Reinterpreting the Court-packing Episode of 1937*, 103 POL. SCI. Q. 267, 273 (1988) (quoting Stuart S. Nagel, *Court-Curbing Periods in American History*,18 VAND. L. REV. 925, 926 (1965))); *see also* Friedman, *supra* note 31, at 994-95.

54. ACKERMAN, *supra* note 22, at 332; *see also id.* at 316 (thirty-nine constitutional amendments were submitted during the congressional term before the 1936 election); Friedman, *supra* note 31, at 994-95 (discussing record number of Court-curbing proposals during 1935-37).

55. Despite initial strong opposition to Roosevelt's proposal even among some New Deal supporters and critics of the Court, a compromise version might well have passed had it not been for the death of Roosevelt's chief congressional supporter, Senate Majority Leader Joe Robinson. ACKERMAN, *supra* note 22, at 335-37; LEUCHTENBURG, *supra* note 30, at 149-54; Friedman, *supra* note 31, at 1029-30.

Deal supporters, the proposal was rendered far less necessary by what is popularly known as "the switch in time that saved nine." The Court issued several five-to-four decisions in 1937 that upheld legislation of the type the Court previously had invalidated,[56] and the Court began radically changing its interpretation of the Commerce Clause and other constitutional provisions (especially the Due Process Clause) critical to the constitutionality of New Deal-era legislation.[57]

The Court's decisions over the next five years repudiated virtually all of the limits the Court itself previously had imposed on what it now described as Congress's "plenary" Commerce Clause authority.[58] Specifically, the Court rejected its narrow definition of commerce that had excluded the manufacture and production of goods,[59] and expressly overruled its decision denying Congress the power to prohibit the interstate sale of goods made with child labor.[60] The Court also abandoned its prior distinction between direct and indirect effects on interstate commerce, a distinction the Court never had articulated clearly or applied consistently. More generally, the Court declared that it no longer would interpret the Tenth Amendment to limit the scope of Congress's power, and to invalidate laws otherwise within a Congress's enumerated powers: "The amendment states but a truism that all is retained which has not been surrendered."[61]

For more than half a century—from 1937 until 1995—the Court followed this broad, deferential interpretation of Congress's commerce power and routinely upheld federal statutes against charges that Congress had exceeded its power.[62] The broadest definition of Congress's commerce power came in the Court's 1942 decision in *Wickard v. Filburn*, which upheld Congress's power to limit a farmer's production of wheat for home consumption because of the possible cumulative effect that all farmers' home consumption of wheat would have on the interstate market for wheat.[63] Under *Wickard*, Congress could regulate particular instances of activity that occurred wholly

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56. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding on basis of commerce power); W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding on basis of due process).

57. "From 1937 on, the relationship among the branches of government shifted dramatically, as an era of 'judicial supremacy' gave way to deference by the Supreme Court to Congress." LEUCHTENBURG, *supra* note 30, at 219.

58. Wickard v. Filburn, 317 U.S. 111, 124 (1942); United States v. Darby, 312 U.S. 100, 115 (1941); *Jones & Laughlin Steel Corp.*, 301 U.S. at 37. Ackerman characterized the resulting "paradigm shift" as "a constitutional change of the most fundamental kind" and quoted Robert Jackson's description that the change "signifies the disintegration of '[t]he older *world* of laissez-faire.'" ACKERMAN, *supra* note 22, at 401 (emphasis in original).

59. *Jones & Laughlin Steel Corp.*, 301 U.S. at 38-41.

60. *Darby*, 312 U.S. at 116-17.

61. *Id.* at 124.

62. The Court found that Congress had exceeded its commerce power in only two cases between 1937 and 1995, and the Court subsequently overruled one of the two cases. *See* New York v. United States, 505 U.S. 144 (1992); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). These decisions did not limit the general scope of Congress's commerce power, but instead imposed special limits on how Congress could exercise the power as applied to the states. *See infra* notes 167-80, 220-29 and accompanying text.

63. *Wickard*, 317 U.S. at 127-28.

within one state and with only trivial interstate effect, based on Congress's assessment of the cumulative effect of all instances of that activity across the country.[64] During those decades, Congress relied, at least in part, on its commerce power to enact a broad array of laws generally accepted today as appropriately the subject of federal legislation. This includes the kinds of economic and social welfare laws the Court invalidated prior to 1937, such as minimum wage, maximum hour, collective bargaining, and child labor laws, as well as major civil rights, environmental, and criminal laws. For example, in 1971, the Court in *Perez v. United States* upheld Congress's authority to impose criminal penalties for purely intrastate extortionate credit transactions.[65] Most notably, the Court unanimously upheld Congress's power to enact the 1964 Civil Rights Act's ban on discrimination in places of public accommodation, because of the cumulative effect of discrimination by restaurants and hotels on interstate commerce, including interstate travel.[66]

B. Congress's Authority to Enforce the Reconstruction Amendments

The modern development of Congress's power to enact civil rights legislation pursuant to the Reconstruction Amendments also showcases nonjudicial actors as important participants in the development of constitutional meaning. Here, Congress provided a particularly strong voice. Professors Robert Post and Reva Siegel insightfully describe how, in the aftermath of *Brown v. Board of Education*,[67] Congress engaged in a kind of public debate with the Court about how to interpret the open-ended guarantees of the Reconstruction Amendments.[68] And to a significant extent the Court "invited Congress's participation in vindicating equality norms" during the

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64. The Court explained:

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.

Id. at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

65. 402 U.S. 146, 154 (1971) ("Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce.").

66. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). Justices Douglas and Goldberg concurred on the grounds that Section 5 of the Fourteenth Amendment provided Congress with the power to enact the 1964 Civil Rights Act. *Heart of Atlanta Motel*, 379 U.S. at 279-80 (Douglas, J., concurring); *id.* at 292 (Goldberg, J., concurring).

67. 397 U.S. 483 (1954).

68. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000). Of course, civil rights organizations and, more broadly, social movements also contributed greatly to the development of the meaning of the Equal Protection Clause. *See* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) (discussing the role of social movements—and especially the American feminist movement—in constitutional change).

period after the Court's decision in *Brown* and prior to the Rehnquist Court.[69]

All three Reconstruction Amendments adopted after the Civil War—the Thirteenth, Fourteenth, and Fifteenth Amendments—expressly empower Congress to enact legislation. They each declare, using very similar language, that Congress shall have the power to enforce the guarantees of the Amendments through appropriate legislation.[70] Most often at issue has been Congress's authority pursuant to Section 5 of the Fourteenth Amendment to enforce Section 1's guarantee that no state shall deny any person the equal protection of the laws. A recurring set of interpretive issues concerns the scope of Congress's Section 5 enforcement authority. For example, may Congress enact legislation premised on a view of the substantive meaning of the guarantees of the Fourteenth Amendment that is more protective of individual rights than the Court's interpretations, adopted in the course of judicial enforcement of those provisions? A related question: apart from any authority to define the scope of protected rights, how broad is Congress's power to enforce judicially recognized rights through legislative protections that go beyond what the courts would order as judicial remedies (that is, how far may Congress go to remedy or prevent what the Court would agree are constitutional violations)?

On relatively rare but significant occasion, Congress has legislated based on a constitutional interpretation in direct conflict with the Court's declared view, as the New Deal Congress did with ultimate success. Congress's claim to some measure of interpretive independence regarding the Reconstruction Amendments gains added strength from the constitutional text's conferral on Congress of "enforcement" authority—indeed, Congress is the only entity textually charged with enforcing the Reconstruction Amendments. During the 1960s and 1970s, as the Court struggled to define the contours of the substantive guarantees of the Reconstruction Amendments, Congress enacted civil rights legislation premised on interpretations more protective of rights than the Court's, or before the Court had adopted any view.[71] Such laws include:

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69. Post & Siegel, *supra* note 68, at 446.

70. The Thirteenth Amendment prohibits slavery and involuntary servitude and, in Section 2 provides "Congress shall have the power to enforce this article by appropriate legislation." U.S. CONST. amend. XIII, § 2.

Section 1 of the Fourteenth Amendment contains many substantive guarantees, including "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws," *id.* amend. XIV, § 1, and Section 5 provides, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." *Id.* amend. XIV, § 5.

The Fifteenth Amendment provides that the right of citizens to vote shall not be denied or abridged by the United States or any state on account of race, color, or previous condition of servitude, *id.* amend. XV, § 1, and in Section 2 provides, "The Congress shall have the power to enforce this article by appropriate legislation." *Id.* amend. XV, § 2.

71. The Court's plurality opinion in *Frontiero v. Richardson* considered Congress's legislative treatment of sex discrimination relevant to the level of protection the Court should afford women pursuant to the Equal Protection Clause:

> We might also note that, over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications. In Tit. VII of the Civil Rights Act of 1964, for example, Congress expressly declared that no employer, labor union, or other organization subject to the provisions of the Act shall discriminate against any individual on the basis of "race, color, religion, sex, or national origin." Similarly, the Equal Pay Act of 1963 provides that no employer . . . "shall

the Equal Pay Act of 1963,[72] the Civil Rights Act of 1964,[73] the Voting Rights Act of 1965,[74] the Equal Employment Opportunity Act of 1972,[75] and the Pregnancy Discrimination Act of 1978.[76]

The ways in which the Rehnquist Court's recent cases have narrowed Congress's powers under the Reconstruction Amendments are less immediately apparent and more complex than its changes in Commerce Clause doctrine, though the implications are at least as profound. First, as Professors Post and Siegel's compelling account demonstrates, the Court's Section 5 precedent alone does not fully convey the extent of the Court's reliance on Congress to help define the meaning of the guarantee of equal protection. Congress assisted the Court both by helping to secure public support of then-controversial constitutional interpretations and also by translating the public's view of what equal protection required.[77] Yet when the Court upheld landmark civil rights legislation, it relied instead on Congress's commerce power,[78] thereby obviating

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> discriminate . . . between employees on the basis of sex." And § 1 of the Equal Rights Amendment, passed by Congress on March 22, 1972, and submitted to the legislatures of the States for ratification, declares that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex." Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration.

411 U.S. 677, 687-88 (1973) (Brennan, J., plurality opinion) (footnotes omitted); *see also* Post & Siegel, *supra* note 68, at 520 (discussing *Frontiero*).

72. Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206d (2000)).

73. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000a-h (2000)).

74. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973 (2000)).

75. Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2000)).

76. Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e (2000)).

77. Post & Siegel, *supra* note 68, at 446 ("[T]he representative branches of government were an important resource for the Court as it struggled to learn from and speak to the American people about the meaning of the Fourteenth Amendment's guarantee of 'equal protection of the laws.'").

78. Congress enacted the Civil Rights Act of 1964 as an exercise of both its commerce power and its Section 5 authority, but a majority of Justices on the Court upheld the law on the basis of the commerce power alone, reserving the Section 5 issue:

> Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone.

Heart of Atlanta Motel v. United States, 379 U.S. 241, 250 (1964). The Court achieved unanimity in upholding the statute with two Justices (Douglas and Goldberg) concurring on the grounds that they believed Section 5 provided the more appropriate source of authority. *Id.* at 279 (Douglas, J., concurring); *id.* at 292 (Goldberg, J., concurring). Post and Siegel write:

> [A]lthough the Court was cautious about attributing Congress's power to prohibit discrimination by private actors to Congress's power to enforce the Fourteenth Amendment . . . it was not in the least ambivalent about the larger point, which was that Congress had authority to enact legislation applying antidiscrimination norms to transactions between private parties.

the need to define the extent of Congress's Section 5 authority (and, more salient to the Court at the time, to reconsider the state action requirement of the *Civil Rights Cases* of 1883).[79] Only since 1995 has the Rehnquist Court's expansion of sovereign immunity and new limits on Congress's commerce power required the Court to consider Section 5 separately as a source of authority for civil rights legislation.[80] Moreover, for Congress to act on a constitutional view that differs from the Court's view may threaten (or at least seem to threaten) judicial power, and the Justices (even those who support expansive interpretations of congressional power) may have a tendency to overprotect the Court's institutional prerogatives. Finally, a related point: the pre-Rehnquist Court's Section 5 doctrine was not as uniform and coherent as was its Commerce Clause doctrine, hence the doctrinal changes appear less extreme.

Even with these qualifications, at the time Reagan took office, the Court's view of Section 5 authority was substantially broader than the current Court's view and at least seemed to allow Congress to define the scope of rights more expansively than the Court's interpretations. Most significant is the Court's 1966 decision in *Katzenbach v. Morgan* upholding section 4(e) of the Voting Rights Act of 1965.[81] Section 4(e) prohibited the states from using an English literacy test to deny the right to vote to anyone who had completed the sixth grade in a school in Puerto Rico where the instruction was in Spanish.[82] Congress sought in particular to override a New York statute that disenfranchised Puerto Ricans who were literate in Spanish but not English.[83] The Court several years earlier had held in *Lassiter v. Northampton County Board of Elections* that the use of an English literacy test as a requirement for voting did not violate Section 1's guarantee of equal protection.[84] Relying on *Lassiter*, the State of New York argued in *Katzenbach* that Congress's Section 5 authority to enforce the Fourteenth Amendment did not include the power to determine, independent of the Court, the scope of the Amendment's substantive guarantees, and in effect overrule the Supreme Court.[85] Under this view, because the Court had determined that the use of literacy tests did not violate the Fourteenth Amendment, Congress could not prohibit their use.

The *Katzenbach* Court upheld section 4(e) and rejected New York's argument, which the Court said "would confine the legislative power . . . to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the 'majestic generalities'" of the Amendment's substantive

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Post & Siegel, *supra* note 68, at 494-95.

79. 109 U.S. 3 (1883). In this and other early cases, the Court was quite hostile to Congress's authority to enforce the recently ratified Reconstruction Amendments.

80. Under the Court's rulings since 1996, Congress now may abrogate states' sovereign immunity, and therefore make available meaningful remedies through private suits for damages, only when it legislates pursuant to the Reconstruction Amendments (and not pursuant to its Article I powers, including its commerce power). Seminole Tribe v. Florida, 517 U.S. 44 (1996) (in federal court); Alden v. Maine, 527 U.S. 706 (1999) (in state court).

81. 384 U.S. 641 (1966).

82. *See id.* at 643 n.1 (quoting section 4(e) of the Voting Rights Act of 1965).

83. *Id.* at 645 n.3.

84. 360 U.S. 45 (1959).

85. *Katzenbach*, 384 U.S. at 648.

guarantees.[86] The Court instead endorsed a broad view of Congress's enforcement authority along two distinct lines. First, using a very deferential standard of review, the Court held that Congress reasonably could have decided to remove this obstacle to voting as a measure to remedy other forms of discrimination the Court would find unconstitutional—in particular, to give Puerto Ricans in New York enhanced political power as an aid to obtaining nondiscriminatory treatment in public services, such as housing and education.[87] Even more broadly, the Court also found that Congress possessed "a specially informed legislative competence" and could have determined that, in the circumstances addressed by section 4(e), New York's literacy requirement violated the equal protection clause of the Fourteenth Amendment.[88]

Justice Harlan, writing for two Justices in dissent, described the majority's approach as giving Congress "the power to define the *substantive* scope of the Amendment," which was a judicial question for the Court, not Congress, to decide.[89] The dissent also raised the concern that, were it otherwise, just as Congress could recognize new rights, it could violate rights recognized by the Court by enacting laws premised on a less expansive view of equal protection or due process.[90] The majority responded that Congress's Section 5 authority to "enforce" does not include the authority "to restrict, abrogate, or dilute" constitutional guarantees.[91] The majority's approach is commonly described as a "one-way ratchet" under which Congress may enforce the Amendment in ways that are more, but not less, protective of rights.

The Court similarly has upheld laws against challenges that they exceeded Congress's enforcement authority under Section 2 of the Fifteenth Amendment[92] by seeking to redefine, rather than enforce, protected rights. In 1980, in *City of Rome v.*

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86. *Id.* at 648-49.

87. *Id.* at 652.

88. *Id.* at 655-56.

> Here again, it is enough that we perceive a basis upon which Congress might predicate a judgment that the application of New York's English literacy requirement to deny the right to vote to a person with a sixth grade education in Puerto Rican schools in which the language of instruction was other than English constituted an invidious discrimination in violation of the Equal Protection Clause.

Id. at 655.

89. *Id.* at 668 (Harlan, J., dissenting) (emphasis in original).

90. "In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve." *Id.* (Harlan, J., dissenting). On the alternative grounds for the majority's conclusion, the dissent conceded that Congress's determinations about relevant "legislative facts," such as the extent of discrimination, were "entitled to due respect" and that even absent such determinations, a simple "legislative announcement" that a state law violated the guarantee of equal protection "is of course entitled to the most respectful consideration, coming as it does from a concurrent branch and one that is knowledgeable in matters of popular political participation." *Id.* at 668-70 (Harlan, J., dissenting).

91. *Id.* at 651 n.10.

92. "[T]he nature of the enforcement powers conferred by the Fourteenth and Fifteenth Amendments has always been treated as coextensive." City of Rome v. United States, 446 U.S. 156, 207 n.1 (1980) (Rehnquist, J., dissenting).

United States, the Court upheld a provision of the Voting Rights Act of 1965 that prohibited certain voting practices that had a discriminatory racial impact.[93] The Court held that, even on the assumption that only purposeful discrimination violated the Fifteenth Amendment, "Congress could rationally have concluded that . . . it was proper to prohibit changes that have a discriminatory impact."[94] Then-Justice Rehnquist dissented and described the law as a congressional usurpation of judicial power,[95] grounds similar to those the current Court cites in support of its new limitations on congressional power.

The Court's 1970 ruling in *Oregon v. Mitchell*, though, did suggest some limits on Congress's power. On the one hand, the Court unanimously upheld a nationwide five-year suspension of the use of literacy tests as a prerequisite for voting,[96] again despite the Court's ruling that literacy tests were not unconstitutional on their face.[97] And yet, by a vote of five-to-four, the Court found that Congress had exceeded its enforcement authority in requiring states to allow anyone eighteen or older to vote in state or local elections, though Congress did have the power to mandate this age for federal elections.[98] The Court lacked a majority rationale for this holding, which was "the only authoritative Supreme Court case from 1937 to 1987 to hold an act of Congress unconstitutional based on a lack of enumerated power."[99]

Finally, in what has been described as perhaps the Court's "most expansive recognition of congressional Reconstruction power,"[100] the Court in 1968 broadly construed Congress's power to enforce the Thirteenth Amendment.[101] The Court upheld a statute, enacted in its original form in 1866, that prohibited "*all* racial discrimination, private as well as public, in the sale or rental of property."[102] In enacting this statute, Congress prohibited forms of racial discrimination that the Court would not itself find violative of Section 1's prohibition on slavery and involuntary

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93. *Id.* at 177.

94. *Id.* (footnote omitted) ("Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.").

95. "Neither reason nor precedent supports the conclusion that here it is 'appropriate' for Congress to attempt to prevent purposeful discrimination by prohibiting conduct which a locality proves is *not* purposeful discrimination." *Id.* at 214 (Rehnquist, J., dissenting) (emphasis in original).

> Thus, the result of the Court's holding is that Congress effectively has the power to determine for itself that this conduct violates the Constitution. This result violates previously well-established distinctions between the Judicial Branch and the Legislative or Executive Branches of the Federal Government. See United States v. Nixon, 418 U.S. 683 (1974); Marbury v. Madison, 1 Cranch 137 (1803).

Id. at 211 (Rehnquist, J., dissenting).

96. Oregon v. Mitchell, 400 U.S. 112, 118 (1970).

97. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959).

98. *Id.* at 118.

99. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS 511 (4th ed. 2000).

100. *Id.* at 503.

101. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968).

102. *Id.* at 413 (emphasis in original).

servitude.[103] The Court nevertheless held that Section 2, which uses language almost identical to the enforcement provisions of the Fourteenth and Fifteenth Amendments, confers on Congress the power "rationally to determine what are the badges and incidents of slavery."[104]

The Court's opinions offered only minimal analysis of why and when Congress could enforce the Reconstruction Amendments to provide greater protection of rights than the Court would provide in the absence of legislation. But the Court's willingness to defer to Congress's enforcement efforts inspired a rich academic literature. In one notable early article, Professor Lawrence Sager supported an active role for Congress in both the interpretation and enforcement of the substantive guarantees of the Reconstruction Amendments.[105] Sager premised his theory on a recognition that the federal judiciary sometimes declines to uphold constitutionally based claims, not because of its reading of the relevant constitutional provision, but because of "'institutional' concerns such as judicial competence and federalism."[106] When the Court exercises restraint due to institutional concerns, the by-product is what Sager terms "'underenforced' constitutional norms," norms that remain legally valid and enforceable by Congress despite judicial nonenforcement.[107] Congress still is bound by such norms up to their conceptual limits, and must take an active role in determining the parameters of those limits.[108] Congress thus is empowered, when necessary fully to enforce constitutional norms, to prohibit state activity that the Court would not itself find unconstitutional.[109]

III. THE REAGAN REVOLUTION

Thus, when Ronald Reagan took office in 1981, the Court interpreted congressional power as subject to few judicial constraints in the interest of state sovereignty. Just as President Roosevelt had publicly challenged the Court's narrow interpretation of the Commerce Clause in the years before 1937, so too President Reagan strongly and openly opposed the Court's then-broad and deferential view of congressional power. Moreover, both President Roosevelt and Congress had established that the political branches could effectively contribute to the development of constitutional meaning.

A hallmark of Reagan's presidency was his commitment to transforming the role of

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103. U.S. CONST. amend. XIII, § 1.

104. *Jones*, 392 U.S. at 440; *see* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 748, 822 (1999) ("These words [of Section 2 of the Thirteenth Amendment] are *in pari materia* with the words of Section 5 of the Fourteenth Amendment. A very powerful intratextual presumption arises that these two parallel clauses must be interpreted in parallel fashion.").

105. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

106. *Id.* at 1212.

107. *Id.* at 1213.

108. *See id.* at 1227.

109. *See id.* at 1235. According to Sager, Congress's authority to act in this manner extends only to instances where the Court has declined to enforce a norm due to "institutional" constraints. If the Court has rendered an "analytical" judgment—that is, one based on a reading of the substantive limits of the constitutional provision at issue—then Congress must view that judgment as establishing the legal limits of such provision. *See id.* at 1217-18, 1241.

government in the United States: to reduce the size and influence of the federal government, to return significant power to the states, and to reverse the so-called "activism" of the federal courts. In his First Inaugural Address, President Reagan declared:

> It is my intention to curb the size and influence of the Federal establishment and to demand recognition of the distinction between the powers granted to the Federal Government and those reserved to the States or the people. All of us need to be reminded that the Federal Government did not create the States; the States created the Federal Government.[110]

Indicative of the depth of his commitment and willingness to use the powers of the presidency to further his vision of federalism, President Reagan in October of 1987 issued an executive order that set forth federalism principles to guide every action of the executive branch.[111]

This much about the Reagan presidency is generally known. Indeed, at the heart of our national understanding of Reagan's legacy lies his significant success in changing at least public discourse about the role of government. Although Reagan was not successful in actually reducing the size of the national government,[112] elected officials from both political parties continue to be influenced by Reagan's rhetoric about federalism and the role of government. President Bill Clinton provided one strong indication of Reagan's success in this regard when in his 1996 State of the Union address he declared "the era of big government is over," in connection with his support for policies such as sweeping reform (including reduction) of public welfare programs.[113]

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110. President Ronald Reagan, Inaugural Address, PUB. PAPERS 1, 2 (Jan. 20, 1981). Reagan similarly told the National Conference of State Legislatures that a goal of his administration was "to restore the constitutional symmetry between the central Government and the States and . . . reestablish the freedom and variety of federalism." President Ronald Reagan, Remarks in Atlanta, Georgia, at the Annual Convention of the National Conference of State Legislatures, PUB. PAPERS 679, 683 (July 30, 1981). "This Nation has never fully debated the fact that over the past 40 years, federalism—one of the underlying principles of our Constitution—has nearly disappeared as a guiding force in American politics and government." *Id.* Reagan announced that he "intends to initiate such a debate." *Id. See generally* FRIED, *supra* note 18, at 50-52, 186-88, 198 (discussing the strong role of federalism concerns in the Reagan administration); DOUGLAS W. KMIEC, THE ATTORNEY GENERAL'S LAWYER: INSIDE THE MEESE JUSTICE DEPARTMENT 17-46, 132-51 (1992) (same).

111. Exec. Order No. 12,612, 3 C.F.R. 252 (1987) [hereinafter Reagan Exec. Order], *repealed by* Exec. Order No. 13,132, 3 C.F.R. 206 (1999), *reprinted in* 5 U.S.C. § 601 (2000) [hereinafter Clinton Exec. Order].

112. Martin Tolchin, *Paradox of Reagan Budgets: Austere Talk vs. Record Debt*, N.Y. TIMES, Feb. 16, 1988, at A1 (federal civilian work force grew under Reagan, and federal government created more new debt than under all previous Presidents combined).

113. When President Clinton's statement is viewed in context, though, it is clear that his vision of government differed significantly from President Reagan's.

> The era of big government is over. But we cannot go back to the time when our citizens were left to fend for themselves. Instead, we must go forward as one America . . . . I believe our new, smaller Government must work in an old-fashioned American way, together with all of our citizens through State and

Less widely appreciated is the extraordinary extent to which Reagan sought not only to advance his vision of government through policy choices and political discourse, but also to enshrine it in constitutional doctrine. In the Reagan administration's view, not only should Congress and the President choose policies and approaches that favor state over federal control, in many instances the Constitution should be reinterpreted to prohibit the federal government from acting. Congress and the President should consider themselves constitutionally bound by narrow views of federal power, and the courts should aggressively strike down as unconstitutional federal action that intrudes on state sovereignty, as broadly redefined by the Reagan administration.

President Reagan's federalism executive order contained suggestions that his administration believed its federalism priorities were at least in part constitutionally mandated. Among the directives: "Federal action limiting the policymaking discretion of the States should be taken only where [among other things] constitutional authority for the action is clear and certain,"[114] and "[c]onstitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States."[115] The order left unanswered critical questions about how the applicable provisions of the Constitution should be interpreted, though the use of "clear and certain" signaled a narrow view of federal power.[116]

The Reagan administration provided clear direction to executive branch officers concerning how to read constitutional provisions relevant to federal power—as well as on many other legal issues—in a series of reports issued by the Department of

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> local governments, in the workplace, in religious, charitable and civic associations. Our goal must be to enable all our people to make the most of their own lives, with stronger families, more educational opportunity, economic security, safer streets, a cleaner environment in a safer world.

President William J. Clinton, Address Before a Joint Session of Congress on the State of the Union, 1 PUB. PAPERS 79 (Jan. 23, 1996).

114. Reagan Exec. Order, *supra* note 111, § 3(b).

115. *Id.* § 3(b)2. The order also provided: "In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level." *Id.* § 2(i).

116. President Clinton replaced President Reagan's federalism executive order with one of his own. Clinton actually issued two executive orders; he replaced the first, Executive Order No. 13,083, 3 C.F.R. 146 (1998), *reprinted in* 5 U.S.C. § 601 (2000), after it met resistance from state and local officials. *See* Jennie Holman Blake, Note, *Presidential Power Grab or Pure State Might? A Modern Debate Over Executive Interpretations on Federalism*, 2000 BYU L. REV. 293, 294. Professor John O. McGinnis concluded that President Clinton's final federalism executive order "does not differ substantially from President Reagan's" version. John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 923 (2001); *see also id.* at 929 n.135. Clinton's order, however, made at least two significant, if subtle changes: it dropped the "clear and certain" constitutional authority standard for federal action from section 3(b) and removed the presumption of state sovereignty from section 1(i). *Compare* Reagan Exec. Order, *supra* note 111, *with* Clinton Exec. Order, *supra* note 111. *See also* Blake, *supra*, app. B at 353.

Justice.[117] These reports, which were little noticed at the time and remain little examined, are extraordinary in several respects. First, their express independence from then-prevailing Supreme Court doctrine is striking. In effect, they constituted blueprints for what the Reagan administration believed the law should look like, as well as how the administration could go about changing the law. In addition, they are comprehensive in scope, detailing the administration's official positions on the most important legal issues of the day—issues such as abortion, affirmative action, and the rights of criminal defendants—and prominently featuring congressional power and state sovereignty among the issues targeted for change. Finally, the reports are remarkable for their success, particularly on issues of federalism, when measured against the Rehnquist Court's recent decisions.

President Reagan, of course, did not succeed as quickly and completely as had President Roosevelt. The state of Supreme Court doctrine regarding congressional power and state sovereignty when President Reagan left office in 1989 was not much changed. Indeed, from Reagan's perspective, the most significant change was for the worse: the Court's 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*,[118] which overruled *National League of Cities v. Usery*[119] and disavowed judicially imposed safeguards for state sovereignty.[120] It was not until 1995 that the Court began significantly limiting the scope of Congress's powers to legislate and expanding the scope of state sovereignty along the lines Reagan had advocated. Notwithstanding that delay, President Reagan's success in promoting his constitutional views has proven substantial, and may continue. I now will examine in greater detail Reagan's vision for transforming the law of federalism and congressional power, his use of judicial appointments to promote that vision, and the extent of his success.

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117. The Reagan administration further evidenced its constitutional views on federalism in a November 1986 inter-agency working group report:

> The nationalization of state sovereignty can be traced in large part to the way the Supreme Court and the Congress have applied and interpreted the Constitution .... Congress, through grasping extensions of the Necessary and Proper Clause, the Commerce Clause, and the spending power, has increased the size and extended the reach of the national government far beyond the scope of the national powers enumerated and fairly implied in the Constitution. The Supreme Court, however, through the power of constitutional interpretation, has been the dominant force in the decline of federalism, either by ratifying actions taken by the political branches of government or interpreting (in truth, amending) the Constitution so as to place limitations on the States not expressed in the Constitution itself.

THE WORKING GROUP ON FEDERALISM OF THE DOMESTIC POLICY COUNCIL, A REPORT ON THE STATUS OF FEDERALISM IN AMERICA 2 (1986) [hereinafter Working Group on Federalism]. Although, unlike the *Guidelines*, the working group report was not, and did not purport to be, an official statement of the administration's positions, it was highly influential and resulted in, among other things, President Reagan's issuance of the federalism executive order.

118. 469 U.S. 528 (1985).

119. 426 U.S. 833 (1976).

120. *See Garcia*, 469 U.S. at 552.

A. The Reagan Administration's Agenda for Constitutional Change

On issues of nonjudicial interpretation, President Reagan should be placed in history with the handful of past Presidents most renowned for promoting constitutional views independent from, and in conflict with, those of the courts: Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin D. Roosevelt.[121] Most prominently, Reagan's Attorney General, Edwin Meese III, who served from 1985 to 1988, sparked considerable controversy when in several speeches he advocated a strong presidential role in shaping constitutional meaning.

Attorney General Meese espoused many controversial positions concerning how the Constitution should be interpreted, including endorsement of a "Jurisprudence of Original Intention" to guide constitutional interpretation.[122] Meese also aroused concern with his views regarding who should interpret the Constitution. In a 1986 speech at Tulane Law School, Meese spoke of the distinction between the Constitution, "the instrument by which the consent of the governed . . . is transformed into a government,"[123] and constitutional law, "what the Supreme Court says about the Constitution in its decisions resolving the cases and controversies that come before it."[124] He criticized the Court for denying this distinction in dictum in *Cooper v. Aaron* that characterized the Court's decisions as themselves "the supreme law of the land."[125] Citing Abraham Lincoln's opposition to the *Dred Scott* decision, Meese explained that what follows from this distinction is that the Court is not the only interpreter of the Constitution. Officials in each of the three coordinate branches of government take an

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121. Many have written about the positions of Presidents Jefferson, Jackson, and Lincoln on presidential interpretative autonomy. *See, e.g.*, BREST ET AL., *supra* note 99, at 51-55, 211-13, 222-25; WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETATIVE AUTHORITY 41-44, 47-50, 71-73, 77-78 (Federalist Society ed., 1992); Kramer, *supra* note 29; Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 85-103 (1993).

122. In one particularly extreme application, Meese criticized the doctrine of incorporation. Citing a 1925 Supreme Court decision that made the guarantees of the First Amendment applicable to the states through the Fourteenth Amendment, *see* Gitlow v. New York, 268 U.S. 652 (1925), Meese stated, "nowhere else has the principle of federalism been dealt so politically violent and constitutionally suspect a blow as by the theory of incorporation." Speech Before the American Bar Association (July 9, 1985), *in* THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 1, 8 (Federalist Society ed., 1986) [hereinafter Speech Before the ABA]. Several months later, Justice John Paul Stevens noted that "no Justice who has sat on the Supreme Court during the past sixty years has questioned the proposition that the prohibitions against state action that are incorporated in the Fourteenth Amendment include the prohibitions against federal action that are found in the First Amendment." Speech Before the Federal Bar Association (Oct. 23, 1985), *in* THE GREAT DEBATE, *supra*, 27, 28. Justice William J. Brennan, Jr. said of those who adhere only to "what they call 'the intentions of the Framers:' [I]n truth it is little more than arrogance cloaked as humility." Speech to the Text and Teaching Symposium, Georgetown University (Oct. 21, 1985), *in* THE GREAT DEBATE, *supra*, 11, 14.

123. Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 981 (1987).

124. *Id.* at 982.

125. *Id.* at 987 (quoting Cooper v. Aaron, 358 U.S. 1, 18 (1958)). Meese noted in a footnote in the published version of his speech that his criticism was aimed at the dictum in *Cooper*, and not its holding, with which he agreed.

oath to uphold the Constitution and must interpret it.[126] Meese clearly had in mind interpretations by the President and Congress that were independent of and even contrary to the Court's decisions. He conceded that a constitutional decision of the Court is binding on the parties in a case "and also the executive branch for whatever enforcement is necessary."[127] He then continued, "[b]ut such a decision does not establish a supreme law of the land that is binding on all persons and parts of government henceforth and forevermore."[128] Meese cited, in addition to *Dred Scott* and *Plessy v. Ferguson*, what he viewed as unfair criticism of a judicial nominee for his vote as a state legislator to require the posting of the Ten Commandments in the public schools, despite a Supreme Court decision declaring a similar law unconstitutional.[129]

Meese's Tulane speech received considerable public attention, and also sparked academic debate over nonjudicial constitutional interpretation.[130] The public reaction was mixed: many accused Meese of threatening the rule of law and inviting chaos,[131] but Meese's views were defended even by some who typically disagreed with him,[132] and some expressions of concern seemed prompted, not only (or even primarily) by the content of his speech, but by the speaker's identity and his other actions and views.[133]

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126. "The Supreme Court, then, is not the only interpreter of the Constitution. Each of the three coordinate branches of government created and empowered by the Constitution—the executive and legislative no less than the judicial—has a duty to interpret the Constitution in the performance of its official functions." *Id.* at 985-86; *see also* Speech before the ABA, *supra* note 122, at 9 ("A constitution that is viewed as only what the judges say it is, is no longer a constitution in the true sense.").

127. Meese, *supra* note 123, at 983.

128. *Id.*

129. *Id.* at 988.

130. *See, e.g.*, Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 979 (1987); Symposium, *The Crisis in Legal Theory and the Revival of Classical Jurisprudence, Panel IV: The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988).

131. *See, e.g.*, Sanford Levinson, *Could Meese Be Right This Time?*, 61 TUL. L. REV. 1071 (1987) (citing various responses); Anthony Lewis, *Law or Power?*, N.Y. TIMES, Oct. 27, 1986, at A23; Stuart Taylor, Jr., *Liberties Union Denounces Meese*, N.Y. TIMES, Oct. 24, 1986, at A17; Stuart Taylor, Jr., *Meese Says Rulings By U.S. High Court Don't Establish Law*, N.Y. TIMES, Oct. 23, 1986, at A1. *But see* Editorial, *The Irrepressible Mr. Meese*, WALL ST. J., Oct. 29, 1986, at 28 (strongly defending the speech).

132. *See, e.g.*, Levinson, *supra* note 131, at 1075 ("As Lloyd Cutler, who was Jimmy Carter's White House counsel, noted, there was little in the speech with which Homer Cummings, F.D.R.'s Attorney General prior to the 1937 'revolution' in the Court, would have disagreed . . . ."); *id.* at 1078 ("Just as a stopped clock is right twice a day, so Attorney General Meese can be a source of insight."); Mark Tushnet, *The Supreme Court, The Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017, 1018 (1987) ("[F]or virtually all of the subjects it addressed, the speech was obviously correct, and for the rest, it was probably right.").

133. For example, the Reagan/Meese Department of Justice controversially had refused to comply with provisions of a federal statute—the Competition in Contracting Act—that it deemed unconstitutional. *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 14-15 (2000). *See generally id.* (discussing appropriate presidential responses to constitutionally suspect statutes).

The *Washington Post*, for example, entitled an editorial *Why Give That Speech?* and wrote that it was "the subtle, unspoken message it sent to listeners, that gives rise to legitimate concern and anger."[134] The public outcry led Meese several weeks later to issue what he called a clarification of his views, entitled *What I Meant*, but which actually in some respects constituted a backing down and change in views.[135] He stated there, for example, that Supreme Court decisions have "general applicability" and "are entitled to very high respect and consideration" by the other branches of government, and that it would be "highly irresponsible" for federal and state officials "not to conform their behavior to precedent."[136]

Meanwhile, largely unnoticed, lawyers at the Department of Justice were at work developing, consistent with Meese's call for interpretative independence in his initial Tulane speech, a set of comprehensive administration positions on a wide range of legal issues, many of which were at odds with Supreme Court doctrine. The Office of Legal Policy led this effort to develop an alternative vision of the law. "OLP," as it was known, "function[ed] as a policy development staff for the Department and undert[ook] comprehensive analyses of contemporary legal issues."[137]

While Meese served as Attorney General, OLP issued a series of reports that described and critiqued the state of the law in particular areas, offered the Reagan administration's views of the correct legal interpretations, and developed strategies for moving the law in the desired direction. These reports averaged well over one hundred pages each, and titles included: *Original Meaning Jurisprudence: A Sourcebook* (1987); *Redefining Discrimination: Disparate Impact and the Institutionalization of Affirmative Action* (1987); *Wrong Turns on the Road to Judicial Activism* (1987); *Justice Without Law: A Reconsideration of the 'Broad Equitable Powers' of the Federal Courts* (1988); and *Religious Liberty Under the Free Exercise Clause* (1986).

One publication in particular described in great detail the administration's positions on issues of federalism and congressional power (among other issues). The Justice Department issued *Guidelines on Constitutional Litigation* ("*Guidelines*") on February 19, 1988, as a litigation manual for government lawyers.[138] Each section analyzed the relevant judicial doctrine on a particular issue and set forth the Reagan administration's view of the correct interpretation of the law; each section concluded with lists of

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134. Editorial, *Why Give That Speech?*, WASH. POST, Oct. 29, 1986, at A18.

135. Edwin Meese III, *The Tulane Speech: What I Meant*, WASH. POST, Nov. 13, 1986, at A21, *reprinted in* 61 TUL. L. REV. 1003 (1987). Former Solicitor General Rex Lee, who served in the Reagan administration from 1981 to 1985, also wrote in support of a more modest reading of Meese's speech. Lee suggested that Meese's "unfortunate" use of examples that suggested a more "extreme" position—*Cooper v. Aaron* and President Lincoln—may be "attributable to an over-zealous speech writer." Rex E. Lee, *The Provinces of Constitutional Interpretation*, 61 TUL. L. REV. 1009, 1016 (1987).

136. Meese, *supra* note 135, at 1003-04.

137. GUIDELINES, *supra* note 20, at preface.

138. "Its purpose is to help ensure that principled and consistent positions are advocated by all Executive Branch litigators, that constitutional and statutory prescriptions are faithfully followed by the Executive Branch in making arguments, and that judicial policymaking is discouraged." *Id.* at 1. The *Guidelines* opened with a letter signed by Meese directing that "[t]he 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." *Id.* at preface.

Supreme Court decisions that OLP considered "consistent" and "inconsistent" with the administration's positions. The introduction stressed that the comprehensive guidelines detailed therein were not "mere suggestions" but "should presumptively be followed" and proposed departures cleared by supervisors.[139] The unmistakable premise of the *Guidelines* was that executive branch lawyers were to seek to advance the administration's understanding of the Constitution[140]—and not simply what the courts said the Constitution means[141]—even when at odds with "inconsistent" Supreme Court decisions.[142]

The *Guidelines* was comprehensive in its coverage and included issues that the Reagan administration viewed as priorities for constitutional change, as well as other issues, constitutional as well as statutory, frequently encountered by government litigators. A theme throughout was a concern that "activist," unelected judges were creating rights not properly found in the constitutional text or structure or original intent of the framers, such as the right to privacy and the rights of criminal suspects. Like many of the other OLP reports, the *Guidelines* sought to replace what the administration viewed as judicial activism with what Meese had described as a "Jurisprudence of Original Intention."[143] An early section directed government attorneys to interpret constitutional provisions based only on their "original meaning,"[144] and listed the following "Decisions Inconsistent With These Principles of Interpretation:"[145] *Griswold v. Connecticut*,[146] *Roe v. Wade*,[147] *Sherbert v. Verner*,[148] and *Miranda v. Arizona*.[149]

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139. *Id.* at 1.

140. The *Guidelines* acknowledged the difficulty of this task for government litigators in the lower federal courts, the principal audience for this particular report: "For that reason, many of these guidelines are expressed in terms of working to prevent the courts from compounding existing errors" and "laying the groundwork for making stronger appellate arguments." *Id.* at 3. "This focus does not, however, relieve government attorneys of their obligation to educate lower courts (thereby laying the groundwork for making stronger appellate arguments) on the original meaning of the relevant constitutional or statutory provision." *Id.*

141. "[T]he nostrum that 'the Constitution and statutes are what judges say they are' is true purely as a political matter—to ensure, at least short term, predictability and stability—and not as an ontological matter." *Id.* at 2.

142. *Id.* at 52, 58.

143. Speech Before the ABA, *supra* note 122, at 10.

144. GUIDELINES, *supra* note 20, at 3.

145. *Id.* at 8-10.

146. 381 U.S. 479 (1965) (invalidating state law that prohibited use of contraception by married couples as violative of the right to privacy).

147. 410 U.S. 113 (1973) (invalidating state law that prohibited abortion as violative of the Fourteenth Amendment). The *Guidelines* also cited as "inconsistent" with the Reagan administration's constitutional views the Court's reasoning in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), which recognized a right to be free from government-mandated sterilization. GUIDELINES, *supra* note 20, at 82.

148. 374 U.S. 398 (1963) (denial of unemployment benefits to an otherwise-qualified individual who refused to work on her Sabbath violated the First Amendment guarantee of the free exercise of religion).

149. 384 U.S. 436 (1966) (requiring police to advise suspects in custody of their rights before beginning interrogations). The Rehnquist Court reaffirmed *Miranda* in *Dickerson v.*

Regarding issues of governmental power, a thirty-four page section set forth "guidelines on respecting the limited power granted to the federal government."[150] As that title suggests, this section advocated increased respect for state sovereignty and the limited nature of the constitutional grants of power to Congress. Because this publication predates the Rehnquist Court's enforcement of new federalism limits, judicial precedent at the time did not support searching review of the sources of congressional power to enact legislation. Indeed, the *Guidelines* acknowledged that for half of a century, the courts rarely had found a federal statute beyond Congress's power to enact.[151] The Reagan administration sought to change the course of that history by developing an alternative vision of governmental power and encouraging courts to invalidate federal laws that did not comport with its view of congressional power. The Reagan Department of Justice did not create these positions out of whole cloth; the *Guidelines* drew heavily on the opinions of concurring and dissenting Justices—and especially then-Justice Rehnquist—whose views, though not endorsed by the Court at that time, since have been adopted by the five-Justice majority on the Rehnquist Court.[152]

United States, 530 U.S. 428 (2000).

150. GUIDELINES, *supra* note 20, at 36-69.

151. "As a matter of historical fact, during the last 50 years, very few federal statutes have been held unconstitutional because they were beyond the range of the powers delegated to Congress." *Id.* at 40 (citing 1 R. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 4.9 (1986)).

152. The Reagan administration's stance toward Congress as reflected in the *Guidelines*, it is worth noting, deviated significantly from executive branch practice. The *Guidelines* contradicted, and failed even to acknowledge, the Department of Justice's longstanding practice of defending acts of Congress against constitutional challenge whenever a reasonable argument could be made on their behalf. The executive branch thus traditionally has not sought to advance its own constitutional views in this context.

Although administrations have differed slightly in how they articulated their responsibility to defend federal statues, almost all recognized only two situations in which they would not defend a federal statute. President Gerald Ford's then-Assistant Attorney General Rex Lee described those exceptions as (1) where "upholding the statute would have the effect of limiting the President's constitutional powers or prerogatives," and (2) where "the Attorney General believes, not only personally as a matter of conscience, but also in his official capacity as the Chief Legal Officer of the United States, that a law is so patently unconstitutional that it cannot be defended." *Representation of Congress and Congressional Interests in Court: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong., 5-6 (1975-1976)(statement of Rex Lee, Assistant Attorney General); *see also* The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) (memorandum from Attorney General Benjamin R. Civiletti identifying similar exceptions); Constitutionality of Legislation Withdrawing Supreme Court Jurisdiction to Consider Cases Relating to Voluntary Prayer, 6 Op. Off. Legal Counsel 13, 26 (1982) ("It is settled practice that the Department of Justice must and will defend Acts of Congress except in the rare case when the statute either infringes on the constitutional power of the Executive or when prior precedent overwhelmingly indicates that the statute is invalid.").

The *Guidelines*, in sharp contrast, directed government litigators not to defend statutes that were inconsistent with the Reagan administration's narrow view of congressional power: "If the statute does not satisfy these requirements, the statute is unconstitutional and should not be defended." GUIDELINES, *supra* note 20, at 41. The *Guidelines* contained just a single sentence of

The Reagan administration ultimately succeeded in advancing its views, not through litigation—the specific means targeted by the *Guidelines*—but through judicial appointments. The use of judicial selection as a means of promoting constitutional change, as I will discuss, was the subject of a separate Department of Justice report.[153] The *Guidelines*, though, comprises the administration's most comprehensive articulation of its constitutional vision for the law of congressional power and federalism, with separate sections devoted to the Commerce Clause, state sovereignty, and the Reconstruction Amendments.

1. Commerce Clause

A section on Congress's powers pursuant to the Commerce Clause acknowledged that, at that time (1988), the Court interpreted the scope of congressional commerce power to be "very broad."[154] The *Guidelines*, though, went on to suggest possible avenues for limitations on the power: "Though very broad, the federal power under the commerce clause nevertheless is subject to important limitations . . . ."[155] Because the Court had interpreted "commerce" broadly,[156] the "real limits" must be found in the phrase "among the several states."[157] By limiting Congress's commerce power to "*among* the several states," the Constitution "contemplates some residual power over commerce not granted to Congress."[158]

The *Guidelines* especially took issue with the Court's then-longstanding view that Congress may regulate activities that, taken alone, do not substantially affect interstate commerce, but when viewed in the aggregate, would have such effect. The *Guidelines* rejected this aspect of the Court's doctrine as "untenable" because "at its extreme, this approach could swallow the whole field of commerce, leaving nothing beyond the reach of the commerce power."[159]

This section's list of "Decisions Inconsistent with These Guidelines" included two Supreme Court decisions. First, the Court's 1942 decision in *Wickard v. Filburn*:[160] *Wickard* "stretches the power of Congress . . . to the breaking point,"[161] in allowing congressional regulation of a farmer's production of wheat for home consumption because of the cumulative effect on interstate commerce of all such home consumption. Second, the Court's 1971 ruling in *Perez v. United States*, in which the Court upheld

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caution in the other direction: "questionable cases should continue to be resolved in favor of constitutionality." *Id.* Especially when read in context, this standard directs litigators to give far less deference to Congress than past executive branch policy and practice.

153. *See* THE CONSTITUTION IN THE YEAR 2000, *supra* note 21.

154. *Id.* at 46.

155. *Id.* at 46-47.

156. The *Guidelines* cautioned, however, "[t]his is not to suggest that the range of activities that constitute commerce is unlimited." *Id.* at 47.

157. *Id.* at 47-48.

158. *Id.* at 49 (emphasis in original).

159. *Id.* The Working Group on Federalism put it more bluntly: "Perhaps the greatest blow to federalism has come from the Congress' and Supreme Court's interpretation of the Commerce Clause." Working Group on Federalism, *supra* note 117, at 2.

160. 317 U.S. 111 (1942).

161. GUIDELINES, *supra* note 20, at 54.

Congress's authority to regulate extortionate credit transactions (i.e., loansharking) because they, "though purely intrastate, may in the judgment of Congress affect interstate commerce:"[162] "[T]he dissent's general analysis is clearly right" in its view that congressional power should exist here only if "loan sharking was an activity with interstate attributes that distinguished it in some substantial respect from other local crime."[163]

The *Guidelines* relied on then-Justice Rehnquist's 1981 concurrence in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[164] in which he disavowed the Court's broad definition of Congress's commerce power and deferential stance toward Congress. It endorsed Rehnquist's proposed limits, including (1) the effect of activities on interstate commerce must be "substantial," (2) congressional determinations and findings regarding interstate effects are reviewable by courts, and (3) "[s]ome activities may be so private or local in nature that they simply may not be *in* commerce."[165] This section concluded by directing government lawyers not to defend regulatory statutes pursuant to Congress's commerce power "where Congress has not sufficiently established a connection between the subject to be regulated and interstate or foreign commerce."[166]

2. State Sovereignty

A closely related question, necessary for a complete picture of the scope of Congress's commerce power, is whether the Constitution imposes any additional limits on Congress's ability to exercise its commerce power when the states are among the subjects of the regulation. While Reagan held office, the Court actually removed a federalism-based judicial constraint on congressional power. In 1985,[167] the Court overruled *National League of Cities v. Usery*,[168] the only case since 1937 in which it had relied on the Tenth Amendment to invalidate a federal statute. Some additional background here is useful.

In 1976, a divided five-to-four Court held in *National League of Cities* that Congress had violated the Constitution by applying the minimum wage and maximum hour requirements of the Fair Labor Standards Act to state and local employees. The Court emphasized that the challenge did not question the Court's decisions defining the breadth of Congress's commerce power, which empowered Congress to impose the requirements on private employers. But, the Court found, when Congress exercises otherwise plenary powers against the states, "there are limits upon the power of Congress to override state sovereignty,"[169] limits that are made express in the Tenth Amendment. The Court struck down the provisions as applied to the states, because they "operate to directly displace the States' freedom to structure integral operations in

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162. 402 U.S. 146, 154 (1971).

163. GUIDELINES, *supra* note 20, at 52.

164. 452 U.S. 264, 307 (1981).

165. GUIDELINES, *supra* note 20, at 48 (quoting *Hodel*, 452 U.S. at 310 (Rehnquist, J., concurring) (emphasis in original)).

166. *Id.* at 49.

167. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

168. 426 U.S. 833 (1976).

169. *Id.* at 842.

areas of traditional governmental functions."[170]

The Court never again relied on the "traditional governmental function" test to invalidate a federal law, and in 1985, Justice Blackmun, the critical fifth vote in *National League of Cities*, provided the fifth vote to overrule that case in *Garcia v. San Antonio Metropolitan Transit Authority*. Writing for the majority, Justice Blackmun explained that the "traditional governmental function" test had proven unworkable in practice, and inconsistent with established principles of federalism.[171] More generally, citing the "elusiveness of objective criteria for 'fundamental' elements of state sovereignty,"[172] the Court disavowed its earlier attempt to impose judicial limits on congressional power and concluded that the political processes and Congress—not the courts—provide the principal safeguards for state sovereignty.[173] Justice Rehnquist wrote a separate one-paragraph dissent to express confidence that the views of the four dissenting Justices would "in time again command the support of a majority of this Court."[174]

The Reagan administration's White House Working Group on Federalism agreed with Rehnquist and denounced *Garcia* and recommended that the Department of Justice seek a case in which to urge the Court to overrule it:[175] "[T]he nadir in the decline of federalism was reached last year in *Garcia v. San Antonio Metropolitan Transit Authority*."[176] Several years later, though, the *Guidelines* notably did not call for the overruling of *Garcia* or include it on the list of "Decisions Inconsistent With This Guideline."

Instead, the *Guidelines* urged an extremely strained reading of *Garcia* that would greatly limit the extent to which it would serve as on obstacle to judicial promotion of state sovereignty. The *Guidelines* conceded that *Garcia* stressed the primacy of the political processes in protecting state sovereignty, but stressed this part of the opinion was only dictum. "We do not read the opinion as saying, however, that state protection is to be found *only* in the deliberations of Congress, which shall be free from judicial review in all cases."[177] Such a reading "cannot be squared with the Constitution."[178]

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170. *Id.* at 852. Justice Blackmun, who provided the fifth vote for the majority, concurred to say that he joined the Court's opinion with the understanding that it essentially endorsed a balancing test, so that federal power would exist, for example, in areas such as environmental protection, where state compliance would be essential. *Id.* at 856 (Blackmun, J., concurring).

171. *Garcia*, 469 U.S. at 531.

172. *Id.* at 548.

173. "State sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552. "[T]he principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action." *Id.* at 556. "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result." *Id.* at 554.

174. *Id.* at 580 (Rehnquist, J., dissenting).

175. Working Group on Federalism, *supra* note 117, at 10.

176. *Id.* at 3.

177. GUIDELINES, *supra* note 20, at 56 (emphasis in original). Notably, in the *Garcia* case itself, Reagan's Solicitor General had urged the Court not to overrule *National League of Cities*, but also had argued for a limited reading that would have allowed the application of federal minimum wage requirements to public employees of the San Antonio mass transit system. *See*

Government attorneys were directed to argue that, notwithstanding *Garcia*'s dictum to the contrary, the federal courts have a duty to enforce the constitutional guarantees of state sovereignty.[179] Again, the Department of Justice relied on the limited nature of the Constitution's delegation of federal power and the Tenth Amendment for its view that "the greater number of all governmental powers . . . were 'reserved to the States, respectively, or to the people.'"[180] The *Guidelines*, though, provided little specific guidance regarding the kinds of limits courts should impose on congressional power in the furtherance of state sovereignty.

3. Reconstruction Amendments

The section of the *Guidelines* most disdainful of the Court's precedent regarding federal power addressed Congress's powers under the enforcement clauses of the Reconstruction Amendments, and in particular Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment. The section opened with the declaration that, beginning in 1966, the Court had taken a wrong turn:

> While the obvious focus of these provisions is upon a remedial authority to "enforce" the substantive provisions of the amendments, in a series of cases since 1966 the Supreme Court has suggested that the scope of Congress's enforcement powers might extend beyond such remedial authority and enable the Congress to define, beyond their original meaning, the substantive guarantees and applicability of these amendments.[181]

The Reagan Justice Department interpreted Congress's textually assigned enforcement powers as more limited and as not including any role in defining the substantive meaning of the constitutional guarantees contained in the first sections of the Reconstruction Amendments. The *Guidelines* warned of the "extreme consequences" for "the federalist system"[182] of the Court's suggestion that Congress could in some instances enact legislation premised on its own interpretations of provisions such as the guarantees of equal protection and due process: Congress would be empowered "virtually at will" to set "uniform, national policies in a wide variety of areas."[183] Specially singled out for derision was what the *Guidelines* described as the Court's "remarkable 'ratchet' theory" in *Katzenbach v. Morgan*,[184] "by which the Congress is apparently able only to modify the particular provision by reading such

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Brief for the Secretary of Labor & Supplemental Brief for the Secretary of Labor, *Garcia*, 469 U.S. 528 (Nos. 82-1913, 82-1951); *cf. supra* note 152 (discussing the longstanding Department of Justice practice of making all reasonable arguments in defense of acts of Congress against constitutional challenge).

178. GUIDELINES, *supra* note 20, at 56.

179. "In litigation involving federal action affecting the states, government attorneys should argue that the Constitution protects the sovereignty of the states and that the federal courts have a duty to enforce the Constitution in this regard." *Id.* at 54.

180. *Id.* (quoting U.S. CONST. amend. X).

181. *Id.* at 56.

182. *Id.*

183. *Id.* at 57.

184. 384 U.S. 641 (1966).

provision in a more expansive manner."[185] The *Guidelines* also emphasized the importance of limiting the protections of the Fourteenth and Fifteenth Amendments to violations by state actors.[186]

At the same time it criticized the Court for allowing Congress a role in defining the meaning of the Reconstruction Amendments, the executive branch was seeking through the *Guidelines* to substitute its own interpretations of the Amendments for those of the Court.[187] Among the Court's decisions the *Guidelines* listed as "inconsistent" with the Reagan administration's views were *Katzenbach v. Morgan*, *Oregon v. Mitchell*, and *City of Rome v. United States*.[188] The *Guidelines* also rejected the suggestion of six Justices in *United States v. Guest*[189] that Congress's power under Section 5 of the Fourteenth Amendment was not limited to state action, but could extend to conspiracies by private persons to interfere with the exercise of Fourteenth Amendment rights.[190] Interestingly, the *Guidelines* do not challenge, or even mention, the Court's decision in *Jones v. Alfred H. Mayer Co.*[191] finding broad congressional power pursuant to the Thirteenth Amendment.

The call for more aggressive judicial review of acts of Congress contrasts with the usual criticism of the *Guidelines*—and the Reagan administration—that the courts were unduly "activist" and too quick to find constitutional defects in legislative enactments. For example, elsewhere the *Guidelines* condemned the "judicial creation of rights not reasonably found in the Constitution" citing as examples the right to privacy and rights of criminal suspects.[192] The *Guidelines* acknowledged this difference in stance: "Rather than the usual problem of exercising authority it does not have, this guideline concerns the judiciary's failure to exercise appropriately its power to hold invalid unconstitutional congressional actions."[193]

B. Constitutional Change through Judicial Selection

The Reagan administration promoted its comprehensive vision of the law through the exercise of various presidential powers. On issues of federalism and congressional power, President Reagan's federalism executive order directed that his views guide

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185. GUIDELINES, *supra* note 20, at 59.

186. *Id.* at 57-59.

187. "Government attorneys reviewing congressional enactments premised on these 'enforcement' provisions should not rely on or contribute to the transformation of the authority to enforce the guarantees of these amendments into the power to expand the nature and breadth of these substantive guarantees." *Id.* at 56.

188. *Id.* at 56, 58-59; *see supra* notes 81-99 and accompanying text (discussing cases). The *Guidelines* also cited disapprovingly, without additional commentary, *Fullilove v. Klutznick*, 488 U.S. 448 (1980). GUIDELINES, *supra* note 20, at 59.

189. 383 U.S. 745 (1966).

190. GUIDELINES, *supra* note 20, at 58-59.

191. 392 U.S. 409 (1968) (holding that Congress possesses broad power, pursuant to Section 2 of the Thirteenth Amendment, to prohibit racial discrimination by private actors in the context of real estate transactions).

192. GUIDELINES, *supra* note 20, at 8; *see supra* notes 143-49 and accompanying text.

193. *Id.* at 57. Again, this is an extraordinary statement given the longstanding executive branch practice of defending acts of Congress whenever a reasonable argument could be made in their defense. *See* THE CONSTITUTION IN THE YEAR 2000, *supra* note 21.

every executive branch policy that had federalism implications, with policy defined broadly to include "regulations, legislative comments or proposed legislation."[194] And the *Guidelines* directed all governmental lawyers to urge the courts to adopt the administration's views. Ultimately, though, President Reagan's greatest influence on the development of constitutional meaning came, not through his administration's litigation positions, but through his judicial appointments, and especially his appointments to the United States Supreme Court.[195]

A separate Reagan administration report issued by the Office of Legal Policy ("OLP") in 1988, six months after the *Guidelines*, endorsed the selection of judges as a means of influencing how the courts would interpret the Constitution in the future. *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation*, was a 199-page guide to substantive legal issues likely to be affected by the future appointment of Justices to the Supreme Court.[196] The introduction noted that the choice of Justices likely would be critical to what the Constitution, and hence the Nation, would look like a dozen years hence, in the year 2000: "There are few factors that are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary."[197] The report addressed not only presidential consideration of potential nominees' legal views, but also encouraged "the most thorough and informed" evaluation by senators of both political parties.[198] Notably, OLP, the author of this and the many other reports that detailed the Reagan administration's legal positions, also was the office at the Department of Justice entrusted with assisting President Reagan with the selection of federal judges.[199]

OLP recognized that much would be at stake in filling upcoming vacancies on the

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194. Reagan Exec. Order, *supra* note 111, § 1(a).

195. President Reagan's appointment to the lower federal courts also proved influential in shaping constitutional doctrine. Professors Jack Balkin and Sanford Levinson have written:

> It is, for example, unthinkable that the Supreme Court would ever have reviewed the federal statute at issue in *Lopez* if the Fifth Circuit had not struck it down in the first place. The same may well be true with regard to the Violence Against Women Act, whose relevant provisions had been held unconstitutional by the Fourth Circuit in an opinion written by the extremely conservative Circuit Judge Michael Luttig.

Balkin & Levinson, *supra* note 6, at 1074 (footnotes omitted).

196. THE CONSTITUTION IN THE YEAR 2000, *supra* note 21.

197. *Id.* at v.

198. "[I]t is hoped that this report will allow Members of Congress of both parties, pursuant to their constitutional responsibilities, to assess judicial nominees in the most thorough and informed manner possible." *Id.* "As the traditional lead agency in the executive branch in the judicial selection process, the Department of Justice believes that this report will prove helpful in communicating to the public, the media and Members of Congress the growing importance of the judicial selection process." *Id.* at iv.

199. *See* Stephen J. Markman, *Judicial Selection: The Reagan Years*, *in* NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST, JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 33-47 (1990) (a description of the judicial selection process and the role of the Office of Legal Policy by Reagan's Assistant Attorney General for the Office of Legal Policy from 1985 to 1989); THE CONSTITUTION IN THE YEAR 2000, *supra* note 21, at vii.

Court.[200] Each of the fifteen chapters in *The Constitution in the Year 2000* analyzed a major constitutional controversy, "the resolution of which is likely to be sharply influenced by the judicial philosophies of the individual justices who sit on the Court."[201] Among the diverse issues addressed: the right to privacy, the rights of criminal defendants, the Takings Clause and property rights, rights of sexual orientation, separation of powers issues, the scope of the Equal Protection Clause, and First Amendment issues of religion and freedom of association.

The tone and style of this report differed significantly from that of the *Guidelines*, because of the different purposes of the two reports. Rather than detail the administration's positions (as, for example, the *Guidelines* did), *The Constitution in the Year 2000* presented two possible directions the Court might take for each of the fifteen issues the report assessed. OLP wrote that its intent was to describe the alternate routes "in as neutral and balanced a manner as possible."[202] It nonetheless was entirely clear, from this report as well as other Reagan administration statements and actions, that President Reagan believed the "activist" courts generally were on the wrong course and that he cared deeply about which future path they would take for virtually every issue discussed in this report.[203]

One of the fifteen chapters concerned federalism and was entitled "Will the Tenth Amendment Play a Significant Role in Protecting the States from Federal Control?" The chapter described the two paths then open to the Court: either continue in the direction in which *Garcia* pointed, that is, judicial abdication of federalism issues to the political branches and processes, or restore a judicial role such as that in *National League of Cities*, in which the courts would enforce limits on federal power and uphold state sovereignty as guaranteed by the Tenth Amendment and the constitutional structure.

In addition to highlighting what was at stake on this overriding question of the appropriate role for the courts in the protection of state sovereignty, the report introduced a related issue: Congress's spending power. *The Constitution in the Year 2000* observed: "Besides modifying its doctrine regarding direct federal regulation of state and local governmental activity, the Court in the 1990's might reconsider its doctrine regarding the imposition of conditions upon federal grants to the states."[204] The report noted ways in which the Court could protect states from federal laws that would require states to waive aspects of state autonomy in return for funding. The Court could adopt doctrines similar to those used to protect individuals from unconstitutional conditions: states could be protected from "abusive grant conditions"

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200. "The purpose of this report is to provide a glimpse of the stakes that are involved in the manner in which the ongoing debate is resolved in the highest court of the land—the United States Supreme Court." THE CONSTITUTION IN THE YEAR 2000, *supra* note 21, at iii.

201. *Id.*

202. *Id.* at iv.

203. "There have been few times in the history of our country at which former Chief Justice Hughes' famous statement that 'the Constitution of the United States is what the judges say it is' has more accurately depicted the state of American jurisprudence." *Id.* at iii; *see also* GOLDMAN, *supra* note 19, at 285-345.

204. THE CONSTITUTION IN THE YEAR 2000, *supra* note 21, at 137. "Under the Supreme Court's current doctrine, . . . states receive virtually no judicial protection from the leverage that Congress can place upon them with conditional grants." *Id.* at 134.

just as the Court had ruled that the government cannot require an individual to surrender rights as a condition of receiving a grant.[205] The Court also could adopt Justice O'Connor's suggestion in dissent in *South Dakota v. Dole*[206] that the courts require a stronger nexus between grant conditions and the purposes of federal programs.[207] The report summarized the Court's choices as follows:

> If the Supreme Court in the next decade adheres to its current doctrine in the area of federalism, Congress will have essentially unrestricted power to displace state policies through direct regulation, conditional grants, and conditional tax exemptions. On the other hand, the Court could modify or even overrule *Garcia*, as some Justices have suggested, and restore to the states some measure of judicial protection from congressional activity.[208]

C. The Rehnquist Court on Congressional Power

The course the Rehnquist Court has chosen is clear. While Congress's spending power remains an issue for the future,[209] the Court's decisions through the year 2002 have moved constitutional law quite close to the Reagan administration's ideal on issues of Congress's commerce and Section 5 powers and the role of the courts in protecting state sovereignty. Also clear is the reason for the success of Reagan's constitutional agenda. Almost every Rehnquist Court decision that narrowed congressional power and expanded state sovereignty was decided by the same five-to-four margin.[210] Of the five Justices in the majority, sometimes referred to as the "federalism five," President Reagan appointed three: Sandra Day O'Connor, Antonin Scalia, and Anthony M. Kennedy. William H. Rehnquist was the one member of the "federalism five" already on the Court when President Reagan took office, and Reagan elevated him to Chief Justice in 1986. The Reagan administration relied heavily on Rehnquist's opinions in formulating its constitutional views on federalism and congressional power, citing them frequently, for example, in the *Guidelines*.[211] The

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205. *Id.* at 137-38. On this point, the report cited *Sherbert v. Verner*, 374 U.S. 398 (1963), and *F.C.C. v. League of Women Voters*, 468 U.S. 364 (1984). *But see* GUIDELINES, *supra* note 20, at 9 (taking position that *Sherbert* was wrongly decided).

206. 483 U.S. 203, 212 (1987) (O'Connor, J., dissenting).

207. THE CONSTITUTION IN THE YEAR 2000, *supra* note 21, at 138.

208. *Id.* at 136. "Many of these restrictions have worthwhile purposes, but there arguably is little reason why these matters could not have been left to the individual states." *Id.* at 133.

209. *See, e.g.*, Lynn A. Baker & Mitchell N. Berman, *Getting off the* Dole: *Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So*, 78 IND. L.J. 459 (2003) (assessing likelihood the Rehnquist Court will limit Congress's spending power, including in *Guillen v. Pierce County*, 31 P.3d 628 (Wash. 2001), *rev'd*, 123 S. Ct. 720 (2003)).

210. The two exceptions: *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *New York v. United States*, 505 U.S. 144 (1992).

211. Even when in the minority, Rehnquist consistently favored a strong judicial role in the protection of state sovereignty. To summarize briefly, he authored *National League of Cities v. Usery*, 426 U.S. 833 (1976), and when the Court overruled that case in 1985, Rehnquist predicted in dissent that he once again would be in the majority. Garcia v. San Antonio Metro.

critical fifth vote came when Reagan's successor, former Vice President George H.W. Bush, appointed Clarence Thomas to the Court in 1991.[212]

1. Commerce Clause

In 1995, seven years after the Reagan Department of Justice issued the *Guidelines* and *The Constitution in the Year 2000*, then-Chief Justice Rehnquist, writing for a majority of five Justices, narrowed the Court's definition of Congress's commerce power for the first time since 1937. In *United States v. Lopez*, the Court held that Congress had exceeded its authority in enacting the Gun Free School Zones Act of 1990.[213] In the year 2000, the Court, by the same five-to-four split, solidified and clarified its new reading of the commerce power. In *United States v. Morrison*, the Court declared unconstitutional the civil remedy provisions of the Violence Against Women Act, which would have allowed the victims of gender-motivated violence a federal cause of action against their assailants.[214]

The Court's interpretation of the Commerce Clause in *Lopez* and *Morrison* is strikingly similar to that urged by the Reagan administration. Like the *Guidelines*, the Court generally justified the imposition of judicial limits by describing the constitutional grant of the commerce power as a limited one that contemplates some activities left to state regulation. The Court articulated a framework of three categories of activity that the commerce power may reach and, like the *Guidelines*, focused its concerns and limits on the regulation of activities the cumulative effect of which affects interstate commerce. The Court expressly adopted the positions, advanced by the Reagan Justice Department and earlier by Rehnquist in his *Hodel* concurrence, that

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Transit Auth., 469 U.S. 528, 580 (1985) (Rehnquist, J., dissenting). In 1981, he wrote separately in *Hodel v. Virginia Surface Mining* to disavow the Court's broad definition of Congress's commerce power and suggest limits. 452 U.S. 264, 307 (1981) (Rehnquist, J., concurring). He also dissented from the Court's broad definitions of Congress's powers under the Reconstruction Amendments, presaging the Court's current position (which he described for the majority in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001)), that to allow Congress to define the scope of rights as part of its enforcement powers would infringe on the Court's constitutionally assigned role. City of Rome v. United States, 446 U.S. 156, 206-21 (1980) (Rehnquist, J., dissenting). Finally, he dissented from the Court's 1989 ruling that Congress could abrogate state sovereign immunity pursuant to its commerce power, and he authored the Court's 1996 opinion in *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) (overruling Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).

212. When in 1990 then-Counsel to President George H.W. Bush, C. Boyden Gray, was asked how the judicial selection process under President Bush would compare to President Reagan's approach, Gray responded: "It's structured a little differently, but the result is very much the same." Neil Lewis, *Bush Picking the Kind of Judges Reagan Favored*, N.Y. TIMES, Apr. 10, 1990, A1. Gray said the aim "is to shift the courts in a more conservative direction." *Id.* While the appointment of Clarence Thomas certainly has achieved that aim, Associate Justice David H. Souter, also appointed by President Bush, consistently has joined the four dissenters.

213. 514 U.S. 549 (1995).

214. 529 U.S. 598 (2000). The Supreme Court has also interpreted federal statutes narrowly to avoid what the Court viewed as serious questions as to whether Congress had exceeded its commerce power. *See, e.g.*, Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001); Jones v. United States, 529 U.S. 848 (2000).

the effect must be substantial,[215] and that the courts should review Congress's findings regarding the interstate effect.[216]

The Court's approach differs from the *Guidelines*, though, in at least two respects. First, and not at all surprising given the doctrine of stare decisis, the Court limited the potential reach of its reasoning in *Wickard v. Filburn* and *Perez v. United States*, but did not overrule those decisions.[217] Second, the way in which the Court avoided overruling those decisions while nonetheless imposing new limits was to consider only "economic" activity when evaluating the adequacy of the cumulative effects on interstate commerce.[218] While the *Guidelines* also focused its call for new limits on those instances that involved the aggregation of intrastate activity, the *Guidelines* did not go so far as to suggest the creation of a formalistic economic/noneconomic distinction, reminiscent in the words of the four dissenters in *Morrison* of the long-discredited "old formalism" of the pre-1937 Court.[219]

2. State Sovereignty

The Rehnquist Court also has not overruled *Garcia v. San Antonio Metropolitan Transit Authority*.[220] Instead, consistent with the approach advocated in the *Guidelines*, the Court has rejected *Garcia*'s dictum about leaving protection of state interests to the political processes, and has created two new, quite complicated categories of judicial limits on Congress's ability effectively to regulate the states.

First, the Court twice in the last decade has relied on a new "anticommandeering" doctrine to invalidate congressional efforts to compel state action.[221] First, in 1992, by a six-to-three vote, the Court held that Congress could not "commandeer" state governments by compelling state lawmakers to provide for the disposal of low-level radioactive waste.[222] This marked the first time since the Court overruled *National League of Cities* (and only the second time since 1937) that the Court relied on notions of state sovereignty to find that Congress had exceeded its commerce power. The Court extended this principle to the "commandeering" of state executive officials in 1997 when, by the typical five-four split, it invalidated provisions of the Brady

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215. *Morrison*, 529 U.S. at 610; *Lopez*, 514 U.S. at 559.

216. *Morrison*, 529 U.S. at 618 n.8; *Lopez*, 514 U.S. at 575.

217. The Court limited *Wickard* by stressing what the Court described as the economic nature of the activity involved: "Even *Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not." *Lopez*, 514 U.S. at 560; *see also id.* at 573-74 (Kennedy, J., concurring) (stating that *Perez v. United States* and similar authorities "are not called in question by our decision today").

218. "While we need not adopt a categorical rule against aggregating the effects of any noneconomic activity in order to decide these cases, thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613.

219. *Id.* at 644 (Souter, J., dissenting).

220. 469 U.S. 528 (1985).

221. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992).

222. *New York*, 505 U.S. at 188 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

Handgun Violence Prevention Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers.[223]

Second, even though after *Garcia*, Congress, in the exercise of its commerce power, generally may apply federal requirements to the states (as long as it avoids "commandeering" the states), the Court has created new state sovereign immunity doctrine that severely limits Congress's ability to provide for the enforcement of its laws against states. The same five-Justice majority that narrowed Congress's commerce power also has raised the constitutional bar to subjecting states to private suits for money damages for violations of federal statutory rights. The Court previously had held that Congress could abrogate the states' Eleventh Amendment immunity from private lawsuits in federal court, specifically upholding abrogation when Congress acted pursuant to its Section 5 authority[224] and its commerce power.[225] In 1996, the Court, divided five-four, overruled its decision that found that Congress could rely on its commerce power to authorize private suits against states. This left only Congress's Reconstruction Amendment authorities as valid bases for the abrogation of Eleventh Amendment sovereign immunity.[226]

The Court further substantially narrowed Congress's authority to authorize suits against states in 1999, when it held that states were immune from private suit not only in federal court, pursuant to the Eleventh Amendment, but also in state court. The text of the Eleventh Amendment expressly is limited to the federal judicial power, but in *Alden v. Maine*, the Court held that the constitutional structure and history supported state immunity in state courts as well.[227] In May 2002, the Court took an additional leap and applied its expansive notions of state sovereign immunity before courts to hearings before a federal agency (here, the Federal Maritime Agency).[228] The Court conceded that the constitutional text and history provided little, if any, support, but found this limitation on congressional power inherent in the constitutional structure.[229] The Rehnquist Court's expansion of state sovereign immunity greatly increases the significance of the scope of Congress's power under the Reconstruction Amendments, for they are the only remaining means by which Congress may subject a nonconsenting state to private suits for damages for violation of federal law.

3. Reconstruction Amendments

It is with regard to Congress's power to enforce the Reconstruction Amendments that the Reagan administration most fully has achieved its goals. In a series of decisions beginning in 1997,[230] the Rehnquist Court has adopted almost all of the *Guidelines*' recommended limitations on Congress's Section 5 authority. In the process, the Court has held that Congress exceeded its Section 5 power in enacting

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223. *Printz*, 521 U.S. 898.

224. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

225. Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989).

226. Seminole Tribe v. Florida, 517 U.S. 44 (1996) (overruling *Union Gas*, 491 U.S. 1 (1989)).

227. 527 U.S. 706 (1999).

228. Fed. Mar. Comm'n v. S.C. State Ports Auth., 53 U.S. 743 (2002).

229. *Id.* at 1872.

230. City of Boerne v. Flores, 521 U.S. 507 (1997).

major portions of federal laws enacted with strong bipartisan majorities to protect a range of civil rights, including the Religious Freedom Restoration Act,[231] the Age Discrimination in Employment Act,[232] the Violence Against Women Act,[233] and the Americans with Disabilities Act,[234] as well as provisions of the Patent and Plant Variety Protection Remedy Classification Act that subjected states to remedies for patent infringement.[235]

Most fundamentally, and consistent with the *Guidelines*, the Court has held that Congress's power to enforce the guarantees of the Fourteenth Amendment does not include any authority to define the substantive meaning of those guarantees.[236] As the *Guidelines* advocated, the Court expressly rejected readings of *Katzenbach v. Morgan*[237] and *Oregon v. Mitchell*[238] that, to the contrary, would have allowed Congress to interpret the guarantee of equal protection as being more protective of rights than the Court's definition of those rights for purposes of judicial enforcement.[239] Moreover, the Court treated the tiers of equal protection judicial scrutiny, originally created by the courts as a mechanism of judicial self-restraint out of deference to legislative power, as part of the substantive meaning of the constitutional guarantees and thus as themselves a limitation on legislative power. The practical effect: to make exceedingly difficult any congressional enforcement of the guarantee of equal protection to prohibit discrimination on the basis of age, disability, sexual orientation, or any other characteristic beyond those few identified by the Court as suspect or quasi-suspect.[240] Congress first must identify "a history and pattern of

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231. *Id.*

232. Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

233. United States v. Morrison, 529 U.S. 598 (2000).

234. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001).

235. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

236. *Garrett*, 531 U.S. at 365 ("[I]t is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees."); City of Boerne v. Flores, 521 U.S. 507, 519 (1997) ("[Congress] has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."). The Court has not addressed Congress's power pursuant to Section 2 of the Thirteenth Amendment and whether, in Professor Lawrence Sager's words, "*Jones v. Alfred H. Mayer Co.* survives the Court's recent Section 5 decisions." Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. REV. 150, 151 (2000); *see also* Amar, *supra* note 104, at 823-24. The Second Circuit recently held that it does. United States v. Nelson, 277 F.3d 164 (2d Cir. 2002).

237. 384 U.S. 641 (1966).

238. 400 U.S. 112 (1970).

239. *Boerne*, 521 U.S. at 527-28 (discussing *Morgan* and *Katzenbach*). "There is language in . . . *Katzenbach v. Morgan* which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in § 1 of the Fourteenth Amendment. This is not a necessary interpretation, however, or even the best one." *Id.*

240. The Court has emphasized that the absence of Section 5 authority does not leave the objects of Congress's protections without any recourse. For example, in *Garrett*, the Court wrote:

> Our holding here that Congress did not validly abrogate the States' sovereign immunity from suit by private individuals for money damages under Title I [of the Americans with Disabilities Act] does not mean that persons with disabilities have

unconstitutional [i.e., irrational] discrimination by the States" against the group that Congress seeks to protect.[241] In addition, and also as specifically urged by the *Guidelines*, the Court has reaffirmed a strong requirement of state action and disavowed the suggestion in *Guest* that appropriate enforcement efforts in some cases could reach private actors.[242]

The Court has gone beyond the specific limitations endorsed by the *Guidelines*, and, consistent with their spirit, adopted limits on Congress's ability to implement even what the Court found to be properly within Congress's enforcement authority: the authority to remedy and prevent violations of the Fourteenth Amendment. Under the Court's newly created "congruence and proportionality" standard, the Court will closely scrutinize Congress's remedial and preventive measures to ensure that Congress in fact is not seeking to redefine the substantive scope of the constitutional guarantee.[243] The Court's review of Title I of the Americans with Disabilities Act, in particular, demonstrates that the Court will demand an extremely close fit between Congress's remedial and preventive measures and what courts would find are judicially cognizable constitutional violations, which leaves relatively little room for Congress to go beyond the courts. Academic commentary overwhelmingly has condemned the Court's creation of these limits[244] and has agreed instead with Justice Breyer's dissent for four Justices, which concludes that the Court has usurped congressional power "through its evidentiary demands, its non-deferential review, and its failure to distinguish between judicial and legislative constitutional competencies."[245]

> no federal recourse against discrimination. Title I of the ADA still prescribes standards applicable to the States. Those standards can be enforced by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908). In addition, state laws protecting the rights of persons with disabilities in employment and other aspects of life provide independent avenues of redress.

Garrett, 531 U.S. at 374 n.9.

241. *Id.* at 368.

242. United States v. Morrison, 529 U.S. 598, 622-24 (2000). The Rehnquist Court also, consistent with the *Guidelines*, rejected the suggestion in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), that Congress possessed special authority to devise race-based measures to counter the continuing effects of past discrimination, and instead held that any governmental use of race in decisionmaking must survive strict scrutiny. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

243. The Court first announced this test in *Boerne*: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect." *Boerne*, 521 U.S. at 520.

244. *See, e.g.*, NOONAN, *supra* note 7; Balkin & Levinson, *supra* note 6; Colker & Brudney, *supra* note 40; Kramer, *supra* note 29; Post & Siegel, *supra* note 68; *see also* Symposium, *Congressional Power in the Shadow of the Rehnquist Court: Strategies for the Future*, 78 IND. L.J. i (2003); Symposium, *Reflections on* City of Boerne v. Flores, 39 WM. & MARY L. REV. 597 (1998); Symposium, *Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity*, 53 STAN. L. REV. 1115 (2001).

245. *Garrett*, 531 U.S. at 388 (Breyer, J., dissenting). Justice Breyer also criticized the Court for failing to adhere to the deferential standard of review adopted in *Katzenbach v. Morgan*, in recognition that "[Section] 5's 'draftsmen sought to grant to Congress, by a specific provision

The only Supreme Court precedent regarding the Reconstruction Amendments that the *Guidelines* targeted but the Court has not yet rejected is *City of Rome v. United States*.[246] The Court in *Rome* upheld a provision of the Voting Rights Act of 1965 that prohibited certain voting practices that had a discriminatory racial impact, without requiring a showing of purposeful discrimination. Federal civil rights laws and regulations that prohibited practices on the basis of disparate impact were a special target of the Reagan administration.[247] More generally, the Court has not yet had occasion to reconsider congressional authority in the context of race or sex discrimination, where the courts apply heightened scrutiny and provide greater protection, though it may do so in its review of whether the Family and Medical Leave Act is appropriate Section 5 legislation aimed at gender discrimination.[248]

The Court has offered remarkably little analysis in support of its new limits, announcing them first in a case[249] that involved an express congressional challenge to the Court's free exercise jurisprudence,[250] and then purporting simply to apply that precedent, with little additional analysis, in future cases where the results were extraordinary.[251] The Court, though, has alluded to two distinct rationales. First, it has echoed the Reagan administration's federalism concerns about affording Congress sweeping national power to legislate at the expense of state power.[252] Second, the

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applicable to the Fourteenth Amendment, the same broad powers expressed in the Necessary and Proper Clause . . . .'" *Id.* at 386 (quoting Katzenbach v. Morgan, 384 U.S. 641, 650 (1966)); *see also id.* at 387 (noting the Court's Section 5 decisions are described as approaching "strict scrutiny," in Post & Siegel, *supra* note 68, at 477, and 1 LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-16 (3d ed. 2000)).

246. 446 U.S. 156 (1980).

247. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, REDEFINING DISCRIMINATION: DISPARATE IMPACT AND THE INSTITUTIONALIZATION OF AFFIRMATIVE ACTION (1987).

248. Hibbs v. Dep't of Human Res., 273 F.3d 844 (9th Cir. 2001), *cert. granted sub nom.*, Nev. Dep't of Human Res. v. Hibbs, 122 S. Ct. 2618 (2002) (holding that the FMLA was within Congress's Section 5 authority to remedy and prevent gender discrimination). *But see* Kazmier v. Widmann, 225 F.3d 519 (5th Cir. 2000) (reaching opposite conclusion).

249. City of Boerne v. Flores, 521 U.S. 507 (1997). In adopting these limits on Congress's Section 5 authority, the Court dismissed, with surprisingly little consideration, widely debated theories in support of a congressional role in giving meaning to the open-ended guarantees of the Fourteenth Amendment.

250. In an article fittingly entitled *How Not to Challenge the Court*, Neal Devins writes:

> Congress and the White House—through the Religious Freedom Restoration Act (RFRA)—backed the Court into a corner. Specifically, because RFRA called for "the most demanding test known to constitutional law," Congress limited the Court's role in defining the parameters of First Amendment religious liberty protections to clarifying ambiguous language in RFRA, rather than actually interpreting the Constitution. Adding insult to injury, lawmakers condemned the Court for its "disastrous," "dastardly and unprovoked," "devastating" "degradation," if not "virtual[ ] eliminat[ion]," of religious liberty protections.

Neal Devins, *How Not to Challenge the Court*, 39 WM. & MARY L. REV. 645, 645 (1998) (alterations in original) (footnotes omitted).

251. *See Garrett*, 531 U.S. 356; Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999).

252. *See, e.g.*, *Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("It is a most serious

Court has added a concern of its own: the preservation of its view of judicial power. Although it cites *Marbury v. Madison*[253] for support,[254] the Court in fact is acting on a form of judicial supremacy that surpasses even its strongest previous assertions of power.[255]

IV. LESSONS REGARDING CONSTITUTIONAL CHANGE

What follows from President Reagan's largely successful efforts to change the law of federalism and congressional power? The clearest, most vital lesson is simply stated and generally familiar, though widely underappreciated: the constitutional views of the President and Congress matter—they matter a great deal. Not only the Supreme Court, but also the political branches of the federal government influence the development of constitutional meaning. Although decisions of the judiciary dominate our understanding of the Constitution and the political branches typically defer to the Court's views, our national elected officials possess a range of constitutional powers—most notably here, the power to select the members of the third branch—that they may choose to exercise to effect substantial changes in the direction of constitutional law.

Consider the following: What if President Franklin D. Roosevelt and the New Dealers in Congress had not voiced and acted upon their own constitutional views and instead had accepted the Court's narrow view of congressional power? What if, out of

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charge to say a State has engaged in a pattern or practice designed to deny its citizens the equal protection of the laws . . . ."); *Boerne*, 521 U.S. at 534 (describing RFRA as "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."). *But see Garrett*, 531 U.S. at 388 (Breyer, J., dissenting) (quoting City of Rome v. United States, 446 U.S. 156, 179 (1980)) ("Rules for interpreting Section 5 that would provide States with special protection, however, run counter to the very object of the Fourteenth Amendment. . . . '[P]rinciples of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal power and an intrusion on state sovereignty.'").

253. 5 U.S. (1 Cranch) 137 (1803).

254. United States v. Morrison, 529 U.S. 598, 616 n.7 (2000) ("[E]ver since *Marbury*, this Court has remained the ultimate expositor of the constitutional text."); *Boerne*, 521 U.S. at 529 (quoting *Marbury*, 5 U.S. (1 Cranch) at 177) ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.' . . . Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."); *id.* at 536 (citing *Marbury*, 5 U.S. (1 Cranch) at 177) ("When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is."); *cf.* Dickerson v. United States, 530 U.S. 428, 437 (2000) ("Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

255. *See* TRIBE, *supra* note 245, at 267 ("Properly understood, both *Cooper* and *Marbury v. Madison* are consistent with *Katzenbach v. Morgan*."); *id.* at 254-67; Kramer, *supra* note 29, at 13 (contrasting "judicial supremacy," which allows the Court "the *last* word" with the Court's current "judicial sovereignty," which asserts the Court's authority to have "the *only* word") (emphasis in original); *id.* at 14 ("The Rehnquist Court no longer views itself as first among equals, but has instead staked its claim to being the *only* institution empowered to speak with authority when it comes to the meaning of the Constitution.") (emphasis in original).

deference to the Court and adherence to a notion of judicial supremacy, they simply had declined to enact legislation such as the Social Security Act and the National Labor Relations Act and had not considered extraordinary proposals to expand the number of Justices and amend the Constitution?[256]

President Reagan's efforts to transform constitutional meaning put him in a class with Franklin D. Roosevelt and a handful of other Presidents.[257] Reagan developed and pursued a constitutional vision extraordinary in its breadth of issues, its detail of analysis, and its ambition for presidential power. Reagan's success in implementing his vision was not as immediate or complete as that enjoyed by President Roosevelt, nor have the Rehnquist Court's decisions imposed the kind of immediate and widespread harms that helped make the pre-1937 Court the subject of great public debate and controversy. Nonetheless, with the benefit of the Court's decisions since 1995 and the previously unexamined Department of Justice reports, we are better able to appreciate that, at least on issues of congressional power and federalism, Reagan's success has been considerable and continues.

The Reagan administration's efforts to remake constitutional law are best evaluated in light of a rich academic literature on constitutional change that examines democratic influences on constitutional meaning. Professors Jack Balkin and Sanford Levinson's theory of "partisan entrenchment" is particularly helpful in understanding Reagan's responsibility for the constitutional change now underway.[258] They describe the judicial appointment process as a means by which the people influence the development of constitutional law through their choice of Presidents and senators. Political parties play a central role in representing popular understandings not only about "ordinary politics," but also "about the deepest meanings of the Constitution and the country."[259] The political party that controls the presidency chooses judges to its liking, subject to "whatever counterweight the Senate provides," and those judges continue to influence the development of constitutional doctrine long after the individuals responsible for their appointment have left office.[260] Thus, "[t]he theory of partisan entrenchment sees the relationship between constitutional law and politics as roughly but imperfectly democratic."[261]

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256. Ackerman posits a similar "grim thought-experiment": what if Roosevelt had been assassinated and the more conservative Southern Vice President, John Nance Garner, had taken office and vetoed the Social Security Act and the Labor Act? Ackerman suggests that the strength of opposition to the Court was sufficiently great that New Dealers in Congress would have responded with a constitutional amendment, "[i]n the same way Republicans reacted to President Johnson's vetoes of the Civil Rights Act and Freedmen's Bureau Bill" with the Fourteenth Amendment. ACKERMAN, *supra* note 22, at 271-72.

257. *See supra* note 121.

258. Balkin & Levinson, *supra* note 6.

259. Balkin & Levinson, *supra* note 6, at 1078. Political parties "collect, filter, co-opt and accumulate the constitutional beliefs and aspirations of the party faithful, of prospective voters, and, perhaps equally crucially, of social movements." *Id.* at 1077.

260. *Id.* at 1076. Judges therefore represent "a temporally extended majority." *Id.*

261. *Id.* Professor Laurence Tribe also has written of the opportunities the constitutional structure creates for democratic influences on constitutional interpretation:

> [D]espite the growth of federal judicial power, the Constitution remains in significant degree a democratic document—not only written, ratified and amended through essentially democratic processes but indeed open at any given time to

Balkin and Levinson recognize that presidential/partisan/democratic influences may result in "slow and steady" constitutional change as consequential as "quick and decisive" change,[262] and they expressly credit Reagan for the Rehnquist Court's recent shifts:

> If judicial review and constitutional change tend to operate through partisan entrenchment, it is fairly easy to explain *Garrett* and its predecessors. The federalism, voting rights, and affirmative action cases that we have witnessed in the last decade are the predictable (though not inevitable) product of a conservative Republican hegemony during the 1980s and early 1990s that produced judges and Justices sympathetic with Reagan's vision of federalism and states' rights, a vision well reflected in a 1987 executive order setting out a series of "fundamental federalism principles."[263]

> competing interpretations limited only by the values which inform the Constitution's provisions themselves, and by the complex political processes that the Constitution creates—processes which on various occasions give the Supreme Court, Congress, the President, or the states, the last word in constitutional debate.

TRIBE, *supra* note 245, at 267. As Professor Levinson noted at the time, *see* Levinson, *supra* note 131, at 1075-76, the *Wall Street Journal* quoted an almost identical statement from Tribe's 1978 edition of his treatise, in support of Attorney General Meese's 1986 Tulane speech. *See supra* notes 123-36 and accompanying text; *cf.* Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 651 (1990) (citing Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 753-54 (1982)) ("Progressives need to create a world in which it is clear that a progressive Congress has embraced one set of constitutional meanings, and the conservative Court a contrasting and incompatible set. The Supreme Court does, and always has, as Fiss reminds us, read the Constitution so as to avoid crisis. The lesson to draw is surely that only when faced with such a constitutional moment will this conservative Court change paths.").

262. *Id.* at 1083.

263. Balkin & Levinson, *supra* note 6, at 1073-74. Balkin and Levinson note that their theory of partisan entrenchment has much in common with Ackerman's theory of "constitutional moments" that effect change outside the formal Article V amendment process. *Id.* at 1079; *see also* Siegel, *supra* note 68; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 115 HARV. L. REV. 1457 (2001). Both theories emphasize the important roles played by nonjudicial actors in constitutional change—by "citizens and politicians" and "social movements, political parties, and presidents." Balkin & Levinson, *supra* note 6, at 1079. Balkin and Levinson, however, dispense with Ackerman's core concept of "constitutional moments," a difference that proves significant in their assessments of Reagan's influence. Ackerman distinguishes between "normal" and "transformative" Supreme Court appointments, with the former leading to "ordinary" constitutional change and the latter to the possibility of "constitutional moments" of extraordinary change. ACKERMAN, *supra* note 22, at 389-400. While Ackerman's theory allows for recognition of Reagan's influences through the "normal evolutionary process," *id.* at 392, his focus on identifying "constitutional moments" leads him, in that context, to highlight Reagan's failures. Ackerman concludes that Reagan (unlike Roosevelt) was not successful in his attempt to make "transformative" appointments and effect a "constitutional moment," *id.* at 389-400, and even entitles a section on Reagan, "Anatomy of Failure." *Id.* at 390. By contrast, Balkin and Levinson conclude, "[T]he changes to constitutional meaning are no less real even thought [sic] they do not fit easily into the model of a constitutional moment." Balkin & Levinson, *supra* note 6, at 1083.

Their theory suggests also that an appropriate response for those who disagree with the constitutional views of President Reagan and the Rehnquist Court is political change, and in particular the election of Presidents and senators who will promote different constitutional visions through their judicial appointments.[264]

A second lesson, closely related to the first: the Reagan/Rehnquist experience underscores the importance of a broader and deeper public understanding of the roles of nonjudicial actors in the processes of constitutional change, currently the subject of vibrant academic debate. The Rehnquist Court's view of judicial supremacy, while close to the Court-centered view predominant among the public and the legal profession generally, runs counter to the trend among legal academics who write about these issues.[265]

Central to the focus of this Article, and the Symposium of which it is a part, is the potential role of constitutional scholars in narrowing the gap between them and the public and improving popular understanding of how constitutional change does and should occur, including the fallacy and perils of judicial interpretive exclusivity. Although Presidents Roosevelt and Reagan moved the law in opposite substantive directions, the efforts of both were premised on a recognition that the Supreme Court sometimes gets it wrong. Or, to put it in terms emphasized by Attorney General Meese, and conceded even by most of his critics, there is a difference between the Constitution and the Court's decisions interpreting it.[266] Disputes over the best substantive interpretations of the Constitution should not be confused with analytically distinct—and often difficult—questions about the appropriate roles of each branch of government in the development of constitutional meaning. For example, Reagan's substantive agenda for constitutional change received (and, in my view, deserved) strong criticism on the merits, but entirely separate (and, in my view, deserving of mixed reviews) is the question whether, in seeking to promote change, Reagan acted inappropriately, in the sense of exceeding his presidential authority. Conflation of these issues—and misguided criticism of nonjudicial constitutional interpretation—encourages a move from judicial supremacy to judicial imperialism, which ill serves constitutional democracy.

Professor H. Jefferson Powell has described American constitutional law (including as interpreted by judges) as "an historically extended tradition of argument, a means (indeed, a central means) by which this political society has debated an ever-shifting set of political issues."[267] Through his compelling "historicist" account of constitutional controversies throughout United States history,[268] Professor Powell

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264. Balkin & Levinson, *supra* note 6, at 1076 ("If one doesn't like the decisions of the Rehnquist Court, one should really have been putting more Democrats in the White House during the 1970s and 1980s. Put another way, if you don't like what the Court is doing now, you (or your parents) shouldn't have voted for Ronald Reagan.").

265. *See* Kramer, *supra* note 29, at 7.

266. *See generally* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000).

267. POWELL, *supra* note 28, at 6.

268. Professor Powell examines a series of controversies from 1790 through 1944 with the express purpose of illustrating what he calls an "'historicist' interpretation of constitutional law—specifically, that constitutional law is thoroughly historical, dependent throughout on the contingencies of time and political circumstance, and that it is a coherent tradition of argument."

illustrates that the political nature of constitutional law, far from being cause for concern, is the source of American constitutionalism's "integrity and distinctiveness"[269] and cause for celebration. Because it both shapes and is shaped by politics, constitutional law over time both "displays continuity and intellectual coherence"[270] and also "offers the means by which people of fundamentally different views, beliefs, origins, and visions can become and remain a political community."[271]

Although a thorough consideration of the appropriate roles of the President and Congress in constitutional interpretation is beyond the scope of this Article, I believe, as I have discussed elsewhere, that the political branches bring value to the debate about constitutional meaning.[272] Contrary to the Rehnquist Court's recent pronouncements (and also contrary to the Reagan administration's claim that constitutional meaning is fixed by the specific intent of the Framers), the American people appropriately take part in the development of constitutional meaning, including through their elected representatives. The Rehnquist Court is wrong to fail even to consider this value, especially in its treatment of Congress's Section 5 authority. Also wrong, though, are those who advocate interpretative autonomy for Congress and the President and deny any special role for the Supreme Court—a position the Reagan administration sometimes approached, at least with regard to the President's conflicting constitutional views.[273] Worthy of consideration and continued study is past governmental practice: contrary to the Reagan Justice Department's professed approach, past executive branch practice generally supports careful attention to context, including the particular power being exercised and the nature of the constitutional issue.[274]

A third lesson: we should seek consensus on the principle that both the President and the Senate appropriately may consider the legal philosophies and ideologies of individuals under consideration for judicial appointments. As Balkin and Levinson note, the relationship between constitutional law and politics, as mediated by judicial appointments, is only "roughly" and "imperfectly" democratic. Attention is due to the specific ways in which that connection is rough and imperfect. Some protections of judicial independence, of course, are constitutionally appropriate, even critical, but at least one significant obstacle to democratic influences deserves attention: the ways in

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Id. at 7. He concludes:

> If judges accepted [the historicist interpretation], they would take a somewhat more modest approach to their role in the constitutional order than is customary, at least among justices of the U.S. Supreme Court. If the rest of us took it seriously, the historicist account would demand of politicians and citizens alike that they recognize their, our, responsibilities in maintaining a constitutional order that is open to and inclusive of all.

Id.

269. *Id.* at 5.

270. *Id.*

271. *Id.* at 213.

272. *See* Johnsen, *supra* note 133.

273. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994).

274. *See* Johnsen, *supra* note 133; *see also* Neal Devins, *Reanimator: Mark Tushnet and the Second Coming of the Imperial Presidency*, 34 U. RICH. L. REV. 359 (2000).

which issues of judicial selection are publicly understood and discussed.

Professor Powell has concluded that one of our "shared constitutional first principles," legitimated by history, is that the American people and the political branches of government should seek to change what they view as incorrect judicial constitutional interpretations, including "by appointing, as opportunity arises, judges likely to take a different position."[275] Yet the importance of judicial selection and the relevance of nominees' legal philosophies and views remain, in my view, underappreciated by the American public[276] and also contested by some government officials and other public figures in ways harmful to appropriate democratic influences. At a recent Senate subcommittee hearing entitled *Judicial Nominations 2001: Should Ideology Matter?*, for example, several former high-ranking government officials testified that the appropriate answer to that question is "no."[277] Senators who vote not to confirm a nominee based on his or her substantive views risk attack for "Borking" candidates and using "ideological litmus tests." The lack of consensus that senators appropriately may consider ideology creates incentives for senators who vote against nominees based on concern about their legal views not to be forthright about their reasons, and to search instead for alternative explanations, such as personal character issues—ethical lapses, lack of "judicial temperament," personal prejudice—which in turn threaten to degrade the process.

The Reagan administration strongly and explicitly endorsed the relevance of the

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275. POWELL, *supra* note 28, at 208. Professor Powell writes:

> The judiciary is not infallible; therefore, the people and the political branches of the federal government ought to take appropriate steps to change the constitutional views of the judiciary, when they believe the courts have erred, through constitutional amendment, litigation, and the appointments process.... The use of the appointments process for this purpose raises some hard questions in application, but despite the occasional protest by those substantively opposed to whatever change is sought, the principle is settled.

Id. at 207-08. While I agree with Professor Powell that the principle should be settled, as I discuss, I view the protest that continues as significant and troubling.

276. Conventional wisdom in American politics holds that the voters pay little attention to positions on judicial selection in choosing among candidates. For example, Professor Laurence Tribe opened an account of the great impact the choice of Justices has on Americans' lives, with the observation "it is unlikely that the [1984] election reflected, in any decisive way, the considered views of more than a handful of the American people about the sorts of Justices they would want a reelected President Reagan or a newly elected President Mondale to nominate." LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY ix (1985). Balkin and Levinson's theory nonetheless retains force because political parties and interest groups (with influence over political parties) tend to care about judicial selection far more than the general electorate.

277. *See The Judicial Nomination and Confirmation Process, Hearings Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001). C. Boyden Gray, former Counsel to President George H.W. Bush, testified: "'Should ideology matter?' I can answer in one word: No." *Id.* at 27 (prepared statement). Douglas W. Kmiec, who served in the Department of Justice as Assistant Attorney General for the Office of Legal Counsel under President Reagan, testified: "To measure nominees by an ideological litmus-test or place the burden on nominees to justify their ideological conformity is the equivalent of partisan, outcome driven court-packing." *Id.* at 193.

legal philosophies and views of judicial nominees.[278] President Reagan acted within the constitutional prerogatives of the presidency in considering the legal views of nominees, and the Senate just as surely is entrusted with the authority to consider those same views in the exercise of its advice and consent role. Indeed, for the Senate to do otherwise would create an imbalance in the federal judiciary.[279] Above all, we should encourage forthrightness regarding judicial selection decisions and thus make possible accountability and appropriate public participation in the development of constitutional meaning.

Finally, Reagan's success underscores that substantial constitutional change is possible and that the development of coherent constitutional interpretations and visions for change can help make it happen. The detailed constitutional views advanced by the Reagan administration were ambitious in their challenge to settled judicial precedent and even seemed unrealistic at the time, including in their challenge to the Court's broad and deferential stance toward congressional power. Moreover, the Reagan administration clearly did not develop its constitutional vision in isolation, but benefited from the work and support of legal academics,[280] practitioners, advocacy groups, and others who continue their work, long after Reagan has left office. President Reagan's close attention to constitutional law and his success in influencing the course of its development should inspire greater energy and creativity among all who care about our Nation's constitutional future.

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278. To quote again the Reagan Justice Department: "There are few factors that are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary." THE CONSTITUTION IN THE YEAR 2000, *supra* note 21, at v.

279. *See* Dawn Johnsen, *Tipping the Scale*, WASH. MONTHLY, July/Aug. 2002, at 15 (discussing the Reagan/Meese Department of Justice reports and the use of ideology in judicial selection).

280. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, BIBLIOGRAPHY OF ORIGINAL MEANING OF THE UNITED STATES CONSTITUTION (1988); OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO THE ATTORNEY GENERAL, ORIGINAL MEANING JURISPRUDENCE: A SOURCEBOOK (1987) (both citing numerous books and articles).