2005

Fig Leaf Federalism and Tenth Amendment Exceptionalism

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FIG LEAF FEDERALISM AND TENTH AMENDMENT EXCEPTIONALISM

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The Supreme Court's jurisprudence of federalism is at best undergoing an unfinished transformation, and is at worst just troubled and unsatisfying. In a little-noticed dissent in *Tennessee v. Lane*,[1] Justice Scalia proposed an approach that could be generalized well beyond the specific position that he took in that case. Thus generalized, this approach may be understood as an elaboration of a proposal made by Justice O'Connor in a dissenting opinion twenty years ago. If adopted by the Court, this synthesis of the O'Connor and Scalia suggestions could work a real transformation in the Court's federalism jurisprudence, and without some of the potentially radical side-effects that have thus far made the Court timorous and inconsistent. Perhaps not insignificantly, I think I can describe where it might take us without producing a hundred page article with a thousand-odd footnotes.

I. THE SUPREME COURT'S FEDERALISM REVIVAL, AND ITS LIMITS

Stripped to essentials, recent debates among the Justices about states' rights begin with two contending propositions. The Court's more "federalist" members insist that any doctrine that gives Congress plenary authority to regulate the states must be wrong. They often point to the Tenth Amendment, which emphatically confirms that the states have reserved powers untouched by the establishment of a limited federal government. Without quite disputing this claim about reserved powers, the Court's more "nationalist" members maintain that the Constitu-

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1. 541 U.S. 509 (2004).

tion identifies very few protected spheres of state autonomy, and that judges should be extremely hesitant to constrain congressional power except where the Constitution provides very clear guidance.

In the 1985 *Garcia* decision, the nationalist position prevailed by a vote of 5-4. Justice Blackmun's majority opinion held that the states must look to the political process, rather than to the courts, for protection from excessive federal regulation.[2] Apparently recognizing that the political process might fail in some unexpected way, however, the majority left open the possibility (albeit a seemingly remote possibility) that the Court might someday have to identify "affirmative limits" imposed on Congress by the "constitutional structure."[3] The dissenters considered the majority's passivity an improper abdication of the Court's constitutional duty, and vowed to keep fighting for meaningful restraints on federal power.[4]

But where were federalist Justices to find "affirmative limits"? The first great problem they faced is the Court's extremely expansive interpretation of congressional power under the Interstate Commerce Clause. Much federal regulation of the states, as of private parties, is imposed pursuant to Commerce Clause authority, which had seemingly become a kind of safe harbor for Congress when no other authority could be found. As Justice O'Connor recognized in her *Garcia* dissent, the framers of the Constitution believed that the autonomy of the states would be protected by the fact that federal powers are "few and defined," and that the Commerce Clause in particular would give Congress only a very narrow and limited authority.[5] When the Commerce Clause was recast by the Court so that the *limits* became few, and congressional power *undefined*, this change incidentally created a threat to the basic structure of federalism.

Unfortunately, the *Garcia* dissenters failed to propose a clearly workable response to that threat. Justice Powell wanted to balance the competing interests of the state and federal governments. But his opinion contained no discussion of the federal government's interest in the statute at issue in *Garcia* itself, and thus offered no reasoned balancing of the competing interests. Justice O'Connor proposed a somewhat different approach, in

2. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).
3. *Id.* at 556.
4. *See, e.g., id.* at 579–80 (Rehnquist, J., dissenting); *id.* at 588–89 (O'Connor, J., dissenting).
5. *Id.* at 582–83.

which the Court would consider the value of state autonomy an important factor in deciding whether a Commerce Clause regulation was consistent with the spirit of the Constitution under the *McCulloch* test.[6] Although more promising than Powell's, her approach still invited decision by ipse dixit, for it lacked an analytically definite standard. As we shall see, Scalia's *Lane* dissent suggests an adjustment to O'Connor's approach that could provide just what is needed.

The debate about states' rights is closely related to broader debates about the Interstate Commerce Clause itself. The Tenth Amendment, of course, refers to the reserved rights both of the states and of the people. And state autonomy would hardly be worth protecting except for the contribution it can make to preserving the liberties of the citizenry. With respect to the Commerce Clause, the federalist Justices again insist that an interpretation that gives Congress authority to regulate anything and everything that citizens may do is inconsistent with the Constitution's careful and limited enumeration of powers, and must therefore be wrong. And once again, the nationalists have resisted demands for the kind of line-drawing that the federalists have sought to undertake. This debate has direct implications for the issue in *Garcia* both because regulations of the states are often justified by invocations of the Commerce Clause, and because the state governments' own power to regulate their citizens—or to decide that they should not be regulated—is often preempted by federal action under the Commerce Clause.

Perhaps the most obvious, or naïve, solution to the whole problem would be to restore the original understanding of the Commerce Clause. Justice Thomas has argued,[7] and others have confirmed with overwhelming evidence,[8] that the Clause was not meant to authorize the broad range of federal regulations that are now routinely upheld. The term "commerce" in the Consti-

6. As O'Connor pointed out, *id.* at 584–85, the most expansive extensions of Congress' Commerce Clause power have been based on the Necessary and Proper Clause, which has traditionally been governed by the test established in McCulloch v. Maryland, 17 U.S. 316, 421 (1819):

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.

7. United States v. Lopez, 514 U.S. 549, 585–93 (1995) (Thomas, J., concurring).

8. *See, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987); Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001); Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. 847 (2003).

tution refers to buying, selling, and bartering, and transportation for the purpose of trade, and the Interstate Commerce Clause only authorizes regulation of commerce "among the several states." The Court has mistakenly extended the Clause far beyond its terms on the specious ground that regulating noncommercial and intrastate activities is necessary and proper because they may "affect" interstate commerce.

With the exception of Thomas himself, nobody on the Supreme Court seems to have the slightest inclination to resurrect the original meaning of the Commerce Clause. Why not? Stare decisis! Or, perhaps more precisely, a deep fear that reinstating the Constitution's restrictions on congressional power would interfere with too many well-established and politically popular federal programs, and thereby create a political backlash that would embarrass the Justices.[9] Rather than entertain any idea so scary as that, the Court has carved out a series of small exceptions to the virtually plenary police power that Congress had been allowed to acquire. These well-known developments require only a brief summary.

- In *United States v. Lopez*,[10] the Court suddenly articulated a limit on the well-established principle that Congress could regulate wholly intrastate activities with no discernable effects on interstate commerce if the aggregate effect of the *class* of targeted activities would substantially affect interstate commerce. Henceforth, this "aggregation" technique may not be used to justify statutes having "nothing to do with 'commerce' or any sort of economic enterprise,"[11] a conclusion confirmed in *United States v. Morrison*.[12]
- In a series of decisions beginning with *Seminole Tribe of Florida v. Florida*,[13] the Court has concluded that respect for the dignity of the states requires that they be immunized from private suits for money damages in actions based on federal law.[14]

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9. *See, e.g., Lopez*, 514 U.S. at 574 (Kennedy, J., concurring) ("[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.").

10. 514 U.S. 549 (1995).

11. *Id.* at 561.

12. 529 U.S. 598 (2000).

13. 517 U.S. 44 (1996).

14. The early cases in this line featured a prolix debate about the original meaning of the Constitution on the issue of the states' sovereign immunity. *See* Seminole Tribe, 517 U.S. 44 (1996); Alden v. Maine, 527 U.S. 706 (1999). Although I believe that the

- In *New York v. United States*,[15] the Court held that Congress may not "commandeer" the legislative processes of the states by directly compelling them to enact and enforce a federal regulatory program.
- In *Printz v. United States*,[16] this anti-commandeering principle was extended so as to forbid Congress from ordering state executive officials to administer a federal regulatory program.

Except for the 6-3 decision in *New York*, these were all 5-4 decisions.[17] And just as the federalist dissenters in *Garcia* refused to accept defeat, so the nationalist dissenters in these cases have vowed to continue a fight in which they expect eventually to prevail.[18] Notwithstanding the highly charged nature of the debates within the Court, however, the practical importance of these new limitations and immunities appears to be slight, and their potential to evolve into meaningful restraints on federal power is highly questionable.

- The reach of *Lopez* and *Morrison* may turn out to be extremely narrow. That at least appears to be the implication of the 6-3 decision in *Gonzales v. Raich*,[19] which seems to limit *Lopez* and *Morrison* to cases where "a particular statute or provision [falls] outside Congress' commerce power *in its entirety*."[20] In *Raich* itself, Congress imposed a nearly total ban on the cultivation or possession of marijuana, and the Court upheld the application of this ban to homegrown marijuana whose use was specifically authorized for medical purposes by state law: "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal con-

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Constitution requires that congressional power to regulate the states be sharply curtailed, I also think that the nationalist dissenters offered some powerful arguments about the treatment of sovereign immunity in the original Constitution and the Eleventh Amendment. The Court's most recent decision leaves the details of this debate behind, and assumes that the Framers constitutionalized a far-reaching principle of sovereign immunity because of solicitude for the dignity of the states. *See* Federal Maritime Comm'n v. South Carolina State Ports Auth., 535 U.S. 743 (2002).

15. 505 U.S. 144 (1992).

16. 521 U.S. 898 (1997).

17. The more federalist members of the Court during this period were Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas; the more nationalist members were Justices Stevens, Souter, Ginsburg, and Breyer. Shortly after joining the Court, Souter joined the federalist majority in *New York v. United States*, but he thereafter became a reliable member of the nationalist wing.

18. *See, e.g.*, *Alden v. Maine*, 527 U.S. at 814 (Souter, J., dissenting).

19. 125 S. Ct. 2195 (2005).

20. *Id.* at 2209 (emphasis added).

trol would [substantially] affect price and market conditions [in other states]."[21] As Justice O'Connor (joined by Chief Justice Rehnquist and Justice Thomas) pointed out in dissent, this decision "gives Congress a perverse incentive to legislate broadly pursuant to the Commerce Clause—nestling questionable assertions of its authority into comprehensive regulatory schemes—rather than with precision,"[22] and thus "is tantamount to removing meaningful limits on the Commerce Clause."[23]

This is not to deny the majority's entirely plausible claim that its decision is a straightforward application of *Wickard v. Filburn*,[24] which upheld a regulation limiting the cultivation of wheat for home consumption on the ground that the aggregate effect of such intrastate activities could alter the price of wheat in interstate markets. As Justice Thomas incisively pointed out ten years ago:

> The aggregation principle [exemplified in *Wickard*] is clever, but has no stopping point.... Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently would be constitutional. Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.[25]

- Even without responding to the incentives provided by *Raich*, Congress may still find it easy to target the kinds of non-economic intrastate activities at issue in *Lopez* and *Morrsion*. *Lopez* itself, for example, invalidated a federal statute forbidding the possession of firearms near elementary and secondary schools. Congress then reenacted the same regulation, with a new (but practically rather unimportant) proviso that it applies only to firearms that have moved through interstate commerce at some time in the past.[26]

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21. *Id.* at 2207.
22. *Id.* at 2221.
23. *Id.* at 2222.
24. 317 U.S. 111 (1942).
25. *Lopez*, 514 U.S. at 600–01 (Thomas, J., concurring).
26. The amended statute was upheld in United States v. Danks, 221 F.3d 1037 (8th Cir. 1999), *cert. denied*, 528 U.S. 1091 (2000).

- The sovereign immunity decisions do not exempt the states from the obligation to obey any federal laws, and they leave the federal government completely free to enforce those laws. Even in the limited context of private suits against the states, the states are immunized only from actions for money damages, leaving private parties free to sue for equitable relief.
- The anti-commandeering principle applies only to federal laws that directly order state officials to carry out federal programs. *New York* illustrates how relatively insignificant this limitation probably is. In the statute at issue in that case, Congress had sought to induce the states to provide new sites for the disposal of low-level radioactive waste. The Court invalidated a provision that compelled the states either to enact legislation providing for the disposal of all internally generated radioactive waste by a date certain or take title to the waste and thereby become liable for any damages suffered by the generators as a result of the state's failure to ensure its disposal. Two other provisions of the statute, which had the same purpose (creating incentives for states to establish new disposal sites) and which were not obviously less efficacious, were upheld. One provision authorized states with waste disposal sites to impose a surcharge on incoming waste, and funneled some of this tax to other states that made progress in creating new sites. Another provision allowed states with disposal sites to raise the price of accepting waste from out of state, and eventually to deny access to such incoming waste. These provisions were upheld as valid exercises of congressional authority to regulate interstate commerce and to spend federal money. As this example suggests, federal authority under the Commerce Clause and the so-called Spending Clause is so broad and flexible that Congress should be able rather easily to induce the states to take virtually any action that *New York* and *Printz* forbid the federal legislature to command directly.

Thus, at least in its current state, the Court's jurisprudence might be described as fig-leaf federalism. The Court has embraced the proposition that the principle of federalism necessarily entails *some* limits on the national government's power, but those limits seem almost entirely symbolic in nature.

II. JUSTICE SCALIA'S DISSENT IN *TENNESSEE v. LANE*

In yet another strand of the recent federalism revival, the Court has imposed new limits on congressional authority under Section 5 of the Fourteenth Amendment, which provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." In *City of Boerne v. Flores*,[27] Congress had forbidden the states to adopt certain generally applicable state laws burdening the free exercise of religion, and had defined the class of forbidden laws differently than the Supreme Court had defined them in its most recent First Amendment decision.[28] Assuming the long-established proposition that the First Amendment is "incorporated" into the Fourteenth Amendment through substantive due process, and is thus enforceable under Section 5, the *Boerne* Court held that Congress is not free to decide what the First and Fourteenth Amendments mean: "Congress does not enforce a constitutional right by changing what the right is."[29] The Court, however, had previously permitted Congress to exercise its Section 5 enforcement authority against state laws that did not themselves violate the Fourteenth Amendment, in order to remedy or prevent such violations of the Constitution.[30] In *Boerne*, the Court reaffirmed this expansive interpretation of Section 5, but held that there "must be a congruence and proportionality between the [constitutional] injury to be prevented or remedied and the means adopted to that end."[31]

In a series of post-*Boerne* decisions, the five more federalist Justices joined together to invalidate several federal statutes on the ground that they flunked this "congruence and proportionality" test. One of those cases, *Board of Trustees of the University of Alabama v. Garrett*,[32] held that sovereign immunity protects the states from actions for money damages under Title I of the Americans with Disabilities Act (ADA), which prohibits employers from discriminating against disabled persons in certain

27. 521 U.S. 507 (1997).

28. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990), held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. This holding replaced the Court's previous test, which did require a compelling governmental interest, and the statute challenged in *City of Boerne* sought to restore the pre-*Smith* test.

29. 521 U.S. at 519.

30. *E.g.*, Katzenbach v. Morgan, 384 U.S. 641 (1966).

31. 521 U.S. at 520.

32. 531 U.S. 356 (2001).

circumstances. Although Section 5 authorizes Congress to abrogate this immunity, it does so only when the abrogating legislation exhibits the requisite "congruence and proportionality." The *Garrett* Court relied on precedent for the proposition that discrimination against the disabled is forbidden by Section 1 of the Fourteenth Amendment only when it cannot survive rational basis review, and concluded a) that Congress had failed to identify a pattern of conduct by the states that would be held unconstitutional under this standard of review, and b) that the ADA forbids a wide range of discriminatory conduct that would survive rational-basis review. Several other 5-4 decisions took a similar approach.[33]

In *Nevada Department of Human Resources v. Hibbs*,[34] however, Chief Justice Rehnquist and Justice O'Connor joined their four more nationalist colleagues in a decision allowing the states' sovereign immunity to be abrogated on the basis of a conspicuously strained congruence-and-proportionality analysis.[35] Then, in *Tennessee v. Lane*,[36] the Court sustained an action for money damages against a state under Title II of the ADA, which forbids certain forms of discrimination against the disabled in public services, programs, and activities. *Lane* involved a claim of discrimination arising from architectural features of a court house that obstructed access by people with certain physical disabilities. The Court decided that the statute met the congruence and proportionality test, at least insofar as it served to protect the Fourteenth Amendment right of access to the courts. Chief Justice Rehnquist, along with Justices Kennedy and Thomas, dissented on the ground that the majority had misapplied the congruence and proportionality test. Justice Scalia also dissented, but his solo opinion went much further.

Disclosing that he had joined the *Boerne* majority only "with some misgiving,"[37] Scalia contended that *Hibbs* and *Lane* demonstrated that the congruence and proportionality test, "like all such flabby tests, is a standing invitation to judicial arbitrari-

33. Other cases in which challenged statutes were invalidated under the congruence-and-proportionality test include: Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000); and United States v. Morrison, 529 U.S. 598 (2000). Like *Garrett*, all of these 5–4 decisions featured the typical federalist/nationalist lineup.

34. 538 U.S. 721 (2003).

35. *Id.* Rehnquist himself wrote the majority opinion. Scalia, Kennedy, and Thomas dissented.

36. 541 U.S. 509 (2004).

37. *Id.* at 556.

ness and policy-driven decisionmaking."[38] As an alternative, Scalia proposed to adopt the bright-line rule actually specified by Section 5: Congress would be authorized to enforce the Fourteenth Amendment *itself*, but not to enact "prophylactic legislation" outlawing state actions that the Fourteenth Amendment does *not* forbid. A very interesting wrinkle in Scalia's proposal was an exception to this bright-line rule for Section 5 legislation aimed at racial discrimination. Scalia framed this exception as a concession to the principle of stare decisis, noting that many important and well-accepted racial discrimination statutes assumed the validity of prophylactic legislation, and emphasizing that the recent *Hibbs* decision was the first to uphold a prophylactic measure outside that limited context. In addition, Scalia stressed that racial discrimination was the principal evil at which the Equal Protection Clause was aimed, suggesting that an expansive reading of Section 5 in this limited context was both appropriate and appropriately limited. The result: a clearly defined limit on congressional power under Section 5, modified only by a clearly defined exception that is consistent with the Fourteenth Amendment's principal purpose.

III. A TENTH AMENDMENT EXCEPTION TO THE EXPANDED SCOPE OF CONGRESSIONAL REGULATORY POWER

Mutatis mutandi, this same approach could be applied more generally to federalism issues. Thus, for example, the Court's expansive interpretation of the Interstate Commerce Clause could be left in place insofar as it applies to private parties, primarily for reasons of stare decisis. With respect to congressional regulation of the states themselves, however, the Court could revive the original meaning of the Clause, and hold such regulations invalid unless they constitute the regulation of interstate commerce itself. This is a bright-line rule, under which Congress would be forbidden to use its Commerce Clause authority to regulate any activities carried out by a state (or its agencies and political subdivisions) unless those activities constituted buying, selling, or bartering with out-of-state parties, or transportation across state lines for purposes of trade. This variation or extension of Scalia's position in *Lane* may be understood as an elaboration or further specification of O'Connor's "spirit of the Constitution" proposal in her *Garcia* dissent.

38. *Id.* at 557–58.

This doctrinal move could have several useful effects. First, it would create the kind of protected sphere of state autonomy that the *Garcia* dissenters, and many others as well, have believed is an enduringly important characteristic of our constitutional structure. Second, it would do so without diminishing in any significant way the broad authority Congress now routinely exercises over the private sector and the national economy. Congressional authority over private actors would be untouched, and Congress could continue to regulate the states themselves when their governments actually engage in interstate commerce. Third, the Court would have the opportunity to develop a new kind of Commerce Clause jurisprudence, one much more faithful to the original meaning of the Constitution, in a limited context where it is unlikely to produce politically intolerable results. Fourth, the development of this line of case law might provide new information about the political risks of imposing meaningful constraints on congressional power over the private sector. Fifth, in case the political risks of major doctrinal changes in the context of private sector regulation someday become, or appear to become, smaller than today's Justices believe they are, the new line of case law would be available to guide those changes.

It is, of course, possible that the proposal made here could also produce some undesirable effects. Because the states would be freed from some federal regulations that would continue to apply to private parties, we would see a new economic incentive for states to begin carrying out functions that would otherwise be left to the private sector. It is doubtful, however, that these incentives would be sufficient to counterbalance, to any significant degree, the efficiency advantages that are generally assumed to make the private sector the preferred provider of most commercial functions. If a significant migration of functions from the private to the public sector did occur, the most obvious inference would be that federal regulation of the private sector had become quite excessive, which in turn would suggest that Congress ought to cut back on such regulations. And maybe that would happen. If, however, Congress considered it imperative to maintain high levels of regulation, and found that competition from the newly freed states was undermining its efforts, it would always have the old-fashioned option of initiating a genuine constitutional amendment under Article V.

Raich provides a good illustration of the more likely effects of the proposal made in this paper. In that case, Congress had banned the private cultivation and possession of marijuana in re-

sponse to a national political consensus that opposed the recreational use of this substance. Decades later, California and several other states attempted to create a narrow exception from this ban in order to allow physicians to treat their patients with therapeutic doses of the drug. Under this paper's proposed modification of Commerce Clause doctrine, California would still not be able to authorize the private cultivation and distribution of marijuana (so the result in *Raich* would be preserved), but California would have the option of creating a government program for cultivating and distributing marijuana for medical uses. Even the *Raich* majority, which thought that California's effort to relieve unnecessary suffering among its citizens had no legal basis, found the case "difficult" and the result of its own decision "troubling."[39] Unless state governments were to begin behaving in a fashion considerably more irresponsible than California did in this case, the need for a constitutional ban on such "novel social and economic experiments"[40] is less than apparent.

The doctrinal move suggested in this paper would also need to be extended to the Court's jurisprudence of the spending power, which is based on this constitutional provision: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." James Madison famously interpreted this to mean that Congress is authorized to appropriate money only for programs separately authorized by one of its enumerated powers. In the notoriously muddled *Butler* opinion in 1936,[41] the Court purported to reject Madison's eminently plausible interpretation, and to adopt the contrary view of Hamilton and Story, according to which the only limit on congressional spending authority is that appropriations must be for the general welfare of the nation. Mysteriously, however, the Court interpreted the Hamilton/Story position so as to make it seemingly indistinguishable from Madison's. The statute at issue in *Butler* sought to reduce agricultural surpluses by subsidizing farmers who agreed to limit production, and *Butler* invalidated the statute on the ground that it "invades the reserved rights of the states" by seeking to regulate agricultural

39. 125 S. Ct. 2195, 2201 (2005). Ironically, Justice O'Connor, who wrote the principal dissent in *Raich*, went out of her way to note that she did *not* agree with California's effort to protect the medical use of marijuana. *Id.* at 2229.

40. *Id.* at 2220 (O'Connor, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

41. United States v. Butler, 297 U.S. 1 (1936).

production, "a matter beyond the powers delegated to the federal government."[42]

In subsequent cases, the spending power has expanded along with Congress' expanding regulatory authority. While continuing to pay lip service to the proposition that there must be limits on the congressional spending power, the Court has not yet identified any law that flunks the general welfare test and has never again identified a spending provision that invades the reserved rights of the states.[43] Accordingly, even a partial restoration of the original limits on congressional power over the states under the Commerce Clause must be matched with a restoration of parallel limits on the spending authority. Otherwise, as *New York v. United States* illustrates, the newly revived limits on congressional regulatory power would probably prove illusory.[44]

CONCLUSION

Justice O'Connor opened her *Garcia* dissent with these words: "The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded."[45] If a victory for federalism would entail a restoration of the states to the role that the Constitution gave them,

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42. *Id.* at 68.

43. The leading case is South Dakota v. Dole, 483 U.S. 203 (1987), which summarized the law as follows:

> The spending power is of course not unlimited, but is instead subject to several general restrictions articulated in our cases. The first of these limitations is derived from the language of the Constitution itself: the exercise of the spending power must be in pursuit of "the general welfare." *In considering whether a particular expenditure is intended to serve general public purposes, courts should defer substantially to the judgment of Congress.* Second, we have required that if Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . ., enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." Third, our cases have suggested (without significant elaboration) that conditions on federal grants might be illegitimate if they are unrelated "to the federal interest in particular national projects or programs." Finally, we have noted that other constitutional provisions may provide an independent bar to the conditional grant of federal funds.

Id. at 207–08 (italics added; citations omitted). In a footnote to the italicized sentence in this passage, the Court mentioned that "[t]he level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." *Id.* at 207 n.2.

44. For a useful discussion of the importance of finding new limits on congressional spending authority as part of any federalism revival, see Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002).

45. 469 U.S. 528, 580 (1985).

O'Connor held out little hope of ever reaching such a goal. She observed that the states' role in our federal system had eroded largely through an expansion, unanticipated by the founders, of congressional power over domestic affairs, but she gave no sign that she believed it would be practicable, or even desirable, for the judiciary of our time to restore the original constitutional limits on congressional authority over the nation's citizens. Instead, she sought to aid the wounded states by contending that some Commerce Clause regulations of unquestioned validity when applied to private parties could nevertheless be struck down when applied to the states themselves, on the ground that such regulations violate the spirit of the Constitution.

With the help of Justice Scalia's *Lane* dissent, it is now possible to put this sense of the spirit of the Constitution into a more rigorous form. Congressional powers that the Court has improperly expanded, such as the power to regulate interstate commerce and to spend federal funds, should be restored to their original limited scope in all those cases where federal statutes operate on the states themselves. This still amounts only to giving "a little aid to the wounded," but it has the advantage of tying the spirit of the Constitution directly to the original meaning of specific textual provisions. And if the Court were to "hold the field" in this way, it might even prepare the ground for a more complete restoration of the constitutional structure someday in the future. Such a restoration would undoubtedly have to be preceded or accompanied by massive changes in public attitudes toward congressional power, and there is little reason to expect such changes to occur anytime soon. But such changes are not impossible, and the Court might be able to contribute in a small way to making them more likely.