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Tobacco Litigation: Constitutional Issues Raised by Proposed Federal Legislation to Cap Attorneys' Fees

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ABSTRACT

Proposals have been made for Congress to enact a law placing a cap on the fees that states could pay attorneys they have retained to pursue litigation against tobacco companies to recover tobacco-related medicaid expenditures or other causes of action. Such caps would apply to existing contracts. Consideration of a law imposing such caps has raised several constitutional issues: (1) Congress's commerce power, (2) due process, (3) the takings clause, and (4) federalism.

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Summary

Proposals have been made for Congress to enact a law placing a cap on the fees that states could pay attorneys they have retained to pursue litigation against tobacco companies to recover tobacco-related medicaid expenditures or other causes of action. Such caps would apply to existing contracts. Consideration of a law imposing such caps has raised several constitutional issues, which we address in this memorandum. The four issues involve: (1) Congress's commerce power, (2) due process, (3) the takings clause, and (4) federalism.

When considering the constitutionality of any federal statute, one must initially determine whether any power enumerated in the Constitution authorizes Congress to enact the statute. If the answer is affirmative, then one must determine whether the statute violates any provision of the Constitution. The enumerated power that would apparently give Congress the authority to cap attorneys' fees in connection with the ongoing tobacco litigation is the Commerce Clause, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States" (Art. I, § 8, cl. 2). The commerce power has been held to apply to *intra*state activities that substantially affect interstate commerce." *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995). There seems little possibility that a court would find that the ongoing tobacco litigation does not substantially affect interstate commerce.

A statute capping fees would almost certainly not violate due process, as economic regulations such as this, even if they have retroactive effect, violate due process only if it can be shown "that the legislature has acted in an arbitrary and irrational way." *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 472 (1985). The "Takings Clause" issue is less certain. If the cap were to deprive an attorney of only a moderate portion of what he would otherwise receive, the reduced amount was reasonable or "nonconfiscatory," and the legislative purposes of the statute were compelling, it is likely that the fee cap would not violate the Takings Clause. If, however, the reduction in a lawyer's compensation were severe and the legislative purpose were seen as less than compelling, an unconstitutional taking might well be discerned.

As for the federalism issue, there is a series of vacillating Supreme Court decisions respecting the power of Congress to regulate the states as states. These decisions, at least for the moment, are apparently inconsistent with each other, so it is impossible to predict which ones the Court would apply in deciding a challenge to a fee cap in this situation. It appears, however, that a cap imposed on the states might successfully be challenged as unconstitutional on federalism grounds.

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Tobacco Litigation: Constitutional Issues Raised by Proposed Federal Legislation to Cap Attorneys' Fees

Proposals have been made for Congress to enact a law placing a cap on the fees that states could pay attorneys they have retained to pursue litigation against tobacco companies to recover tobacco-related medicaid expenditures or other causes of action. Such caps would apply to existing contracts. Consideration of a law imposing such caps has raised several constitutional issues, which we address in this memorandum. The four issues involve: (1) Congress's commerce power, (2) due process, (3) the takings clause, and (4) federalism.[1] With respect to the due process and the takings clause issues, the analysis below would not change if Congress imposed a cap on a contract between an attorney and a private party instead of between an attorney and a State. The federalism issue, however, would not arise in the absence of State involvement.

Congress's Commerce Power

When considering the constitutionality of any federal statute, one must initially determine whether any power enumerated in the Constitution authorizes Congress to enact the statute. If the answer is affirmative, then one must determine whether the statute violates any provision of the Constitution. The next three sections of this memorandum address the latter question. In this section we note that the enumerated power that would apparently give Congress the authority to cap attorneys' fees in connection with the ongoing tobacco litigation is the Commerce Clause, which gives Congress the power to "regulate Commerce with foreign Nations, and among the several States" (Art. I, § 8, cl. 2). The commerce power has been held to apply to *intra*state activities that substantially affect interstate commerce." *United States v. Lopez*, 115 S. Ct. 1624, 1630 (1995). There seems little possibility that a court would find that the ongoing tobacco litigation does not substantially affect interstate commerce.

Due Process

The Contract Clause of the Constitution (Art. I, sec. 10, cl. 1) provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." This clause does not limit the federal government.[2] The Due Process Clause of the Fifth

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[1] (name re dacted) is the author of the sections on (1) and (2); (name redacted) of (3), an (name redacted) of (4).

[2] *See*, *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 732 n.9 (continued...)

Amendment, however, does limit the federal government, but capping attorneys' fees would not appear to violate it.

The Due Process Clause provides that no person shall "be deprived of life, liberty, or property, without due process of law." The Supreme Court has written:

> To prevail on a claim that federal economic legislation unconstitutionally impairs a private contractual right, the party complaining of unconstitutionality . . . must overcome a presumption of constitutionality and "'establish that the legislature has acted in an arbitrary and irrational way.'"[3]

In another case, the Court held that due process requirements could be "met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose."[4] And, in a later case, the Court wrote:

> "The retroactive aspects of legislation, as well as the prospective aspects, must meet the test of due process": a legitimate legislative purpose furthered by a rational means.[5]

The question, then, is whether capping attorneys' fees of lawyers whom the states have hired to represent them in the tobacco litigation would be irrational. Applying its rational basis test in an equal protection case, the Supreme Court has written that, "[i]n areas of social and economic policy," a statute must be upheld

> if there is any reasonably conceivable state of facts that could provide a rational basis for [it]. Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." This standard of review is a paradigm of judicial restraint.[6]

Under this standard, it seems very likely that the proposal in question would not violate due process.

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[2](...continued)
(1984).

[3] *National Railroad Passenger Corp. v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 472 (1985).

[4] *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

[5] *General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992).

[6] *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313-314 (1993) (citations omitted).

The Takings Clause

Because the proposed attorneys' fee cap would apply retroactively to fee contracts already performed by the attorneys, the cap could be held to take property under the Fifth Amendment's Takings Clause.[7] Under current takings case law, however, it seems that a taking would be found only if the cap effected a rather substantial reduction in the compensation that would otherwise have been owed for such work performed, and was unaccompanied by other provisions that conferred offsetting benefits on the affected attorneys.

The essential prerequisite to any taking claim is the plaintiff's demonstration that he or she possesses a property right cognizable by the Takings Clause, as of the date of the alleged taking. Contract rights are generally deemed to be property,[8] so this hurdle is met here. (We assume valid contracts promising the states' attorneys some precisely ascertainable amount of compensation for their legal work on the tobacco settlement.)

On the takings issue itself, the opening question is whether to regard the government action as an appropriation or a mere regulatory restriction. Appropriations (and physical invasions) are analyzed quite differently from regulation in takings jurisprudence. With the former, a *per se* taking occurs independent of the amount of property appropriated and the purpose of the government action. With the latter, the court employs a fact-intensive, ad hoc balancing test under which the degree of economic impact is pivotal, and the sovereign's purpose plays a role as well (except in "total takings").

Supreme Court case law on government interference with private contracts suggests that the court is most likely to place the lawyers' fee cap in the second, regulatory mold. In two decisions on retroactive, contract-altering provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MMPA), the Court opted to use the three-factor *Penn Central* balancing test invoked for regulatory takings.[9] Lower court rulings on federal actions that directly contravened private contracts use the same analytical approach.[10]

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[7] U.S. Const. Amend. V: "[N]or shall private property be taken for public use, without compensation."

[8] *See, e.g., Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 642 (1993).

[9] *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 641-647 (1993); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 221-228 (1986).

[10] *See, e.g., Burlington Northern Railroad Co. v. United Transportation Union*, 822 F. Supp. 797, 802-803 (D.D.C. 1991), *affirmed*, 987 F.2d 784 (D.C. Cir. 1993).

The MMPA decisions and others[11] are generally read to mean that the Supreme Court is not interested in finding takings, short of egregious circumstances, in the sphere of what is often called "economic regulation," as contrasted with land use cases which form the mainstream of takings law. A phrase used in both the MMPA decisions is particularly revealing. The Court noted that having found no substantive due process violation in those cases, "it would be surprising indeed" to discover that a taking had occurred.[12] Because the Court virtually never finds a substantive due process violation on the basis of economic regulation, this statement has been taken to mean it would be similarly hesitant to find a taking in that realm. Economic regulation is generally viewed as merely "adjust[ing] the benefits and burdens of economic life to promote the common good and, under our cases, does not constitute a taking . . . ."[13] And indeed, the Supreme Court has never found a taking based on federal legislative alteration of existing private contracts.

Note, quite critically, that the MMPA cases — and the lawyers' fee cap proposal — do not involve the United States' seeking to abrogate *its own* contracts, a situation entitled to much less deference because of the government's self-interest. Owing to such lowered deference, U.S. Government abrogations of its own contracts for reasons of self-enrichment rather than furtherance of a broad public interest have been voided as either violations of substantive due process[14] or breach of contract.[15] Note as well that the proposed ceiling on tobacco-settlement attorneys' fees takes nothing for the United States' own use, another factor cutting against a taking.[16]

More specifically, governmental restraints on wages, prices, rents, and common carrier rates have usually been upheld against taking challenge.[17]

But while economic regulation generally appears to hold little interest to the courts as a taking, there is a potentially significant distinction between the attorneys' fee cap and the facts involved in the surveyed cases to date. None of these cases appeared to involve a statute that excused (or partially excused) a contract party from a duty (1) stated in a pre-existing contract in a non-heavily regulated field (attorneys'

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[11] *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989) (state agency's refusal to allow inclusion in utility's rate base of cost of cancelled nuclear power plants had, overall, insufficient impact to be held taking); *FCC v. Florida Power Corp*., 480 U.S. 245 (1987) (federal regulation requiring that utility reduce rent charged cable TV company for attaching its cables to utility's poles effects no taking, despite pre-existing contract).

[12] *Connolly*, 475 U.S. at 223; *Concrete Pipe*, 508 U.S. at 641.

[13] *Connolly*, 475 U.S. at 225; *Concrete Pipe*, 508 U.S. at 643.

[14] *Lynch v. United States,* 292 U.S. 571 (1934); *Perry v. United States*, 294 U.S. 330 (1935).

[15] *United States v. Winstar Corp*., 116 S. Ct. 2432 (1996).

[16] *Connolly*, 475 U.S. at 224; *Concrete Pipe*, 508 U.S. at 604.

[17] *See, e.g., Garelick v. Sullivan*, 987 F.2d 913 (2d Cir. 1993) (limits on amount doctors can charge Medicare patients do not work taking); Local Union No. 11 v. Boldt, 481 F.2d 1392 (Temp. Emer. Ct. App. 1973) (sustaining government's disallowance of wage increase scheduled under existing collective bargaining agreement).

fees), (2) reducible to a precise dollar amount, (3) to pay for work already performed. This fact counsels against cavalierly applying to the proposed fee cap the general hands-off approach of the Court to federal modification of existing private contracts.

In light of the above, the soundest argument seems to be that if the effect of a lawyers' fee cap were to deprive an attorney of only a moderate portion of what he or she would otherwise receive, the reduced amount was reasonable or "nonconfiscatory," and the legislative purposes recited in the statute were compelling, it is quite likely that the fee cap would be seen as inoffensive to the Takings Clause. If, on the other hand, the reduction in a lawyer's compensation were severe and the legislative purposes seen as less than compelling, a taking might well be discerned. In the latter circumstance, it is difficult to regard the legislative action as but another legislative "adjust[ment] [of] the benefits and burdens of economic life." Nor do we understand the fee cap proposal to offer the affected attorneys any offsetting benefits.

The Federalism Issues

This section addresses the question whether there is a substantial constitutional argument based on federalism concerns that could be made against proposals to cap or to require the States to cap the attorneys' fees to be paid lawyers retained by the States to pursue litigation against the tobacco companies.

Various proposals were offered and debated in 1997, with the greatest advance contained in amendments to the Labor/HHS appropriations bill. Briefly, the bill was amended in the Senate to cap attorneys' fees, but it was further amended so as not to apply to already existing fee agreements. Other legislation, one approach being exemplified by the bill by Senator Hatch, S. 1530, which, as part of an overall enactment of the settlement between the States and the tobacco companies, would mandate an arbitration panel to fix attorneys' fees, and others, exemplified by S. 1570, by Senator Faircloth. Briefly, this latter bill would cap attorneys' fees at $125 per hour, in connection with the June 20, 1997, settlement agreement or other actions involving suits to recover medicaid expenditures deemed to have been paid out as a result of smoking disabilities.

There is a series of vacillating Supreme Court decisions respecting the powers of Congress to regulate the States as States. Because the decisions are not, at least for the moment, consistent one with another, it is not possible to make a definitive statement that the amendment would be invalidated if it were enacted and judicially challenged. But, inasmuch as a discernable trend may be observed in the decisions and because the more recent decisions may be determinative of the issue, we believe that a serious and, perhaps, successful challenge to the constitutionality of the amendment can be predicted.

A challenge to the amendment would be on the basis that Congress is regulating state conduct that it cannot regulate. The contention is not that Congress lacks the legislative jurisdiction to impose such a regulation generally, the commerce clause, Art. I, § 8, cl. 3, being more than adequate to provide the foundation, but that congressional power cannot be so extended to require the States to do something or to prohibit the States from doing something that falls within traditional state

functions. Conducting litigation to obtain obligations owed to them and either using their own counsels or retaining private attorneys to litigate, concomitantly with being able freely to contract with private attorneys the amount of their fees, is a core traditional state function.

An arguable approach to a successful constitutional result may be for Congress to tie a statute capping attorneys' fees to legislation needed to approve last year's settlement, the contention that since Congress may in its discretion act or refuse to act it may condition its action on the States agreeing to the cap.

The Commerce Clause Basis. Preliminarily, one must ask whether Congress has legislative jurisdiction upon which to base legislation capping the fees that States agree to pay attorneys. The obvious basis is the commerce clause, Article I, § 8, cl. 3, which empowers Congress to regulate commerce among the several States. It is well settled that Congress pursuant to this clause can regulate *intrastate* activities or conduct that does not cross state lines but that substantially affects interstate commerce.

"Even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations." *Fry v. United States*, 421 U.S. 542, 547 (1975). The sweep of the power is illustrated by the doctrine of aggregation, that is, the activities of all individual parties are considered together for the purpose of determining effect, e.g., *Perez v. United States*, 402 U.S. 146 (1971); *Summit Health Ltd. v. Pinhas*, 500 U.S. 322 (1991), and by the limited scope of judicial review. Courts do not attempt for themselves to determine whether there is an effect and whether it is substantial. The courts rather seek to determine whether Congress could rationally conclude that there was a substantial effect. "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981). See also *Hodel v. Virginia Surface Mining & Reclamation Assn.*, 452 U.S. 264, 281 (1981); *Preseault v. ICC*, 494 U.S. 1, 17 (1990).

No change in the doctrines or standards was effected in *United States v. Lopez*, 514 U.S. 549 (1995), in which, for the first time since 1936, the Court held that Congress had exceeded its commerce authority in regulating private conduct. The decision struck down a ban on possession of a firearm within 1,000 feet of a school. Adopted as a floor amendment in the Senate, the provision was subject to no hearings and to no congressional findings and did not contain any jurisdictional basis requiring a determination of an effect on interstate commerce. Moreover, the section was not applied to an activity for which it was rational to conclude that each individual piece of conduct could be aggregated to count as a whole. The case is a rare example of an act of Congress being found to be irrational. It evidences no intent to turn away from a half century of jurisprudence. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

This impression is strengthened by the numerous decisions of the federal courts of appeals since *Lopez*, which have overwhelmingly rejected constitutional

challenges under the commerce clause to other gun legislation, to drug laws, carjacking prohibitions, and numerous other statutes, decisions that the Supreme Court has declined to review.

The Federalism Issue. The issue turns, thus, on whether the Constitution bars or does not permit the extension of a commerce-clause exercise to the States as States. Ordinarily, when "it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). However, this is not always the case.

To explicate the case law on this matter requires a brief history. For long periods in our jurisprudence, the Supreme Court followed a principle of "dual federalism" under which the Federal Government and the States had each an area of jurisdiction that was mutually exclusive of the other's authority, an exclusivity that was not textual constitutionally but that was exemplified by the Tenth Amendment. Beginning in the 1930s, however, the doctrine of dual federalism fell into desuetude, and Congress' powers were interpreted so that if a fair reading of the express and implied grants contained in the Constitution allowed Congress to regulate certain state activities, that reading was the correct one without reference to the powers of the States. Illustrative of this approach was *United States v. California*, 297 U.S. 175 (1936), in which the Court upheld the power of Congress to extend a railroad safety law to a state-owned and -operated railroad under the commerce clause. The sovereignty of the State was necessarily diminished to the extent of the powers granted to Congress.

For years, the kind of federal regulations at issue was directed to the proprietary activities of the States, conduct that was also engaged in by private actors, such as the operation of railroads. But, then, Congress began to regulate governmental activities. In *Maryland v. Wirtz*, 392 U.S. 183 (1968), the Court sustained the extension of the federal wage and hour law to nonprofessional employees of state operated schools and hospitals. See also *Fry v. United States*, 421 U.S. 542 (1975)(upholding temporary wage and salary controls on all state governmental employees).

Shifting course, the Court, in *National League of Cities v. Usery*, 426 U.S. 833 (1976), held unconstitutional an expansion of FSLA coverage of state and local employees. It is impermissible, the Court's 5-to-4 majority held, for the Federal Government to interfere with "functions essential to [the States'] separate and independent existence." Id., 845. Their freedom to structure their internal operations by determining the wages and hours of their employees in areas of "traditional governmental functions" was critical and protected.

Were *League of Cities* good law today, good argument could be made that a congressional cap on attorneys fees would be highly questionable and likely to be held unconstitutional, under the doctrinal lines of that case.

However, following a period in which efforts to extend it failed, the case was overruled in *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528 (1985), also by a 5-to-4 vote. Doctrinally, the Court did two things. First, it held that federal powers granted by the Constitution were not cabined by considerations of state sovereignty; if a power was granted to Congress, it could be exercised even to the

extent of regulating and limiting state powers. Second, absent an express provision in the Constitution protecting them, the States' recourse against federal actions was to act within the political process and through their congressional representatives. See also *South Carolina v. Baker*, 485 U.S. 505 (1988)(reaffirming and strengthening *Garcia*).

Garcia has not been overruled and, if it remains good law, a constitutional challenge to a congressional cap on state-paid attorneys fees would be problematic.

Doubt exists, though, that it is good law. Moreover, it is not the only law in this field. Concerns of federalism were reasserted by new majorities in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in the context of statutory construction purportedly pursued to avoid a Tenth Amendment challenge to a federal law. In *New York v. United States*, 505 U.S. 144 (1992), the Court held unconstitutional a federal law requiring the States to implement and carry out provisions of the Low-Level Radioactive Waste Policy Amendments. The Court purported not to question the validity of *Garcia*, saying that the former case was distinguishable because it involved the application to the States of a generally applicable law, equally applied to private parties and the States; thus, States are not remitted to the political process when a federal law is applied solely to them..

Inasmuch as a congressional cap would apply only to the States, the *New York* principle, rather than the *Garcia* principle, prevails. States, or private parties aggrieved by the Senate amendment asserting States' rights, could challenge its constitutionality in court.

Further, the Court held that Congress lacked the power under the Constitution to "commandeer" state legislative and administrative resources to carry out federal functions. The Court did not discern a solid textual basis for this conclusion. It observed that the federalism question presented - i.e., "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States" - can be viewed in either of two ways. "In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution. In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment. In a case like this one, involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the states; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. . . .

"[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." Id., 155-57 (internal citations omitted).

A congressional cap would not commandeer state legislative and administrative resources within the proscription of *New York*, but rather it would regulate a state

function, a traditional state function. *New York* is not squarely on point, and, thus, it does not directly implicate the proposals. But its interpretative analysis does suggest the substantial burden a congressional cap would carry.

Last Term, the Court, in another 5-to-4 decision, *Printz v. United States*, 117 S.Ct. 2365 (1997), held unconstitutional certain provisions of the Brady Law, that required law enforcement officers of the States and local governments to conduct background checks in order to determine whether applicants to purchase handguns might be disqualified from doing so. Expressly adverting to the doctrine of "dual federalism," id., 2376, the Court asserted that while no constitutional text spoke to the precise issue, id., 2369-70, history and practice did, and Congress could not impose on state and local officers federal duties and compel them to exercise those duties. Id., 2376-78.

In *Printz*, the Court read its precedents as establishing that "the Federal Government may not compel the states to implement, by legislation or executive action, federal regulatory programs." Id., 2380. Moreover, *Garcia* was rejected as an "inappropriate" precedent, because "it is the whole object of the [Brady] law to direct the functioning of the state executive. . . ." Id., 2383. The Court's statement of its holding is unyielding. "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the states to address particular problems, nor command the states' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty." Id., 2384.

Hence, although there is no square constitutional doctrine on which we may rely, it seems reasonably evident that this Court as now constituted would look favorably on a challenge to a congressional cap. *New York* and *Printz* strongly suggest that *Garcia* when it arises in a case before the Court will be reconsidered and overruled and that *League of Cities*, in some form or another, will be reinstated as controlling law. As we have indicated above, *League of Cities* would indicate that the cap would be constitutionally questionable. Even absent the revival of that case, however, constitutional doubts exist with respect to the proposals. The most recent cases strongly suggest that Congress would be held to lack authority to regulate or to restrict the manner in which States structure their litigating authority.

One must observe that if an enacted cap is challenged in the lower courts, those courts must accept *Garcia* as good law until the Supreme Court overrules it; lower courts may not engage in an anticipatory overruling of a case that they may think to be undermined by later precedent. Cf. *Agostini v. Felton*, 117 S.Ct. 1997, 2017 (1997). But, this only means that if the issue turns on the vitality of *Garcia* versus *League of Cities*, the matter would have to go to the Supreme Court. However, as we have indicated, because the "political-process" doctrine of *Garcia* does not apply, a federal cap exclusively covering the states, a lower court could adjudicate the question and might hold that a cap would fall under the principle of *New York* and *Printz*.

That the latter approach may prevail is evidenced by two recent decisions in federal district courts, in which plaintiffs challenged the constitutionality of the Driver's Privacy Protection Act of 1994, 18 U.S.C. §§ 2721-25. That law regulates the dissemination and use of certain information contained in state motor vehicle records, addressing a congressional perception of problems associated with the active commerce in and the consequent easy availability of personal information contained in such records. Both courts found that the law, in regulating how States maintain and choose to disseminate motor vehicle records, infringed on state sovereignty and was unconstitutional. *Condon v. Reno*, 972 F.Supp. 977 (D.S.C. 1997); *Oklahoma v. United States*, 1997 U.S. Dist. LEXIS 14455 (W.D.Okla. Sept. 17, 1997). The point is not whether these two courts are decisionally correct but rather that they chose to approach the issue in the context of *New York* and *Printz*, instead of trying to analyze the statute through the prism of a revivified *League of Cities*.

Conditions on Federal Legislation. One possible approach to the avoidance of the constitutional bar to regulation of the States as States is to enact legislation conferring a benefit on the States conditioned upon their acceptance of a federal provision capping attorneys' fees. The most common example of this approach is the conditioning of federal spending; if a State wants to accept the money, it must accept the condition. See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987). However, in the context of the tobacco settlement, resort to money offers need not be the solution.

Federal legislation is necessary to closure of the settlement between the States and the tobacco companies. But, Congress need not enact legislation; it has discretion to act or not to act. Thus, Congress could invoke what has been called the "greater-power" doctrine, the principle of which is that, if government has the greater power to deny a benefit completely or to forbid an activity entirely, it cannot be improper to confer the benefit or to permit the activity conditionally. That is, a power must include its constituent elements, or, in the parlance of the doctrine, "the-greater-includes-the-lesser."

Congress in the course of legislating into law the settlement would include the cap on attorneys' fees, either making it clear to the States that the cap is prerequisite to the overall legislation or going further to require the States expressly to accede to the cap.

However, the "greater-power" doctrine has been paralleled for the better part of this century by another doctrine, the "unconstitutional-conditions" doctrine. That is, government may not utilize a discretionary benefit as a device to extract from someone a surrender of a constitutional right.

To illustrate the two doctrines, we might point to an early case, *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1876), in which a State was permitted to allow an out-of-state corporation into the State to do business, provided the corporation gave up its right to bring suit in federal courts under diversity jurisdiction. The greater power of exclusion included the lesser power of admission based upon acceptance of a condition, a condition the State could not have imposed directly. However, in *Frost & Frost Trucking Co. v. Railroad Comm.*, 271 U.S. 583 (1926), the Court imposed the doctrine of unconstitutional conditions on the exercise of a similar state condition. In that case, the State conditioned the use of the State's highways on the

acceptance by certain corporations of the duties of common carriers, a status the State could not have imposed directly. Striking down this condition, the Court declared: "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." Id., 594. And see *Terral v. Burke Const. Co.*, 257 U.S. 529 (1922).

One would think that the two doctrines cannot coexist. One must supersede the other. And, yet, as we said above, both doctrines do exist, in parallel tracks, one sometimes governing a case, the other governing another case. Inconsistency shadows the Court in its application of first one, then the other. Reconciliation of precedents in this area is impossible.

Thus, the doctrine of unconstitutional conditions has been utilized at times by both wings of the modern Court and by its center. E.g., *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994)(Chief Justice Rehnquist for the Court holding that the city could not condition its approval of a building permit sought by the property owner upon her dedication of a portion of her property for public use without compensation); *Nollan v. California Coastal Comm.*, 483 U.S. 825, 834-35 (1987)(Justice Scalia for the Court holding that the Commission could not condition its grant of permission to rebuild property owners' house on their transfer to the public of an easement across their beachfront property); *Speiser v. Randall*, 357 U.S. 513, 518-19 (1958)(Justice Brennan for the Court holding that State could not condition a veteran's tax exemption upon each recipient executing a loyalty oath); *FCC v. League of Women Voters*, 468 U.S. 364 (1985) (Justice Brennan for the Court holding that government could not condition receipt of funds by public broadcasting stations upon stations' agreeing not to editorialize even with their own money); *Board of County Comrs., Wabaunsee County v. Umbehr*, 116 S.Ct. 2342, 2345-48 (1996)(Justice O'Connor for the Court holding that County could not terminate trash-hauling contract because of contractor's criticism of the county and the board); *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S.Ct. 2353, 2356-57 (1996)(Justice Kennedy for the Court holding that city could not condition private towing company's business with the City on owner's support of a political party and its candidates).

Each of these Justices has also authored or joined opinions of the Court that rejected application of the doctrine. Each of these Justices has authored or joined opinions that accepted the "greater-includes-the-lesser" principle or the "right-privilege" distinction. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court, after it struck down as violative of the First Amendment the political expenditures limits Congress had enacted, id., 39-59, upheld the provision of public funding to presidential candidates conditioned on their adherence to these very same expenditures limits. Id., 57 n. 65, 90-109. In *Lyng v. International Union, UAW*, 485 U.S. 360, 364-69 (1988), the Court rejected an unconstitu-tional conditions challenge to provisions barring federal food stamps to otherwise eligible households that had become needy because a household member was on strike. In *Wyman v. James*, 400 U.S. 309 (1971), the Court held that the government could legitimately condition receipt of AFDC on the recipient's submission to warrantless inspections of her home to make sure she was complying with the program. In *Rust v. Sullivan*, 500 U.S. 173

(1991), the Court upheld a regulation that provided that federally-funded family planning clinics were not, among other things, to allow their doctors to discuss abortion with pregnant clients. In *Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation*, 492 U.S. 408, 433-37 (1989)(Justice Stevens delivering the opinion of the Court in part and concurring in part), the Court held that the Tribe's power to exclude nonmembers from its reservation - which derived from its aboriginal sovereignty and the express provisions of its treaty with the United States - necessarily included the lesser power to regulate land use in the interest of protecting the tribal community, a zoning power the Tribe would not otherwise have had.

Because of the Court's failure to promulgate standards as to when the doctrine is applicable and when not, not only is the result in any newly arising case rather speculative, but the stability of precedent is subject to erosion and even to destruction. To illustrate: In *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986), the Commonwealth had licensed casino gambling, but, because it thought access to the casinos by Puerto Ricans was economically and socially harmful, it barred casinos from advertising to Puerto Ricans while encouraging them to advertise to mainlanders, both in the United States and in tourist-oriented publications within the Island. It can readily be seen that the issue, the right to advertise, which is protected to some extent under the commercial-speech doctrine, *Central Hudson Gas & Electric Corp. v. PSC*, 447 U.S. 557 (1980), as modified, is the same issue raised by a ban or regulation on the advertising of tobacco products, as contemplated in the tobacco bills. The Court, in an opinion by Justice Rehnquist, explicitly found that the advertisements at issue met the test for constitutionally-protected commercial speech. Id., 340-41. However, the Court went on to hold that the Commonwealth had met its burden under the *Central Hudson* standard by making the showing required. Further, Justice Rehnquist continued, prior decisions striking down advertising bans were inapposite, inasmuch as those cases concerned advertising of items that were constitutionally protected. That was not the case here. "[T]he Puerto Rico legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." Id., 345-46. And see id., 346 ("[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising")(emphasis by Court).

Clearly, even had the Court found the Commonwealth's restriction to fail the commercial-speech standard, it would have upheld the bar on the "greater-includes-the-lesser" approach. And the outlook for the sustaining of a congressional regulation might be considered bright. But *Posadas* has not stood the test of time.

In *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996), a majority of the Justices, although in disparate separate opinions, disavowed *Posadas*, both in its application of the *Central Hudson* test and in its "greater-includes-the-lesser" analysis. At issue before the Court were two state laws prohibiting the advertising of the price of alcoholic beverages, one banning all advertising by liquor licensees and out-of-state manufacturers, wholesalers, and shippers outside of the licensed premises and the other barring news media from publishing or broadcasting

advertisements making reference to the price of alcoholic beverages. The purported purpose of the State was to promote temperance. Besides rejecting the contention of the State, based on *Posadas*, that it could choose a ban on advertising rather than counter-speech, the Justices, either explicitly in some instances or implicitly in others, rejected *Posadas* in its expression of the "greater-includes-the-lesser." Id., 1510-13 (Justice Stevens, joined on this point by Justices Kennedy, Thomas, and Ginsburg); id., 1520-22 (Justice O'Connor concurring, joined by Chief Justice Rehnquist and Justices Souter and Breyer).

Whether Congress could validly impose a cap on attorneys' fees as a condition of enacting the tobacco settlement presents a problematic proposition. Even if the "greater-power" doctrine is the one applied, a single issue bill, such as S. 1570, standing alone, would not have the advantage of the doctrine. Moreover, it is unclear to what extent the revisions in the omnibus bills, the changes worked in what Congress would accept and enact, see the amended S. 1415, as reported by the Senate Committee on Commerce, would unsettle the approach.

Even assuming, however, that the eventual law would be acceptable to both the States and the tobacco companies, it remains unclear whether the Court would apply the "greater-power" doctrine, to find valid the cap on attorneys' fees, or whether it would apply the "unconstitutional-conditions" doctrine to invalidate a congressional cap. In the final analysis, the predilection of the Court, of the majority of the Court, respecting the value of the constitutional principle at issue, speech in many of the cited cases or federalism in the present circumstance, appears to determine which doctrine will be opted for.

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