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Big Questions Facing Public Administration Theory

# Dead or Alive? The Federalism Revolution and Its Meaning for Public Administration

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*Federalism jurisprudence shapes the powers that public administrators have to achieve policy priorities. Federalism, however, is neither static nor simplistic as a concept, and a proper understanding of the environment in which public administrators work rests on a careful analysis of U.S. Supreme Court decisions. The authors review claims that a 2005 decision,* Gonzales v. Raich, *terminated a federalism revolution that had been ushered in a decade earlier. Does Raich in fact mark the end of the Supreme Court's federalism doctrine? Analysis of this question clarifies whether the past and current Court has articulated any direction touching on administrators' powers at both the national and state levels. The authors argue that before the federalism revolution is declared dead or alive, public administration can better understand the realities of the Supreme Court's doctrinal boundaries by examining a more detailed analysis of jurisprudence for what is says about the foundations of federalism such as the commerce clause, Fourteenth Amendment, Tenth Amendment, Eleventh Amendment, spending clause, and statutory interpretation issues.*

Federalism is explicitly covered in many current textbooks on public administration (e.g., Milakovich and Gordon 2007; Rosenbloom and Kravchuck 2005; Starling 2007) as a fundamental part of the operating environment of public administration. Thomas Anton (1989, 3) defines federalism as the system of rules that divides public responsibilities among various units of government. The U.S. Supreme Court has come to play an important role in articulating that system of rules. The Supreme Court's federalism decisions are especially important in understanding what powers public managers have to achieve policy priorities in the current context of devolved government (Wise 1998).

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The Supreme Court's role in defining the framework of our federal system has not always been so active. Many summarize the Court's federalism doctrines as following a trend that has consistently favored national authority since the 1800s.[1] While there were several exceptions to this trend prior to 1937,[2] in that year, the Court, in *National Labor Relations Board v. Jones and Laughlin* (301 U.S. 1), returned with fervor to its practice of solidifying the reach of congressional power. The Court's stance on federalism from 1937 to 1995—with a notable commerce clause exception of *National League of Cities v. Usery,* which was later overturned in *Garcia v. San Antonio Metropolitan Transportation Authority*[3]—has been called a period of "Constitution in exile." The decision in *Garcia* particularly disappointed federalism proponents because, in overturning *Usery,* the *Garcia* majority stated that the principal limit on Congress's commerce power to regulate state functions is to be found in state participation in the legislative process of Congress, and not the federal courts (469 U.S. 556 [1984]). That pronouncement seemed to crystallize the "Constitution in exile." This refers to the Supreme Court's unwillingness "to enforce constitutional limits on national power vis-à-vis the states" (Baker and Young 2001, 75). Many scholars concluded that the Court had merely abandoned its role in interpreting the Constitution with regard to what it means for the respective powers of the federal government and state governments (Cooper 1988; Van Alstyne 1985).

However, the Court's posture changed in the 1990s. In a series of cases, the Supreme Court signaled a change in the legal basis of intergovernmental relations that portended a shift in the environment of public administration (Dinan 1998; Rosenbloom and Ross 1998; Wise 1998). In 1995, the Supreme Court handed down one particularly notable decision, *United States v. Lopez* (514 U.S. 549 [1995]), that seemingly broke with the decades-long trend of consistently affirming

the expansion of congressional power and instead interpreted the Constitution's commerce clause by enunciating some limits on Congress's power to use that clause as a basis for legislation. In *Lopez,* the Court struck down the Gun-Free School Zones Act, which made it a federal crime for an individual to possess a firearm at a place known to be a school zone, on the grounds that the act exceeded Congress's powers under the Constitution's commerce clause (115 S.Ct. 1624 [1995]). As a result of this and subsequent commerce clause cases (see Wise 2001), some journalists and scholars raised the possibility that the Court had ushered in a federalism revolution (Chemerinsky 2006; Turley 2005; *Wall Street Journal* 1999). There seemed to be some agreement that the Court, if not revolutionist, at least articulated jurisprudence more Tocquevillian in its deference to states' powers (McGinnis 2002; Wise and Christensen 2005). Nonetheless, a fuller understanding of the Court's approach to federalism questions necessitates an analysis of cases beyond those based on the commerce clause. While the Court began to enunciate some limits on Congress's power to legislate based on the commerce clause and, to a lesser extent, on the Fourteenth Amendment, at the same time, it expanded Congress's legislative reach versus that of the states based on the spending clause (Magill 2004; Ponnuru 2005; Wise 2001). Nonetheless, proponents of greater Court protection for state prerogatives hoped that the Court's enunciation of some limits on federal power would lead to even greater deference to state prerogatives in subsequent cases (Greve 1999).

However, in 2005, many feared that they heard a death knell for the higher expectations harbored by such proponents in a subsequent case involving the commerce clause. The Court affirmed in *Gonzales v. Raich* (545 U.S. 1 [2005]) that Congress's regulatory power extends to activities—even purely local activities such as California's legislation to authorize medicinal marijuana—that are "part of an economic class of activities that have a substantial effect on interstate commerce" (545 U.S. 1, 17). While much of the reasoning in *Raich* is reminiscent of *Wickard v. Filburn* (317 U.S. 111 [1942]), the epitome of the "Constitution in exile" period, whether *Raich* is a signal that the Court may once again be closing the federalism question is an issue with deep meaning for public managers.

## Research Questions

Our research inquiry is centered on this last issue. What does the ebb and flow of the Court's federalism jurisprudence imply for public managers? Did *Raich* and other recent cases mark the end of the Supreme Court's federalism doctrine? Is the Court signaling a new period of "Constitution in exile"? Analysis of these questions clarifies whether the past and current Court has articulated any direction touching on administrators' powers to achieve policy priorities. The practical relevance of our inquiry for public administration rests on how changes in federalism jurisprudence have altered administrative powers for the public administrator at the national and state levels. Our analysis is broadly organized along these lines and includes insights into what new federalism directions might mean for public managers.

The analysis places the *Lopez* and *Raich* decisions in a larger context for public administrators. We argue that before the federalism revolution is declared dead or alive, public administration can better understand the realities of the Supreme Court's doctrinal boundaries by examining a more detailed analysis of recent, individual decisions for what they have to say about the foundations of federalism, such as the commerce clause, Fourteenth Amendment, Tenth Amendment, Eleventh Amendment, spending clause, and statutory interpretation issues. After we engage these issues, we proffer our own estimation of where the Court has struck the federalism balance. We conclude by highlighting the importance of the debate for public managers.

## The Federalism Revolution: Conflicting Perspectives

Policy makers and commentators have taken up conflicting positions on the significance of the Court's decisions involving federalism. Citing the 1995 *Lopez* decision, Chemerinsky observed that for "the first time in sixty years, the Supreme Court declared a federal law unconstitutional as exceeding the scope of Congress's commerce clause power . . . [o]ver the past decade the Supreme Court has limited the Scope of Congress's powers and has greatly expanded the protection of state sovereign immunity" (2006, 1763). McGinnis observed that William Rehnquist's federalism jurisprudence "restores a degree of the Constitution's original meaning, because the Framers shared the Rehnquist Court's contemporary concern with restraining special interests [and] seems designed to protect the decentralized order and mediating institutions that Alexis De Tocqueville . . . viewed as our society's distinctive principle" (2002, 490–91). Yoo argued that while promoting federalism as the intended "cornerstone of the Founder's liberal republic" (1998, 203), the Court emphasized the power that decentralized institutions have to counterbalance an overbearing, centralized government. Like Yoo, Calabresi (2001) welcomed the federalism revolution for these same reasons, also arguing that the judiciary is an important partner with Congress in policing the reach of national legislative power.

Others have viewed the Court's new direction as potentially damaging. Senator Charles Schumer recently described Rehnquist's federalism as a movement that "has undermined the lawmaking authority of Congress . . . reflecting a trend of diminishing judicial deference to Congress's ability to find facts and enact appropriate laws." Senator Arlen Specter roundly criticized the Court for "usurping Congressional authority" (August 8, 2005, letter from Specter to John Roberts, cited in Lazarus 2006). Focusing on the Court's opinions asserting Eleventh Amendment protection of state sovereignty, Judge John Noonan objected to the Court inappropriately granting states power that necessarily lies with Congress—an effect of which is also a transfer of congressional power to the judiciary to determine these types of issues (Noonan 2002). Amid the arguments over the appropriateness of the federalism decisions, others have observed that the effects of *Lopez* on federalism policies have actually been fairly modest (Dinan 2004; Thomas and Tatelman 2005).

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which was otherwise legal under California law. Antagonists of the federalism revolution viewed *Raich* as the resounding end to an ill-begotten effort. Ponnuru observed, post-*Raich,* that "[o]ne has to ask, at this point, what conservatives have gained by attempting to get the courts to impose limits on congressional authority. The Court cannot impose federalism over the objections of the other branches of the government. That project was never likely to succeed and is now over" (2005, 34–35). Lazarus suggested that *Raich* stands contrary to "Rehnquist Court's half-aborted initiative and squarely behind the view that American federalism exists primarily to expand democratic options for the people—not to empower judges to arbitrarily trump the choices of their elected representatives" (2006, 9). Proponents of the new federalism direction criticized *Raich* for failing to provide what *Lopez* had offered: a contextual analysis of the circumstances under which congressional reach or regulation was justified (Coleman 2006, 862).

Concerning the line of the Court's federalism cases, we propose that "continued conversation" is a more appropriate descriptor than "revolution" or "post-revolution." The history of federalism jurisprudence does not support the polar prescriptions for federalism that *Raich*'s advocates and antagonists have suggested. We argue that *Raich* and several other post-2000 cases represent additional points in a federalism conversation that continues to develop. Barnett supports this proposition relative to *Raich*'s, holding that "federalism lives as a 'first principle' of constitutional law because no Court has had the temerity to kill it outright. And if the New Deal Court could not take that step, neither will a future Court" (2005, 750).

To substantiate our proposition, we offer analyses at the national and state levels that take up a multiprovisional approach (Wise 2001). For public administrators, "a fuller picture [of federalism] comes into focus when we examine the various bases for the exercise of federal power and what the Court has said about them" (Wise 2001, 343). In considering the latest developments in the federalism conversation at the national and state levels, we contemplate these bases to include the commerce clause; Fifth Amendment; election clause; spending clause; Tenth, Eleventh, and Fourteenth amendments; as well as selected statutory interpretations by the Court.

## Analysis: National Boundaries of the Revolution

### *Commerce Clause*

As mentioned earlier, the Court in *United States v. Lopez* invalidated the Gun-Free School Zones Act. The Court's majority opinion set out the criteria for assessing valid statutes within the commerce clause, stating that they should be sustained if it could be shown that the activity to be regulated "substantially affects" interstate commerce (115 S.Ct. 1640 [1995]). In a subsequent case, *United States v. Morrison,* the Court struck down a part of the Violence Against Women Act on similar grounds, finding that gender-motivated crimes of violence do not, in any sense of the phrase, constitute economic activity (120 S.Ct. 1751 [2000]). The Court stated that the existence of findings is not sufficient by itself to sustain the constitutionality of commerce clause legislation (120 S.Ct. 1751, 1752).

In *Gonzales v. Raich,* the Court heard a constitutional challenge to the Controlled Substances Act (21 U.S.C. sec. 801 et seq.) from two California residents who sought to avail themselves of marijuana pursuant to a California statute that created an exception for marijuana use prescribed for a medical condition. The residents asserted (citing *Morrison*) that the Controlled Substances Act could not constitutionally be applied to their activities because Congress had not made a specific finding that the intrastate cultivation and possession of marijuana for medical purposes based on the recommendation of a physician would substantially affect the larger interstate marijuana market. The Court's majority, however, found that Congress had made findings regarding the effects of intrastate drug activity on interstate commerce, and observed that the court of appeals had found that those findings weighed in favor of upholding the constitutionality of the act (352 F.3d. 1222, 1232 [2003]). Further, the Court's majority, citing *Lopez,* observed that the Court never required Congress to make particularized findings in order to legislate, and asserted that "while congressional findings are certainly helpful in reviewing the substance of a congressional statutory scheme, particularly when the connection to commerce is not self-evident, and while we will consider congressional findings in our analysis when they are available, the absence of particularized findings does not call into question Congress' authority to legislate" (*Gonzales v. Raich,* 545 U.S. 1, 21 [2005]). The majority observed that they "need not determine whether the residents' activities, taken in the aggregate, substantially affect interstate commerce in fact, only whether a 'rational basis' exists for so concluding" (*Raich,* 22, referencing *Lopez*). The majority went on to find that Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions (*Raich,* 20). The residents had relied on the Court's opinions in *Lopez* and *Morrison,* but the Court majority found that they had misapplied them. The Court concluded that, in this case, the residents were asking the Court to excise individual applications of a concededly valid statutory scheme, whereas in both *Lopez* and *Morrison,* the parties had asserted that a particular statute or provision fell outside commerce power in its entirety. Further, the Court observed that in *Lopez,* the act did not regulate any economic activity, whereas in this case, Congress's classification and regulation of marijuana was merely one of many "essential parts of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated" (*Raich,* quoting *Lopez,* 514 U.S., at 561). The majority observed that, unlike the activities regulated in *Lopez* and *Morrison,* the "activities regulated by the CSA are quintessentially economic" (*Raich,* 25).

The Court reached a related conclusion in a later case, *Watters v. Wachovia* (2007 U.S. Lexis 4336). *Watters* illustrates the point that the Court acts as a traffic cop in commercial relations involving competing state and federal regulatory schemes. In *Watters,* the state of Michigan challenged the reach of Congress's regulatory powers over banking activities on the basis of the Tenth Amendment. The Court ruled that the Tenth Amendment was not even implicated, as bank operations are a clear prerogative of Congress under the commerce and necessary and proper clauses.

Thus, the Court is (1) continuing to apply its principle that the statutory scheme must regulate activity that affects interstate commerce to pass commerce clause muster; (2) continuing to assert its own authority to assess whether Congress had a rational basis for finding that the activity substantially affected interstate commerce; and (3)

asserting that Congress's legislation did not have to contain detailed findings proving that each activity regulated within a comprehensive scheme is essential to the statutory scheme.

### *Federal Statutory Interpretation*

Another case involving the Controlled Substances Act, while involving statutory interpretation rather than a commerce clause constitutional challenge, nonetheless demonstrated that the Court would not refrain from stepping in to defend state prerogatives from federal interference. *Gonzales v. Oregon* (126 S.Ct. 917 [2006]) involved the Oregon Death with Dignity Act (Ore. Rev. Stat. sec. 127.800 et seq.), which legalized assisted suicide. The U.S. attorney general issued an interpretive rule addressing the interpretation and enforcement of the Controlled Substances Act, specifying that the use of controlled substances to assist in suicide is not a legitimate medical practice and that dispensing or prescribing them for this purpose is unlawful under the act, and the challenge to the rule was before the Court. The Court examined the statute to determine the authority of the attorney general to issue the rule and found that his authority was specifically confined to promulgating rules relating only to "registration" and "control" and "for the efficient execution of his functions under the statute. The Court concluded that the interpretive rule did not concern the scheduling of substances and was not issued after the required procedures for rules regarding scheduling, so it could not fall under the attorney general's "control" authority (126 S.Ct. 917 [2006]). The Court further examined the statute to see whether it could be used to regulate physician-assisted suicide. The Court's analysis yielded the conclusion that it could not, and it particularly referred to state prerogatives to regulate medical practice: "The Statute and our case law amply support the conclusion that Congress regulates medical practice insofar as it bars doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood. Beyond this, however, the statute manifests no intent to regulate the practice of medicine generally. The silence is understandable given the structure and limitations of federalism, which allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons'" (126 S.Ct. 917, 923 [2006]; citations omitted). The government tried to advance the argument that the attorney general's authority to decide whether a physician's actions are inconsistent with the "public interest" provides the basis for the interpretive rule. The Court rejected this argument, and opined, "Just as the conventions of expression indicate that Congress is unlikely to alter a statute's obvious scope and division of authority through muffled hints, the background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police powers" (126 S.Ct. 917, 924 [2006]).

A different statute in potential conflict with Eleventh Amendment sovereign immunity protection for the states was at issue in *Federal Maritime Commission v. South Carolina State Ports Authority* (535 U.S. 743 [2002]). The question in that case was whether state sovereign immunity precluded the Federal Maritime Commission from adjudicating a private party's complaint that a state-run port had violated the Shipping Act of 1984 (46 U.S.C., App. Sec. 1701 et. seq). The case began when a company asked the State Ports Authority to berth a cruise ship, which would cruise in the Bahamas and international waters from a base in Charleston. On all the trips, passengers would be permitted to participate in gambling activities while on board. The Ports Authority repeatedly denied the company's requests, contending that it had an established policy of denying berths in Charleston to vessels whose primary purpose was gambling. The company filed a complaint with the Federal Maritime Commission, contending that the refusal violated the Shipping Act by allowing another company that allowed gambling on its ships to berth ships in Charleston. The Federal Maritime Commission administrative law judge hearing the case granted South Carolina's motion to dismiss the case on the grounds that the Ports Authority, as an arm of the state of South Carolina, was entitled to Eleventh Amendment immunity from the company's suit. While the company did not appeal the administrative law judge's ruling, the Federal Maritime Commission on its own motion decided to review the ruling, and concluded that the doctrine of state sovereign immunity was meant to cover proceedings before judicial tribunals, and not executive branch agencies such as the Federal Maritime Commission, and then reversed the administrative law judge's decision.

The Supreme Court reiterated that the preeminent purpose of state sovereign immunity is to accord states the dignity that is consistent with their status as sovereign entities. It went on to declare, "Given both this interest in protecting States' dignity and the strong similarities between FMC proceedings and civil litigation, we hold that state sovereign immunity bars the FMC from adjudicating complaints filed by a private party against a nonconsenting State. Simply put, if the framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a state to do exactly the same thing before an administrative tribunal of an agency, such as the FMC" (535 U.S. 743, 760). The Federal Maritime Commission attempted to assert federal commerce clause authority by maintaining that sovereign immunity should not bar it from adjudicating the company's complaint because the constitutional necessity of uniformity in the regulation of maritime commerce limits the states' sovereignty with respect to the federal government's authority to regulate that commerce. The Supreme Court, however, reaffirmed its conclusion in a previous sovereign immunity case, *Seminole Tribe v. Florida* (517 U.S. 44 [1996]), that "the background principle of sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government. Thus, 'even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States'" (535 U.S. 743, 768, quoting *Seminole Tribe*). Finally, the Court opined, "While some might complain that our dual sovereignty is not a model of administrative convenience, that is not its purpose. Rather, 'the constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties'" (535 U.S. 743, 769, quoting *Atascadero State Hospital v. Scanlon*).

### *Fourteenth Amendment*

The Fourteenth Amendment has also served as a foundation on which courts have calculated the federalism balance. Section 5 of the Fourteenth Amendment contains an enactment clause giving

Congress "the power to enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. With respect to the federalism balance, Wise explains that "the Court has been concerned that Congress, under the guise of enforcing rights, may be enunciating rights that are not reasonably within its constitutional prerogatives" (2001, 346). Jurisprudence under the early Rehnquist Court clarified that

> Congress cannot use Section 5 to override the Court's contemporary interpretation of the Eleventh Amendment protecting the states from suit in policy areas that are not squarely within the purview of the Fourteenth Amendment. In addition, in situations in which Congress does act within the appropriate boundaries of the Fourteenth Amendment, and where it seeks to override state sovereign immunity, it must be crystal clear that it intends to override. (Wise 2001, 348)

The Court has provided an important distinction from past decisions in this regard. In 2003, the Court heard *Nevada Department of Human Resources v. Hibbs* (538 U.S. 721). Hibbs was a state employee who had applied for leave under the Family and Medical Leave Act (FMLA) of 1993 in order to care for his ailing wife. The public agency employing Hibbs granted 12 weeks of leave, as guaranteed by the FMLA, between certain dates. After Hibbs had taken some of the leave intermittently, he did not return to work and, after notice, was terminated before the end of the calendar year. Hibbs sued for equitable relief and money damages under specific FMLA provisions permitting such private action.

With respect to public employers, the FMLA's enactment is based primarily on the section 5 authority of the Fourteenth Amendment, which abrogates states' Eleventh Amendment immunity in order to facilitate enforcement of the specific interests of the FMLA. At issue in the *Hibbs* case was whether FMLA suits for damages against states are constitutionally permissible. In a 6–3 opinion written by Rehnquist, the Court ruled that such suits are permissible based on two considerations, drawn from previous section 5 cases in which Congress's powers were circumscribed by the Court in *Kimel v. Florida Board of Regents* (528 U.S. 62, [2000]), in which the Court ruled that states, if rationally motivated, may discriminate based on age, and in *City of Boerne v. Flores* (521 U.S. 507 [1997]), in which the Court ruled that 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" (521 U.S. 507, 520).

In *Hibbs,* the Court pursued a two-step analysis. First, the Court looked at *Kimel*'s specification that Congress give clear notice to states when it intends to abrogate their immunity through section 5 of the Fourteenth Amendment. The Court reviewed the language of the FMLA and found that Congress gave clear notice to states by using such words allowing suits "against any employer that interfere[d] with, restrain[ed], or den[ied] the exercise of" FMLA guarantees.

Second, the Court analyzed the FMLA under requirements highlighted in *City of Boerne.* First, when Congress does rightly abrogate state immunity, it must do so within the proper scope of section 5 powers. In *Hibbs,* the Court found that Congress met this requirement in the language of the FMLA. The Court also considered whether the FMLA satisfied *Boerne*'s congruence and proportionality requirement, and found that Congress satisfied this as well. The FMLA's aim is to prevent the injury of sex discrimination in the workplace. By allowing men and women equal access to a minimum of 12 weeks of leave for family and medical reasons, the Court found that Congress "attack[ed] the formerly state-sanctioned stereotype that only women are responsible for family care giving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes" (*Hibbs,* 538 U.S. 721, 737). Furthermore, the Court distinguished *Hibbs* by ruling that "[u]nlike the statutes at issue in *City of Boerne,* [and] *Kimel* . . . , which applied broadly to every aspect of state employers' operations, the FMLA is narrowly targeted at the faultline between work and family-precisely where sex-based overgeneralization has been and remains strongest-and affects only one aspect of the employment relationship" (538 U.S. 721, 738). The Court was especially persuaded by restrictions on the FMLA's scope that it did not find in the *City of Boerne* and *Kimel* cases. These restrictions included the FMLA's application to only unpaid leave, employees with a minimum service record, and the exclusion of elected or sensitive employees.

In 2004, the Court continued this theme when it handed down its decision in *Tennessee v. Lane* (541 U.S. 509). *Lane* considered whether Congress, in the Americans With Disabilities Act (ADA), violated Eleventh Amendment state sovereign immunity by allowing plaintiffs to sue states for alleged ADA violations. The disabled plaintiffs in this case were unable to access the upper stories of a Tennessee state courthouse. They brought suit against the state of Tennessee in federal court, alleging that the state had violated Title II of the ADA ("no person, based on disability, shall be denied access to public services"). Tennessee countered that it was protected from such suits based on the Eleventh Amendment's provision of state sovereign immunity. Based on the facts of the case, a 5–4 Court held that the ADA does not violate the Eleventh Amendment, and that Congress properly exercised its authority. First, the Court reasoned that the ADA specifically clarified Congress's intent to abrogate state power to ensure due process to disabled citizens. Second, the Court ruled that such an abrogation was justified based on Congress's section 5 enforcement powers. It reasoned that "Congress' chosen remedy for the pattern of exclusion and discrimination [at issue], Title II's requirement of program accessibility, is congruent and proportional to its object of enforcing the right of access to the courts. The unequal treatment of disabled persons in the administration of judicial services has a long history, and has persisted despite several legislative efforts to remedy the problem of disability discrimination. Faced with considerable evidence of the shortcomings of previous legislative responses, Congress was justified in the [ADA's prophylactic measures]" (541 U.S. 509, 531).

In 2006, the Court further clarified the two-part federalism issues present in *Hibbs* and *Lane,* again with respect to Title II of the ADA involved in *Lane.* The Court seemingly expanded its federalism jurisprudence in the consolidated cases of *United States v. Georgia/ Goodman v. Georgia* (546 U.S. 151 [2006]). At issue in these cases was whether Title II of the ADA properly abrogated states' immunity, and if so, whether the abrogation was a properly exercised extension of Congress's section 5 powers.

Goodman was a Georgia state prison inmate and paraplegic. He sued the state of Georgia in federal court, alleging that prison conditions violated Title II of the ADA. The relevant portion of Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Goodman asserted that the evidence of such violations included

- A cell in which he could not turn his wheelchair
- No wheelchair-accessible toilet or shower
- Lack of assistance in using nonaccessible facilities
- Denial of physical therapy and "virtually all" other prison programs and services

Title II allows private citizens to sue public entities for money damages when ADA violations have occurred. The Court ruled that Title II properly abrogated state immunity because of Congress's clear statements made in the ADA. The Court observed that Congress specifically drew on the enforcement power of the Fourteenth Amendment in enacting the ADA. Further, the ADA specifically states that "[a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this chapter." The Court relied on this last statement as an "unequivocal expression of Congress's intent to abrogate state sovereign immunity" (546 U.S. 151, 154).

The Court incorporated into the first issue its consideration of the second issue—whether the abrogation was properly exercised within Section 5 powers. The Court said that "[w]hile the Members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers under §5 of the Fourteenth Amendment. . . . insofar as Title II creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity" (546 U.S. 151, 157).

The Court's conclusion with respect to federalism is that Congress's section 5 enforcement power *includes* the power to abrogate states' immunity in the event that states violate substantive provisions of the Constitution (in this case, section 1 of the Fourteenth Amendment) rather than prophylactic legislation enacted under Congress's section 5 powers.

In sum, recent cases validating FMLA and ADA provisions seem to expand judicial deference to Congress's scope of power under section 5 of the Fourteenth Amendment.

### *Spending Clause*

Congressional spending authority (U.S. Constitution, Article I, section 8, clause 1) has long been an important dynamic in determining the balance of federalism. Discussed in greater detail here, the spending clause serves as the foundation that facilitates federal conditions on monies granted to states in order to further policy priorities.

In the past, the Supreme Court granted Congress expansive powers with respect to these spending powers (Wise 2001). Chief Justice Rehnquist wrote the majority opinion in *South Dakota v. Dole* (483 U.S. 203, 207–208 [1987]), wherein he reasoned that spending clause powers are conditioned on several considerations. First, congressional authority exercised based on spending power must achieve "general welfare." In cases in which such powers promote general public objectives, courts generally defer to Congress. However, regarding deference to states' authority, Congress can only condition federal funds on particular state behaviors if done overtly and unambiguously. Third, any conditions on federal funds must be related to national priorities. Fourth, the judiciary reserves the right to enforce constitutional provisions that may prohibit conditional grants.

Despite the Court's assertion that federal spending powers are not unlimited, many observers saw little real restraint or application of the Court's stated guidelines. More recent cases suggest that the federalism revolutions did not reach the spending clause area, but the current Court may be curbing some of the Court's past deference to Congress.

In 2004, the Court decided *Frew v. Hawkins* (540 U.S. 431). The case implicates spending clause jurisprudence because the litigation was based on the state of Texas's decision to accept federal funds to operate its Medicaid programs. Pursuant to cooperative federal–state funding requirements, Texas was required to operate a program called Early and Periodic Screening, Diagnosis, and Treatment (EPSDT). Plaintiffs alleged that Texas had failed to meet its obligations in operating the EPSDT program, citing, among other things, mismanagement of cases, lack of uniformity in service provision, and failure to give notice of eligibility and available services.

Texas agencies initially claimed Eleventh Amendment immunity, but state officials remained in the suit and entered into a consent decree approved in federal court. Two years later, the plaintiffs brought this suit, claiming that Texas still failed to meet EPSDT obligations.

At issue was whether the Eleventh Amendment bars suits against state officials when those officials have entered a federal consent decree. In a unanimous decision, the Court ruled that enforcement of the consent decree does not violate Eleventh Amendment immunity. The Court reasoned that because the dispute arises from a federal dispute, concerning federal objectives, the consent decree is enforceable in federal courts.

The Court directly engaged consideration of federalism principles by noting that when litigation "requires a detailed order to ensure compliance with a decree for prospective relief, and the decree in effect mandates the State, through its named officials, to administer a significant federal program, principles of federalism require that state officials with front-line responsibility for administering the program be given latitude and substantial discretion. . . . If the State establishes reason to modify the decree, the court should make the necessary changes; where it has not done so, however, the decree should be enforced according to its terms" (540 U.S. 431, 442).

In *Frew,* the Court distinguished its enforcement from cases concerning only state officials' violations of state law. The *Frew* decree "reflects a choice among various ways that a State could implement the Medicaid Act. As a result, enforcing the decree vindicates an agreement that the state officials reached to comply with federal

law" (540 U.S. 431, 439). The Court asserted the latitude that state officials should receive and directed lower courts to be responsive accordingly. State officials need to realize, however, that if they enter into a decree agreement, they will be held to it and will not be able to escape by relying on the Eleventh Amendment.

In 2005, *Schaffer v. Weast* (546 U.S. 49) opened a line of Individuals with Disabilities Education Act (IDEA) jurisprudence in which the Court drew increased attention to the requirements of Congress regarding spending clause authority. In a dispute over the burden of proof in IDEA services, the Court ruled that Congress's legislative silence on the matter left no alternative but to put the burden on parties seeking relief—not on the administrative agencies.

A second, more prolific development in federalism under spending clause authority came in 2006, when the Court heard *Arlington Central School District Board of Education v. Murphy* (126 S. Ct. 2455). This case was predicated by Murphy's parents successfully suing the Arlington Central School District to pay private school tuition for their son under the IDEA. Pursuant to that litigation, the parents sought to recover fees that they had paid to experts who testified in the IDEA case. While the IDEA specifically allows recovery of "reasonable attorney's fees as part of the costs" for prevailing litigants, at issue is whether, under the IDEA, those reasonable fees include expert witness costs.

The Court, Justice Samuel Alito writing, ruled in a 6–3 decision that IDEA does not allow recovery of such fees. The Court reminded that Congress's spending clause authority serves as the foundation of the IDEA's enactment. Building upon *Dole*'s second spending clause guideline, the Court clarified that "Congress has broad power to set the terms on which it disburses federal money to the States, but when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously'" (126 S. Ct. 2455, 2459). At issue here is whether Congress's spending clause authority permitted Murphy's parents to recover expert fees against the Arlington Central School District. After lengthy analysis, including legislative history, the Court found the IDEA to be ambiguous on the issue of expert fees and ruled that the spending clause does not justify such recovery. Of note is the Court's finding that legislative intent alone is not sufficient to establish an unambiguous fair notice to states. The Court concluded that "in a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds. Here … we cannot say that the legislative history on which respondents rely is sufficient to provide the requisite fair notice" (126 S. Ct. 2455, 2463).

The *Arlington* case suggests that the Court may be pulling away from its expansive interpretation of congressional powers, when under *Dole*'s second requirement, federal legislation predicated on spending clause authority does not fairly or clearly give notice of obligations to states. The Court emphasized that it would not permit Congress to infer what is required of the states. The legislation must state the requirements clearly. This gives the states the chance to make their opinions known when legislation is being considered and keeps them from being blindsided after passage.

## Analysis: State Boundaries of the Revolution

### *Dormant Commerce Clause*

The Supreme Court's role in interpreting the commerce clause as it affects state and local governments is not confined to scrutinizing congressional enactments. Perhaps of equal significance is how the Court applies the so-called dormant commerce clause, pursuant to which plaintiffs ask the Court to invalidate state statutes that they believe unfairly discriminate against interstate commerce. In *Granholm v. Held* (544 U.S. 460 [2005]), the Court confronted the question of whether a state regulatory scheme permitting in-state wineries to directly ship alcohol to consumers but restricting the ability of out-of-state wineries to do so violated the dormant commerce clause, or whether the state's activities were shielded by the Twenty-First Amendment.[4] The case involved challenges to statutes in Michigan and New York that permitted in-state wineries to ship directly to consumers. Michigan's law required all out-of-state wine to pass through an in-state wholesaler and retailer, and New York's, among other things, required out-of-state wineries to establish an in-state distribution operation in order to get a license for direct distribution, and still refused them a "farm winery" license, which provided the most direct means of shipping to in-state consumers. The Court held that both state statutes discriminated against interstate commerce in violation of the commerce clause. The Court found that the differential treatment between in-state and out-of-state wineries constituted explicit discrimination against interstate commerce, and the discrimination substantially limited the direct sale of wine to consumers, an otherwise emerging and significant business (544 U.S. 460, 465 [2005]).

The Supreme Court's role in interpreting the commerce clause as it affects state and local governments is not confined to scrutinizing congressional enactments. Perhaps of equal significance is how the Court applies the so-called dormant commerce clause, pursuant to which plaintiffs ask the Court to invalidate state statutes that they believe unfairly discriminate against interstate commerce.

With regard to Michigan's and New York's claim that the Twenty-First Amendment granted them the authority for their regulations, the Court found that the history of the amendment and its interpretation did not support their argument. The Court concluded that the aim of the Twenty-First Amendment is to allow states to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use, and it does not give states the authority to pass nonuniform laws in order to discriminate against out-of-state goods (544 U.S. 460, 485 [2005]). The majority's review of the Court's precedents led them to the conclusion that the recent cases confirm that the Twenty-First Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that states may not give a discriminatory preference to their own producers (544 U.S. 460, 485 [2005]). The Court observed that it previously had upheld state regulations that discriminate against interstate commerce only in circumstances in which it found based on concrete evidence that a

state's nondiscriminatory alternatives would prove unworkable, but that Michigan and New York's regulations had not satisfied that exacting standard (544 U.S. 460, 490 [2005]). So, the Court declared that if a state chooses to allow direct shipment of wine, it must do so on evenhanded terms.

Nonetheless, in a subsequent dormant commerce clause case, the Court upheld the state's position. In *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority* (2007 U.S. LEXIS 4746), waster haulers challenged two New York counties' flow control ordinances, which required haulers to bring waste to facilities owned and operated by a state-created public benefit corporation. Two courts of appeals had issued conflicting opinions about whether a flow control ordinance favoring a public entity facially discriminates against interstate commerce, and the Court took this case to resolve the conflict. In a previous case, the Court had struck down a flow control ordinance that forced haulers to deliver waste to a particular *private* processing facility (511, U.S. 383 [1994]). The issue was whether it made a difference if the processing facility was a public one. The Court found that it did. The Court found that the flow control ordinances in this case benefited a clearly public facility, while treating all private companies exactly the same, and decided that they did not discriminate against interstate commerce for purposes of the dormant commerce clause. The majority opined that laws favoring local government, in contrast to those favoring in-state businesses over out-of-state competition, may be directed toward any number of legitimate goals unrelated to protectionism. The Court reasoned that the contrary approach of treating public and private entities the same under the dormant commerce clause would lead to unprecedented and unbounded interference by the courts in state and local government. The Court emphasized, "The dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local governments to undertake, and what activities must be the province of private market competition" (2007 U.S. LEXIS 4746, 22), and, in a warning to all courts to exercise restraint, "We should be particularly hesitant to interfere with the Counties' efforts under the guise of the commerce clause because "[w]aste disposal is both typically and traditionally a local government function" (2007 U.S. LEXIS 4746, 25; citations omitted). The Court instructed the lower courts that it would uphold nondiscriminatory statutes such as those in this case under the *Pike* test, "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits" (397 U.S. at 142). In this case, the Court found that after years of discovery, both the magistrate judge and the district court could not detect *any* disparate impact on out-of-state as opposed to in-state businesses. On the benefit side of the ledger, the Court found revenue generation for the counties, a cognizable benefit for purposes of the *Pike* test, and increased recycling was also a benefit, and thus concluded that any arguable burden he ordinances imposed on interstate commerce does not exceed their public benefits" (2007 U.S. LEXIS 4746, 30). Thus, while the states can expect continued vigilance by the Court when they pass statutes that favor certain in-state private parties, the Court has made it clear that it respects the ability of the states to engage in public services and will not allow attacks pursuant to the dormant commerce clause to infringe on state prerogatives. The traditional government functions language in *United Haulers Association* is particularly heartening to states and is reminiscent of *Usery.*

### *Fifth Amendment*

Regulation of private property has long been considered to be largely the province of state and local government. During the past two decades, however, the Supreme Court has allowed challenges in federal courts against state and local regulations alleged to violate the Fifth Amendment's prohibition on the taking of private property without just compensation (Wise 2004). Proponents of state and local prerogatives have been dismayed that the doctrine of regulatory takings—which has allowed challenges to state and local regulations that, in effect, have so restricted the use of a property owner's property that they have effected a taking of the property—has superimposed decision making by federal courts over state and local decision making in an area of long-standing state and local control: land use. Nonetheless, some decisions since 2000 appear to be more respectful of state and local prerogatives.

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (535 U.S. 302 [2002]), the Supreme Court took up the question of whether the Planning Agency's moratorium on all development for a period of 32 months while it developed a comprehensive land-use plan constituted a per se taking of private property requiring compensation under the takings clause. The landowners had urged the Court to find that the mere enactment of a temporary regulation that, while in effect, denied a property owner all viable use of his or her property gave rise to an unqualified constitutional obligation to compensate him or her for the value of its use during that period (535 U.S. 318 [2002]). The Court refused to enact such a categorical rule and concluded that a better approach "requires careful examination and weighing all the circumstances" (535 U.S. 335 [2002]). The Court did not say that the temporary nature of a land-use restriction precluded finding that it effects a taking; it simply recognized that it should not be given exclusive significance one way or the other (535 U.S. 335, 337, [2002]). The Court concluded, "The interest in facilitating informed decisionmaking by regulatory agencies counsels against adopting a *per se* rule that would impose such severe costs on their deliberations" (535 U.S. 335, 339 [2002]). Thus, state and local governments that are developing comprehensive land use plans and systems of regulation will not be automatically subjected to federal court mandates to pay compensation to landowners whose development plans are delayed by the planning process.

Another case involving the regulatory takings doctrine focused not on the regulation of real estate but on the regulation of rents that oil companies may charge to dealers who lease service stations. In *Lingle v. Chevron* (544 U.S. 528 [2005]), the Court dealt with a federal district court ruling based on a previous Supreme Court ruling (*Agins v. City of Tiburon,* 477 U.S. 255) that had declared that government regulation of private property effects a taking if it does not "substantially advance legitimate state interests" (477 U.S. 255, 260 [1980]). The district court had applied the *Agins* "substantially advances" formula to strike down a Hawaii statute limiting the rents that oil companies may charge to dealers who lease service stations owned by the companies. The district court had found that the statute did not substantially advance Hawaii's asserted interest in controlling gasoline prices. The district court concluded that the oil companies would raise wholesale gasoline prices to offset any rent reduction required by Hawaii's act, and would refrain from building lessee-dealer stations, thus decreasing their number.

The Supreme Court reviewed its prior precedents and found that in most cases, the method for finding an unconstitutional regulatory taking involved determining whether a regulation had significantly burdened property rights. The Court observed that the lower courts, in solely applying the *Agins* "substantially advances" test, did not assess whether any burden had been placed on the oil companies. The Court observed that an ineffective regulation may not significantly burden property rights at all, and it may distribute burdens broadly and evenly among property owners (544 U.S. 528, 543).

Thus, the Court observed that instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. The Court pointed out that Chevron asserted, and the district court found, that Chevron would recoup any reductions in its rental income by raising wholesale prices. Thus, the Court concluded that Chevron had not clearly even argued—let alone established—that it had been singled out to bear any severe regulatory burden. The Court also concluded that the "substantially advances" formula used alone would present serious practical difficulties. It could be read to demand heightened means-ends review of virtually any regulation of private property, and if so interpreted, would require courts to scrutinize the efficacy of vast array of state and federal regulations—"a task for which courts are not well suited." "Moreover" the Court concluded, "it would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies" (544 U.S. 528, 543). Therefore, the Court declared that the "substantially advances" formula is not a valid method of identifying regulatory takings for which the Fifth Amendment requires just compensation (544 U.S. 528, 545).

This declaration that plaintiffs cannot use the "substantially advances" formula standing alone to challenge state regulations means that the Court has closed the door on the many challenges to state regulations that would have surely followed if Chevron had prevailed in the case. The Court's clearly expressed concern that federal courts would have been increasingly placed in the position of second guessing state legislatures and administrative agencies over the predicted effectiveness of regulations demonstrates a much-needed respect for state control of their regulatory functions.

Another Fifth Amendment case did not involve the regulatory takings doctrine, but rather the definition of "public use." The Fifth Amendment states, "[N]or shall private property be taken for public use, without just compensation." In *Kelo v. City of New London* (545 U.S. 469 [2005]), the city of New London approved a development plan to revitalize the downtown and waterfront areas. In assembling the land needed for the project, the city's development agent purchased property from willing sellers and proposed to use the power of eminent domain to acquire the remainder of the property from unwilling owners in exchange for just compensation. Nine property owners who did not want to sell challenged the condemnation proceeding, claiming that the taking of their properties would violate the "public use" restriction in the Fifth Amendment. After reviewing its decisions in previous cases, the Court stated that the disposition of this case turned on the question of whether the city's development plan served a "public purpose." The Court observed, "Without exception, our cases have defined the concept broadly, reflecting our longstanding policy of deference to legislative judgments in the field" (545 U.S. 469, 480), and "Our earliest cases in particular embodied a strong theme of federalism, emphasizing the 'great respect' that we owe to state legislatures and state courts in discerning local public needs" (545 U.S. 469, 482). The Court opined that the city had invoked a state statute specifically authorizing the use of eminent domain to promote economic development, and that because the plan unquestionably served a public purpose, the takings challenged by the landowners satisfied the public use requirement of the Fifth Amendment (545 U.S. 469, 484). The landowners had asked the Court to declare that economic development did not qualify as a public use because it blurred the boundary between public and private takings. The Court observed that the public end may be served as well or better through an agency of private enterprise, and the Court could not say that public ownership is the sole method of promoting the public purposes of community projects (545 U.S. 469, 486). Quoting an earlier decision, the Court emphasized, "When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts" (545 U.S. 469, 487; citations omitted). The Court made it clear that lower courts are not to engage in scrutiny of the details of such plans and regulations or the inclusion of particular properties:

> Just as we decline to second-guess the City's considered judgment about the efficacy of its development plan, we also decline to second-guess the City's determinations as to what lands it needs to acquire in order to effectuate the project. 'It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of the particular project area. Once the question of the public purpose has been decided, the amount and character of the land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch. (545 U.S. 469, 489; citations omitted)

### *Fourteenth Amendment*

The Court has also shaped the federalism balance by scrutinizing state action under the Fourteenth Amendment. Wise observed that the early Rehnquist Court was no exception in using the "various Fourteenth Amendment provisions to scrutinize state actions. The Court does not shy away from using its own authority to invalidate state actions, even when the states believe they have the approval of Congress for such actions" (2001, 351).

In *Lawrence v. Texas* (539 U.S. 558), the Court took the opportunity to clarify its jurisprudence in this regard. The Court considered whether a Texas law criminalizing acts of same-sex intimacy violated Fourteenth Amendment equal protection and due process guarantees. Previously, a 5–4 Court had ruled in *Bowers v. Hardwick* (478 U.S. 186 [1986]) that the Constitution does not guarantee a right to engage in acts of sodomy, thus allowing states the latitude to govern the issue. The 6–3 *Lawrence* Court overturned its decision in *Bowers.* The Court focused on the due process claims, stating that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests" (539 U.S. 558, 575). The Court concluded that the

reasoning and support of *Bowers* had eroded, as fewer and fewer states and nations enforced their antisodomy laws. The Court reinforced an observation from an earlier case that "'[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.' The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" (539 U.S. 558, 578; citations omitted). The dissent criticized the Court for failing to explicitly declare sodomy a fundamental right, and further failing by subjecting Texas's legislative interests to the strict scrutiny warranted if sodomy were explicitly declared a fundamental right. Notwithstanding, the *Lawrence* case illustrates a Supreme Court that may be moving toward federalism jurisprudence that is less deferential to the scope of state powers.

## Gauging the Federalism Balance: Implications for Public Managers

Our analysis underscores several important conclusions about the life and death of federalism. First, evisceration of all past nonfederal regulatory enactments has not been the vision of the Court or the result of its decisions. Neither the worst fears nor the fondest hopes of federalism's revolutionaries and anti-revolutions were realized. We observed, instead, yet another cycle in the ebb and flow of federalism jurisprudence.

Our conclusions, however, are more nuanced than sweeping historical observation. To understand the contours of federalism and its effects, we have argued and demonstrated a more detailed federalism analysis. We observe that much of the extant discussion about whether federalism is alive or dead is focused primarily on congressional power. Because federalism involves all three branches of government (e.g., congressional, executive, and judicial directives to states), gauging the federalism balance would be incomplete if done by focusing on legislative behavior alone. In our preceding analysis of judicial opinions, we have endeavored to underscore the interaction of the three branches across constitutional and statutory issues (see, e.g., *Federal Maritime Commission v. South Carolina State Ports Authority* (535 U.S. 743 [2002]).

We observe that much of the extant discussion about whether federalism is alive or dead is focused primarily on congressional power. Because federalism involves all three branches of government (e.g., congressional, executive, and judicial directives to states), gauging the federalism balance would be incomplete if done by focusing on legislative behavior alone.

Similarly, declaring a federalism revolution requires more than considering commerce clause jurisprudence. We have demonstrated that the federalism balance is also shaped by spending clause, Fifth, Tenth, Eleventh, and Fourteenth amendment issues. We summarize here the jurisprudence in each area in an effort to gauge a federalism balance that not only reflects commerce clause jurisprudence, but also these other important areas. By unpacking federalism in this way, we also underscore specific implications touching public administration (e.g., the status of takings regulations under the Fifth Amendment). To underscore the relevance of this exercise for public administrators, we have organized our analyses into two parts: jurisprudence as it affects national and state administrative powers.

With respect to the commerce clause, the Court will continue to scrutinize statutes to determine whether Congress has a rational basis for deciding whether covered activities, even noneconomic ones, threaten a regulatory scheme that governs a set of economic activities in interstate commerce. It will not require documented empirical findings that every included activity is essential to the regulatory scheme. This last point would seem to allay the fears of some congressional supporters that the Court would second-guess Congress's fact-finding methods concerning every activity included in legislation, and thus provide Congress with more leeway in establishing the basis for legislation (and less ammunition for those who believe Congress has overreached its authority under the commerce clause).

The Court, however, will not allow parties wishing to challenge state actions to "read in" congressional intent where Congress itself has not spoken on the issue legislatively. Nonetheless, the Court maintains that it will continue to play its role in being the judge of whether Congress has acted rationally in including an activity as being essential to regulating an area of interstate commerce. As such, the Court's posture cannot be said to be a return to what it was under *Garcia* and a return to the Constitution in exile, but we will have to wait to see whether any subsequent congressional statutes fail to meet the Court's clarified standard.

Fifth Amendment jurisprudence has been another important influence shaping federalism, and it is a particularly good example of the waxing and waning of federalism in a particular policy area. Traditionally, courts deferred to state and local administrators in matters of private property takings actions. However, Supreme Court jurisprudence during the 1980s and 1990s increasingly entertained takings challenges in federal courts against state and local administration. Since 2000, the Court seems to be marking another shift as the tenor of federalism respecting takings seems, once again, more deferential to the administrations of state and local authorities. Of particular note is the Court's departure from sole use of the "substantially advances" formula to challenge takings regulations.

The Fourteenth Amendment has informed the federalism balance in several important ways as well. In recent cases concerning the scope of federal powers, the Court upheld Congress's statutory provisions (FMLA and ADA). This seems to indicate expanded judicial deference in this area to Congress's scope of power under section 5 of the Fourteenth Amendment. In examining the scope of state powers under the Fourteenth Amendment, the Court, in the *Lawrence* cases, seems to indicate a contraction of deference to state powers when it comes to the equal protection clause of the Fourteenth Amendment.

The Court's post-revolution federalism jurisprudence dealing with the spending clause primarily engaged the first two points under the analysis articulated in *Dole:* (1) that congressional spending clause authority must be exercised for the "general welfare" of the public, and (2) that Congress may condition federal funds on particular state behaviors if done unambiguously. Taken together, the relevant

cases heard by the U.S. Supreme Court on these points indicate a continued deference to Congress's spending clause authority, with some relatively recent exceptions. Justice Alito's opinion in *Arlington v. Murphy* (2006) suggests that the Court might be withdrawing an expansive deference to Congress's spending clause authority, when under *Dole's* second requirement, federal legislation predicated on spending clause authority does not fairly or clearly give notice of obligations to states. For administrators at the state level, the Court has guided Congress to leave nothing inferred as it makes particular requirements of states. This places a restraint on plaintiffs who may be tempted to ask the courts to "read in" requirements on states. *Schaffer v. Weast* (546 U.S. 49 [2005]) sent a similar message when the Court ruled that Congress's legislative silence on who bears the burden of proof in IDEA disputes left no alternative but to put the burden on plaintiffs—not on public administrators.

In conclusion, we find support for our earlier proposition that using "revolution" to conceptualize the recent the line of the Court's federalism is less accurate than the concept of a "continued conversation." Neither pre- nor post-*Raich* jurisprudence supports the extreme prescriptions for federalism that Raich's advocates or antagonists have offered. A systematic analysis of recent federalism cases that considers multiple branches (i.e., more than Congress) and areas of federalism jurisprudence (i.e., more than commerce clause) provides public administrators with a clearer, if not more complex, understanding of the dynamics in our federal system that shape a public administrator's ability to achieve policy priorities.

For public administrators, this analysis guides the continued need to stay abreast federalism developments. In part, intergovernmental coordination depends on understanding the development of Congress's commerce clause powers, but this understanding alone is myopic. The effective administrator's federalism calculus must also inspect the constraining *and* enabling powers found under judicial interpretations of the Fifth, Tenth, Eleventh, and Fourteenth amendments. We have detailed the most important of these interpretations here for the last decade, but, more importantly, have also provided public administration with a framework to guide federalism's continued conversation.

## Notes

1. See, for example, *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1 (1824), in which the Court upheld Congress's ability to regulate commerce-related activities such as navigation.
2. In a series of cases, the Court refused to extend the reach of the Congress's commerce power to production, manufacturing, or mining (Thomas and Tatelman 2005, 6). See, respectively, *Hoke v. United States,* 227 U.S. 308 (1913); *United States v. E. C. Knight Co.,* 156 U.S. 1, 12 (1895); and *Carter v. Carter Coal Co.,* 298 U.S. 238, 304 (1936).
3. For example, the 5–4 decision in *National League of Cities v. Usery* (426 U.S. 833 [1976]) suggests that in areas that in regulatory areas such as state labor markets, federal laws—although applicable—should not "directly displace the States' freedom to structure integral operations in areas of traditional governmental functions." This case was later overturned by *Garcia v. San Antonia Metro. Transit Authority* (469 U.S. 528 [1985]).
4. The Twenty-First Amendment provides, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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