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The Tao of Federalism

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ESSAY

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So long as we continue to maintain a federal system, we will argue about the process by which we allocate power between the central government and the States. Those arguments take familiar forms. The principal dispute concerns the degree to which federalism ought to be primarily politically enforceable or judicially enforceable. Politically enforceable federalism leaves undisturbed the boundaries of state and federal power produced by the national political process. Judicially enforceable federalism regards the scope of federal power as an issue of constitutional law susceptible to and requiring judicial resolution. Neither side has ever achieved total victory, nor will it. But the debate at least ought to be conducted with a principled methodology rather than the brazen expediency that sometimes characterizes the Supreme Court's discussion of these issues.

This is a tale in three parts. The first illustrates the Court's use of diametrically opposed premises to resolve two cases in a manner that showed no awareness of its blatant inconsistency. The second part reveals the Court's badly flawed method of deciding federalism issues. The third explores the extreme difficulty of altering the Court's deeply ingrained approach to federalism, even when the Court summons the nerve to enforce federalism values judicially.

These three segments show a Court that fails to understand the "Tao of federalism." Lest the reader's eyes roll at this moment, I hasten to add that this Essay is not a bizarre excursion into some New Age, crystalline vision of the Constitution. The Tao of federalism is pure metaphor, but one that may help to restore some clarity in our consideration of

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federalism, an issue that Justice O'Connor has called "perhaps our oldest question of constitutional law."[1]

The "Tao" (or the "way," as it is usually translated) is a philosophic world-view that originated some 2500 years ago in China. Lao-tzu's *Tao Te Ching*, which may have been the original book of virtues, expresses the essence of Taoism—the idea that an implicit harmony exists in all relationships.[2] Denial or avoidance of this harmony simply creates confusion, difficulty, and troubles of all kinds. This harmony is experiential; it is not readily captured by words. As Robert Wilson, the big-game hunter, said to Francis Macomber in one of Hemingway's stories, "[d]oesn't do to talk too much about all this."[3] But one way to describe the Taoist insight is to note the inescapable fact of duality: without darkness there can be no concept of light; wet is understood only because there is also dry; the value of life inheres in the knowledge of certain death. As Lao-tzu put it:

> Being and non-being create each other.
>
> Difficult and easy support each other.
>
> Long and short define each other.
>
> High and low depend on each other.
>
> Before and after follow each other.[4]

Taoism represents this duality in its familiar *yin-yang* symbol, the intertwined teardrops each of which contains the seed of the other.[5]

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1. New York v. United States, 505 U.S. 144, 149 (1992).

2. *See* LAO-TZU, TAO TE CHING (Stephen Mitchell trans., Macmillan 1988).

3. Ernest Hemingway, *The Short Happy Life of Francis Macomber*, *in* THE SHORT STORIES OF ERNEST HEMINGWAY 3, 33 (Charles Scribner's Sons, 1953) (1927) . If you prefer Lao-tzu: "[T]he more you talk of [the Tao], the less you understand." LAO-TZU, *supra* note 2, at 5. Or: "Those who know don't talk. Those who talk don't know." *Id.* at 56.

4. LAO-TZU, *supra* note 2, at 2. Similarly,

> We shape clay into a pot,
> but it is the emptiness inside
> that holds whatever we want.
> We hammer wood for a house,
> but it is the inner space
> that makes it livable.
> We work with being,
> but non-being is what we use.

Id. at 11.

Now what has this got to do with federalism? The essence of federalism is not so much that the Framers "split the atom of sovereignty," as Justice Kennedy has put it,[6] but that the Framers conceived the atom of sovereignty to consist of two parts that cannot exist without each other. Just as *yin* contains a dot of *yang*, and *yang* a speck of *yin*, the extent of federal power can only be understood by thinking about the powers of the States, and the powers of the States can only be understood in terms of the scope of federal powers. Ever since Justice Stone labeled the Tenth Amendment a "truism,"[7] it has been vogue to assume that the crux of federalism is simply to chart the extent of federal powers. Everything left over belongs to the States. That is like saying we will understand *yang* by charting *yin*: Whatever is not *yang* must be *yin*. Or, it is like trying to understand life by dissecting death: Through the autopsy of all things dead we will learn the meaning of life. After all, if it is not dead, it must be living.

As Hemingway's weather-beaten hunter observed, it is better not to talk too much, especially when you are trying to explain the Tao. Consider instead the following examples of the Court's federalism jurisprudence, in which the discourse is mostly about law. Perhaps you will experience the Tao somewhere along the way.

I. DO MEMBERS OF CONGRESS REPRESENT THE NATION OR THE STATES?

In *Garcia v. San Antonio Metropolitan Transit Authority*,[8] the Court rejected judicially enforceable limits upon Congress's use of its commerce power to regulate the States, holding that the principal mechanism "to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[9] That structure gives the States "control of electoral

5. A good introduction to the Tao, especially because its mechanism of instruction is illustration, is BENJAMIN HOFF, THE TAO OF POOH (1982). If you insist on a scholarly treatment (which of course takes most of the Tao out of it), see EVA WONG, THE SHAMBHALA GUIDE TO TAOISM (1997).

6. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 839 (1995) (Kennedy, J., concurring).

7. *See* United States v. Darby, 312 U.S. 100, 124 (1941).

8. 469 U.S. 528 (1985) (holding that a metropolitan transit authority was not entitled to Tenth-Amendment immunity from minimum-wage and overtime provisions of the Fair Labor Standards Act).

9. *Id.* at 550.

qualifications" of their congressional representatives and ensures "the States' equal representation in the Senate," a provision emphasized "by the prohibition of any constitutional amendment divesting a State of equal representation without the State's consent."[10] To the Court, this structure was the principal method of protecting state autonomy.

> In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself.... State sovereign interests ... are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.[11]

All of this appeal to structure was couched at a high level of abstraction, coupled with a convenient embrace of the Framers' original intentions (on this occasion, for some unexplained reason, those intentions seemed clear and controlling).[12] But the Court buttressed its argument by noting that federal regulatory schemes often exempt States.[13] The abstract and the practical combined to demonstrate that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action. The political

10. *Id.* at 551.

11. *Id.* at 552.

12. The debate concerning whether the "original intentions" of the Framers can be known and, if so, whether those intentions are irrelevant, advisory, persuasive, or dispositive to our present decisions about constitutional meaning is too long to be encapsulated here. *Compare* ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997) (arguing that original understanding is the only approach consistent with democratic government), ROBERT H. BORK, THE TEMPTING OF AMERICA (1990) (same), *and* Edwin Meese III, *Address Before the D.C. Chapter of the Federalist Society Lawyers Division* (Nov. 15, 1985), *in* 19 U.C. DAVIS L. REV. 22 (1985) (arguing that original intent can be known and should be respected out of fidelity to the Constitution) *with* H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the Framers did not expect their intent to govern for all time), *and* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (arguing that resort to original intent does not obviate the need for subjective judgments about the law). *See generally* Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J.L. & PUB. POL'Y 237 (1996) (discussing the nature of originalism, normative and historical indeterminacy, and alternative theories of constitutional interpretation). Whatever the merits of the debate, the Court employs or eschews original intentions in a seemingly random fashion. Without reliable knowledge of the Justices' motives, it would be unfair to suggest that the Court's guiding principle on this choice is pure expediency.

13. *See Garcia*, 469 U.S. at 553.

process ensures that laws that unduly burden the States will not be promulgated."[14]

How, exactly, will this supreme confidence in the federal political process be manifested? The Court gave no explicit answer, but surely its reliance on structural intention and practical result delivered an inferential one. Congress can be relied upon to respect the States and to not impede state autonomy excessively, because Congress will have state, not federal, interests at heart. Why? Because Congress is composed of representatives of the States; members of Congress owe fealty to their respective States. They are politically accountable to state electorates, reside in their States (at least until they head off to Georgetown or suburban Maryland or Virginia), and thus are peculiarly responsible to their States. In short, they represent the States, not the nation, and can be safely relied upon to exercise federal power in a fashion that respects the basic value of federalism—divided power between the States and the central government. If this is not the case, there is no reason to suppose that the national political process will assign any particular value to state interests. If members of Congress represent the nation, not their States, we should expect them to prefer national interests over state ones whenever the two collide.

But because we can safely rely on members of Congress to represent the States in federal assembly, "[a]ny substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process . . . ."[15] The Court has done just that, by fashioning a new doctrine of "process autonomy"[16] out of such cases as *South Carolina v. Baker*,[17] *Gregory v. Ashcroft*,[18] and *New York*

14. *Id.* at 556.

15. *Id.* at 554.

16. For a description of this doctrine, see Calvin R. Massey, *Etiquette Tips: Some Implications of "Process Federalism,"* 18 HARV. J.L. & PUB. POL'Y 175 (1994) (discussing and criticizing the Court's attempt to preserve federalism values through procedural, rather than substantive, limitations on Congress's power over the States).

17. 485 U.S. 505 (1988) (finding no Tenth-Amendment violation where Congress removed the tax exemption for bearer bonds issued by state and local governments).

18. 501 U.S. 452 (1991) (declining, in the absence of a clear statement from Congress, to apply the Age Discrimination in Employment Act to a provision of the Missouri Constitution that provides a mandatory retirement age for state judges).

v. United States.[19] Justice O'Connor has been the intellectual leader of this development, which suggests that even the *Garcia* dissenters are willing to accept the premise that the national political process is composed of a Congress of state representatives, not federal representatives.

What, then, are we to make of *U.S. Term Limits, Inc. v. Thornton*?[20] The Court invalidated an Arkansas constitutional amendment (approved by nearly 60 percent of voters) that barred Arkansans who had served three terms in the national House or two terms in the United States Senate from appearing on the ballot for another term. The Court rested its decision on a few key premises, a selective view of history, and a bundle of unspoken assumptions. Let us start with this important premise: "In [the] National Government, representatives owe primary allegiance *not* to the people of a State, *but to the people of the Nation.*"[21]

Lest there be any doubt on this point, the Court invoked *Powell v. McCormack*[22] to assert that it is a "fundamental principle of our representative democracy . . . 'that the people should choose whom they please to govern them.'"[23] The Court's invocation in *Powell* of Alexander Hamilton's phrase made sense. After all, in *Powell*, the electoral choice of the people of Harlem had been vetoed by the massed electoral choices of everyone *outside of Harlem.* Justice Stevens's reliance upon it in *U.S. Term Limits* made a lot less sense. As he put it, in order for the people of Arkansas to be free to choose who should govern them, they must be denied the freedom to choose. Before we accuse Justice Stevens and his majority colleagues of partaking of the classic reasoning of the Vietnam War ("It became necessary to destroy the village to save it."[24]), we ought to consider the relationship of

19. 505 U.S. 144 (1992) (striking down a provision of the Low-Level Radioactive Waste Policy Amendment Act of 1985 that required the States in some circumstances to take title to internally-generated radioactive waste, because the Constitution does not permit the federal government to coerce the States into enacting a federal regulatory scheme).

20. 514 U.S. 779 (1995).

21. *Id.* at 803 (emphasis added).

22. 395 U.S. 486 (1969) (holding that the House of Representatives lacks authority to exclude any duly-elected person who meets the constitutional requirements for membership).

23. *U.S. Term Limits*, 514 U.S. at 793 (quoting 2 ELLIOT'S DEBATES 257 (1836) (statement of Alexander Hamilton in the New York constitutional ratification debate)). This statement by Alexander Hamilton is also cited in *Powell*, 395 U.S. at 547.

24. *Major Describes Move*, N.Y. TIMES, Feb. 8, 1968, at 14.

this quotation to the key premises upon which *U.S. Term Limits* is built.

First Premise: Members of Congress owe their allegiance to the people of the entire nation, not those of any State.

Second Premise: The people must be free to choose their representatives in Congress.

Unavoidable Fact: All members of Congress are elected by the people of a State or a portion of a State.

Unproved (and Unspoken) Assumption: Uniform electoral rules are necessary to freedom of electoral choice.

Conclusion: A single State's attempt to limit service of its representatives in Congress interferes with the freedom of the people of the entire nation to choose their representatives in Congress.

This chain of reasoning may be correct, but the Court did not prove it. Our republican form of national government "owes its existence to the act of the whole people who created it."[25] Congress is the body that legislates for the nation, a reflection of "[t]he political identity of the entire people of the Union."[26] Surely "there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere."[27] Perhaps it follows that "the Arkansas enactment intrudes upon this federal domain,"[28] but if so, it is only because members of Congress owe their fealty to the nation as a whole, rather than to their state constituents.

The Court in *U.S. Term Limits* may also have gotten its history right, though that is debatable. Stitching together snippets from Madison's *Federalist* Nos. 52 and 57,[29] expressions of concern in the 1787 Convention that the States might abuse the power to regulate elections for federal office,[30] and the absence of any claim made in the ratification debates that the States could add

25. *U.S. Term Limits*, 514 U.S. at 839 (Kennedy, J., concurring).

26. *Id.* at 841.

27. *Id.* at 845.

28. *Id.*

29. *See id.* at 806-08 (majority opinion) (citing THE FEDERALIST NOS. 52, 57 (James Madison)).

30. *See U.S. Term Limits*, 514 U.S. at 808-09 (citing 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farrand ed., 1911)).

to the constitutionally specified eligibility requirements,[31] the Court concluded that "the Qualifications Clauses were intended to preclude the States from exercising any . . . power" to impose term limits on their congressional representatives.[32] Suppose that the Court in *U.S. Term Limits* correctly deciphered the Framers' original intentions, as it claimed to do, and suppose that the original intentions control judicial decisionmaking, as the Court implied by placing so much reliance on its reading of the Framers' intent. If these suppositions are correct, the fundamental rationale for *Garcia* is impeached. The Court in *Garcia* was convinced that the Framers' intentions were to create a structure in which members of Congress would be politically accountable to their state electors and responsive to their parochial concerns. The Court in *U.S. Term Limits* then concluded that the Framers intended to create a structure in which state electors cannot subject their members of Congress to the final accountability of forced rotation.

These positions may be reconciled, but the reconciliation is not very convincing. It is possible that denial of a State's power to impose term limits does not destroy effectively the political accountability of members of Congress to state concerns. Members of Congress might retain their offices because of their constant attention to state concerns, but that conclusion rests on pure supposition about changing political preferences and the dynamics of the political process itself (including such distorting phenomena as nationwide fund-raising, "independent" political expenditures, and the name recognition and franking privileges attendant to incumbency). It is not a conclusion mandated by the *structure* of government. The Court in *Garcia* contended that the structural apparatus *itself* guarantees that the States' autonomy will be preserved. The Court in *U.S. Term Limits* contended that the structural apparatus guarantees that congressional "representatives owe primary allegiance not to the people of a State, but to the people of the Nation."[33] If the *U.S. Term Limits* structure is sound, *Garcia*'s structure is gossamer imagination. If *Garcia*'s structure is real, it is based upon a *structural* tie between members of Congress and their States. But

31. *See id.* at 809-10.
32. *Id.* at 806.
33. *Id.* at 803.

U.S. Term Limits denied to the States any power to create such ties, asserting instead that the States have no claim whatever upon the fealty of their federal representatives. If so, *Garcia* cannot be correct. If not, then *U.S. Term Limits* is wrong. Sadly, the Court's opinion in *U.S. Term Limits* offers no consideration of this tension.

II. WHY ISN'T THERE A "SACRED PROVINCE OF STATE AUTONOMY"?

In *Garcia,* the Court quickly belittled and ultimately dismissed the idea that there is some domain of public policy that is reserved exclusively to the States. "Any substantive restraint on the exercise of commerce powers . . . must be tailored to compensate for possible failings in the national political process rather than to dictate a 'sacred province of state autonomy.'" [34] The Court's view was that "the purpose of [state] constitutional immunity . . . is not to preserve a 'sacred province of state autonomy.' . . . . With rare exceptions . . . the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace."[35]

In doing this, the Court parsed the Framers' original intentions to conclude that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."[36] The *Garcia* Court's originalism is a bit astigmatic because the Court failed to consider what is perhaps the keystone architectural element of the "structure of the federal government"—the unprecedented decision to endow the central government with *no power to do anything at all* except through the use of a few (albeit important) explicitly enumerated powers. Of course, it is axiomatic that the domain of *exclusive* state power begins where the federal powers end. In that sense, the Tenth Amendment is surely a truism. But it is a truism that is "an exclamation point to the concept of limited federal powers."[37]

This is the *yin* and *yang* of federalism. The *yang* is the grant of federal power; the *yin* is the undeniable fact that "[t]he enumeration [of federal powers] presupposes something not

34. *Garcia,* 469 U.S. at 554 (quoting EEOC v. Wyoming, 460 U.S. 226, 236 (1983)).
35. *Id.* at 550 (quoting EEOC v. Wyoming, 460 U.S. at 236).
36. *Id.*
37. MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 44 (1995).

enumerated"[38]—the exclusive domain of state power. But there is no *yin* without *yang*, nor any *yang* without *yin*. The Court's problem is that its jurisprudence is all *yang* and no *yin*. If one stares constantly at the blazing light that dissolves all shadow, one will lose any sense of darkness.

The Court has been mesmerized by the blaze of federal powers in two principal ways. First, it has all-too-readily abdicated any judicial review of the scope of federal powers. In *Garcia*, the Court did this openly, by declaring that federalism was only politically enforceable—there was no role for the Court to police the use of the commerce power to regulate the States. More generally, the Court has retained the appearance of judicial review while abandoning its exercise. The Court has articulated a varied set of tests of the validity of exercise of federal powers, but all of them are flaccid permutations on rational-basis minimal scrutiny.[39] The result is that the extent of federal powers is determined by those who wield them. Is it any surprise that federal power seems limitless, a bloated caricature of the original design? There is only the *yang*—the constitutional grant of power to the federal policeman, augmented by the Court's decision to let the federal cop voluntarily limit his power.

Chief Justice John Marshall thought there was also a *yin*: "The enumeration [of federal powers] presupposes something not enumerated,"[40] a something that is the sphere of exclusive state power. But Chief Justice Marshall is long dead, and now we have a *living* Constitution.[41] In fact, the Chief Justice had it right. It is well known to us, and was even better known to Chief Justice Marshall, that the Federalists objected to the addition of a bill of rights for two reasons: a bill of rights "would result in the loss of rights not enumerated," and "it would undermine the enumerated powers scheme."[42] Most notably, Alexander

38. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824).

39. *See, e.g.*, Massey, *supra* note 16, at 180-86 (discussing areas where the Court grants deferential review to Congress's use of its powers).

40. *Gibbons*, 22 U.S. (9 Wheat.) at 195.

41. So why is the Court so anxious to claim that its federalism decisions are rooted in original intentions? Justice Robert Jackson may have had an answer of sorts: "We are not final because we are infallible, but we are infallible only because we are final." Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

42. David N. Mayer, *Justice Clarence Thomas and the Supreme Court's Rediscovery of the Tenth Amendment*, 25 CAPITAL U. L. REV. 339, 413 (1996).

Hamilton contended that a bill of rights would be "dangerous" because it

> would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why . . . should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?[43]

A bill of rights, said Hamilton, could "furnish, to men disposed to usurp, a plausible pretence for claiming . . . power."[44] To prevent the creation of implied federal powers, it was necessary to add the Tenth Amendment. Far from being *merely* a truism, the Tenth Amendment was supposed to furnish an express principle by which to construe the proper scope of federal powers.[45] The Tenth Amendment provided the *yin* for the *yang* of federal power.

When Justice Blackmun, speaking for the Court in *Garcia*, sneered at the notion of a "sacred province of state autonomy,"[46] he revealed his lack of understanding of the deeply interconnected role of the Tenth Amendment and the scope of federal power. To Justice Blackmun, the Court only needed to ascertain the scope of federal power in isolation. But the Constitution's *structure* does not permit such a one-sided analysis. Ironically, in his opinion in *Garcia*, Justice Blackmun relied on structure even while he was ignoring it. Perhaps one should annotate Chief Justice John Marshall's famous epigram, "we must never forget that it is a *constitution* we are expounding,"[47] by noting that when construing a *constitution*, one must necessarily construe *all of it*. It is a hologram, not a menu. Chief Justice Marshall understood this. In *McCulloch v. Maryland*, he observed that "the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, . . . depend[s] on a *fair*

43. THE FEDERALIST NO. 84, at 579 (Alexander Hamilton) (Jacob Cooke ed., 1961).

44. *Id.*

45. "The Amendment was intended to provide a rule of construction against additional federal power being inferred from the *absence* of limitations . . . ." Mayer, *supra* note 41, at 352.

46. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550 (1985).

47. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

construction of the whole instrument."[48] And a fair construction of the whole Constitution, especially when done from the Court's chosen originalist *cum* structuralist perspective, reveals that the whole point of enumerating powers delegated to the central government (rather than simply giving the central government a catch-all police power) is to preserve a "sacred province of state autonomy."

The best that can be said for the Court's effort in *Garcia* is that it does not totally ignore the "sacred province of state autonomy," but just leaves the boundaries of that province for Congress to decide. This is rather like saying that the Soviet-German Non-Aggression Pact of 1939 did not ignore the territorial integrity of Poland; it just left the boundaries of Poland to be decided by Hitler and Stalin. The Court relied on structure to abdicate judicial review, but in doing so, it ignored the basic fact that judicial review itself is rooted in a structural argument. The Court's view seems to be that the Constitution implies the power of judicial review, except when its exercise is inconvenient, difficult, or unpleasant—the Court is mighty selective about when it uses judicial review.[49]

The most distressing aspect of the Court's refusal to recognize the existence of any "sacred province of state autonomy" is its method. The Court managed to combine originalist and structuralist argument in a manner stripped of context. As a result, the Court offered a skewed, atomistic perspective on constitutional meaning that is not very convincing to anybody who appreciates the larger context of the Court's chosen ground of argument. This perspective is unconvincing because it misses the Tao of federalism. The Court's method dutifully inquires into one aspect of the totality that misses entirely the function of the search. "We shape clay into a pot, but it is the emptiness inside that holds whatever we want."[50] The Court's approach to federalism is like examining the shape of the clay to determine what is inside the pot. To use a different Taoist metaphor:

48. *Id.* at 406 (emphasis added).

49. This is not entirely deplorable. I do not suggest that the Court lacks authority to eschew judicial review, but I do suggest that when it does so, it ought to be because it is obeying a constitutional directive. *See, e.g.*, Calvin R. Massey, *Abstention and the Constitutional Limits of the Judicial Power of the United States*, 1991 BYU L. REV. 811 (contending that the abstention doctrines ought to be regarded as constitutionally mandated).

50. LAO-TZU, *supra* note 2, at 11.

"Look, and it can't be seen. Listen, and it can't be heard. Reach, and it can't be grasped."[51] The Court is too busy looking, listening, and reaching for the scope of federal powers in isolation to understand the duality of the quest. Metaphorically, the Court when approaching federalism needs to heed Lao-tzu's advice: "Approach it and there is no beginning; follow it and there is no end. You can't know it, but you can be it . . . ."[52] More tangibly, the Court must remember that its reading of the scope of the federal power must be done in light of a "sacred province of state autonomy" that was created by the federal structure we still profess to observe.

III. WHY *LOPEZ* DOES NOT MATTER VERY MUCH

When the Court in *United States v. Lopez*[53] invalidated part of the Gun-Free School Zones Act of 1990,[54] it was the first time in nearly sixty years that the Court found that Congress had exceeded its commerce powers.[55] Congress had prohibited the possession of a gun in or within 1000 feet of a school. The Court concluded that such gun possession did not substantially affect interstate commerce and was thus beyond the scope of the commerce power. Chief Justice Rehnquist restated the scope of the commerce power to include "the channels of interstate commerce, . . . the instrumentalities of . . . [or] persons or things" actually in interstate commerce, and activities that "substantially affect" interstate commerce.[56] The Gun-Free School Zones Act sought harbor in the final category. The Court did not depart from its standard of review: so long as the class of activities regulated by Congress might rationally be thought to affect interstate commerce substantially, the legislation would be upheld. But the Gun-Free School Zones Act failed that test.

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51. *Id.* at 14.

52. *Id.*

53. 514 U.S. 549 (1995).

54. 18 U.S.C. § 922(q) (1994).

55. This statement excludes *National League of Cities v. Usery*, 426 U.S. 833 (1976), which I regard as based upon an "enclave" theory of state autonomy (some state activities may not be reached by Congress even though they are within the scope of its commerce power), and *New York v. United States*, 505 U.S. 144 (1992), which exemplifies the wholly procedural nature of process autonomy (Congress cannot coerce the States into implementing federal regulatory schemes).

56. *Lopez*, 514 U.S. at 558-59.

The Court offered several reasons why gun possession in or near schools could not rationally be thought to affect interstate commerce substantially. First, the activity regulated had "nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[57] Nor did the regulated activity fall within the "protective principle"[58]—the idea, first fully developed in the *Shreveport Rate Cases*,[59] that a wholly intrastate activity could be regulated if the regulation was "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[60] Congress had not bothered to supply its reasons for thinking "that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye."[61] Consequently, the Court could only consider after-the-fact arguments linking gun possession in or near schools with interstate commerce. Those arguments boiled down to the contention that gun violence constitutes a problem that "has an adverse effect on classroom learning," which in turn "represents a substantial threat to trade and commerce."[62] The Court concluded that this would "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[63]

Although the Court recognized the fundamental truth that the scope of federal power—in this instance, the commerce power—must be construed in light of the retained general police powers of the States, it took but a small step toward the full realization of that vision. It did not take the opportunity to declare that courts will not consider after-the-fact conjecture about the supposed substantiality of the connection between the regulated activity and interstate commerce. If Congress cannot conceive and articulate a plausible relationship, no reason exists

57. *Id.* at 561 (footnote omitted).

58. This phrase is used by, among others, Richard A. Epstein, in *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1399 n.28 (1987), and Laurence H. Tribe, in AMERICAN CONSTITUTIONAL LAW §§ 5-7, at 313 (2d ed. 1988).

59. Houston, E. & W. Texas Ry. Co. v. United States, 234 U.S. 342 (1914).

60. Lopez, 514 U.S. at 561.

61. *Id.* at 563.

62. *Id.* at 565.

63. *Id.* at 567.

for the Court to do its work for it later. Because the post-1937 Court has deferred to congressional judgment concerning the scope of the commerce power, it has reason to demand that Congress exercise some judgment about the scope of its powers instead of proceeding on the apparently widely-shared assumption within Congress that Congress can do what it wants. The constitutional code words for this assumption are those coined by Justice Brennan in a case, now overturned, concerning the scope of congressional power under Section 5 of the Fourteenth Amendment: "deference [to congressional judgment about the scope of its powers] was appropriate in light of Congress' institutional competence as the National Legislature."[64] Because Congress is "institutional[ly] competent," according to Justice Brennan, we ought to vest control over the scope of federal power to this competent body. *Lopez* interred this wholly extra-constitutional source of limitless federal power, at least with respect to the Commerce Clause. When Congress regulates an activity that "substantially affects" interstate commerce, after *Lopez* it had best declare the reasons for its conclusion.

But the *Lopez* Court could have done more. Although the majority opinion hinted that congressional regulation of intrastate non-commercial activities not coming within the protective principle might lie outside of the commerce power altogether, it unfortunately did not so state. That is unfortunate. It will require another case, perhaps involving the Violence Against Women Act of 1994[65] or the Child Support Recovery Act of 1992,[66] to clarify what the Court meant by its distinction between commercial and non-commercial activities in connection with the scope of the "substantially affecting

64. Metro Broad., Inc. v. Federal Comm. Comm'n, 497 U.S. 547, 563 (1990).

65. Pub. L. No. 103-322, Title IV, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 16, 18, and 42 U.S.C.). *Compare* Brzonkala v. Virginia Polytechnic & State Univ., 935 F. Supp. 779 (W.D. Va. 1996) (voiding the Act as beyond the commerce power), *with* Doe v. Doe, 929 F. Supp. 608 (D. Conn. 1996) (upholding the Act as within the commerce power).

66. Pub. L. No. 102-521, 106 Stat. 3403 (1994) (codified as amended in 18 U.S.C. § 228, 42 U.S.C. §§ 3796cc, 3796cc-1 to 3796cc-6). *Compare* United States v. Hampshire, 95 F.3d 999 (10th Cir. 1996), United States v. Mussari, 95 F.3d 787 (9th Cir. 1996), *and* United States v. Sage, 92 F.3d 101 (2d Cir. 1996) (all finding the Act to be within the commerce power), *with* United States v. Parker, 911 F. Supp. 830 (E.D. Pa. 1995) *and* United States v. Bailey, 902 F. Supp. 727 (W.D. Tex. 1995) (finding the Act to be outside the scope of the commerce power).

interstate commerce" branch of the commerce power. It makes sense to conclude forthrightly that intrastate non-commercial activities not within the protective principle are beyond the commerce power, because that interpretation of the commerce power takes seriously the premise that the enumerated power presupposes a regulatory domain left for the States. The Court's remarks on this point echo these views;[67] perhaps it will explicitly so hold in the future.

But the Court could have done even more. Justice Thomas summarized the considerable defects of the substantial effects test: it renders the Necessary and Proper Clause and a host of specific powers—bankruptcy, patents, and copyrights, for example—nugatory.[68] It cannot be confined to the commerce power and so threatens to extend congressional power to anything "not expressly *prohibited* by the Constitution,"[69] thus grotesquely transforming the Tenth Amendment. It is inconsistent with much of what we know of the Framers' intent.[70] It is a perversion of Chief Justice Marshall's treatment of the commerce power in *Gibbons v. Ogden*[71] and of the Court's decisions in the century following *Gibbons*.[72] Finally, combined with the "cumulative effects" or "aggregation" principle of *Wickard v. Filburn*,[73] it creates an unlimited general police power in Congress.[74] The Court ought to have discarded the entire "substantial effects" test.

Even if the Court had four more justices with the vision and courage of Justice Thomas, it would need to do far more than *Lopez* could possibly have done. Confinement of the commerce power to its intended and natural scope within the constitutional architecture would simply encourage Congress to substitute its spending or taxing powers. Any serious attempt to

67. *See Lopez*, 514 U.S. at 565.

68. *See id.* at 588 (Thomas, J., concurring).

69. *Id.* at 589.

70. *See id.* at 591-92.

71. *See id.* at 594-97 (discussing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)).

72. *See Lopez*, 514 U.S. at 597-99.

73. 317 U.S. 111 (1942) (holding that the commerce power permitted Congress to regulate a farmer's production of wheat for his own use, on the theory that even though the effect of the individual farmer's actions on interstate commerce was trivial, the aggregation of all such farmers' actions could affect interstate commerce significantly).

74. *See Lopez*, 514 U.S. at 600 (Thomas, J., concurring).

restore the balance of federalism must also impose equally appropriate limits on the use of these powers.

The whole rationale for a taxing power is to enable a government to raise revenue out of the pockets of the citizenry. If a government wishes to regulate behavior, it may do so to the extent that it possesses regulatory authority. This bifurcation of taxing and regulatory authority is of no consequence to state governments, which possess a general police power. But it is (or, rather, ought to be) of great consequence to the federal government, which possesses only a limited set of regulatory powers. Of course, the Court has abdicated responsibility for controlling the use of the taxing power for regulatory ends, with the predictable result that tax policy is debated mostly in terms of whose ox should be gored and how deep the wound should be. The definitions, rates, deductions, and credits that litter the income tax landscape are openly formulated to encourage or discourage behavior. Some of this is unavoidable, as Justice Jackson once noted: "[A]ll taxation has a tendency . . . to discourage the activity taxed. One cannot formulate a revenue-raising plan that would not have economic and social consequences."[75] But it is inexcusable for the Court to tolerate taxes obviously designed simply to prohibit or encourage behavior by resort to the weak rationale that it produces "some revenue."[76]

Congress's abuse of the spending power is even worse. The principal usurpation inheres in Congress's penchant for conditioning the grant of money to the States on state enforcement of federal regulations. At the very least, the only conditions that Congress should be permitted to attach to grants are those that specify precisely how the money is to be spent. Anything else constitutes "'a regulation, which is valid only if it falls within one of Congress' delegated regulatory powers.'"[77] This conclusion stems directly from the Court's conclusion in *United States v. Butler*[78] that Congress could spend for the general welfare but could only regulate by invoking one of its specific

75. United States v. Kahriger, 345 U.S. 22, 35 (1953) (Jackson, J., concurring).

76. Sonzinsky v. United States, 300 U.S. 506, 514 (1937).

77. South Dakota v. Dole, 483 U.S. 203, 216 (1987) (O'Connor, J. dissenting) (quoting Brief for Amici Curiae National Conference of State Legislatures et al., at 19-20 (No. 86-260)).

78. 297 U.S. 1, 64-67 (1936).

regulatory powers. The whole point of the conditional spending gambit is to regulate. The only difference between conditional spending and open regulation is that Congress uses the bait of federal money to entice the States into the enforcement task. Toleration of this constitutional deceit, as the current test allows, is a constant reproach to the structure of federalism.

All of this flows from a common source—the refusal to recognize the Tao of federalism. Since Franklin Roosevelt's constitutional *coup d'etat,* there has been supine, uncritical acceptance of the unbalanced notion that the scope of federal powers can be determined by looking at them alone. This is like assuming that when only one leg is broken, a person needs only one crutch to move along nicely. Listen to Justice Robert Jackson, Franklin Roosevelt's attorney general and appointee to the Supreme Court, at the end of his distinguished career:

> I think in the long run the transgressions of liberty by the Federal Government, with its all-powerful organization, are much more to be feared than those of the several states, which have a greater capacity for self-correction.
>
> . . .
>
> I know that it is now regarded as more or less provincial and reactionary to cite the Tenth Amendment.... But our forefathers made it a part of the Bill of Rights in order to retain in the localities certain powers and not to allow them to drift into centralized hands....[79]

There is an old Taoist saying: "A thousand mile journey begins with a single step." Perhaps with *Lopez* the Court took that first step.

79. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 71-72, 73-74 (1955).