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Contingency Fees May Be Hazardous to Your Health: A Constitutional Analysis of Congressional Interference with Tobacco Litigation Contracts

Kris W. Kobach
University of Missouri (Kansas City) School of Law

CONTINGENCY FEES MAY BE HAZARDOUS TO YOUR HEALTH: A CONSTITUTIONAL ANALYSIS OF CONGRESSIONAL INTERFERENCE WITH TOBACCO LITIGATION CONTRACTS

KRIS W. KOBACH*

I. INTRODUCTION

On June 20, 1997, attorneys representing the nation's tobacco industry and states suing the industry to recover tobacco-related Medicaid expenditures announced a historic settlement. Under the settlement, tobacco companies would pay $368.5 billion over twenty-five years to compensate states for smoking-related medical expenditures, to fund a nationwide anti-smoking campaign, and to underwrite health care for uninsured children.[1] The industry would admit for the first time that smoking is addictive. The tobacco companies would agree to stronger product labels declaring tobacco's lethality and addictiveness[2] and also agree to more stringent restrictions on the advertising of tobacco products.[3] The unprecedented terms of the settlement seemed unattainable only a year earlier when

* Associate Professor of Law, University of Missouri (Kansas City) School of Law. A.B., Harvard College, 1988; M.Phil., Oxford University, 1990; D.Phil., Oxford University, 1992; J.D., Yale Law School, 1995. I am indebted to Doug Linder, Robert Atherton, and W. Christopher Hillman for their input in the production of this article.

1. John M. Broder, *Cigarette Makers in a $368 Billion Accord to Curb Lawsuits and Curtail Marketing: Major Concessions*, N.Y. TIMES, June 21, 1997, at 1.

2. *Id.*

3. The complex agreement would prohibit all cigarette advertisements targeting underage smokers. It would ban human and cartoon characters in tobacco advertisements, Internet advertising, and tobacco product placements in movies and on television. The proposal would also prohibit distributing merchandise bearing cigarette logos and sponsoring sporting events or outdoor concerts. *Id.*

the industry and its damning documents appeared unshakable behind the ramparts of attorney-client privilege.

The settlement did not end the battle: the agreement contemplated, among other things, Congress's limiting the tobacco industry's liability in future lawsuits.[4] Close congressional scrutiny of the deal was inevitable, and some members of Congress were not content to confine their inspection to the terms of the settlement itself. In August 1997, a proposal emerged in the Senate to limit the contingency fees paid to the private attorneys representing the various states. Specifically, the proposed amendment would disallow the payment of fees at a rate exceeding $250 per hour and would limit total attorneys' fees in any single state to $5 million.[5] Consequently, the proposal would void the contingency fee contracts established in the involved states at the outset of the lawsuits. In November 1997, Senator Orrin G. Hatch (R-UT) introduced a second proposal to limit attorneys' fees in the Senate. As part of a larger tobacco settlement bill, Hatch's proposal would establish an arbitration panel to determine attorneys' fees with a fee ceiling set at five percent of the amount paid to the relevant state in each fiscal year.[6] Like the first proposal, it would effectively void existing contingency fee contracts between the states and their private attorneys. For the sake of simplicity, this article will refer to the first proposal throughout the following analysis, with the understanding that the second proposal presents the same constitutional problems.

This article assesses the constitutional questions raised by a congressionally imposed cap on such attorneys' fees and concludes that it would be unconstitutional if enacted. Two constitutional barriers prohibit this interference with existing contracts between states and their private attorneys. The first is the limitation on federal power reflected in the Tenth Amendment to the United States Constitution.[7] Taken together, three recent Supreme Court opinions, *Gregory v. Ashcroft*,[8] *New York v. United States*,[9] and *Printz v. United States*,[10] present a consistent approach to understanding the Tenth Amendment and the scope of constitutionally protected state sovereignty—an approach that does not brook congressional interference with the terms of contracts negotiated by state governments. From these recent decisions, one may infer that the Constitution protects the autonomous decision-making authority of states in certain protected spheres. This article considers the three decisions in turn, describing how each contributes to a coherent understanding of

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4. *See id.*; John M. Broder & Barry Meier, *Tobacco Accord, Once Applauded, Is All But Buried*, N.Y. TIMES, Sept. 14, 1997, at 1.

5. Sessions amend. 1125 proposed to amend Durbin amend. 1078 as an amendment to S. 1061, 105th Cong. (1997), *in* 143 CONG. REC. S9025 (daily ed. Sept. 13, 1997).

6. S. 1530, 105th Cong. § 227 (1997).

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

8. 501 U.S. 452 (1991).

9. 505 U.S. 144 (1992).

10. 117 S. Ct. 2365 (1997).

state sovereignty and the Tenth Amendment and explaining the implications for any congressional attempt to cap tobacco litigation attorneys' fees.[11]

The second constitutional barrier to this interference with existing contracts between states and their private attorneys operates independently of the Tenth Amendment limitation. The Takings Clause of the Fifth Amendment proscribes uncompensated public taking of private property.[12] Although the particular Fifth Amendment claim that would arise from these contracts would be a novel one, the underlying doctrines are well established in takings jurisprudence. These doctrines support the conclusion that federal negation of a contract between a state and a private firm, under which the firm possesses a reliance-based claim of entitlement, constitutes a taking of private property without compensation.[13]

II. THE STATE SOVEREIGNTY ISSUE

> *[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere.*[14]

The Tenth Amendment to the United States Constitution makes explicit the underlying notion in the Constitution that the federal government is limited to only those discrete, enumerated powers that may be found in the constitutional text.[15] The terms of the Tenth Amendment affirm that residual state sovereignty exists in all other areas: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[16] As the Court reiterated in *Printz*, the American constitutional structure

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11. *See infra* Part II.

12. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

13. *See infra* Part III.

14. THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

15. U.S. CONST. amend X; *see Printz*, 117 S. Ct. at 2376-77. If one assumes the constitutional framework of enumerated powers (that the Constitution only confers upon the federal government the powers specified in the constitutional text), then the Tenth Amendment appears somewhat truistic. In the words of Justice Stone, "[t]he amendment states but a truism that all is retained which has not been surrendered." United States v. Darby, 312 U.S. 100, 124 (1941). These words echoed Justice Story's commentary a century earlier: "This amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the Constitution. Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1009, at 711-12 (Carolina Academic Press 1987) (1833).

16. U.S. CONST. amend. X.

is one of "'dual sovereignty,'"[17] under which the states retain "'a residuary and inviolable sovereignty.'"[18]

The Framers averred that the distribution of powers between these competing sovereignties preserved considerable state authority:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[19]

Yet in an era of distended federal regulatory powers under the Interstate Commerce Clause[20] and the Taxing and Spending Clause,[21] the extent and nature of this inviolable sovereignty retained by the states are unclear. Also uncertain is whether the Tenth Amendment contains any *independent* restriction on federal power beyond the limitation already implied by the enumeration and description of powers in the body of the Constitution. The Court has suggested that "[w]hile the Tenth Amendment has been characterized as a 'truism,'. . . it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system."[22] But the phrases "States' integrity" and "function effectively in a federal system" resound with ambiguity. The Court has struggled since 1937 to describe with any precision the boundaries and nature of the state sovereignty that is manifest in the Tenth Amendment.[23]

In 1976 the Court attempted to breathe new life into the Tenth Amendment in *National League of Cities v. Usery*[24] by declaring that Congress may not "directly displace the States' freedom to structure integral operations in areas of traditional

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17. *Printz*, 117 S. Ct. at 2376 (quoting Gregory v. Ashcroft, 501 U.S. 452, 457 (1991)).

18. *Id.* (quoting THE FEDERALIST No. 39, at 56 (James Madison) (Jacob E. Cooke ed., 1961)).

19. THE FEDERALIST No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

20. "The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . ." U.S. CONST. art. I, § 8, cls. 1, 3.

21. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ." U.S. CONST. art. I, § 8, cl. 1.

22. Fry v. United States, 421 U.S. 542, 547 n.7 (1975) (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

23. The relevant starting point is 1937 because in that year, the Court began its long retreat from the battle to significantly contain congressional power conferred by the Interstate Commerce Clause. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding the National Labor Relations Act of 1935 to be a constitutional exercise of congressional commerce powers).

24. 426 U.S. 833 (1976) (holding unconstitutional the extension of minimum wage and maximum hour provisions of the 1974 amendments to the Fair Labor Standards Act to state and local employees in areas of traditional governmental functions and overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

government functions."[25] Striking down federal interference with the minimum wages and maximum hours of municipal fire and police departments, the Court stressed that such responsibilities were among "those governmental services which the States and their political subdivisions have traditionally afforded their citizens."[26] Unlike the pre-1937 holdings regarding state sovereignty,[27] a critical facet of the *National League of Cities* approach was that it did not bar federal regulation of *private* entities in areas traditionally left to state or local control. Rather, the Court recognized constitutional protection against federal regulation for the state and local governments *themselves*. The Court averred that "the States as States stand on a quite different footing from an individual or a corporation when challenging the exercise of Congress'[s] power to regulate commerce."[28]

For nine years, the Court struggled to apply the *National League of Cities* holding in other contexts.[29] Finally, in *Garcia v. San Antonio Metropolitan Transit Authority*,[30] the Court retreated from the functions-based approach of *National*

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25. *Id.* at 852.

26. *Id.* at 851.

27. See, for example, *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), where the Court held unconstitutional the Bituminous Coal Conservation Act of 1935.

> So far as [a manufacturer] produces or manufactures a commodity, his business is purely local. So far as he sells and ships, or contracts to sell and ship, the commodity to customers in another state, he engages in interstate commerce. In respect of the former, he is subject only to regulation by the state; in respect of the latter, to regulation only by the federal government.

Id. at 303. In *Hammer v. Dagenhart*, 247 U.S. 251 (1918), the Court declared unconstitutional the federal attempt to regulate child labor by prohibiting transportation in interstate commerce of child-made goods.

> [T]he necessary effect of this act is, by means of a prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States, a purely state authority. . . . It not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which the federal authority does not extend.

Id. at 276. Furthermore, in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), the Court held that the lower court properly dismissed the government civil action under the Sherman Act to set aside a monopolistic acquisition of other refineries by one sugar refining company.

> It cannot be denied that the power of a State to protect the lives, health, and property of its citizens, and to preserve good order and the public morals, . . . is a power originally and always belonging to the States, not surrendered by them to the general government . . . . The relief of the citizens of each State from the burden of monopoly and the evils resulting from the restraint of trade among such citizens was left with the States to deal with.

Id. at 11.

28. *National League of Cities*, 426 U.S. at 854.

29. *See, e.g.*, EEOC v. Wyoming, 460 U.S. 226 (1983) (upholding application of federal Age Discrimination in Employment Act to state employees); United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982) (upholding application of federal Railway Labor Act to state-owned railroad); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (upholding federal regulation of strip mining).

30. 469 U.S. 528 (1985) (upholding application of federal FLSA minimum-wage and overtime

League of Cities and concluded that "[t]hus far, this Court itself has made little headway in defining the scope of the governmental functions deemed protected under *National League of Cities*."[31] The Court described it as "difficult, if not impossible, to identify an organizing principle" for the recognition of traditional government functions.[32] Since *Garcia*, the Court has not attempted to revive the functions-based approach to defining state autonomy.

However, in three landmark decisions between 1991 and 1997, without seeking to define traditional state functions, the Court traced a new set of constitutional boundaries that protects state sovereignty and reasserts the Tenth Amendment as an independent check on federal action.[33] At first blush, these three decisions may appear to lack a shared organizing principle. However, a common core is discernible: all three cases may be understood as recognizing constitutional protection of the states' *autonomous decision-making authority*. This new line of jurisprudence prohibits congressional action that commandeers or controls the instruments of state government in the creation or implementation of laws. In other words, the Constitution bars Congress from forcing state governments to make legislative or executive decisions in accordance with Congress's wishes. As did *National League of Cities*, these cases concern congressional regulation of the states as *states*.

A. Gregory v. Ashcroft

In the first of the recent state sovereignty cases, *Gregory v. Ashcroft*, state judges in Missouri asserted the federal Age Discrimination in Employment Act (ADEA) as a challenge to the Missouri Constitution's requirement that most state judges retire at the age of seventy.[34] The Court resolved the issue by holding that the ADEA's exemption for government "appointee[s] 'on the policymaking level'" included judges, thus construing the law to avoid a conflict with the Missouri Constitution.[35] In so doing, the Court reiterated its "plain statement rule" that any congressional undertaking to alter the constitutional balance between the states and the federal government must be explicit and unmistakable in the language of the congressional act. Otherwise, the default presumption that Congress does not intend to trench upon the powers of the states must guide judicial interpretation of the act.[36]

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provisions to municipal transit authority and overruling *National League of Cities*).

31. *Id.* at 539.

32. *Id.*

33. Printz v. United States, 117 S. Ct. 2365 (1997); New York v. United States, 505 U.S. 144 (1992); Gregory v. Ashcroft, 501 U.S. 452 (1991).

34. 501 U.S. 452, 455 (1991); *see* MO. CONST. art. V, § 26. The judges also challenged the Missouri constitutional provision under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

35. *Gregory*, 501 U.S. at 466-67 (quoting 29 U.S.C. § 630(f) (1994)).

36. *Id.* at 460-61.

Gregory might seem out of place in a list of decisions demonstrating a new judicial approach to the Tenth Amendment and state sovereignty. Had the Court said no more, it would be. However, in writing for the majority, Justice O'Connor expounded at great length upon the nature of state sovereignty.[37] This elaboration provided the theoretical underpinning of the plain statement rule: "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[38] The Court asseverated that the federal government may not intermeddle with certain state governmental decisions. The specification of qualifications for state judges is such a determination—"a decision of the most fundamental sort for a sovereign entity."[39] The states' "'power to prescribe the qualifications of their own officers . . . should be exclusive, and free from external interference, except so far as plainly provided by the Constitution of the United States.'"[40] The Court stressed that "[c]ongressional interference with this decision of the people of Missouri . . . would upset the usual constitutional balance of federal and state powers."[41] These statements acknowledging the decision-making prerogatives of states were the first tentative strokes in the Court's recent depiction of the state sovereignty protected by the Tenth Amendment.

Justice O'Connor's statements concerning state sovereignty also have portentous implications for the proposed attorneys' fees cap. If an elected officer of a state negotiates a contract with a private entity for legal assistance in the recovery of medical expenditures for smoking-related illnesses, Congress may not second-guess the state and effectively alter the terms of the contract. A state's capacity to negotiate its contracts without federal tampering is an important way in which a state expresses itself as a sovereign entity. Respect for autonomous state decision making is essential in our system of dual federalism. Without such autonomy, American federalism would likely come to resemble political systems in which subnational polities play only a subordinate and facilitating role. For example, in the Federal Republic of Germany's cooperative federalism framework, the Länder governments' chief responsibility is to implement the decisions of the national

37. *See id.* at 457-64. One might regard the Court's long discourse on state sovereignty as unnecessary to its holding and therefore *obiter dicta*. However, the plain statement rule would have lacked theoretical force without this discussion. Justices White, Stevens, Blackmun, and Marshall dissented with respect to the majority's analysis of the potential constitutional conflict and its conception of state sovereignty. *Id.* at 474 (White, J., concurring in part and dissenting in part); *id.* at 486 (Blackmun, J., dissenting).

38. *Id.* at 461.

39. *Id.* at 460.

40. *Id.* at 460 (quoting Taylor v. Beckham, 178 U.S. 548, 570-71 (1900)).

41. *Id.*

government.[42] The scope of autonomous decision making, free from national government interference, is greatly circumscribed.

The *Gregory* Court noted that the power of a state to stipulate the character of its office holders is one of the ways in which "a State defines itself as a sovereign."[43] This concept easily extends to states hiring law firms to serve the public purpose of recovering vast Medicaid expenditures. If Congress cannot constitutionally interfere with state decisions regarding state officers' retirement ages, then presumably Congress cannot put a ceiling on the *salaries* earned by state officers. For example, Congress may not constitutionally enact a law prohibiting states from paying their governors more than $200,000 a year. It requires only a short, logical leap from this position to reach the conclusion that Congress may not compel states to pay private attorneys $250 or less per hour for services rendered to the states. The only significant distinction is that the governor is a state officer, whereas the law firm is an independent contractor paid by the state.[44] However, this distinction is largely without a difference; the primary justifications for state autonomy in setting terms of employment are the same. In both cases, the states have exercised independence in setting generous compensation levels to attract qualified individuals to serve the public by performing important, high-profile state missions.

B. New York v. United States

A year after the *Gregory* decision, the Court recognized more extensive constitutional protection for state sovereignty in *New York v. United States*.[45] In this case, the Court addressed a challenge to three incentive provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 that sought to encourage states to "'provid[e] . . . for the disposal of low-level radioactive waste generated within [their] borders.'"[46] The Court held that the "take title" provisions of the Act, which compelled states either to regulate pursuant to Congress's directions or take title to, and possession of, the waste, unconstitutionally encroached upon the zone of state

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42. Article 83 of the German Basic Law charges the Länder with implementing the bulk of federal legislation. For decades the German system has been plagued by a "creeping centralization" that has gradually eroded the autonomy and power of the Länder. *See* Simon Bulmer, *Territorial Government, in* DEVELOPMENTS IN WEST GERMAN POLITICS, at 42 (Gordon Smith et al. eds., 1989). As the Supreme Court has recognized, the Framers of the United States Constitution considered and rejected the possibility of allowing Congress to compel the states to legislate in the service of congressional objectives. New York v. United States, 505 U.S. 144, 164-66 (1992).

43. *Gregory*, 501 U.S. at 460.

44. Or, stated differently, the office of the governor is a permanent part of the structure of state government, whereas the law firm is a temporary ally of the state and not part of the state government itself.

45. 505 U.S. 144 (1992).

46. *Id.* at 150-51 (quoting Low-Level Radioactive Waste Policy Act § 4(a)(1), Pub. L. No. 96-573, 94 Stat. 3348 (1980)).

sovereignty protected by the Tenth Amendment. The Court concluded that Congress cannot constitutionally coerce the states to take either action and that offering the states a choice between the two options did not ameliorate this defect.[47]

Writing for the Court, Justice O'Connor elaborated at great length upon the conception of state sovereignty that she had described in *Gregory*.[48] What had been merely a peripheral set of observations in *Gregory* now lay at the core of the Court's holding in *New York*.[49] Importantly, Justice O'Connor set out the Court's new understanding of the Tenth Amendment. She acknowledged that in one sense the text of the Tenth Amendment is merely the truistic complement of the powers conveyed in Article I of the Constitution.[50] However, she declared that, like the First Amendment, the Tenth Amendment also imposes an *independent* constraint on the powers of Congress: "The Tenth Amendment likewise restrains the power of Congress .... [It] confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States."[51] In identifying such limits, the Court was required to determine "whether an incident of state sovereignty is protected by a limitation on an Article I power."[52] Once again, the states' decision-making autonomy was the "incident of state sovereignty" for which the Court found constitutional protection. The Court declared emphatically that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[53]

The Court's conclusions in *Gregory* and *New York* are similar: Congress may neither tell states when to retire their judges nor tell states what regulations to enact. The implications for the proposed attorneys' fees cap are plain. Just as state decisions regarding the tenure of state officers or the shape of state legislation are shielded by the Tenth Amendment, so too are decisions regarding the terms of state contracts. The power to make each of these decisions autonomously is an incident of state sovereignty. Thus, Congress may not prohibit a state from determining the fee that it wishes to pay to a private law firm.

Comprehending the *New York* decision requires an understanding of what the Court did *not* hold. This case was not one in which the Court held that Congress

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47. *Id.* at 175-77. In a 6-to-3 vote, the Court simply declared the provision unconstitutional.

48. *See id.* at 155-69.

49. Although Justice O'Connor did not explicitly describe the Court's *New York* holding as the direct descendant of *Gregory*'s holding and state sovereignty analysis, her discussion was plainly the natural extension of her conclusions iterated only one year earlier in *Gregory*. Indeed, she repeatedly cited and quoted *Gregory* on the matter of state sovereignty. *See id. passim*. Justices White, Blackmun, and Stevens, the three dissenters in *New York*, similarly dissented from her statements on the subject in *Gregory*.

50. *Id.* at 156. Justice O'Connor noted that "the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" *Id.* (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).

51. *New York*, 505 U.S. at 156-57.

52. *Id.* at 157.

53. *Id.* at 188.

lacked the power to regulate private individuals or to pre-empt state regulations. Congress could have permissibly exercised its own power over interstate commerce to require generators of low-level radioactive waste to dispose of such waste according to Congress's wishes.

However, Congress could not require the states to regulate private individuals according to congressional inclinations. Requiring the states to do so would have effectively reduced the states to subservient administrative units of the national government.[54] The Court noted that the Framers of the Constitution considered and rejected such a system,[55] choosing instead a framework "that confers upon Congress the power to regulate individuals, not States."[56] Accordingly, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."[57] This observation is pertinent to the proposed attorneys' fees cap. Should it wish to do so, Congress may use its power over interstate commerce to cap all lawyers' contingency fees nationally. Congress may also limit the amount of money that the *federal* government pays to private law firms for services rendered to the federal government. However, Congress may not compel the states to adopt the proposed fee cap in their contracts with private law firms.

Implicit in this conclusion, as in the *New York* holding, is the assumption that the federal government must treat the states as fellow sovereign entities. The Supremacy Clause concedes congressional superiority in the regulation of individuals;[58] however, Congress does not possess an elevated status in the direct relationship between state governments and the national government. Indeed, prior to the enactment of the Seventeenth Amendment,[59] the Constitution suggested the opposite. The original constitutional provision charged state legislatures with the selection of United States senators.[60] The fact that delegates from the state

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54. *See supra* note 38 and accompanying text.

55. *New York*, 505 U.S. at 164-66.

56. *Id.* at 166. The *New York* Court clearly stated that Congress may regulate individuals, but not the states as states, within the scope of its enumerated powers. However, the Court left ambiguous the extent of congressional power to regulate individuals and states together, as part of a generally applicable regulatory program. *See id.* at 177-78. This sort of congressional action is what the Court declared unconstitutional in *National League of Cities* and then held constitutional in *Garcia*. *See supra* notes 24-32 and accompanying text. Regardless, the proposed attorneys' fees cap does not fall into this third, ambiguous category of congressional action. The proposed cap plainly targets the states *as states*.

57. *New York*, 505 U.S. at 162.

58. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

59. "The Senate of the United States shall be composed of two Senators from each state, *elected by the people* thereof, for six years . . . ." U.S. CONST. amend. XVII (emphasis added).

60. "The Senate of the United States shall be composed of two Senators from each State, *chosen by the Legislature* thereof, for six years . . . ." U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII, § 1 (emphasis added).

legislatures comprised one house of Congress strongly implied that Congress, at times, would be expected to do the state legislatures' collective bidding. In this sense, the Seventeenth Amendment may be understood as having had the indirect effect of placing Congress and the state legislatures on equal footing in their relationships with one another.

In any case, the Framers clearly did not intend for the federal government to control the behavior of state governments. The delegates to the Philadelphia Convention of 1787 discussed and rejected the New Jersey Plan, under which the federal government and the state governments would have regulated individuals jointly. Like the Articles of Confederation, this plan stipulated that Congress must gain the consent of the states before legislating.[61] The New Jersey Plan was challenged on various grounds, including the possibility that it might result in federal coercion of the state governments to follow Congress's preferences.[62] In the Convention debates, the Framers generally assumed that the New Jersey Plan would entail federal direction of the states. William Patterson, who introduced the New Jersey Plan, described this objection to his plan as follows: "There must be a national Governm[en]t to operate individually upon the People in the first Instance, and not upon the States . . . ."[63] After considerable debate, the Convention delegates rejected the New Jersey Plan, opting instead for a version of the Virginia Plan under which the federal government would be empowered to regulate individuals directly without using the states as its agents.[64] Madison revisited this subject in the *Federalist Papers*. After describing the failure of the political system of the Netherlands, in which the central government enjoyed authority to direct the confederacy's constituent states, Madison insisted that the proposed U.S. Constitution did not create such "a sovereignty over sovereigns" or a "government over governments." Such an arrangement would have been a "solecism in theory" and would likely have been "subversive of the order and ends of civil polity" in practice.[65]

The principle that the Constitution does not countenance federal regulation of the states *as states* lies at the heart of the *New York* decision and presents the most fundamental barrier to the proposed attorneys' fees cap. Just as congressional compulsion of the states to legislate on Congress's behalf offends this principle, so too would congressional nullification of contracts negotiated by the states with private entities. The cap would effectively say to the states, "You may not enter into contracts containing these terms." This type of congressional restriction on state

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61. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 243-44 (Max Farrand ed., 1911).

62. *See id.* at 255-66. The Court in *New York* emphasized this objection to the New Jersey Plan. *New York*, 505 U.S. at 164-65.

63. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 61, at 275.

64. *See id.* at 21, 257-80, 313.

65. THE FEDERALIST NO. 20, at 128-29 (James Madison) (Jacob E. Cooke ed., 1961). The Court in *New York* quoted these words in support of its contention that "the Framers did *not* intend that Congress should exercise [its interstate commerce] power through the mechanism of mandating state regulation." *New York*, 505 U.S. at 180.

behavior cannot be easily squared with the *New York* holding.[66]

The *New York* Court looked not only to the Framers' intent in reaching its holding but also to considerations of constitutional policy. The Court professed that "where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished."[67] This loss of accountability stems from the fact that when state officials are forced to make policy according to congressional design, the state officials are exposed to any public disapproval while "federal officials . . . remain insulated from any electoral" backlash.[68] Likewise, undeserving state officials enjoy the benefits of any popular policy making, while the responsible federal officials go unrecognized. As a result, the political incentives to make good policy become skewed. Such accountability considerations are also present with respect to the proposed attorneys' fees cap. Congressional intervention to cap the previously negotiated attorneys' fees would distort political incentives by stealing for the states an extremely good deal in legal representation. The states would not be held politically accountable for the deal that they negotiated—be it a good deal or a bad one. Moreover, in future negotiations for legal representation in any nationally significant lawsuit, the states would possess an incentive to offer private firms high contingency fees with the expectation that Congress would later intervene and reduce the fees.

One other aspect of the *New York* holding bears mentioning at this point. The Court declared that Congress may not "'commandeer' state governments into the service of federal regulatory purposes."[69] Congress had commandeered the states by forcing them to adopt a federal scheme for the disposal of low-level radioactive waste. In the wake of *New York,* lower federal courts have elaborated upon what, precisely, it means to "commandeer" the instruments of state government. In addition to the Brady Act discussed below,[70] at least one other federal act has been

66. One might argue that such a strong iteration of the principle that the federal government may not regulate the states *as states* proves too much. Taken to its logical extreme, this principle calls into question any federal law that requires states to adopt particular regulatory standards or refrain from licensing certain behavior. For example, federal laws regarding sports gambling not only prevent individuals from operating betting schemes based on athletic games but also prevent states from licensing such behavior: "It shall be unlawful for . . . a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact . . . a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly . . . on one or more competitive games in which amateur or professional athletes participate . . . ." 28 U.S.C. § 3702 (1994) (exempting Nevada from these provisions). Arguably, the no-regulation-of-the-states-as-states principle demands that such congressional action be adjudged unconstitutional. However, this understanding is not as drastic as it might first appear. Congress could still regulate individual behavior, including participation by individuals in sports gambling schemes (assuming that regulation of sports gambling is contemplated by the Commerce Clause). Because the Supremacy Clause of Article VI would render void any countervailing state laws permitting sports gambling, Congress could reach the same objective through constitutionally sound means. *See supra* note 52.

67. *New York,* 505 U.S. at 168.

68. *Id.* at 169.

69. *Id.* at 175.

70. *See infra* Part II.C.

held unconstitutional on these grounds. The Driver's Privacy Protection Act bars state departments of motor vehicles from knowingly disclosing personal information contained in motor vehicle records, including addresses, photographs, and social security numbers, but not including telephone numbers and driving records.[71] Federal district courts in South Carolina and Oklahoma have determined that this act impermissibly commandeers state agencies to enforce federal preferences regarding the dissemination of such information.[72]

Although the concept of commandeering state government is not without limits,[73] it encompasses a wide range of possible federal actions. In all likelihood, the proposed attorneys' fees cap lies within its broad boundaries. In the cases where a violation of the Tenth Amendment was found, the federal government achieved its policy objective by ordering state officers, agencies, or legislatures to behave in a certain way. The same certainly may be said of the attorneys' fees cap. Because Congress deems the negotiated attorneys' fees in the multi-state tobacco settlement to be excessive, it orders state governments to limit their fees to figures within Congress's preferred range. In this sense, the proposed cap commandeers the states' contracting authority. This conclusion is further supported by the holding in *Printz v. United States*,[74] in which the Court expanded upon the concept of commandeering the instruments of state governments.

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71. 18 U.S.C.A. §§ 2721-2725 (West Supp. 1997).

72. Condon v. Reno, 972 F. Supp. 977, 982-86 (D.S.C. 1997); Oklahoma v. United States, No. CIV-97-1423-R, 1997 U.S. Dist. Lexis 14455 (W.D. Okla. Sept. 17, 1997).

73. In at least three instances, lower federal courts have found no commandeering of state governments when presented with constitutional challenges to federal statutes under the *New York* precedent. In *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996), the Third Circuit found no Tenth Amendment violation in the federal government's alleged failure to stem the tide of illegal immigration which, according to the state of New Jersey, compelled the state to incur expenses incarcerating and educating illegal aliens. The Court held that "[n]either the state's incarceration of illegal aliens nor its obligation to educate illegal aliens results from any command by Congress." *Id.* at 467. In *Strahan v. Coxe*, 939 F. Supp. 963 (D. Mass. 1996), the United States District Court for the District of Massachusetts found no commandeering of state government in the Endangered Species Act and Marine Mammal Protection Act. The state of Massachusetts alleged that a federal judicial injunction against Massachusetts licensing practices under the Acts would be tantamount to commandeering the Commonwealth's commercial licensing process. The Court found no Tenth Amendment violation because the Endangered Species Act "does not require the Commonwealth to regulate commercial fishing at all"; rather, it affords Massachusetts "the 'critical alternative' of declining to 'administer' the federal program." *Id.* at 979-80. In *United States v. Lewis*, 936 F. Supp. 1093 (D.R.I. 1996), the federal district court for the District of Rhode Island upheld the Child Support Recovery Act against a Tenth Amendment challenge premised on the *New York* holding. The Court found that although the Act provided for relitigation in federal courts of issues decided by state courts, the goal of the Act was to strengthen state enforcement efforts with respect to child support orders. Therefore, no unconstitutional invasion of state sovereignty took place. *Id.* at 1105-06.

74. 117 S. Ct. 2365 (1997).

C. Printz v. United States

In *Printz*, the Court delivered its most confident shot across the bow of Congress yet. The Court held unconstitutional a provision of the Brady Handgun Violence Prevention Act that required the chief law enforcement officers of localities to administer background checks on prospective handgun purchasers.[75] Reiterating its *New York* holding that the federal government may not force states to enact or administer federal regulatory schemes[76] and characterizing the Brady Act as an attempt to "press" state and local law enforcement officers into federal service,[77] the Court concluded that the Brady Act unconstitutionally compelled state and local officers to implement a federal regulatory program.[78] Writing for the majority,[79] Justice Scalia offered a detailed exposition on the history of congressional direction of state governments, the writings of the Framers on the subject, and the relevant prior holdings of the Court.[80] His discursive opinion was peppered with observations relevant to the proposed cap on attorneys' fees.

At the heart of the *Printz* decision was the general principle that "state legislatures are *not* subject to federal direction."[81] From this axiom, the Court derived the corollary principle that the states' executive power is also shielded from federal command. As the Court summarized, "The Federal Government may neither *issue directives requiring the States to address particular problems*, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[82] The first half of this sentence bears directly upon the proposed cap on attorneys' fees. The proposed cap can be fairly characterized as a congressional directive requiring the states to address a particular problem. Private law firms stand to reap an unusually large financial reward for their efforts to recoup tobacco-related Medicaid expenditures. Not only does the proposed cap require the states to address this problem, the legislation mandates precisely how they should do so—by paying their private attorneys no more than $250 per hour, with the total fees not to exceed $5 million. As such, the proposed fees cap constitutes a federal directive prohibited under *Printz*.

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75. For a description of the relevant provisions of the Act, see *id.* at 2368-69.

76. *Id.* at 2380, 2384.

77. *Id.* at 2369.

78. *Id.* at 2384.

79. The Court split five to four in this decision, with Justices Stevens, Souter, Ginsburg, and Breyer dissenting. Of the dissenting four, Justices Ginsburg and Breyer had not been members of the Court at the time of the *New York* decision. Justice Stevens dissented on both occasions. Justice Souter voted with the majority in *New York*, but dissented in *Printz*. He explained this apparent inconsistency by drawing a distinction between telling state legislatures what to legislate and telling state executive officers what to execute. Souter maintained that the former was impermissible because of the discretionary nature of legislative power, but the latter was permissible because executive power is inherently subject to direction. *See id.* at 2402 & n.1 (Souter, J., dissenting).

80. *See Printz*, 117 S. Ct. at 2370-84.

81. *Id.* at 2373.

82. *Id.* at 2384 (emphasis added).

The *Printz* opinion echoed the common theme of *Gregory* and *New York*: beyond simply confirming that the federal government is one of enumerated powers, the Tenth Amendment assures the states' decision-making autonomy. Framing this principal in terms of spheres of sovereignty, Madison stated, "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority, than the general authority is subject to them, within its own sphere."[83] The *Printz* Court quoted Madison in this regard[84] and concluded that "[i]t is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority."[85] Application of this concept to the proposed cap on attorneys' fees yields further support for the view that such congressional action would be unconstitutional. Arguably, the amount of money a state chooses to spend in its contracts with private entities is entirely within a protected sphere of state autonomy.[86] If Congress can constitutionally interfere with a state contract for legal representation and declare the contract void because, in Congress's eyes, the state agreed to a "bad deal," then when would Congress *ever* be forbidden from declaring a state contract void because it is a bad deal? The logical implications border on the absurd: Congress could tell states that they are paying their elected representatives too much, spending too much money on computers, paying teachers too little, and so on. Not surprisingly, the best way to avoid this slippery slope is to stay off the scarp altogether—by recognizing that contractual terms between states and private entities lie within the states' sphere of autonomous decision making.[87]

This separation of state and federal decision-making prerogatives was a variation on the theme of state decision-making autonomy that resonated throughout the *Printz* opinion. The Court stressed that a state government has "'its own privity, its own set of mutual rights and obligations to the people who sustain it and are

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83. THE FEDERALIST No. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961).

84. *Printz*, 117 S. Ct. at 2377.

85. *Id.* at 2381.

86. There are, of course, limits on the terms of such state contracts that are imposed by the Fourteenth Amendment and the Bill of Rights.

87. This attention to spheres of autonomous state decision making in *Printz* seems to undermine the Court's earlier holding in *Garcia* that Congress can subject state and local governments to the minimum wage and overtime requirements of the Fair Labor Standards Act. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *see also supra* notes 30-32 and accompanying text. Wages and overtime requirements are terms in employment contracts between states and individuals. However, a critical difference exists between the minimum wage and the proposed fees cap. As the Court stressed in *Garcia*, the minimum wage is part of a general nationwide program constraining all employers. "SAMTA faces nothing more than the same minimum-wage and overtime obligations that hundreds of thousands of other employers, public as well as private, have to meet." *Garcia*, 469 U.S. at 554. In contrast, the proposed attorneys' fees cap specifically and solely targets those contracts in which a state is the client. In this way, the proposed fees cap would constitute a direct congressional affront to state autonomy. Presumably, Congress could regulate the contingency fees of all attorneys in the country, regardless of the client, and retain the constitutional blessing of *Garcia*.

governed by it,'" apart from any obligations that Congress has to its own constituencies.[88] The area of autonomous decision making protected by the Tenth Amendment coincides with this area of privity of obligation. A state legislature's decision to adopt a particular statute providing for the disposal of radioactive waste is borne of the legislators' obligations and duties owed to the residents of the state. Similarly, the obligations and expectations that exist between a law enforcement officer and the community that he protects shape his decisions to monitor the selling of handguns and to take other steps to prevent crime. This privity of obligation analysis also applies to the proposed cap on attorneys' fees. When launching a civil suit to recoup smoking-related Medicaid expenditures from the tobacco industry, a state has an obligation to its citizens to retain an adequate share of any recovered damages.[89] However, Congress has no authority to second-guess the state and declare that the state is failing to fulfill that obligation. Congress has its own, independent obligations to its own constituencies that it must meet. The Constitution does not appoint Congress the guarantor of the states' obligations to their citizens.

Finally, the *Printz* Court observed that where congressional action "compromise[s] the structural framework of dual sovereignty," no judicial "balancing" of competing interests is appropriate.[90] Rather, Congress is absolutely prohibited from intruding upon protected areas of state autonomy, regardless of the persuasiveness of Congress's policy arguments. "It is the very *principle* of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."[91] Thus, any congressional insistence that important or even compelling federal interests are at stake would be entirely beside the point.

Of course, one may question whether Congress could even articulate a cognizable federal interest in interfering with the attorneys' fees negotiated by the states. Congress might assert an interest in ensuring that the state governments retain as much of the recovered damages as possible in order to fatten state coffers and thereby reduce the states' demand for federal grants. However, this indirect and attenuated federal interest has little persuasive force, as the states are quite capable of looking after their own financial well-being without interference from a Congress that has had great difficulty managing its own budget. Alternatively, one might assert that the federal purpose is one of comity—a congressional attempt to assist the states by correcting their blunders. Arguably, returning billions of dollars to

88. *Printz*, 117 S. Ct. at 2377 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

89. In determining the contingency fee that it is willing to pay, a state might consider a variety of factors, including the risk that such a suit would ultimately fail, the prevailing market contingency fees for similar legal services, the minimum fee necessary to retain superior counsel, and the expectations of the public with respect to the lawyers' share of any damages awarded.

90. *Printz*, 117 S. Ct. at 2383.

91. *Id.*

state governments that supposedly negotiated a bad deal is a legitimate federal purpose. However, such a purpose rings hollow when one considers that the states were free to negotiate whatever attorneys' fees they wished. The states evidently concluded that the selected contingency fees properly balanced the competing state interests in maximizing recovery to the government and encouraging effective litigation. A third possible federal purpose served by the fees cap might be the deterrence of future coordinated lawsuits by state governments seeking to recover Medicaid or other expenditures from culpable industries. However, this purpose is the least colorable of the three. By and large, members of Congress have expressed satisfaction, rather than dismay, at the states' success in recovering Medicaid expenditures and obtaining concessions from the tobacco industry. Therefore, the proposed cap on attorneys' fees does not likely reflect a desire to deter similar suits in the future. Furthermore, there has been no suggestion that a similar wave of suits is imminent or even possible in the future. Thus, there appears to be no defensible federal interest behind the fees cap proposal.

In sum, the *Gregory-New York-Printz* line of decisions has recognized constitutional protection for the decision-making autonomy of state governments. The proposed cap would intrude upon this protected zone of state sovereignty. However, even if the Tenth Amendment were interpreted as presenting no barrier to the proposed action, the fees cap would still run afoul of the Takings Clause of the Fifth Amendment.

III. THE TAKINGS ISSUE

> *The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States.*[92]

The government effects a taking in its most recognizable form when it acquires, confiscates, physically occupies, or simply destroys private property.[93] Compensation is required regardless of whether the private property is real property, chattel property, or money.[94] However, the Court has long acknowledged that a compensable taking may also occur as a result of a regulatory action that is not a straightforward acquisition, occupation, or destruction of property. The best known

92. Lynch v. United States, 292 U.S. 571, 579 (1934) (Brandeis, J.).

93. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441-42 (1982) (finding compensation required for installation of cable television facilities on real property); United States v. Lynah, 188 U.S. 445, 470 (1903) ("[W]here the government by the construction of a dam or other public works so floods lands belonging to an individual as to substantially destroy their value there is a taking within the scope of the Fifth Amendment.").

94. *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164-65 (1980) (holding that state government appropriation of interest earned on an interpleader account constituted a compensable taking of private property).

iteration of this principle came from Justice Holmes in *Pennsylvania Coal Co. v. Mahon*: "[W]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[95] Although the Court in *Mahon* was not the first to declare a regulatory taking compensable,[96] it marked the beginning of a series of twentieth-century decisions recognizing such takings.[97]

Arguably, one may view the proposed cap on attorneys' fees as a *regulatory* taking because Congress would be regulating the fees that state governments may pay their attorneys without specifically identifying and seizing property. However, the taking at issue here does not fit easily into the regulatory takings category. Regulatory takings typically involve government-imposed limitations on usage rights or other rights that normally adhere to private property rather than actual government acquisition of property. The proposed fees cap does not circumscribe property rights in this fashion. Alternatively, one may view the proposed fees cap as an *acquisition* of the private law firms' property and a transfer of that property to the state governments.[98] The author favors the latter characterization, viewing the fees cap as more like a direct confiscation of property than a regulation of property.[99] Nonetheless, analyzing the fees cap initially as a regulatory taking[100] is useful for two reasons. First, in the past the Court has examined congressional interference with the contractual rights of parties to an existing contract through the regulatory takings lens, even though such interference fits uneasily under this label.[101] Second, considering the Court's regulatory takings analysis in cases of non-

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95. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

96. Although *Mahon* is the most famous early statement of the view that regulatory takings must be compensated, the doctrine actually dates to the early decades of the nineteenth century, when state courts applying natural law, common law, or their respective state constitutions required compensation for what were essentially regulatory takings. In two decisions in the 1870s, the Supreme Court also apparently endorsed this view. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 UTAH L. REV. 1211, 1267-76 (discussing *Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1870), and *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871)).

97. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1030 (1992) (requiring compensation where state regulation preventing building of any permanent habitable structure on coastal property denied landowner all economically viable use of property); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 322 (1987) (holding that flood control ordinance that denied landowner all use of his property, even if only temporarily, required compensation); Hodel v. Irving, 481 U.S. 704, 718 (1987) (holding that the provision of the Indian Land Consolidation Act that prevented the transfer of Indian land by intestacy or devise resulted in a taking of decedent's right to pass property at death); Kaiser Aetna v. United States, 444 U.S. 164, 178-79 (1979) (holding that a taking occurred when the Rivers and Harbors Appropriation Act required that a privately owned pond converted into a navigable waterway by its owner be open to the public).

98. For an attempt to create a logical taxonomy of takings which divides them into three general categories—acquisitive, destructive, and devaluative—and numerous subcategories, see Kobach, *supra* note 96, at 1223-28.

99. *See* discussion *infra* Part III.B.

100. *See* discussion *infra* Part III.A.

101. In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), the Court used the regulatory takings criteria of *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), to assess a claim that the withdrawal liability provisions of the Multiemployer Pension Plan

regulatory takings of intangible or contractual property is often useful. In various regulatory takings cases, the Court has devoted considerable attention to the question of when an expectation rises to the level of a property interest protected by the Takings Clause. In any event, both approaches yield the same ultimate conclusion: the proposed cap constitutes a compensable taking of private property.

A. The Regulatory Takings Framework

Although the Court has yet to arrive at a "set formula" for determining when a government regulation constitutes a compensable taking,[102] it has defined the general contours of such takings. The Court recognizes two situations in which the government has effected a compensable taking per se without any case-specific inquiry into the value of the property or the government interests behind the restraint: first, when a regulation compels a property owner to suffer a physical invasion of his property;[103] and second, when a regulation deprives a landowner of all economically beneficial use of his property.[104] In regulatory situations falling outside of these two categories, including that presented by the proposed cap, the Court has identified three factors that are critical in determining whether the challenged government action constitutes a compensable taking: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action."[105]

Of course, the preliminary question that must be answered with respect to the proposed cap on attorneys' fees is whether what is taken can be considered "property." Well-settled constitutional jurisprudence affirms that valid contracts may create property rights, and the Takings Clause prohibits the government from impairing the property rights in such contracts without providing just compensation. As the Supreme Court's 1934 holding in *Lynch v. United States* pronounced, "[v]alid contracts are property" protected by the Takings Clause of the Fifth Amendment.[106] This statement in *Lynch*, though often cited, was not the Court's first announcement of this principle. In 1897, the Court declared flatly that "a contract is property, and, like any other property, may be taken under condemnation proceedings for public use. Its condemnation is of course subject to the rule of just

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Amendments Act of 1980 amounted to an uncompensated taking of private property from an employer withdrawing from a multiemployer pension plan, from the employer's trustees, and from the plan participants. *Connolly*, 475 U.S. at 224-27.

102. *Penn Central*, 438 U.S. at 124.

103. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982).

104. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992).

105. *Penn Central*, 438 U.S. at 124.

106. Lynch v. United States, 292 U.S. 571, 579 (1934) (holding that the government annulment of contractual rights under War Risk Insurance Policies constituted a compensable taking of private property).

compensation . . . ."[107] This iteration of takings protection for contracts was grounded in even earlier precedent.[108] The Court has not deviated from this view in the century of takings jurisprudence that has unfolded since.[109]

To establish a compensable property interest, a claimant must show more than a "'unilateral expectation or an abstract need'"; the claimant must present a legitimate claim of entitlement reflecting a "'reasonable investment-backed expectation.'"[110] The nature of the tobacco litigation contingency fee arrangements in most states is clear: the law firms have more than a unilateral expectation of financial gain. They have valid, binding contracts for legal services. As consideration for their negotiated returns, the law firms have rendered thousands of hours of legal work. Moreover, they undertook this investment of resources in detrimental reliance on such contractual arrangements. This investment-backed expectation is sufficient to establish a valid property interest within the scope of the Takings Clause.[111] A contractual property right vests for Fifth Amendment purposes when the contract is made and consideration is given, even if the right does not fully

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107. Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 690 (1897) (citation omitted).

108. The *Long Island Water Supply* Court noted that *Hall v. Wisconsin*, 103 U.S. 5 (1880), implied the same view regarding the compensability of government takings of contracts. *Long Island Water Supply*, 166 U.S. at 690.

109. *See* Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 223 (1986) ("Contracts may create rights of property . . . ."); Armstrong v. United States, 364 U.S. 40, 46 (1960) (holding that the governmental destruction of a materialmen's lien rights required compensation under Fifth Amendment); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 121 (1924) (holding that government expropriation of rights granted under a shipbuilding contract constituted a compensable taking of private property).

110. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005-06 (1984) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)).

111. *See* Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision, 746 F. Supp. 1042, 1050 (D. Or. 1990) ("Plaintiffs' property interest . . . is clear. They have far more than a mere unilateral expectation in the Conversion Agreement. They have a valid, binding contract, in reliance on which the Investors risked $27 million."), *rev'd*, Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision, 951 F.2d 1093, 1096 n.4 (9th Cir. 1991) (explaining that the takings claim was voluntarily abandoned by plaintiff bank during appeal after plaintiff was placed in receivership); Rhode Island Higher Educ. Assistance Auth. v. Cavazos, 749 F. Supp. 414, 423 (D.R.I. 1990) (holding unconstitutional the amendments to the Higher Education Act of 1965 that retroactively require state student loan guaranty agencies to transfer excess reserves to the Secretary of Education and permitting the Secretary to withhold reimbursement for losses), *rev'd sub nom.*, Rhode Island Higher Educ. Assistance Auth. v. Secretary, United States Dep't. of Educ., 929 F.2d 844, 850-52 (1st Cir. 1991) (reversing on grounds that Congress had implicitly reserved the right to amend or repeal the Act and thereby retained sovereign authority over the program).

> [T]he facts in *Lynch* are strikingly similar to those in this case. In both cases, the plaintiffs contracted with government agencies pursuant to statutes expressly authorizing the agencies to enter into such contracts. In each case, consideration was given in exchange for the agency's commitment. In one case it took the form of premiums, and in the other it took the form of loan guarantees made in reliance on that commitment.

Cavazos, 749 F. Supp. at 422.

mature until the occurrence of some future event.[112] Indeed, the Court has suggested in the context of materialmen's liens that the Takings Clause protects such contractual rights regardless of whether the rights-holders have taken statutorily-required action to enforce their claims.[113]

Application of the three factors identified by the Supreme Court in *Penn Central*[114] to the proposed congressional interference with the contingency fees for the states' law firms evinces a compensable taking of private property. First, the government's regulatory action must have a significant economic impact on the claimant. The proposed fees cap would plainly satisfy this criterion. The exact amount of property that Congress would strip from the law firms varies from state to state,[115] but the vast magnitude of the potential taking is clear. In the hypothetical case of a state recovering $2 billion with twenty-five percent going to counsel, the law firms representing the state would be entitled to $500 million absent congressional interference. Under the proposed cap, however, the firms employed by the state would receive only $5 million—a loss of $495 million.[116]

Second, the claimants must hold a distinct, investment-backed expectation in the taken property. Essentially, this requirement means that the loss must not be entirely prospective; the property owner must have invested considerable expenditures into the venture.[117] In the present case, the law firms' investment-backed expectations are evident in the specific terms of the contingency fee agreements and in the massive investment of lawyer hours and other resources in reliance on these contracts. This commitment of resources constitutes an investment based on a contractually-embedded expectation that an agreed percentage of recovered damages from the tobacco industry will flow to the law firms. These expenditures, as well as other actions taken in reliance on the contracts, can sufficiently establish the investment-backed expectation required for a takings

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112. "Like the policy rights in *Lynch*, RIHEAA's right to reimbursement vested when the contract was made and the consideration given even though the right to collect would not mature until occurrence of the specified event (i.e. death of the insured or the occurrence of a default)." *Cavazos*, 749 F. Supp. at 422.

113. In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court held that materialmen's liens constituted private property protected by the Takings Clause even though, under Maine law, the lien had to be enforced by attachment of the vessel or supplies, and the claimants had taken no steps to attach the uncompleted work. "Nevertheless, they were entitled to resort to the specific property for the satisfaction of their claims." *Armstrong*, 364 U.S. at 44.

114. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

115. The amount of the taking would also have to be modified by present discounted value calculations, depending on when the payments would have occurred in the absence of the fees cap.

116. The wording of the first fees cap proposal legislation is ambiguous at this stage. In relevant part it states: "[I]f any attorneys' fees are paid . . . in connection with an action maintained by a State against one or more tobacco companies . . . such fees shall . . . be limited to a total of $5,000,000." Amend. 1125 to Amend. 1075 to amend S. 1061, 105th Cong. (1997). Whether this amount is the combined total that any single state may pay (to be divided among the various law firms involved) or whether no single firm is to be paid more than $5,000,000 is unclear.

117. *See* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 50 (1995).

claim.[118] Arguably, the expectations inherent in a lawyer's contingency fee arrangement are the epitome of investment-backed expectations. Lawyers operating under such contracts invest substantial resources in litigation on behalf of their clients, often bearing entirely the risk that the ventures will fail. What makes the bearing of this risk financially justifiable is the certainty of payment of a bargained-for percentage of any award. Although such lawyers cannot normally be certain of their success or failure in advance, they can be certain of their percentage. It is this concrete expectation that the proposed fees cap would take.

Not all contractual expectations are sufficiently concrete to create a property right protected by the Fifth Amendment. Courts have found that no such expectation exists in situations where a claimant's expectation of contract performance is highly uncertain. For example, substantial uncertainty was present in several cases engendered by the dissolution of communist Yugoslavia and the United States government's freezing of Yugoslav assets. In these cases, the claimants' expectations, in the form of contracts with Yugoslav agencies operating in the United States, rested upon the assumption that the United States would maintain stable relations with the former government of Yugoslavia.[119] Similarly heavy uncertainty was present with respect to the possession of permits to import arms from the People's Republic of China.[120]

Equivalent ambiguity is not present in the contracts between the states and their counsel for legal representation in tobacco litigation. Although the ultimate success or failure of these lawsuits was highly uncertain at their commencement, no contemporaneous uncertainty existed regarding the ability and willingness of state governments to pay their counsel the negotiated contingency fees in the event that

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118. *See* Far W. Fed. Bank, S.B. v. Director, Office of Thrift Supervision, 746 F. Supp. 1043, 1050 (D. Or. 1990) ("The Investors invested and Far West commenced its niche-lending business, as well as other steps in reliance on the Conversion Agreement. It is hard to imagine any more distinct an investment-backed expectation could be.").

119. *See* 767 Third Ave. Assocs. v. United States, 48 F.3d 1575, 1580 (Fed. Cir. 1995).

> Sage had no reasonable investment-backed expectation to be free from government interference with its leases to the SFRY organizations.
>
> Prior to 1981, statutory and constitutional authority existed that permitted the government to take various actions against other countries, including the blocking of assets and closure of foreign government offices.

Id.; Rockefeller Ctr. Properties v. United States, 32 Fed. Cl. 586, 592 (1995) (compelling performance of contractual terms "'is contingent upon the continuation of friendly relations between nations'" (quoting Chang v. United States, 859 F.2d 893, 897 (Fed. Cir. 1988))).

120. While an individual who obtains a permit to import arms may make commitments in the arms market on the assumption that the permit will not be revoked before the importation is completed, that assumption does not constitute a "reasonable investment backed expectation[]" of the type necessary to support a takings claim. That is particularly true with respect to importations of arms from a country with which the United States has an arms embargo that is subject to an exemption that could be terminated at any time.

B-West Imports, Inc. v. United States, 75 F.3d 633, 638 (Fed. Cir. 1996) (citation omitted).

the states recovered Medicaid expenditures from the tobacco industry. One might argue against the certainty of the law firms' expectation by pointing out that congressional interference was always in the cards. The very terms of the initial settlement proposal contemplated congressional involvement in, for example, the conferral of immunity on the tobacco industry from subsequent similar lawsuits. However, congressional involvement in facilitating settlement terms between the parties is quite unlike congressional interference with separate contracts for legal representation which created vested property rights long before the prospect of a settlement appeared on the horizon.[121] Moreover, the utter absence of any clear federal interest in the terms of these contracts[122] renders implausible the assertion that the proposed fees cap was foreseeable and therefore implicitly incorporated into the attorneys' expectations of payment.[123]

Prior congressional regulation of an area can also defeat a property owner's assertions of investment-backed expectations. Where the specific contractual provisions at issue have been the object of congressional regulation prior to the alleged regulatory taking, the owner of the contractual rights may be unable to establish that he had a legitimate expectation that his rights would remain free from subsequent congressional modification.[124] In *Connolly v. Pension Benefit Guaranty Corp.*,[125] the Court considered a claim that the withdrawal liability provisions of the

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121. A number of congressional proposals have also contemplated altering the quantity of damages awarded to the states. *See Tobacco to Be High on Congress' 1998 Agenda*, REUTERS, Nov. 16, 1997, *available in* INFOBEAT, File No.5987258-3c8. This form of congressional involvement, although not targeted directly at the contingency fee contracts between the states and their private attorneys, would nonetheless affect the final amount of the attorneys' fees received. However, such alteration of the total damages amount is conceptually distinct from congressional meddling with the attorneys' fees. The attorneys representing a state possess a contractual entitlement to a stipulated percentage of that state's award, regardless of the award's size. The total amount of damages that would be recovered by states suing the tobacco industry was *always* surrounded by considerable uncertainty—including uncertainty stemming from the prospect of congressional involvement in any settlement. Indeed, virtually all contingency fee contracts between lawyers and their clients embrace uncertainty as to the amount of the lawyers' eventual return. However, such uncertainty does not jeopardize a lawyer's entitlement to his contracted-for percentage. Accordingly, the uncertainty engendered by possible congressional alteration of the tobacco litigation settlement amount does not render infirm the attorneys' expectations of stipulated contingency fees.

122. *See supra* Part II.C.

123. Even less plausibly, one might also argue that no expectation ever exists with respect to contingent attorneys' fees because these fees are always reviewable by the relevant judicial authority on ethical grounds. However, given the fact that the fees at issue here are generally in the twenty-five percent range, well below the predominant thirty-three percent rate, and the fact that the state attorneys general are well-equipped to evaluate whether the fees that their states negotiate are too high, it is unlikely that any judge would have valid reason to sustain an ethical challenge to the fees.

124. The doctrine of construing contracts so as "to avoid foreclosing exercise of sovereign authority," reiterated by the Court in *Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52-53 (1986), is not applicable in this instance. That doctrine principally governs contracts to which the federal government itself is a party and is based on the precept that the government is presumed not "to have surrendered a sovereign power" by entering a contract. *Id.* at 53.

125. 475 U.S. 211 (1986).

Multiemployer Pension Plan Amendments Act of 1980 amounted to an uncompensated taking of private property from an employer withdrawing from a multiemployer pension plan.[126] The Court applied the three factors of *Penn Central* and concluded that the takings claim was weak in all three respects.[127] In assessing whether employers affected by the Act had a reasonable, investment-backed expectation that they would remain free from withdrawal liability, the Court noted that "[p]ension plans . . . were the objects of legislative concern long before the passage of ERISA in 1974."[128] By the time Congress passed ERISA, it was clear that withdrawing employers might be subject to liability for their share of their plan's contributions.[129] After surveying the legislative landscape in this fashion, the Court concluded that "[p]rudent employers . . . had more than sufficient notice not only that pension plans were currently regulated, but also that withdrawal itself might trigger additional financial obligations."[130] No such notice was present with respect to the proposed attorneys' fees cap. Congress has never attempted to regulate the amount of money that a state might offer a law firm to sue for the recovery of tobacco-related Medicaid expenditures. Indeed, Congress has never attempted to regulate the amount of money that a state might offer a law firm to conduct *any* sort of litigation. Although Congress might permissibly exercise its commerce power to regulate the attorneys' fees that any state can offer to a firm to conduct tobacco litigation in the future,[131] congressional interference with *existing* contracts impairs investment-backed expectations. Such expectations were clearly reasonable, given the absence of prior congressional regulation of attorneys' fees paid by states.

The third *Penn Central* factor relevant to the regulatory takings inquiry is the nature of the government action. The *Penn Central* Court posited rather vaguely that a taking is more likely to be found where the government physically invades private property than where interference with property "arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[132] This description of extremes provided little help in assessing the infinite number of situations that lie in between.[133] However, in *Connolly*, the Court

126. *Id.* at 221. The appellants also asserted that the Act amounted to a taking from the employer's trustees and from the plan participants. *Id.*

127. *See id.* at 224-27.

128. *Id.* at 226.

129. *Id.* at 227.

130. *Id.*

131. The possibility of regulating attorneys' fees negotiated in the future assumes that the Tenth Amendment barriers prohibiting such congressional action do not exist. It also assumes that such a fees cap falls within Congress's power to regulate interstate commerce, the Court's limitation of the commerce power in *United States v. Lopez*, 514 U.S. 549 (1995), notwithstanding. Although the first assumption is weak for the reasons described in Part I, the second assumption is probably valid because most of the states suing the tobacco industry hired both in-state law firms and out-of-state law firms to represent them. *See supra* Part I.

132. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

133. *See* FISCHEL, *supra* note 117, at 50-51.

suggested that a permanent appropriation of a claimant's assets is as likely to constitute a taking as is a physical invasion of property.[134] The proposed attorneys' fees cap would specifically and directly negate a valuable contractual right held by the law firms. Unquestionably, it is akin to permanently appropriating the firms' assets and distributing those assets back to the states. Moreover, the proposed fees cap would be decidedly unlike the opposite extreme suggested in *Penn Central.* It would not be a component of a public program to adjust the benefits and burdens of economic life that only incidentally or indirectly circumscribed private property rights. Rather, it would amount to a one-time transfer of assets from a small group of private law firms to a collection of state governments.

Thus, all three of the *Penn Central* factors suggest that the proposed fees cap would constitute a compensable taking of private property. However, as noted above, analysis of the fees cap under the regulatory takings rubric is problematic because it is not really part of a broad regulatory scheme that restricts usage rights normally associated with property. It may be more appropriate to treat the taking as a straightforward acquisition and transfer of contractual property. In this guise, the fees cap is equally, if not more, likely to present a compensable taking.

B. The Acquisition of Contractual Property Framework

The acquisition of contractual property framework regards the proposed fees cap not as a regulation on private or state behavior but as a simple confiscation of the law firms' property and a transfer of that property to the relevant state governments. Once one recognizes that the firms' contractual rights to the negotiated contingency fees are property rights protected by the Fifth Amendment,[135] the inquiry turns to whether congressional nullification of these contractual rights can be accurately characterized as a taking. In three twentieth-century cases, the Supreme Court conducted this inquiry regarding congressional actions that modified the contractual rights of private parties. The Court consistently found compensable takings of private property. Each case concerned a congressional action with significant similarities to the proposed fees cap.

The first was the 1924 decision of *Brooks-Scanlon Corp. v. United States.*[136] In 1917, Congress passed the Emergency Shipping Act to confer upon the President various wartime powers, including the power to requisition contracts for the building of ships and the power to requisition any ship under construction. The President then delegated these powers to the Emergency Fleet Corporation, which seized the claimant's partially completed ship and ordered its builder to complete construction "in conformity with . . . the contract, plans, and specifications under

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134. "[W]ith respect to the nature of the governmental action, . . . the Government does not physically invade or permanently appropriate any of the employer's assets for its own use." *Connolly,* 475 U.S. at 225.

135. See *supra* notes 12-13 and accompanying text.

136. 265 U. S. 106 (1924).

which construction proceeded prior to the requisition."[137] The Fleet Corporation compensated the claimant in an amount approximately equal to the claimant's expenditures, albeit slightly less than the claimant's total outlays.[138] The question before the Court was whether the Fleet Corporation had expropriated the claimant's contract and rights thereunder. The Court found that the government had indeed taken the claimant's contractual rights and, therefore, owed the claimant just compensation for the contract's value.[139]

As the Court explained, the value of the contract rights may have little to do with the sum of expenditures made in return for the rights at the time of the taking:

> The contract rights of claimant taken are to be distinguished from its expenditures for the production of the ship. The value of property may be greater or less than its cost; and this is true of contract rights and other intangibles as well as of physical things. It is the property and not the cost of it that is protected by the Fifth Amendment.[140]

The value of the claimant's contractual rights was sizeable. In taking these rights, the government "secured the benefit of prices prevailing immediately after the making of the contract . . . . At the time of the requisition, costs were higher than the contract prices."[141] Thus, the Court held that the Fifth Amendment protected the increase in the value of a contractual right.[142]

This protection of contractual rights that have increased in value and reflect far-sighted bargaining by their holder is particularly relevant to the proposed fees cap. The law firms hired by the states possess contractual rights to particular contingency fees that gradually became more valuable as the legal position of the tobacco companies weakened and the likelihood of a settlement advantageous to the states increased. This increase in value is evident in the progressively lower contingency fees accepted by firms representing states that commenced their suits later in the game. Insisting, as the proposed fees cap implicitly does, that the law firms are entitled only to a particular hourly rate for their work is to ignore entirely this shift in the value of the contingency fee contracts. *Brooks-Scanlon* plainly indicates that the Fifth Amendment protects sagacious negotiators by requiring compensation for the market value of contractual rights rather than merely requiring the government to reimburse such rights holders for their expenditures.

The *Brooks-Scanlon* decision is also noteworthy in that the Court distinguished its earlier holding in *Omnia Commercial Co. v. United States*, a case in which the Court found that congressional frustration of a private company's performance

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137. *Id.* at 115-18.
138. *See id.* at 118-19.
139. *Id.* at 121, 125.
140. *Id.* at 123 (citing The Minnesota Rate Cases, 230 U.S. 352, 454 (1913)).
141. *Id.* at 120.
142. *See Brooks-Scanlon*, 265 U.S. at 123.

under a contract did not amount to a taking from the would-be recipient of the performance.[143] The claimant in *Omnia* possessed a contractual right for the purchase of steel plate. The government's requisition of the steel company's entire production of steel plate rendered realization of the contract's value impossible.[144] Among other differences, the *Brooks-Scanlon* Court noted that, in *Omnia*, the "[d]amages claimed were held too remote."[145] The Court distinguished the government's indirect, remote frustration of a contractual right from government action designed specifically to appropriate a valuable contractual right. The proposed attorneys' fees cap clearly falls into the latter category. The proposed cap would not present a situation in which Congress only incidentally and indirectly handicaps the states in their contract performance by acting upon them in some other way. Rather, the proposed fees cap would present a narrowly focused federal order that directly deprives the law firms of property and transfers that property to the relevant states.

The second decision involving government confiscation of contractual rights came in 1935 in *Louisville Joint Stock Land Bank v. Radford*.[146] The case involved a takings challenge to the Frazier-Lemke Act of 1934. The Act amended the country's bankruptcy laws to provide relief to bankrupt farmers by affording bankrupt mortgagors various options to avoid dispossession of their property.[147] The bank challenged the Act as an uncompensated taking of various contractual rights that it held with respect to Radford's property prior to the Act's passage.[148] The Court agreed, noting that the "right of the mortgagee to insist upon full payment before giving up his security has been deemed of the essence of a mortgage."[149] Specifically, the Court held that the Act resulted in a taking from the bank of the following contractual property rights:

> (1) The right to retain the lien until the indebtedness thereby secured is paid. (2) The right to realize upon the security by a judicial public sale. (3) The right to determine when such sale shall be held, subject only to the discretion of the court. (4) The right to protect its interest in the property by bidding at such a sale . . . . (5) The right to control . . . the property during the period of default . . . .[150]

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143. Omnia Commercial Co. v. United States, 261 U.S. 502, 511-13 (1923).
144. *See id.* at 507.
145. *Brooks-Scanlon*, 265 U.S. at 121.
146. 295 U.S. 555 (1935).
147. *See id.* at 575-76.
148. *See id.* at 560-61.
149. *Id.* at 580.
150. *Id.* at 594-95.

The Court's decision was unequivocal: the Act took from the bank specific valuable contractual rights and effectively gave them to Radford without providing compensation to the bank. The Court's parting salvo left no room for doubt:

> As we conclude that the Act as applied has [taken specific rights without compensation], we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.[151]

The *Radford* holding undeniably offers strong support for the view that the proposed attorneys' fee cap would effect an uncompensated taking from the law firms. The similarities between the two situations are notable. In both instances, the attempted congressional action provides relief to one side in a set of private contracts throughout the nation by depriving the other side of particular contractual rights. The denied rights are valuable and no compensation is provided. However, the differences between the two situations offer even greater support for the conclusion that the proposed fees cap would constitute an uncompensated taking. One vital difference concerns the legislative environment surrounding the two takings. The upsetting of contractual expectations in *Radford* constituted a compensable taking, even though it occurred in the bankruptcy context—an area riddled with prior legislative activity. In contrast, congressional regulation of attorneys' fees paid by states did not precede the proposed attorneys' fees cap. Thus, if, as *Penn Central* and its progeny suggest, prior legislation weakens a claim that investment-backed expectations support an asserted property right,[152] then the property right that would be confiscated by the proposed attorneys' fees cap stands on stronger footing than that in *Radford*.

A second difference between the two situations concerns the nature of the program under which the taking occurred. In *Radford*, the taking of rights from mortgagees was part of a general effort to ease the mounting debt burden faced by farmers around the country: "[t]he controlling purpose of the Act [was] to preserve to the mortgagor the ownership and enjoyment of the farm property."[153] The taking accomplished by the proposed fees cap would not be part of a similarly broad redistribution of economic burdens. Compared to the taking in *Radford*, it looks much less like an interference with property rights arising "from some public

151. *Id.* at 601-02.
152. *See supra* notes 106-11 and accompanying text.
153. *Radford*, 295 U.S. 555, 594 (1935).

program adjusting the benefits and burdens of economic life to promote the common good," which, according to *Penn Central*, would not likely constitute a taking.[154]

The third case in which the Court evaluated a congressional action modifying the contractual rights of private parties and found a compensable taking of private property was *Armstrong v. United States*, decided in 1960[155] *Armstrong* involved a claim for just compensation for the value of materialmen's liens. The federal government had effectively nullified the liens by acquiring uncompleted boat hulls and manufacturing materials following a shipbuilder's default under a construction contract. The petitioners claimed that the government's action had destroyed their liens by rendering them unenforceable, thereby taking their property.[156] The Court agreed and cited *Radford* in support of the view that lien rights constitute property secured by the Takings Clause.[157] The Court concluded that, although the government did not actually eliminate the materialmen's liens, its actions rendered them valueless:

> After transfer [of the hulls and materials] to the United States the liens were still valid, but they could not be enforced because of the sovereign immunity of the Government and its property from suit. The result of this was a destruction of all petitioners' property rights under their liens, although, as we have pointed out, the liens were valid and had compensable value.[158]

Accordingly, the Court held that the transfer constituted a taking of the lien rights without compensation.[159]

By echoing the *Brooks-Scanlon* and *Radford* holdings, the *Armstrong* opinion further bolsters the position that the proposed fees cap would present an unconstitutional taking of private property. The *Armstrong* Court also demonstrated the overlap between this sort of contractual taking and traditional regulatory takings by noting the difficulty of distinguishing between unconstitutional takings and consequential repercussions of valid regulatory measures.[160] However, the Court was firm in its conviction that the government action at issue was the former:

> The total destruction by the Government of all value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incidence" of a

154. Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).
155. 364 U.S. 40 (1960).
156. *Id.* at 41-42.
157. *Id.* at 44.
158. *Id.* at 46 (citation and footnote omitted).
159. *Id.* at 48.
160. *Id.*

> valid regulatory measure. Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none. This was not because their property vanished into thin air. It was because the Government for its own advantage destroyed the value of the liens . . . .[161]

This conclusion is striking because the government's nullification of the materialmen's liens was indirect, consequential, and probably unintentional. If the directness of the destruction of a contractual right is crucial to it being considered a taking, then the law firms affected by the proposed attorneys' fees cap would have a more compelling claim than did the materialmen in *Armstrong*. In this sense, *Armstrong* offers particularly trenchant support for the conclusion that the fees cap would violate the Takings Clause.

Although the Court has yet to offer a comprehensive framework for assessing confiscatory takings of contractual rights, the cases discussed above lay a relatively coherent foundation. From *Brooks-Scanlon*, *Radford*, and *Armstrong*, one may glean at least four basic principles. First, government interference with specific, identifiable contractual rights of private individuals or entities amounts to government interference with property and is constrained by the compensation requirement of the Takings Clause. Second, where the government alters contractual rights and obligations so as to relieve one class of parties and burden another class, it commits a compensable taking regardless of whether the action serves a significant public interest. Third, government action is more likely to constitute a taking if it is a direct and causally proximate alteration of contractual rights rather than a consequential and remote frustration of such rights. Fourth, the application of the Takings Clause to rights embedded in contracts protects escalation in the value of such rights. Therefore, it may have the effect of shielding far-sighted negotiators and investors from government interference with their gains.

IV. CONCLUSION

Any congressional effort to alter the contingency fee arrangements between states and their counsel in tobacco litigation faces formidable constitutional hurdles. It would likely violate a core principle of state autonomy protected by the Tenth Amendment and trench upon property rights safeguarded by the Takings Clause of the Fifth Amendment. With respect to the Tenth Amendment, the Court's *Gregory-New York-Printz* line of decisions describes an independent barrier to federal government action beyond the amendment's truistic reflection of whether such actions fall within the government's enumerated powers. The momentous common principle of these cases is that the federal government cannot regulate the states as states in such a way as to commandeer the instruments of state government or

161. *Armstrong*, 364 U.S. at 48.

otherwise interfere with the autonomy of state decision-making. Several corollary principles are also evident in these decisions. Outside the context of regulating private behavior, the federal government may neither second-guess and alter state government decisions nor compel states to spend their money in certain ways. In these and other respects, the federal government must treat the states as fellow sovereign entities. Importantly, the *Printz* Court specifically recognized that the federal government may not "issue directives requiring the states to address particular problems."[162] State governments also possess a privity of obligations with their citizens that is separate from obligations owed by Congress to its constituencies. Finally, this constitutional protection of the states' decision-making autonomy is absolute; no pressing federal interest can license congressional interference. Not only does the basic principle that the federal government may not interfere with the decision-making autonomy of the states bode ill for the proposed attorneys' fees cap, but each of these corollary principles supports the conclusion that the fees cap would run afoul of the Tenth Amendment.

The Takings Clause of the Fifth Amendment poses an independent and equally compelling constitutional obstacle to the proposed attorneys' fees cap. This obstacle exists regardless of whether the cap is treated as a regulatory taking or an acquisitive taking. Analyzed under the rubric of regulatory takings, the fees cap possesses the hallmarks of a regulatory taking as described in *Penn Central*.[163] More appropriately analyzed as an acquisitive taking, it looks unmistakably like confiscatory takings of contractual rights that the Court has recognized in past decisions. It interferes with specific contractual rights in a direct manner to benefit one class of entities and burden another. In sum, there is little doubt that the proposed fees cap would present an uncompensated taking of private property.

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162. Printz v. United States, 117 S. Ct. 2365, 2384 (1997); *see supra* notes 75-91 and accompanying text.

163. *See supra* Part III.A.