

ARTICLE VI

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

CONTENTS

	Page
Clause 1. Validity of Prior Debts and Engagements	983
Prior Debts	983
Clause 2. Supremacy of the Constitution, Laws and Treaties	983
National Supremacy	983
Marshall's Interpretation of the National Supremacy Clause	983
The General Issue: Preemption	984
Preemption Standards	987
The Standards Applied	989
Specific Applications	1003
Federal Immunity Laws and State Courts	1003
Priority of National Claims Over State Claims	1003
Federal Versus State Labor Laws	1004
Obligation of State Courts Under the Supremacy Clause	1010
Supremacy Clause Versus the Tenth Amendment	1011
Federal Instrumentalities and Personnel and State Police Power	1021
The Doctrine of Federal Exemption From State Taxation	1024
McCulloch v. Maryland	1024
Applicability of Doctrine to Federal Securities	1024
Taxation of Government Contractors	1026
Taxation of Salaries of Federal Employees	1028
Ad Valorem Taxes Under the Doctrine	1029
Federal Property and Functions	1031
Federally Chartered Finance Agencies: Statutory Exemptions	1032
Royalties	1033
Immunity of Lessees of Indian Lands	1033
Summation and Evaluation	1034
Clause 3. Oath of Office	1035
Oath of Office	1035
Power of Congress in Respect to Oaths	1035
National Duties of State Officers	1035

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

ARTICLE VI

Clause 1. All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

PRIOR DEBTS

There have been no interpretations of this clause.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, 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.

NATIONAL SUPREMACY

Marshall's Interpretation of the National Supremacy Clause

The assertion of federal authority under the Supremacy Clause is most often associated with Chief Justice John Marshall. Prior to Marshall's appointment, the Court had considered the clause and had rendered a state statutory provision that was inconsistent with a treaty executed by the Federal Government null and void.¹ It was left for Marshall, however, to develop the full significance of the clause as applied to legislation. By his vigorous opinions in *McCulloch v. Maryland*² and *Gibbons v. Ogden*,³ Marshall gave the principle a vitality that survived despite a century of subsequent vacillation under the doctrine of dual federalism. In the former case, he asserted broadly that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into

¹ *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796).

² 17 U.S. (4 Wheat.) 316 (1819).

³ 22 U.S. (9 Wheat.) 1 (1824).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.”⁴ From this he concluded that a state tax upon notes issued by a branch of the Bank of the United States was void.

In *Gibbons v. Ogden*, the Court held that certain New York statutes that granted an exclusive right to use steam navigation on the waters of the state were null and void insofar as they applied to vessels licensed by the United States to engage in coastal trade. Chief Justice Marshall wrote: “In argument, however, it has been contended, that if a law passed by a state, in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the constitution, they affect the subject, and each other, like equal opposing powers. But the framers of our constitution foresaw this state of things, and provided for it, by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of an act, inconsistent with the constitution, is produced by the declaration, that the constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties, is to such acts of the state legislatures as do not transcend their powers, but though enacted in the execution of acknowledged state powers, interfere with, or are contrary to, the laws of congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In every such case, the act of congress, or the treaty, is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it.”⁵

The General Issue: Preemption

Since the turn of the 20th century, federal legislation has penetrated deeper and deeper into areas once occupied by the regulatory power of the states. One result is that state laws on subjects about which Congress has legislated have been more and more frequently attacked as being incompatible with the acts of Congress

⁴ 17 U.S. (4 Wheat.) at 436.

⁵ 22 U.S. (9 Wheat.) at 210–11. A modern application of *Gibbons v. Ogden* is *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), in which the Court, relying on the present version of the licensing statute used by Chief Justice Marshall, struck down state laws curtailing the operations of federally licensed vessels. In the course of the *Douglas* opinion, the Court observed that, “[a]lthough it is true that the Court’s view in *Gibbons* of the intent of the Second Congress in passing the Enrollment and Licensing Act is considered incorrect by commentators, its provisions have been repeatedly re-enacted in substantially the same form. We can safely assume that Congress was aware of the holding, as well as the criticism, of a case so renowned as *Gibbons*. We have no doubt that Congress has ratified the statutory interpretation of *Gibbons* and its progeny.” *Id.* at 278–79.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

and hence invalid under the supremacy clause. The cases considered below are overwhelmingly about federal legislation based on the Commerce Clause, but the principles enunciated are identical whatever source of power Congress uses.

The general principle of preemption is that conflicting state law and policy must yield to the exercise of Congress's delegated powers,⁶ The Supremacy Clause, however, operates whether the authority of Congress is express or implied, and whether the power is solely Congress's or if it is conditional upon state acceptance. The latter may be seen in a series of cases concerning the validity of state legislation enacted to bring the states within the various programs authorized by Congress pursuant to the Social Security Act.⁷ State participation in the programs is voluntary, technically speaking, and no state is compelled to enact legislation comporting with the requirements of federal law. Once a state is participating, however, any of its legislation that is contrary to federal requirements is void under the Supremacy Clause.⁸

In applying the Supremacy Clause to subjects that have been regulated by Congress, the Court's primary task is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute.⁹ When Congress legislates with regard to a subject, the extent and nature of the legal consequences of the regulation are federal questions, the answers to which are to be derived

⁶ *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210–11 (1824). See also *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *Morales v. TWA*, 504 U.S. 374 (1992); *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

⁷ By the Social Security Act of 1935, 49 Stat. 620, 42 U.S.C. §§ 301 *et seq.*, Congress established a series of programs operative in those states that joined the system and enacted the requisite complying legislation. Although participation is voluntary, the underlying federal tax program induces state participation. See *Steward Machine Co. v. Davis*, 301 U.S. 548, 585–98 (1937).

⁸ On the operation of federal spending programs upon state laws, see *South Dakota v. Dole*, 483 U.S. 203 (1987) (under highway funding programs). On the preemptive effect of federal spending laws, see *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985). An early example of states being required to conform their laws to the federal standards is *King v. Smith*, 392 U.S. 309 (1968). Private parties may compel state acquiescence in federal standards to which they have agreed by participation in the programs through suits under a federal civil rights law (42 U.S.C. § 1983). *Maine v. Thiboutot*, 448 U.S. 1 (1980). The Court has imposed some federalism constraints in this area by imposing a “clear statement” rule on Congress when it seeks to impose new conditions on states. *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 11, 17–18 (1981).

⁹ Although preemption is basically constitutional in nature, deriving its forcefulness from the Supremacy Clause, it is much more like statutory decisionmaking, in that it depends upon an interpretation of an act of Congress in determining whether a state law is ousted. *E.g.*, *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 271–72 (1977). See also *Swift & Co. v. Wickham*, 382 U.S. 111 (1965). “Any such preemption or conflict claim is of course grounded in the Supremacy Clause of the Con-

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

from a consideration of the language and policy of the state. If Congress expressly provides for exclusive federal dominion or if it expressly provides for concurrent federal-state jurisdiction, the Court's task is simplified, though, of course, there may still be doubtful areas in which interpretation will be necessary. Where Congress is silent, however, the Court must itself decide whether the effect of the federal legislation is to oust state jurisdiction.

“The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.”¹⁰ As Justice Black once explained in a much quoted exposition of the matter: “There is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹¹

Before setting out in their various forms the standards and canons to which the Court formally adheres, one must still recognize the highly subjective nature of their application. As an astute observer long ago observed, “the use or non-use of particular tests, as well as their content, is influenced more by judicial reaction to the desirability of the state legislation brought into question than by metaphorical sign-language of ‘occupation of the field.’ And it would seem that this is largely unavoidable. The Court, in order to determine an unexpressed congressional intent, has undertaken the task of making the independent judgment of social values that Congress

stitution: if a state measure conflicts with a federal requirement, the state provision must give way. The basic question involved in these cases, however, is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes.” *Id.* at 120.

¹⁰ *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274, 285–86 (1971).

¹¹ *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This case arose under the immigration power of clause 4.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

has failed to make. In making this determination, the Court's evaluation of the desirability of overlapping regulatory schemes or overlapping criminal sanctions cannot but be a substantial factor."¹²

Preemption Standards.—Until roughly the New Deal, as recited above, the Supreme Court applied a doctrine of “dual federalism,” under which the Federal Government and the states were separate sovereigns, each preeminent in its own fields but lacking authority in the other's. This conception affected preemption cases, with the Court taking the view, largely, that any congressional regulation of a subject effectively preempted the field and ousted the states.¹³ Thus, when Congress entered the field of railroad regulation, the result was invalidation of many previously enacted state measures. Even here, however, safety measures tended to survive, and health and safety legislation in other areas was protected from the effects of federal regulatory actions.

In the 1940s, the Court began to develop modern standards, still recited and relied on, for determining when preemption occurred.¹⁴ All modern cases recite some variation of the basic standards. “[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent. The purpose of Congress is the ultimate touchstone. To discern Congress's intent we examine the explicit statutory language and the structure and purpose of the statute.”¹⁵ Congress's intent to supplant state authority in a particular field may be “explicitly stated in the statute's language or implic-

¹² Cramton, *Pennsylvania v. Nelson: A Case Study in Federal Preemption*, 26 U. CHI. L. REV. 85, 87–88 (1956). “The [Court] appears to use essentially the same reasoning process in a case nominally hinging on preemption as it has in past cases in which the question was whether the state law regulated or burdened interstate commerce. [The] Court has adopted the same weighing of interests approach in preemption cases that it uses to determine whether a state law unjustifiably burdens interstate commerce. In a number of situations the Court has invalidated statutes on the preemption ground when it appeared that the state laws sought to favor local economic interests at the expense of the interstate market. On the other hand, when the Court has been satisfied that valid local interests, such as those in safety or in the reputable operation of local business, outweigh the restrictive effect on interstate commerce, the Court has rejected the preemption argument and allowed state regulation to stand.” Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208, 217 (1959) (quoted approvingly as a “thoughtful student comment” in G. GUNTHER, *CONSTITUTIONAL LAW* 297 (12th ed. 1991)).

¹³ *E.g.*, *Charleston & W. Car. Ry. v. Varnville Co.*, 237 U.S. 597, 604 (1915). *But see* *Corn Products Refining Co. v. Eddy*, 249 U.S. 427, 438 (1919).

¹⁴ *E.g.*, *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Cloverleaf Butter v. Patterson*, 315 U.S. 148 (1942); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *California v. Zook*, 336 U.S. 725 (1949).

¹⁵ *Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (internal quotation marks and case citations omitted). Recourse to legislative history as one means of ascertaining congressional intent, although contested, is permissible. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 606–12 & n.4 (1991). *See also* *Dan's City Used Cars, Inc. v. Pelkey*, 569 U.S. ___, No. 12–52, slip op. (2013) (provi-

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

itly contained in its structure and purpose.”¹⁶ Because preemption cases, when the statute contains no express provision, theoretically turn on statutory construction, generalizations about them can carry one only so far. Each case must construe a different federal statute with a distinct legislative history. If the statute and the legislative history are silent or unclear, the Supreme Court has developed general criteria which it purports to use in determining the preemptive reach.

“Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, . . . and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, . . . or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁷ However, “federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons—either that the nature of the regulated subject matters permits no other conclusion, or that the Congress has unmistakably so ordained.”¹⁸ At the same time, “[t]he relative importance to the State

sion of Federal Aviation Administration Authorization Act of 1994 regulating activities of motor carriers “with respect to transportation of property” held not to preempt state laws on the disposal of towed vehicles by towing companies).

¹⁶ *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604–605 (1991).

¹⁷ *Gade v. National Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992) (internal quotation marks and case citations omitted). The same or similar language is used throughout the preemption cases. *E.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); *id.* at 532–33 (Justice Blackmun concurring and dissenting); *id.* at 545 (Justice Scalia concurring and dissenting); *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604–05 (1991); *English v. General Electric Co.*, 496 U.S. 72, 78–80 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Pacific Gas & Elec. Co. v. State Energy Resources Comm’n*, 461 U.S. 190, 203–04 (1983); *Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

¹⁸ *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963); *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). Where Congress legislates in a field traditionally occupied by the States, courts should “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Dev. Comm.*, 461 U.S. 190, 206 (1983) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Nonetheless, this assumption may go only so far. *See, e.g.*, *Pliva, Inc. v. Mensing*, 564 U.S. ___, No. 09–993, slip op. at 15 (2011) (Thomas, J., plural-

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.”¹⁹

In the final analysis, “the generalities” that may be drawn from the cases do not decide them. Rather, “the fate of state legislation in these cases has not been determined by these generalities but by the weight of the circumstances and the practical and experienced judgment in applying these generalities to the particular instances.”²⁰

The Standards Applied.—As might be expected from the *caveat* just quoted, any overview of the Court’s preemption decisions can only make the field seem tangled, and to some extent it is. But some threads may be extracted.

Express Preemption. Of course, it is possible for Congress to write preemptive language that clearly and cleanly prescribes or does not prescribe displacement of state laws in an area.²¹ Provisions governing preemption can be relatively interpretation free.²² For example, a prohibition of state taxes on carriage of air passengers “or

ity opinion) (“[T]he text of the Clause—that federal law shall be supreme, ‘any Thing in the Constitution or Laws of any State to the Contrary notwithstanding’—plainly contemplates conflict pre-emption by describing federal law as effectively repealing contrary state law.”).

¹⁹ *Free v. Bland*, 369 U.S. 663 (1962).

²⁰ *Union Brokerage Co. v. Jensen*, 322 U.S. 202, 211 (1944) (per Justice Frankfurter).

²¹ Regulations as well as statutes can preempt. Agency regulations, when Congress has expressly or implied empowered these bodies to preempt, are “the supreme law of the land” and can displace state law. *E.g.*, *Smiley v. Citibank*, 517 U.S. 735 (1996); *City of New York v. FCC*, 486 U.S. 57, 63–64 (1988); *Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355 (1986); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141 (1982). Federal common law, *i.e.*, law applied by the courts in the absence of explicit statutory directive, and respecting uniquely federal interests, can also displace state law. *See Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (Supreme Court promulgated common-law rule creating government-contractor defense in tort liability suits, despite Congress’s having considered and failed to enact bills doing precisely this); *Westfall v. Erwin*, 484 U.S. 292 (1988) (civil liability of federal officials for actions taken in the course of their duty). Finally, ordinances of local governments are subject to preemption under the same standards as state law. *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707 (1985).

²² Thus, § 408 of the Federal Meat Inspection Act, as amended by the Wholesome Meat Act, 21 U.S.C. § 678, provides that “[m]arking, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any state” *See Jones v. Rath Packing Co.*, 430 U.S. 519, 528–32 (1977). *See also National Meat Ass’n v. Harris*, 565 U.S. ___, No. 10–224, slip op. (2012) (broad preemption of all state laws on slaughterhouse activities). Similarly, much state action is saved by the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(a), which states that “[n]othing in this chapter shall affect the jurisdiction of the securities commissioner (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the regulations thereunder.”

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

on the gross receipts derived therefrom” was held to preempt a state tax on airlines, described by the state as a personal property tax, but based on a percentage of the airline’s gross income. “The manner in which the state legislature has described and categorized [the tax] cannot mask the fact that the purpose and effect of the provision are to impose a levy upon the gross receipts of airlines.”²³

But, more often than not, express preemptive language may be ambiguous or at least not free from conflicting interpretation. Thus, the Court was divided with respect to whether a provision of the Airline Deregulation Act proscribing the states from having and enforcing laws “relating to rates, routes, or services of any air carrier” applied to displace state consumer-protection laws regulating airline fare advertising.²⁴ Delimiting the scope of an exception in an express preemption provision can also present challenges. For example, the Immigration Control and Reform Act of 1986 (IRCA), which imposed the first comprehensive federal sanctions against employing aliens not authorized to work in the United States, preempted “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ unauthorized aliens.”²⁵

In *Chamber of Commerce of the United States v. Whiting*, a majority of the Court adopted a straightforward “plain meaning” approach to uphold a 2007 Arizona law that called for the suspension or revocation of the business licenses (including articles of incorporation and like documents) of Arizona employers found to have knowingly hired an unauthorized alien.²⁶ By contrast, two dissenting opinions were troubled that the Arizona sanction was far more severe than that authorized for similar violations under either federal law or state laws in force prior to IRCA. The dissents interpreted IRCA’s “licensing and similar laws” language narrowly to cover only businesses that primarily recruit or refer workers for employment, or

For examples of other express preemptive provisions, see *Norfolk & Western Ry. v. American Train Dispatchers’ Ass’n*, 499 U.S. 117 (1991); *Exxon Corp. v. Hunt*, 475 U.S. 355 (1986). See also *Department of Treasury v. Fabe*, 508 U.S. 491 (1993).

²³ *Aloha Airlines v. Director of Taxation*, 464 U.S. 7, 13–14 (1983).

²⁴ *Morales v. TWA*, 504 U.S. 374 (1992). The section, 49 U.S.C. § 1305(a)(1), was held to preempt state rules on advertising. See also *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). But see *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. ___, No. 12–52, slip op. (2013) (provision of Federal Aviation Administration Authorization Act of 1994 preempting state law “related to a price, route, or service of any motor carrier . . . with respect to the transportation of property” held not to preempt state laws on the disposal of towed vehicles by towing companies).

²⁵ 8 U.S.C. § 1324a(h)(2).

²⁶ *Chamber of Commerce of the United States v. Whiting*, 563 U.S. ___, No. 09–115, slip op. (2011).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

businesses that have been found by federal authorities to have violated federal sanctions, respectively.²⁷

At issue in *AT&T Mobility, LLC v. Concepcion*²⁸ was a savings provision of the Federal Arbitration Act (FAA) that made arbitration provisions in contracts “valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”²⁹ An arbitration provision in their cellular telephone contract forbade plaintiffs from seeking arbitration of an allegedly fraudulent practice by AT&T on a class basis. The Court closely divided over whether the FAA saving clause made this anti-class arbitration provision attackable under California law prohibiting class action waivers in consumer contracts, or whether the savings clause looked solely to grounds for revoking the cellular contract that had nothing to do with the arbitration provision.³⁰ Another case focused on a preemption clause that preempted certain laws of “a State [or] political subdivision of a State” regulating motor carriers, but excepted “[State] safely regulatory authority.” The Court interpreted the exception to allow a safety regulation adopted by a city: “[a]bsent a clear statement to the contrary, Congress’s reference to the ‘regulatory authority of a State’ should be read to preserve, not preempt, the traditional prerogative of the States to delegate their authority to their constituent parts.”³¹

Perhaps the broadest preemption section ever enacted, § 514 of the Employment Retirement Income Security Act of 1974 (ERISA), is so constructed that the Court has been moved to comment that the provisions “are not a model of legislative drafting.”³² The section declares that the statute shall “supersede any and all State laws insofar as they now or hereafter relate to any employee benefit plan,” but saves to the States the power to enforce “any law . . . which regulates insurance, banking, or securities,” except that an employee benefit plan governed by ERISA shall not be “deemed” an insurance company, an insurer, or engaged in the business of insurance for purposes of state laws “purporting to regulate” insur-

²⁷ Chamber of Commerce of the United States v. Whiting, 563 U.S. ___, No. 09–115, slip op. (2011) (Breyer and Ginsburg, JJ., dissenting); id (Sotomayor, J., dissenting).

²⁸ 563 U.S. ___, No. 09–893, slip op. (2011).

²⁹ 9 U.S.C. § 2.

³⁰ Writing for the Court, Justice Scalia held, *inter alia*, that the saving clause was not intended to open arbitration provisions themselves to possible scrutiny. 563 U.S. ___, No. 09–893, slip op. (2011). The four dissenting Justices interpreted the saving clause as allowing use of the California law to attack the anti-class arbitration contract provision. Id. (Breyer, J. dissenting).

³¹ City of Columbus v. Ours Garage and Wrecker Serv., 536 U.S. 424, 429 (2002).

³² Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985), repeated in FMC Corp. v. Holliday, 498 U.S. 52, 58 (1991).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

ance companies or insurance contracts.³³ Interpretation of the provisions has resulted in contentious and divided Court opinions.³⁴

Also illustrative of the judicial difficulty with ambiguous preemption language are the fractured opinions in *Cipollone*, in which the Court had to decide whether sections of the Federal Cigarette Labeling and Advertising Act, enacted in 1965 and 1969, preempted state common-law actions against a cigarette company for the alleged harm visited on a smoker.³⁵ The 1965 provision barred

³³ 29 U.S.C. §§ 1144(a), 1144(b)(2)(A), 1144(b)(2)(B). The Court has described this section as a “virtually unique pre-emption provision.” *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983). See *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138–139 (1990); see also *id.* at 142–45 (describing and applying another preemption provision of ERISA).

³⁴ *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990) (ERISA preempts state common-law claim of wrongful discharge to prevent employee attaining benefits under plan covered by ERISA); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (provision of state motor-vehicle financial-responsibility law barring subrogation and reimbursement from claimant’s tort recovery for benefits received from a self-insured health-care plan preempted by ERISA); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987) (state law requiring employers to provide a one-time severance payment to employees in the event of a plant closing held not preempted by 5–4 vote); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (state law mandating that certain minimum mental-health-care benefits be provided to those insured under general health-insurance policy or employee health-care plan is a law “which regulates insurance” and is not preempted); *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (state law forbidding discrimination in employee benefit plans on the basis of pregnancy not preempted, because of another saving provision in ERISA, and provision requiring employers to pay sick-leave benefits to employees unable to work because of pregnancy not preempted under construction of coverage sections, but both laws “relate to” employee benefit plans); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981) (state law prohibiting plans from reducing benefits by amount of workers’ compensation awards “relates to” employee benefit plan and is preempted); *District of Columbia v. Greater Washington Bd. of Trade*, 506 U.S. 125 (1992) (law requiring employers to provide health insurance coverage, equivalent to existing coverage, for workers receiving workers’ compensation benefits); *John Hancock Mutual Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. 86 (1993) (ERISA’s fiduciary standards, not conflicting state insurance laws, apply to insurance company’s handling of general account assets derived from participating group annuity contract); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (no preemption of statute that required hospitals to collect surcharges from patients covered by a commercial insurer but not from patients covered by Blue Cross/Blue Shield plan); *De Buono v. NYSA–ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997); *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316 (1997); *Boggs v. Boggs*, 520 U.S. 833 (1997) (decided not on the basis of the express preemption language but instead by implied preemption analysis); *Aetna Health, Inc. v. Davila*, 542 U.S. 200 (2004) (suit brought against HMO under state health care liability act for failure to exercise ordinary care when denying benefits is preempted).

³⁵ *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). The decision relied on two controversial rules of construction. First, the courts should interpret narrowly provisions that purport to preempt state police-power regulations, and, second, that when a law has express preemption language courts should look only to that language and presume that when the preemptive reach of a law is defined Congress did not intend to go beyond that reach, so that field and conflict preemption will not be found.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

the requirement of any “statement” relating to smoking health, other than what the federal law imposed, and the 1969 provision barred the imposition of any “requirement or prohibition based on smoking and health” by any “State law.” It was, thus, a fair question whether common-law claims, based on design defect, failure to warn, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud, were preempted or whether only positive state enactments came within the scope of the clauses. Two groups of Justices concluded that the 1965 section reached only positive state law and did not preempt common-law actions;³⁶ different alignments of Justices concluded that the 1969 provisions did reach common-law claims, as well as positive enactments, and did preempt some of the claims insofar as they in fact constituted a requirement or prohibition based on smoking health.³⁷

Little clarification of the confusing *Cipollone* decision and opinions resulted in the cases following, although it does seem evident that the attempted distinction limiting courts to the particular language of preemption when Congress has spoken has not prevailed. At issue in *Medtronic, Inc. v. Lohr*³⁸ was the Medical Device Amendments (MDA) of 1976, which prohibited states from adopting or continuing in effect “with respect to a [medical] device” any “requirement” that is “different from, or in addition to” the applicable federal requirement and that relates to the safety or effectiveness of the device.³⁹ The issue was whether a common-law tort obligation imposed a “requirement” that was different from or in addition to any federal requirement. The device, a pacemaker lead, had come on the market not pursuant to the rigorous FDA test but rather as

Id. at 517; and id. at 532–33 (Justice Blackmun concurring and dissenting). Both parts of this canon are departures from established law. Narrow construction when state police powers are involved has hitherto related to *implied* preemption, not *express* preemption, and courts generally have applied ordinary-meaning construction to such statutory language; further, courts have not precluded the finding of conflict preemption, though perhaps field preemption, because of the existence of some express preemptive language. See id. at 546–48 (Justice Scalia concurring and dissenting).

³⁶ 505 U.S. at 518–19 (opinion of the court), 533–34 (Justice Blackmun concurring).

³⁷ 505 U.S. at 520–30 (plurality opinion), 535–43 (Justice Blackmun concurring and dissenting), 548–50 (Justice Scalia concurring and dissenting).

³⁸ 518 U.S. 470 (1996). See also *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) (under Federal Railroad Safety Act, a state common-law claim alleging negligence for operating a train at excessive speed is preempted, but a second claim alleging negligence for failure to maintain adequate warning devices at a grade crossing is not preempted); *Norfolk So. Ry. v. Shanklin*, 529 U.S. 344 (2000) (applying *Easterwood*).

³⁹ 21 U.S.C. § 350k(a).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

determined by the FDA to be “substantially equivalent” to a device previously on the market, a situation of some import to at least some of the Justices.

Unanimously, the Court determined that a defective design claim was not preempted and that the MDA did not prevent states from providing a damages remedy for violation of common-law duties that paralleled federal requirements. But the Justices split 4–1–4 with respect to preemption of various claims relating to manufacturing and labeling. FDA regulations, which a majority deferred to, limited preemption to situations in which a particular state requirement threatens to interfere with a specific federal interest. Moreover, the common-law standards were not specifically developed to govern medical devices and their generality removed them from the category of requirements “with respect to” specific devices. However, five Justices did agree that common-law requirements could be, just as statutory provisions, “requirements” that were preempted, though they did not agree on the application of that view.⁴⁰

Following *Cipollone*, the Court observed that, although it “need not go beyond” the statutory preemption language, it did need to “identify the domain expressly pre-empted” by the language, so that “our interpretation of that language does not occur in a contextual vacuum.” That is, it must be informed by two presumptions about the nature of preemption: the presumption that Congress does not cavalierly preempt common-law causes of action and the principle that Congress’s purpose is the ultimate touchstone.⁴¹

The Court continued to struggle with application of express preemption language to state common-law tort actions in *Geier v. American Honda Motor Co.*⁴² The National Traffic and Motor Vehicle Safety Act contained both a preemption clause, prohibiting states from applying “any safety standard” different from an applicable federal standard, and a “saving clause,” providing that “compliance with” a federal safety standard “does not exempt any person from any liability under common law.” The Court determined that the express preemp-

⁴⁰ The dissent, by Justice O’Connor and three others, would have held preempted the latter claims, 518 U.S. at 509, whereas Justice Breyer thought that common-law claims would sometimes be preempted, but not here. *Id.* at 503 (concurring).

⁴¹ 518 U.S. at 484–85. *See also id.* at 508 (Justice Breyer concurring); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288–89 (1995); *Barnett Bank v. Nelson*, 517 U.S. 25, 31 (1996); *California Div. of Labor Standards Enforcement v. Dillingham Construction, Inc.*, 519 U.S. 316, 334 (1997) (Justice Scalia concurring); *Boggs v. Boggs*, 520 U.S. 833 (1997) (using “stands as an obstacle” preemption analysis in an ERISA case, having express preemptive language, but declining to decide when implied preemption may be used despite express language), and *id.* at 854 (Justice Breyer dissenting) (analyzing the preemption issue under both express and implied standards).

⁴² 529 U.S. 861 (2000).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

tion clause was inapplicable, because the saving clause implied that some number of state common law actions would be saved. However, despite the saving clause, the Court ruled that a common law tort action seeking damages for failure to equip a car with a front seat airbag, in addition to a seat belt, was preempted. According to the Court, allowing the suit would frustrate the purpose of a Federal Motor Vehicle Safety Standard that specifically had intended to give manufacturers a choice among a variety of “passive restraint” systems for the applicable model year.⁴³ The Court’s holding makes clear, contrary to the suggestion in *Cipollone*, that existence of express preemption language does not foreclose the alternative operation of conflict (in this case “frustration of purpose”) preemption.⁴⁴

Field Preemption. Where the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” states are ousted from the field.⁴⁵ Still a paradigmatic example of field preemption is *Hines v. Davidowitz*,⁴⁶ in which the Court held that a new federal law requiring the registration of all aliens in the country precluded enforcement of a pre-existing state law mandating registration of aliens within the state.⁴⁷ Adverting to the supremacy of national power in

⁴³ The Court focused on the word “exempt” to give the saving clause a narrow application—as “simply bar[ring] a special kind of defense, . . . that compliance with a federal safety standard automatically exempts a defendant from state law, whether the Federal Government meant that standard to be an absolute requirement or only a minimum one.” 529 U.S. at 869. *But cf.* *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002) (interpreting preemption language and saving clause in Federal Boat Safety Act as not precluding a state common law tort action).

⁴⁴ Compare *Williamson v. Mazda Motor of America, Inc.*, 562 U.S. ___, No. 08–1314, slip op. (2011) (applying same statute as *Geir*, and later version of same regulation, no conflict preemption found of common law suit based on rear seat belt type, because giving manufacturers a choice on the type of rear seat belt to install was not a “significant objective” of the statute or regulation). For a decision applying express preemption language to a variety of state common law claims, see *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005) (interpreting FIFRA, the federal law governing pesticides).

⁴⁵ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (holding that a federal system of regulating the operations of warehouses and the rates they charged completely occupied the field and ousted state regulation). The case also is the source of the oft-quoted maxim that when Congress legislates in a field traditionally occupied by the states, courts should “start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Id.*

⁴⁶ 312 U.S. 52 (1941).

⁴⁷ In *Arizona v. United States*, the Court struck down state penalties for violating federal alien registration requirements, emphasizing that “[w]here Congress occupies an entire field, . . . even complementary state regulation is impermissible.” 567 U.S. ___, No. 11–182, slip op. at 10 (2012) The same case also struck down on preemption grounds state sanctions on unauthorized aliens who work or seek employment, *id.* at 12–15, and authority for state officers to make warrantless arrests

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

foreign relations and the sensitivity of the relationship between the regulation of aliens and the conduct of foreign affairs, the Court had little difficulty declaring the entire field to have been occupied by federal law.⁴⁸ Similarly, in *Pennsylvania v. Nelson*,⁴⁹ the Court invalidated as preempted a state law punishing sedition against the National Government. The Court enunciated a three-part test: (1) the pervasiveness of federal regulation, (2) federal occupation of the field as necessitated by the need for national uniformity, and (3) the danger of conflict between state and federal administration.⁵⁰

Field preemption analysis often involves delimiting the subject of federal regulation and determining whether a federal law has regulated part of the field, however defined, or the whole area, so that state law cannot even supplement the federal.⁵¹ Illustrative of this point is the Court's holding that the Atomic Energy Act's preemption of the safety aspects of nuclear power did not invalidate a state law conditioning construction of nuclear power plants on a finding by a state agency that adequate storage and disposal facilities were available to treat nuclear wastes, because "economic" regulation of power generation has traditionally been left to the states—an

based on possible deportability under federal immigration law. *Id.* By contrast, a regime of state immigration status checks with federal authorities was found not to be preempted on its face because the regime was supported by federal law facilitating federal-state cooperation in immigration enforcement.

⁴⁸ The Court also said that courts must look to see whether under the circumstances of a particular case, the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." 312 U.S. at 67. That standard is obviously drawn from conflict preemption, for the two standards are frequently intermixed. *See AT&T Mobility, LLC v. Concepcion*, 563 U.S. ___, No. 09-893, slip op. at 9-18 (2011) (Scalia, J.). Nonetheless, not all state regulation is precluded. *De Canas v. Bica*, 424 U.S. 351 (1976) (upholding a state law penalizing the employment of an illegal alien, the case arising before enactment of the federal law doing the same thing).

⁴⁹ 350 U.S. 497 (1956).

⁵⁰ 350 U.S. at 502-05. Obviously, there is a noticeable blending into conflict preemption.

⁵¹ *See Kurns v. Railroad Friction Products Corp.*, 565 U.S. ___, No. 10-879, slip op. (2012) (state suit by the estate of maintenance engineer alleging manufacturer's defective design of locomotive components and failure to warn of accompanying dangers held preempted by the Locomotive Inspection Act; the subject of the Act held to be the regulation of locomotive equipment generally, including its manufacture, and not limited to regulating activities of locomotive operators or regulating locomotives while in use for transportation). *Compare Campbell v. Hussey*, 368 U.S. 297 (1961) (state law requiring tobacco of a certain type to be marked by white tags, ousted by federal regulation that occupied the field and left no room for supplementation), *with Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) (state law setting minimum oil content for avocados certified as mature by federal regulation is complementary to federal law, because federal standard was a minimum one, the field having not been occupied). One should be wary of assuming that a state law that has dual purposes and impacts will not, just for the duality, be held to be preempted. *See Gade v. National Solid Wastes Mgmt. Ass'n*, 505 U.S. 88 (1992); *Perez v. Campbell*, 402 U.S. 637 (1971) (under Bankruptcy Clause).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

arrangement maintained by the Act—and because the state law could be justified as an economic rather than a safety regulation.⁵²

A city's effort to enforce stiff penalties for ship pollution that resulted from boilers approved by the Federal Government was held not preempted, the field of boiler safety, but not boiler pollution, having been occupied by federal regulation.⁵³ A state liability scheme imposing cleanup costs and strict, no-fault liability on shore facilities and ships for any oil-spill damage was held to complement a federal law concerned solely with recovery of actual cleanup costs incurred by the Federal Government and which textually presupposed federal-state cooperation.⁵⁴ On the other hand, a comprehensive regulation of the design, size, and movement of oil tankers in Puget Sound was found, save in one respect, to be either expressly or implicitly preempted by federal law and regulations. Critical to the determination was the Court's conclusion that Congress, without actually saying so, had intended to mandate exclusive standards and a single federal decisionmaker for safety purposes in vessel regulation.⁵⁵ Also, a closely divided Court voided a city ordinance placing an 11 p.m. to 7 a.m. curfew on jet flights from the city airport where, despite the absence of preemptive language in federal law, federal regulation of aircraft noise was of such a pervasive nature as to leave no room for state or local regulation.⁵⁶

⁵² *Pacific Gas & Elec. Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983). Neither does the same reservation of exclusive authority to regulate nuclear safety preempt imposition of punitive damages under state tort law, even if based upon the jury's conclusion that a nuclear licensee failed to follow adequate safety precautions. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984). See also *English v. General Electric Co.*, 496 U.S. 72 (1990) (employee's state-law claim for intentional infliction of emotional distress for her nuclear-plant employer's actions retaliating for her whistleblowing is not preempted as relating to nuclear safety).

⁵³ *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960).

⁵⁴ *Askew v. American Waterways Operators*, 411 U.S. 325 (1973).

⁵⁵ *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978). *United States v. Locke*, 529 U.S. 89 (2000) (applying *Ray*). See also *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (preempting a state ban on pass-through of a severance tax on oil and gas, because Congress has occupied the field of wholesale sales of natural gas in interstate commerce); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (Natural Gas Act preempts state regulation of securities issuance by covered gas companies); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (under Patent Clause, state law extending patent-like protection to unpatented designs invades an area of pervasive federal regulation).

⁵⁶ *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624 (1973).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

Congress may preempt state regulation without itself prescribing a federal standard; it may deregulate a field and thus occupy it by opting for market regulation and precluding state or local regulation.⁵⁷

Conflict Preemption. Several possible situations will lead to a holding that a state law is preempted as in conflict with federal law. First, it may be that the two laws, federal and state, will actually conflict. Thus, in *Rose v. Arkansas State Police*,⁵⁸ federal law provided for death benefits for state law enforcement officers “in addition to” any other compensation, while the state law required a reduction in state benefits by the amount received from other sources. The Court, in a brief, *per curiam* opinion, had no difficulty finding the state provision preempted.⁵⁹

Second, conflict preemption may occur when it is practically impossible to comply with the terms of both laws. Thus, where a federal agency had authorized federal savings and loan associations to include “due-on-sale” clauses in their loan instruments and where the state had largely prevented inclusion of such clauses, while it was literally possible for lenders to comply with both rules, the federal rule being permissive, the state regulation prevented the exercise of the flexibility the federal agency had conferred and was preempted.⁶⁰

More problematic are circumstances in which a party has an administrative avenue for seeking removal of impediments to dual

⁵⁷ *Transcontinental Gas Pipe Line Corp. v. Mississippi Oil & Gas Board*, 474 U.S. 409 (1986); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988).

⁵⁸ 479 U.S. 1 (1986).

⁵⁹ *See also Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985) (state law requiring local governments to distribute federal payments in lieu of taxes in same manner as general state-tax revenues conflicts with federal law authorizing local governments to use the payments for any governmental purpose); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (state franchise law requiring judicial resolution of claims preempted by federal arbitration law precluding adjudication in state or federal courts of claims parties had contracted to submit to arbitration); *Perry v. Thomas*, 482 U.S. 483 (1987) (federal arbitration law preempts state law providing that court actions for collection of wages may be maintained without regard to agreements to arbitrate); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (federal arbitration law preempts state law invalidating predispute arbitration agreements that were not entered into in contemplation of substantial interstate activity); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996) (federal arbitration law preempts state statute that conditioned enforceability of arbitration clause on compliance with special notice requirement). *See also Free v. Brand*, 369 U.S. 663 (1962).

⁶⁰ *Fidelity Fed. Savings & Loan Assn. v. de la Cuesta*, 458 U.S. 141 (1982). *See also Wos v. E.M.A.*, 568 U.S. ___, No. 12–98, slip op. (2013) (North Carolina statute allowing the state, in certain circumstances, to collect one-third of the amount of a tort settlement as reimbursement for state-paid medical expenses under Medicaid held to effectively conflict with anti-lien provisions of the federal Medicaid statute where settlement designated a lesser amount as medical expenses award).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

compliance. In *Pliva, Inc. v. Mensing*,⁶¹ federal law required generic drugs to be labeled the same as the brand name counterpart, while state tort law required drug labels to contain adequate warnings to render use of the drug reasonably safe. There had been accumulating evidence that long-term use of the drug metoclopramide carried a significant risk of severe neurological damage, but manufacturers of generic metoclopramide neither amended their warning labels nor sought to have the Food and Drug Administration require the brand name manufacturer to include stronger label warnings, which consequently would have led to stronger labeling of the generic. Five Justices held that state tort law was preempted.⁶² It was impossible to comply both with the state law duty to change the label and the federal law duty to keep the label the same.⁶³ The four dissenting Justices argued that inability to change the labels unilaterally was insufficient, standing alone, to establish a defense based on impossibility.⁶⁴ Emphasizing the federal duty to monitor the safety of their drugs, the dissenters would require that the generic manufacturers also show some effort to effectuate a labeling change through the FDA.

In contrast to *Pliva, Inc. v. Mensing*, the Court found no preemption in *Wyeth v. Levine*,⁶⁵ a state tort action against a brand-name drug manufacturer based on inadequate labeling. A brand-name drug manufacturer, unlike makers of generic drugs, could unilaterally strengthen labeling under federal regulations, subject to subsequent FDA override, and thereby independently meet state tort law requirements. In another case of alleged impossibility, it was held possible for an employer to comply both with a state law mandating leave and reinstatement to pregnant employees and with a federal law prohibiting employment discrimination on the basis of pregnancy.⁶⁶ Similarly, when faced with both federal and state standards on the ripeness of avocados, the Court discerned that the federal

⁶¹ 564 U.S. ___, No. 09–993, slip op. (2011).

⁶² 564 U.S. ___, No. 09–993, slip op. (2011) (Thomas, J.).

⁶³ Justice Thomas, joined on point by three others, characterized the Supremacy Clause phrase “any [state law] to the Contrary notwithstanding” as a *non obstante* provision that “suggests that federal law should be understood to impliedly repeal conflicting state law” and indicates limits on the extent to which courts should seek to reconcile federal and state law in preemption cases. 564 U.S. ___, No. 09–993, slip op. at 15–17 (2011) (Thomas, J.).

⁶⁴ 564 U.S. ___, No. 09–993, slip op. (2011) (Sotomayor, J., dissenting).

⁶⁵ 555 U.S. ___, No. 06–1249, slip op. (2009).

⁶⁶ *California Federal Savings & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987). Compare *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942) (federal law preempts more exacting state standards, even though both could be complied with and state standards were harmonious with purposes of federal law).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

standard was a “minimum” one rather than a “uniform” one and decided that growers could comply with both.⁶⁷

Third, a fruitful source of preemption is found when it is determined that the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.⁶⁸ Thus, despite the inclusion of a saving clause preserving liability under common law, the National Traffic and Motor Vehicle Safety Act nevertheless was found to have preempted a state common law tort action based on the failure of a car manufacturer to install front seat airbags: Giving car manufacturers some leeway in developing and introducing passive safety restraint devices was, according to the Court, a key congressional objective under the Act, one that would be frustrated should a tort action be allowed to proceed.⁶⁹

The Court also has voided a state requirement that the average net weight of a package of flour in a lot could not be less than the net weight stated on the package. While applicable federal law

⁶⁷ Florida Lime & Avocado Growers v. Paul, 373 U.S. 132 (1963).

⁶⁸ The standard is drawn from Hines v. Davidowitz, 312 U.S. 52, 67 (1941), which often is held out as a leading example of field preemption analysis. When “frustration of purpose” predominates in an opinion, it may be fairer to characterize the issue as one of conflict preemption, rather than field preemption, for the possibility of a limited state role would appear to be implicitly recognized. Arizona v. United States, in which the Court found three of the four Arizona immigration provisions it examined to be preempted, illustrates the continuum from field to conflict analysis. In overturning state penalties for violations of federal alien registration requirements, the Court found the sweep and detail of the federal law to leave no room whatsoever for state regulation. In overturning state sanctions against unauthorized aliens seeking employment or working, the Court emphasized that the comprehensive system of federal employer sanctions eschewed employee sanctions, and allowing states to impose them would upset the careful policy balance struck by Congress. In overturning state authority to arrest individuals believed to be deportable on criminal grounds, the Court did not examine whether state officers have any inherent arrest authority in deportation cases, but rather found that allowing states to engage in such arrests as a general matter creates an obstacle to congressional objectives. And finally, the Court declined to overturn on its face a state policy of checking the immigration status of individuals stopped by the police for general law enforcement purposes, finding that federal law facilitated status checks and only implementation of the status check policy would disclose whether federal enforcement policy ultimately would be frustrated. 567 U.S. ___, No. 11–182, slip op. (2012).

See also Hillman v. Maretta, 569 U.S. ___, No. 11–1221, slip op. (2013) (state law cause of action against ex-spouse for life insurance proceeds paid under a designation of beneficiary in a federal employee policy held to be preempted by federal employee insurance statute giving employees the right to designate: beyond administrative convenience, Congress intended that the proceeds actually *belong* to named beneficiary); Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996) (federal law empowering national banks in small towns to sell insurance preempts state law prohibiting banks from dealing in insurance). Unsurprisingly, the Justices at times disagree on what Congress’s primary objectives and purposes were in passing particular legislation, and such a disagreement can end with different conclusions about whether state law has been preempted. See AT&T Mobility, LLC v. Concepcion, 563 U.S. ___, No. 09–893, slip op. (2011).

⁶⁹ Geier v. American Honda Motor Co., 529 U.S. 861 (2000).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

permitted variations from stated weight caused by distribution losses, such as through partial dehydration, the state allowed no such deviation. Although it was possible for a producer to satisfy the federal standard while satisfying the tougher state standard, the Court discerned that to do so defeated one purpose of the federal requirement—the facilitating of value comparisons by shoppers. Because different producers in different situations in order to comply with the state standard may have to overpack flour to make up for dehydration loss, consumers would not be comparing packages containing identical amounts of flour solids.⁷⁰ And, in *Felder v. Casey*,⁷¹ a state notice-of-claim statute was found to frustrate the remedial objectives of civil rights laws as applied to actions brought in state court under 42 U.S.C. § 1983. A state law recognizing the validity of an unrecorded oral sale of an aircraft was held preempted by the Federal Aviation Act’s provision that unrecorded “instruments” of transfer are invalid, since the congressional purpose evidenced in the legislative history was to make information about an aircraft’s title readily available by requiring that all transfers be documented and recorded.⁷²

In *Boggs v. Boggs*,⁷³ the Court, 5-to-4, applied the “stands as an obstacle” test for conflict even though the statute (ERISA) contains an express preemption section. The dispute arose in a community-property state, in which heirs of a deceased wife claimed property that involved pension-benefit assets that was left to them by testamentary disposition, as against a surviving second wife. Two ERISA provisions operated to prevent the descent of the property to the heirs, but under community-property rules the property could have been left to the heirs by their deceased mother. The Court did not pause to analyze whether the ERISA preemption provision operated to preclude the descent of the property, either because state law “relate[d] to” a covered pension plan or because state law had an impermissible “connection with” a plan, but it instead decided that the operation of the state law insofar as it conflicted with the purposes Congress had intended to achieve by ERISA and insofar as it ran into the two noted provisions of ERISA stood as an obstacle to the effectuation of the ERISA law. “We can begin, and in this case end, the analysis by simply asking if state law conflicts with the provisions of ERISA or operates to frustrate its objects. We hold that there is a conflict, which suffices to resolve the case. We need not inquire whether the statutory phrase ‘relate to’ pro-

⁷⁰ *Jones v. Rath Packing Co.*, 430 U.S. 519, 532–543 (1977).

⁷¹ 487 U.S. 131 (1988).

⁷² *Philco Aviation v. Shacket*, 462 U.S. 406 (1983).

⁷³ 520 U.S. 833 (1997).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

vides further and additional support for the pre-emption claim. Nor need we consider the applicability of field pre-emption.”⁷⁴

Similarly, the Court found it unnecessary to consider field pre-emption due to its holding that a Massachusetts law barring state agencies from purchasing goods or services from companies doing business with Burma imposed obstacles to the accomplishment of Congress’s full objectives under the federal Burma sanctions law.⁷⁵ The state law was said to undermine the federal law in several respects that could have implicated field preemption—by limiting the President’s effective discretion to control sanctions, and by frustrating the President’s ability to engage in effective diplomacy in developing a comprehensive multilateral strategy—but the Court “decline[d] to speak to field preemption as a separate issue.”⁷⁶

Also, a state law making agricultural producers’ associations the exclusive bargaining agents and requiring payment of service fees by nonmember producers was held to counter a strong federal policy protecting the right of farmers to join or not join such associations.⁷⁷ And a state assertion of the right to set minimum stream-flow requirements different from those established by FERC in its licensing capacity was denied as being preempted under the Federal Power Act, despite language requiring deference to state laws “relating to the control, appropriation, use, or distribution of water.”⁷⁸

Contrarily, a comprehensive federal regulation of insecticides and other such chemicals was held not to preempt a town ordinance that required a permit for the spraying of pesticides, there being no conflict between requirements.⁷⁹ The application of state antitrust laws

⁷⁴ 520 U.S. at 841. The dissent, *id.* at 854 (Justice Breyer), agreed that conflict analysis was appropriate, but he did not find that the state law achieved any result that ERISA required.

⁷⁵ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

⁷⁶ 530 U.S. at 374 n.8.

⁷⁷ *Michigan Canners & Freezers Ass’n v. Agricultural Marketing & Bargaining Bd.*, 467 U.S. 461 (1984). *See also* *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986) (state allocation of costs for purposes of setting retail electricity rates, by disallowing costs permitted by FERC in setting wholesale rates, frustrated federal regulation by possibly preventing the utility from recovering in its sales the costs of paying the FERC-approved wholesale rate); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984) (state ban on cable TV advertising frustrates federal policy in the copyright law by which cable operators pay a royalty fee for the right to retransmit distant broadcast signals upon agreement not to delete commercials); *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (damage action based on common law of downstream state frustrates Clean Water Act’s policies favoring permitting state in interstate disputes and favoring predictability in permit process).

⁷⁸ *California v. FERC*, 495 U.S. 490 (1990). The savings clause was found inapplicable on the basis of an earlier interpretation of the language in *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152 (1946).

⁷⁹ *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 614–16 (1991).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

to authorize indirect purchasers to recover for all overcharges passed on to them by direct purchasers was held to implicate no preemption concerns, because the federal antitrust laws had been interpreted to not permit indirect purchasers to recover under *federal law*; the state law may have been inconsistent with federal law but in no way did it frustrate federal objectives and policies.⁸⁰ The effect of federal policy was not strong enough to warrant a holding of preemption when a state authorized condemnation of abandoned railroad property after conclusion of an ICC proceeding permitting abandonment, although the railroad's opportunity costs in the property had been considered in the decision on abandonment.⁸¹

Specific Applications

Federal Immunity Laws and State Courts.—The operation of federal immunity acts⁸² to preclude the use in state courts of incriminating statements and testimony given by a witness before a committee of Congress or a federal grand jury⁸³ illustrates direct federal preemption that is not contingent on state participation in a federal program. Because Congress in pursuance of its paramount authority to provide for the national defense, as complemented by the Necessary and Proper Clause, is competent to compel testimony of persons that is needed in order to legislate, it is competent to obtain such testimony over a witness's self-incrimination claim by immunizing him from prosecution on evidence thus revealed not only in federal courts but in state courts as well.⁸⁴

Priority of National Claims Over State Claims.—Anticipating his argument in *McCulloch v. Maryland*,⁸⁵ Chief Justice Marshall in 1805 upheld an act of 1792 asserting for the United States a priority of its claims over those of the states against a debtor in bankruptcy.⁸⁶ The principle was later extended to federal enactments providing that taxes due to the United States by an insol-

⁸⁰ California v. ARC America Corp., 490 U.S. 93 (1989).

⁸¹ Hayfield Northern Ry. v. Chicago & N.W. Transp. Co., 467 U.S. 622 (1984). See also CTS Corp. v. Dynamics Corp. of America, 481 U.S. 69 (1987) (federal law's broad purpose of protecting shareholders as a group is furthered by state anti-takeover law); Rose v. Rose, 481 U.S. 619 (1987) (provision governing veterans' disability benefits protects veterans' families as well as veterans, hence state child-support order resulting in payment out of benefits is not preempted).

⁸² Immunity laws operate to compel witnesses to testify even over self-incrimination claims by giving them an equivalent immunity from prosecution.

⁸³ Adams v. Maryland, 347 U.S. 179 (1954).

⁸⁴ Ullmann v. United States, 350 U.S. 422, 434–436 (1956). See also Reina v. United States, 364 U.S. 507, 510 (1960).

⁸⁵ 17 U.S. (4 Wheat.) 316 (1819).

⁸⁶ United States v. Fisher, 6 U.S. (2 Cr.) 358 (1805).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

vent shall have priority in payment over taxes he owes to a state.⁸⁷ Similarly, the Federal Government was held entitled to prevail over a citizen enjoying a preference under state law as creditor of an enemy alien bank in the process of liquidation by state authorities.⁸⁸ A federal law providing that when a veteran dies in a federal hospital without a will or heirs his personal property shall vest in the United States as trustee for the General Post Fund was held to operate automatically without prior agreement of the veteran with the United States for such disposition and to take precedence over a state claim founded on its escheat law.⁸⁹

Federal Versus State Labor Laws.—One group of cases, which has caused the Court much difficulty over the years, concerns the effect of federal labor laws on state power to govern labor-management relations. Although the Court some time ago reached a settled rule, changes in membership on the Court re-opened the issue and modified the rules.

With the enactment of the National Labor Relations Act and subsequent amendments, Congress declared a national policy in labor-management relations and established the NLRB to carry out that policy.⁹⁰ It became the Supreme Court's responsibility to determine what role state law on labor-management relations was to play. At first, the Court applied a test of determination whether the state regulation was in direct conflict with the national regulatory scheme.

⁸⁷ *Spokane County v. United States*, 279 U.S. 80, 87 (1929). A state requirement that notice of a federal tax lien be filed in conformity with state law in a state office in order to be accorded priority was held to be controlling only insofar as Congress by law had made it so. Remedies for collection of federal taxes are independent of legislative action of the states. *United States v. Union Central Life Ins. Co.*, 368 U.S. 291 (1961). *See also* *United States v. Buffalo Savings Bank*, 371 U.S. 228 (1963) (state may not avoid priority rules of a federal tax lien by providing that the discharge of state tax liens are to be part of the expenses of a mortgage foreclosure sale); *United States v. Pioneer American Ins. Co.*, 374 U.S. 84 (1963) (Matter of federal law whether a lien created by state law has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien).

⁸⁸ *Brownell v. Singer*, 347 U.S. 403 (1954).

⁸⁹ *United States v. Oregon*, 366 U.S. 643 (1961).

⁹⁰ Throughout the ups and downs of federal labor-law preemption, it remains the rule that the Board remains preeminent and almost exclusive. *See, e.g.*, *Wisconsin Dep't of Industry v. Gould, Inc.*, 475 U.S. 282 (1986) (states may not supplement Board enforcement by debarring from state contracts persons or firms that have violated the NLRA); *Golden Gate Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (city may not condition taxicab franchise on settlement of strike by set date, because this intrudes into collective-bargaining process protected by NLRA). On the other hand, the NLRA's protection of associational rights is not so strong as to outweigh the Social Security Act's policy permitting states to determine whether to award unemployment benefits to persons voluntarily unemployed as the result of a labor dispute. *New York Tel. Co. v. New York Labor Dep't*, 440 U.S. 519 (1979); *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471 (1977); *Baker v. General Motors Corp.*, 478 U.S. 621 (1986).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

Thus, in one early case, the Court held that an order by a state board which commanded a union to desist from mass picketing of a factory and from assorted personal threats was not in conflict with the national law that had not been invoked and that did not touch on some of the union conduct in question.⁹¹ A cease-and-desist order of a state board implementing a state provision making it an unfair labor practice for employees to conduct a slowdown or to otherwise interfere with production while on the job was found not to conflict with federal law,⁹² and another order of the board was also sustained in its prohibition of the discharge of an employee under a maintenance-of-membership clause inserted in a contract under pressure from the War Labor Board and which violated state law.⁹³

By contrast, a state statute requiring business agents of unions operating in the state to file annual reports and to pay an annual fee of one dollar was voided as in conflict with federal law.⁹⁴ And state statutes providing for mediation and outlawing public utility strikes were similarly voided as being in specific conflict with federal law.⁹⁵ A somewhat different approach was noted in several cases in which the Court held that the federal act had so occupied the field in certain areas as to preclude state regulation.⁹⁶ The latter approach was predominant through the 1950s, as the Court voided

⁹¹ Allen-Bradley Local No. 1111 v. WERB, 315 U.S. 740 (1942).

⁹² United Automobile Workers v. WERB, 336 U.S. 245 (1949), *overruled by* Machinists & Aerospace Workers v. WERC, 427 U.S. 132 (1976).

⁹³ Algoma Plywood Co. v. WERB, 336 U.S. 301 (1949).

⁹⁴ Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945). More recently, the Court has held that *Hill's* premise that the NLRA grants an unqualified right to select union officials has been removed by amendments prohibiting some convicted criminals from holding union office. Partly because the federal disqualification standard was itself dependent upon application of state law, the Court ruled that more stringent state disqualification provisions, also aimed at individuals who had been involved in racketeering and other criminal conduct, were not inconsistent with federal law. Brown v. Hotel Employees, 468 U.S. 491 (1984).

⁹⁵ United Automobile Workers v. O'Brien, 339 U.S. 454 (1950); Bus Employees v. WERB, 340 U.S. 383 (1951). *See also* Bus Employees v. Missouri, 374 U.S. 74 (1963).

⁹⁶ Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); Garner v. Teamsters Local 776, 346 U.S. 485 (1953); Bethlehem Steel Co. v. New York Employment Relations Bd., 330 U.S. 767 (1947). *See also* Livadas v. Bradshaw, 512 U.S. 107 (1994) (finding a practice of a state labor commissioner preempted because it stood as an obstacle to the achievement of the purposes of NLRA). Of course, where Congress clearly specifies, the Court has had no difficulty. Thus, in the NLRA, Congress provided, 29 U.S.C. § 164(b), that state laws on the subject could override the federal law on union security arrangements and the Court sustained those laws. Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); AFL v. American Sash & Door Co., 335 U.S. 538 (1949). When Congress in the Railway Labor Act, 45 U.S.C. § 152, Eleventh, provided that the federal law on union security was to override contrary state laws, the Court sustained that determination. Railway Employees' Dep't v. Hanson, 351 U.S. 225 (1956). The Court has held that

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

state court action in enjoining⁹⁷ or awarding damages⁹⁸ for peaceful picketing, in awarding of relief by damages or otherwise for conduct that constituted an unfair labor practice under federal law,⁹⁹ or in enforcing state antitrust laws so as to affect collective bargaining agreements¹⁰⁰ or to bar a strike as a restraint of trade,¹⁰¹ even with regard to disputes over which the NLRB declined to assert jurisdiction because of the degree of effect on interstate commerce.

In *San Diego Building Trades Council v. Garmon*,¹⁰² the Court enunciated the rule, based on its previous decade of adjudication. “When an activity is arguably subject to § 7 or § 8 of the Act, the States . . . must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.”¹⁰³

For much of the period since *Garmon*, the dispute in the Court concerned the scope of the few exceptions permitted in the *Garmon* principle. First, when picketing is not wholly peaceful but is attended by intimidation, violence, and obstruction of the roads affording access to the struck establishment, state police powers have been held not disabled to deal with the conduct and narrowly drawn injunctions directed against violence and mass picketing have been permitted¹⁰⁴ as well as damages to compensate for harm growing out of such activities.¹⁰⁵

A 1958 case permitted a successful state court suit for reinstatement and damages for lost pay because of a wrongful expulsion, leading to discharge from employment, based on a theory that the union constitution and by-laws constitute a contract between the union and the members the terms of which can be enforced by state

state courts may adjudicate questions relating to the permissibility of particular types of union security arrangements under state law even though the issue involves as well an interpretation of federal law. *Retail Clerks Int’l Ass’n v. Schermerhorn*, 375 U.S. 96 (1963).

⁹⁷ *Garner v. Teamsters Local 776*, 346 U.S. 485 (1953); *United Mine Workers v. Arkansas Flooring Co.*, 351 U.S. 62 (1956); *Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 (1957); *Construction Laborers v. Curry*, 371 U.S. 542 (1963).

⁹⁸ *San Diego Building Trades Council v. Garmon*, 353 U.S. 26 (1957).

⁹⁹ *Guss v. Utah Labor Board*, 353 U.S. 1 (1957).

¹⁰⁰ *Teamsters Union v. Oliver*, 358 U.S. 283 (1959).

¹⁰¹ *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

¹⁰² 359 U.S. 236 (1959).

¹⁰³ 359 U.S. at 245. The rule is followed in, *e.g.*, *Radio & Television Technicians v. Broadcast Service of Mobile*, 380 U.S. 255 (1965); *Hattiesburg Building & Trades Council v. Broome*, 377 U.S. 126 (1964); *Longshoremen’s Local 1416 v. Ariane Shipping Co.*, 397 U.S. 195 (1970); *Amalgamated Ass’n of Street Employees v. Lockridge*, 403 U.S. 274 (1971). *Cf.* *Nash v. Florida Industrial Comm.*, 389 U.S. 235 (1967).

¹⁰⁴ *United Automobile Workers v. WERB*, 351 U.S. 266 (1956); *Youngdahl v. Rainfair*, 355 U.S. 131 (1957).

¹⁰⁵ *United Automobile Workers v. Russell*, 356 U.S. 634 (1958); *United Construction Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

courts without the danger of a conflict between state and federal law.¹⁰⁶ The Court subsequently narrowed the interpretation of this ruling by holding in two cases that members who alleged union interference with their existing or prospective employment relations could not sue for damages but must file unfair labor practice charges with the NLRB.¹⁰⁷ *Gonzales* was said to be limited to “purely internal union matters.”¹⁰⁸ Finally, *Gonzales*, was abandoned in a five-to-four decision in which the Court held that a person who alleged that his union had misinterpreted its constitution and its collective bargaining agreement with the individual’s employer in expelling him from the union and causing him to be discharged from his employment because he was late paying his dues had to pursue his federal remedies.¹⁰⁹ Justice Harlan wrote for the Court that, although it was not likely that, in *Gonzales*, a state court resolution of the scope of duty owed the member by the union would implicate principles of federal law, state court resolution in this case involved an interpretation of the contract’s union security clause, a matter on which federal regulation is extensive.¹¹⁰

One other exception has been based, like the violence cases, on the assumption that it concerns areas traditionally left to local law into which Congress would not want to intrude. In *Linn v. Plant Guard Workers*,¹¹¹ the Court permitted a state court adjudication of a defamation action arising out of a labor dispute. And, in *Letter Carriers v. Austin*,¹¹² the Court held that federal law preempts state defamation laws in the context of labor disputes to the extent that the state seeks to make actionable defamatory statements in labor disputes published without knowledge of their falsity or in reckless disregard of truth or falsity.

However, a state tort action for the intentional infliction of emotional distress occasioned through an alleged campaign of personal abuse and harassment of a member of the union by the union and its officials was held not preempted by federal labor law. Federal law was not directed to the “outrageous conduct” alleged, and NLRB resolution of the dispute would neither touch upon the claim of emotional distress and physical injury nor award the plaintiff any com-

¹⁰⁶ *International Ass’n of Machinists v. Gonzales*, 356 U.S. 617 (1958).

¹⁰⁷ *Journeyman & Plumbers’ Union 100 v. Borden*, 373 U.S. 690 (1963); *Iron Workers Local 207 v. Perko*, 373 U.S. 701 (1963). Applying *Perko*, the Court held that a state court action by a supervisor alleging union interference with his contractual relationship with his employer is preempted by the NLRA. *Local 926, Int’l Union of Operating Engineers v. Jones*, 460 U.S. 669 (1983).

¹⁰⁸ 373 U.S. at 697 (*Borden*), and 705 (*Perko*).

¹⁰⁹ *Amalgamated Ass’n of Street Employees v. Lockridge*, 403 U.S. 274 (1971).

¹¹⁰ 403 U.S. at 296.

¹¹¹ 383 U.S. 53 (1966).

¹¹² 418 U.S. 264 (1974).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

pensation. But state court jurisdiction, in order that there not be interference with the federal scheme, must be premised on tortuous conduct either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.¹¹³

A significant retrenchment of *Garmon* occurred in *Sears, Roebuck & Co. v. Carpenters*,¹¹⁴ in the context of state court assertion of jurisdiction over trespassory picketing. Objecting to the company's use of nonunion work in one of its departments, the union picketed the store, using the company's property, the lot area surrounding the store, instead of the public sidewalks, to walk on. After the union refused to move its pickets to the sidewalk, the company sought and obtained a state court order enjoining the picketing on company property. Depending upon the union motivation for the picketing, it was either arguably prohibited or arguably protected by federal law, the trespassory nature of the picketing being one factor the NLRB would have looked to in determining at least the protected nature of the conduct. The Court held, however, that under the circumstances, neither the arguably prohibited nor the arguably protected rationale of *Garmon* was sufficient to deprive the state court of jurisdiction.

First, as to conduct arguably prohibited by NLRA, the Court seemingly expanded the *Garmon* exception recognizing state court jurisdiction for conduct that touches interests “deeply rooted in local feeling”¹¹⁵ in holding that where there exists “a significant state interest in protecting the citizens from the challenged conduct” and there exists “little risk of interference with the regulatory jurisdiction” of the NLRB, state law is not preempted. Here, there was obviously a significant state interest in protecting the company from trespass; the second, “critical inquiry” was whether the controversy presented to the state court was identical to or different from that which could have been presented to the Board. The Court concluded that the controversy was different. The Board would have been presented with determining the motivation of the picketing and the location of the picketing would have been irrelevant; the moti-

¹¹³ *Farmer v. Carpenters*, 430 U.S. 290 (1977). Following this case, the Court held that a state court action for misrepresentation and breach of contract, brought by replacement workers promised permanent employment when hired during a strike, was not preempted. The action for breach of contract by replacement workers having no remedies under the NLRA was found to be deeply rooted in local law and of only peripheral concern under the Act. *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). See also *Int'l Longshoremen's Ass'n v. Davis*, 476 U.S. 380 (1986).

¹¹⁴ 436 U.S. 180 (1978).

¹¹⁵ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

vation was irrelevant to the state court and the situs of the picketing was the sole inquiry. Thus, there was deemed to be no realistic risk of state interference with Board jurisdiction.¹¹⁶

Second, in determining whether the picketing was protected, the Board would have been concerned with the situs of the picketing, since under federal labor laws the employer has no absolute right to prohibit union activity on his property. Preemption of state court jurisdiction was denied, nonetheless, in this case on two joined bases. One, preemption is not required in those cases in which the party who could have presented the protection issue to the Board has not done so and the other party to the dispute has no acceptable means of doing so. In this case, the union could have filed with the Board when the company demanded removal of the pickets, but did not, and the company could not file with the Board at all. Two, even if the matter is not presented to the Board, preemption is called for if there is a risk of erroneous state court adjudication of the protection issue that is unacceptable, so that one must look to the strength of the argument that the activity is protected. While the state court had to make an initial determination that the trespass was not protected under federal law, the same determination the Board would have made, in the instance of trespassory conduct, the risk of erroneous determination is small, because experience shows that a trespass is far more likely to be unprotected than protected.¹¹⁷

Introduction of these two balancing tests into the *Garmon* rationale substantially complicates determining when state courts do not have jurisdiction, and will no doubt occasion much more litigation in state courts than has previously existed.

Another series of cases involves not a Court-created exception to the *Garmon* rule but the applicability and interpretation of § 301 of the Taft-Hartley Act,¹¹⁸ which authorizes suits in federal, and state,¹¹⁹ courts to enforce collective bargaining agreements. The Court has held that in enacting § 301, Congress authorized actions based on conduct arguably subject to the NLRA, so that the *Garmon* preemption doctrine does not preclude judicial enforcement of duties and obligations which would otherwise be within the exclusive jurisdiction of the NLRB so long as those duties and obligations are

¹¹⁶ *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 190–98 (1978).

¹¹⁷ 436 U.S. at 199–207.

¹¹⁸ 61 Stat. 156 (1947), 29 U.S.C. § 185(a).

¹¹⁹ *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962). The state courts must, however, apply federal law. *Local 174, Teamsters Union v. Lucas Flour Co.*, 369 U.S. 95 (1962).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

embodied in a collective-bargaining agreement, perhaps as interpreted in an arbitration proceeding.¹²⁰

Here, too, the permissible role of state tort actions has been in great dispute. Generally, a state tort action as an alternative to a § 301 arbitration or enforcement action is preempted if it is substantially dependent upon analysis of the terms of a collective-bargaining agreement.¹²¹ Thus, a state damage action for the bad-faith handling of an insurance claim under a disability plan that was part of a collective-bargaining agreement was preempted because it involved interpretation of that agreement and because state enforcement would frustrate the policies of § 301 favoring uniform federal-law interpretation of collective-bargaining agreements and favoring arbitration as a predicate to adjudication.¹²²

Finally, the Court has indicated that, with regard to some situations, Congress has intended to leave the parties to a labor dispute free to engage in “self-help,” so that conduct not subject to federal law is nonetheless withdrawn from state control.¹²³ However, the NLRA is concerned primarily “with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions,” so states are free to impose minimum labor standards.¹²⁴

Obligation of State Courts Under the Supremacy Clause

The Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. Their obligation “is imperative upon the state judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to

¹²⁰ *Smith v. Evening News Ass’n*, 371 U.S. 195 (1962); *Humphrey v. Moore*, 375 U.S. 335 (1964); *Vaca v. Sipes*, 386 U.S. 171 (1967).

¹²¹ See the analysis in *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399 (1988) (state tort action for retaliatory discharge for exercising rights under a state workers’ compensation law is not preempted by § 301, there being no required interpretation of a collective-bargaining agreement).

¹²² *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). See also *Int’l Brotherhood of Electric Workers v. Hechler*, 481 U.S. 851 (1987) (state-law claim that union breached duty to furnish employee a reasonably safe workplace preempted); *United Steelworkers of America v. Rawson*, 495 U.S. 362 (1990) (state-law claim that union was negligent in inspecting a mine, the duty to inspect being created by the collective-bargaining agreement preempted).

¹²³ *Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369 (1969); *Machinists & Aerospace Workers v. WERC*, 427 U.S. 132 (1976); *Golden Gate Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986). Cf. *New York Telephone Co. v. New York Labor Dept.*, 440 U.S. 519 (1979).

¹²⁴ *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) (upholding a state requirement that health-care plans, including those resulting from collective bargaining, provide minimum benefits for mental-health care).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States—“the supreme law of the land.”¹²⁵ State courts are bound then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and laws and treaties but also the interpretations of their meanings by the United States Supreme Court.¹²⁶ Although states may not have to specially create courts competent to hear federal claims or give courts authority specially,¹²⁷ it violates the Supremacy Clause for a state court to refuse to hear a category of federal claims when the court entertains state law actions of a similar nature,¹²⁸ or sometimes even when it does not entertain state law actions of a similar nature.¹²⁹ The existence of inferior federal courts sitting in the states and exercising often concurrent jurisdiction of subjects has created problems with regard to the degree to which state courts are bound by their rulings. Though the Supreme Court has directed and encouraged the lower federal courts to create a corpus of federal common law,¹³⁰ it has not spoken to the effect of such lower court rulings on state courts.

Supremacy Clause Versus the Tenth Amendment

The logic of the Supremacy Clause would seem to require that the powers of Congress be determined by the fair reading of the express and implied grants contained in the Constitution itself, without reference to the powers of the states. For a century after Mar-

¹²⁵ *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 335 (1816). State courts have both the power and the duty to enforce obligations arising under federal law, unless Congress gives the federal courts exclusive jurisdiction. *Claffin v. Houseman*, 93 U.S. 130 (1876); *Second Employers’ Liability Cases*, 223 U.S. 1 (1912); *Testa v. Katt*, 330 U.S. 386 (1947).

¹²⁶ *Cooper v. Aaron*, 358 U.S. 1 (1958). State judges must defer to the arbitration process for resolving contract disputes under the Federal Arbitration Act even though substantive state law applies. This is so despite allegations that arbitration of a particular subject violates state public policy, that Supreme Court precedents do not control, or that a specific state law should trump a general federal statute. *Nitro-Lift Technologies, L.L.C. v. Howard*, 568 U.S. ___, No. 11–1377, slip op. (2012); *Marmet Health Care Center, Inc. v. Brown*, 565 U.S. ___, No. 11–391, slip op. (2012).

¹²⁷ In *Haywood v. Drown*, 556 U.S. ___, No. 07–10374, slip op. at 10 (2009), the Court noted, “this case does not require us to decide whether Congress may compel a State to offer a forum, otherwise unavailable under state law, to hear suits brought pursuant to [a federal statute].”

¹²⁸ *Howlett v. Rose*, 496 U.S. 356 (1990); *Felder v. Casey*, 487 U.S. 131 (1988). The Court’s re-emphasis upon “dual federalism” has not altered this principle. See, e.g., *Printz v. United States*, 521 U.S. 898, 905–10 (1997).

¹²⁹ See *Haywood v. Drown*, 556 U.S. ___, No. 07–10374, slip op. (2009), discussed in Art. III, “Use of State Courts in Enforcement of Federal Law,” *supra*.

¹³⁰ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943); *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448 (1957); *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

shall's death, however, the Court proceeded on the theory that the Tenth Amendment had the effect of withdrawing various matters of internal police from the reach of power expressly committed to Congress. This point of view was originally put forward in *New York City v. Miln*,¹³¹ which was first argued but not decided before Marshall's death. *Miln* involved a New York statute that required captains of vessels entering New York Harbor with aliens aboard to make a report in writing to the Mayor of the City, giving certain prescribed information. It might have been distinguished from *Gibbons v. Ogden* on the ground that the statute involved in the earlier case conflicted with an act of Congress, whereas the Court found that no such conflict existed in this case. But the Court was unwilling to rest its decision on that distinction.

Speaking for the majority, Justice Barbour seized the opportunity to proclaim a new doctrine. "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."¹³² Justice Story, in dissent, stated that Marshall had heard the previous argument and reached the conclusion that the New York statute was unconstitutional.¹³³

The conception of a "complete, unqualified and exclusive" police power residing in the states and limiting the powers of the national government was endorsed by Chief Justice Taney ten years later in the *License Cases*.¹³⁴ In upholding state laws requiring licenses for the sale of alcoholic beverages, including those imported from other states or from foreign countries, he set up the Supreme

¹³¹ 36 U.S. (11 Pet.) 102 (1837).

¹³² 36 U.S. at 139.

¹³³ 36 U.S. at 161.

¹³⁴ 46 U.S. (5 How.) 504, 528 (1847).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

Court as the final arbiter in drawing the line between the mutually exclusive, reciprocally limiting fields of power occupied by the national and state governments.¹³⁵

Until recently, it appeared that in fact and in theory the Court had repudiated this doctrine,¹³⁶ but, in *National League of Cities v. Usery*,¹³⁷ it revived part of this state police power limitation upon the exercise of delegated federal power. However, the decision was by a closely divided Court and subsequent interpretations closely cabined the development and then overruled the case.

Following the demise of the “doctrine of dual federalism” in the 1930s, the Court confronted the question whether Congress had the power to regulate state conduct and activities to the same extent, primarily under the Commerce Clause, as it did to regulate private conduct and activities to the exclusion of state law.¹³⁸ In *United States v. California*,¹³⁹ upholding the validity of the application of a federal safety law to a state-owned railroad being operated as a non-profit entity, the Court, speaking through Justice Stone, denied the existence of an implied limitation upon Congress’s plenary power to regulate commerce when a state instrumentality was involved. “The state can no more deny the power if its exercise has been authorized by Congress than can an individual.”¹⁴⁰ Although the state in operating the railroad was acting as a sovereign and within the powers reserved to the states, the Court said, its exercise was “in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution.”¹⁴¹

A series of cases followed in which the Court refused to construct any state immunity from regulation when Congress acted pur-

¹³⁵ 46 U.S. at 573–74.

¹³⁶ Representative early cases include *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937); *United States v. Darby*, 312 U.S. 100 (1941). Among the cases incompatible with the theory was *Maryland v. Wirtz*, 392 U.S. 183 (1968).

¹³⁷ 426 U.S. 833 (1976).

¹³⁸ On the doctrine of “dual federalism,” see the commentary by the originator of the phrase, Professor Corwin. E. CORWIN, *THE TWILIGHT OF THE SUPREME COURT—A HISTORY OF OUR CONSTITUTIONAL THEORY* 10–51 (1934); *THE COMMERCE POWER VERSUS STATES RIGHTS* 115–172 (1936); *A CONSTITUTION OF POWERS IN A SECULAR STATE* 1–28 (1951).

¹³⁹ 297 U.S. 175 (1936).

¹⁴⁰ 297 U.S. at 185.

¹⁴¹ 297 U.S. at 184.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

suant to a delegated power.¹⁴² The culmination of this series had been thought to be *Maryland v. Wirtz*,¹⁴³ in which the Court upheld the constitutionality of applying the federal wage and hour law to nonprofessional employees of state-operated schools and hospitals. In an opinion by Justice Harlan, the Court saw a clear connection between working conditions in these institutions and interstate commerce. Labor conditions in schools and hospitals affect commerce; strikes and work stoppages involving such employees interrupt and burden the flow across state lines of goods purchased by state agencies, and the wages paid have a substantial effect. The Commerce Clause being thus applicable, the Justice wrote, Congress was not constitutionally required to “yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. . . . [I]t is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests whether these be described as ‘governmental’ or ‘proprietary’ in character. . . . [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation.”¹⁴⁴

Wirtz was specifically reaffirmed in *Fry v. United States*,¹⁴⁵ in which the Court upheld the constitutionality of presidentially imposed wage and salary controls, pursuant to congressional statute, on all state governmental employees. In dissent, however, Justice Rehnquist propounded a doctrine that was to obtain majority approval in *League of Cities*,¹⁴⁶ in which he wrote for the Court: “[T]here

¹⁴² *California v. United States*, 320 U.S. 577 (1944) (federal regulation of shipping terminal facilities owned by state); *California v. Taylor*, 353 U.S. 553 (1957) (Railway Labor Act applies on state-owned railroad); *Case v. Bowles*, 327 U.S. 92 (1946); *Habler v. Twin Falls County*, 327 U.S. 103 (1946) (federal wartime price regulations applied to state transactions; Congress’s power effectively to wage war); *Board of Trustees v. United States*, 289 U.S. 48 (1933) (state university required to pay federal customs duties on imported educational equipment); *Oklahoma ex rel. Phillips v. Atkinson Co.*, 313 U.S. 508 (1941) (federal condemnation of state lands for flood control project); *Sanitary Dist. v. United States*, 206 U.S. 405 (1925) (prohibition of state from diverting water from Great Lakes).

¹⁴³ 392 U.S. 183 (1968). Justices Douglas and Stewart dissented. *Id.* at 201.

¹⁴⁴ 392 U.S. at 195–97 (internal quotation marks omitted).

¹⁴⁵ 421 U.S. 542 (1975).

¹⁴⁶ 421 U.S. at 549. Essentially, the Justice was required to establish an affirmative constitutional barrier to congressional action. *Id.* at 552–53. That is, if one asserts only the absence of congressional authority, one’s chances of success are dim

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.”¹⁴⁷ The standard, apparently, in judging between permissible and impermissible federal regulation, is whether there is federal interference with “functions essential to separate and independent existence.”¹⁴⁸ In the context of this case, state decisions with respect to the pay of their employees and the hours to be worked were essential aspects of their “freedom to structure integral operations in areas of traditional governmental functions.”¹⁴⁹ The line of cases exemplified by *United States v. California* was distinguished and preserved on the basis that the state activities there regulated were so unlike the traditional activities of a state that Congress could reach them;¹⁵⁰ *Case v. Bowles* was held distinguishable on the basis that Congress had acted pursuant to its war powers and to have rejected the power would have impaired national defense;¹⁵¹ *Fry* was distinguished on the bases that it upheld emergency legislation tailored to combat a serious national emergency, the means were limited in time and effect, the freeze did not displace state discretion in structuring operations or force a restructuring, and the federal action “operated to reduce the pressure upon state budgets rather than increase them.”¹⁵² *Wirtz*

because of the breadth of the commerce power. But when he asserts that, say, the First or Fifth Amendment bars congressional action concededly within its commerce power, one interposes an affirmative constitutional defense that has a chance of success. It was the Justice’s view that the state was “asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority.” *Id.* at 553. But whence the affirmative barrier? “[I]t is not the Tenth Amendment *by its terms*. . . .” *Id.* at 557 (emphasis supplied). Rather, the Amendment was an example of the Framers’ understanding that the sovereignty of the states imposed an implied affirmative barrier to the assertion of otherwise valid congressional powers. *Id.* at 557–59. But the difficulty with this construction is that the equivalence that Justice Rehnquist sought to establish lies *not* between an individual asserting a constitutional limit on delegated powers and a state asserting the same thing, but *is* rather between an individual asserting a lack of authority and a state asserting a lack of authority; this equivalence is evident on the face of the Tenth Amendment, which states that the powers not delegated to the United States “are reserved to the States respectively, *or to the people*.” (emphasis supplied). The states are thereby accorded no greater interest in restraining the exercise of nondelegated power than are the people. *See Massachusetts v. Mellon*, 262 U.S. 447 (1923).

¹⁴⁷ *National League of Cities v. Usery*, 426 U.S. 833, 845 (1976).

¹⁴⁸ 426 U.S. at 845.

¹⁴⁹ 426 U.S. at 852.

¹⁵⁰ 426 U.S. at 854.

¹⁵¹ 426 U.S. at 854 n.18.

¹⁵² 426 U.S. at 852–53.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

was overruled; it permitted Congress to intrude into the conduct of integral and traditional state governmental functions and could not therefore stand.¹⁵³

League of Cities did not prove to be much of a restriction upon congressional power in subsequent decisions. First, its principle was held not to reach to state regulation of private conduct that affects interstate commerce, even as to such matters as state jurisdiction over land within its borders.¹⁵⁴ Second, it was held not to immunize state conduct of a business operation, that is, proprietary activity not like “traditional governmental activities.”¹⁵⁵ Third, it was held not to preclude Congress from regulating the way states regulate private activities within the state—even though such state activity is certainly traditional governmental action—on the theory that, because Congress could displace or preempt state regulation, it may require the states to regulate in a certain way if they wish to continue to act in this field.¹⁵⁶ Fourth, it was held not to limit Congress when it acts in an emergency or pursuant to its war powers, so that Congress may indeed reach even traditional governmental activity.¹⁵⁷ Fifth, it was held not to apply at all to Congress’s enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.¹⁵⁸ Sixth, it apparently was to have no application to the exercise of Congress’s spending power with conditions attached.¹⁵⁹ Seventh, not because of the way the Court framed the statement of its doctrinal position, which is absolutist, but because of the way it accommodated precedent and because of Justice Blackmun’s concurrence, it was always open to interpretation that Congress was enabled to reach traditional governmental activities not involving employer-employee relations or is enabled to reach even these relations if the effect is “to reduce the pressures upon state

¹⁵³ 426 U.S. at 853–55.

¹⁵⁴ *Hodel v. Virginia Surface Mining & Recl. Ass’n*, 452 U.S. 264 (1981).

¹⁵⁵ *United Transp. Union v. Long Island R.R.*, 455 U.S. 678 (1982).

¹⁵⁶ *FERC v. Mississippi*, 456 U.S. 742 (1982).

¹⁵⁷ *National League of Cities v. Usery*, 426 U.S. 833, 854 n.18 (1976).

¹⁵⁸ *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *City of Rome v. United States*, 446 U.S. 156, 178–80 (1980).

¹⁵⁹ In *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17 n.13 (1981), the Court suggested rather ambiguously that *League of Cities* may restrict the federal spending power, citing its reservation of the cases in *League of Cities*, 426 U.S. 852 n.17, but citing also spending clause cases indicating a rational basis standard of review of conditioned spending. Earlier, the Court had summarily affirmed a decision holding that the spending power was not affected by the case. *North Carolina ex rel. Morrow v. Califano*, 445 F. Supp. 532 (E.D.N.C. 1977) (three-judge court), *aff’d*, 435 U.S. 962 (1978). No hint of such a limitation is contained in more recent decisions (to be sure, in the aftermath of *League of Cities*’ demise). *New York v. United States*, 505 U.S. 144, 167, 171–72, 185 (1992); *South Dakota v. Dole*, 483 U.S. 203, 210–12 (1987).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

budgets rather than increase them.”¹⁶⁰ In his concurrence, Justice Blackmun suggested his lack of agreement with “certain possible implications” of the opinion and recast it as a “balancing approach” that “does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”¹⁶¹

The Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,¹⁶² and seemingly returned to the conception of federal supremacy embodied in *Wirtz* and *Fry*. For the most part, the Court indicated, states must seek protection from the impact of federal regulation in the political processes, and not in any limitations imposed on the commerce power or found in the Tenth Amendment. Justice Blackmun’s opinion for the Court in *Garcia* concluded that the *National League of Cities* test for “integral operations in areas of traditional governmental functions” had proven “both impractical and doctrinally barren.”¹⁶³ State autonomy is both limited and protected by the terms of the Constitution itself, hence—ordinarily, at least—exercise of Congress’s enumerated powers is not to be limited by “*a priori* definitions of state sovereignty.”¹⁶⁴ States retain a significant amount of sovereign authority “only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”¹⁶⁵ There are direct limitations in Art. I, § 10; and “Section 8 . . . works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation.”¹⁶⁶ On the other hand, the principal restraints on congressional exercise of the commerce power are to be found not in the Tenth Amendment, in the Commerce Clause itself, or in “judicially created limitations on federal power,” but in the structure of the Federal Government and in the

¹⁶⁰ *National League of Cities v. Usery*, 426 U.S. 833, 846–51 (1976). The quotation in the text is at 853 (one of the elements distinguishing the case from *Fry*).

¹⁶¹ 426 U.S. at 856.

¹⁶² 469 U.S. 528 (1985). The issue was again decided by a 5-to-4 vote, Justice Blackmun’s qualified acceptance of the *National League of Cities* approach having changed to complete rejection. Justice Blackmun’s opinion of the Court was joined by Justices Brennan, White, Marshall, and Stevens. Writing in dissent were Justices Powell (joined by Chief Justice Burger and by Justices Rehnquist and O’Connor), O’Connor (joined by Justices Powell and Rehnquist), and Rehnquist.

¹⁶³ 469 U.S. at 557.

¹⁶⁴ 469 U.S. at 548.

¹⁶⁵ 469 U.S. at 549.

¹⁶⁶ 469 U.S. at 548.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

political processes.¹⁶⁷ “[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the ‘States as States’ is one of process rather than one of result.”¹⁶⁸ While continuing to recognize that “Congress’s authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system,” the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these “affirmative limits.”¹⁶⁹ Thus, arguably, the Court has not totally abandoned the *National League of Cities* premise that there are limits on the extent to which federal regulation may burden states as states. Rather, it has stipulated that any such limits on exercise of federal power must be premised on a failure of the political processes to protect state interests, and “must be tailored to compensate for [such] failings . . . rather than to dictate a ‘sacred province of state autonomy.’”¹⁷⁰

Further indication of what must be alleged in order to establish affirmative limits to commerce power regulation was provided in *South Carolina v. Baker*.¹⁷¹ The Court expansively interpreted *Garcia* as meaning that there must be an allegation of “some extraordinary defects in the national political process” before the Court will intervene.¹⁷² A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had “not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless.”¹⁷³ Thus, the general rule is that “limits on Congress’s authority to regulate state activities . . . are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity.”¹⁷⁴

Dissenting in *Garcia*, Justice Rehnquist predicted that the doctrine propounded by the dissenters and by those Justices in *Na-*

¹⁶⁷ “Apart from the limitation on federal authority inherent in the delegated nature of Congress’s Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.” 469 U.S. at 550. The Court cited as prime examples the role of states in selecting the President, and the equal representation of states in the Senate. *Id.* at 551.

¹⁶⁸ 469 U.S. at 554.

¹⁶⁹ 469 U.S. at 556.

¹⁷⁰ 469 U.S. at 554.

¹⁷¹ 485 U.S. 505 (1988).

¹⁷² 485 U.S. at 512.

¹⁷³ 485 U.S. at 513.

¹⁷⁴ 485 U.S. at 512.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

tional League of Cities “will . . . in time again command the support of a majority of the Court.”¹⁷⁵ As the membership of the Court changed, it appeared that the prediction was proving true.¹⁷⁶ Confronted with the opportunity in *New York v. United States*,¹⁷⁷ to re-examine *Garcia*, the Court instead distinguished it,¹⁷⁸ striking down a federal law on the basis that Congress could not “commandeer” the legislative and administrative processes of state government to compel the administration of federal programs.¹⁷⁹ The line of analysis pursued by the Court makes clear, however, what the result will be when a *Garcia* kind of federal law is reviewed.

That is, because the dispute involved the division of authority between federal and state governments, Justice O’Connor wrote for the Court in *New York*, one could inquire whether Congress acted under a delegated power or one could ask whether Congress had invaded a state province protected by the Tenth Amendment. But, the Justice wrote, “the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.”¹⁸⁰

Powers delegated to the Nation, therefore, are subject to limitations that reserve power to the states. This limitation is not found in the text of the Tenth Amendment, which is, the Court stated, “but a truism,”¹⁸¹ but is a direct constraint on Article I powers when an incident of state sovereignty is invaded.¹⁸² The “take title” provision was such an invasion. Both the Federal Government and the

¹⁷⁵ *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 579–80 (1985).

¹⁷⁶ The shift was pronounced in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), in which the Court, cognizant of the constraints of *Garcia*, chose to apply a “plain statement” rule to construction of a statute seen to be intruding into the heart of state autonomy. *Id.* at 463. To do otherwise, said Justice O’Connor, was to confront “a potential constitutional problem” under the Tenth Amendment and the Guarantee Clause of Article IV, § 4. *Id.* at 463–64.

¹⁷⁷ 505 U.S. 144 (1992).

¹⁷⁸ The line of cases exemplified by *Garcia* was said to concern the authority of Congress to subject state governments to generally applicable laws, those covering private concerns as well as the states, necessitating no revisiting of those cases. 505 U.S. at 160.

¹⁷⁹ Struck down was a provision of law providing for the disposal of radioactive wastes generated in the United States by government and industry. Placing various responsibilities on the states, the provision sought to compel performance by requiring that any state that failed to provide for the permanent disposal of wastes generated within its borders must take title to, take possession of, and assume liability for the wastes, 505 U.S. at 161, obviously a considerable burden.

¹⁸⁰ 505 U.S. at 156.

¹⁸¹ 505 U.S. at 156 (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

¹⁸² 505 U.S. at 156.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

states owe political accountability to the people. When Congress encourages states to adopt and administer a federally prescribed program, both governments maintain their accountability for their decisions. When Congress compels the states to act, state officials will bear the brunt of accountability that properly belongs at the national level.¹⁸³ The “take title” provision, because it presented the states with “an unavoidable command”, transformed state governments into “regional offices” or “administrative agencies” of the Federal Government, impermissibly undermined the accountability owing the people and was void.¹⁸⁴ Whether viewed as lying outside Congress’s enumerated powers or as infringing the core of state sovereignty reserved by the Tenth Amendment, “the provision is inconsistent with the federal structure of our Government established by the Constitution.”¹⁸⁵

Federal laws of general applicability, therefore, are surely subject to examination under the *New York* test rather than under the *Garcia* structural standard.

Expanding upon its anti-commandeering rule, the Court in *Printz v. United States*¹⁸⁶ established “categorically” the rule that “[t]he Federal Government may not compel the States to enact or administer a federal regulatory program.”¹⁸⁷ At issue in *Printz* was a provision of the Brady Handgun Violence Prevention Act that required, pending the development by the Attorney General of a national system by which criminal background checks on prospective firearms purchasers could be conducted, the chief law enforcement officers of state and local governments to conduct background checks to ascertain whether applicants were ineligible to purchase handguns. Confronting the absence of any textual basis for a “categorical” rule, the Court looked to history, which in its view demonstrated a paucity of congressional efforts to impose affirmative duties upon the states.¹⁸⁸ More important, the Court relied on the “structural Constitution” to demonstrate that the Constitution of 1787 had not taken from the states “a residuary and inviolable sovereignty,”¹⁸⁹ that it had, in fact and theory, retained a system of “dual

¹⁸³ 505 U.S. at 168–69.

¹⁸⁴ 505 U.S. at 175–77, 188.

¹⁸⁵ 505 U.S. at 177.

¹⁸⁶ 521 U.S. 898 (1997).

¹⁸⁷ 521 U.S. at 933 (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

¹⁸⁸ 521 U.S. at 904–18. Notably, the Court expressly exempted from this rule the continuing role of the state courts in the enforcement of federal law. *Id.* at 905–08.

¹⁸⁹ 521 U.S. at 919 (quoting *THE FEDERALIST*, No. 39 (Madison)).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

sovereignty”¹⁹⁰ reflected in many things but most notably in the constitutional conferral “upon Congress of not all governmental powers, but only discrete, enumerated ones,” which was expressed in the Tenth Amendment. Thus, although it had earlier rejected the commandeering of legislative assistance, the Court now made clear that administrative officers and resources were also fenced off from federal power.

The scope of the rule thus expounded was unclear. Particularly, Justice O’Connor in concurrence observed that Congress retained the power to enlist the states through contractual arrangements and on a voluntary basis. More pointedly, she stated that “the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.”¹⁹¹

A partial answer was provided in *Reno v. Condon*,¹⁹² in which the Court upheld the Driver’s Privacy Protection Act of 1994 against a charge that it offended the anti-commandeering rule of *New York* and *Printz*. The Act in general limits disclosure and resale without a driver’s consent of personal information contained in the records of state motor vehicle departments, and requires disclosure of that information for specified government record-keeping purposes. While conceding that the Act “will require time and effort on the part of state employees,” the Court found this imposition permissible because the Act regulates state activities directly rather than requiring states to regulate private activities.¹⁹³

Federal Instrumentalities and Personnel and State Police Power

Federal instrumentalities and agencies have never enjoyed the same degree of immunity from state police regulation as from state taxation. The Court has looked to the nature of each regulation to determine whether it is compatible with the functions committed by Congress to the federal agency. This problem has arisen most often with reference to the applicability of state laws to the operation of national banks. Two correlative propositions have governed the decisions in these cases. The first was stated by Justice Miller

¹⁹⁰ 521 U.S. at 918.

¹⁹¹ 521 U.S. at 936 (citing 42 U.S.C. § 5779(a)) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice).

¹⁹² 528 U.S. 141 (2000).

¹⁹³ 528 U.S. at 150–51.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

in *National Bank v. Commonwealth*.¹⁹⁴ “[National banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.”¹⁹⁵ In *Davis v. Elmira Savings Bank*,¹⁹⁶ the Court stated the second proposition thus: “National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created.”¹⁹⁷

Similarly, a state law, insofar as it forbids national banks to use the word “saving” or “savings” in their business and advertising, is void because it conflicts with the Federal Reserve Act’s authorizing such banks to receive savings deposits.¹⁹⁸ However, federal incorporation of a railroad company of itself does not operate to exempt it from control by a state as to business consummated wholly within the state.¹⁹⁹ Also, Treasury Department regulations, designed to implement the federal borrowing power (Art. I, § 8, cl. 2) by making United States Savings Bonds attractive to investors and conferring exclusive title thereto upon a surviving joint owner, override contrary state community property laws whereunder a one-half interest in such property remains part of the estate of a decedent co-owner.²⁰⁰ Similarly, the Patent Office’s having been granted by Congress an unqualified authorization to license and regulate the conduct throughout the United States of nonlawyers as patent agents, a state, under the guise of prohibiting unauthorized practice of law, is preempted from enjoining such activities of a licensed agent as entail the rendering of legal opinions as to patent-

¹⁹⁴ 76 U.S. (9 Wall.) 353 (1870).

¹⁹⁵ 76 U.S. at 362.

¹⁹⁶ 161 U.S. 275 (1896).

¹⁹⁷ 161 U.S. at 283.

¹⁹⁸ *Franklin Nat’l Bank v. New York*, 347 U.S. 273 (1954).

¹⁹⁹ *Reagan v. Mercantile Trust Co.*, 154 U.S. 413 (1894).

²⁰⁰ *Free v. Bland*, 369 U.S. 663 (1962).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

ability or infringement of patent rights and the preparation and prosecution of application for patents.²⁰¹

The extent to which states may regulate contractors who furnish goods or services to the Federal Government is not as clearly established as is the states' right to tax such dealers. In 1943, a closely divided Court sustained the refusal of the Pennsylvania Milk Control Commission to renew the license of a milk dealer who, in violation of state law, had sold milk to the United States for consumption by troops at an army camp located on land belonging to the state, at prices below the minimum established by the Commission.²⁰² The majority was unable to find in congressional legislation, or in the Constitution, unaided by congressional enactment, any immunity from such price fixing regulations. On the same day, a different majority held that California could not penalize a milk dealer for selling milk to the War Department at less than the minimum price fixed by state law where the sales and deliveries were made in a territory which had been ceded to the Federal Government by the state and were subject to the exclusive jurisdiction of the former.²⁰³ On the other hand, by virtue of its conflict with standards set forth in the Armed Services Procurement Act, 41 U.S.C. § 152, for determining the letting of contracts to responsible bidders, a state law licensing contractors cannot be enforced against one selected by federal authorities for work on an Air Force base.²⁰⁴

Most recently, the Court has done little to clarify the doctrinal difficulties.²⁰⁵ The Court looked to a “functional” analysis of state regulations, much like the rule covering state taxation. “A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom it deals.”²⁰⁶ In determining whether a regulation discriminates against the Federal Government, “the entire regulatory system should be analyzed.”²⁰⁷

²⁰¹ *Sperry v. Florida*, 373 U.S. 379 (1963).

²⁰² *Penn Dairies v. Milk Control Comm'n*, 318 U.S. 261 (1943).

²⁰³ *Pacific Coast Dairy v. Department of Agriculture*, 318 U.S. 285 (1943). *See also Paul v. United States*, 371 U.S. 245 (1963).

²⁰⁴ *Leslie Miller, Inc. v. Arkansas*, 353 U.S. 187 (1956).

²⁰⁵ *North Dakota v. United States*, 495 U.S. 423 (1990). The difficulty is that the case was five-to-four, with a single Justice concurring with a plurality of four to reach the result. *Id.* at 444. Presumably, the concurrence agreed with the rationale set forth here, disagreeing only in other respects.

²⁰⁶ 495 U.S. at 435. Four dissenting Justices agreed with this principle, but they also would invalidate a state law that “actually and substantially interferes with specific federal programs.” *Id.* at 448, 451–52.

²⁰⁷ 495 U.S. at 435. That is, only when the overall effect, when balanced against other regulations applicable to similarly situated persons who do not deal with the government, imposes a discriminatory burden will they be invalidated. Justice Scalia, concurring, was doubtful of this standard. *Id.* at 444.

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

The Doctrine of Federal Exemption From State Taxation

McCulloch v. Maryland.—Five years after the decision in *McCulloch v. Maryland* that a state may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in *Osborn v. Bank of the United States*.²⁰⁸ In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was “contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the Court.”²⁰⁹ To which Marshall replied: “It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance.”²¹⁰ Secondly, the appellants relied “greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government. . . . Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors.”²¹¹ Marshall accepted this analogy but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the government were entitled to immunity from taxation upon such transactions.²¹² Thus, not only was the decision of *McCulloch v. Maryland* reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

Applicability of Doctrine to Federal Securities.—The first significant extension of the doctrine of the immunity of federal instrumentalities from state taxation came in *Weston v. Charleston*,²¹³ where Chief Justice Marshall also found in the Supremacy Clause a bar to state taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from state taxation.²¹⁴ A modified version of this section remains on the

²⁰⁸ 22 U.S. (9 Wheat.) 738 (1824).

²⁰⁹ 22 U.S. at 865.

²¹⁰ 22 U.S. at 865.

²¹¹ 22 U.S. at 866.

²¹² 22 U.S. at 867.

²¹³ 27 U.S. (2 Pet.) 449 (1829), followed in *New York ex rel. Bank of Commerce v. New York City*, 67 U.S. (2 Bl.) 620 (1863).

²¹⁴ Ch. 73, 37th Cong., 3d Sess., 12 Stat. 709, 710 (1863).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

statute books today.²¹⁵ The right of Congress to exempt legal tender notes to the same extent as bonds was sustained in *Bank v. Supervisors*,²¹⁶ over the objection that such notes circulate as money and should be taxable in the same way as coin. But a state tax on checks issued by the Treasurer of the United States for interest accrued upon government bonds was sustained since it did not in any way affect the credit of the National Government.²¹⁷ Similarly, the assessment for an *ad valorem* property tax of an open account for money due under a federal contract,²¹⁸ and the inclusion of the value of United States bonds owed by a decedent, in measuring an inheritance tax,²¹⁹ were held valid, since neither tax would substantially embarrass the power of the United States to secure credit.²²⁰ A state property tax levied on mutual savings banks and federal savings and loan associations and measured by the amount of their capital, surplus, or reserve and undivided profits, but without deduction of the value of their United States securities, was voided as a tax on obligations of the Federal Government. Apart from the fact that the ownership interest of depositors in such institutions was different from that of corporate stockholders, the tax was imposed on the banks which were solely liable for payment thereof.²²¹

Income from federal securities is also beyond the reach of the state taxing power as the cases now stand.²²² Nor can such a tax be imposed indirectly upon the stockholders on such part of the corporate dividends as corresponds to the part of the corporation's income which is not assessed, *i.e.*, income from tax exempt bonds.²²³ A state may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property of net income of the corporation, including tax exempt United

²¹⁵ 31 U.S.C. § 3124. The exemption under the statute is no broader than that which the Constitution requires. *First Nat'l Bank v. Bartow County Bd. of Tax Assessors*, 470 U.S. 583 (1985). The relationship of this statute to another, 12 U.S.C. § 548, governing taxation of shares of national banking associations, has occasioned no little difficulty. *American Bank & Trust Co. v. Dallas County*, 463 U.S. 855 (1983); *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1983).

²¹⁶ 74 U.S. (7 Wall.) 26 (1868).

²¹⁷ *Hibernia Savings Society v. San Francisco*, 200 U.S. 310, 315 (1906).

²¹⁸ *Smith v. Davis*, 323 U.S. 111 (1944).

²¹⁹ *Plummer v. Coler*, 178 U.S. 115 (1900); *Blodgett v. Silberman*, 277 U.S. 1, 12 (1928).

²²⁰ *Accord*, *Rockford Life Ins. Co. v. Illinois Dep't of Revenue*, 482 U.S. 182 (1987) (tax including in an investor's net assets the value of federally-backed securities ("Ginnie Maes") upheld, as it would have no adverse effect on Federal Government's borrowing ability).

²²¹ *Society for Savings v. Bowers*, 349 U.S. 143 (1955).

²²² *Northwestern Mut. Life Ins. Co. v. Wisconsin*, 275 U.S. 136, 140 (1927).

²²³ *Miller v. Milwaukee*, 272 U.S. 713 (1927).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

States securities or the income derived therefrom.²²⁴ The designation of a tax is not controlling.²²⁵ Where a so-called “license tax” upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.²²⁶

Taxation of Government Contractors.—In the course of his opinion in *Osborn v. Bank of the United States*,²²⁷ Chief Justice Marshall posed the question: “Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative.”²²⁸

Today, the question insofar as taxation is concerned is answered in the affirmative. Although the early cases looked toward immunity,²²⁹ in *James v. Dravo Contracting Co.*,²³⁰ by a 5-to-4 vote, the Court established the modern doctrine. Upholding a state tax on the gross receipts of a contractor providing services to the Federal Government, the Court said that “[I]t is not necessary to cripple [the state’s power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.”²³¹ A state-imposed sales tax upon the purchase of goods by a private firm having a cost-plus contract with the Federal Government was sustained, it not being critical to the tax’s validity that

²²⁴ *Provident Inst. v. Massachusetts*, 73 U.S. (6 Wall.) 611 (1868); *Society for Savings v. Coite*, 73 U.S. (6 Wall.) 594 (1868); *Hamilton Company v. Massachusetts*, 73 U.S. (6 Wall.) 632 (1868); *Home Ins. Co. v. New York*, 134 U.S. 594 (1890); *Werner Machine Co. v. Director of Taxation*, 350 U.S. 492 (1956).

²²⁵ *Macallen Co. v. Massachusetts*, 279 U.S. 620, 625 (1929).

²²⁶ *Northwestern Mutual Life Ins. Co. v. Wisconsin*, 275 U.S. 136 (1927).

²²⁷ 22 U.S. (9 Wheat.) 738 (1824).

²²⁸ 22 U.S. at 867.

²²⁹ The dissent in *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937), observed that the Court was overruling “a century of precedents.” See, e.g., *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928) (voiding a state privilege tax on dealers in gasoline as applied to sales by a dealer to the Federal Government for use by Coast Guard). It was in *Panhandle* that Justice Holmes uttered his riposte to Chief Justice Marshall: “The power to tax is not the power to destroy while this Court sits.” *Id.* at 223 (dissenting).

²³⁰ 302 U.S. 134 (1937).

²³¹ 302 U.S. at 150 (quoting *Willcuts v. Bunn*, 282 U.S. 216, 225 (1931)).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

it would be passed on to the government.²³² Previously, it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line, who was engaged in carrying the mails as an independent contractor²³³ and an excise tax on gasoline sold to a contractor with the government and used to operate machinery in the construction of levees on the Mississippi River.²³⁴ Although the decisions have not set an unwavering line,²³⁵ the Court has hewed to a very restrictive doctrine of immunity. “[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.”²³⁶ Thus, *New Mexico* sustained a state gross receipts tax and a use tax imposed upon contractors with the Federal Government which operated on “advanced funding,” drawing on federal deposits so that only federal funds were expended by the contractors to meet their obligations.²³⁷ Of course, Congress may statutorily provide for immunity from taxation of federal contractors generally or in particular programs.²³⁸

²³² *Alabama v. King & Boozer*, 314 U.S. 1 (1941), overruling *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928), and *Graves v. Texas Co.*, 298 U.S. 393 (1936). See also *Curry v. United States*, 314 U.S. 14 (1941). “The Constitution . . . does not forbid a tax whose legal incidence is upon a contractor doing business with the United States, even though the economic burden of the tax, by contract or otherwise, is ultimately borne by the United States.” *United States v. Boyd*, 378 U.S. 39, 44 (1964) (sustaining sales and use taxes on contractors using tangible personal property to carry out government cost-plus contract).

²³³ *Alward v. Johnson*, 282 U.S. 509 (1931).

²³⁴ *Trinityfarm Const. Co. v. Grosjean*, 291 U.S. 466 (1934).

²³⁵ *United States v. Allegheny County*, 322 U.S. 174 (1944) (voiding property tax that included in assessment the value of federal machinery held by private party); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110 (1954) (voiding gross receipts sales tax applied to contractor purchasing article under agreement whereby he was to act as agent for government and title to articles purchased passed directly from vendor to United States).

²³⁶ *United States v. New Mexico*, 455 U.S. 720, 735 (1982). See *South Carolina v. Baker*, 485 U.S. 505, 523 (1988).

²³⁷ “[I]mmunity may not be conferred simply because the tax has an effect on the United States, or even because the Federal Government shoulders the entire economic burden of the levy.” *United States v. New Mexico*, 455 U.S. 720, 734 (1982). *Arizona Dep’t of Revenue v. Blaze Constr. Co.*, 526 U.S. 32 (1999) (the same rule applies when the contractual services are rendered on an Indian reservation).

²³⁸ *James v. Dravo Contracting Co.*, 302 U.S. 134, 161 (1937); *Carson v. Roane-Anderson Co.*, 342 U.S. 232, 234 (1952); *United States v. New Mexico*, 455 U.S. 720, 737 (1982). *Roane-Anderson* held that a section of the Atomic Energy Act barred the collection of state sales and use taxes in connection with sales to private companies of personal property used by them in fulfilling their contracts with the AEC. Thereafter, Congress repealed the section for the express purpose of placing AEC contractors on the same footing as other federal contractors, and the Court upheld imposition of the taxes. *United States v. Boyd*, 378 U.S. 39 (1964).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

Taxation of Salaries of Federal Employees.—Of a piece with *James v. Dravo Contracting Co.* was *Graves v. New York ex rel. O’Keefe*,²³⁹ handed down two years later. Repudiating the theory “that a tax on income is legally or economically a tax on its source,” the Court held that a state could levy a nondiscriminatory income tax upon the salary of an employee of a government corporation. In the opinion of the Court, Justice Stone intimated that Congress could not validly confer such an immunity upon federal employees. “The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes; and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.”²⁴⁰ Chief Justice Hughes concurred in the result without opinion. Justices Butler and McReynolds dissented and Justice Frankfurter wrote a concurring opinion in which he reserved judgment as to “whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live.”²⁴¹

That question is academic, Congress’s having consented to state taxation of its employees’ compensation as long as the taxation “does not discriminate against the . . . employee, because of the source of the . . . compensation.”²⁴² This principle, the Court has held, “is

²³⁹ 306 U.S. 466 (1939), followed in *State Comm’n v. Van Cott*, 306 U.S. 511 (1939). This case was overruled by implication in *Dobbins v. Erie County*, 41 U.S. (16 Pet.) 435 (1842), and *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937), which held the income of federal employees to be immune from state taxation.

²⁴⁰ 306 U.S. at 487.

²⁴¹ 306 U.S. at 492.

²⁴² 4 U.S.C. § 111. The statute, part of the Public Salary Tax Act of 1939, was considered and enacted contemporaneously with the alteration occurring in constitutional law, exemplified by *Graves*. That is, in *Helvering v. Gerhardt*, 304 U.S. 405 (1938), the Court had overruled precedents and held that Congress could impose nondiscriminatory taxes on the incomes of most state employees, and the 1939 Act had as its primary purpose the imposition of federal income taxes on the salaries of all state and local government employees. Feeling equity required it, Congress included a provision authorizing nondiscriminatory state taxation of federal employees. *Graves* came down while the provision was pending in Congress. See *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803, 810–14 (1989). For application of the Act to salaries of federal judges, see *Jefferson County v. Acker*, 527 U.S. 423 (1999) (upholding imposition of a local occupational tax).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity.”²⁴³

Ad Valorem Taxes Under the Doctrine.—Property owned by a federally chartered corporation engaged in private business is subject to state and local *ad valorem* taxes. This was conceded in *McCulloch v. Maryland*²⁴⁴ and confirmed a half century later with respect to railroads incorporated by Congress.²⁴⁵ Similarly, a property tax may be levied against the lands under water that are owned by a person holding a license under the Federal Water Power Act.²⁴⁶ However, when privately owned property erected by lessees on tax-exempt state lands is taxed by a county at less than full value, and houses erected by contractors on land leased from a federal Air Force base are taxed at full value, the latter tax, solely because it discriminates against the United States and its lessees, is void.²⁴⁷ Likewise, when, under state laws, a school district does not tax private lessees of state and municipal realty, whose leases are subject to termination at the lessor’s option in the event of sale, but does levy a tax, measured by the entire value of the realty, on lessees of United States property used for private purposes and whose leases are terminable at the option of the United States in an emergency or upon sale, the discrimination voided the tax collected from the latter. “A state tax may not discriminate against the government or those with whom it deals” in the absence of significant differences justifying levy of higher taxes on lessees of federal property.²⁴⁸ Land conveyed by the United States to a corporation for dry dock purposes was subject to a general property tax, despite a reservation in the conveyance of a right to free use of the dry dock and a provision for forfeiture in case of the continued unfitness of the dry dock for use or the use of land for other purposes.²⁴⁹ Also, where equitable

²⁴³ *Davis v. Michigan Dept. of the Treasury*, 489 U.S. at 813. This case struck down, as violative of the provision, a state tax imposed on federal retirement benefits but exempting state retirement benefits. See also *Barker v. Kansas*, 503 U.S. 594 (1992) (similarly voiding a state tax on federal military retirement benefits but not reaching state and local government retirees).

²⁴⁴ 17 U.S. (4 Wheat.) 316, 426 (1819).

²⁴⁵ *Thomson v. Union Pac. R.R.*, 76 U.S. (9 Wall.) 579, 588 (1870); *Union Pacific R.R. v. Peniston*, 85 U.S. (18 Wall.) 5, 31 (1873).

²⁴⁶ *Susquehanna Power Co. v. Tax Comm’n* (No. 1), 283 U.S. 291 (1931).

²⁴⁷ *Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961).

²⁴⁸ *Phillips Chemical Co. v. Dumas School Dist.*, 361 U.S. 376, 383, 387 (1960). In *Offutt Housing Co. v. Sarpy County*, 351 U.S. 253 (1956), a housing company was held liable for county personal property taxes on the ground that the government had consented to state taxation of the company’s interest as lessee. Upon its completion of housing accommodations at an Air Force Base, the company had leased the houses and the furniture therein from the Federal Government.

²⁴⁹ *Baltimore Shipbuilding Co. v. Baltimore*, 195 U.S. 375 (1904).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

title has passed to the purchaser of land from the government, a state may tax the equitable owner on the full value thereof, despite retention of legal title;²⁵⁰ but, in the case of reclamation entries, the tax may not be collected until the equitable title passes.²⁵¹ In the pioneer case of *Van Brocklin v. Tennessee*,²⁵² the state was denied the right to sell for taxes lands which the United States owned at the time the taxes were levied, but in which it had ceased to have any interest at the time of sale. Similarly, a state cannot assess land in the hands of private owners for benefits from a road improvement completed while it was owned by the United States.²⁵³

In 1944, with two dissents, the Court held that where the government purchased movable machinery and leased it to a private contractor the lessee could not be taxed on the full value of the equipment.²⁵⁴ Twelve years later, and with a like number of Justices dissenting, the Court upheld the following taxes imposed on federal contractors: (1) a municipal tax levied pursuant to a state law which stipulated that when tax exempt real property is used by a private firm for profit, the latter is subject to taxation to the same extent as if it owned the property, and based upon the value of real property, a factory, owned by the United States and made available under a lease permitting the contracting corporation to deduct such taxes from rentals paid by it; the tax was collectible only by direct action against the contractor for a debt owed, and was not applicable to federal properties on which payments in lieu of taxes are made; (2) a municipal tax, levied under the authority of the same state law, based on the value of the realty owned by the United States, and collected from a cost-plus-fixed-fee contractor, who paid no rent but agreed not to include any part of the cost of the facilities furnished by the government in the price of goods supplied under the contract; (3) another municipal tax levied in the same state against a federal subcontractor, and computed on the value of materials and work in process in his possession, notwithstanding that title thereto had passed to the United States following his receipt of installment payments.²⁵⁵

In sustaining the first tax, the Court held that it was imposed, not on the government or on its property, but upon a private les-

²⁵⁰ *Northern Pacific R.R. v. Myers*, 172 U.S. 589 (1899); *New Brunswick v. United States*, 276 U.S. 547 (1928).

²⁵¹ *Irwin v. Wright*, 258 U.S. 219 (1922).

²⁵² 117 U.S. 151 (1886).

²⁵³ *Lee v. Osceola Imp. Dist.*, 268 U.S. 643 (1925).

²⁵⁴ *United States v. Allegheny County*, 322 U.S. 174 (1944).

²⁵⁵ *United States v. City of Detroit*, 355 U.S. 466 (1958). The Court more recently has stated that *Allegheny County* “in large part was overruled” by *Detroit v. United States v. New Mexico*, 455 U.S. 720, 732 (1982).

ART. VI—PRIOR DEBTS, SUPREMACY CLAUSE, ETC. 1031

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

see, that it was computed by the value of the use to the contractor of the federally leased property, and that it was nondiscriminatory; that is, it was designed to equalize the tax burden carried by private business using exempt property with that of similar businesses using taxed property. Distinguishing *Allegheny County*, the Court maintained that in that older decision, the tax invalidated was imposed directly on federal property and that the question of the legality of a privilege on use and possession of such property had been expressly reserved. Also, insofar as the economic incidents of such tax on private use curtails the net rental accruing to the government, such burden was viewed as insufficient to vitiate the tax.²⁵⁶

Deeming the second and third taxes similar to the first, the Court sustained them as taxes on the privilege of using federal property in the conduct of private business for profit. With reference to the second, the Court emphasized that the government had reserved no right of control over the contractor and, hence, the latter could not be viewed as an agent of the government entitled to the immunity derivable from that status.²⁵⁷ As to the third tax, the Court asserted that there was no difference between taxing a private party for the privilege of using property he possesses, and taxing him for possessing property which he uses; for, in both instances, the use was private profit. Moreover, the economic burden thrust upon the government was viewed as even more remote than in the administration of the first two taxes.²⁵⁸

Federal Property and Functions.—Property owned by the United States is, of course, wholly immune from state taxation.²⁵⁹ No state can regulate, by the imposition of an inspection fee, any activity carried on by the United States directly through its own

²⁵⁶ *United States v. City of Detroit*, 355 U.S. 478, 482, 483 (1958). *See also* *California Bd. of Equalization v. Sierra Summit*, 490 U.S. 844 (1989).

²⁵⁷ *United States v. Township of Muskegon*, 355 U.S. 484 (1958).

²⁵⁸ *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958). In *United States v. County of Fresno*, 429 U.S. 452 (1977), these cases were reaffirmed and applied to sustain a tax imposed on the possessory interests of United States Forest Service employees in housing located in national forests within the county and supplied to the employees by the Forest Service as part of their compensation. A state or local government may raise revenues on the basis of property owned by the United States as long as it is in possession or use by the private citizen that is being taxed.

²⁵⁹ *Clallam County v. United States*, 263 U.S. 341 (1923). *See also* *Cleveland v. United States*, 323 U.S. 329, 333 (1945); *United States v. Mississippi Tax Comm'n*, 412 U.S. 363 (1973); *United States v. Mississippi Tax Comm'n*, 421 U.S. 599 (1975).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

agents and employees.²⁶⁰ An early case, the authority of which is now uncertain, held invalid a flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business.²⁶¹

Federally Chartered Finance Agencies: Statutory Exemptions.—Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent.²⁶² Immediately after the Supreme Court construed the statute authorizing the states to tax national bank shares as allowing a tax on the preferred shares of such a bank held by the Reconstruction Finance Corporation,²⁶³ Congress enacted a law exempting such shares from taxation. The Court upheld this measure, saying: “When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will.”²⁶⁴ In *Pittman v. Home Owners’ Corp.*,²⁶⁵ the Court sustained the power of Congress under the necessary and proper clause to immunize the activities of the Corporation from state taxation; and in *Federal Land Bank v. Bismarck Lumber Co.*,²⁶⁶ the like result was reached with respect to an attempt by the state to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by foreclosure or mortgages.

The state’s principal argument proceeded thus: “Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositories and fiscal agents for the Federal Government and providing a market for government bonds; all other functions of the land banks are private;

²⁶⁰ *Mayo v. United States*, 319 U.S. 441 (1943). A municipal tax on the privilege of working within the city, levied at the rate of one percent of earnings, although not deemed to be an income tax under state law, was sustained as such when collected from employees of a naval ordinance plant by reason of federal assent to that type of tax expressed in the Buck Act. 4 U.S.C. §§ 105–110. *Howard v. Commissioners*, 344 U.S. 624 (1953).

²⁶¹ *Telegraph Co. v. Texas*, 105 U.S. 460, 464 (1882).

²⁶² *Des Moines Bank v. Fairweather*, 263 U.S. 103, 106 (1923); *Owensboro Nat’l Bank v. Owensboro*, 173 U.S. 664, 669 (1899); *First Nat’l Bank v. Adams*, 258 U.S. 362 (1922); *Michigan Nat’l Bank v. Michigan*, 365 U.S. 467 (1961).

²⁶³ *Baltimore Nat’l Bank v. Tax Comm’n*, 297 U.S. 209 (1936).

²⁶⁴ *Maricopa County v. Valley Bank*, 318 U.S. 357, 362, (1943).

²⁶⁵ 308 U.S. 21 (1939).

²⁶⁶ 314 U.S. 95 (1941).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore § 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions."²⁶⁷ The Court rejected this argument and invalidated the tax, writing: "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the Federal Government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."²⁶⁸

Similarly, the lease by a federal land bank of oil and gas in a mineral estate, which it had reserved in land originally acquired through foreclosure and thereafter had conveyed to a third party, was held immune from a state personal property tax levied on the lease and on the royalties accruing thereunder. The fact that at the time of the conveyance and lease, the bank had recouped its entire loss resulting from the foreclosure did not operate to convert the mineral estate and lease into a non-governmental activity no longer entitled to exemption.²⁶⁹ However, in the absence of federal legislation, a state law laying a percentage tax on the users of safety deposit services, measured by the bank's charges therefore, was held valid as applied to national banks. The tax, being on the user, did not, the Court held, impose an intrinsically unconstitutional burden on a federal instrumentality.²⁷⁰

Royalties.—In 1928, the Court went so far as to hold that a state could not tax as income royalties for the use of a patent issued by the United States.²⁷¹ This proposition was soon overruled in *Fox Film Corp. v. Doyal*,²⁷² where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Likewise a state may lay a franchise tax on corporations, measured by the net income from all sources and applicable to income from copyright royalties.²⁷³

Immunity of Lessees of Indian Lands.—Another line of anomalous decisions conferring tax immunity upon lessees of restricted

²⁶⁷ 314 U.S. at 101.

²⁶⁸ 314 U.S. at 102 (citations omitted).

²⁶⁹ *Federal Land Bank v. Kiowa County*, 368 U.S. 146 (1961).

²⁷⁰ *Colorado Bank v. Bedford*, 310 U.S. 41 (1940).

²⁷¹ *Long v. Rockwood*, 277 U.S. 142 (1928).

²⁷² 286 U.S. 123 (1932).

²⁷³ *Educational Films Corp. v. Ward*, 282 U.S. 379 (1931).

Cl. 2—Supremacy of the Constitution, Laws, and Treaties

Indian lands was overruled in 1949. The first of these cases, *Choc-taw & Gulf R.R. v. Harrison*,²⁷⁴ held that a gross production tax on oil, gas, and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next, the Court held the lease itself a federal instrumentality immune from taxation.²⁷⁵ A modified gross production tax imposed in lieu of all ad valorem taxes was invalidated in two *per curiam* decisions.²⁷⁶ In *Gillespie v. Oklahoma*,²⁷⁷ a tax upon net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the state was held inapplicable to oil produced on restricted Indian lands.²⁷⁸ In harmony with the trend to restricting immunity implied from the Constitution to activities of the government itself, the Court overruled all these decisions in *Oklahoma Tax Comm'n v. Texas Co.* and held that a lessee of mineral rights in restricted Indian lands was subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant him immunity.²⁷⁹

Summation and Evaluation

Although *McCulloch v. Maryland* and *Gibbons v. Ogden* were expressions of a single thesis, the supremacy of the national government, their development after Marshall's death has been sharply divergent. During the period when *Gibbons v. Ogden* was eclipsed by the theory of dual federalism, the doctrine of *McCulloch v. Maryland* was not merely followed but greatly extended as a restraint on state interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the more extreme positions taken in reliance upon *McCulloch v. Maryland*. Today, the application of the Supremacy Clause is becoming, to an ever increasing

²⁷⁴ 235 U.S. 292 (1914).

²⁷⁵ *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916).

²⁷⁶ *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co. v. Howard*, 248 U.S. 549 (1919).

²⁷⁷ 257 U.S. 501 (1922).

²⁷⁸ *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936).

²⁷⁹ 336 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity lessees of Indian lands from state taxation, which he found to stem from early rulings that tribal lands are themselves immune. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). One of the first steps taken to curtail the scope of the immunity was *Shaw v. Oil Corp.*, 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to state taxation. Congress soon upset the decision, however, and its act was sustained in *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943).

Cl. 3—Oath of Office

degree, a matter of statutory interpretation; a determination whether state regulations can be reconciled with the language and policy of federal enactments. In the field of taxation, the Court has all but wiped out the private immunities previously implied from the Constitution without explicit legislative command. Broadly speaking, the immunity which remains is limited to activities of the government itself, and to that which is explicitly created by statute, *e.g.*, that granted to federal securities and to fiscal institutions chartered by Congress. But the term “activities” will be broadly construed.

Clause 3. The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

OATH OF OFFICE

Power of Congress in Respect to Oaths

Congress may require no other oath of fidelity to the Constitution, but it may add to this oath such other oath of office as its wisdom may require.²⁸⁰ It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law,²⁸¹ and the same rule holds in the case of the states.²⁸²

National Duties of State Officers

Commenting in *The Federalist* on the requirement that state officers, as well as members of the state legislatures, shall be bound by oath or affirmation to support the Constitution, Hamilton wrote: “Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and it

²⁸⁰ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416 (1819).

²⁸¹ *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 337 (1867).

²⁸² *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1867). *See also* *Bond v. Floyd*, 385 U.S. 116 (1966), in which the Supreme Court held that antiwar statements made by a newly elected member of the Georgia House of Representatives were not inconsistent with the oath of office to support to the United States Constitution.

Cl. 3—Oath of Office

will be rendered auxiliary to the enforcement of its laws.”²⁸³ The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention: “They [the states] are the instruments upon which the Union must frequently depend for the support and execution of their powers. . . .”²⁸⁴ Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,²⁸⁵ and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789²⁸⁶ not only left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different states and in concurrent possession of the rest, and by other sections state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, examples of the principle that federal law is law to be applied by the state courts, but also any justice of the peace or other magistrates of any of the states were authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. From the beginning, Congress enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.²⁸⁷ Pursuant to the same idea of treating state governmental organs as available to the national government for administrative purposes, the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one state to another exclusively to the state executives.²⁸⁸

With the rise of the doctrine of states’ rights and of the equal sovereignty of the states with the National Government, the availability of the former as instruments of the latter in the execution

²⁸³ No. 27, (J. Cooke ed. 1961), 175 (emphasis in original). *See also*, *id.* at No. 45, 312–313 (Madison).

²⁸⁴ 1 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* 404 (rev. ed. 1937).

²⁸⁵ *See* Article I, § 3, cl. 1; § 4, cl. 1; 10; Article II, § 1, cl. 2; Article III, 2, cl. 2; Article IV, §§ 1, 2; Article V; Amendments 13, 14, 15, 17, 19, 25, and 26.

²⁸⁶ 1 Stat. 73 (1789).

²⁸⁷ *See* Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 SELECTED ESSAYS ON CONSTITUTIONAL LAW 1187 (1938); Barnett, *Cooperation Between the Federal and State Governments*, 7 ORE. L. REV. 267 (1928). *See also* J. CLARK, *THE RISE OF A NEW FEDERALISM* (1938); E. CORWIN, *COURT OVER CONSTITUTION* 148–168 (1938).

²⁸⁸ 1 Stat. 302 (1793).

Cl. 3—Oath of Office

of its power came to be questioned.²⁸⁹ In *Prigg v. Pennsylvania*,²⁹⁰ decided in 1842, the constitutionality of the provision of the act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in *Kentucky v. Dennison*,²⁹¹ decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it “the duty” of the chief executive of a state to render up a fugitive from justice upon the demand of the chief executive of the state from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In *Prigg*, the Court, speaking by Justice Story, said that “while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation.”²⁹² Subsequent cases confirmed the point that Congress could authorize willing state officers to perform such federal duties.²⁹³ Indeed, when Congress in the Selective Service Act of 1917 authorized enforcement to a great extent through state employees, the Court rejected “as too wanting in merit to require further notice” the contention that the Act was invalid because of this delegation.²⁹⁴ State officials were frequently employed in the enforcement of the National Prohibition Act, and suits to abate nuisances as defined by the statute were authorized to be brought, in the name of the United States, not only by federal officials, but also by “any prosecuting attorney of any State or any subdivision thereof.”²⁹⁵

In *Dennison*, however, the Court held that, although Congress could delegate, it could not require performance of an obligation.

²⁸⁹ For the development of opinion, especially on the part of state courts, adverse to the validity of such legislation, see 1 J. KENT, COMMENTARIES ON AMERICAN LAW 396–404 (1826).

²⁹⁰ 41 U.S. (16 Pet.) 539 (1842).

²⁹¹ 65 U.S. (24 How.) 66 (1861).

²⁹² 41 U.S. (16 Pet.) 539, 622 (1842). See also *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 108 (1861). The word “magistrates” in this passage does not refer solely to judicial officers but reflects the usage in that era in which officers generally were denominated magistrates; the power thus upheld is not the related but separate issue of the use of state courts to enforce federal law.

²⁹³ *United States v. Jones*, 109 U.S. 513, 519 (1883); *Robertson v. Baldwin*, 165 U.S. 275, 280 (1897); *Dallemagne v. Moisan*, 197 U.S. 169, 174 (1905); *Holmgren v. United States*, 217 U.S. 509, 517 (1910); *Parker v. Richard*, 250 U.S. 235, 239 (1919).

²⁹⁴ *Selective Draft Law Cases*, 245 U.S. 366, 389 (1918). The Act was 40 Stat. 76 (1917).

²⁹⁵ 41 Stat. 314, § 22. In at least two States, the practice was approved by state appellate courts. *Carse v. Marsh*, 189 Cal. 743, 210 Pac. 257 (1922); *United States v. Richards*, 201 Wis. 130, 229 N.W. 675 (1930). On this and other issues under the Act, see Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 VA. L. REV. 86 (1922).

Cl. 3—Oath of Office

The “duty” of state executives in the rendition of fugitives from justice was construed to be declaratory of a “moral duty.” Chief Justice Taney wrote for the Court: “The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . . It is true,” the Chief Justice conceded, “that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution.”²⁹⁶

Eighteen years later, in *Ex parte Siebold*,²⁹⁷ the Court sustained the right of Congress, under Article I, § 4, paragraph 1 of the Constitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. Although the doctrine of the holding was expressly confined to cases in which the National Government and the states enjoy “a concurrent power over the same subject matter,” no attempt was made to catalogue such cases. Moreover, the outlook of Justice Bradley’s opinion for the Court was decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel “that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned”²⁹⁸ To this Justice Bradley replied: “As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of

²⁹⁶ 65 U.S. (24 How.) 66, 107–08 (1861).

²⁹⁷ 100 U.S. 371 (1880).

²⁹⁸ 100 U.S. at 391.

Cl. 3—Oath of Office

the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.”²⁹⁹

Conflict thus developed early between these two doctrinal lines. But it was the *Siebold* line that prevailed. Enforcement of obligations upon state officials through mandamus or through injunctions was readily available, even when the state itself was immune, through the fiction of *Ex parte Young*,³⁰⁰ under which a state official could be sued in his official capacity but without the immunities attaching to his official capacity. Although the obligations were, for a long period, in their origin based on the United States Constitution, the capacity of Congress to enforce statutory obligations through judicial action was little doubted.³⁰¹ Nonetheless, it was only recently that the Court squarely overruled *Dennison*. “If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that ‘the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,’ . . . basic constitutional principles now point as clearly the other way.”³⁰² That case is doubly important, because the Court spoke not only to the Extradition Clause and the federal statute directly enforcing it, but it also enforced a purely statutory right on behalf of a Territory that could not claim for itself rights under the clause.³⁰³

Even as the Court imposes new federalism limits upon Congress’s powers to regulate the states as states, it has reaffirmed the principle that Congress may authorize the federal courts to compel state officials to comply with federal law, statutory as well as constitutional. “[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply.”³⁰⁴

²⁹⁹ 100 U.S. at 392.

³⁰⁰ 209 U.S. 123 (1908). See also *Board of Liquidation v. McComb*, 92 U.S. 531, 541 (1876).

³⁰¹ *Maine v. Thiboutot*, 448 U.S. 1 (1980).

³⁰² *Puerto Rico v. Branstad*, 483 U.S. 219, 227 (1987) (*Dennison* “rests upon a foundation with which time and the currents of constitutional change have dealt much less favorably”).

³⁰³ In including territories in the statute, Congress acted under the Territorial Clause rather than under the Extradition Clause. *New York ex rel. Kopel v. Bingham*, 211 U.S. 468 (1909).

³⁰⁴ *New York v. United States*, 505 U.S. 144, 179 (1992). See also *FERC v. Mississippi*, 456 U.S. 742, 761–765 (1982); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 695 (1979); *Illinois v. City of Milwaukee*, 406 U.S. 91, 106–108 (1972).

Cl. 3—Oath of Office

No doubt, there is tension between the exercise of Congress's power to impose duties on state officials³⁰⁵ and the developing doctrine under which the Court holds that Congress may not “commandeer” state legislative or administrative processes in the enforcement of federal programs.³⁰⁶ However, the existence of the Supremacy Clause and the federal oath of office, as well as a body of precedent, indicates that coexistence of the two lines of principles will be maintained.

³⁰⁵ The practice continues. *See* Pub. L. 94–435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (authorizing state attorneys general to bring *parens patriae* antitrust actions in the name of the state to secure monetary relief for damages to the citizens of the state); Medical Waste Tracking Act of 1988, Pub. L. 100–582, 102 Stat. 2955, 42 U.S.C. § 6992f (authorizing states to impose civil and possibly criminal penalties for violations of the Act); Brady Handgun Violence Prevention Act, Pub. L. 103–159, tit. I, 107 Stat. 1536, 18 U.S.C. § 922s (imposing on chief law enforcement officer of each jurisdiction to ascertain whether prospective firearms purchaser his disqualifying record).

³⁰⁶ *New York v. United States*, 505 U.S. 144 (1992).