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The Constitution and the American Federal System

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I. INTRODUCTION

The American federal system as we know it today was not planned. We did not adopt a Constitution at the time of Independence or at any time thereafter establishing the structure of a federal system and allocating power between the federal government and the states.[1] Rather the structure of the American federal system has evolved over a period of time as a result of the Supreme Court's interpretation of the provisions of

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1. Contrast the Canadian federal system that was established by the Constitution Act of 1867 (formerly the British North America Act). In the Canadian system, a particular power is either a federal power or a provincial power, and there is very little overlap. See the discussion in Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1195-1201 (1984).

the Constitution dealing with federal and state power and the Court's development of constitutional policy with respect to the nature and operation of the American federal system.[2]

The American federal system consists of four components: (1) state sovereignty and constitutional limitations on state power; (2) the powers of the federal government; (3) the relationship between the federal government and the states; and (4) the relationship between the states.[3] In this writing, I will set forth the constitutional doctrine applicable to each of these four components. It is my hope that in so doing, I will succeed in explaining the structure of the American federal system. I will also demonstrate that, for the most part, constitutional doctrine relating to state and federal power and to the relationship between the federal and state governments and between the states themselves is fairly well-settled, and such change, as may be occurring, is mostly around the edges.[4] The essential nature of the American federal system, as it has evolved from many years of constitutional interpretation by the Supreme Court, remains unchanged.[5]

We start out with three basic propositions underlying the American federal system. First is the matter of state sovereignty. The American federal system, as it now exists, began with the states.[6] In American constitutional theory, upon Independence, the newly-formed states succeeded to the power over domestic matters formerly exercised by the British Crown, and as each new state was admitted to the Union, it automatically became entitled to exercise this power.[7] Thus, state sovereignty is a "given" in the American constitutional system, and the states do not depend on the federal Constitution for the source of their sovereignty.[8] The states exercise full sovereignty over domestic matters except to the extent that a particular exercise of such sovereignty is prohibited or restricted by the Constitution.[9]

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2. Robert A. Sedler, *The Settled Nature of American Constitutional Law*, 48 WAYNE L. REV. 173, 177-78 (2002).

3. *Id.* at 220.

4. *Id.* at 176.

5. *Id.* at 176-77.

6. *Id.* at 220.

7. *Id.*

8. *See* Carter v. Carter Coal Co., 298 U.S. 238, 294 (1936).

9. Sedler, *The Settled Nature*, *supra* note 2, at 220. Upon Independence, that aspect of the sovereignty of the British Crown pertaining to foreign affairs devolved upon the "Union of States" that was waging the Revolutionary War and that eventually concluded the peace with Great Britain. *Id.* In American constitutional theory, sovereignty over foreign affairs was deemed to be in the federal government that was subsequently established by the Constitution. Thus, the foreign affairs power is an inherent federal power. As the Supreme Court stated in *United States v. Belmont*, 301 U.S. 324 (1937):

In terms of allocation of power, the Constitution restricts state sovereignty over domestic matters in essentially three ways. First, it provides that certain powers, very few in number, are exclusively federal powers, in the sense that they cannot be exercised by the states at all, such as the power to enter into a treaty or the power to coin money,[10] or can only be exercised by the states with the consent of Congress, such as the power to impose a duty of tonnage or to the power to enter into a compact with another state or foreign government.[11] Second, under the Supremacy Clause[12] there is federal supremacy in the event of a conflict between federal and state power.[13] Congress then has the power to preempt state regulation over particular issues or over particular areas of activity. Federal preemption is very important in practice, and preemption cases come before the Court with considerable frequency.[14] It is with respect to preemption that the matter of "states rights" is most starkly presented, and we will see that in the area of preemption, both Congress and the Court have tried to strike a balance between the principle of federal supremacy and the principle of state sovereignty. Third, the Court has held that the affirmative grant of the commerce power to Congress has a negative or dormant implication, and we will see that the negative aspect of the Commerce Clause imposes some important, but precisely defined, limitations on the power of the states to regulate and tax interstate and foreign commerce.[15] Subject only to these

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"In the case of all international compacts and agreements . . . complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states." *Id.* at 331.

10. U.S. CONST. art. I, § 10, cl. 1. In order for a power to be an exclusive federal power, it must be affirmatively granted to Congress by Article I, Section 8, and either expressly denied to the states by Article I, Section 10, or be of such a nature that the exercise of power by the states would be incompatible with its exercise by Congress. Research has disclosed no case where the Supreme Court has specifically held that a particular power is an exclusive federal power by implication. "[T]wo powers that necessarily would be exclusive federal powers would be the naturalization and immigration power and the power to fix the standards of weights and measures." Sedler, *The Settled Nature*, *supra* note 2, at 220 n.268. The bankruptcy power is not an exclusive federal power. *See* Sturges v. Crowinshield, 17 U.S. 122, 123-28 (1819). Neither is the power over copyright. *See* Goldstein v. California, 412 U.S. 546, 571 (1973).

11. U.S. CONST. art. I, § 10, cl. 2, 3. In addition to interstate compacts, some American states have received Congressional approval to enter into compacts with neighboring Canadian provinces, such as the Great Lakes Compact entered into between the states bordering the Great Lakes and the Province of Ontario. *See* MICH. COMP. LAWS ANN. § 324.32101 (West 2009).

12. U.S. CONST. art. VI, § 2.

13. *Id.*

14. Sedler, *The Settled Nature*, *supra* note 2, at 220.

15. *Id.* at 221.

limitations, the American states have plenary power over all activity that takes place within their boundaries.[16]

The second proposition is that the dominant feature of the American federal system as regards domestic matters is *concurrent power*.[17] While in constitutional theory the powers of the federal government are only those enumerated in the Constitution, we know that those powers, particularly the power of Congress over interstate and foreign commerce, have been construed very broadly by the Court, so that with few exceptions, today virtually any activity is subject to congressional regulation. The expansive interpretation of federal power interacts with state sovereignty, with the result that to a large extent, both the states and Congress have enormous regulatory power and both can usually regulate the same activity. Thus, it can be said that the dominant feature of the American federal system as regards domestic matters is *concurrent power*. And for the most part, the reach of federal and state power and the resolution of conflicts between federal and state power is essentially settled by existing constitutional doctrine.

The third proposition is that the states form a national union. It cannot be disputed that a primary motivating force behind the calling of the constitutional convention in 1787 and the resulting new Constitution was to transform the loose confederation of sovereign states into one nation, an "indestructible union composed of indestructible states"[18] and to "constitute the citizens of the United States as one people."[19] The provisions of Article IV, Section 1, dealing with Full Faith and Credit to judgments and public acts of sister states, and Article IV, Section 2, dealing with Privileges and Immunities of the citizens of sister states and interstate rendition, are specifically directed toward this end. We will discuss both provisions in our discussion of the relationship between the states themselves. In addition, precisely because the United States is a federal union, there is a generic right of citizens to travel from one state to another.[20] Finally, the Constitution requires that Congress admit new

16. *Id.*

17. *Id.*

18. The Supreme Court has said that, "[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." Texas v. White, 74 U.S. 700, 725 (1869). Because this is so, the Court held in that case that during the civil war, the Confederate states remained in the Union, notwithstanding that they were trying to secede from it. *Id.* at 726.

19. Paul v. Virginia, 75 U.S. 168, 180 (1869).

20. The Court has stated that "[t]he constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union." United States v. Guest, 383 U.S. 745, 757 (1966). In that case, the Court upheld the power of Congress to make it a crime to interfere with interstate travel. *Id.* at 760. The right of

states to the Union on an "equal footing" with the same attributes of sovereignty as were possessed by the original thirteen states,[21] and that the United States guarantee to each state "a republican form of government,"[22] and to protect the states against invasion or domestic violence.[23]

For the last decade or so, there has been considerable academic debate on the subject of federal and state power, revolving around the contention that the Supreme Court should curtail the range of federal power and to that extent avoid possible interference with the exercise of state power.[24] On the Court itself, particularly under the leadership of former Chief Justice William H. Rehnquist, there have been expressions of concern about the expansion of federal power operating to diminish

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interstate travel was first recognized in *Crandall v. Nevada*, 73 U.S. 35, 49 (1867), where the Court held unconstitutional a state's imposition of a head tax on the exit of all persons from the state. In *Edwards v. California*, 314 U.S. 160, 177 (1941), the Court held unconstitutional as an undue burden on interstate commerce a state law that prohibited bringing an indigent person into the state. The law also violated the right of interstate travel, as the concurring Justices emphasized. *Id.* at 178-81 (Douglas, J., concurring); *Id.* at 182-84 (Jackson, J., concurring). There are two other components of the right of interstate travel: the right to be treated as a welcome visitor when a citizen of one state is temporarily in another state, protected by the Privileges and Immunities Clause of Article IV, Section 2, and for those citizens who elect to become permanent residents of another state, to be treated equally with other citizens of that state, which is protected as one of the Privileges and Immunities of national citizenship under Section 1 of the Fourteenth Amendment. Saenz v. Roe, 526 U.S. 489, 500-03 (1989).

21. In *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-08 (1999), the Court held that recognition of Indian rights to hunt, fish, and gather on state land, provided for under a treaty between an Indian tribe and the federal government, was not irreconcilable with a state's sovereignty over the natural resources in the state, and so the treaty was not abrogated upon admission of the state to the Union. *Id.* at 205-06.

22. The Court has held that it is the responsibility of the President and Congress to guarantee to the states a "republican form of government," and that the political question doctrine precludes the federal courts from deciding what constitutes a "republican form of government." Pac. States Tel. Co. v. Oregon, 223 U.S. 118, 149 (1912). It also precludes the courts from deciding which competing group is the "lawful" government of the state. Luther v. Borden, 48 U.S. 1 (1849).

23. U.S. CONST. art. IV, § 4.

24. For a sampling of the voluminous academic commentary, see Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After* Morrison, 25 OKLA. CITY U. L. REV. 843 (2000); Grant S. Nelson & Robert J. Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control Over Social Issues*, 85 IOWA L. REV. 1 (1999); Jay S. Bybee, *Insuring Domestic Tranquility*: Lopez, *Federalization of Crime, and the Forgotten Role of the Domestic Violence Clause*, 66 GEO. WASH. L. REV. 1 (1997); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Deborah J. Merritt, *Reflections on* United States v. Lopez*: Commerce!*, 94 MICH. L. REV. 674 (1995).

traditional areas of state authority.[25] As we will see, there have been two cases, one in 1995,[26] and one in 2000,[27] where the Court has ruled against the exercise of federal power under the Commerce Clause. However, these were very narrow decisions that did not undercut the line of growth of decisions expanding the range of federal power.[28] And in the Court's most recent decision dealing with the exercise of federal power, it appeared that the Court was coming down even more strongly on the side of federal power when it held that so long as the class of activities that Congress was regulating came within the reach of federal power, it was not necessary to show that Congress could independently regulate the local activity that came within that class of activities.[29] In my opinion, the academic debate on the subject of federal and state power is truly academic, and I have no interest in participating in it. Again, my purpose in this writing is to explain the structure of the American federal system and to demonstrate that the essential nature of the American federal system, as it has evolved from many years of constitutional interpretation by the Supreme Court, has not changed and is not likely to do so.

II. STATE SOVEREIGNTY AND CONSTITUTIONAL LIMITATIONS ON STATE POWER

As stated at the outset, state sovereignty is a "given" in the American constitutional system, and the states exercise full sovereignty over domestic matters except to the extent that a particular exercise of such sovereignty is prohibited or restricted by the Constitution.[30] Moreover, as we will see, although Congress has the power to preempt state laws, both Congress, in specifically dealing with preemption in the legislation it

25. Writing for the Court in *United States v. Morrison*, 529 U.S. 598 (2000), Chief Justice Rehnquist observed that: "Were the Federal Government to take over regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." *Id.* at 611. Similarly, Justice Clarence Thomas, concurring in *Morrison*, stated: "Unless this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with the original understanding, we will continue to see Congress appropriating state police powers under the guise of regulating commerce." *Id.* at 611.

26. United States v. Lopez, 514 U.S. 549 (1995).

27. *Morrison*, 529 U.S. at 627.

28. *See* infra notes 112-17 and accompanying text.

29. Gonzales v. Raich, 545 U.S. 1, 22, 23 (2005). In that case, the Court held that Congress had the power to prohibit the local cultivation and use of marijuana for medical purposes, even though this was authorized by state law. *See infra* notes 118-23 and accompanying text.

30. Sedler, *The Settled Nature*, *supra* note 2, at 220.

enacts, and the Court, when deciding questions of federal preemption, have tried carefully to strike a balance between the principle of federal supremacy and the principle of state sovereignty.[31] The result has been that in practice federal preemption has been somewhat limited and has not substantially impaired state sovereignty or altered concurrent power as the dominant feature of the American federal system.[32]

From a federalism standpoint, the most important constitutional limitation on state sovereignty relates to state power to regulate and tax interstate and foreign commerce.[33] The Supreme Court has long held that the affirmative grant of the commerce power to Congress has a negative or dormant implication, and imposes some important, but precisely-defined, limitations, on the power of the states to regulate and tax interstate commerce.[34] The Court has never developed a comprehensive conceptual justification for a negative aspect to the Commerce Clause. It has merely stated that this constitutional restriction on state power is either predicated on the "implications of the Commerce Clause itself" or on the "presumed intention of Congress" that the states not impose certain kinds of regulations on interstate commerce.[35] While many

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31. *Id.* at 225.

32. *Id.*

33. *Id.* at 220. Federalism considerations generally do not affect the Court's application of the individual rights provisions of the Constitution. That is, in practice the individual rights provisions operate substantially the same with respect to actions of the federal and state governments. The only apparent exception is that because of Congress's plenary power over immigration, the Court has held that Congress can enact discriminatory legislation against aliens that the states cannot do under the Fourteenth Amendment's equal protection clause. *See* Mathews v. Diaz, 426 U.S. 67, 80-85 (1976); *cf.* Graham v. Richardson, 403 U.S. 365, 376-80 (1971). In addition, Congress' plenary power over immigration has been a factor that the Court has considered in invalidating state laws discriminating against aliens, that such discrimination interferes with the exercise of Congress' plenary power. *See, e.g.*, Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (denying alien college students financial aid unless they had affirmed their intention to apply for citizenship as soon as they were able); Plyer v. Doe, 457 U.S. 202, 226 (1982) (denial of free public school education to undocumented alien children).

34. As the Court stated in *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 769 (1945): "For a hundred years it has been accepted constitutional doctrine that the Commerce Clause, without the aid of Congressional legislation, thus affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the Commerce Clause the final arbiter of the competing demands of state and national interests." *Id.*

35. In *Southern Pacific*, the Court stated: "Whether or not this long-recognized distribution of power between the national and state governments is predicated upon the implications of the Commerce Clause itself, or upon the presumed intention of Congress, where Congress has not spoken, the result is the same." *Id.* at 767-68 (internal citations omitted). The Court again stated, in *California v. Zook*, 336 U.S. 725, 728 (1949): "Certain first principles are no longer in doubt. Whether as inference from congressional

academic commentators, including the present author,[36] have questioned this kind of conceptual justification for a negative aspect to the Commerce Clause,[37] and while Justices Scalia and Thomas of the current Court have rejected the concept of a negative aspect to the Commerce Clause,[38] the Court as an institution has consistently adhered to it, and the negative aspect of the Commerce Clause continues to operate as a discrete limitation on the exercise of state power to regulate and tax interstate commerce.

Structurally, the negative aspect of the Commerce Clause is best analyzed as a residual restriction on state power. Since Congress has plenary control over interstate commerce, the first step in any challenge to a state regulation of interstate commerce is to consider the effect, if any, of federal law on the state regulation in issue. It is possible that the state regulation has been preempted by federal law and if so, the state

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silence, or as a negative implication from the grant of power itself, when Congress has not specifically acted we have accepted the *Cooley* [Cooley v. Bd. of Wardens, 53 U.S. (12.How.) 229 (1851)] case's broad delineation of the areas of state and national power over interstate commerce." In its most recent negative Commerce Clause case, *United Haulers Association v. Oneida-Herkimer*, 550 U.S. 330, 338 (2007), Chief Justice Roberts, writing for the Court, stated simply: "Although the Constitution does not in terms limit the power of States to regulate commerce, we have long interpreted the Commerce Clause as an implicit restraint on state authority, even in the absence of a conflicting federal statute." *Id.*

36. *See, e.g.*, Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 968-82 (1985).

37. Some of the numerous other writings include: Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986). Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125; *Earl M. Maltz, How Much Regulation is Too Much? An Examination of Commerce Clause Jurisprudence*, 50 GEO. WASH. L. REV. 47 (1981); Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (1982); Martin H. Redish & Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569; Patrick C. McGinley, *Trashing the Constitution: Judicial Activism, the Dormant Commerce Clause, and the Federalism Mantra*, 71 OR. L. REV. 409 (1992); Michael A. Lawrence, *Toward a More Coherent Dormant Commerce Clause: A Proposed Unitary Framework*, 21 HARV. J.L. & PUB. POL'Y 395 (1998).

38. Justice Scalia considers the "so-called negative Commerce Clause" an "unjustified judicial expansion not to be expanded beyond its existing domain," and on *stare decisis* grounds, would accept it only as a basis for invalidating a state law that facially discriminated against interstate commerce or a state law that is indistinguishable from a type of law previously held unconstitutional by the Court. *United Haulers*, 550 U.S. at 348 (Scalia, J., concurring). Justice Thomas would go even further and would "discard the Court's negative Commerce Clause jurisprudence." *Id.* at 349. (Thomas, J., concurring in judgment).

regulation is inoperative.[39] Conversely, Congress may decide that it will exercise its power over interstate commerce in such a way as to authorize state regulation that otherwise would violate the negative aspect of the Commerce Clause.[40] The rationale here is not that Congress has the power to authorize the states to take action that violates the Constitution, which it does not. Rather, it is that the Commerce Clause is not a limitation on the exercise of Congressional power, but only on the exercise of state power. So, once there is Congressional authorization, the affirmative aspect of the Commerce Clause rather than the negative aspect controls, and the challenged state regulation is necessarily immune from constitutional challenge under the negative Commerce Clause.[41] The state regulation, of course, may be challenged as violative of the individual rights provisions of the Constitution, such as the Fourteenth Amendment's equal protection clause.[42] In *Metropolitan Life*, the Court held that a discriminatory state tax on out-of-state insurance companies, immune from negative Commerce Clause challenge due to Congressional authorization, was violative of the equal protection clause.[43] The case is of dubious value as an equal protection precedent, since, as dissent charged, the majority's analysis is very similar to a

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39. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372-73 (2000).

40. *See, e.g.,* Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 423 (1946); Northeast Bankcorp, Inc. v. Bd. of Governors of Fed. Reserve Sys., 472 U.S. 159, 175-76 (1985). In *Benjamin* and *Northeast Bankcorp*, Congress *expressly authorized* discriminatory state regulation that, in the absence of Congressional authorization, would be violative of the negative aspect of the Commerce Clause. As the Court stated in *Benjamin*: "[I]t has never been the law that what the states may do in the regulation of commerce, Congress being silent, is the full measure of [Congress'] power . . . . So to regard the matter would invert the constitutional language into a limitation upon the very power it confers." *Benjamin*, 328 U.S. at 422-23.

41. For example, as regards the authorization of discriminatory state regulation, as in *Benjamin* and *Northeast Bankcorp*, the Commerce Clause does not prohibit Congress from regulating in such a way as to discriminate against interstate commerce in favor of local commerce. This being so, Congress may set up a regulatory scheme that incorporates state regulation discriminating against interstate commerce. *Benjamin*, 328 U.S. at 432-34; *Northeast Bankcorp*, 472 U.S. at 174-75. For the view that while Congress itself may discriminate, it should be precluded from validating state laws that would otherwise violate the negative aspect of the Commerce Clause, see Norman R. Williams, *Why Congress May Not "Overrule" the Dormant Commerce Clause*, 53 U.C.L.A. L. REV. 153, 238 (2005). The Court has not drawn this distinction. Indeed, as the Court observed in *Benjamin*: "[This] broad authority Congress may exercise alone [or] in conjunction with coordinated action by the states, in which case limitations imposed for the preservation of their powers become inoperative and only those designed to forbid action altogether by any power or combination of powers in out governmental system remain effective." *Benjamin*, 328 U.S. at 434-35.

42. *See* Metropolitan Life Insurance Co. v. Ward, 470 U.S. 869, 883 (1985).

43. *Id.*

negative Commerce Clause analysis. The Court has emphasized, however, that Congress must "manifest its unambiguous intent" before a federal statute will be read to permit what would otherwise be a Negative Commerce Clause violation.[44]

In most of the cases involving constitutional challenges to state regulation of interstate commerce, there is neither preemption nor Congressional authorization, and the Court applies negative Commerce Clause doctrine to determine whether the particular regulation violates the negative Commerce Clause.

The Court's current approach to constitutional challenges to state regulation under the negative aspect of the Commerce Clause contains both a "non-discrimination" component and an "undue burden" component. In practice, however, the Court has invariably invalidated regulations that it found to be "discriminatory," but when the state regulation is truly non-discriminatory, the Court has, with few exceptions, rejected the "undue burden" challenge.[45]

It is necessary to explain further what is meant by the "non-discrimination" component of the negative Commerce Clause. The Court's articulated doctrine draws a distinction between laws that on their face discriminate against interstate commerce and laws that on their face do not. The Court has stated that, "[w]here simple economic protectionism is effected by state regulation, a virtual per se rule of invalidity has been erected."[46] Where the law is not discriminatory on its face, the Court says that it applies the *Pike* test,[47] under which the state law will be upheld "unless the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits."[48] In practice, however, where the Court finds that a purportedly neutral law has the effect of discriminating against interstate commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the Court has held the law unconstitutional. Thus, the non-discrimination component of the negative Commerce Clause includes both laws that are discriminatory on their face and laws that have a discriminatory effect on interstate commerce.

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44. Wyoming v. Oklahoma, 502 U.S. 437, 458 (1992); Hillside Dairy, Inc. v. Lyons, 539 U.S. 59, 66 (2003).

45. *See* discussion *infra* pp. 1496-1506.

46. Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

47. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

48. The Court emphasized this distinction in most recent negative Commerce Clause case. *United Haulers*, 530 U.S. at 338-39.

The reason why the Court has invariably invalidated a state regulation that it has found to discriminate against interstate commerce relates to the fact that a major historic purpose for the affirmative grant of the commerce power to Congress was to overcome the "protectionism" that had existed on the part of the states during the period between the end of the Revolutionary War and the adoption of the Constitution.[49] Since "economic protectionism" may result from state regulation that is neutral on its face but has a "protectionist" effect, the negative aspect of the Commerce Clause reaches both state regulation that discriminates against interstate commerce on its face and state regulation that in practical operation has a discriminatory effect against interstate commerce.[50]

The results of the Court's decisions under the non-discrimination component of the negative Commerce Clause may be explained as follows: where the essential effect of the regulation is to discriminate against interstate commerce or out-of-state interests in favor of local commerce or local interests because of the interstate nature of that commerce or the out-of-state nature of those interests, the regulation is violative of the negative Commerce Clause.[51]

A regulation has the essential effect of discriminating against interstate commerce or out-of-state interests in favor of local commerce or in-state interests when, on its face or in practical effect, it either (1)

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49. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 522, 527 (1935).

50. The Court has stated that where the state regulation is discriminatory on its face, the virtual per se rule of invalidity "can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." *United Haulers*, 550 U.S. at 338-39. The Court has also looked to the availability of non-discriminatory alternatives when invalidating a facially neutral law that has a discriminatory effect on interstate commerce. *See, e.g.*, Dean Milk Co. v. Madison, 340 U.S. 349, 355 (1951) (alternative means of ensuring purity of milk other than requiring that it be processed at approved facility located within five miles of city). In practice, reasonable non-discriminatory alternatives will always be available. They were not used precisely because the state or local government wanted to engage in "economic protectionism." *Id.* at 354-55. The only case where the Court has sustained a state law due to the absence of reasonable non-discriminatory alternatives is *Maine v. Taylor*, 477 U.S. 131, 151-52 (1986), where the state prohibited the importation of live baitfish that could not be shown to be free of parasites that could endanger local species of fish that were parasite free. This case is better explained as coming within the "quarantine and inspection" exception to the negative aspect of the Commerce Clause, which permits a state to bar "harmful" products from another state, such as cattle infected with bovine disease. *See* Mintz v. Baldwin, 289 U.S. 346 (1933).

51. Sedler, *The Settled Nature*, *supra* note 2, at 230. The author formulated this test over twenty years ago and submits that it continues to explain the results of the Court's decisions under the non-discrimination component of the negative Commerce Clause. Sedler, *The Negative Commerce Clause, supra* note 37, at 898.

prohibits or restricts the entry of out-of-state products into the state,[52] (2) prevents local products from leaving the state or gives local residents preferential access to local products,[53] or (3) otherwise provides an advantage to local commerce over interstate commerce.[54] To the same effect is *Toomer v. Witsell*,[55] where the Court held that a state law requiring that owners of shrimp boats licensed to fish in the state's waters unload and pack their catch in the state before shipping it to another state, was unconstitutional.

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52. *See* Lewis v. B.T. Inv. Managers, Inc., 447 U.S. 27, 53 (1980) (prohibition against out-of-state banking institutions controlling in-state investment advisory firms); Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978) (prohibition on private landfills in state receiving out-of-state waste); *Dean Milk Co.*, 340 U.S. at 354-57 (municipal law prohibiting sale of milk in city that was not processed at approved facility located within five miles of the municipality); *Baldwin*, 294 U.S. at 511 (prohibition of sale in New York of milk purchased from farmers in other states at lower prices than the New York minimum price); Granholm v. Heald, 544 U.S. 460, 465 (2005) (state regulatory scheme allowing in-state wineries to make direct sales to consumers, but prohibiting out-of-state wineries from doing so). In *Granholm*, the Court was divided over whether this type of discrimination was permitted under the Twenty-First Amendment and/or specifically authorized by federal law, with the 5-4 majority holding that it was not. *Id.* at 471, 493.

53. *See* New England Power Co. v. New Hampshire, 455 U.S. 331 (1982) (ban on exportation of hydroelectric power produced by privately-owned facilities in the state); Hughes v. Oklahoma, 441 U.S. 322 (1979) (ban on exportation of small fish caught in waters within the state); Sporhase v. Nebraska, 458 U.S. 941 (1982) (ban on exportation of ground water to adjoining states that did not grant reciprocal rights with respect to exportation of water to the state); H.P. Hood & Sons v. DuMond 326 U.S. 525 (1949) (refusal to license milk processing facility on express ground that facility would divert local milk supplies to other states).

54. *See* Hunt v. Wash. State Apple Advertising Comm'n, 432 U.S. 333 (1977). In *Hunt*, North Carolina required that all apples sold in closed containers in the state either use the grading system approved by the United States Department of Agriculture or carry a "non-graded" label. The State of Washington had developed a grading system that was considered in the industry to be superior to the Department of Agriculture grading system, and this being so, the application of the requirement to apple containers coming from Washington deprived the Washington apple growers of a competitive advantage they enjoyed because of the out-of-state origin of Washington apples. Another example of such a situation is *Pike v. Bruce Church, Inc.* 397 U.S. 137 (1970), where the Court held that an Arizona regulation requiring cantaloupe growers in Arizona to package the cantaloupes picked there in containers bearing the Arizona name and address of the packer was unconstitutional. *Id.* at 146. A packer having a packing facility across the border in California challenged the regulation, and the Court held it unconstitutional as imposing an "undue burden" on interstate commerce. *Id.* However, The Court should have more properly invalidated the regulation on "discriminatory effect" grounds, because its effect was to divert employment and business from California to Arizona. The packer necessarily would be more likely to employ Arizona workers and use Arizona suppliers if it had to maintain the packing facility in Arizona than it would if it could retain its California facility. So, the effect of the regulation was to favor in-state interests (here Arizona employees and suppliers) over out-of-state interests.

55. 334 U.S. 385 (1948).

On the other hand, if the regulation affects local commerce and in-state interests in the same way that it affects interstate commerce and out-of-state interests, it does not have a "discriminatory effect" for negative Commerce Clause purposes, although it regulates a product that is primarily destined for the interstate market. Similarly, the "discriminatory effect" must be "because of" the interstate nature of that commerce or the out-of-state nature of that interest. The fact that the regulation benefits one kind of economic interest at the expense of a different kind of economic interest does not make it "discriminatory" for negative Commerce Clause purposes, even though the economic interest benefited is primarily local while the economic interest disadvantaged is primarily interstate.[56]

The Court's most recent negative Commerce Clause case involved the question of what constitutes "discrimination" for negative Commerce Clause purposes.[57] The Court had long held the states could not bar the importation of out-of-state waste by privately-owned landfills in the state.[58] The more recent landfill cases have involved more indirect methods to prevent out-of-state waste from coming into the state, but the Court held these methods to be unconstitutional as well. They have included: imposing a higher fee for disposal at a private facility of waste generated outside the state than for disposal of waste generated inside the state;[59] a prohibition against private landfill operators accepting solid waste generated in another county within the state unless expressly authorized by the receiving county;[60] and a "flow control" law requiring that all non-recyclable solid waste generated within the town be processed at a facility built by a private contractor and operated by it for

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56. *See* Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (holding that a regulation barring the use of plastic non-refillable milk containers was constitutional, although all the producers of plastic resin are from out-of-state, while pulpwood, which is the source of paperboard non-refillable milk containers is a major in-state industry); EXXON Corp. v. Governor of Maryland, 437 U.S. 117, 128 (1978) (holding that a regulation prohibiting oil companies from also owning retail service stations, which favors retail service stations, most of which are local, over oil companies, all of which are interstate, was constitutional); Breard v. City of Alexandria, 341 U.S. 622, 640-41 (1951) (holding that a ban on door-to-door solicitation did not violate negative aspect of the Commerce Clause when it was applied to prohibit door-to-door solicitation for national magazines, since the effect of the ban was to favor local retail merchants over magazine solicitors, both local and interstate).

57. Dep't of Revenue of Ky. v. Davis, 489 U.S. 803 (2008).

58. The first case to so hold was *Philadelphia*, 437 U.S. 617.

59. Chemical Waste Mgmt. v. Hunt, 504 U.S. 334, 342 (1992); Oregon Waste System, Inc. v. Dep't of Envtl. Quality of Oregon, 511 U.S. 93, 99-100 (1994).

60. Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res., 504 U.S. 353, 362-63 (1992).

a five year period, after which the facility would be turned over to the town.[61]

In *United Haulers Ass'n v. Oneida-Herkimer*,[62] the Court again dealt with a negative Commerce Clause challenge to a "flow control" law, requiring that all solid waste in some counties be delivered to a facility owned and operated by a county waste management authority.[63] The Court was badly split. Four Justices, in an opinion by Chief Justice Roberts, took the position that because the facility was owned by a governmental body, there was no discrimination against interstate commerce for negative Commerce Clause purposes, and so the law was constitutional.[64] Two Justices took the position that there should be no negative aspect to the Commerce Clause and so voted to uphold the law.[65] Three Justices took the position that the "flow control" law did constitute discrimination for negative Commerce Clauses purposes, and so was unconstitutional.[66]

Once the Roberts plurality in *United Haulers* held that the law did not constitute discrimination for negative Commerce Clause purposes, it had no difficulty in finding that the law did not impose an undue burden on interstate commerce, noting that, "any arguable burden [on interstate commerce] does not exceed the public benefits of the ordinances."[67] The plurality's dismissive treatment of the "undue burden" challenge is in accord with the Court's institutional practice of dealing with this component of the negative Commerce Clause. While some relatively older cases invalidated particular non-discriminatory laws on "undue burden" grounds,[68] in more recent years, the Court has rejected the

61. C & A Carbone, Inc. v. Clarkstown, 511 U.S. 383, 390-91 (1994).

62. 550 U.S. 330 (2007).

63. *Id.* at 342.

64. Justices Souter, Ginsburg and Breyer joined the Roberts opinion. *Id.* at 342-47.

65. Justices Scalia and Thomas. *Id.* at 348-55.

66. Justices Alito, Stevens, and Kennedy. *Id.* at 356-71.

67. *Id.* at 346. Justice Roberts contended that so long as the law was not discriminatory for negative Commerce Clause purposes, the Court should not "rigorously scrutinize" it, just as the Court would not "rigorously scrutinize" economic legislation challenged on due process grounds. *United Haulers*, 550 U.S. at 347.

68. *See* Bibb v. Navajo Freight Lines, 359 U.S. 520, 529-30 (1959) (state law requiring that trucks be equipped with a specific kind of mudflap instead of a different kind of mudflap that was permitted in virtually all other states and was required in a neighboring state); Southern Pacific Co. v. Arizona, 325 U.S. 761, 781-82 (state law limiting the length of trains). In more recent cases where the Court invalidated state regulations affecting interstate transportation on "undue burden" grounds, the invalidated regulations also contained exemptions favoring local interests and so could have been invalidated on discrimination grounds. *See* Kassell v. Consolidated Freightways, Corp., 450 U.S. 662, 675-76(1981); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447-48 (1978). The "protectionism" effected by the regulations was a significant factor in the

"undue burden" challenge to non-discriminatory regulation affecting interstate commerce. The only exception to this practice has been with respect to state regulation found to have an "extraterritorial effect" in that it could control the conduct of entities engaged in interstate commerce in another state. The Court has held that this kind of regulation is unconstitutional as imposing an "undue burden" on interstate commerce.[69]

The constraints of the negative Commerce Clause do not apply when the state is acting as a "market participant." Thus, when the state purchases goods from suppliers or sells good produced at state-owned facilities, it can give preference to its own residents.[70] However, once the state disposes of a state-owned resource, the constraints of the negative Commerce Clause do apply, and the state cannot impose conditions on the purchaser of the resource that would require preferential access to state residents or otherwise discriminate against interstate commerce or out-of-state interests in favor of local commerce or in-state interests.[71]

We see then the primary restriction on state sovereignty imposed by the Constitution is that the states cannot engage in discrimination against interstate commerce or out-of-state interests in favor of local commerce or in-state interests. They cannot impose regulations or adopt taxation schemes that have this effect.[72] The law in this area is fairly well-settled, and future litigation, as in *United Haulers*, is likely to resolve around the question of whether the regulatory scheme is in fact discriminatory for negative Commerce Clause purposes.

The non-discrimination principle also applies to state taxation of interstate and foreign commerce. Constitutional limitations on the power

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Court's "undue burden" analysis. *See Kassell*, 450 U.S. at 675-76; *Raymond Motor Transp., Inc.*, 434 U.S. at 447-48.

69. The cases have involved attempts to control wholesale prices at which alcoholic beverages could be sold in the state by tying the in-state prices to the wholesale prices at which the distiller sells the beverages in neighboring states. *See* Healy v. Beer Inst., Inc., 491 U.S. 324, 336-37 (1989); Brown-Foreman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582-83 (1986).

70. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 440 (1980) (resident preference for cement produced by state-owned cement plant); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 805-06 (1976) (eligibility requirements for state subsidy for recycling automobile hulks favoring state residents). *See also* White v. Mass. Council of Constr. Employers, Inc., 460 U.S. 204, 214-15 (1982) (upholding against negative Commerce Clause challenge a municipality's rule requiring that contractors on municipally-funded projects employ at least fifty percent municipality residents in their work force).

71. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87-88 (1984) (requirement that purchaser of state owned timber must saw timber in state before shipping it in interstate commerce violated negative Commerce Clause).

72. *See id.*

of the states to tax interstate and foreign commerce derive from both the negative aspect of the Commerce Clause and from the Fourteenth Amendment's due process clause. In addition, Article I, Section 10 of the Constitution prohibits the states, without the consent of Congress, from taxing imports or exports.[73] In *Complete Auto Transit, Inc. v. Brady*,[74] the Supreme Court adopted a combined negative Commerce Clause-due process approach to the constitutional permissibility of such taxation, now referred to as the "*Complete Auto* four-prong test."[75] This approach is a pragmatic one, designed to take into account the realities of interstate and international business operations and the legitimate needs of the states to obtain revenue from multistate and multinational corporations that do business within their borders.[76] Under the *Complete Auto* test, state taxation of interstate and foreign commerce is constitutionally permissible if all of the following four elements are satisfied: (1) the tax is applied to an activity having a substantial nexus with the taxing state; (2) the tax is fairly apportioned to that activity; (3) the tax does not discriminate against interstate or foreign commerce; and (4) the tax is fairly related to services provided by the state.[77]

It is only the third element of the test, the prohibition of discrimination against interstate or foreign commerce, that is based on federalism considerations rather than on the constitutional protection of individual rights. What constitutes discriminatory taxation for negative Commerce Clause purposes is determined by the same standard that is used to determine when state regulation of interstate or foreign commerce is impermissibly discriminatory, where a state taxation

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73. The purpose of the import-export clause was to provide the federal government with a reliable source of tax revenue by enabling it to tax imports and ensuring that this source of revenue would not be eroded by overlapping state taxation. Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-86 (1976).

74. 430 U.S. 274 (1977).

75. *See, e.g.*, Quill Corp. v. N.D. By and Through Hetikamp, 504 U.S. 298 (1992).

76. *See id.*

77. In *Michelin Tire Corp.*, 423 U.S. at 278-79, the Court held that the import-export restriction prohibited only discriminatory state taxation. The import-export restriction thus does not apply to prevent the states from imposing general taxes on goods produced in the state, notwithstanding that the goods may be destined for foreign export, or to impose general taxes on goods that have been imported into the state from a foreign country. *Id.* Earlier cases holding that imports could not be taxed so long as they remained in the "original package" were overruled in *Michelin Tire*. *Id.* at 296-300. Thus, a state may impose its general property tax on imported goods to be used in the importer's factory in the state. Limbach v. Hooven & Allison Co., 466 U.S. 353, 363 (1984). Likewise, it may impose a non-discriminatory ad valorem tax on imported tobacco stored under bond in a customs warehouse and destined for domestic manufacture and sale. R.J. Reynolds Tobacco Co. v. Durham County, N.C., 479 U.S. 130, 152 (1986).

scheme, expressly or in practical operation, has the effect of discriminating against interstate or foreign commerce or out-of-state interests in favor of local commerce or in-state interests because of the interstate or foreign nature of that commerce or the out-of-state nature or foreign nature of those interests, it violates the negative aspect of the Commerce Clause. The Court has invalidated a number of state taxation schemes on this basis.[78] However, as with state regulation affecting interstate commerce, if the tax applies equally to in-state and out-state consumers, it is not discriminatory, although most of the product is shipped out-of-state.[79] On the other hand, where the tax is imposed on an

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78. *See* South Central Bell Telephone Co. v. Alabama, 526 U.S. 160, 169 (1999) (franchise tax based on corporation's capital, but allowing in-state corporation to pay tax based on par value of stock, which can be set by corporation, while requiring out-of-state corporation to pay tax based upon the value of the actual amount of capital it employs in the state); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575-76 (1997) (property tax exemption for charitable institutions except for those operated primarily for benefit of non-residents); Gen. Motors Corp. v. Tracy, 519 U.S. 278, 303-04 (1997) (sales and use taxes on natural gas purchases except for purchases from in-state regulated utilities); Fulton Corp. v. Faulkner, 516 U.S. 325, 333-34 (1996) (intangibles tax on value of corporate stock owned by state residents that was inversely proportional to the amount of state income tax paid by the corporation, so that the larger the percentage of a corporation's business conducted in the state, the smaller the amount of the intangibles tax); Or. Waste Sys., Inc. v. Dep't of Envtl. Quality, 511 U.S. 93, 102 (1994) (per ton surcharge for disposal at site in state of waste generated out-of-state); Assoc. Indus. of Mo. v. Lohman, 511 U.S. 641, 648-49 (1994) (local use tax on out-of-state purchases by state residents that was higher than corresponding amount of the intangibles tax); Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue, 505 U.S. 71, 79 (1992) (allowance of income tax credit to corporation for dividends received from domestic subsidiaries, but not from foreign subsidiaries); New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 274 (1986) (motor fuel tax credit for each gallon of fuel containing ethanol, which was limited to ethanol produced in the state or in another state that granted reciprocal tax credit for ethanol produced in taxing state); Bacchus Imports v. Dias, 468 U.S. 263, 269 (1984) (exemption of certain locally produced beverages from excise tax imposed on wholesale liquor sales); ARMCO, Inc. v. Hardesty, 467 U.S. 638, 642 (1984) (exemption of locally manufactured goods from gross receipts tax notwithstanding that local manufacturers were subject to higher manufacturing tax); Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 403-04 (1984) (allowance of a corporate tax credit on accumulated income of a subsidiary domestic international sales corporation, but not on accumulated income of a subsidiary nondomestic international sales corporation); Maryland v. Louisiana, 451 U.S. 725, 749-50 (1981) ("first use" tax on natural gas brought into the state that contained various credits and exclusions, the effect of which would be to encourage the use and production of natural gas in the state rather than in other states); Boston Stock Exch. v. State Tax Comm'n, 429 U.S. 318, 330 (1977) (stock transfer tax which imposed a greater tax liability on out-of-state sales than on in-state sales).

79. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). There the state had imposed a severance tax on all coal mined in the state, ninety percent of which was shipped out of state. *Id.* at 617. Similarly, in the more recent case of *American Trucking*

industry, such as the dairy industry, but the proceeds of the tax are earmarked and used to provide a subsidy to local milk producers, the combination of earmarking and subsidization of local industry constitutes discrimination against interstate commerce and is unconstitutional.[80]

The Court's most recent decision dealing with discriminatory taxation saw a divided Court upholding a state taxation structure that exempted interest on bonds issued by the state and its subdivisions from the state income tax, while taxing interest income on bonds from other states and their subdivisions.[81] Justice Souter, joined on this point by Justices Ginsburg, Breyer and Roberts, took the position that the state's preference for state-issued governmental bonds involved a governmental function and so did not violate the non-discrimination principle of the negative Commerce Clause.[82] Justice Stevens, who dissented in *United Haulers*, saw this case as involving a "pure" governmental function, and so concurred in the result.[83] Justices Scalia and Thomas took the same position they did in *United Haulers*, to the effect that there should be no negative aspect to the Commerce Clause and so voted to uphold the tax preference.[84] Justices Kennedy and Alito dissented.[85]

Where a state tax falls exclusively on foreign companies, there is the concern that the state tax may constitute an improper interference with federal power over foreign affairs. In *Japan Lines, Ltd. v. Los Angeles*

Ass'n, Inc. v. Michigan Public Service Commission, 545 U.S. 429, 434 (2005), the Court held that Michigan's imposition of a flat annual fee on all trucks hauling goods between one point in Michigan and another could constitutionally be applied to trucking companies engaged in interstate commerce.

80. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 195-96 (1994) (tax on all sales of milk by wholesalers to retailers, the proceeds of which funded a subsidy to local milk producers). Although the Supreme Court has never dealt specifically with the issue, it has been assumed that a state can constitutionally provide subsidies out of general revenues to local businesses in order to promote business activity within the state. In *West Lynn*, Justice Stevens, writing for the Court, stated: "We have never squarely confronted the constitutionality of subsidies, and we need not do so now. We have, however, noted that 'direct subsidization of domestic industry does not ordinarily run' afoul of the negative Commerce Clause." *Id.* at 199 n.15 (internal citations omitted).

81. *Davis*, 128 S. Ct. 1801, 1810-12.

82. *Id.* at 1819-20. On this point, Justice Souter saw the preference here as involving a traditional governmental function in the same manner as the flow control ordinances upheld in *United Haulers*. *Id.* at 1811. Chief Justice Roberts, who authored the opinion in *United Haulers*, said that case was controlling here. *Id.* at 1821, 1819-20. Justice Souter, joined on this point only by Justices Ginsburg and Breyer, also contended that the preference could be sustained on the "market participant" ground. *Id.* at 1811-17.

83. *Id.* at 1819-20.

84. *Davis*, 128 Sup. Ct. at 1821-22.

85. *Id.* at 1822.

County,[86] the Court held unconstitutional on negative Commerce Clause grounds California's attempt to impose a property tax on the cargo containers of Japanese companies that were used exclusively in international trade and which were based, registered, and subject to full value property taxes in Japan.[87] The Court discussed the "international complications" that could result from state taxes on instrumentalities of foreign commerce, and observed that such taxes could "impair federal uniformity in an area in which federal uniformity is essential" and could "prevent the federal government from 'speaking with one voice' in international trade."[88] The Court also assumed that the tax, which was non-discriminatory, would be constitutional in its application to instrumentalities of interstate commerce, but went on to say that negative Commerce Clause analysis operated differently where foreign commerce was involved.[89] The Court noted that where foreign commerce was involved, there was no "authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value," so that foreign commerce might be subjected to the risk of a double tax burden to which domestic commerce was not exposed.[90] For these reasons, I think that the case is better explained on the basis of improper interference with the federal government's control over foreign affairs.

The Court's subsequent decision in *Itel Containers International Corp. v. Huddleston*[91] supports the improper interference with foreign affairs basis of *Japan Lines*. In *Itel*, the Court upheld against negative Commerce Clause and federal supremacy challenge a state's application of its general sales tax to leases of containers owned by a domestic company and used in international shipping.[92] It was significant that here a domestic company was involved, that the state credited against the tax any tax paid in another jurisdiction, foreign or domestic, and that the United States filed an amicus brief, defending the application of the tax.

The decision in *Japan Lines*, as I have explained it, is an example of another limited restriction on state sovereignty imposed by the Constitution. State regulation affecting foreign commerce or other foreign matters may be subject to constitutional challenge as an improper interference with federal power over foreign affairs. A party is likely to assert such a challenge where the state action is not inconsistent with a

86. 441 U.S. 434 (1979).
87. *Id.* at 453-54.
88. *Id.* at 448, 453.
89. *Id.* at 451-52.
90. *Id.* at 447-48.
91. 507 U.S. 60 (1992).
92. *Id.* at 76-78. The Court also rejected the company's argument that the imposition of the tax violated container treaties into which the United States had entered. *Id.* at 75.

federal treaty and is not preempted by federal law. The imposition of the cargo tax on the containers of the Japanese companies in *Japan Lines* could only be challenged on this basis, because there could be no claim of a treaty violation or federal preemption.

The Court has held that federal power over foreign affairs dictates that what is considered an "act of state" under federal law must be recognized as such by state courts in litigation coming before them.[93] Likewise, state laws providing for the forfeiture of an alien heir's share of a decedent's estate, where the alien heir's home state would not allow American citizens reciprocal rights of inheritance, have been invalidated by the Court as "an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress."[94] In two more recent cases, the Court again invoked this principle to invalidate the challenged state laws. In *Crosby v. National Foreign Trade Council*,[95] the Court held that a Massachusetts law restricting the authority of state agencies to purchase goods or services from companies doing business with Myanmar was an unconstitutional interference with the power of the federal government over foreign affairs and conflicted with a federal law imposing sanctions on Myanmar.[96] And in *American Insurance Ass'n v. Garamendi*,[97] the Court held that a California law requiring insurance companies doing business in the state to disclose information about all insurance policies sold by the company or one related to it in Europe between 1920 and 1945, interfered with the President's efforts to resolve Holocaust-era insurance claims by encouraging European governments and insurance companies to make voluntary settlements.[98]

My discussion about constitutional limitations on state sovereignty should make it clear that these limitations, while important, are precisely defined, and do not undercut the overriding American federalism feature of concurrent power nor the basic proposition that the states have plenary power over all activity that takes place within their boundaries.

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93. Bancio Nacional de Cuba v. Sabbatino, 376 U.S. 398, 436-37 (1964). In that case the Court held that under the federal definition of the "act of state" doctrine, the Cuban government's expropriation of American property in Cuba would be recognized, so that a state court was compelled to recognize the validity of that expropriation in a suit in which the effect of the expropriation was in issue. *Id.* at 439.

94. Zschernig v. Miller, 389 U.S. 429, 432 (1968).

95. 530 U.S. 363 (2000)

96. *Id.* at 373-74.

97. 539 U.S. 396 (2003).

98. *Id.* at 419-20.

III. THE POWERS OF THE FEDERAL GOVERNMENT

While in constitutional theory the powers of the federal government are only those enumerated in the Constitution, it has long been the case that the Court, when construing those powers, particularly the power of Congress over interstate and foreign commerce, has done so very broadly. The result today is that, as a constitutional matter, virtually any activity is subject to federal regulation. I will now proceed to analyze the components of federal power.[99]

At the outset, it should be noted that even within the concept of enumerated powers, there are principles favoring the expansion of federal power. First, it was long ago settled in the classic case of *McCulloch v. Maryland*,[100] that under the necessary and proper clause, Congress can rely on a combination of powers to do something that is not specifically authorized by any single power. In that case, the Court held that although Congress was not specifically authorized in Article I, Section 8, to charter a Bank of the United States, Congress had the implied power to do so by putting together certain enumerated powers, such as the power to tax and spend, the power to wage war, and the power to regulate interstate and foreign commerce.[101] Second, all of the enumerated powers of Congress are independent powers that, interacting with the necessary and proper clause, furnish the authority for whatever action Congress takes under that power.[102] So, when Congress enters into a treaty with a foreign country, the treaty power will support any law executed to carry out the provisions of the treaty, regardless of whether Congress would have the power to enact the law in the absence of the treaty.[103] Likewise, under its war powers, Congress can deal with domestic problems created by the war, such as the need for price controls, and this power continues so long as the problem remains, even

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99. I will do so from the perspective of determining the *existence* of federal power. In the part of the Article dealing with issues involving the relationship between the federal government and the states—what I would call true "states rights" issues—I will discuss federal preemption, the regulation of the "states as states" by Congress, and the constraints of the Eleventh Amendment.

100. 17 U.S. 316 (1819).

101. *Id.* at 353-54.

102. *Id.*

103. Missouri v. Holland, 252 U.S. 416, 433-34 (1920). Pursuant to a treaty with Canada involving the protection of migratory birds, Congress enacted implementing legislation. At that time it was questionable whether the Court would uphold the law as a proper exercise of the commerce power, but since the law was tied to the treaty power, it did not matter whether the legislation would be valid in the absence of the treaty. *Id.* at 432.

though the war has ended.[104] And pursuant to its power over foreign affairs, Congress may, either by the legislation itself or by authorization of the President to do so, take action that directly affects domestic matters.[105] Finally, the question of the existence of federal power relates to whether the power is granted to the federal government as a whole rather than to a particular branch of the federal government. Thus, since admiralty and jurisdiction is granted to the federal courts under Article III, admiralty and maritime matters are within the power of the federal government, and Congress has the power to legislate with respect to such matters.[106] The Thirteenth, Fourteenth, and Fifteenth Amendments give Congress the power to enforce the substantive provisions of those amendments "by appropriate legislation." Similar authorization is contained in the Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments. Since the Thirteenth Amendment does not contain any state action requirement, Congress may use its enforcement power under section 2 of the Thirteenth Amendment enforcement power to prohibit racial and ethnic discrimination by private persons.[107]

I will now consider the sweep of Congress' power over interstate and foreign commerce. The two bases of the affirmative commerce power are those of interstate movement and affecting interstate commerce. Under the interstate movement basis of the commerce power, Congress has the complete power to regulate the interstate movement of persons or things, to follow the person or thing across state lines, and to regulate the channels and instrumentalities of interstate commerce. Where interstate

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104. *See* Yakus v. United States, 321 U.S. 414 (1944); Woods v. Cloyd W. Miller Co., 333 U.S. 138 (1948).

105. *See* Dames & Moore v. Regan, 453 U.S. 654, 678-79 (1981), where the President, pursuant to Congressional authorization, entered into an agreement with Iran to secure the release of American hostages. The agreement provided for the termination of all litigation between the government of Iran and American nationals and for the settlement of pending claims through binding arbitration before a tribunal established under the agreement. *Id.* at 669. The agreement also nullified all prejudgment attachments against Iran's assets in actions against Iran in American courts, and ordered transfer to Iran of all of its assets in American banks except for one billion dollars to cover awards against Iran by the claims tribunal. *Id.* at 670.

106. Panama R. Co. v. Johnson, 264 U.S. 375, 386-88 (1924). There the Court upheld Congress' power to enact a law increasing the rights of injured seamen. *Id.* at 388. Based on the grant of jurisdiction to the federal courts in admiralty cases, Congress has the power to enact rules for admiralty and maritime cases and make those rules binding on the states. *See Ex parte* Garnett, 141 U.S. 1, 12-13 (1891) (upholding Congressional limitations on liability in admiralty cases).

107. *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Griffin v. Breckenridge, 403 U.S. 88 (1971); Runyon v. McCrary, 427 U.S. 160 (1976); Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987); Shaare Tefila Congregation v. Cobb, 481 U.S. 615 (1987).

movement is involved, the commerce power thus serves as a national police power.[108] The extent of Congress' power to regulate the channels and instrumentalities of interstate commerce is illustrated by *Pierce County, Washington v. Guillen*,[109] where the Court upheld a federal law protecting from discovery or introduction into evidence any reports or data compiled and collected by state agencies to identify potential accident sites or hazardous roadway conditions.[110]

Under the affecting interstate commerce basis of the commerce power, Congress can regulate all economic activity, no matter how "local," on the premise that any local activity, when viewed cumulatively, exerts a substantial economic effect on interstate commerce.[111] In regard to economic activity then, Congress has the plenary power to regulate the national economy.

The Court has never questioned Congress' plenary power under the Commerce Clause to regulate all interstate movement and all economic activity.[112] There is currently some controversy on the Court and among

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108. A good example of the sweep of Congress' power under the interstate movement basis of the commerce power is *Barrett v. United States*, 423 U.S. 212 (1976), which upheld the power of Congress to make it unlawful for a person who has been convicted of a felony to purchase a firearm that has moved in interstate commerce. *Id.* at 215-16. Similarly, with respect to following the person or thing across state lines after interstate commerce has come to an end, see United States v. Sullivan, 332 U.S. 689 (1948) (upholding Congress' power to require that a retailer display federally-mandated labels on goods that have moved in interstate commerce, although the retailer purchased the goods from an in-state wholesaler). A number of ordinary crimes, such as kidnapping and auto theft, are made federal crimes when there has been a crossing of state lines in connection with the crime. Some examples are: kidnapping, Lindbergh Act of 1932, 18 U.S.C. § 408a (1940) (current version at 18 U.S.C. § 1201 (2000)); Gooch v. United States, 297 U.S. 124 (1936); auto theft, Dwyer Act of 1919, 18 U.S.C. § 408 (1940) (current version at 18 U.S.C. § 2312 (2000)); Brooks v. United States, 267 U.S. 432 (1936). Similarly, under the interstate movement basis of the commerce power, Congress can exclude from interstate commerce any activity that it considers to be harmful. *See* The Lottery Case, 188 U.S. 321, 356 (1903) (lotteries); Kentucky Whip & Collar Co. v. Ill. Cent. R. Co., 299 U.S. 334, 345-46 (1937) (goods produced by prison inmates); United States v. Darby, 312 U.S. 100, 114 (1941) (goods produced under sub-standard labor conditions).

109. 537 U.S. 129 (2003).

110. *Id.* at 147-48.

111. *See, e.g.*, Perez v. United States, 402 U.S. 146, 155-56 (1971) (prohibiting "extortionate extension of credit" in purely local activities because of dependence nationally of organized crime on revenues derived from this activity); Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 298 (1981) (regulating surface coal mining within each state); Wickard v. Filburn, 317 U.S. 111, 127-28 (1942) (regulating production of homegrown wheat used for feeding of livestock, since wheat grown on a large number of farms for livestock feed could have a nationwide effect on wheat prices).

112. Sedler, *The Settled Nature*, *supra* note 2, at 221.

academic commentators about the scope of the commerce power in the situation where Congress uses the affecting interstate commerce basis of the commerce power to regulate purely local *non-economic* activity, such as the possession of firearms near a school,[113] or acts of domestic violence occurring within a single state.[114] Here, a majority of the Court demanded that Congress demonstrate that in fact the activity in question had a substantial economic effect on interstate commerce,[115] and in these two cases, the Court has invalidated the challenged regulations as being beyond the commerce power.[116]

The situation where Congress attempts to use the commerce power to regulate purely local non-economic activity would seem to be fairly limited. Most laws enacted under the commerce power, either regulate only economic activity,[117] or apply only to non-economic activity that has crossed state lines.[118] This being so, any limitation on the power of Congress to regulate purely local non-economic activity under the affecting interstate commerce basis of the commerce power would only operate on the commerce power at the periphery and would not alter significantly the sweeping nature of this power.

Moreover, the Court's latest decision involving the power of Congress to regulate interstate commerce appears to limit the holdings of the two earlier cases to little more than their particular facts. In *Gonzales v. Raich*,[119] the Court held 6-3 that Congress had the power to apply the Controlled Substances Act[120] to prohibit the local cultivation and use of marijuana for medical purposes, even though authorized by state law.[121] The opinion for the Court by Justice Stevens took a broad view of

113. *See Lopez*, 514 U.S. 549.

114. *See Morrison*, 529 U.S. at 609.

115. *See Lopez*, 514 U.S. at 563; *Morrison*, 529 U.S. at 614.

116. *See Lopez*, 514 U.S. at 561; *Morrison*, 529 U.S. at 609.

117. It is on this basis that lower courts have upheld Congress' power to protect access to local abortion clinics under the Access to Clinic Entrances Act, 18 U.S.C. § 248 (2000). *See, e.g.*, United States *v.* Gregg, 226 F.3d 253 (3d Cir. 2000), *cert. denied,* 532 U.S. 971 (2001).

118. The criminal provision of the Violence Against Women Act, 18 U.S.C. § 2261(a)(1) (2000), punishes "interstate crimes of abuse including crimes committed against spouses or intimate partners during interstate travel and crimes committed by spouses or intimate partners who cross State lines to continue the abuse." *See* S. REP. NO. 103-138, at 43 (1993). In *Morrison*, the Court noted that the Courts of Appeals have "uniformly upheld th[e] criminal sanction as an appropriate exercise of Congress' Commerce Clause authority" as "regulat[ing] the use of channels of interstate commerce." *Morrison,* 529 U.S. at 613 n.5 (citing the cases collected in United States v. Lankford, 196 F.3d 563, 571-72 (5th Cir. 1999)).

119. 545 U.S. 1 (2005).

120. 21 U.S.C. §§ 801-904 (2000).

121. *Gonzales*, 545 U.S. at 32, 33.

"economic effect" for Commerce Clause purposes, saying that Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would affect price and market conditions and that high demand in the interstate market would draw home-grown marijuana into that market.[122] He also made the point that where Congress is regulating a class of activities, such as marijuana use, and the class of activities is within the reach of federal power, the Court would not "excise individual components of that larger scheme."[123] In his concurring opinion, Justice Scalia made the point that Congress has regulatory authority over purely local activities that may not in themselves substantially affect interstate commerce if those local activities are "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated."[124] In other words, according to Scalia, since Congress could regulate the production and use of marijuana as a whole, it could regulate any local use of marijuana without specifically tying that local use to the national regulation of marijuana. The decision in *Gonzales v. Raich* makes it clear that there will be virtually no limitation on the otherwise plenary power of Congress to regulate interstate commerce.

Congress also has broad powers under the taxing and spending clause,[125] and may use the taxation and spending power to establish social welfare programs and to accomplish regulatory objectives. Pursuant to the taxing and spending power, Congress has established the Social Security program[126] and enacted a comprehensive system of regulation of narcotic drugs.[127] Congress may also use the taxing and

122. *See id.* at 18-21.

123. *See id.* at 22. Since federal law prohibited the growing of marijuana for personal use, including medical use, federal law controlled as a matter of federal supremacy, and it did not matter that the use of marijuana for medical purposes was authorized by state law.

124. *See id.* at 36 (Scalia, J., concurring) (quoting *Lopez*, 514 U.S. at 561).

125. *See* U.S. CONST. art. I, § 8, cl. 1. (granting Congress the power "[t]o lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the commence Defence and general Welfare of the United States").

126. *See* Steward Mach. Co. v. Davis, 301 U.S. 548, 588-89 (1937); Helvering v. Davis, 301 U.S. 619, 640 (1937). Although Social Security has been politically marketed as a form of social insurance, by which people pay in premiums and receive benefits when they retire or become disabled, as a constitutional matter, Social Security is a tax imposed on wage-earners and employers, the proceeds of which are used to pay social welfare benefits. *See* discussion in *Steward Mach. Co.*, 301 U.S. at 578-98. Social Security does not operate on standard insurance principles, and there is no constitutional entitlement to social security benefits. *See* Califano v. Jobst, 434 U.S. 47 (1977).

127. *See* United States v. Doremus, 249 U.S. 86, 93 (1919). The current use of the taxation power to regulate narcotic drugs is contained in the Controlled Substances Act, 26 U.S.C.A. §§ 801-904 (West 2009).

spending power to make it a crime to bribe a state or local official whose government agency has received federal funds.[128] And as we will see in the next section, when Congress exercises the spending power, it may impose requirements on the states as a condition for the receipt of federal benefits that it could not impose on the states if it were acting as regulator.[129]

We have demonstrated then that because the powers of the federal government have been construed so broadly, today, as a constitutional matter, virtually any activity is subject to federal regulation. At the same time, because of the principle of state sovereignty, the fact that an activity is subject to federal regulation does not as such preclude state regulation of the same activity. State regulation of an activity is precluded only when Congress has acted to preempt state regulation, and as we will see in the next section, when dealing with preemption both Congress and the courts have tried to strike a balance between the principle of federal supremacy and the principle of state sovereignty, with the result that federal preemption has not substantially altered the concurrent power feature of the American federal system.

It is for this reason that issues as to the existence of federal power do not as such raise "states rights" concerns. "States rights" concerns involve congressional regulation of the "states as states," federal preemption of state law, and federalism-based restrictions on state power, such as those contained in the negative Commerce Clause. These concerns relate to the relationship between the federal government and the states, to which we now turn.

IV. THE RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE STATES

The relationship between the federal government and the states is the most complex part of the American federal system. This is because the relationship between the federal government and the states implicates both the principle of state sovereignty and the principle of federal supremacy and impacts significantly on the dominant American federalism system's feature of concurrent power. Our discussion will cover the following areas: (1) intergovernmental immunities, regulation of the "states as states," and cooperative arrangements; (2) federal preemption; and (3) federalism-based limitations on federal judicial power.

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128. *See* Sabri v. United States, 541 U.S. 600, 605-06 (2004).

129. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987).

A. Intergovernmental Immunities, Regulation of the "States as States," and Cooperative Arrangements

Because both the federal government and the states are sovereign in the American constitutional system, it follows that the Constitution imposes certain limits on the ability of each sovereign to interfere with the operations of the other sovereign. However, the concept of intergovernmental immunity operates in relation to the principle of federal supremacy. What this means in the final analysis is that the states cannot in any way interfere with the operations of the federal government, but that the federal government may, to a very considerable degree, apply its laws to the "states as states."

It has long been decided, going back to *McCulloch v. Maryland*,[130] that the states cannot impose a tax on any instrumentality of the federal government, such as a federally-chartered bank,[131] or otherwise directly interfere with the operations of the federal government.[132] However, principles of federal supremacy do not preclude the states from imposing a non-discriminatory income tax on federal employees,[133] nor do considerations of state sovereignty preclude the federal government from imposing a non-discriminatory income tax on state employees.[134] When it comes to the imposition of federal taxes on activities operated by the state governments, the constitutional situation is not as clear. It is not disputed that the federal government could not constitutionally impose a tax on state revenues or on an "instrumentality" of the state government. However, state governments carry on a lot of activities, including some of a proprietary nature that are no different from activities carried on by private entities. The Supreme Court has upheld the imposition of a federal excise tax on a state's sale of mineral waters bottled and sold by the state to provide funds for a state health resort.[135] The Court has also

130. 17 U.S. 316 (1819).

131. *Id.* at 330.

132. *Id.* at 322.

133. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1938).

134. Helvering v. Gerhardt, 304 U.S. 405, 419-20 (1938). The Court's decisions in this area were codified in the Public Salary Tax Act of 1939, 4 U.S.C.A. § 111 (West 2000). *See* discussion in Jefferson County, Alabama v. Acker, 527 U.S. 423, 424-25 (1999). In *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 817 (1989), the Court held that a Michigan taxation scheme that excluded the retirement pay of state and local governmental employees, but not federal employees, violated the constitutional principle of intergovernmental tax immunity and was not authorized by 4 U.S.C.A. § 111. In *Jefferson County*, the Court held that an "occupational tax," calculated on a percentage of the income of persons working within a county, was a nondiscriminatory tax that could be levied on federal judges. *Jefferson County*, 527 U.S. at 443.

135. New York v. United States, 326 U.S. 572, 575 (1946).

upheld the application to airplanes owned by a state police force of a federal registration tax on all civil aircraft, imposed to defray the cost of federal air navigational facilities and services.[136] For the most part, however, Congress has not sought to apply federal tax law to activities operated by the state governments, and it is recognized that the power of Congress to do so is clearly subject to some constitutional limitations.

When it comes to the power of Congress to apply federal regulatory laws to state and municipal governmental regulations, the Court, after some going back and forth on this issue in the 1970s, has squarely held that Congress may use the commerce power to "regulate the states as states," and so, for example, can impose federal wage and hour regulations on state and local governments.[137] In *League of Cities* and *Garcia*, the Court had rejected the state's claim that the state activity in question could not be regulated by Congress.[138] The only limitation on Congress's power to "regulate the states as states" is that Congress may not compel the states to regulate in a non-preemptable field in accordance with federal standards.[139]

B. Federal Preemption

As I have noted in an earlier piece, "[i]n practice, it is the matter of federal preemption of state law that has the most potential for expanding federal power over state power and altering the concurrent power feature of the American federal system."[140] Federal preemption necessarily involves the interaction between the principle of federal supremacy and the principle of state sovereignty. It is fair to say that both Congress, in specifically dealing with preemption in the laws it enacts, and the Court,

136. Massachusetts v. United States, 435 U.S. 444, 461 (1978).

137. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 555-56 (1985). As to the imposition of other federal regulations on the states, see *South Carolina v. Baker*, 485 U.S. 505, 512-513 (1988); Reno v. Condon, 528 U.S. 141 (2000). In *Garcia,* the Court overruled *National League of Cities Usery*, 426 U.S. 833, 851 (1976) (invalidating the application of these laws to state and local governments, and overruling the earlier case of *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

138. *See, e.g.*, United Transportation. Union v. Long Island R.R., 455 U.S. 678, 685 (1982).

139. *See* New York v. United States, 505 U.S. 144, 166 (1992); Printz v. United States, 521 U.S. 898, 924 (1997). Congress may require the states to regulate in accordance with federal standards as a condition to the continuance of state regulation in a preemptible field. *See* Federal Energy Comm'n v. Mississippi, 456 U.S. 742, 754-55 (1982); South Carolina v. Baker, 485 U.S. 505, 526-27 (1988). Congress also has broad authority to condition the grant of federal funds to the states on their compliance with federal policies. *See* South Dakota v. Dole, 483 U.S. 203, 206 (1987).

140. Sedler, *The Settled Nature*, *supra* note 2, at 225 (2002).

when deciding questions of preemption, have tried to strike a balance between these principles, with the result that federal preemption has not substantially altered the concurrent power feature of the American federal system.[141] A basic premise of preemption doctrine is that the question is informed by "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."[142] However, as we will see, in a number of cases, the Court has found Congressional intent to preempt the particular state law or regulation in question, but in a number of other cases, it has found against preemption.

Congress may expressly deal with the matter of preemption in the legislation itself. It may include a "savings clause," authorizing state regulation that does not conflict with the federal law or authorizing the states to impose even more extensive regulation than has been provided under the federal law.[143] More typically, Congress establishes a standard of preemption in the legislation. When Congress has done so, the courts must apply that standard according to its terms in order to determine whether a particular state law that affects the area in which Congress has legislated has been preempted by the federal law.[144] By far the largest number of the preemption cases that arise in practice involve application of the congressional standard of preemption to a particular state law. In these cases, the Court applies the congressional standard very carefully in an apparent effort to avoid preemption where it is possible to do so, but at the same time, the Court does not hesitate to find preemption where it is clearly called for under the congressional standard. We will consider a number of examples.

A case that illustrates the Court's very careful application of the federal standard of preemption is *Cipollone v. Liggett Group, Inc.*,[145] dealing with state tort law claims brought by cigarette smokers against the tobacco companies. The Public Health Cigarette Smoking Act of

141. *Id.*

142. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

143. See, for example, the "savings clause" contained in the Securities Exchange Act of 1934, 15 U.S.C.A. § 78bb(a) (West 2000) ("[N]othing in this chapter shall affect the jurisdiction of the securities commission of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder."), and that contained in the Civil Rights Act of 1964, 42 U.S.C.A. § 2000-4 (West 1994) ("Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.").

144. Sedler, *The Settled Nature*, *supra* note 2, at 225.

145. 505 U.S. 504 (1992).

1969[146] imposed federal warning requirements on cigarette advertising, and provided that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarette the packages of which are labeled in conformity with the provisions of this Chapter."[147] The plaintiffs in *Cipollone* alleged a number of theories of liability.[148] The Court, focusing on the operative language, "requirement or prohibition . . . with respect to . . . advertising or promotion," held that this provision preempted state law claims based on a failure to adequately warn of the dangers of smoking,[149] and those based on advertising that allegedly "neutralized" the effect of the federally-mandated warning labels,[150] but did not preempt claims based on breach of an express warranty[151] or claims based on intentional fraud or on a conspiracy theory.[152] However, when the State of Massachusetts tried to prevent cigarette advertising directed at children by prohibiting any outdoor advertising of tobacco products with a 1000 foot radius of any public playground, playground area in a public park, elementary school or secondary school, and also regulated advertising in retail stores selling cigarettes, the Court found that Congress intended to preempt *all* state cigarette advertising regulations motivated by concerns about smoking and health, including those regulating only the location of the advertisement.[153]

Sometimes, the federal standard of preemption is very broad, such as the standard contained in the Employee Retirement Income Security Act of 1974 (ERISA).[154] In this Act, Congress enacted a comprehensive regulation of employee benefit plans, imposing participation, funding and vesting requirements.[155] As a part of this regulatory scheme, Congress set out a broad standard of preemption, providing that, with limited exceptions, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described [in the law]."[156] Applying this broad standard of preemption, the Court has held that ERISA preempted a state common law rule that

146. 15 U.S.C.A. §§ 1331-40 (West 2000).
147. 15 U.S.C.A. § 1334(b) (West 2000).
148. *Cipollone*, 504 U.S. at 509.
149. *Id.* at 524.
150. *Id.* at 506.
151. *Id.* at 525-26.
152. *Id.* at 506.
153. Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 547-48 (2001).
154. 29 U.S.C.A. § 1144(a) (West 2000).
155. Employee Retirement Income Act of 1974, 29 U.S.C.A. §§ 1001-1461 (West 2000).
156. 29 U.S.C.A. § 1444(a) (West 2000).

would impose liability on an employer for discharging an employee in order to prevent him from receiving benefits under a plan covered by ERISA.[157] The Court has also held that ERISA preempted a provision of a state community property law that allowed a spouse to make a testamentary disposition of her interest in the other spouse's undistributed pension benefits.[158] Similarly, the Court has held that ERISA preempted a state law providing for automatic revocation upon divorce of any designation of the divorced spouse as beneficiary of an asset that was not subject to probate,[159] and that ERISA preempted a state law allowing a suit for damages against a health maintenance organization that provided benefits under an employer's health insurance plan.[160] But even under this very broad standard, the Court held that ERISA did not preempt a state law setting wage rates for apprentices employed on public works projects, saying that Congress did not intend to reach this area .[161]

There is an exception to ERISA preemption for state laws "regulating insurance." The Court has held that a state's "notice prejudice" rule, under which an insurer must show that it was prejudiced by an untimely proof of claim in order to avoid liability, was a law "regulating insurance" within the meaning of the ERISA exception, and so was not preempted.[162] In the same case, however, the Court held that another state rule allowing the employer to be deemed an agent in administering a group insurance policy was a rule "relating to an employee benefit plan" rather than a rule "regulating insurance," and so was preempted.[163] The Court has also held that an Illinois law requiring health maintenance organizations to provide an independent review of disputes between the primary care physician and the health maintenance organization and to cover services deemed medically necessary by the independent reviewer was a law "regulating insurance" within the meaning of the ERISA exception.[164]

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157. Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 140 (1990). To the same effect, see District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125 (1993) (holding that ERISA preempted a state law requiring employers who purchased health insurance for their employees to provide equivalent health insurance coverage for injured employees eligible for workers' compensation benefits).

158. Boggs v. Boggs, 520 U.S. 833, 842-43 (1997).

159. Egelhoff v. Egelhoff *ex. Rel* Breiner, 532 U.S. 141, 148 (2001).

160. Aetna Health, Inc. v. Davila, 542 U.S. 200, 214 (2004).

161. Cal. Div. of Labor Standards Enforcement v. Dillingham Constr. Co., 519 U.S. 316, 328, 334 (1997).

162. UNUM Life Ins. Co. of America v. Ward, 526 U.S. 358, 372-73 (1999).

163. *Id.* at 364.

164. Rush Prudential HMO v. Moran, 536 U.S. 355, 374-75 (2002).

Another example of the Court's careful and balanced application of the statutory standard of preemption is the Airline Deregulation Act of 1978,[165] which prohibits the states from enforcing any law "related to a price, route or service of an air carrier."[166] The Court has held that this provision preempted state regulation of allegedly deceptive airline fare advertising through enforcement of general consumer protection laws and restoration of frequent flyer claims under state consumer fraud laws,[167] but did not preempt state laws allowing frequent flyer claims as a matter of breach of contract.[168]

Continuing with the Court's application of the statutory standard of preemption in federal laws regulating transportation, Congress borrowed the preemption provision of the Airline Deregulation Act for a 1994 law deregulating trucking,[169] and the Court recently held that this provision preempted two provisions of a state law regulating the delivery of tobacco within the state.[170] The Court has held that federal regulations establishing the terms under which states could use federal funds to eliminate hazards at railroad grade crossings did not preempt state tort law requirements regarding a railroad's duty to maintain warning devices at railroad crossings.[171] But in the same case, the Court held that federal regulations regarding the maximum speeds at which trains were to operate along certain types of tracks did preempt any tort claim against the railroad for operating a train within those limits.[172] In a similar case, the Court held that where federal funds were used in the installation of warning devices at railroad crossings, once those devices were installed, the federal standard for adequacy of the warnings preempted state law.[173]

In other more recent preemption cases, the Court has held that the preemption clause of the Federal Boat Safety Act,[174] referring to "state law or regulation," did not preempt state common law claims arising out of the failure to install propeller guards on a boat engine,[175] that a provision of the federal Telecommunications Act preempting state laws prohibiting the ability of "any entity to provide any interstate or intrastate

165. 49 U.S.C.A. § 40101 (West 1994 & Supp. 1999).
166. 49 U.S.C.A. § 41713(b) (West 1994).
167. Morales v. Trans World Airlines, Inc., 504 U.S. 374, 383-84 (1992).
168. Am. Airlines, Inc. v. Wolens, 513 U.S. 219, 228-29 (1995).
169. 49 U.S.C.A. § 14501(c)(1) (West 2009).
170. Rowe v. N.H. Motor Transp. Ass'n., 128 S.Ct. 989, 995-96 (2008).
171. CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 667-68 (1993).
172. *Id.* at 676.
173. Norfolk S. Ry. v. Shanklin, 529 U.S. 344, 352-53 (2000).
174. 46 U.S.C.A. § 4306 (West 2000).
175. Sprietsma v. Mercury Marine, 537 U.S. 51, 65 (2002).

telecommunications services"[176] did not preempt a state law barring political subdivisions of a state, such as municipalities, from providing telecommunications services,[177] and that a provision of the Federal Insecticide, Fungicide, and Rodenticide Act, providing that no state shall "impose or continue in effect any requirements for labeling or packaging in addition to or different from those required in this subchapter,[178] did not preempt state law claims for defective design, defective manufacture, negligent testing, and breach of express warranty brought by farmers whose crops had been severely damaged by the application of a pesticide.[179] However, the Court also held that a provision of the Federal Clean Air Act prohibiting the adoption of any state or local standard "relating to the control of emissions from new motor vehicles,"[180] did preempt state laws prohibiting the purchase by fleet operators of vehicles that did not comply with the state's stricter emission requirements.[181]

A final example of the Court's careful application of the federal standard of preemption is found in its 2008 decision in *Riegel v. Medtronic, Inc.*,[182] involving the preemption clause of the Medical Device Amendments of 1976, which provides that

> with respect to a device intended for human use, no state . . . may establish or continue in effect any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.[183]

In the 1976 statute, Congress for the first time required federal Food and Drug Administration (FDA) approval for medical devices.[184] The statute provides for various levels of federal oversight, with the highest provided for Class III devices, which include replacement heart valves, implanted cerebella stimulators, and pacemaker pulse generators.[185] In

176. 47 U.S.C.A. § 253(a) (West 2000).
177. Nixon v. Mo. Mun. League, 541 U.S. 125, 138-40 (2004).
178. 7 U.S.C.A. § 136v(b) (West 2000).
179. Bates v. Dow Agrosciences LLC, 544 U.S. 431, 444 (2005).
180. 42 U.S.C.A. § 7543(a) (West 2000).
181. Engine Mfrs. Ass'n V. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 254-55 (2004).
182. 128 S. Ct. 999, 1011 (2008).
183. 21 U.S.C.A. § 360K(a) (West 2000).
184. *Reigel*, 128 S. Ct. at 1003-05.
185. *Id.*

the earlier case of *Medtronic, Inc. v. Lohr*,[186] the Court held that the preemption provision of the Act did not preempt the state common law rules imposing liability for defective medical device products that were at issue in the particular case. In *Riegel*, the Court stated that in *Lohr*, it had interpreted the preemption provision in a manner "substantially informed" by the applicable FDA regulation, which provided that state requirements were preempted "only when the Food and Drug Administration ha[d] established specific counterpart regulations or there are other specific requirements applicable to a particular device."[187] In *Lohr*, the Court concluded that the FDA manufacturing and labeling requirements were "applicable across the board to almost all medical devices" and were not specific to the device in question.[188] As the decision in *Lohr* was explained by the Court in *Riegel*, this was a major factor in the Court's finding that the state common law rules were not preempted.

In *Riegel*, in contrast, the FDA had given premarket approval to the catheter in issue, and the process leading to premarket approval included an evaluation of the device's safety and effectiveness under the conditions of use set forth on the label, as well as a determination that the proposed labeling was neither false nor misleading.[189] Because of the FDA preapproval of the device in question, the Court held that the preemption provision operated to preempt state common law tort claims imposing liability on the basis of a different standard than that used in the FDA approval process.[190]

Where Congress has not expressly dealt with the matter of preemption, analytically the question becomes whether Congress impliedly intended to preempt the state law in question.[191] Congress is deemed to have impliedly intended to preempt state law whenever there is a direct conflict between federal and state law in the sense that compliance with both the state law and federal law is a physical impossibility, or the state law stands as an obstacle to the implementation of the full purposes of federal law.[192]

The following are examples of the situation where the Court has found preemption due to a direct conflict. A state law restricting the authority of state entities to purchase goods or services from companies

186. 518 U.S. 470, 494 (1996).

187. *See Riegel*, 128 S. Ct. at 1006.

188. *Id.*

189. *See id.*

190. *See id.* at 1008.

191. Mich. Canners and Freezers Ass'n v. Agric. Mktg. and Bargaining Bd., 467 U.S. 461, 469 (1984).

192. *Id.* (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

doing business with Myanmar (Burma) conflicted with a federal law dealing with the imposition of sanctions against that country.[193] A state tort suit alleging that a 1987 model automobile was defectively designed because it lacked an airbag was preempted by a federal law that allowed automobile manufacturers for the 1987 model year to select from several passive restraint alternatives, of which airbags was only one, as a means of complying with the federal standard.[194] Where a federal law providing retirement benefits expressly provided that the benefits would not be subject to legal attachment, a state could not apply its marital property law to require that a share of these benefits go to the other spouse upon divorce.[195] Where a federal regulatory agency authorized federally-chartered savings and loan associations to include "due on sale" provision in mortgages that they issued, that preempted state law making such provisions unenforceable.[196]

The following are examples of the situation where the Court has found preemption due to the fact that state law stands as an obstacle to the implementation of the full purposes of federal law. A state law that creates patent-like rights in property interferes with the operation of the federal patent system and so is preempted.[197] A state law that attempts to regulate a national-bank operating subsidiary interferes with the scheme of regulation of federal banking law and so is preempted.[198] A state law limiting the timing and takeoffs at airports was preempted by the fact that under federal law, the Federal Aviation Agency has the responsibility to ensure aircraft safety and the efficient utilization of airspace.[199] A state law regulating labeling of packaged flour was preempted because it would interfere with purposes of federal law regulating flour packaging.[200] Federal laws regulating oil tankers preempt state laws relating to oil tanker design, equipment and operating requirements, because enforcement of the state requirements would frustrate the congressional intention to establish a uniform federal law governing the design and operation of all tankers.[201]

The Court's most recent decision on implied preemption due to a direct conflict between federal and state law, however, saw the Court

193. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373-74 (2000).
194. Geier v. Am. Honda Motor, Inc., 529 U.S. 861, 875-76 (2000).
195. Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979).
196. Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 155 (1982).
197. Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 153 (1989).
198. Watters v. Wachovia Bank, 550 U.S. 1, 12 (2007).
199. City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).
200. Jones v. Rath Packing Co., 430 U.S. 519, 540-41 (1977).
201. United States v. Locke, 529 U.S. 89, 112-17 (2000).

rejecting the claim of implied preemption.[202] In *Wyeth v. Levine*, a state court action was brought against a drug manufacturer alleging that the manufacturer had failed to provide an adequate warning about the significant risks of administering the drug by a certain method.[203] The manufacturer asserted implied preemption on the ground that the drug's labeling had been approved by the Federal Food and Drug Administration (FDA). The state court rejected the claim of implied preemption, and the Supreme Court affirmed.[204] The Court found that the FDA approval of the drug's labeling would not have prevented the manufacturer from adding a stronger warning about the risks of administering the drug by this method, so that it was not impossible for the manufacturer to comply with both the state law duties underlying the claims and its federal labeling duties.[205] The Court further found that requiring the manufacturer to comply with the state law duty to provide a stronger warning would not stand as an obstacle to the implementation of federal law, because Congress had not expressly authorized the FDA to preempt state law failure to warn actions.[206] The decision indicates that the Court will carefully scrutinize claims of implied preemption due to a direct conflict between federal and state law, and will find implied preemption only where it is fully satisfied that compliance with both the state and federal law is a physical impossibility or that the state law stands as an obstacle to the implementation of the full purposes of federal law.

Where there is no direct conflict between state law and federal law, the question becomes one of "implied field preemption," that is, whether Congress intended to "occupy the field," so as to leave no room for state

202. *See* Wyeth v. Levine, 129 S. Ct. 1187, 1200 (2009).

203. *See id.* at 1191.

204. *See id.* at 1204.

200. *See id.* at 1199. In this regard the Court noted that it is a central premise of the Act and FDA regulations that the manufacturer bears responsibility for the content of its label at all times. *Id.* at 1197-98.

206. The Court stated, "If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history." *Wyeth,* 129 S. Ct. at 1200. The Court went on to point out that in 1976 Congress had enacted an express pre-emption provision for medical devices, which was the basis for the Court's decision in *Riegel*, 128 S. Ct. at 1008, but did not enact such a provision for prescription drugs. *Id.* The Court concluded: "Its silence on the issue, coupled with its certain awareness of the prevalence of state tort litigation, is powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness." *Id.* Furthermore, since the FDA had not issued a regulation establishing a specific labeling standard that left no room for different state law judgments, the Court gave no weight to a preamble to a 2006 FDA regulation declaring that state law failure-to-warn requirements threatened the FDA's statutorily-prescribed role. *Id.* at 1201-02.

regulation at all even if the state regulation is not inconsistent with and may actually supplement the federal regulation. It is here that the principle of state sovereignty comes into play most strongly. Where the matter in issue involves a field that the states have traditionally regulated, the Court has stated that the presumption is against preemption, and that, "[w]e start with the assumption that the historic police powers of the States were not to be superseded . . . unless this was the clear and manifest purpose of Congress."[207] In order for the Court to find implied field preemption, there must be a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[208] This will occur only when (1) the federal law "touche[s] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or (2) "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."[209]

The most significant factor leading to a finding of implied field preemption is that of dominant federal interest. This is most likely to be found where the federal law is based on a power other than the commerce power, such as the power over immigration or the power over national security. On this basis, the Court has held that the federal law dealing with the registration of aliens preempts all state alien registration laws,[210] and that federal laws against sedition preempt all state laws in this area.[211]

Once we get beyond matters where the federal government clearly has the dominant interest, the Court is reluctant to find implied field preemption. The Court focuses not only on the comprehensiveness of the scheme of federal regulation, but also on whether the particular state regulation would actually interfere with the objectives of the federal regulatory scheme. Despite the comprehensiveness of a scheme of federal regulation, the Court has typically found that the federal law was not intended to preempt all elements of state regulation. For example, the Court has held that while the comprehensive federal regulation of nuclear energy preempts all state nuclear safety regulation, it does not preempt

207. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983).

208. *Id.* at 204.

209. *Id.*

210. Hines v. Davidowitz, 312 U.S. 52, 72-74 (1941).

211. Pennsylvania v. Nelson, 350 U.S. 497, 504 (1956).

the states from regulating the economic aspects of nuclear power,[212] or from allowing tort recovery of compensatory and punitive damages for the harm caused by the escape of hazardous nuclear energy materials.[213] The Court has also held that the National Traffic and Motor Vehicle Safety Act of 1966[214] and implementing regulations did not preempt state common law tort claims against tractor-trailer manufacturers,[215] and that federal law permitting seamen injured during the course of their employment to bring their claims in state courts did not preempt state law barring the application of the *forum non conveniens* doctrine in such cases.[216]

In a similar vein, while the Court has held that federal labor law reflects a comprehensive scheme of federal regulation, and so preempts state law with respect to questions of unfair labor practices and employee rights that are within the jurisdiction of the National Labor Relations Board,[217] matters that could alter the balance of power between labor unions and employers,[218] and the interpretation and construction of collective bargaining agreements,[219] there are a number of matters that the Court has held were not preempted. The states may award damages to an employee who was subject to a retaliatory discharge for filing a workers' compensation claim,[220] or for any wrongful discharge,[221] or to a member claiming damages for emotional harm caused by the union's discrimination against him.[222] The states may also require employers to provide a one-time severance payment to employees in the event of a plant closing,[223] and may grant unemployment compensation to striking workers.[224]

Where the federal scheme of regulation is less comprehensive, the Court is correspondingly less likely to find any implied field

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212. *Pacific Gas*, 461 U.S. at 215-16. Thus, California could refuse to license a nuclear facility until the facility had a federally-approved plan for the permanent disposition of high-level nuclear waste. *Id.* at 218-19.

213. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 258 (1984).

214. 15 U.S.C.A. § 1381 (repealed 1994).

215. Freightliner Corp. v. Myrick, 514 U.S. 280, 282-83 (1995).

216. Am. Dredging Co. v. Miller, 510 U.S. 443, 455-57 (1994).

217. *See* San Diego Bldg. Trades Council v. Gannon, 359 U.S. 236, 244-46 (1959).

218. *See* Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers, AFL CIO v. Wis. Emp. Relations Comm'n, 427 U.S. 132, 148-49 (1976).

219. *See* Linge v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407-13 (1988).

220. *Id.* at 401.

221. Hawaiian Airlines, Inc. v. Norris, 512 U.S. 246, 248 (1994).

222. Farmer v. United Bhd. of Carpenters and Joiners, 430 U.S. 290, 302 (1977).

223. Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 3-4 (1987).

224. N.Y. Tel. Co. v. New York State Dep't of Labor, 440 U.S. 519, 544 (1979).

preemption.[225] This is especially true where the federal government has not regulated the particular activity, so that a finding of preemption would leave a regulatory vacuum.[226] The Court is also not disposed to find implied field regulation where the challenged state regulation supplements the federal regulation and does not interfere with its operation.[227]

Federal preemption is a very significant component of the American federal system, and it provides an effective basis for challenging state laws regulating interstate commerce. However, while federal preemption has the most potential for expanding federal power over state power, this has not happened in practice. Both Congress and the Court have tried to strike a balance between the principle of federal supremacy and the principle of state sovereignty. The Court's holdings in preemption cases over the years provide sufficient guidelines for the resolution of many of the preemption questions that arise in actual cases, and the numerous cases presenting preemption questions will be determined in accordance with these guidelines.

C. Federalism-Based Limitations on Federal Judicial Power

The Constitution and federal law impose certain federalism-based limitations on the exercise of federal judicial power.

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225. *See, e.g.*, Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 70-71 (1993), where the Court held that a federal treaty permitting foreign cargo containers to enter the United States "free of import duties and taxes," referred only to customs duties, and was not intended to occupy the field of container regulation and taxation. This being so, the treaty did not preempt the states from imposing a tax on the income derived from leasing the containers within the state. *Id.* at 71.

226. *See* Maurer v. Hamilton, 309 U.S. 598, 603-04 (1940) (where the Interstate Commerce Commission had not promulgated regulations dealing with carrying of automobiles over the cab of the automobile transportation vehicle, although it had the authority to do so, state regulation prohibiting this practice was not preempted); Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375, 388-89 (1983) (where federal agencies having jurisdiction over the matter had not regulated rates charged by a rural electric cooperative to local members, state regulation of such rates was not preempted by federal law).

227. For illustrative cases, see California v. Zook, 336 U.S. 725, 735-38 (1949) (holding that state prohibition of transportation not licensed by Federal Interstate Commerce Commission not preempted); Colorado Anti-Discrimination Comm'n v. Continental Air Lines, 372 U.S. 714, 722-24 (1963) (holding that state application of employment discrimination law to federally regulated air carrier not preempted); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 593-94 (1987) (holding that state requirement that mining company apply for state permit not preempted as applied to company that was mining in national forest pursuant to permit granted by federal agency).

1. The Eleventh Amendment

The limitation imposed by the Constitution is found in the Eleventh Amendment. While the Eleventh Amendment, by its terms, is addressed to the jurisdiction of the federal courts, and refers only to a suit against a state by a citizen of another state or a foreign country,[228] it has long been interpreted to extend to suits brought against a state by its own citizens.[229] More recently it has been interpreted as prohibiting Congress from abolishing state sovereign immunity in suits by private persons against the states.[230] The Court has held that rather than break new ground, the Eleventh Amendment is a confirmation of the proposition that the states' sovereign immunity derives from the structure of the Constitution itself.[231] As the Court has stated: "[i]t follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone, but by fundamental postulates implicit in the constitutional design."[232] Thus, the Eleventh Amendment constrains Congress from abolishing a state's sovereign immunity from suits by private persons to enforce federal statutory rights whether in federal court or in state court.[233] Applying current Eleventh Amendment doctrine, the Court has held that a number of federal laws authorizing private entities to sue the state were violative of the Eleventh Amendment. These include the following: a federal statute authorizing a federal court suit by a private entity to compel a state to comply with a duty imposed by federal law;[234] a federal law interpreted as authorizing suit by a private entity against a state for trademark violation and another federal law abrogating state sovereign immunity in suits by private

228. The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens of subjects of any foreign State." U.S. CONST. amend. XI.

229. *See* Hans v. Louisiana, 134 U.S. 1 (1890). The Eleventh Amendment only applies to suits against the state itself or agencies of state government, and does not apply to suits against subordinate units of state government, such as cities or school districts. Alden v. Maine, 527 U.S. 706, 756-57 (1994). The Supreme Court has also held that the Eleventh Amendment did not apply to a suit against a railroad owned by the Port Authority of New York, an independent entity created by a bistate compact between the states of New York and New Jersey Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 39 (1994).

230. *Alden*, 527 U.S. at 732-33.

231. *Id.* at 728.

232. *Id.* at 729.

233. *Id.* at 747-48.

234. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 75-76 (1996). In this case, the Court overruled its prior decision in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989), that held that Congress had the authority under the commerce power to abrogate state sovereign immunity.

entities for patent infringement claims;[235] a federal law subjecting states to suit in state court for claims under the federal Wages and Hours law;[236] application of the federal Age Discrimination in Employment Act to suits by state employees against state agencies;[237] application of Title I of the Americans with Disabilities Act of 1990, prohibiting employment discrimination against persons with disabilities,[238] to suits by state employees against state agencies.[239]

The Court, however, has made two exceptions to the Eleventh Amendment immunity of the states, both grounded in the Fourteenth Amendment. First, the Court has held that since the Fourteenth Amendment was enacted after the Eleventh Amendment, it supersedes the Eleventh Amendment where Congress has acted pursuant to its enforcement powers under Section 5 of the Fourteenth Amendment to authorize an award of damages against the state for violation of a person's federal constitutional rights.[240] In the exercise of its Section 5 enforcement powers, Congress may do more than proscribe conduct that the Court has held unconstitutional. Congress has the power both to remedy and to deter the violation of constitutional rights, and may do so by enacting prophylactic legislation that proscribes facially constitutional conduct. When Congress exercises its Section 5 powers for this purpose, the legislation must be an appropriate remedy for identified constitutional violations by the states, and the legislation must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adapted to that end.[241] Applying this test, the Court has held that Congress could abolish state sovereign immunity in a suit under the Family and Medical Leave Act,[242] in light of the states' record of unconstitutional participation in, and fostering of, gender-based

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235. Coll. Sav. Banks v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 691 (1999).

236. *Alden,* 527 U.S. at 712.

237. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91-92 (2000).

238. 42 U.S.C.A. § 12131 (West 2009).

239. *See* Bd. of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). *See also* Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743, 747 (2002), where the Court held that the Eleventh Amendment prevents a federal administrative agency, here the Federal Maritime Commission, from adjudicating a cruise ship's complaint that the state port authority violated federal law by denying the cruise ship permission to berth at the agency's port facilities.

240. Fitzpatrick v. Bitzer, 427 U.S. 445, 447 (1976) (awarding of damages and attorneys fees in action under 42 U.S.C. § 1983 to redress violation of federal constitutional rights, here racial discrimination in employment).

241. See the discussion in *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721, 727-28 (2003).

242. 29 U.S.C.A. § 2601 (West 2009).

discrimination in the administration of leave benefits.[243] The Court has also held that Congress could abolish state sovereign immunity in a suit under Title II of the Americans with Disabilities Act of 1990,[244] prohibiting discrimination against persons with disabilities with respect to the provision of public services and access to public facilities, in a suit by paraplegics who contended that they were denied access to state courts that were not wheelchair accessible.[245]

Second, the Court held many years ago in *Ex parte Young*[246] that a suit brought against state officials, such as the state attorney-general, to prevent a violation of federal constitutional rights, in which the plaintiffs sought only prospective injunctive relief, was not a suit against the state for Eleventh Amendment purposes, although the action of the state officer would otherwise qualify as state action for Fourteenth Amendment purposes. The Court has also applied the *Ex parte Young* principle to allow a suit against state officials to enjoin an action taken in violation of federal law.[247] As a practical matter, the Eleventh Amendment does not prevent federal court judicial review of the constitutionality of state laws or governmental action or the violation of federal laws by state officials.[248] Rather, the essential effect of the Eleventh Amendment is to prohibit Congress from abrogating the states' sovereign immunity in suits by private entities for damages or monetary relief against the state or state officers in their official capacity.[249] It is thus a specific and narrow, limitation on Congressional power, grounded in considerations of state sovereignty.

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243. *Nev. Dept. of Human Res.*, 538 U.S. at 730.

244. 42 U.S.C.A. § 12132 (West 2009).

245. Tennessee v. Lane, 541 U.S. 509 (2004). The Court held that the fact that the courthouses were not wheelchair-accessible violated the paraplegic person's due process right to access to courts, and that Congress could find that in many states across the country, many individuals were being excluded from courthouses and court proceedings by reason of their disabilities. *Id.* at 532-33. Whereas in *Garrett*, the Court held that Congress did not have a valid basis for concluding that there had been a long history of discrimination against persons with disabilities in state employment. *Garrett*, 531 U.S. at 368-72.

246. 209 U.S. 123 (1908).

247. Verizon Maryland, Inc. v. Pub. Serv. Comm'n, 535 U.S. 635, 645-48 (2002). The holding of *Ex parte Young* also applies to federal court enforcement of a consent decree entered into by state officials in an action under 42 U.S.C. § 1983. Frew v. Hawkins, 540 U.S. 431, 436-37 (2004).

248. *Ex parte Young*, 209 U.S. at 167-68.

249. For earlier cases barring actions for monetary relief against state officials see, for example: Edelman v. Jordan, 415 U.S. 651, 678 (1974) (holding that federal courts cannot order state officials to pay illegally withheld welfare payments); Green v. Mansour, 474 U.S. 64 (1985) (federal courts cannot require state to issue notices to persons that welfare payments were illegally withheld).

2. Limitations on Federal Court Jurisdiction

Congress and the Supreme Court have also imposed certain federalism-based limitations on federal court jurisdiction. These federalism-based limitations relate to the fact that in the American constitutional structure there is a dual system of federal and state courts, with a substantial degree of overlapping jurisdiction,[250] and that the state court system represents a very important element of state sovereignty.

The most important of these limitations is the Anti-Suit Injunction Act, which provides that, "[a] court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgment."[251] The Act traces back to 1793, and is designed to "balance the tensions inherent in a dual system of courts." [252] The Court has stated that the Act is "an absolute

250. In retrospect, the substantial degree of overlapping jurisdiction between federal and state courts results from the fact that under the Supremacy Clause, U.S. CONST. art. VI, § 2, the state courts are required to apply the Constitution and federal laws and treaties in cases coming before them. Furthermore, under U.S. CONST. art. III, § 2, cl. 2, and implementing legislation, the federal courts are given diversity jurisdiction in suits between citizens of different states and suits between a state citizen and a foreigner. *See, e.g.*, 28 U.S.C. § 1331. The overlapping jurisdiction was increased by the provisions of the Reconstruction and other Amendments, protecting individual rights against state governmental action, and implementing legislation, such as 42 U.S.C. § 1983, which created a federal cause of action to protect those rights.

251. 28 U.S.C.A. § 2283 (West 2009).

252. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988). In tracing the history of the Act, the Court has observed as follows:

> When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. But those powers that were not surrendered were retained by the States and unless a State was restrained by 'the supreme Law of the Land,' as expressed in the Constitution, laws or treaties of the United States, it was free to exercise those retained powers as it saw fit. One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies. Many of the Framers of the Constitution felt that separate federal courts were unnecessary and that the state courts could be entrusted to protect both state and federal rights. Others felt that a complete system of federal courts to take care of federal legal problems should be provided for in the Constitution itself. The dispute resulted in compromise. One 'supreme Court' was created by the Constitution, and Congress was given the power to create other federal courts. . . . Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system. Understandably this dual court system was bound to lead to conflicts and frictions . . . . Obviously this dual system could not function if state and federal courts were free to fight each other for control of a particular case. Thus, in order to make the dual system

prohibition against enjoining state court proceedings unless the injunction falls within one of the three specifically defined exceptions."[253]

In applying the Act the Court has held that a federal court cannot enjoin a state court from issuing an injunction against peaceful picketing in connection with a labor dispute, despite the claim that Congress had preempted the field and that the matter came within the jurisdiction of the National Labor Relations Board.[254] Likewise, a federal court cannot issue an injunction against a state court judgment on the ground that the underlying action had an anti-competitive purpose and violated federal antitrust laws.[255]

The Act does not apply when suit to enjoin enforcement of a state court judgment is brought by the United States or by a federal agency, such as the National Labor Relations Board.[256] It also does not apply when the injunction is not against enforcement of a state court judgment, such as when an injunction is issued against enforcement of a garnishment obtained by a private person pursuant to state law,[257] or against a recount by state election officials.[258]

With respect to the "expressly authorized" exception, the Court, looking to the broad remedial purpose of the Civil Rights Act of 1871,[259] has held that it is a statutorily authorized exception to Section 2283, so that a federal court may issue an injunction against a state court proceeding that violates federal constitutional rights.[260] However, under the Supreme Court's *Younger* doctrine, which we will discuss shortly, the federal courts generally cannot exercise jurisdiction to interfere with pending state court criminal or civil proceedings, so the Section 2283

> work and 'to prevent needless friction between state and federal courts,' it was necessary to work out lines of demarcation between the two systems. . . . The 1793 anti-injunction act was at least in part a response to those pressures.

Atlantic Coast Line R. Co. v. Bhd. of Locomotive Engineers, 398 U.S. 281, 285-86 (1970) (internal citations omitted).

253. *Id.* at 286.

254. Amalgamated Clothing Workers v. Richman Bros., 348 U.S. 511, 519-21 (1955).

255. Vendo Co. v. Lektro-Vend Corp., 433 U.S. 623 (1977). The Court there held that the Clayton Act, 15 U.S.C. § 1, was not an expressly authorized exception to 28 U.S.C. § 2283.

256. *See* Leiter Minerals v. United States, 352 U.S. 220, 224-25 (1957); N.L.R.B. v. Nash-Finch Co., 404 U.S. 138, 144 (1971).

257. Lynch v. Household Finance Corp., 405 U.S. 538, 554-56 (1972).

258. Roudebush v. Hartke, 405 U.S. 15, 21-23 (1972).

259. 42 U.S.C.A. § 1983 (West 1996).

260. Mitchum v. Foster, 407 U.S. 225, 242-43 (1972).

exception is somewhat limited. Only a few federal statutes have been held to come within the "expressly authorized" exception.[261]

The more difficult cases involve the "in aid of its jurisdiction" and "protect or effectuate its judgments" exception. The "in aid of its jurisdiction" exception only applies where the later state court action involves property in the custody of a federal court. Where separate suits are brought in federal and state courts, and both are pending, Section 2283 precludes the federal court from issuing an injunction against the pending state court proceeding.[262] The "relitigation" exception is founded on the well-recognized principles of res judicata and collateral estoppel, and "is designed to permit a federal court to prevent state court relitigation of an issue that previously was presented to and decided by a federal court."[263] It is clearly applicable where a federal court suit had terminated in a final judgment, and the later state court suit was brought for the purpose of relitigating issues finally adjudicated by the federal court.[264] This exception does not apply, however, in a case where the state court judgment decided an issue that was not decided in the prior federal court action, and in that circumstance, Section 2283 precludes the federal court from issuing an injunction against enforcement of the state court judgment.[265] *Chick Kam Choo* involved a claim for the wrongful death of a Singapore resident killed in Singapore while performing repair work on a ship owned by an American company in Singapore.[266] The federal court held that Singapore law applied on the choice of law question and rendered judgment for the defendant on the plaintiff's federal law claims.[267] The court also dismissed the rest of the case on

261. These statutes are set out and the matter discussed more fully in CHARLES A. WRIGHT & MARY KAY KANE, LAW OF THE FEDERAL COURTS 303-04 (6th ed. 2002).

262. *See* Kline v. Burke Constr. Co., 260 U.S. 226, 235 (1922) and the discussion in WRIGHT & KANE, *supra* note 260, at 304-05.

263. *Chick Kam Choo*, 486 U.S. at 147.

264. *See, e.g.*, Bethke v. Grayuburg Oil Co., 89 F.2d 536, 539 (5th Cir. 1937).

265. *Atlantic Coast Line R. Co.*, 398 U.S. at 296-97. In that case, a federal court refused to enjoin a union from picketing a railroad on the ground that the picketing was not prohibited by federal law. *Id.* at 283. The railroad then went into state court, where the injunction was granted pursuant to state law. *Id.* Following a United States Supreme Court decision holding that federal law prohibited state courts from issuing injunctions such as the one the railroad had obtained, the union moved in the state court to dissolve the injunction, but the state court refused to do so. *Id.* at 284. The union then returned to federal court and sought an injunction against enforcement of the state court injunction. *Id.* The Supreme Court held that the issuance of a federal court injunction was barred by Section 2283, even assuming that the state court injunction was erroneous, since the prior federal court suit did not decide the question of whether federal law precluded the issuance of an injunction based on state law. *Id.* at 296-97.

266. *Chick Kam Choo*, 486 U.S. at 140.

267. *Id.* at 143.

forum non conveniens grounds.[268] The plaintiffs then brought a suit in a Texas state court seeking to recover on a claim under Texas law.[269] The Texas court refused to dismiss the suit on *forum non conveniens* grounds.[270] The defendant then returned to federal court and sought an injunction against the continuation of the Texas court suit.[271] The Supreme Court held that since the Texas law of *forum non conveniens* differed from the federal law of *forum non conveniens*, the federal court's decision did not resolve that issue, and the federal court could not enjoin continuation of the state court proceedings.[272] However, since the federal court had determined that as a matter of choice of law, Singapore law governed the substantive claims, Singapore law had to apply in the state court suit, and the federal court could issue an injunction precluding relitigation of that issue.[273] On the other hand, the fact that a state court has held that a state law is constitutional does not bring into play Section 2283, so as to bar a party who was a "stranger" to the prior state court proceeding from bringing a subsequent federal suit to obtain an injunction against enforcement of the state law.[274]

In addition to the Anti-Suit Injunction Act, Congress has enacted two laws that prohibit the federal courts from interfering with particular state governmental actions. The Johnson Act of 1934[275] prohibits the federal courts from enjoining the operation of any order of a state administrative agency or ratemaking body affecting rates charged by a public utility, where (1) the order does not interfere with interstate commerce, (2) the order was made after reasonable notice and hearing, and (3) there is be a "plain, speedy and efficient remedy" in the state courts to challenge the validity of the order.[276] The effect of the Johnson Act is to channel normal utility rate litigation into the state courts, while leaving the federal courts free to enjoin ratemaking orders that interfere with interstate commerce or that are procedurally unfair.

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268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.* at 144.
272. *Chick Cam Choo*, 486 U.S. at 148-49.
273. *Id.* at 149-50.
274. Hale v. Bimco Trading, 306 U.S. 375, 377-78 (1939); County of Imperial, California v. Munoz, 449 U.S. 54, 59-60 (1980).
275. 28 U.S.C.A. § 1342 (West 2009).
276. Where a subsequently enacted federal law preempts the state ratemaking law, the federal courts can enjoin the operation of the state ratemaking law. Public Utilities Comm'n v. United Fuel Gas. Co., 317 U.S. 456, 468-70 (1943).

The Tax Injunction Act[277] similarly prohibits the federal courts from enjoining the assessment, levy or collection of any tax under state law when a "plain, speedy and efficient remedy" is available in the state courts.[278] Again, the purpose of the Act is to channel litigation over the validity of state taxes into the state courts, provided that state law provides an adequate remedy to challenge the tax.[279] Neither the Johnson Act nor the Tax Injunction Act applies to a suit brought by the United States.[280]

These statutes reflect Congressional recognition of the importance of state sovereignty in the American constitutional system. In interpreting the Tax Injunction Act, for example, as a "broad jurisdictional barrier" to federal court interference with the states' administration of their taxing systems, the Supreme Court has noted that, "[t]he federal balance is well served when the several States define and elaborate their own laws through their own courts and administrative processes and without undue interference from the federal judiciary," and that "[t]he power to tax is basic to the power of the State to exist."[281] Again, recall that in the American constitutional system the states succeeded to the sovereignty over domestic matters formerly exercised by the British Crown and possess the general regulatory and taxation power.[282] Congress has made the policy choice to channel litigation over state taxation into the state courts with possible review of constitutional questions in the United States Supreme Court.[283] However, when the United States is a party, the federal balance changes, and the federal government's assertion of its

277. 28 U.S.C.A. § 1341 (West 2009).

278. In *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 323-24 (1952), the Court held that the state court remedy to challenge the tax assessment was inadequate when the taxpayer would have had to file over three hundred separate claims in fourteen different counties.

279. The Act also applies to a federal court declaratory judgment action. California v. Grace Brethern Church, 457 U.S. 393, 417 (1982).

280. *See* Dep't of Empl. v. United States, 385 U.S. 355, 358 (1966). In *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821, 831-32 (1997), the Court held that for these purposes a suit by a federally-chartered production credit association was not a suit by the United States, so that a suit by such an association to enjoin the operation of a state tax was barred by the Act. Indian Tribes are also not exempt from the provisions of the Act as such, but are in effect exempt, because another federal law, 28 U.S.C. § 1362 provides for sweeping federal court jurisdiction where an Indian Tribe is a party. Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 472-75 (1976).

281. *Farm Credit Servs.*, 520 U.S. at 826.

282. Sedler, *The Settled Nature*, *supra* note 2, at 220.

283. *See, e.g.*, Allegheny Pittsburgh Coal Co. v. County Comm'n, 488 U.S. 336, 346 (1989), where the Supreme Court held that a state property tax assessment that was upheld by the state courts violated equal protection.

own sovereign power to tax justifies federal court jurisdiction to protect the federal government from improper state taxation.[284]

The Supreme Court has also imposed federalism-based limitations on federal court jurisdiction by means of various abstention doctrines. A detailed discussion of the various abstention doctrines imposed by the Supreme Court is beyond the scope of the present article. Rather, we will present an overview of the doctrines as they relate to the structure of the American federal system and the operation of dual state and federal courts. As the Supreme Court has explained, these doctrines "reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes."[285]

The *Pullman* abstention doctrine[286] provides that when an unsettled question of state law is presented in a case involving a federal constitutional challenge to a state law or governmental action, and the resolution of the state law question may avoid or modify the resolution of the federal constitutional question, the federal court must abstain from deciding the federal constitutional question until the parties have repaired to the state courts and have obtained an authoritative determination of the state law question.[287] *Pullman* abstention thus is a postponement not a relinquishment of federal court jurisdiction, and after the parties have obtained the authoritative determination of the state law question, they return to the federal court and litigate the federal constitutional question in light of the state court's determination of the state law question.[288]

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284. See the discussion in *Farm Credit Servs.*, 520 U.S. at 827-28.

285. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 12 n.9 (1987).

286. Named after *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941).

287. *Id.* at 500. In *Pullman*, the federal plaintiff challenged an order of the Texas Railroad Commission, contending that Texas law did not give the Commission the authority to issue the order, and further that if the Commission did have the authority to issue the order, the order violated the plaintiff's Fourteenth Amendment due process rights. *Id.* at 498. If the state court would hold that the Commission did not have the authority to issue the order, there would be no need for the federal court to decide the federal constitutional question. *Id.* at 499. The test for *Pullman* abstention is whether the state law at issue is "fairly subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question." Harman v. Forssenius, 380 U.S. 528, 535 (1965). Abstention is proper if the claim is that the state law may violate a specialized state constitutional provision, but not if "the state constitutional provision is the mirror of the federal one." Harris County Commr's Court v. Moore, 420 U.S. 77 (1975) (holding that abstention is proper with respect to state constitutional provision relating to the removal of members of the minor judiciary).

288. However, if the federal plaintiff chooses to litigate the federal constitutional question in the proceedings before the state court, the state court determination of that question is binding on the litigants, and it may not be re-litigated in the federal court proceeding. England v. La. State Bd. Med. Exam'rs, 375 U.S. 411, 418-19 (1964).

The *Burford* abstention doctrine[289] mandates federal court dismissal of an action that would interfere with proceedings or orders of state administrative agencies with respect to a specialized aspect of a complicated regulatory system, which is better left to the state administrative agencies and the state courts.[290] *Burford* abstention is limited to the situation where timely and adequate state court review is available, and there are either "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar," or "the exercise of federal review of the question in a case or similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[291] As this definition of *Burford* abstention makes clear, there will be relatively few cases in which *Burford* abstention is proper.

The most prevalent form of federal abstention is *Younger* abstention,[292] which mandates that a federal court may not grant injunctive or declaratory relief against the enforcement of a state law or governmental action that is being enforced against the federal plaintiff in a *pending* state court proceeding. *Younger* abstention is based on considerations of "equity, comity, and federalism," and requires dismissal of the federal action on the grounds that (1) the federal plaintiff has an adequate remedy to assert his federal constitutional rights by way of defense to the pending state court proceeding,[293] (2) that interference with the pending state court proceeding would prevent the states from advancing an important state interest, and (3) that the federal courts

289. Named after *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

290. *Burford* involved proration orders in Texas oil fields, and the Court held that the federal court should abstain from hearing the case. *Burford*, 319 U.S. at 334.

291. New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 361 (1989). In that case the Court held that *Burford* Abstention was improper where a utility challenged a city's order denying it a refund of charges was preempted by federal law. *Id.* The Court noted that in that case there was no unsettled question of state law and that federal intervention would not amount to disruption of efforts to establish a coherent ratemaking policy. *Id.* at 372-73.

292. Named after *Younger v. Harris*, 401 U.S. 37 (1971). In *Younger*, a party who was being prosecuted in a state court for a violation of a state criminal law brought suit in a federal court, claiming that the law under which he was being prosecuted violated his First Amendment rights. *Id.* at 38.

293. Under this element of *Younger* abstention, abstention was not proper in a federal constitutional challenge to the constitutionality of pretrial detention without a judicial determination of probable cause, since this would not be a defense to the criminal prosecution, *Gerstein v. Pugh*, 420 U.S. 103, 108 n.9 (1975), nor would it be proper in a federal suit claiming that a state administrative agency could not give a party in a proceeding before it a full and fair hearing because it was biased against him. Gibson v. Berryhill, 411 U.S. 564, 577 (1973).

should respect the authority of the state courts to protect federal constitutional rights in the cases pending before them.[294] *Younger* abstention applies not only to pending state court criminal proceedings, but also to pending state civil proceedings involving important state interests, including civil proceedings between private parties.[295] *Younger* abstention also applies even if the federal suit was brought before the state court proceeding, since once the state court proceeding has commenced, the reasons justifying *Younger* abstention come into play.[296] However, *Younger* abstention only applies where there is a state court proceeding that is concurrently pending with the federal court proceeding.[297] Where state officials have threatened to prosecute a party under a state law if that party engages in certain conduct, and the party alleges an intention to continue to engage in such conduct, the party is not precluded by *Younger* abstention from bringing a federal suit seeking to enjoin the prosecution.[298] And where a party has been prosecuted under a state criminal law, and that prosecution has been completed, the party can then bring a suit in federal court for a declaration that the law under which the party was prosecuted is unconstitutional and an injunction against future prosecutions under it.[299]

The effect of *Younger* abstention is to enable the state courts to maintain control over criminal and civil proceedings pending in those courts. It is assumed that the state courts will provide the federal plaintiff with an adequate remedy by which to assert the federal constitutional claim, and following the conclusion of the state court proceedings rejecting the constitutional claim, the losing party can seek review in the United States Supreme Court.[300]

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294. *Younger*, 401 U.S. at 43-49.

295. Pennzoil Co. v. Texaco, Inc. 481 U.S. 1 (1987).

296. Hicks v. Miranda, 422 U.S. 332 (1975).

297. *Younger*, 401 U.S. at 41-42.

298. Steffel v. Thompson, 415 U.S. 452, 475 (1974).

299. Wooley v. Maynard, 430 U.S. 705, 711 (1977). The subsequent federal court suit is not barred by res judicata, because the parties were different: the state court criminal case was brought by the state itself, and the subsequent suit was brought against the prosecutor charged with the enforcement of the challenged law. *Id.*

300. Under the *Rooker-Feldman* doctrine, the losing party in a state court proceeding cannot bring a federal court suit, claiming that the state court judgment violated that party's federal constitutional rights. Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-83 (1983). The losing party must seek review in the United States Supreme Court pursuant to 28 U.S.C. § 1257. However, when there are parallel federal court and state court suits involving the same claim, the federal court is not divested of subject matter jurisdiction by the fact that the state court rendered its judgment first. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005).

We have seen then that Congress and the Supreme Court have imposed certain federalism-based limitations on federal court jurisdiction. These federalism-based limitations relate to the fact that in the American constitutional structure there is a dual system of federal and state courts and that the state court system represents a very important element of state sovereignty. A nation that establishes a more modern federalism-based constitutional structure would likely have a single court system, as, for example, prevails in Canada.[301] But this is not how American federalism has developed, and the dual court system is an integral part of that structure. Congress and the Supreme Court have shown respect for state sovereignty in the American constitutional structure by imposing certain federalism-based limitations on federal court jurisdiction designed to protect the states and the state court system from what they considered to be improper interference by the federal courts.

V. THE RELATIONSHIP BETWEEN THE STATES

The final component of the American federal system is the relationship between the states themselves. As stated at the outset, a primary motivating force behind the adoption of the Constitution was to transform the loose confederation of sovereign states into one nation, "an indestructible union composed of indestructible states,"[302] and "to constitute the citizens of the United States one people as this."[303] The provisions of Article IV, Sections 1 and 2 are directed toward this end.

A. Full Faith and Credit

The Full Faith and Credit Clause of Article IV, Section 1, provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial proceedings of every other state. And the Congress may by general Laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[304] The primary

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301. Dep't of Justice of Canada: How the Courts are Organized, http://www.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page3.html (last visited Nov. 6, 2009).

302. Texas v. White, 74 U.S. 700, 725 (1868).

303. *Paul*, 75 U.S. at 180.

304. U.S. CONST. art. IV, § 1. The full faith and credit statute, 28 U.S.C. § 1738, passed by the first Congress, simply provides in pertinent part that "[t]he records and judicial proceedings of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *Id.*

historical purpose of the Full Faith and Credit Clause was to ensure that judgments rendered by one state court be recognized by another state court. In light of that historical purpose, the Supreme Court has held that the Full Faith and Credit Clause requires maximum recognition of sister state judgments.[305] This means that the Full Faith and Credit Clause requires recognition of sister state judgments in circumstances where principles of private international law would not require recognition of foreign court judgments. Thus, an American state court cannot refuse recognition of a sister state judgment on the ground that recognition of the judgment would offend its "public policy,"[306] or that it has an interest in refusing to recognize the judgment.[307] Although neither the constitutional or statutory provision refers to federal court judgments, it has long been established that they are entitled to recognition in the same manner as judgments rendered by a state court,[308] and under the statute, federal courts must recognize state court judgments as well.

Under the Full Faith and Credit Clause then, a final judgment on the merits[309] rendered by a state court or a federal court must be recognized

305. Hughes v. Fetter, 341 U.S. 609, 611 (1951).

306. *See* Fauntleloy v. Lum, 210 U.S. 230 (1908). In that case suit was brought in a Missouri court on a claim governed by Mississippi law. *Id.* at 223. The Missouri court misapplied Mississippi law, with the result that it upheld a contract that was illegal under Mississippi law. *Id.* at 234. When the plaintiff sought to enforce the Missouri judgment in Mississippi, the Supreme Court held that the Full Faith and Credit Clause required the Mississippi court to recognize and enforce the Missouri judgment. *Id.* at 237-38. Similarly, while a state is not constitutionally required to entertain a suit for taxes brought by a sister state, once the claim for taxes is reduced to judgment, that judgment must be recognized and enforced by a sister state court. *See* Milwaukee County v. M.E. White Co., 296 U.S. 268, 279 (1935).

307. *See* Yarborough v. Yarborough, 290 U.S. 202 (1933). In that case, a Georgia court entered a judgment terminating a father's duty of support to a child. *Id.* at 205. The child subsequently moved to South Carolina, and the South Carolina court in a suit against the father entered an additional order of support. *Id.* The Supreme Court held that South Carolina was required to recognize the Georgia judgment as terminating the father's duty of support. *Id.* at 212-13.

308. *See* Stoll v. Gottleib, 305 U.S. 165, 170 (1938).

309. A judgment dismissing a suit on procedural grounds, such that suit is barred by the statute of limitations or on grounds of public policy, is not a judgment on the merits. *See* RESTATEMENT OF JUDGMENTS § 49 cmt. A (2009). *See also* Angel v. Bulington, 330 U.S. 183, 189-90 (1947). A custody decree is not a final judgment for full faith and credit purposes because it is subject to modification by the court that has rendered it in light of changed conditions. *See* Kovacs v. Brewer, 356 U.S. 604, 607-08 (1958). In an effort to prevent endless relitigation of custody questions by courts of different states, Congress in 1980 enacted the federal Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A, which generally requires that sister state custody decrees be recognized and enforced by other sister states in accordance with their terms, and that proceedings to modify the custody decree be brought before the court that rendered the original decree. 28 U.S.C.A. § 1738A(a) (West 2009).

by another state court or federal court, subject only to the following exceptions. One, the judgment may not be recognized if the exercise of jurisdiction by the rendering court violated due process, provided that the party challenging it did not appear in the original proceeding.[310] Where both parties participated in the original proceeding, that court's determination of its jurisdiction is binding on the parties and may not be challenged in a subsequent proceeding.[311] Two, the judgment is subject to collateral attack in the state of rendition on grounds such as fraud or lack of subject matter jurisdiction.[312] Since the judgment is subject to collateral attack in the state of rendition, another state may permit the collateral attack in accordance with the law of the state of rendition, thereby giving the judgment the same "credit" it has in the state of rendition.[313] Three, enforcement of the judgment is barred by the non-discriminatory statute of limitations applicable to judgments in the state where enforcement of the judgment is sought.[314] Four, the judgment is a limited effect judgment, such as a worker's compensation decree, which only determines entitlement to worker's compensation under the law of the state where the claim is first asserted and is not intended to bar a subsequent claim for worker's compensation under the law of another state.[315]

The Supreme Court has not used the Full Faith and Credit Clause to limit the power of state courts to apply their own law in preference to the law of another state. As a general proposition, the constitutional test for the permissible application of a state's law under the due process and Full Faith and Credit Clause is co-extensive,[316] so that whenever the application of a state's law is valid as a matter of due process, the state

310. Richards v. Jefferson County, 517 U.S. 793, 797 n.4 (1996).

311. *See* Durfee v. Duke, 375 U.S. 106 (1963). *Compare* Baker v. Gen. Motors Corp., 522 U.S. 222, 238 (1998) (holding that an injunction prohibiting one party from testifying against another party in a subsequent case could not be applied to bar the testimony of that party in a case brought by a third person in another state court. Since the third person was not a party to the original proceeding, that court's judgment did not have to be recognized by the other state court).

312. *See, e.g.*, Thompson v. Whitman, 85 U.S. 457, 469-70 (1873) (holding that the judgment was subject to collateral attack for lack of subject matter jurisdiction in state of rendition).

313. *Id.*

314. Watkins v. Conway, 385 U.S. 188, 190 (1966).

315. *See* Washington Gas & Light Co. v. Thomas, 448 U.S. 261 (1980).

316. A state may constitutionally apply its own law whenever it has a "significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981). This test imposes very few limitations on a state's application of its own law, since it will be rare when a state's decision to apply its own law will be arbitrary or fundamentally unfair.

will not be required by full faith and credit to apply the law of another state.[317] The Supreme Court has specifically rejected the contention that a state is required to recognize the sovereign immunity of out-of-state agencies involved in accidents or other controversies with residents of that state.[318]

However, under the Full Faith and Credit Clause, a state may not discriminate against claims existing under the law of a sister state.[319] So, if a state allows an action for wrongful death under its own law, it may not refuse to entertain an action for wrongful death brought under the law of a sister state.[320]

B. The Privileges and Immunities Clause

The Privileges and Immunities Clause of Article IV, Section 2 provides that, "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States."[321] The Supreme Court has said that the clause prohibits a state from discriminating against residents of other states with respect to "basic rights," rights that "bear on the vitality of the Nation as a single entity . . . interference with which would frustrate the purposes of the formation of the Union."[322] Most rights, however, would be considered "basic rights" for privileges and immunities purposes, such as the right to work within a state, the right to own property, and the right of access to the courts. The Court has held violative of the privileges and immunities clause the following: a state law requiring private employers to give preference to local residents in employment in all oil and gas operations somehow connected to state-owned oil and gas reserves;[323] a prohibition against the

317. *See* Pac. Employers Ins. Co. v. Indus. Accident Comm'n of Cal., 306 U.S. 493 (1939).

318. *See* Nevada v. Hall, 440 U.S. 410 (1979); Franchise Tax Bd. of Cal. v. Hyatt, 538 U.S. 488 (2003).

319. *Pac. Employers Ins.*, 306 U.S. at 501-02.

320. *Hughes*, 341 U.S. at 612-13. But it may apply its non-discriminatory statute of limitations for wrongful death to bar a wrongful death action brought under the law of a sister state. Wells v. Simonds Abrasive Co., 345 U.S. 514, 518-19 (1953).

321. U.S. CONST. art. IV, § 2. The clause protects only individuals, so a corporation is not a "citizen" for purposes of the clause. *Id.*

322. Baldwin v. Fish & Game Comm'n, 436 U.S. 371, 383 (1978). In that case, the Court held that the denial of access to elk hunting, a sporting activity, was not a "basic right," and so upheld a state's rule imposing a substantially higher license fee for non-residents. *Id.* at 388.

323. Hicklin v. Orbeck, 437 U.S. 518, 527 (1978).

admission of non-residents to the practice of law in the state;[324] and the imposition of a "commuters tax" applicable only to nonresidents.[325]

The Privileges and Immunities Clause does not prevent a state from giving preferential treatment to its residents with respect to benefits directly provided by the state that involve the expenditure of state funds or the utilization of state resources.[326] Such preference is justified by considerations of state sovereignty, in that each state is entitled to use the collective wealth of the state for the benefit of its own residents, whose welfare is the state's primary concern.[327] So, a state can limit state employment and attendance at a public university to state residents, or charge non-resident students higher tuition at a public university.[328] It can also give state residents preference with respect to access to state-owned resources.[329] And while discrimination against non-residents with respect to employment by a private contractor on a state-funded public works project must be independently justified, such justification may be found in the state's need to provide employment for disadvantaged segments of its work force.[330]

The Privileges and Immunities Clause is an important limitation on state power, prohibiting discrimination against non-residents solely because they are non-residents, and ensuring that Americans are generally free to carry on their activities within the boundaries of any state on an equal footing with residents of that state.[331]

C. Interstate Rendition

The interstate rendition clause of Article IV, Section 2 provides that when a person charged with a crime in one state flees to another state, the Governor of the state from which that person has fled may demand that the person be apprehended by the authorities in that state and

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324. Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 283 (1985).

325. Austin v. New Hampshire, 420 U.S. 656, 665-66 (1975).

326. *Baldwin*, 436 U.S. at 388.

327. *See id.* at 385 (citing Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C. Pa. 1823) (No. 3,230)).

328. *See* the discussion in *Valandis v. Kline*, 412 U.S. 441, 445 (1973); Saenz v. Roe, 526 U.S. 489, 502 (1999).

329. *See, e.g.*, McCready v. Virginia, 94 U.S. 391, 396 (1877) (upholding a state's exclusion of non-residents from planting oysters in state-owned tidelands).

330. *See* United Bldg. and Const. Trades Council v. City of Camden, 465 U.S. 208, 222-23 (1984).

331. In this respect, the Privileges and Immunities Clause is a component of the constitutional right of interstate travel, in that it protects the right to be treated as a welcome visitor when a citizen of one state is temporarily present in another state. See the discussion in *Saenz*, 526 U.S at 500-03.

returned to the state where the crime has been committed for trial.[332] There is no authority to refuse to return that person, and if the Governor of the state where the person has fled refuses to do so, the federal courts will order that the person be returned.[333] The process is commonly referred to as extradition.

The requirements of Full Faith and Credit, Privileges and Immunities, and interstate rendition regulate the relationship between the states themselves. They limit state sovereignty to the extent necessary to ensure that the United States is "an indestructible union composed of indestructible states,"[334] and that the citizens of the United States are constituted as one people.[335]

VI. CONCLUSION

In this writing, we have tried to set forth the constitutional basis of the American federal system. The American federal system as we know it today was not planned. Rather its structure has evolved over a period of time as a result of the Court's interpretation of the provisions of the Constitution dealing with federal and state power and the Court's development of constitutional policy with respect to the nature and operation of the American federal system.

We have reviewed and discussed the constitutional doctrine applicable to the four components of the American federal system: (1) State sovereignty and constitutional limitations on state power; (2) The powers of the federal government; (3) The relationship between the federal government and the states; and (4) The relationship between the states. In so doing, I have tried to demonstrate that for the most part, constitutional doctrine relating to federal and state power and to the relationship between the federal government and the states and between the states themselves is fairly well-settled and such change as may be occurring is mostly around the edges. The essential nature of the American federal system, as it has evolved from many years of constitutional interpretation by the Supreme Court, remains unchanged. Precisely because the constitutional doctrine relating to the components of the American federal system is essentially well-settled, there is no reason to believe that the essential nature of the American federal system will change in the future.

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332. U.S. CONST. amend art. IV, § 2.
333. Puerto Rico v. Branstad, 483 U.S. 219 ((1987).
334. *White*, 74 U.S. at 725.
335. *Paul*, 75 U.S. at 180.

In the American federal system, state sovereignty over domestic matters coexists with the power of the federal government, so that the dominant feature of the American federal system is *concurrent power.* There are very few exclusive federal powers, and in the absence of federal preemption, both the federal government and the states can usually regulate the same activity. While Congress has the power to preempt state regulation over particular issues or over particular areas of activity and could have used preemption to expand federal power over state power and alter the concurrent power feature of the American federal system, it has not done so. Rather, both Congress, in specifically dealing with preemption in the laws it enacts, and the Court, when deciding questions of preemption, have tried to strike a balance between the principle of federal supremacy and the principle of state sovereignty, with the result that federal preemption has not substantially altered the concurrent power feature of the American system.

An unusual aspect of the American federal system, tracing entirely to the historical development of state power in light of the principle of state sovereignty, is the presence of a dual system of federal and state courts, with a substantial degree of overlapping jurisdiction. If we were starting anew, we would doubtless have a unitary court system, with jurisdiction to decide both questions of state law and federal law. But we are not starting anew, and with the dual court system interacting with the principle of state sovereignty, Congress and the Court have imposed certain federalism-based limitations on federal court jurisdiction, designed to avoid undue interference with state court jurisdiction.

We must also remember, however, that the structure of the American federal system was designed to bring the states into a national union, that would transform the loose confederation of sovereign states into one nation, an "indestructible union composed of indestructible states,"[336] and to "constitute the citizens of the United States as one people."[337]

The provisions of Article IV, Section 1, dealing with full faith and credit, and Article IV, Section 2, dealing with privileges and immunities of citizens of sister states and interstate rendition, are specifically directed toward this end. It may also fairly be suggested that the Court, in interpreting the provisions of the Constitution, dealing with federal and state power, with the relationship between the federal government and the states, and the relationship between the states themselves, has not lost sight of this fundamental objective of the American federal system.

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336. *White*, 74 U.S. at 725.
337. *Paul*, 75 U.S. at 180.

This, then, is the American federal system. For better or worse, it is the system under which we live now and under which we will live in the future. I hope that in this writing I have succeeded in setting forth the constitutional basis of the American federal system.