THE NATURE OF PREEMPTION

Stephen A. Gardbaum†

INTRODUCTION

It is "well established"[1] that Congress has the power to preempt state law in a given area. The only issue in preemption cases is whether Congress has in fact exercised this undoubted power.[2] Such exercise is a matter of the intent of Congress, and the issue is resolved by an analysis of that intent.[3] The apparent precision, orderliness, and axiomatic quality of this black-letter position, however, conceals fundamental confusion in the thinking of judges and scholars alike about the underlying nature of preemption.

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† Associate Professor, Northwestern University School of Law. B.A. Oxford 1980; M.Sc. London 1985; Ph.D. Columbia 1989; J.D. Yale 1990.

Although this Article analyzes the nature of preemption in the context of American constitutional law, any insights it contains undoubtedly originated and were developed in my capacities as a teacher of European Community (now European Union) law and a student of comparative constitutional law. As I point out in the Introduction, the issues of preemption and supremacy inevitably confront all federal systems, the European Union no less than the United States. I would like to thank Robert Bennett, Steven Calabresi, Laura Coyne, Charlotte Crane, David Engdahl, Candice Hoke, Gary Lawson, Michael Perry, Richard Pildes, and Martin Redish for valuable suggestions and comments. My greatest debts are to Tom Merrill, whose interest in and understanding of preemption was of enormous help to me in thinking through the issues raised in this Article, and to Joseph Weiler, who taught me the importance of issues of federalism in the constitutional structure of the European Union. Finally, I am grateful to the Julius Rosenthal Fund at Northwestern University School of Law for support.

1 Pacific Gas & Elec. Co. v. State Energy Comm'n, 461 U.S. 190, 203 (1983).

2 *See, e.g.*, William Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption, in* COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 523, 537 (Sandalow & Stein eds., 1982) ("Congress's power to preempt state laws which affect interstate commerce is . . . unquestioned . . . . With reference to preemption, the problem has been to define the standards for deciding when Congress has in fact exercised that power." And, "[t]hus, the issue, in pre-emption cases, simply stated, is not what Congress has the power to do, but what Congress has done.").

3 "The purpose of Congress is the ultimate touchstone [of preemption analysis]. . . ." Retail Clerks v. Schermerhorn, 375 U.S. 96, 103 (1963). Under modern preemption doctrine, the Court has recognized three ways in which such intent may be manifested: (1) express congressional intent to preempt state law; (2) implied intent where the congressional legislation in question is so comprehensive as to completely occupy a given field and thus leave no room for state regulation of the field ("field preemption"); and (3) implied intent where federal and state law conflict ("conflict preemption"). Often, but not always, a fourth category is recognized: implied intent where state law would unduly frustrate the purposes of Congress ("frustration preemption"). See *infra* notes 206, 210. For the *loci classici* of modern preemption doctrine, see Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947), and Hines v. Davidowitz, 312 U.S. 52 (1941). *See also infra* notes 204-16 and accompanying text.

Although as a topic, preemption has largely been ignored by constitutional law scholars,[4] it is almost certainly the most frequently used doctrine of constitutional law in practice.[5] This fact alone should ensure the importance of exposing and resolving the profound confusion at the heart of preemption law, which is belied by the seemingly simple statement of its provisions. But there is another reason for the importance of this task. This is the centrality of the issue of the internal division of political power within the growing fields of comparative constitutional law in general, and comparative federalism in particular. American constitutional scholars as a group may have happily bequeathed the topic of preemption to others in quest of what they perceive as more exciting fare, but this is not the case elsewhere. Indeed, in many places, no such "luxury" is possible: the division of powers between central and regional governments is an urgent political and constitutional issue, the resolution of which may determine whether the rule of law is possible. The granting of a power of preemption to the central government is a common, but not a necessary, feature of a federal state. Thus, preemption is a critical legal concept that helps to define the nature of any federal political system, so that an entity such as the European Union (prior to November 1, 1993, the European Community[6]), for example, which is still developing its sense of identity as a federal system, inevitably confronts the issue of preemption just as the much more mature American system does. In the case of the European Union, that confrontation has been much more self conscious than it has in recent decades in the United States, but that fact does not make a proper understanding of the nature of preemption as a legal concept and its application within the particular federal system any less critical for the one than for the other.

In the American context, the most common and consequential error is the belief that Congress's power of preemption is closely and essentially connected to the Supremacy Clause of the Constitution.[7]

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4 I stress the term "constitutional law," as I wish to distinguish the paucity of "second-order" scholarly work on preemption (reflection on the nature of preemption itself) from the abundance of "first-order" work (the preemption of particular areas of state law by specific federal statutes). Among the very few recent works which discuss preemption in the second-order sense are DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM (1987); David E. Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); S. Candice Hoke, *Preemptive Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685 (1991); S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829 (1992) [hereinafter Hoke, *Transcending Conventional Supremacy*].

5 A quick search on LEXIS revealed that the word "preemption" was mentioned in 49 Supreme Court cases in the last five terms alone.

6 That is, prior to the (belated) coming into effect of the European Union (Maastricht) Treaty of 1992.

7 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be

Statements of preemption law almost routinely "start from the top" with a reference to the Supremacy Clause,[8] although the exact connection that is claimed to exist between the two often varies. In fact, in order of descending frequency and significance, three different theories regarding the nature of the connection can be reconstructed from the literature. First, Congress's constitutional power to preempt state law *derives* from the Supremacy Clause.[9] Second, regardless of the source of the preemption power, the Supremacy Clause operates to preempt state law where it *conflicts* with federal law.[10] Third, each case of preemption involves a conflict between Congress's *intent* to displace state regnlation in a given area, and the intent of the state or states to regulate that same area. According to this view, the Supremacy Clause operates to resolve this conflict in favor of Congress.[11]

This Article makes two claims. First, contrary to the standard view, the power of preemption has little if anything to do with the Supremacy Clause. Second, correcting this central error about the nature of preemption has significant implications for the content of preemption law.

Part I argues that preemption and supremacy are quite distinct legal and constitutional concepts. Supremacy does not presuppose preemption, and each constitutes a different method of regulating concurrent state and federal powers. Part II demonstrates that each of the three asserted connections is the result of muddled thinking about preemption and supremacy, and establishes that the two have little to do with each other. Part III turns from conceptual to historical analysis of the difference between supremacy and preemption. It shows that unlike the principle of supremacy, which was firmly acknowledged by the courts from the earliest period of constitutional history, the unequivocal recognition of a congressional power of preemption is of relatively recent vintage and forms an intrinsic part of

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bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI.

8 Here is a representative example, taken from the Supreme Court's 1991 term. "Article VI of the Constitution provides that the laws of the United States 'shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.' Thus, since our decision in McCulloch v. Maryland, it has been settled that state law that conflicts with federal law is 'without effect.' *Consideration of issues arising under the Supremacy Clause* 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.' " Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617 (1992) (Stevens, J.) (citations omitted) (emphasis added).

9 *See infra* note 22 for examples of this claim.

10 The exposition of preemption doctrine in virtually every modern preemption case includes a statement to this effect. *See, e.g., Cipollone*, 112 S.Ct. at 2617 ("[S]tate law is preempted if that law actually conflicts with federal law") (citations omitted).

11 *See infra* notes 24-28 and accompanying text; *See also infra* part II.C.

the great expansion of national powers that has taken place during the course of this century.

Part IV discusses the implications of the previous analysis. Because of the assumed connection with the Supremacy Clause, preemption takes on the false appearance of a distinct area of constitutional law. Indeed, the Supreme Court sometimes refers to preemption claims as "Supremacy Clause cases."[12] In reality, the Supremacy Clause adds nothing to what should be a question of interpreting what Congress has in fact done. Preemption claims should be resolved through application of ordinary rules of statutory interpretation, and not through doctrinal categories such as "conflict preemption" and "field preemption," both of which constitute distorting filters through which the determination of congressional intent is mistakenly required to pass. In short, there should be no such thing as preemption doctrine.

I
PREEMPTION AND SUPREMACY

Contrary to the prevailing view, which treats them as either essentially identical or necessarily connected, supremacy and preemption are quite distinct legal concepts and constitute two alternative methods of regulating the relationship between concurrent federal and state powers. It should at the outset be clear that both the issues of supremacy and preemption arise only where the states and the federal government have concurrent power. Where Congress has exclusive power, no issue of preemption can arise because there is no state legislative power to be preempted. Similarly, in such areas, the Supremacy Clause is redundant as there can in principle be no conflict between valid state and federal laws where the states have no power to act, and vice-versa.

The supremacy of federal law means that valid federal law overrides otherwise valid state law in cases of conflict between the two. In itself, federal supremacy does not deprive states of their preexisting, concurrent lawmaking powers in a given area; rather, it means that a particular state law in conflict with a particular federal law will be trumped in cases where both apply. State legislation has full effect as long as it is not in conflict with federal law, and state legislative competence in a given area fully survives the trumping of any particular state law on supremacy grounds. This means, for example, that in the face of a potential or actual conflict with federal law, states retain legislative power to amend their legislation in order to avoid the conflict.

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12 *See, e.g.*, Perez v. Campbell, 402 U.S. 637, 651 (1971). *See also* Hoke, *Transcending Conventional Supremacy*, *supra* note 4, at footnote 4.

It also means that where no federal law covers specific subjects within a given field of congressional regulation, states remain free to regulate those subjects without regard to the federal scheme.

Preemption, by contrast, means (a) that states are deprived of their power to act *at all* in a given area, and (b) that this is so *whether or not* state law is in conflict with federal law.[13] When states lose their concurrent lawmaking powers through preemption by Congress, the issue of potential substantive conflict between the content of valid state and federal laws is simply not reached, for the state no longer has power to legislate at all in the given area. Preemption is thus a jurisdiction-stripping (or "jurispathic"[14]) concept, unlike supremacy which deals with conflict resolution in particular cases. To borrow two terms from conflict of laws scholarship, supremacy resolves a "true conflict"—a conflict between two valid laws on the same issue; by contrast, preemption resolves a "false conflict"[15]—where it applies, there is only one valid law governing the issue, namely the federal. Whereas supremacy resolves a conflict resulting from the exercise by two or more entities of their concurrent powers, preemption implies that one entity (the federal) has attained exclusive power on the issue. Accordingly, on any given subject, there are potentially two separate questions to be answered. First, is state lawmaking power preempted by Congress? If so, then federal law governs and that is the end of the inquiry. If not, and thus the states retain concurrent lawmaking power to act in the field, one must then consider whether the particular state law in question conflicts with the terms of the relevant federal law. If it does, then that state law (but not others) is trumped by application of the Supremacy Clause.

Thus, preemption is a significantly more radical inroad on state power than supremacy per se. Supremacy means that states remain free to act as long as their laws are not in conflict with federal law; preemption means that states lose their power to act at all, regardless of any conflict with federal law. Each principle constitutes a different regime for regulating concurrency: in the case of supremacy, continuing co-equal powers with a rule for resolving conflicts; in the case of preemption, terminating the co-equal powers of the states.

At this point, even if the validity of the distinction I have drawn between the legal concepts of supremacy and preemption is conceded, it might still be thought that the practical difference between

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13 For a recent statement of the difference between supremacy and preemption in the context of the federal structure of the European Union, see Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2417 (1991).

14 *See* Robert M. Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

15 *See, e.g.*, JAMES MARTIN, CONFLICT OF LAWS 226 (2d ed. 1984).

them could, in principle, be reduced to nil: supremacy can be made to cover the same legal ground as preemption.

Such an argument might take the following form. Conflicts are matters of degree, with the spectrum ranging from direct contradiction (that is, it is impossible to comply with both) to minor differences between state and federal laws on the same subject, where the state law does not interfere with the objectives of the federal law. As a hypothetical example of the latter,[16] imagine a federal statute requiring that a health warning cover a minimum of four percent of the surface area of a cigarette package, and a law of State Y requiring that the same warning cover five percent of the surface area. Absent the power of preemption, the scope of supremacy principles could be expanded from the traditionally strict view incorporating a presumption of no conflict, to include any degree of conflict, even the most minor difference between state and federal law.[17]

There are two problems with this argument. First, even though the exact type or degree of difference that is necessary to constitute a "conflict" between state and federal laws probably cannot be specified *a priori*, there are undoubtedly conceptual (and constitutional) limits which render the suggested spectrum far too wide. Mere differences are certainly insufficient.[18] Second, quite apart from this issue of the particular degree of conflict required to trigger a valid supremacy claim, there are general structural differences between the two concepts which stem from the fact that what distinguishes supremacy

16 In fact, this example is hypothetical only from the perspective of U.S. law. It was taken from the European Union's recent Cigarette Labeling Directive and the United Kingdom statute passed to implement ("transpose") that directive.

17 Indeed, according to Professor Hoke, this describes the tendency of the federal courts over the past fifty years or so. *See* Hoke, *Transcending Conventional Supremacy*, *supra* note 4.

In doctrinal terms at least (if not always in practice), courts apply a presumption in favor of state law in both preemption and supremacy contexts. (It might be argued that these presumptions constitute the last vestiges of federalism in the American system. *See infra* part IV.) Currently, again at least doctrinally, the presumption against conflict translates into the proposition that a relatively high degree of conflict is required for a state law to be trumped. Another way of stating that courts should expand the scope of supremacy principles to cover more minor interferences or differences is to say that they could adopt a presumption of conflict.

18 *See* Hoke, *Transcending Conventional Supremacy*, *supra* note 4 (arguing that the Supremacy Clause, which does not in its terms specify the degree of conflict necessary for its application, should, for reasons of federalism and republican democracy, only be invoked in cases of conflict nearer the direct contradiction end of the spectrum).

Professor Hoke makes this point in the context of her general thesis that "all types of preemption claims should he reconceptualized as species of conflict," and that state law may only be preempted when in proscribed conflict with federal law. *See* Hoke, *id.* at notes 287-88 and accompanying text; *See also* Hoke, *Preemption Pathologies and Civic Republican Values*, *supra* note 4, at 735-37. The arguments in this section and in parts II.A. and II.C. constitute my response to this thesis.

from preemption is the centrality of conflict in the former and its irrelevance in the latter.

Under any version of the principle of supremacy, a finding of conflict applies only to the specific state measure at issue, whereas preemption applies to every measure in the given field. In other words, supremacy necessitates case-by-case analysis on an ex post basis. State regulation of the field cannot be ruled out ex ante. Moreover, no plausible version of the principle of supremacy can prevent states from amending their measures to avoid the conflict, a power that gives the states a significant measure of control; conversely, under a regime of preemption, Congress maintains the initiative.

This loss of congressional control to the states under the Supremacy Clause, however, is probably less important than Congress's loss of control to the courts. Unlike preemption, which is a matter of legislative will, supremacy is inherently a judicial matter: it is up to the courts to determine, in the context of a case or controversy, if there is a conflict between the two laws at issue.[19] Whether or not to preempt state law, on the other hand, is a matter within the discretion of Congress. The court's role is limited to discovering Congress's intent,[20] and (in principle) Congress has the ability to make its intent crystal clear.[21] Accordingly, even with the most extreme manipulation, supremacy cannot cover the same legal ground as preemption.

II
THE ERRONEOUS CONNECTIONS BETWEEN PREEMPTION AND THE SUPREMACY CLAUSE

A. The Source of Congress's Power of Preemption

1. *The Supremacy Clause*

It is widely assumed that Congress's power of preemption derives from the Supremacy Clause. Being assumed, the derivation is often left implicit, but even where stated, it tends to be asserted peremptorily and without explanation in judicial opinions and scholarly articles

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19 A state or federal court must first decide on the interpretation of the state law in question. A state or federal court must then decide if the state law, as interpreted, conflicts with the federal.

20 *See supra* note 3.

21 I acknowledge that the distinction I am drawing between the role of a court under preemption and supremacy analyses (interpreting clearly expressed intent versus adjudicating a conflict) is somewhat formalistic in a (judicial) world in which there are no facts, only interpretations. Nonetheless, there is still a difference (at least of degree) between a situation in which what is being interpreted is congressional intent itself (preemption), and one in which, even though Congress may have expressed its view, it is not that view which is being adjudicated, but the existence of a conflict (supremacy).

alike.[22] There are, however, at least two straightforward problems with this view of the constitutional source of the preemption power. First, it fails to explain how the Supremacy Clause, which on its face is the Constitution's dispute resolution mechanism, can be understood to *grant* any powers at all. The Supremacy Clause does not empower, but rather resolves a particular problem arising out of the powers granted by other parts of the Constitution: namely, conflicts resulting from concurrent state and federal powers.

Second, this assumed derivation fails to appreciate that, as explained above, supremacy and preemption are distinct legal concepts constituting two *different* methods of regulating the relationship between concurrent federal and state powers.[23] For once the distinction is acknowledged, the following problem immediately arises: while the Supremacy Clause expressly contains the supremacy principle, it says nothing about preemption.

Faced with these two threshold problems, simple assertion of the derivation no longer suffices. Proponents of this view must explain how preemption derives from the Supremacy Clause, how the clause contains not only the principle of supremacy but also that of preemption. Having (I hope) succeeded in undermining the common assumption that preemption *automatically* derives from supremacy, I now turn to the task of establishing the following stronger thesis: preemption *cannot* derive from supremacy.

The basic argument for this stronger thesis follows directly from the analytical distinction between supremacy and preemption, and can be simply stated in syllogistic form. A greater power cannot (logically) derive from a lesser one. Preemption is a greater federal power than supremacy (that is, the ability of congressional legislation to pre-

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22 *See, e.g.*, New York Central R.R. Co. v. Winfield, 244 U.S. 147, 148 (1917) ("it [] is settled that when Congress acts upon the subject all state laws covering the same field are necessarily superseded *by reason of the supremacy of the national authority*") (emphasis added). *See also* Gade v. National Solid Wastes Management Ass'n, 112 S. Ct. 2374, 2388 (1992) ("*But under the Supremacy Clause, from which our pre-emption doctrine is derived*, 'any state law . . . which interferes with or is contrary to federal law, must yield.' ") (emphasis added); ENGDAHL, CONSTITUTIONAL FEDERALISM, *supra* note 4, at 76 ("*By virtue of the supremacy clause*, every federal law 'made in Pursuance' of the Constitution, has the capacity to supersede, or preempt, state law.") (emphasis added); GERALD GUNTHER, CONSTITUTIONAL LAW 219 (12th ed. 1991) ("When Congress exercises a granted power, the federal law may supersede state laws and preempt state authority, *because of the operation of the Supremacy Clause of Art. VI.* In these cases, it is ultimately Art. VI, not the commerce clause or some other grant of delegated power, that overrides the state law.") (emphasis added); Cohen, *supra* note 2, at 537 ("Unlike the power of Congress to consent to state laws, the power of Congress to pre-empt state laws has not been subject to puzzling questions of the source of Congressional power. Acting within the scope of its delegated powers, Congress may require or permit conduct that state law requires or prohibits, or prohibit conduct that state law requires or permits. *That is the clear meaning of the Supremacy Clause . . . .*") (emphasis added).

23 *See supra* part I.

empt state lawmaking power constitutes a greater inroad on state power than the principle that federal law trumps state law when the two conflict). Therefore, preemption cannot (logically) derive from supremacy.

Those who are persuaded by the weaker thesis—that there is nothing automatic about deriving preemption from the Supremacy Clause—may believe that the affirmative case for the derivation that I have admittedly shown to be necessary is nonetheless readily available, thus undermining the stronger thesis at the outset. This affirmative case for the derivation is that all preemption cases can be *translated* into conflict cases, so that whatever the conceptual differences between the two, the practical difference between supremacy and preemption ultimately collapses. In this way, preemption becomes simply a different way of characterizing supremacy, leading to the conclusion that the power of preemption can be derived from supremacy or conflict principles after all.

The argument for the claim of translatability takes the following form. First, under the Court's current preemption doctrine, what it terms "conflict preemption" or "actual conflict" is simply the classic case for the application of supremacy principles. In this situation, there is an actual conflict between the substantive terms of certain federal and state laws. For example, a federal statute states that a specified warning of the dangers of cigarette smoking which must be placed on cigarette packages by the manufacturer is both necessary and sufficient to fulfil the duty to warn, thereby shielding the manufacturer from civil liability for the harmful consequences of cigarette smoking.[24] The law of State X, on the other hand, asserts that such a warning is not sufficient to protect the manufacturer. I shall call such situations "first-order conflicts."

Second, the other two major types of modern preemption cases, those of "express preemption" (in which Congress has expressly stated its intent to preempt state law on a particular subject) and "field preemption" (where such intent is implied—or rather inferred—from Congress's attempt to "occupy the field" with a comprehensive scheme of legislation that leaves no room for state jurisdiction) can both be *recharacterized* as conflict cases. In these situations, there is a conflict, although not between the substantive terms of federal and state legislation. Rather, the conflict exists between Congress's (express or implied) *intent* that there should be no state regulation in a given area, on the one hand, and the actions of a state seeking to

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24 This statute, The Federal Cigarette Labeling and Advertising Act, 15 U.S.C. 1331-1341 (1988), was at issue in the well-known *Cipollone* litigation. Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (1988), *aff'd in part, rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part*, 112 S. Ct. 2608 (1992).

regulate *any part* of that area—regardless of the actual content of the regulation—on the other. I shall call such situations "second-order conflicts." Thus, by recharacterizing express and field preemption cases into such second-order (or "jurisdictional") conflicts between federal and state laws, it would seem possible to rely *directly* on supremacy principles, which of course require that Congress prevail. In this way, preemption is seen to be a species of conflict after all (rather than conflict a species of preemption) and thus, it is squarely derivable from the Supremacy Clause.

Interestingly, this recharacterization or translation of preemption cases into conflicts was recently suggested by Justices Souter and O'Connor.[25] In *Gade v. National Solid Wastes Management Ass'n*,[26] Justice O'Connor quotes approvingly from Justice Souter's dissent in *English v. General Electric Co*,[27] as follows: "[F]ield preemption may be understood as a species of conflict preemption: A state law that falls within a preempted field confiicts with Congress's intent (either express or plainly implied) to exclude state regulation."[28]

Plausible though this translation of "express" and "field" preemption situations into second-order confiicts may appear at first glance (and thus devastating for the strong thesis), it does not survive closer scrutiny. The reason is that the translation begs the question it poses, which is precisely *whether* Congress has the constitutional power to say (expressly or impliedly) "there shall be no state regulation of field X" in the first place—that is, whether Congress has the power to preempt state law. The argument assumes the very power of preemption that it claims to be deriving from the Supremacy Clause. Supremacy principles apply where there is a conflict between two valid laws—one state and the other federal. In order for the congressional law forbidding state regulation of field X to be valid, there must already be a power to preempt state law. This power is the cause of the conflict and not the effect. That is, if Congress does have the power to say "no state regulation," this power must preexist the conflict and cannot derive from it. If, on the other hand, Congress does not already have the preemption power, then legislation containing such a "no state regulation" provision would be unconstitutional. In this case, because there are not two valid laws in conflict, the Supremacy Clause would not apply (the

25 *See Gade*, 112 S. Ct. at 2386. This recharacterization, however, was not suggested in response to the claim that only conflicts are governed by the Supremacy Clause, but rather, as a way of importing flexibility and open-endedness into the three categories of preemption (express, field, and conflict), which are usually viewed as mutually exclusive.

As noted above, Professor Hoke has also suggested that all preemption cases should be reconceptualized as species of conflict. *See supra* note 18.

26 112 S. Ct. 2374 (1992).

27 496 U.S. 72 (1990).

28 *Gade*, 112 S. Ct. at 2386 n.2.

state law would stand) and, obviously, the power of preemption cannot be derived from it. Either way, the Supremacy Clause is irrelevant with regard to the validity or invalidity of the federal law, and the attempt to derive the power of preemption from second order conflicts fails.

Another way of stating this argument is as follows: if Congress has the power of preemption, an exercise of this power would be effective *regardless* of whether or not any state had already attempted to regulate the same field. That is, the states would be preempted even when no second-order conflict exists. If this is so, the power of preemption cannot depend upon the existence of such a conflict and, therefore, it cannot derive from the Supremacy Clause.

In sum, even assuming that all cases of preemption can be manipulated to involve a conflict between federal and state law, it does not follow that preemption can be derived from the Supremacy Clause. Second-order, or jurisdictional, conflicts can only come into existence once the relevant federal law preventing states from regulating a given area is deemed valid; that is, when the power of preemption has already been established.

2. *The Commerce Clause*

The preceding sections establish that the power of preemption does not derive from the Supremacy Clause. In addition, they demonstrate that this power is not redundant: by itself, the principle of supremacy cannot cover the same legal ground as preemption. Accordingly, if the preemption power is constitutionally justified, its source lies elsewhere.

Even those who believe that preemption derives from the Supremacy Clause would probably agree that Congress has most often exercised this power in the context of acting under its general authority to regulate interstate commerce. That is, the Commerce Clause represents the characteristic vehicle for the exercise of the preemption power. The proposition that will now be considered is whether the power itself can be located in this clause: that is, does the Commerce Clause constitute both the vehicle for *and the source of* preemption?

The argument for the Commerce Clause derivation of the power of preemption might take the following form. If Congress has the power to do X (for example, to regulate the tobacco industry) under its general authority to regulate interstate commerce, then that power includes the power to preempt state lawmaking capacity. No *additional* question of congressional authority is raised when the exercise of this power involves the preemption of preexisting state legislative competence. It makes no sense to ask by what constitutional grant of

power Congress is enabled to preempt state regulatory power in the course of exercising its own undoubted powers of regulation in a given area. To ask this question is to be guilty of a "category mistake"[29] on a par with the one that confuses supremacy with preemption. This is because preemption is an *instance* of federal regulation of interstate commerce and is not the exercise of a separately granted power.

At first sight, this is a powerful argument. Such an appeal to the parsimony of Occam's razor is always attractive where appropriate; but, on closer inspection, it is not appropriate here. In effect, the argument does not seek to solve the problem of the source of the preemption power, but to *dissolve* it: preemption does not raise the issue of justifying a separate Congressional power because it is simply one way in which Congress may exercise the single power of regulating interstate commerce. In reality, however, the argument does not dissolve the problem but merely recharacterizes it. Given both the constitutionally granted concurrent powers of the states and the existence of the Supremacy Clause, the following question still needs to be answered: why is preemption a constitutionally justified form of regulation? The fact that preemption may be characterized as a form of regulation does not mean that it is a constitutionally authorized form. However the problem is framed, it is still one thing to expand the scope of the federal commerce power (what areas can be regulated) and another to say that within this scope, Congress can abolish concurrent state power (what form may regulation constitutionally take). In other words, the argument necessarily involves implying the preemption power as part of the general commerce power. And if this is so, the necessity of providing a constitutional justification for the implication cannot be avoided by defining preemption as part of what it means to possess the power to regulate interstate commerce.

Once the merits of this implication are reached, however, a number of serious constitutional objections present themselves. First, there is a straightforward textual problem, analogous to the one involving the purported derivation of preemption from supremacy. In principle, there are at least two possible means of regulating concurring state and federal commerce powers, however extensive the latter may be: the principle of supremacy alone, and supremacy plus preemption. As between these two, only supremacy has obvious textual support. What basis is there for implying preemption where the textually-based method of regulation is entirely coherent, if not necessarily the most convenient? Just as the Supremacy Clause does not refer

29 *See* GILBERT RYLE, THE CONCEPT OF MIND (1948).

to—and is perfectly coherent without implying—the power of preemption, the same is true of the Commerce Clause.

Second, and more importantly, an obvious implication of deriving the preemption power from the Commerce Clause is that, contrary to the conventional understanding,[30] there would be no *general* congressional power of preemption. The power would exist only where Congress acts under the Commerce Clause and not where it acts under any of its other concurrent enumerated powers. Derivation from the Commerce Clause would thus constitute a limitation on the power as it is generally understood. Although this limitation may not appear to have much practical significance—because Congress already acts under the commerce power in most preemption situations or could so act given the clause's broad modern interpretation—nonetheless, the Court has certainly recognized preemption under legislation adopted pursuant to other enumerated powers. Indeed, some of the most important preemption cases have assumed that the power is not limited to Commerce Clause legislation.[31]

Third, another complication results from treating the Commerce Clause as the source of the power of preemption. What theory of constitutional interpretation, it might be asked, justifies inferring the power of preemption from the mere grant of power over interstate commerce without inferring it also from other mere grants of congressional powers? What is different about the grant of federal power under the Commerce Clause that alone includes a power of preemption? At least from a textualist point of view, it would seem that as a matter of basic constitutional interpretation, the identical textual grant of "mere" power must have the same implications for federal/state relations in all cases.[32]

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30 *See, e.g.*, PATRICK ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 58 (1987). *See also* ENGDAHL, *supra* note 22 ("... every federal law 'made in pursuance' of the Constitution, has the capacity to supersede or preempt state law"); GUNTHER, *supra* note 22 ("when Congress exercises *a* granted power, the federal law may supercede state laws and preempt the state . . . all because of the operation of the Supremacy Clause." (emphasis added).

31 For example, the federal statute at issue in *Hines*, one of the landmark cases establishing modern preemption doctrine, was based not on the interstate commerce power, but on Congress's power over matters of naturalization and immigration. 312 U.S. at 66. Similarly, the Atomic Energy Act of 1954, the federal statute at issue in the leading case of Pacific Gas & Elec. Co. v. State Energy Comm'n, 461 U.S. 190 (1983), was not based on the Commerce Clause.

The Court has also recognized preemption under legislation pursuant to the Property Clause of Article IV. *See, e.g.*, Kleppe v. New Mexico, 426 U.S. 529 (1976). It has also done so with respect to the Bankruptcy Clause of Article I, although here, the situation is different because Congress is expressly granted the power to pass uniform laws in the area, i.e., to preempt the states. *See, e.g.*, Perez v. Campbell, 402 U.S. 637 (1971).

32 For a recent example of such a textualist argument (albeit made in the context of different clauses of the Constitution), that similar clauses in different parts of the Constitu-

One response to this textualist point might be that the Commerce Clause contains the *only* instance of concurrent federal and state powers in the Constitution.[33] It might be argued, for example, that all original congressional powers were exclusive,[34] with the commerce power alone becoming concurrent over time as a result of its expansion into areas traditionally reserved exclusively to the States. If this is the case, preemption would be both a general federal power and a power specific to the Commerce Clause. Even if the burden of establishing this claim were successfully discharged, however, the argument for the Commerce Clause derivation would still remain incomplete. For it would only establish that a concurrent commerce power *requires* an implied power of preemption to make it operable, allowing uniform national laws to be guaranteed where necessary. It would not establish how, as a matter of constitutional theory and interpretation, one moves from *practical necessity* to constitutional *justification.*

A second response, one that does point towards justification, might explain directly what is different about the Commerce Clause such that a power of preemption is implied here that is not implied in any other concurrent federal powers that may exist. This response focuses on the inherent primacy of the federal government's responsibility for regulating interstate commerce and protecting the national market, a responsibility that goes beyond co-equal powers with the states. Certainly, an argument for this position can be made on the basis of "modified" original intent. That is, although an originalist version of this "inherent primacy" argument would point towards simple rather than latent exclusivity of the federal commerce power,[35] the modern expansion of this power renders straightforward exclusivity utterly unworkable. The sheer amount of regulation and the complexity of the issues involved would place far too heavy a burden on

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tion should be given the same meaning, see Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary,* 105 HARV. L. REV. 1153 (1992).

33 The Eighteenth Amendment explicitly provided a second instance. "The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation." U.S. CONST. amend. XVIII, § 2 (repealed 1933). In fact, this is the only *express* reference to concurrent powers in the entire text of the Constitution.

34 The argument might take the following form. First, most of the powers granted to Congress are inherently national powers, requiring central authority. Second, exclusive grants of power to Congress explain the meaning of the Tenth Amendment's reservation to the States of all powers not delegated to the United States; in other words, those delegated are *not* reserved to the states. U.S. CONST. amend. X. Third, by the time the Eighteenth Amendment was adopted in 1919, there was a presumption that where Congress is given explicit power, that power is exclusive. Only this would explain the need for an express reference to concurrent powers in the Amendment. *See* U.S. CONST. amend. XVII, § 2 (repealed 1933).

35 See Justice Johnson's opinion in Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). *See also infra* notes 59-61 and accompanying text.

Congress under an exclusive system without overlap, and requires at least some residual state regulatory powers. Although it will not satisfy the textualist, this combination of special federal responsibility and the practical need for state participation might perhaps provide a feasible justification for the unique jurisdictional principle of preemption in the context of the commerce power over and above the normal regime of concurrency plus supremacy.

Fortunately, it is unnecessary to grapple further with these arguments for and against the Commerce Clause derivation because there is an easier and more plausible solution available to the problem of source, a solution moreover that is consistent with textualist principles. This is that the gap between practical necessity and constitutional justification is bridged in the text of the Constitution itself: namely, the Necessary and Proper Clause of Article I.[36]

3. *The Necessary and Proper Clause*

Undoubtedly, the basic and most compelling argument in favor of a congressional power of preemption is a practical one—the need for uniform national regulation, for one set of rules, in particular areas. As Part III will demonstrate, the tremendous contemporary growth in both the amount and scope of federal regulation, and the increasingly obvious need for a single scheme of regulation in areas such as interstate railroads, explain the urgency surrounding recognition of the power of preemption at the beginning of the twentieth century. To see the issue of preemption in terms of this need, however, is to point to a more satisfactory constitutional justification of it.

Simply put, in certain areas and under certain circumstances, Congress needs to pass uniform national laws in order to exercise its express powers effectively. Most often, but not necessarily, this need arises under its power to regulate interstate commerce. Supremacy principles are sometimes insufficient. Yet, these are precisely the circumstances under which Congress is authorized to use the power contained in the Constitution's Necessary and Proper Clause located at the end of Section 8, Article I. From *McCulloch v. Maryland*[37] on, the Necessary and Proper Clause has been understood to authorize actions which, in themselves, are not within Congress's express Article 1 powers, but serve to effectuate other policies within the express powers. In Marshall's words, "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate,

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36 "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, section 8, cl. 18.

37 17 U.S. (4 Wheat.) 316 (1819).

which are plainly adapted to that end . . . are constitutional."[38] From the creation of the Bank of the United States to the outlawing of private acts of racial discrimination,[39] measures that are not within the express powers of Congress have been authorized under the Necessary and Proper Clause as appropriate methods of regulating interstate commerce. In precisely the same manner, the Necessary and Proper Clause provides the power to preempt state law in order to pass uniform national laws. The existence of a layer of state regulation, although not in conflict with the federal, is sometimes inappropriate.

There is thus a straightforward plausibility behind ultimately deriving preemption from Congress's enumerated power under the Necessary and Proper Clause.[40] Moreover, doing so overcomes the potential problems associated with the Commerce Clause derivation. First, there is no textual problem: the power of preemption ultimately stems from a clear textual grant of power to Congress. Second, under this derivation, Congress has the potential for a general power of preemption: the power to pass uniform national laws is, in principle, available under all other enumerated powers rather than being restricted to the Commerce Clause. As noted above, this is consistent with the conventional understanding of the scope of the power.[41] Moreover, the fact that the source of the preemption power lies outside the Commerce Clause does not, of course, prevent the full exercise of the power through the vehicle of that clause. Indeed, the conventional wisdom locates the source outside the Commerce Clause, namely, in the Supremacy Clause.

In sum, the power of preemption derives from the Necessary and Proper Clause; it is authorized as a means of effectuating other congressional powers. It has nothing to do with the Supremacy Clause. The independent principle of supremacy alone is insufficient to guarantee the uniform national regulation that is sometimes required.

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38 *Id.* at 421.

39 *See, e.g.*, Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964). As the concurrences in both of these cases note, symbolically at least, the commerce power was a strange basis on which to rely, given the seeming availability of express legislative authorization under Section V of the Fourteenth Amendment. *See Heart of Atlanta*, 379 U.S. at 280 (Douglas, J., concurring).

40 As Engdahl makes clear, the power granted by the Necessary and Proper Clause is enumerated not implied. "The phrase 'implied powers,' commonly associated with the clause from the beginning is an unfortunate and confusing misnomer . . . . [U]nique among the enumerated powers, this one concerns no particular subject matter but operates instead in conjunction with each of the other power-granting clauses." Engdahl, *supra* note 22, at 17. For a recent work arguing that the scope of the power granted by the clause is limited by the word "proper," see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

41 *See supra* note 30 and accompanying text.

As will be described in Part III, recognition of the preemption power was an intrinsic part of the expansion of federal power that has taken place over the course of this century. This explains why the power of preemption was not generally recognized for most of the previous century.[42] It is not that the Supremacy Clause has changed or expanded, or that it now yields implications that were previously overlooked; rather, it is the nature and extent of congressional power that has changed. In effect, a transformation occurred, replacing the previous regime of concurrent powers regnlated only by the principle of supremacy ("concurrency plus supremacy") with the modern regime of concurrent powers regulated also by a congressional power of preemption ("concurrency plus preemption"). But this transformation did not begin and end with the New Deal revolution in federal power. The first installment of the enlarged federal power encompassing the power of preemption took place during the second decade of this century.[43]

Prior to the beginning of this century, concurrent state and federal power was "genuine": that is, each sovereigu possessed equal regulatory power subject only to the independent operation of the Supremacy Clause. When the Supreme Court first unequivocally acknowledged a Congressional power of preemption around 1912,[44] this original jurisdictional regime of concurrency plus supremacy gave way to a regime of what I shall term the "latent exclusivity"[45] of congressional power. Under the new regime, the power of the states over interstate commerce in particular was subordinate to that of Congress *in all cases* of congressional action and not only in cases of conflict as before. The form that this subordination took under the system of latent exclusivity was that the power of the states ended as soon as Congress chose to exercise its regnlatory power in a given field. This new regime of latent exclusivity was itself replaced in the 1930s by the current one which, in principle at least, established genuinely concurrent power (concurrency plus supremacy) as the default situation, unless and until Congress clearly manifests its intent to end it.

B. First-Order Conflicts

Without question, the view that preemption derives from the Supremacy Clause is the most important mistaken connection between these two distinct legal concepts, as it constitutes the premise for much of the thinking about preemption. It is not, however, the only misconception. The second contends that, regardless of the

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42 *See infra* part IV.

43 This story forms the subject matter of part IV. The following is a summary.

44 *See infra* note 169 and accompanying text.

45 This phrase was suggested to me by my colleague, Tom Merrill.

source of the power of preemption, state law is preempted under the Supremacy Clause if it conflicts with federal law.[46] In modern preemption doctrine, this type of implied preemption is termed "conflict preemption."

As the previous discussion should make clear, however, "conflict preemption" is a contradiction in terms. The trumping of an otherwise valid state law by supreme federal law is not an instance of preemption at all. The state in question does not lose its concurrent lawmaking powers, it is not deprived of the power to legislate in the same area in the future. It can, for example, amend the trumped statute to avoid the conflict with federal law.

As noted earlier, this difference is not an empty one, involving simply the shuffling of labels.[47] First, whereas conflict is essential to the application of supremacy, it is largely irrelevant to the issue of preemption. Second, whereas preemption is a discretionary power depending on the intent of Congress for its exercise, the principle of supremacy operates automatically, without regard to such intent, to trump conflicting state laws. Third, determining whether or not a state law conflicts with a federal law is an ex post judicial matter, involving first the interpretation of the state law in question and then an evaluation of its compatibility with the federal law. Preemption, by contrast, is an ex ante legislative exercise that does not involve the interpretation of state laws.

C. Second-Order Conflicts

The third purported connection between preemption and supremacy assumes that each case of preemption represents a second-order conflict (between Congress's intent to displace state law and the state's intent to regulate) that the Supremacy Clause resolves in favor of Congress.

This argument regarding the *exercise* of the preemption power is parallel to the one that *derives* the power from the Supremacy Clause by translating preemption cases into cases of second-order conflicts. The problem with the argument is similarly parallel: the Supremacy Clause simply does *not* operate to resolve this case. If the federal statute clearly exhibits congressional intent to preempt state law (expressly or impliedly), then that is the end of the matter. No valid state laws survive the exercise of Congress's power of preemption which could conflict with the federal. Such exercise eradicates any and all concurrent state lawmaking authority. With no valid state law remaining to conflict with the relevant federal statute, no circumstances exist

46 *See supra* note 10.

47 *See supra* note 19 and accompanying text.

after preemptive congressional action to implicate the Supremacy Clause.

In sum, none of the purported connections between preemption and supremacy is valid. The Necessary and Proper Clause, and not the Supremacy Clause, provides the source and constitutional justification for Congress's power to preempt state lawmaking capacity. This power is not involved when the Supremacy Clause trumps a particular state law that conflicts with a federal statute. Finally, the Supremacy Clause does not resolve second-order conflicts between congressional intent to preempt and state attempts to regulate. If preempted, state law is simply no longer valid.

III
THE CONSTITUTIONAL HISTORY OF PREEMPTION

The constitutional history of preemption that I shall recount in this section serves two purposes. First, it provides historical support for the conceptual analysis presented above, in particular the fact that supremacy does not imply, and has little to do with, preemption. If preemption were essentially connected with supremacy, one would expect the earliest cases concerning the relationship between federal and state authority to have firmly acknowledged the power of preemption, as they acknowledged the principle of supremacy itself.[48] The fact is, however, that the courts did not recognize a clear and unequivocal power of preemption until the second decade of the twentieth century, when state laws were overturned on preemption grounds for the first time.

As will be clear from what follows, I am not arguing that no Justice of the Supreme Court ever accepted the power of preemption before 1912, but rather, (a) that whether or not Congress had the power to preempt state law was an unresolved, and at times highly controversial, issue throughout the nineteenth century; (b) that, at least before 1876, preemption was generally understood to be quite distinct from, and a more radical intrusion upon state power than, supremacy; and (c) that no state law was actually overturned on preemption grounds until 1912.[49]

For most of the nineteenth century, the Court typically decided cases involving the relationship between state and federal power not on preemption grounds, but on grounds of exclusivity or supremacy alone. The structure of the Court's analysis was as follows: if congressional (or state) power was exclusive, then states (or Congress) had no power to legislate; but if congressional power was concurrent, then

48 *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

49 *See infra* part III.C.

only a conflict between the state and federal laws could invalidate the state law, under the Supremacy Clause. Indeed, the characteristic (and in some minds, notorious) importance attached to the categorization of federal power as exclusive or concurrent in the nineteenth century is itself evidence that Congress was not generally considered to have the power of preemption. Where there is no such power, uniform national regulation can only be guaranteed through exclusive federal jurisdiction. Conversely, once the power of preemption is acknowledged, constitutional exclusivity becomes less crucial.[50] Uniform regulation can be attained in spite of concurrent state power by preemptive congressional action to eliminate it.

The second purpose of this section is to demonstrate that, despite the official position to the contrary, modern preemption doctrine has in practice not sufficiently abandoned the quite different earlier version of preemption established after 1910. Unlike modern preemption doctrine, which is focused exclusively on the (express or implied) intent of Congress, the earlier doctrine operated automatically whenever Congress entered a field of regulation; thus, *any* federal regulation of a given area automatically preempted *all* state regulation in the same area.[51] Under this regime, congressional "occupation of the field" was the paradigmatic instance of preemption.

The concept of automatic preemption was itself derived from confused thinking about supremacy: the preemption power was thought to be implied by the fact that Congress's authority over interstate commerce was "paramount." Although automatic preemption was officially replaced in the 1930s by an exclusive concern with congressional intent,[52] the retention of the doctrine of "field preemption" is, in practice, inconsistent with the centrality of actual intent underlying modern preemption law. Given its origins in the notion that congressional "occupation of a field" automatically triggers Congress's latently exclusive power, the doctrine of "field preemption" tends to overlook actual intent, going beyond what ordinary principles of statutory interpretation justify.[53]

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50 Though less crucial, exclusivity is clearly not unimportant, as Professor Redish's argument concerning the Dormant Commerce Clause makes clear. The practical, institutional, and constitutional differences between requiring Congress to pass legislation on the one hand, and relying on the Constitution to end state power in the absence of federal legislation on the other, are clearly not negligible. *See* Martin H. Redish & Shane V. Nugent, *The Dormant Commeree Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569.

51 *See* Engdahl, *Preemptive Capability of Federal Power*, *supra* note 4, at 53.

52 *See id.* and *infra* note 196 and accompanying text.

53 *See infra* note 216 and accompanying text.

A. The Early Cases

The United States Supreme Court did not clearly and unequivocally recognize a congressional power of preemption until the beginning of the twentieth century. In some of the earliest cases that are often thought to affirm the power of preemption, the issue of preemption properly understood simply did not arise. In others, the issue arose but was highly controversial, and the Court often avoided its resolution by deciding cases on other grounds.

This situation continued until the last quarter of the nineteenth century when, for the first time, the issue of preemption became of great practical importance due to the creation by Congress of the early federal regulatory agencies under its power to regnlate interstate commerce, and the inevitable question that these agencies raised of their impact on the traditional police powers of the states. As an institution, the Court's response during this latter period was to confuse supremacy with preemption, never clearly choosing between the two. It was only the urgent need for a clear answer, resulting from the continued rapid growth of federal regulation and the perceived need for uniform national laws, that brought the issue to the fore in the early part of this century.

The landmark case of *Gibbons v. Ogden*[54] is sometimes thought of as the first case in which the Supreme Court affirmed the power of preemption.[55] On this view, the Court in *Gibbons* held that the New York statute granting Fulton and Livingston the exclusive right to operate steamships between New Jersey and New York was preempted by the 1793 federal statute, under which Gibbons's ferries were licensed as "vessels employed in the coasting trade."[56]

This interpretation of the Court's decision represents a classic instance of the general failure to distinguish preemption from supremacy, for Chief Justice John Marshall's opinion rests on straightforward supremacy principles. Indeed, the case is notable as the first major application, not of preemption, but of supremacy. Moreover, the case is a good example of how the Court at this time used only the two principles of supremacy and exclusivity as alternative means of deciding issues of federalism.

For Marshall, the federal law trumped the New York law in question because the two were in conflict. There is no suggestion in his opinion that, as preemption implies, the issue of conflict was irrelevant once Congress had acted, nor that Congress's action terminated the power of New York to legislate in this area. Marshall states:

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54 22 U.S. (9 Wheat.) 1 (1824).

55 *See, e.g.*, Cohen, *supra* note 2, at 538.

56 *Gibbons*, 22 U.S. at 212.

> Since, however, in exercising the power of regulating their own purely internal affairs . . . the States may sometimes enact laws, the validity of which depends on their interfering with, and being contrary to, an act of Congress . . . , the Court will enter upon the inquiry, whether the laws of New York . . . have, in their application to this case, come into collision with an act of Congress . . . . Should this collision exist . . . the acts of New York must yield to the law of Congress . . . .[57]

Somewhat later in the opinion, he adds:

> The appropriate application of that part of the [Supremacy] clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, . . . interfere with, or are contrary to the laws of Congress . . . . In every such case, the act of Congress . . . is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.[58]

In contrast, Justice Johnson took the alternative path in his concurring opinion, affirming the exclusivity of federal power to regulate interstate commerce.[59] For Johnson, the state law was invalid not because the federal statute preempted the state's concurrent power to pass such laws, but because, *regardless* of any federal action, the states had no power *ab initio* in this area under the Constitution.[60] He concluded, "[t]he inferences, to be correctly drawn, from this whole article, appear to me to be altogether in favour of the exclusive grants to Congress of power over commerce . . . ."[61] Thus, both Marshall and Johnson invalidated the state law, but neither did so on the ground of preemption.

The nearest the Supreme Court came to affirming a congressional power to preempt state law during the first three quarters of the nineteenth century was actually not *Gibbons* at all, but the case of *Houston v. Moore*,[62] decided four years earlier in 1820. In *Houston*, the Supreme Court upheld a Pennsylvania statute that provided for punishment of state militiamen who failed to appear when ordered into service by the President of the United States.[63] The Court rejected the defendant's claim that, under the relevant federal statute, he could only lawfully be punished by the United States.[64]

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57 *Id.* at 209-10.

58 *Id.* at 211.

59 *Id.* at 226. Although this was an argument in which Marshall found "great force," he felt it did not need to be resolved given the conflict between the two laws.

60 *Id.* at 227.

61 *Id.* at 236.

62 18 U.S. (5 Wheat.) 1 (1820).

63 *Id.* at 26.

64 *Id.* at 27.

Writing for the Court in a three-two decision, Justice Washington upheld the state legislation on the ground that Congress had not in fact preempted the state's concurrent power.[65] His opinion, however, strongly supported the existence of a general power of preemption itself. Justice Story's concurring opinion, on the other hand, contains an equally explicit and vehement denial of the power of preemption in favor of supremacy alone.[66] Despite this difference of view, what Washington and Storey held in common, unlike their successors, was the clear recognition that the two principles are significantly different: supremacy is distinct from, and does not imply, preemption.

Justice Washington affirmed the power of preemption by denying:

> [the] novel and unconstitutional doctrine, that in cases where the State governments have a concurrent power of legislation with the national government, they [the states] may legislate upon any subject on which Congress has acted, provided the two laws are not in terms, or in their operation, contradictory and repugnant to each other.[67]

Applying this principle, he concluded that:

> the State Court Martial had a concurrent jurisdiction with the tribunal pointed out by the acts of Congress to try a militia man who had disobeyed the call of the President, and to enforce the laws of Congress against such delinquent; and that this authority will remain to be so exercised until it shall please Congress to vest it exclusively elsewhere . . . .[68]

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65 *Id.* So far as I have been able to discover, the first appearance in the U.S. Reports of the term "preemption," as it is used to describe the power at issue, is in a dissent (his very first since joining the Court) by Justice Brandeis in New York Central R.R. v. Winfield, 244 U.S. 147, 169 (1917). "The contention that Congress has, by legislating on one branch of a subject relative to interstate commerce, preempted the whole field . . ." *Id.* (Brandeis, J., dissenting). Both before this first use and up until the 1940s, the term "superseded" was generally used to describe the phenomenon.

66 *Houston*, 18 U.S. at 49.

67 *Id.* at 24.

68 *Id.* at 32. Like his many successors, Washington did not identify or discuss the *source* of the congressional power to preempt, but he did provide three abstract rationales for the power. First, "[t]o subject [the people] to the operation of two laws upon the same subject, dictated by distinct wills, particularly in a case infiicting pains and penalties, is, to my apprehension, something very much like oppression, if not worse." *Id.* at 23. Second, when state law provides for the same type of punishment as federal law for a given offence, but adds to the amount, the two laws are not repugnant in that *both* can be carried out. Nevertheless, "the will of Congress is . . . thwarted and opposed." *Id.* at 22. Third, "[i]f the other [state] legislature impose[s] a different punishment, in kind or degree, I am at a loss to conceive how they can both consist harmoniously together." *Id.* at 23.

Washington's concern over the existence of two laws enacted by two different entities on the same subject, appears to stem in part from the same metaphysical problem with the general concept of divided sovereignty that characterized pre-modern theorists of the state. *See, e.g.*, JULIAN FRANKLIN, JEAN BODIN AND THE THEORY OF SOVEREIGNTY (1976). It also stemmed from a perceived threat of tyranny posed by dual sovereigns. Both of these

In his concurring opinion, Justice Story borrowed directly from Alexander Hamilton in *The Federalist*.[69] He argued that the power of the states is concurrent with that of Congress except where:

> the constitution has expressly in terms given an exclusive power to Congress, or [where] the exercise of a like power is prohibited to the States, or there is a direct repugnancy or incompatibility in the exercise of it by the States. The example . . . of the third class . . . [is] the power to establish an uniform rule of naturalization . . . .[70]

Story continued,

> In all other cases . . . it seems unquestionable that the States retain concurrent authority with Congress . . . . There is this reserve, however, that in cases of concurrent authority, where the laws of the States and of the Union are in direct and manifest collision on the same subject, those of the Union being 'the supreme law of the land,' are of paramount authority, and the State laws, so far, *and so far only*, as such incompatibility exists must necessarily yield.[71]

Story thus clearly rejected Washington's view that Congress possesses the power of preemption, contending that only the principle of supremacy regulates concurrent federal and state powers.

Justice Johnson also wrote a concurring opinion in *Houston*.[72] Although not as forthright, he undoubtedly sided with Story.[73] He attacked:

> the exploded doctrine, that within the scope in which Congress may legislate, the States shall not legislate. That they cannot, when legislating within that ceded region of power, run counter to the laws of Congress, is denied by no one; but . . . to reason against the exercise of this power from the possible abuse of it, is not for a court of justice. When instances of this opposition occur, it will be time enough to meet them.[74]

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reasons underlying his concern were, of course, transcended by the very structure of the U.S. Constitution, which famously divided sovereignty in the name of liberty. *See* THE FEDERALIST No. 51 (James Madison). In any event, the potential for two laws upon the same subject results from the very definition of concurrent powers, so that Washington's argument is really an argument for exclusivity, not preemption.

In addition, to assert that congressional will should not be thwarted in the absence of conflict is to assume the power to preempt, because if Congress has no such power, its will may certainly be thwarted. Since this is the very power that Washington sought to derive, his argnment clearly begs the question. Washington's third argument seems to reduce the issue to one of conflict. As stated throughout this Article, however, conflict is irrelevant to the issue of preemption.

69 *See* THE FEDERALIST No. 32 (Alexander Hamilton).

70 *Houston*, 18 U.S. at 49.

71 *Id.* at 49-50 (emphasis added).

72 *Id.* at 32.

73 At the end of his own opinion, Washington stated that "[t]he other judges" in the majority (referring to Story and Johnson) "do not concur in all respects in the reasons which influence my opinion." *Id.*

74 *Id.* at 45.

Nine years after *Houston*, the Court again considered how the Constitution regulates concurrent powers. In *Willson v. Black Bird Creek Marsh*,[75] the Court found that supremacy was the *only* constitutional principle other than the Dormant Commerce Clause that could invalidate the state statute in question.[76] Chief Justice Marshall, writing for the Court, concluded that the state statute permitting the defendant to erect a dam could not "under all the circumstances of the case, be considered as repuguant to the [federal] power to regulate commerce in its dormant state, or as being in conflict with any [federal] law passed on the subject."[77] The Court did not consider preemption as a third potential basis for evaluating the statute's validity.

In *City of New York v. Miln*,[78] the Supreme Court upheld a New York statute that required masters of ships arriving in New York from abroad or from another state to report the names and nationalities of all passengers. The plaintiff, New York City, brought an action in debt to recover the $15,000 penalty from the defendant, who had violated the statute.[79] The defendant argued that the state statute was an unconstitutional violation of Congress's exclusive power to regulate commerce.[80] The plaintiff countered first, that the statute was an exercise of the police power reserved exclusively to the states under the Tenth Amendment;[81] and alternatively, that if the statute were considered a regulation of commerce, it was valid because the states had concurrent power and there was no conflict with any act of Congress.[82]

The Court decided in favor of the plaintiff on the police power ground,[83] but it also offered interesting dicta on the supremacy/preemption issue. Writing for the Court, Justice Barbour stated that if the New York statute had been deemed a regulation of commerce rather than an exercise of the state's police power, then it would have been valid under the principle of concurrency plus supremacy.

> [W]hilst a state is acting within the legitimate scope of its power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit; although they may be the same, or so nearly the same, as scarcely to be distinguishable from those adopted by congress acting under a different power: subject, only,

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75 27 U.S. (2 Pet.) 245 (1829). The Court here first used the term "dormant" to describe that aspect of the Commerce Clause which prevents states from unreasonably burdening interstate commerce, even in the absence of relevant federal legislation. *See* Redish & Nugent, *supra* note 50, at 577.

76 *Willson*, 27 U.S. at 252.

77 *Id.*

78 36 U.S. 102 (1837).

79 *Id.* at 104.

80 *Id.* at 118.

81 *Id.* at 112.

82 *Id.* at 127.

83 *Id.* at 132.

> say the Court, to this limitation, that in the event of collision, the law of the state must yield to the law of congress.[84]

After summarizing the two relevant congressional statutes concerning shipping passengers, Barbour concluded that:

> there is, then, no collision between the law in question, and the acts of Congress just commented on; and, *therefore*, if the state law were to be considered as partaking of the nature of a commercial regulation; it would stand the test of the most rigid scrutiny, if tried by the standard laid down in the reasoning of the Court, quoted from the case of Gibbons against Ogden.[85]

In the infamous 1842 case of *Prigg v. Pennsylvania*,[86] the Supreme Court held unconstitutional a Pennsylvania statute making it a felony, inter alia, to return a fugitive slave who had escaped to the state of Pennsylvania.[87] Counsel for Prigg, the defendant bounty hunter, contended that the Pennsylvania statute was unconstitutional on any one of three grounds: (a) that Congress has exclusive power to legislate on the subject of fugitive slaves;[88] (b) that even if Congress's power is not exclusive, state power to legislate was preempted ("suspended")[89] by the federal Fugitive Slave Act of 1793; and (c) that if not preempted, the state statute is in conflict with the federal, and thus falls on supremacy principles.[90]

Once again, there is clear acknowledgement that the second and third grounds are distinct[91] and, by implication from the ordering of the grounds, that supremacy represents the smallest intrusion upon state sovereignty. Moreover, as in *Gibbons*, *Houston*, *Willson*, and *Miln*, the Court did not decide the case on the basis of a congressional power to preempt state legislation. The Court based its decision on the first argument, that federal power to legislate on the subject was exclusive.[92]

Several members of the Court, however, took the opportunity to discuss the other two claims. Justice Story's opinion for the Court represented a complete *volte-face* from his earlier anti-preemption position in *Houston v. Moore*.[93] Moreover, as sole precedent for affirming the preemption power he cited the very language of Justice Washing-

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84 *Id.* at 137.

85 *Id.* at 139 (emphasis added).

86 41 U.S. (16 Pet.) 539 (1842).

87 *Id.* at 608.

88 *Id.* at 610.

89 *Id.*

90 *Id.*

91 This acknowledgement runs counter to the current understanding that conflict is a sub-category of preemption, and constitutes evidence of congressional intent to preempt. *See, e.g., Hines v. Davidowitz*, 312 U.S. 52 (1941). *See also infra* part IV.A.

92 *Id.* at 625.

93 *See supra* notes 69-71 and accompanying text.

ton in *Houston* with which (as we have seen) he had squarely taken issue in his own opinion in that case.[94] Justice Taney's concurring opinion in *Prigg* decided the case on supremacy grounds, rejecting both the majority's reliance on exclusive federal power and the existence of a power of preemption.[95] Justice Daniel similarly concurred on supremacy grounds, denying both exclusivity and preemption.[96] In rejecting the power of preemption, Daniel took the liberty of quoting a large section of Story's opinion in *Houston v. Moore* to the effect that state law is invalid only when it conflicts with federal law.[97]

The next important case dealing with the issues of exclusivity, preemption and supremacy is *Cooley v. Board of Wardens of Port of Philadelphia*, decided in 1851.[98] The Court upheld an 1803 Pennsylvania statute requiring all ships entering or leaving the port of Philadelphia to use a local pilot or pay a fine that was used to support retired pilots and their dependents.[99] In a two-step analysis, the Court first found that the state statute constituted a regulation of commerce, but concluded that the Constitution granted concurrent powers to the states and the federal government on the particular subject-matter of pilots.[100] Second, the Court held that the Pennsylvania law was valid because it did not conflict with the two relevant acts of Congress.[101] In Justice Curtis's words:

> We are of opinion that this State law was enacted by virtue of a power, residing in the State to legislate; that it is not in conflict with any law of Congress; that it does not interfere with any system which Congress has established by making regulations, or by intentionally

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94 *Prigg*, 41 U.S. at 617-18.

> If [the federal statute covers the field of fugitive slaves], then it would seem, upon just principles of construction that the legislation of Congress, if constitutional, must supersede all state legislation upon the same subject; and by necessary implication prohibit it. For if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject-matter .... *This doctrine was fully recognised by this Court, in the case of Houston v. Moore*, 5 Wheat. Rep. 1, 21, 22 (emphasis added).

Id.

95 *Id.* at 627.

96 *Id.* at 651.

97 *Id.* at 654-55.

98 53 U.S. (12 How.) 299 (1851).

99 *Id.* at 312.

100 *Id.* at 320.

101 *Id.* at 315.

> leaving individuals to their own unrestricted action; that this law is *therefore* valid . . . .[102]

The first step of the Court's analysis, enumerating a test to resolve whether the power of Congress under the Commerce Clause is exclusive or concurrent with the states, made *Cooley* a landmark case.[103] Under the *Cooley* test, "whatever subjects of this [Commerce Clause] power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."[104] All other subjects that Congress is authorized to regulate, including pilots, give rise to concurrent power.[105] Thus, *Cooley* again illustrates the dominant conceptual framework for dealing with federalism issues: either federal power is exclusive, or the principle of concurrency plus supremacy determines the validity of a particular state law.

Notably, Justice Curtis expressly denied resolving the problem of preemption, or, as he put it, the "general question how far any regulation of a subject by Congress, may be deemed to operate as an exclusion of all legislation by the States upon the same subject."[106] This express avoidance of the question of preemption surely indicates that it was far from settled in 1851.[107]

Interestingly, the *Cooley* test presents exclusivity of federal power as answering the need for uniform national regulation: where the subject-matter is such that there is a need for national laws, Congress

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102 *Id.* at 321 (emphasis added).

103 Justice McLean, in a dissenting opinion, argued that the power was exclusive. *Id.* at 323. (McLean, J., dissenting) Note again that this issue of concurrency or exclusivity is less crucial once the power of preemption is recoguized. *See supra* note 50 and accompanying text.

104 *Id.* at 319.

105 *Id.*

106 *Id.* at 320.

107 There are two suggestions in Curtis' opinion that might be read to contradict my interpretation of it as supporting "concurrency plus supremacy" rather than "concurrency plus preemption." Curtis stated as settled precedent that "it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the States . . . ." *Id.* at 319. The use of "may be incompatible" indicates that there is some other requirement that must be met if the state law is to be deemed invalid. Of course, it is my thesis that this additional requirement is the need for conflict between the two exercises of power.

Later, having noted that the mere grant of power to Congress to regulate commerce did not deprive the states of their own right to do so, Curtis continued, "that although Congress has legislated on this subject, its legislation manifests an intention . . . to leave its regulation to the several States." *Id.* at 320. This might be interpreted in line with moderu preemption doctrine requiring congressional intent to preempt. *See infra* notes 196-203 and accompanying text. Read in context, this passage does not suggest that congressional intent is the end of the inquiry. It would be internally consistent to understand these words to mean that intent may be evidence of conflict. Thus, even if Congress intended to regulate the subject, this intent would only be given legal effect if the resulting legislation conflicted substantively with that of the states.

has exclusive power.[108] However, uniform laws can clearly be based either on exclusivity or on preemption. Indeed, insofar as the perceived need for uniform laws will often be in response to the inadequacies and inefficiencies of specific disparate state regulation,[109] preemption of state power provides a more useful basis for uniformity than exclusivity. By assuming that the practical need for uniform national laws in certain areas requires exclusivity of federal power, however, the *Cooley* Court illustrates the contemporary view that Congress did not possess the general power of preemption.

B. Confusion and Ambivalence: 1875-1912

In terms of the constitutional history of preemption, three features characterize the period from 1875 to 1912. First, as in the previous period, no state statute was overturned on preemption grounds (the first such case comes in 1912[110]). Second, during this period, Justice Stephen Field's test of direct or indirect effect on interstate commerce replaced the *Cooley* test for determining whether Congress's power is exclusive or concurrent under the Commerce Clause. Henceforth, regulation having direct effect on interstate commerce was a matter of exclusive congressional power, but where the effect on interstate commerce was merely indirect, state power to regulate was at least concurrent with that of Congress.[111] Third, in cases of concurrent state power under either the *Cooley* or Field tests, there was both confusion and ambivalence regarding the impact of federal legislation: does general state power in an area end where there is any federal legislation in that same area (preemption), or is it only that particular state laws are trumped if they conflict with federal legislation (supremacy)?[112]

In a series of opinions in the 1870s and 1880s, Justice Field conclusively stated (though always by means of dicta) his own answer to the "general question" of preemption consciously left open in *Coo-*

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108 The *Cooley* Court implicitly adopted the orthodox view that the express grant of power to pass uniform laws in the areas of bankruptcy and naturalization created exclusive congressional power. *Cooley*, 53 U.S. at 318. *See* THE FEDERALIST No. 32 (Alexander Hamilton). It then applied the presumed rationale behind this express grant in a radically functionalist manner to cover *any* area requiring uniform laws. *Cooley*, 53 U.S. at 318-19. Henceforth, wherever national regulation was called for, congressional power over that area would be exclusive.

109 Such inefficiencies might include negative externalities of state regulation and the loss of economies of scale to be derived from national regulation.

110 Southern Ry. Co. v. Reed, 222 U.S. 424 (1912).

111 I say "at least concurrent" because, until the revolution of the New Deal period, there were still areas of intrastate regulation, albeit with indirect effects on interstate commerce, that remained exclusively matters of state power.

112 At stake here was "automatic preemption," whereby state power ends automatically once Congress has acted in a given area, rather than the modern form, which requires congressional intent to preempt. *See* Engdahl, *supra* note 51, at 53; *see also infra* part III.C.

ley.[113] Field's approach was too definitive and unqualified for his colleagues, however, and only came to command clear and informed consent in the second decade of the twentieth century.

Field first announced a general congressional power of preemption in *Welton v. Missouri*,[114] decided twenty-four years after *Cooley*. The case involved a Missouri statute requiring peddlers to pay a license tax for selling goods that originated in states other than Missouri.[115] Although *Welton* is generally known as an early Dormant Commerce Clause case,[116] Field affirmed a general power of preemption in setting out the constitutional framework for the decision.[117]

By his explicit appeal to precedent, Field claimed simply to be applying the *Cooley* framework to determine the federalism issues raised by state regulation of the interstate movement of goods.[118] In fact, he changed this framework from one affirming supremacy to one affirming preemption. Field described the test as follows:

> So far as some of these instruments [for regulating commerce] are concerned, and some subjects which are local in their operation, *it has been held* that the States may provide regulations *until* Congress acts with reference to them; but where the subject to which the power applies is national in its character, or of such a nature as to admit of uniformity of regulation, the power is exclusive of all State authority.[119]

In applying this test, Field found that congressional power was exclusive because "that portion of commerce . . . which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation."[120] The state regulation in question was, therefore, unconstitutional.[121] In addition, the state law violated the provision of the Constitution prohibiting a state from laying "any Imposts or Duties on Imports or Exports" without the consent of Congress.[122]

Field's (mis)statement of the first part of the *Cooley* test, which deals with concurrent powers, is of more significance than his conclusion. As we have seen, the *Cooley* Court held that the principles of concurrency and *supremacy* would determine the outcome where the

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113 *See supra* note 106 and accompanying text.

114 91 U.S. 275 (1875).

115 *Id.* at 277.

116 In other words, there are constitutional constraints on state power contained in the Commerce Clause, even in the *absence* of federal legislation. *See* Redish & Nugent, *supra* note 50, at 579-80.

117 91 U.S. at 280.

118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.*

122 U.S. CONST. art. I, § 10, cl. 2.

subject-matter of regulation is local in character.[123] It specifically left open the "general question" of preemption: "how far any regulation of a subject by Congress may be deemed to operate as an exclusion of all legislation by the States upon the same subject."[124] By claiming that the states may regulate *until* Congress acts,[125] Field answered this question: the principles of concurrency and preemption—not supremacy—determine the outcome. Moreover, by prefacing this claim with "it has been held that,"[126] Field unjustifiably sought to wrap the power of preemption in the legitimating shroud of precedent.[127]

Reiterating his position on preemption the following year, Field abandoned the *Cooley* test for exclusivity/concurrency, asking instead whether state action directly or indirectly affects interstate commerce. In *Sherlock v. Alling*,[128] the Court upheld an Indiana statute against a Commerce Clause challenge. The statute granted a right of action to a decedent's personal representatives when death was caused by a tort committed within the state.[129] Writing for the Court, Field announced a new exclusivity/concurrency test, in which only the direct regulation of interstate commerce is constitutionally outside the power of the states.[130] Finding concurrent state power in this area under this test, he concluded that "[u]ntil Congress, therefore, makes *some* regulation touching the liability of parties for marine torts resulting in the death of the persons injured, we are of the opinion that the statute of Indiana applies . . . and that . . . it constitutes no encroachment upon the commercial power of Congress."[131] The difference between preemption and supremacy is precisely the difference between the sufficiency of "some" federal regulation and the necessity of "conflicting" regulation for the non-application of state law.

In *Nashville, Chattanooga & St. Louis Railway v. Alabama*,[132] decided in 1888, Field expressed a similar position.

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123 *See supra* note 102 and accompanying text.

124 *See supra* note 106 and accompanying text.

125 *See supra* note 119 and accompanying text.

126 *Id.*

127 Based on this general power of preemption, Field hints at a third ground for the decision.

> The fact that Congress has not seen fit to prescribe any specific rules to govern inter-State commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that inter-State commerce shall be free and untrammeled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri.

Welton, 91 U.S. at 282.

128 93 U.S. 99 (1876).

129 *Id.* at 100.

130 *Id.* at 103.

131 *Id.* at 104 (emphasis added).

132 128 U.S. 96 (1888).

> It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties, and liabilities of employe's and others on railway trains engaged in that commerce; *and that such legislation will supersede any state action on the subject.* But until such legislation is had, it is clearly within the competency of the States to provide against accidents on trains whilst within their limits.[133]

Once again, as in every such case until the second decade of the next century, the state law was upheld.

Field's position supporting preemption was thus confined to dicta and was not invoked as grounds for invalidating any state law during this period. More importantly, his position on preemption did not attain a consensus on the Court until much later. But rather than the explicit and principled disagreements on the issue that we saw in the previous period, this period was generally characterized by confusion regarding the difference between supremacy and preemption. In the brief respites from confusion, ambivalence about the existence of the latter power reigned.

For example, in the 1886 case of *Morgan's Steamship Co. v. Louisiana Board of Health*,[134] the Court upheld a Louisiana quarantine statute that required a sanitary inspection and fee for all vessels entering New Orleans against Commerce Clause and import duty challenges.[135] Rejecting the former claim, the Court first applied the *Cooley* test to establish concurrent state power.[136] Then, in determining the continuing validity of the state statute, the Court stated:

> But it may be conceded that whenever Congress shall undertake to provide . . . a general system of quarantine . . . all State laws on the subject will be abrogated, *at least so far as the two are inconsistent.* But, until this is done, the laws of the State on the subject are valid.[137]

Unfortunately, because there was no federal legislation on the subject with which to compare that of Louisiana,[138] the case does not provide a practical example of applying the difference between supremacy and preemption that the Court's opinion acknowledged.

Two years later, in *Smith v. Alabama*,[139] the Court considered an Alabama statute requiring licensing of locomotive engineers by a state board of examiners. In discussing the issue of concurrency, the Court stated that the power of Congress "might . . . be exercised in prescribing the qualifications for locomotive engineers employed by railroad

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133 *Id.* at 99-100 (emphasis added).
134 118 U.S. 455 (1886).
135 *Id.* at 459.
136 *Id.* at 463.
137 *Id.* at 464 (emphasis added).
138 *Id.* at 466.
139 124 U.S. 465 (1888).

companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority."[140] The Court upheld the state statute, finding that such regulations "are parts of that body of the local laws which . . . properly governs the relation between carriers of passengers and merchandise and the public who employ them, *which are not displaced until they come in conflict with express enactments of Congress* in the exercise of its power over commerce."[141]

Again, in *Hennington v. Georgia*,[142] the Supreme Court upheld a Georgia statute against the by now familiar Commerce Clause challenge. Holding that the statute banning the operation of freight trains on Sundays was a valid exercise of the state's police power,[143] Justice Harlan set out the general principles upon which continuing concurrent power depends as follows:

> Of course, if the inspection, quarantine or health laws of a State, passed under its reserved power to provide for the health, comfort and safety of its people, come into conflict with an act of Congress, passed under its power to regulate interstate and foreign commerce, such local regulations, *to the extent of the conflict*, must give way in order that the supreme law of the land—an act of Congress passed in pursuance of the Constitution—may have unobstructed operation.[144]

Having thus stated that supremacy, not preemption, is the test of validity for concurrent state powers, Harlan then demonstrated confusion about the difference between the two. In the space of a couple of pages in his opinion, he quoted approvingly both the passage from Field's opinion in *Nashville* stating that congressional action "will supersede *any* state action on the subject"[145] and the passage from *Smith v. Alabama*[146] that congressional action "would supersede *any conflicting* provisions on the same subject made by the local authority."[147]

Confusion is again evident in Harlan's opinion for the Court in *New York, New Haven & Hartford Railroad Company v. New York*.[148] At one point, Harlan stated that "it was clearly competent for the State of New York, *in the absence of national legislation covering the subject*, to forbid under penalties the heating of passenger cars in that State, by stoves or furnaces kept inside the cars."[149] Later, he claims that:

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140 *Id.* at 479-80.
141 *Id.* at 480 (emphasis added).
142 163 U.S. 299 (1896).
143 *Id.* at 318.
144 *Id.* at 309 (emphasis added).
145 *Id.* at 316-17 (emphasis added).
146 124 U.S. 465 (1888) (emphasis added).
147 *Id.* at 479-80.
148 165 U.S. 628 (1897).
149 *Id.* at 631 (emphasis added).

> [E]ach State has plenary authority within its territorial limits to provide for the safety of the public, according to its own views of necessity and public policy, and so long as Congress deems it wise not to establish regulations on the subject that would displace any *inconsistent* regulations of the States covering the same ground.[150]

Upholding a Kansas statute protecting cattle against contagious disease in *Missouri, Kansas & Texas Railway v. Haber*,[151] Harlan delivered an opinion that seemed to affirm that concurrent state powers are regulated only by the principle of supremacy. Whether the statute could stand in light of the federal Animal Industry Act of 1893, he said,

> [M]ust of course be determined with reference to the *settled rule* that a statute enacted in execution of a reserved power of the State is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, *unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together.*[152]

And citing *Gibbons* and the 1857 case of *Sinnot v. Davenport*[153] as support, he found that "a state statute, although enacted in pursuance of a power not surrendered to the General Government, must in the execution of its provisions yield in case of conflict to a statute constitutionally enacted under authority conferred upon Congress."[154]

In *Reid v. Colorado*, however, this apparent clarity again dissolved into confusion.[155] After first expressing the preemption position,[156] Harlan then proceeded in successive sentences to assert both preemption and supremacy:

> It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested. This Court has said—and the principle has been often reaffirmed—that "in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repuguance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together."[157]

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150 *Id.* at 633 (emphasis added).

151 169 U.S. 613 (1898).

152 *Id.* at 623 (emphasis added).

153 63 U.S. (22 How.) 227 (1859).

154 169 U.S. at 626.

155 187 U.S. 137 (1902).

156 "So that when the entire subject of the transportation of live stock from one State to another is taken under direct national supervision . . . , *all* local or State regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not." *Id.* at 146-47 (emphasis added).

157 *Id.* at 148.

C. Preemption Established: 1912-1920

The period from 1912-1920 marked the end of the prevailing confusion, with the Court issuing for the first time consistently clear and explicit statements of genuine preemption principles. It is not merely conflicting state laws that are overridden by federal law on the same subject, but any state laws—even those that are consistent with and supplement federal law.[158] The effect of congressional action is to end the concurrent power of the states and thereby to create exclusive power at the federal level from that time on.

During this period, the Court overturned many state regulations explicitly on the ground of the newly recognized power.[159] Moreover, it rejected a number of others as unconstitutional under the Dormant Commerce Clause.[160] This double shift in the direction of enhanced federal power, which was in stark contrast to the Court's practice of almost always upholding state laws during the previous century, was undoubtedly driven by a perception that uniform regulation, especially (but not only) of the railroads, had become a national necessity.[161] Much of the academic literature during this period reflected both this perception and the controversy which the response to it aroused.[162]

Three interrelated features characterize the power of preemption established by the Court at this time. First, preemption was an automatic consequence of congressional action in a given field. There was no systematic reference to congressional intent as the necessary trigger for preemption; rather, where the states and Congress had concurrent power, "that of the State [was] superseded when the power of Congress [over interstate commerce was] exercised."[163]

Second, automatic preemption by occupation of a field was interpreted as resulting from the nature of Congress's power over interstate commerce—a power that, in jurisdictional terms, can be described by the idea of "latent exclusivity." As a statement of Congress's power over interstate commerce, neither exclusive nor concurrent power satisfied the Court: exclusive power would have left too

158 Again, congressional intent, as a qualification on the automatic preemptive effect of federal legislation, was not generally recognized until the 1930s. *See supra* note 52.

159 *See* ALEXANDER BICKEL & BENNO SCHMIDT, THE JUDICIARY AND RESPONSIBLE GOVERNMENT, 1910-1921, at 264-76 (1984) for details of some of the other preemption decisions during this period.

160 *Id.*

161 *See* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017 (1988).

162 *See, e.g.*, Woodrow Wilson, *The States and the Federal Government*, 187 N. AM. REV. 684 (1908); Henry Wade Rogers, *The Constitution and the New Federalism*, 188 N. AM. REV. 321 (1908); Philip Allen, *States With Ideas of Their Own*, 190 N. AM. REV. 515 (1909).

163 222 U.S. 424, 436 (1912).

many areas unregulated, and concurrent power belittled Congress's special role and responsibility in the area. Thus, the Court developed a third possibility, that of latent exclusivity, giving Congress more than concurrent power but less than exclusive power ab initio. The states had "permissive" power to act until Congress exercised its "inherent" power under the Commerce Clause.[164] In short, congressional action created exclusive congressional power, aptly described by the metaphor of "occupying the field." This action itself was deemed to have automatic preemptive effect, rendering any determination of congressional intent irrelevant and unnecessary. Latent exclusivity was, therefore, understood more as a doctrine about the constitutional division of interstate commerce powers than as a general, discretionary power of Congress.

Third, automatic preemption and latent exclusivity were believed to be implications of the Supremacy Clause. Time and again, the Court stated that its preemption doctrine resulted from the "paramount" power that the Supremacy Clause grants to Congress over interstate commerce.[165] This reasoning exhibits the conventional modern confusion. "Paramountcy" under the Supremacy Clause does not imply preemption, but rather implies concurrency plus the supremacy of federal law in cases of conflict.[166] Absent conflict, state and federal power is co-equal. Supremacy means that Congress "prescribe[s] the final and dominant rule,"[167] not that it may prescribe all the rules. The Court's concept of Congress's paramount power over interstate commerce actually had nothing to do with supremacy. Rather, it meant that because Congress has *primary* responsibility for the regulation of interstate commerce (in the interests of a single national market), more than the regime of concurrency plus supremacy is required: latent exclusivity is necessary as a third type of jurisdiction. And, as discussed earlier,[168] latent exclusivity does not derive from Congress's paramount power under the Supremacy Clause, but from the Necessary and Proper Clause.

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164 Justice Harlan used these terms in *Reid*. *See supra* note 155.

165 *See, e.g.*, Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers Elevator Co., 226 U.S. 426 (1913). "[I]t must follow in consequence of the action of Congress . . . that the power of the State over the subject-matter ceased to exist from the moment that Congress exerted its *paramount* and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate commerce and that the regulations of Congress on that subject are *supreme*." *Id.* at 435 (emphasis added). *See also* Reid v. Colorado, 187 U.S. 137, 146 ("*any* specified rule or regulation in respect of such [live stock] transportation, which Congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is *paramount* throughout the union.") (emphasis added).

166 *See supra* part I.

167 Houston, E. & W. Texas Ry. Co. v. United States, 234 U.S. 342, 351-52 (1914).

168 *See supra* part I.

Although the term "preemption" did not appear in this context in the U.S. Reports until 1917 and did not gain currency until the early 1950s,[169] the first Supreme Court case actually decided on preemption grounds was *Southern Railway Co. v. Reid*.[170] At issue in *Reid* was a North Carolina statute requiring railroad companies to transport tendered freight.[171] The Court overturned the state statute on the ground that, as a result of the Interstate Commerce Act, Congress had "taken possession of the field" of railroad rate regulation.[172] Consequently, the state no longer had concurrent power to regulate this aspect of the behavior of interstate railroad companies.[173] In setting out the principles governing the case, the Court stated that "[i]t is well settled that if the State and Congress have a concurrent power, that of the State is superseded when the power of Congress is exercised."[174] All that was needed to find preemption was "specific action" by Congress "covering the matters which the statute of North Carolina attempts to regulate."[175] The Court concluded that the Interstate Commerce Act constituted such action and that therefore, through it, Congress had "taken control of the subject of rate making and charging."[176]

In his opinion for the Court, Justice McKenna introduced much of what would become the standard terminology of preemption analysis, a terminology quite different from that employed under the traditional supremacy analysis of *Gibbons* and its progeny considered above.[177] Instead of the *Gibbons*-style language of two valid laws in confiict, McKenna spoke of "a Federal exertion of authority which *takes from a State the power* to regulate the duties of interstate carriers,"[178] and of Congress having "taken possession of the field," thereby imposing "affirmative duties upon the carriers which the State *cannot even supplement*."[179]

By prefacing his discussion of the legal principles governing preemption analysis with the phrase "it is well settled that . . . ,"[180] McKenna provided the tell-tale sign that new law was being made. Further indication of this comes from the fact that, despite the new, clear langnage of preemption, McKenna supported the preemption

169 *See supra* note 65.
170 222 U.S. 424 (1912).
171 *Id.* at 431.
172 *Id.* at 442.
173 *Id.*
174 *Id.* at 436.
175 *Id.* at 437.
176 *Id.* at 438.
177 *See supra* part III.A.
178 *Reid*, 222 U.S. at 437 (emphasis added).
179 *Id.* (emphasis added).
180 *Id.* at 436.

ground of the decision with both a Supremacy and a Dormant Commerce Clause argument.[181] In the latter part of the opinion, he stressed the actual conflict between the relevant provisions of the Interstate Commerce Act and the North Carolina statute,[182] a conflict that is essentially irrelevant under the preemption analysis set forth in the first part of his opinion. Finding that the two laws are "directly contradictory"[183] and that the state statute "conflicts"[184] with the requirements of the congressional act, he concluded:

> What they [the federal regulations] forbid the carrier to do the [state] statute requires him to do. . . .
>
> . . . If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount.[185]

In addition, McKenna argued that the state statute would be invalid under the Dormant Commerce Clause, as a burden on interstate commerce. This padding at the end of the opinion should not, however, detract from the radical nature of the grounds upon which this case was decided. That this was acknowledged at the time is evidenced both by the immediate adoption of its new terminology of preemption, and by the frequent citing of *Reid* as the original precedent in the many preemption decisions over the course of the next decade.[186]

The following year, the Court consolidated this new preemption analysis, invalidating state regulations without relying on the supplemental Supremacy and Dormant Commerce Clause analyses. Citing *Reid* as the sole precedent for the governing principles of law,[187] the Court in *Chicago, Rock Island & Pacific Ry. Co. v. Hardwick Farmers Elevator Co.*[188] overturned a Minnesota statute regulating the delivery of interstate cars as preempted by the Hepburn Act of 1906. Chief Justice White stated the principles of automatic preemption (and its supposed derivation from supremacy) as follows:

> [I]t must follow in consequence of [the Hepburn Act] that the power of the State over the subject-matter *ceased to exist from the moment* that Congress exerted its paramount and all embracing authority over the subject. We say this because the elementary and long settled doctrine is that there can be no divided authority over interstate

181 *Id.* at 441-42.

182 *Id.* at 441.

183 *Id.*

184 *Id.* at 442.

185 *Id.*

186 *See, e.g., infra* notes 188-90 and accompanying text.

187 226 U.S. 426, 435 (1913).

188 *Id.*

> commerce and that the regulations of Congress on that subject are supreme.[189]

Affirming the notion of latent exclusivity, White noted that Congress's action "covers the whole field and renders the State impotent to deal with a subject over which it had *no inherent but only permissive* power."[190] These are clear statements that congressional action automatically deprives the states of the power to pass any laws at all on the subject, conflicting or otherwise. In short, preemption eliminates the need to consider the content of state laws on the subject, to lay the two laws side by side to ascertain whether or not they conflict.

In the 1915 case of *Charleston & Western Carolina Railway Co. v. Varnville*,[191] Justice Holmes unequivocally set forth the full implications of the new preemption analysis. Overturning a South Carolina statute[192] as preempted by the Hepburn Act, the Court rejected the plaintiff's argument that the statute did not conflict with, but aided, congressional policy. Holmes explained that the presence or absence of conflict is irrelevant where preemption is concerned, and clearly affirmed the automatic nature of the preemptive power. "[T]hat [the alleged absence of conflict] is immaterial. When Congress has taken the particular subject-matter in hand coincidence is as ineffective as opposition, and a state law is not to be declared a help because it attempts to go farther than Congress has seen fit to go."[193]

D. Modern Preemption Doctrine: The Centrality of Intent

The power of preemption that was firmly established for the first time during the second decade of this century should be understood in proper historical context. Even if not directly part of the broader movement to enhance the powers of the federal government that characterized an important strand of the progressive movement,[194] the establishment of preemption was animated by similar concerns about the need for effective national regulatory powers. As we have

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189 *Id.* at 435 (emphasis added).

190 *Id.* (emphasis added).

191 237 U.S. 597 (1915).

192 The statute imposed a penalty on carriers for failure to settle claims within forty days. *Id.* at 601.

193 *Id.* at 604. Similarly, in New York Cent. & Hudson River R.R. Co. v. Tonsellito, 244 U.S. 360 (1917), Justice McReynolds confirmed that all state law was preempted by the Federal Employers' Liability Act, regardless of content. "Congress having declared when, how far, and to whom carriers shall be liable on account of accidents in the specified class, such liability can neither be extended nor abridged by common or statutory laws of the State." *Id.* at 362.

194 One of the best-known historians of the period refers to this strand of the progressive movement as "New Nationalism." *See* ARTHUR LINK, WOODROW WILSON AND THE PROGRESSIVE ERA 1-25 (1954). Apart from Theodore Roosevelt, the most celebrated contemporary proponent of New Nationalism was probably Herbert Croly. *See* HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (1909).

seen, the preemptive power was automatic, based on a new jurisdictional concept of latent exclusivity that was incorrectly thought to follow from the "paramount" nature of federal power over interstate commerce granted by the Supremacy Clause.[195]

By the 1930s, a second and greater movement to extend national powers was under way. In this new context, the preemption power was qualified by replacing its automatic element with a new requirement that a federal statute would be considered to have taken over a given field only if Congress clearly manifested its intent to do so. Thus, at a time of radical increases in the general power of Congress at the expense of the states, it is perhaps paradoxical that Congress's preemptive power was seemingly curtailed.

This new requirement of intent was, however, a logical result of the restructuring of American federalism that began with the New Deal in 1933 and that was judicially affirmed in 1937.[196] The greatly enlarged power granted to Congress by the new interpretation of the Commerce Clause took from the states their previously sacrosanct exclusive power over *intra*state commerce.[197] Henceforth, no area of intrastate commerce would be open to the states to regulate which at the same time is constitutionally closed to Congress; no such area remained fully protected from the threat of congressional intervention.

In this context of a revolutionary extension of federal legislative competence, the consequence of the preexisting preemption doctrine (established while there were still significant areas of exclusive state jurisdiction) would have been to threaten vast areas of state regulation of seemingly local matters with extinction. Instead, the new constitutional strategy replaced a strict division of powers version of federalism with a new version embodying the presumption that state powers, though no longer constitutionally guaranteed, survive unless clearly ended by Congress. Preemption doctrine was thus modified to reflect this new presumption, and thereafter, Congress was affirmatively required to manifest an intent to preempt.

Illustrating this shift are two key cases that span the period in which modern preemption doctrine evolved: *Mintz v. Baldwin*,[198] decided in 1933, and *Rice v. Santa Fe Elevator Corp.*,[199] decided in 1947. *Mintz* involved the compatibility of state regulation to prevent infec-

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195 *See supra* part III.C.

196 *See, e.g.*, Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 510-15 (1989).

197 Under the new interpretation, (a) any effect at all on interstate commerce would be sufficient to authorize congressional action; (b) congressional assertion of such an effect would, in almost all cases, be conclusive of its existence; (c) consequently, the distinction between intra- and inter-state commerce was effectively eliminated.

198 289 U.S. 346 (1933).

199 331 U.S. 218 (1947).

tious cattle diseases with Congress's Cattle Contagious Diseases Acts.[200] The Court, having found no conflict between the two laws, set forth the circumstances under which state law can nonetheless be preempted.

> Unless limited by the exercise of federal authority under the commerce clause, the State has power to make and enforce the order. The purpose of Congress to supersede or exclude state action against the ravages of the disease is not lightly to be inferred. The intention so to do must definitely and clearly appear.[201]

Although the Court cites two cases from the founding period of preemption as additional support for this statement, nothing in these or previous cases gave such a central position to congressional intent in preemption analysis.[202]

Rice constitutes the *locus classicus* of modern preemption doctrine. Justice Douglas's statement of the presumption against preemption is still the one most often quoted in contemporary cases.

> Congress legislated here in a field which the States have traditionally occupied. So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act [United States Warehouse Act] unless that was the clear and manifest purpose of Congress. Such a purpose may be evidenced in several ways .... It is often a perplexing question whether Congress has precluded state action or by the choice of selective regulatory measures has left the police power of the States undisturbed except as the state and federal regulations collide.[203]

IV
IMPLICATIONS

The task of clarifying the nature of Congress's power to preempt state lawmaking power by ridding the power of any supposed connection to the Supremacy Clause, is now complete. This section explores the implications of the confusion that links preemption with supremacy, and the impact that correcting this confusion should have on the content of preemption law.

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200 *Mintz*, 289 U.S. at 347-48.

201 *Id.* at 350.

202 There are a few earlier references to congressional intent, but none seriously challenge the notion of automatic preemption. For example, in *Reid*, Justice Harlan stated, "It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States . . . unless its purpose to effect that result is clearly manifested." 187 U.S. 137, 148 (1902). As noted in the text, this statement appeared towards the end of the opinion, where Harlan confused preemption and supremacy. In any event, after the firm establishment of preemption in 1912, there was little, if any, reference to clearly manifested congressional intent to preempt as a necessary condition of the exercise of the preemption power.

203 *Rice*, 331 U.S. at 230-31 (citations omitted).

As has been discussed above, modern preemption law dates from two periods: the establishment of a firm power of preemption from 1912 to 1920,[204] and the official shift from automatic preemption to an intent-based test during the 1930s, when the enlargement of the commerce power would otherwise have threatened to preempt too much state power.[205] Modern preemption law recognizes three ways in which Congress can preempt the states: first, express preemption, where Congress expressly states in the text of a statute its intention to displace state authority in the area; second, field preemption, where such congressional intent is inferred from the comprehensiveness of federal regulation, which leaves no room for states to supplement it; and third, conflict preemption, where there is an actual conflict between state and federal law.[206]

In short, ridding preemption of the ghost of supremacy reveals it to be nothing more nor less than an instance of ordinary legislative power, ultimately justified under the Necessary and Proper Clause, to which standard principles of statutory interpretation[207] should apply to determine whether the power has in fact been exercised. The doctrines of modern preemption law, however, are not derived from, or justified by, such a conception of preemption; rather, they reflect a conception of preemption as elevated by an alleged connection to the Supremacy Clause to form a distinct area of constitutional law. Yet, neither conflict preemption nor field preemption is justified from the perspective of ordinary statutory interpretation used to determine what Congress has actually done. In fact, these two doctrines divert attention from actual intent.[208] Both in effect establish a form of "implied-in-law" intent to preempt, which in some instances operates to "preempt" a fair reading of the statute.

A. "Conflict Preemption"

The doctrine of conflict preemption is expressed in a number of different ways, reflecting perhaps an underlying uneasiness with its es-

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204 *See supra* notes 158-93 and accompanying text.

205 *See supra* notes 196-203 and accompanying text.

206 *See supra* note 3. Sometimes, but not always, the category of "frustration preemption" is added as a fourth type of preemption. This is the notion that state law is also (impliedly) preempted when, even though it does not conflict with a federal statute, it would unduly frustrate the purposes of that statute to permit concurrent state regulation. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52 (1941); Perez v. Campbell, 402 U.S. 637 (1971). At other times, however, frustration preemption is considered a type of conflict preemption, involving some lesser degree of conflict between state and federal laws than direct incompatibility. *See, e.g.*, Gade v. National Solid Waste Management Ass'n, 112 S. Ct. 2374, 2386 (1992).

207 *See, e.g.*, Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*, 3 VAND. L. REV. 395 (1950).

208 Of course, actual intent may be "implied-in-fact."

sential coherence. The most common formula is the straightforward one: state law is preempted if it conflicts with federal law.[209] As discussed above, however, this statement is a contradiction in terms, representing the most basic confusion between preemption and supremacy.[210] The trumping of an otherwise valid state law by supreme federal law is simply not an instance of preemption, but of supremacy. Once the inquiry moves from jurisdiction to the content of a particular piece of legislation, we are in the realm of supremacy. If, on the other hand, state lawmaking power had truly been preempted, then no state laws would survive to be judged in conflict (or not in conflict) with federal ones.

As if tacitly acknowledging this fundamental objection, the doctrine of conflict preemption is sometimes expressed as follows: state law is preempted *to the extent* that it actually conflicts with federal law.[211] This, however, does nothing to remedy the contradiction, for the notion of partial preemption (to the extent of conflict) is not an instance of preemption either, though it may be an extremely loose way of describing supremacy.

Even if it is conceded that these characterizations of conflict preemption are sloppy and contradictory, a third and more subtle approach may seem readily available. It is not that the existence of the actual conflict itself operates to preempt state law (as the previous two formulations suggest), but rather that such conflicts provide the necessary *evidence* for implying congressional intent to preempt state law that conditions the exercise of the power. This refinement is a useful consequence of the earlier analytical work because, unlike the previous two accounts of conflict preemption, this one does not suffer from any internal contradiction. The problem, however, is that taken on its own terms as a piece of statutory interpretation without the supremacy baggage, the existence of an actual conflict between state and federal law should only very rarely provide a sufficient basis for inferring congressional intent to preempt state law.

Consider the possible temporal sequences in which first-order conflicts arise. Either the relevant congressional statute precedes a conflicting state statute or it follows one. Where the federal statute comes first in time without any express preemption provision, how could one reasonably infer an intent to preempt from the conflict? At the time the federal statute came into existence, there was no conflict. Conversely, where the preexisting state regulation is followed by a conflicting federal statute that neither "occupies the field" nor contains an express preemption provision, surely it is more reasonable to

209 *See supra* note 10.
210 *See supra* part I.
211 *See, e.g., Pacific Gas & Elec. Co.*, 461 U.S. at 204.

infer that Congress only intended to trump the relevant state statutes without taking from the state all legislative power in that field. In short, distinguishing the concepts of preemption and supremacy permits a more nuanced analysis of congressional intent. Given the presumption against preemption, it is hard to see how actual conflict clearly manifests congressional intent to preempt rather than the intent to maintain concurrency subject to the Supremacy Clause.

Indeed, in this context the doctrine of conflict preemption not only fails to give full weight to the express principle of supremacy contained in the Supremacy Clause, but it virtually renders the clause redundant. This is because modern doctrine does not simply equate supremacy and preemption, but in its application grants *priority* to the latter. Only in highly exceptional circumstances does preemption doctrine permit the Supremacy Clause to operate directly to resolve a conflict between federal and state law. Under the dominant doctrine, if Congress intends to preempt state law (either expressly or impliedly, by occupying the relevant field), the principle of supremacy is not reached because the state law is invalid; i.e., there are not two valid laws—one state and one federal—in conflict. If, on the other hand, there is no such congressional intent to preempt, but there is a conflict between the two laws, the principle of supremacy will still not apply; instead, the conflict itself is considered evidence of congressional intent to preempt, and once again, because the state law is not valid, the Supremacy Clause is not reached. Only where there is both a conflict and *express* congressional intent *not* to preempt state law will supremacy resolve the conflict. Thus, modern preemption doctrine effectively reads the Supremacy Clause out of the Constitution.

This analysis suggests the elimination of conflict preemption from preemption law. The doctrine is at best unnecessary and at worst counterproductive to the real task of interpreting congressional intent. Once the distinction between supremacy and preemption is acknowledged, conflict preemption either expresses a contradiction in terms or it imputes to Congress, effectively as a matter of law, an intent that is highly questionable in practice.[212]

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212 Whether "frustration preemption" is understood as a sub-category of conflict preemption or as a distinct type of implied preemption, *see supra* note 206, what I have stated in this section about conflict preemption applies equally to it. If it is deemed a sub-category of conflict preemption, then the relevant state law is trumped under the Supremacy Clause, and preemption is not involved. The lesser degree of conflict involved would not generally provide any greater evidence of congressional intent to preempt.

If, on the other hand, the doctrine refers to a situation in which there is something less than actual conflict between state law and a subsequent federal statute, it is still not easy to see how such congressional action presumptively manifests an intent to preempt state law.

B. "Field Preemption"

As discussed above, the doctrine of field preemption originated in the notion that any congressional occupation of a field of regulation automatically preempted state lawmaking capacity in that field.[213] Federal movement into a field of regulation from which it had previously chosen to remain absent triggered preemption. In consequence, *any* congressional regulation of a field preempted *all* state power in that same field. "Occupation of the field" was thus not merely the paradigmatic instance of preemption, it was in effect the only one: when Congress occupied the field, neither the issue of intent or conflict would ever be reached. Similarly, the Court justified automatic field preemption by reference to the Supremacy Clause as an implication of the "paramount" congressional power over interstate commerce, whereas in fact the paramount nature of federal power under the Supremacy Clause implies only supremacy and not preemption.[214]

With the radical expansion of the commerce power in the 1930s, automatic field preemption was perceived as potentially too destructive of state power. This concern led to modifications reflecting the general reconstitution of federalism from a principle of constitutional law to one of congressional policy.[215] In this new order, which rests on the presumption that congressional regulation does not preempt the states,[216] the doctrine of field preemption seems to have no obvious application. Rather than discard it altogether, however, modern preemption doctrine attempted to revise it in line with the new focus on intent. Although occupation of a field alone does not trigger preemption, it provides evidence of a congressional intent to preempt if the occupation is pervasive. In other words, the more comprehensive the field occupation, the more reasonable the inference of preemption.

The danger of reforming rather than discarding the concept of field preemption, however, lies in a shift back towards an automatic element in preemption law that is incompatible with the task of interpreting intent. Field preemption provides a shorthand that runs the risk of detracting from a fair reading of the statute, for the issue becomes not whether Congress intended to preempt state law, but whether the congressional scheme of legislation is comprehensive. If it is, intent is assumed.

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213 *See supra* notes 163-68 and accompanying text.

214 *Id.*

215 *See supra* notes 196-97 and accompanying text.

216 *See* Justice Douglas's statement in *Rice*, 331 U.S. at 230-31 (discussed *supra* note 203).

Clearly, in certain circumstances the scope of federal regulation does render intent to preempt a reasonable inference, but it is doubtful that intent can *always* be so inferred. Congress may perfectly plausibly intend or not intend to preempt the states regardless of the pervasiveness of its scheme of regulation, so that from the perspective of congressional intent, the doctrine of field preemption is both over- and under-inclusive. It is over-inclusive because (a) Congress may intend that states be allowed to supplement federal regulation (that is, Congress may intend to maintain concurrency plus supremacy), (b) Congress may not have considered whether or not to preempt, or (c) Congress may have considered preemption without reaching any conclusion. It is under-inclusive because Congress may actually intend to preempt state law while leaving the particular field relatively, or even entirely, unregulated by any level of government.

By effectively requiring these other options to be expressly chosen in order to be operative, the doctrine of field preemption is inconsistent with modern federalism and its presumption that states retain concurrent powers.[217] As with conflict preemption, the doctrine that comprehensive regulation automatically provides evidence of congressional intent to preempt ignores alternative interpretations of that intent in a way that potentially distorts the result that would be reached upon a fair reading of the statute.

In short, ordinary statutory interpretation provides little support for any analysis suggesting that extensive occupation of a field automatically creates a presumption of intent to preempt. It seems, instead, that the doctrine is artificially imposed on the interpretive process as a holdover from the period before the radical expansion in the scope of Congress's interstate commerce power.

CONCLUSION

Preemption is a critical legal concept that helps to define the nature of any federal political system. Once it is known which powers of the federal and state governments are exclusive and which concurrent, it is still necessary to determine whether the concurrent powers are subject only to the principle of supremacy or also to the power of preemption in order to understand the true division of powers in that federal system.

Each entity, local and national, may have exclusive powers over its areas of jurisdiction. In this case, there is no overlap and the most formal division of powers exists between the two levels of government. Obviously, such a federal system does not require a principle of supremacy, nor does the issue of preemption arise. To the extent,

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217 *Id.*

however, that state entities have no exclusive powers and the federal government can preempt their concurrent powers, there is no formal division of powers between them at all. In this case, the division is a matter for the ordinary federal legislative process rather than for the higher law of the constitution; it is contingent or permissive, based on political or policy concerns of the central authority.

These general observations lead to a critical question about the nature of the American federal system, and of federalism more generally. Has the United States, alone among western federal systems, moved to the permissive end of the spectrum where there is no constitutional protection of state lawmaking capacity?[218] If the answer is affirmative, then it raises the larger question of the essential or theoretical difference between a federal and a unitary state.

In the United States, two factors combined to create the current character of the federal system. First, during the second decade of this century, it was unambiguously recognized that Congress possesses the power of preemption. Henceforth, with regard to any subject matter, if Congress can regulate at all, it can as an instance of such regnlation deprive the states of preexisting concurrent lawmaking capacity. Second, in the 1930s, the areas of exclusive state power were drastically contracted with the expansion of Congress's commerce power.[219]

It was the *combination* of these two factors that was so explosive and that so dramatically altered the nature of American federalism from a matter of constitutional law to largely (if not entirely) one of ordinary law, and not either of these developments alone. For, in the first place, the situation would be quite different if there were still significant areas of exclusive state jurisdiction over which the federal power of preemption could not be used to terminate state power. The Court's acknowledgment in *Garcia v. San Antonio Metropolitan Transit Authority*[220] that there is no constitutional limitation on the

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218 In contrast, Canada comes very close to emulating the first example of the strict division of powers. The European Union is, in practice, a federation in which the constituent entities (the "Member States") retain exclusive powers in certain areas, but the central authority ("the Union") has the power of preempting the Member States in areas of concurrent jurisdiction.

In terms of exclusive Member State power, it is true both that no Community measure has ever been declared unconstitutional for lack of jurisdiction, and that there is no authoritative enumeration of which powers are exclusively Member State powers. Nonetheless, the consensus is that at the present time there are still areas of exclusive state jurisdiction. In terms of concurrent jurisdiction and preemption, the constitutional position of the Member States has been bolstered by the introduction of the principle of "subsidiarity" into the European Union (Maastricht) Treaty in Article 3b. Henceforth, in areas of concurrent jurisdiction, the Union shall act only where the particular objectives in question cannot be sufficiently achieved at the national level.

219 *See supra* note 197.

220 469 U.S. 528 (1985).

scope of Congress's power to preempt state law is so significant from the perspective of federalism only because of the background fact that virtually all exclusive state powers have been abolished.[221] It is the interplay of exclusive/concurrent powers and supremacy/preemption that defines the character of the system.

Conversely, the situation would also be quite different if, despite the effective extension of federal legislative authority to all areas in which states can act, it had not also been recognized that this enhanced federal authority includes the power to abolish concurrent state power. The Supremacy Clause does not include this latter power, it only states that where Congress acts, conflicting state law is trumped. In other words, the preemption power was a critical independent factor in the growth of federal power. Unlike supremacy, preemption is not a necessary feature of a federal system with overlapping jurisdictions.

As should be clear, it is not at all the larger point of this article to evaluate and render judgment on the merits and demerits of the changes in the balance between state and federal power that have taken place during this century; let alone to play the role of advocate in this debate. Rather, it is to lay the foundations for resolving the quite different issue of the meaningfulness of the term "federalism" when it can continue to be applied to a political and legal system in which these changes have taken place. If the United States nonetheless remains a federal state, in what sense can this be? What then distinguishes a federal state from a unitary one? With perhaps just a trace of irony, it may be noted that these two questions are strikingly analogous to the one that asks in what sense do constitutional rights

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221 "[T]he Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Id.* at 550. And also, "[T]he fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the 'States as States' is one of process rather than one of result . . . [, specifically] the built-in restraints that our system provides through state participation in federal governmental action." *Id.* at 554-56 (citations omitted).

In view of the claim that the much-heralded recent case of New York v. United States, 112 S. Ct. 2408 (1992), revives federalism as a substantive legal and constitutional principle (as distinct from merely a political one), it should be noted that the case does not depart at all from *Garcia* on the issue of preemption. In *New York*, the Supreme Court held that in protecting the sovereignty reserved to the states, the Tenth Amendment prohibits Congress from commandeering "the State's legislative processes by directly compelling them to enact a federal regulatory program." *Id.* at 2428. However, the Court made it very clear that (incidentally, under the Supremacy Clause) "Congress could, if it wished, entirely preempt state radioactive waste regnlation." *Id.* at 2420. Accordingly, in its own terms, *New York* simply constrains the manner in which Congress may limit state sovereignty; it does not enumerate areas that cannot be limited.

In the light of *New York*, one is perhaps left wondering why, if it is unconstitutional coercion for Congress to *require* a state to pass a specific piece of legislation, it is not also unconstitutional coercion to *forbid* them from doing so (that is, preempting state authority).

exist in the United Kingdom, where there is no higher law and the courts lack the power of judicial review. Is the answer in each case history, tradition, and the integrity of the political process?