ARTICLE VI

PRIOR DEBTS, NATIONAL SUPREMACY, AND OATHS OF OFFICE

CONTENTS

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ARTICLE VI

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

PRIOR DEBTS

There have been no interpretations of this clause.

Clause 2. This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

NATIONAL SUPREMACY

Marshall's Interpretation of the National Supremacy Clause

Although the Supreme Court had held, prior to Chief Justice John Marshall's appointment to it, that the Supremacy Clause rendered null and void a state constitutional or statutory provision that was inconsistent with a treaty executed by the Federal Government,[1] it was left for Marshall to develop the full significance of the clause as applied to acts of Congress. By his vigorous opinions in *McCulloch v. Maryland*[2] and *Gibbons v. Ogden*,[3] Marshall gave the principle a vitality that survived a century of vacillation under the doctrine of dual federalism. In the former case, he asserted broadly that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoid-

[1] Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796).
[2] 17 U.S. (4 Wheat.) 316 (1819).
[3] 22 U.S. (9 Wheat.) 1 (1824).

able consequence of that supremacy which the constitution has declared."[4] From this he concluded that a state tax upon notes issued by a branch of the Bank of the United States was void.

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

Task of the Supreme Court Under the Clause: Preemption

In applying the Supremacy Clause to subjects that have been regulated by Congress, the Court's primary task is to ascertain whether a challenged state law is compatible with the policy expressed in the federal statute. When Congress legislates with regard to a subject, the extent and nature of the legal consequences of the regulation are federal questions, the answers to which are to be derived from a consideration of the language and policy of the state. If Congress expressly provides for exclusive federal dominion or if it expressly provides for concurrent federal-state jurisdiction, the Court's task is simplified, though, of course, there may still be doubtful areas in which interpretation will be necessary. Where Congress is

[4] 17 U.S. (4 Wheat.) at 436.

[5] 22 U.S. (9 Wheat.) at 210–11. *See* the Court's discussion of *Gibbons* in Douglas v. Seacoast Products, Inc., 431 U.S. 265, 274–79 (1977).

silent, however, the Court must itself decide whether the effect of the federal legislation is to oust state jurisdiction.[6]

The Operation of the Supremacy Clause

When Congress legislates pursuant to its delegated powers, conflicting state law and policy must yield.[7] Although the preemptive effect of federal legislation is best known in areas governed by the Commerce Clause, the same effect is present, of course, whenever Congress legislates pursuant to one of its enumerated powers. The Supremacy Clause operates whether the authority of Congress is express or implied, and whether plenary or dependent upon state acceptance. The latter may be seen in a series of cases concerning the validity of state legislation enacted to bring the states within the various programs authorized by Congress pursuant to the Social Security Act.[8] State participation in the programs is voluntary, technically speaking, and no state is compelled to enact legislation comporting with the requirements of federal law. Once a state is participating, however, any of its legislation that is contrary to federal requirements is void under the Supremacy Clause.[9]

At the same time, however, the Supremacy Clause is not the "source of any federal rights," [10] and the Clause "certainly does not create a cause of action." [11] As such, individual litigants cannot sue to enforce federal law through the Supremacy Clause, as such a reading of the Clause would prevent Congress from limiting enforce-

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[6] Treatment of preemption principles and standards is set out under the Commerce Clause, which is the greatest source of preemptive authority.

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

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

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

[10] *See* Golden State Transit Corp. v. Los Angeles, 493 U.S. 103, 107 (1989).

[11] *See* Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. ___, No. 14–15, slip op. at 3 (2015).

ment of federal laws to federal actors.[12] Instead, without a statutory cause of action, those wishing to seek injunctive relief against a state actor that refuses to comply with federal law must rely on the inherent equitable power of courts, a judge-made remedy that may be overridden by Congress.[13]

Federal Immunity Laws and State Courts.—The operation of federal immunity acts[14] to preclude the use in state courts of incriminating statements and testimony given by a witness before a committee of Congress or a federal grand jury[15] illustrates direct federal preemption that is not contingent on state participation in a federal program. Because Congress in pursuance of its paramount authority to provide for the national defense, as complemented by the Necessary and Proper Clause, is competent to compel testimony of persons that is needed in order to legislate, it is competent to obtain such testimony over a witness's self-incrimination claim by immunizing him from prosecution on evidence thus revealed not only in federal courts but in state courts as well.[16]

Priority of National Claims Over State Claims.—Anticipating his argument in *McCulloch v. Maryland*,[17] Chief Justice Marshall in 1805 upheld an act of 1792 asserting for the United States a priority of its claims over those of the states against a debtor in bankruptcy.[18] The principle was later extended to federal enactments providing that taxes due to the United States by an insolvent shall have priority in payment over taxes he owes to a state.[19] Similarly, the Federal Government was held entitled to prevail over a citizen enjoying a preference under state law as creditor of an enemy alien bank in the process of liquidation by state authori-

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[12] *Id.*

[13] *Id.* at 5–6.

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

[15] Adams v. Maryland, 347 U.S. 179 (1954).

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

[17] 17 U.S. (4 Wheat.) 316 (1819).

[18] United States v. Fisher, 6 U.S. (2 Cr.) 358 (1805).

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

ties.[20] A federal law providing that when a veteran dies in a federal hospital without a will or heirs his personal property shall vest in the United States as trustee for the General Post Fund was held to operate automatically without prior agreement of the veteran with the United States for such disposition and to take precedence over a state claim founded on its escheat law.[21]

Obligation of State Courts Under the Supremacy Clause

The Constitution, laws, and treaties of the United States are as much a part of the law of every state as its own local laws and constitution. Their obligation "is imperative upon the state judges, in their official and not merely in their private capacities. From the very nature of their judicial duties, they would be called upon to pronounce the law applicable to the case in judgment. They were not to decide merely according to the laws or Constitution of the State, but according to the laws and treaties of the United States—'the supreme law of the land.'"[22] State courts are bound then to give effect to federal law when it is applicable and to disregard state law when there is a conflict; federal law includes, of course, not only the Constitution and laws and treaties but also the interpretations of their meanings by the United States Supreme Court.[23] Although states may not have to specially create courts competent to hear federal claims or give courts authority specially,[24] it violates the Supremacy Clause for a state court to refuse to hear a category of

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[20] Brownell v. Singer, 347 U.S. 403 (1954).

[21] United States v. Oregon, 366 U.S. 643 (1961).

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

[23] Cooper v. Aaron, 358 U.S. 1 (1958); *see also* James v. City of Boise, 577 U.S. ___, No. 15–493, slip op. at 2 (2016) ("The Idaho Supreme Court, like any other state or federal court, is bound by this Court's interpretation of federal law."); DIRECTV, Inc. v. Imburgia, 577 U.S. ___, No. 14–462, slip op. at 5 (2015) (holding that the Supreme Court's interpretation of a federal law is an "authoritative interpretation of that Act," requiring the "judges of every State" to "follow it."). Moreover, the Court has interpreted the Supremacy Clause to require that a state court, when reviewing a prisoner's collateral claims that are controlled by federal law, "has a duty to grant the relief that federal law requires." *See* Montgomery v. Louisiana, 577 U.S. ___, No. 14–280, slip op. at 13 (2016) (quoting Yates v. Aiken, 484 U.S. 211, 218 (1988)). For an extended discussion on *Montgomery* and the obligations of state collateral review courts when reviewing substantive constitutional rules, see *supra* Article III: Section 2. Judicial Power and Jurisdiction: Clause 1. Cases and Controversies; Grants of Jurisdiction: Judicial Power and Jurisdiction-Cases and Controversies: The Requirements of a Real Interest: Retroactivity Versus Prospectivity.

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

federal claims when the court entertains state law actions of a similar nature,[25] or sometimes even when it does not entertain state law actions of a similar nature.[26] The existence of inferior federal courts sitting in the states and exercising often concurrent jurisdiction of subjects has created problems with regard to the degree to which state courts are bound by their rulings. Though the Supreme Court has directed and encouraged the lower federal courts to create a corpus of federal common law,[27] it has not spoken to the effect of such lower court rulings on state courts.

Supremacy Clause Versus the Tenth Amendment

The logic of the Supremacy Clause would seem to require that the powers of Congress be determined by the fair reading of the express and implied grants contained in the Constitution itself, without reference to the powers of the states. For a century after Marshall's death, however, the Court proceeded on the theory that the Tenth Amendment had the effect of withdrawing various matters of internal police from the reach of power expressly committed to Congress. This point of view was originally put forward in *New York City v. Miln*,[28] which was first argued but not decided before Marshall's death. *Miln* involved a New York statute that required captains of vessels entering New York Harbor with aliens aboard to make a report in writing to the Mayor of the City, giving certain prescribed information. It might have been distinguished from *Gibbons v. Ogden* on the ground that the statute involved in the earlier case conflicted with an act of Congress, whereas the Court found that no such conflict existed in this case. But the Court was unwilling to rest its decision on that distinction.

Speaking for the majority, Justice Barbour seized the opportunity to proclaim a new doctrine. "But we do not place our opinion on this ground. We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a state has the same undeniable and unlimited jurisdiction over all persons and things, within its territorial limits, as any foreign nation, where that jurisdiction is not surrendered or restrained by the constitution of the United States. That, by virtue of this, it is not only the right,

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

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

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

[28] 36 U.S. (11 Pet.) 102 (1837).

but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called *internal police*, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive."[29] Justice Story, in dissent, stated that Marshall had heard the previous argument and reached the conclusion that the New York statute was unconstitutional.[30]

The conception of a "complete, unqualified and exclusive" police power residing in the states and limiting the powers of the national government was endorsed by Chief Justice Taney ten years later in the *License Cases*.[31] In upholding state laws requiring licenses for the sale of alcoholic beverages, including those imported from other states or from foreign countries, he set up the Supreme Court as the final arbiter in drawing the line between the mutually exclusive, reciprocally limiting fields of power occupied by the national and state governments.[32]

Until recently, it appeared that in fact and in theory the Court had repudiated this doctrine,[33] but, in *National League of Cities v. Usery*,[34] it revived part of this state police power limitation upon the exercise of delegated federal power. However, the decision was by a closely divided Court and subsequent interpretations closely cabined the development and then overruled the case.

Following the demise of the "doctrine of dual federalism" in the 1930s, the Court confronted the question whether Congress had the power to regulate state conduct and activities to the same extent, primarily under the Commerce Clause, as it did to regulate private conduct and activities to the exclusion of state law.[35] In *United States*

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[29] 36 U.S. at 139.

[30] 36 U.S. at 161.

[31] 46 U.S. (5 How.) 504, 528 (1847).

[32] 46 U.S. at 573–74.

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

[34] 426 U.S. 833 (1976).

[35] On the doctrine of "dual federalism," *see* the commentary by the originator of the phrase, Professor Corwin. E. Corwin, The Twilight of the Supreme Court—A History of Our Constitutional Theory 10–51 (1934); The Commerce Power Versus States Rights 115–172 (1936); A Constitution of Powers in a Secular State 1–28 (1951).

v. California,[36] upholding the validity of the application of a federal safety law to a state-owned railroad being operated as a nonprofit entity, the Court, speaking through Justice Stone, denied the existence of an implied limitation upon Congress's plenary power to regulate commerce when a state instrumentality was involved. "The state can no more deny the power if its exercise has been authorized by Congress than can an individual." [37] Although the state in operating the railroad was acting as a sovereign and within the powers reserved to the states, the Court said, its exercise was "in subordination to the power to regulate interstate commerce, which has been granted specifically to the national government. The sovereign power of the states is necessarily diminished to the extent of the grants of power to the Federal Government in the Constitution." [38]

A series of cases followed in which the Court refused to construct any state immunity from regulation when Congress acted pursuant to a delegated power.[39] The culmination of this series had been thought to be *Maryland v. Wirtz*,[40] in which the Court upheld the constitutionality of applying the federal wage and hour law to nonprofessional employees of state-operated schools and hospitals. In an opinion by Justice Harlan, the Court saw a clear connection between working conditions in these institutions and interstate commerce. Labor conditions in schools and hospitals affect commerce; strikes and work stoppages involving such employees interrupt and burden the flow across state lines of goods purchased by state agencies, and the wages paid have a substantial effect. The Commerce Clause being thus applicable, the Justice wrote, Congress was not constitutionally required to "yield to state sovereignty in the performance of governmental functions. This argument simply is not tenable. There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as not to interfere with the free and full exercise of the powers of the other. . . . [I]t is clear that the Federal Govern-

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[36] 297 U.S. 175 (1936).

[37] 297 U.S. at 185.

[38] 297 U.S. at 184.

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

[40] 392 U.S. 183 (1968). Justices Douglas and Stewart dissented. Id. at 201.

ment, when acting within a delegated power, may override countervailing state interests whether these be described as 'governmental' or 'proprietary' in character. . . . [V]alid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State too may be forced to conform its activities to federal regulation." [41]

Wirtz was specifically reaffirmed in *Fry v. United States*,[42] in which the Court upheld the constitutionality of presidentially imposed wage and salary controls, pursuant to congressional statute, on all state governmental employees. In dissent, however, Justice Rehnquist propounded a doctrine that was to obtain majority approval in *League of Cities*,[43] in which he wrote for the Court: "[T]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." [44] The standard, apparently, in judging between permissible and impermissible federal regulation, is whether there is federal interference with "functions essential to separate and independent existence." [45] In the context of this case, state decisions with respect to the pay of their employees and the hours to be worked were essential aspects of their "freedom to structure in-

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[41] 392 U.S. at 195–97 (internal quotation marks omitted).

[42] 421 U.S. 542 (1975).

[43] 421 U.S. at 549. Essentially, the Justice was required to establish an affirmative constitutional barrier to congressional action. Id. at 552–53. That is, if one asserts only the absence of congressional authority, one's chances of success are dim because of the breadth of the commerce power. But when he asserts that, say, the First or Fifth Amendment bars congressional action concededly within its commerce power, one interposes an affirmative constitutional defense that has a chance of success. It was the Justice's view that the state was "asserting an affirmative constitutional right, inherent in its capacity as a State, to be free from such congressionally asserted authority." Id. at 553. But whence the affirmative barrier? "[I]t is not the Tenth Amendment *by its terms*. . . ." Id. at 557 (emphasis supplied). Rather, the Amendment was an example of the Framers' understanding that the sovereignty of the states imposed an implied affirmative barrier to the assertion of otherwise valid congressional powers. Id. at 557–59. But the difficulty with this construction is that the equivalence that Justice Rehnquist sought to establish lies *not* between an individual asserting a constitutional limit on delegated powers and a state asserting the same thing, but *is* rather between an individual asserting a lack of authority and a state asserting a lack of authority; this equivalence is evident on the face of the Tenth Amendment, which states that the powers not delegated to the United States "are reserved to the States respectively, *or to the people*." (emphasis supplied). The states are thereby accorded no greater interest in restraining the exercise of nondelegated power than are the people. *See* Massachusetts v. Mellon, 262 U.S. 447 (1923).

[44] National League of Cities v. Usery, 426 U.S. 833, 845 (1976).

[45] 426 U.S. at 845.

tegral operations in areas of traditional governmental functions."[46] The line of cases exemplified by *United States v. California* was distinguished and preserved on the basis that the state activities there regulated were so unlike the traditional activities of a state that Congress could reach them;[47] *Case v. Bowles* was held distinguishable on the basis that Congress had acted pursuant to its war powers and to have rejected the power would have impaired national defense;[48] *Fry* was distinguished on the bases that it upheld emergency legislation tailored to combat a serious national emergency, the means were limited in time and effect, the freeze did not displace state discretion in structuring operations or force a restructuring, and the federal action "operated to reduce the pressure upon state budgets rather than increase them."[49] *Wirtz* was overruled; it permitted Congress to intrude into the conduct of integral and traditional state governmental functions and could not therefore stand.[50]

League of Cities did not prove to be much of a restriction upon congressional power in subsequent decisions. First, its principle was held not to reach to state regulation of private conduct that affects interstate commerce, even as to such matters as state jurisdiction over land within its borders.[51] Second, it was held not to immunize state conduct of a business operation, that is, proprietary activity not like "traditional governmental activities."[52] Third, it was held not to preclude Congress from regulating the way states regulate private activities within the state—even though such state activity is certainly traditional governmental action—on the theory that, because Congress could displace or preempt state regulation, it may require the states to regulate in a certain way if they wish to continue to act in this field.[53] Fourth, it was held not to limit Congress when it acts in an emergency or pursuant to its war powers, so that Congress may indeed reach even traditional governmental activity.[54] Fifth, it was held not to apply at all to Congress's enforcement powers under the Thirteenth, Fourteenth, and Fifteenth Amendments.[55] Sixth, it apparently was to have no application to the ex-

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[46] 426 U.S. at 852.
[47] 426 U.S. at 854.
[48] 426 U.S. at 854 n.18.
[49] 426 U.S. at 852–53.
[50] 426 U.S. at 853–55.
[51] Hodel v. Virginia Surface Mining & Recl. Ass'n, 452 U.S. 264 (1981).
[52] United Transp. Union v. Long Island R.R., 455 U.S. 678 (1982).
[53] FERC v. Mississippi, 456 U.S. 742 (1982).
[54] National League of Cities v. Usery, 426 U.S. 833, 854 n.18 (1976).
[55] Fitzpatrick v. Bitzer, 427 U.S. 445 (1976); City of Rome v. United States, 446 U.S. 156, 178–80 (1980).

ercise of Congress's spending power with conditions attached.[56] Seventh, not because of the way the Court framed the statement of its doctrinal position, which is absolutist, but because of the way it accommodated precedent and because of Justice Blackmun's concurrence, it was always open to interpretation that Congress was enabled to reach traditional governmental activities not involving employer-employee relations or is enabled to reach even these relations if the effect is "to reduce the pressures upon state budgets rather than increase them."[57] In his concurrence, Justice Blackmun suggested his lack of agreement with "certain possible implications" of the opinion and recast it as a "balancing approach" that "does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential."[58]

The Court overruled *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*,[59] and seemingly returned to the conception of federal supremacy embodied in *Wirtz* and *Fry*. For the most part, the Court indicated, states must seek protection from the impact of federal regulation in the political processes, and not in any limitations imposed on the commerce power or found in the Tenth Amendment. Justice Blackmun's opinion for the Court in *Garcia* concluded that the *National League of Cities* test for "integral operations in areas of traditional governmental functions" had proven "both impractical and doctrinally barren."[60] State autonomy is both limited and protected by the terms of the Constitution itself, hence—ordinarily, at least—exercise of Congress's enu-

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

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

[58] 426 U.S. at 856.

[59] 469 U.S. 528 (1985). The issue was again decided by a 5-to-4 vote, Justice Blackmun's qualified acceptance of the *National League of Cities* approach having changed to complete rejection. Justice Blackmun's opinion of the Court was joined by Justices Brennan, White, Marshall, and Stevens. Writing in dissent were Justices Powell (joined by Chief Justice Burger and by Justices Rehnquist and O'Connor), O'Connor (joined by Justices Powell and Rehnquist), and Rehnquist.

[60] 469 U.S. at 557.

merated powers is not to be limited by "*a priori* definitions of state sovereignty."[61] States retain a significant amount of sovereign authority "only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government."[62] There are direct limitations in Art. I, § 10; and "Section 8 . . . works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation."[63] On the other hand, the principal restraints on congressional exercise of the commerce power are to be found not in the Tenth Amendment, in the Commerce Clause itself, or in "judicially created limitations on federal power," but in the structure of the Federal Government and in the political processes.[64] "[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."[65] While continuing to recognize that "Congress's authority under the Commerce Clause must reflect [the] position . . . that the States occupy a special and specific position in our constitutional system," the Court held that application of Fair Labor Standards Act minimum wage and overtime provisions to state employment does not require identification of these "affirmative limits."[66] Thus, arguably, the Court has not totally abandoned the *National League of Cities* premise that there are limits on the extent to which federal regulation may burden states as states. Rather, it has stipulated that any such limits on exercise of federal power must be premised on a failure of the political processes to protect state interests, and "must be tailored to compensate for [such] failings . . . rather than to dictate a 'sacred province of state autonomy.'"[67]

Further indication of what must be alleged in order to establish affirmative limits to commerce power regulation was provided in *South Carolina v. Baker*.[68] The Court expansively interpreted *Garcia* as meaning that there must be an allegation of "some extraor-

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[61] 469 U.S. at 548.
[62] 469 U.S. at 549.
[63] 469 U.S. at 548.
[64] "Apart from the limitation on federal authority inherent in the delegated nature of Congress's Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself." 469 U.S. at 550. The Court cited as prime examples the role of states in selecting the President, and the equal representation of states in the Senate. Id. at 551.
[65] 469 U.S. at 554.
[66] 469 U.S. at 556.
[67] 469 U.S. at 554.
[68] 485 U.S. 505 (1988).

dinary defects in the national political process" before the Court will intervene.[69] A claim that Congress acted on incomplete information will not suffice, the Court noting that South Carolina had "not even alleged that it was deprived of any right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless."[70] Thus, the general rule is that "limits on Congress's authority to regulate state activities . . . are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[71]

Dissenting in *Garcia*, Justice Rehnquist predicted that the doctrine propounded by the dissenters and by those Justices in *National League of Cities* "will . . . in time again command the support of a majority of the Court."[72] As the membership of the Court changed, it appeared that the prediction was proving true.[73] Confronted with the opportunity in *New York v. United States*,[74] to reexamine *Garcia*, the Court instead distinguished it,[75] striking down a federal law on the basis that Congress could not "commandeer" the legislative and administrative processes of state government to compel the administration of federal programs.[76] The line of analysis pursued by the Court makes clear, however, what the result will be when a *Garcia* kind of federal law is reviewed.

That is, because the dispute involved the division of authority between federal and state governments, Justice O'Connor wrote for the Court in *New York*, one could inquire whether Congress acted under a delegated power or one could ask whether Congress had

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[69] 485 U.S. at 512.

[70] 485 U.S. at 513.

[71] 485 U.S. at 512.

[72] Garcia v. San Antonio Metropolitan Transit Auth., 469 U.S. 528, 579–80 (1985).

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

[74] 505 U.S. 144 (1992).

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

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

invaded a state province protected by the Tenth Amendment. But, the Justice wrote, "the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." [77]

Powers delegated to the Nation, therefore, are subject to limitations that reserve power to the states. This limitation is not found in the text of the Tenth Amendment, which is, the Court stated, "but a truism," [78] but is a direct constraint on Article I powers when an incident of state sovereignty is invaded.[79] The "take title" provision was such an invasion. Both the Federal Government and the states owe political accountability to the people. When Congress encourages states to adopt and administer a federally prescribed program, both governments maintain their accountability for their decisions. When Congress compels the states to act, state officials will bear the brunt of accountability that properly belongs at the national level.[80] The "take title" provision, because it presented the states with "an unavoidable command", transformed state governments into "regional offices" or "administrative agencies" of the Federal Government, impermissibly undermined the accountability owing the people and was void.[81] Whether viewed as lying outside Congress's enumerated powers or as infringing the core of state sovereignty reserved by the Tenth Amendment, "the provision is inconsistent with the federal structure of our Government established by the Constitution." [82]

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

Expanding upon its anti-commandeering rule, the Court in *Printz v. United States* [83] established "categorically" the rule that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program." [84] At issue in *Printz* was a provision of the Brady Handgun Violence Prevention Act that required, pending the development by the Attorney General of a national system

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[77] 505 U.S. at 156.
[78] 505 U.S. at 156 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
[79] 505 U.S. at 156.
[80] 505 U.S. at 168–69.
[81] 505 U.S. at 175–77, 188.
[82] 505 U.S. at 177.
[83] 521 U.S. 898 (1997).
[84] 521 U.S. at 933 (internal quotation marks omitted) (quoting New York v. United States, 505 U.S. 144, 188 (1992)).

by which criminal background checks on prospective firearms purchasers could be conducted, the chief law enforcement officers of state and local governments to conduct background checks to ascertain whether applicants were ineligible to purchase handguns. Confronting the absence of any textual basis for a "categorical" rule, the Court looked to history, which in its view demonstrated a paucity of congressional efforts to impose affirmative duties upon the states.[85] More important, the Court relied on the "structural Constitution" to demonstrate that the Constitution of 1787 had not taken from the states "a residuary and inviolable sovereignty,"[86] that it had, in fact and theory, retained a system of "dual sovereignty"[87] reflected in many things but most notably in the constitutional conferral "upon Congress of not all governmental powers, but only discrete, enumerated ones," which was expressed in the Tenth Amendment. Thus, although it had earlier rejected the commandeering of legislative assistance, the Court now made clear that administrative officers and resources were also fenced off from federal power.

The scope of the rule thus expounded was unclear. Particularly, Justice O'Connor in concurrence observed that Congress retained the power to enlist the states through contractual arrangements and on a voluntary basis. More pointedly, she stated that "the Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid."[88]

A partial answer was provided in *Reno v. Condon*,[89] in which the Court upheld the Driver's Privacy Protection Act of 1994 against a charge that it offended the anti-commandeering rule of *New York* and *Printz*. The Act in general limits disclosure and resale without a driver's consent of personal information contained in the records of state motor vehicle departments, and requires disclosure of that information for specified government record-keeping purposes. While conceding that the Act "will require time and effort on the part of state employees," the Court found this imposition permissible because the Act regulates state activities directly rather than requiring states to regulate private activities.[90]

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[85] 521 U.S. at 904–18. Notably, the Court expressly exempted from this rule the continuing role of the state courts in the enforcement of federal law. Id. at 905–08.

[86] 521 U.S. at 919 (quoting THE FEDERALIST, No. 39 (Madison)).

[87] 521 U.S. at 918.

[88] 521 U.S. at 936 (citing 42 U.S.C. § 5779(a)) (requiring state and local law enforcement agencies to report cases of missing children to the Department of Justice).

[89] 528 U.S. 141 (2000).

[90] 528 U.S. at 150–51.

Federal Instrumentalities and Personnel and State Police Power

Federal instrumentalities and agencies have never enjoyed the same degree of immunity from state police regulation as from state taxation. The Court has looked to the nature of each regulation to determine whether it is compatible with the functions committed by Congress to the federal agency. This problem has arisen most often with reference to the applicability of state laws to the operation of national banks. Two correlative propositions have governed the decisions in these cases. The first was stated by Justice Miller in *National Bank v. Commonwealth*.[91] "[National banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional."[92] In *Davis v. Elmira Savings Bank*,[93] the Court stated the second proposition thus: "National banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States. It follows that an attempt, by a State, to define their duties or control the conduct of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created."[94]

Similarly, a state law, insofar as it forbids national banks to use the word "saving" or "savings" in their business and advertising, is void because it conflicts with the Federal Reserve Act's authorizing such banks to receive savings deposits.[95] However, federal incorporation of a railroad company of itself does not operate to exempt it from control by a state as to business consummated wholly within the state.[96] Also, Treasury Department regulations, designed to implement the federal borrowing power (Art. I, § 8, cl. 2) by making United States Savings Bonds attractive to investors and conferring exclusive title thereto upon a surviving joint owner,

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[91] 76 U.S. (9 Wall.) 353 (1870).
[92] 76 U.S. at 362.
[93] 161 U.S. 275 (1896).
[94] 161 U.S. at 283.
[95] Franklin Nat'l Bank v. New York, 347 U.S. 273 (1954).
[96] Reagan v. Mercantile Trust Co., 154 U.S. 413 (1894).

override contrary state community property laws whereunder a one-half interest in such property remains part of the estate of a decedent co-owner.[97] Similarly, the Patent Office's having been granted by Congress an unqualified authorization to license and regulate the conduct throughout the United States of nonlawyers as patent agents, a state, under the guise of prohibiting unauthorized practice of law, is preempted from enjoining such activities of a licensed agent as entail the rendering of legal opinions as to patentability or infringement of patent rights and the preparation and prosecution of application for patents.[98]

The extent to which states may regulate contractors who furnish goods or services to the Federal Government is not as clearly established as is the states' right to tax such dealers. In 1943, a closely divided Court sustained the refusal of the Pennsylvania Milk Control Commission to renew the license of a milk dealer who, in violation of state law, had sold milk to the United States for consumption by troops at an army camp located on land belonging to the state, at prices below the minimum established by the Commission.[99] The majority was unable to find in congressional legislation, or in the Constitution, unaided by congressional enactment, any immunity from such price fixing regulations. On the same day, a different majority held that California could not penalize a milk dealer for selling milk to the War Department at less than the minimum price fixed by state law where the sales and deliveries were made in a territory which had been ceded to the Federal Government by the state and were subject to the exclusive jurisdiction of the former.[100] On the other hand, by virtue of its conflict with standards set forth in the Armed Services Procurement Act, 41 U.S.C. § 152, for determining the letting of contracts to responsible bidders, a state law licensing contractors cannot be enforced against one selected by federal authorities for work on an Air Force base.[101]

Most recently, the Court has done little to clarify the doctrinal difficulties.[102] The Court looked to a "functional" analysis of state regulations, much like the rule covering state taxation. "A state regulation is invalid only if it regulates the United States directly or discriminates against the Federal Government or those with whom

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[97] Free v. Bland, 369 U.S. 663 (1962).

[98] Sperry v. Florida, 373 U.S. 379 (1963).

[99] Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943).

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

[101] Leslie Miller, Inc. v. Arkansas, 353 U.S. 187 (1956).

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

it deals." [103] In determining whether a regulation discriminates against the Federal Government, "the entire regulatory system should be analyzed." [104]

The Doctrine of Federal Exemption From State Taxation

McCulloch v. Maryland.—Five years after the decision in *McCulloch v. Maryland* that a state may not tax an instrumentality of the Federal Government, the Court was asked to and did reexamine the entire question in *Osborn v. Bank of the United States*.[105] In that case counsel for the State of Ohio, whose attempt to tax the Bank was challenged, put forward two arguments of great importance. In the first place it was "contended, that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and not being expressed, ought not to be implied by the Court." [106] To which Marshall replied: "It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from state control, which is said to be so objectionable in this instance." [107] Secondly, the appellants relied "greatly on the distinction between the bank and the public institutions, such as the mint or the post office. The agents in those offices are, it is said, officers of government. . . . Not so the directors of the bank. The connection of the government with the bank, is likened to that with contractors." [108] Marshall accepted this analogy but not to the advantage of the appellants. He simply indicated that all contractors who dealt with the government were entitled to immunity from taxation upon such transactions.[109] Thus, not only was the decision of *McCulloch v. Maryland* reaffirmed but the foundation was laid for the vast expansion of the principle of immunity that was to follow in the succeeding decades.

Applicability of Doctrine to Federal Securities.—The first significant extension of the doctrine of the immunity of federal instrumentalities from state taxation came in *Weston v. Charles-*

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[103] 495 U.S. at 435. Four dissenting Justices agreed with this principle, but they also would invalidate a state law that "actually and substantially interferes with specific federal programs." Id. at 448, 451–52.

[104] 495 U.S. at 435. That is, only when the overall effect, when balanced against other regulations applicable to similarly situated persons who do not deal with the government, imposes a discriminatory burden will they be invalidated. Justice Scalia, concurring, was doubtful of this standard. Id. at 444.

[105] 22 U.S. (9 Wheat.) 738 (1824).

[106] 22 U.S. at 865.

[107] 22 U.S. at 865.

[108] 22 U.S. at 866.

[109] 22 U.S. at 867.

ton,[110] where Chief Justice Marshall also found in the Supremacy Clause a bar to state taxation of obligations of the United States. During the Civil War, when Congress authorized the issuance of legal tender notes, it explicitly declared that such notes, as well as United States bonds and other securities, should be exempt from state taxation.[111] A modified version of this section remains on the statute books today.[112] The right of Congress to exempt legal tender notes to the same extent as bonds was sustained in *Bank v. Supervisors*,[113] over the objection that such notes circulate as money and should be taxable in the same way as coin. But a state tax on checks issued by the Treasurer of the United States for interest accrued upon government bonds was sustained since it did not in any way affect the credit of the National Government.[114] Similarly, the assessment for an *ad valorem* property tax of an open account for money due under a federal contract,[115] and the inclusion of the value of United States bonds owed by a decedent, in measuring an inheritance tax,[116] were held valid, since neither tax would substantially embarrass the power of the United States to secure credit.[117] A state property tax levied on mutual savings banks and federal savings and loan associations and measured by the amount of their capital, surplus, or reserve and undivided profits, but without deduction of the value of their United States securities, was voided as a tax on obligations of the Federal Government. Apart from the fact that the ownership interest of depositors in such institutions was different from that of corporate stockholders, the tax was imposed on the banks which were solely liable for payment thereof.[118]

Income from federal securities is also beyond the reach of the state taxing power as the cases now stand.[119] Nor can such a tax

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[110] 27 U.S. (2 Pet.) 449 (1829), followed in New York ex rel. Bank of Commerce v. New York City, 67 U.S. (2 Bl.) 620 (1863).

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

[112] 31 U.S.C. § 3124. The exemption under the statute is no broader than that which the Constitution requires. First Nat'l Bank v. Bartow County Bd. of Tax Assessors, 470 U.S. 583 (1985). The relationship of this statute to another, 12 U.S.C. § 548, governing taxation of shares of national banking associations, has occasioned no little difficulty. American Bank & Trust Co. v. Dallas County, 463 U.S. 855 (1983); Memphis Bank & Trust Co. v. Garner, 459 U.S. 392 (1983).

[113] 74 U.S. (7 Wall.) 26 (1868).

[114] Hibernia Savings Society v. San Francisco, 200 U.S. 310, 315 (1906).

[115] Smith v. Davis, 323 U.S. 111 (1944).

[116] Plummer v. Coler, 178 U.S. 115 (1900); Blodgett v. Silberman, 277 U.S. 1, 12 (1928).

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

[118] Society for Savings v. Bowers, 349 U.S. 143 (1955).

[119] Northwestern Mut. Life Ins. Co. v. Wisconsin, 275 U.S. 136, 140 (1927).

be imposed indirectly upon the stockholders on such part of the corporate dividends as corresponds to the part of the corporation's income which is not assessed, *i.e.*, income from tax exempt bonds.[120] A state may constitutionally levy an excise tax on corporations for the privilege of doing business, and measure the tax by the property of net income of the corporation, including tax exempt United States securities or the income derived therefrom.[121] The designation of a tax is not controlling.[122] Where a so-called "license tax" upon insurance companies, measured by gross income, including interest on government bonds, was, in effect, a commutation tax levied in lieu of other taxation upon the personal property of the taxpayer, it was still held to amount to an unconstitutional tax on the bonds themselves.[123]

Taxation of Government Contractors.—In the course of his opinion in *Osborn v. Bank of the United States*,[124] Chief Justice Marshall posed the question: "Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative." [125]

Today, the question insofar as taxation is concerned is answered in the affirmative. Although the early cases looked toward immunity,[126] in *James v. Dravo Contracting Co.*,[127] by a 5-to-4 vote, the Court established the modern doctrine. Upholding a state tax on the gross receipts of a contractor providing services to the Federal Government, the Court said that "'[I]t is not necessary to cripple [the state's power to tax] by extending the constitutional exemption from taxation to those subjects which fall within the general application of non-discriminatory laws, and where no direct burden

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[120] Miller v. Milwaukee, 272 U.S. 713 (1927).

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

[122] Macallen Co. v. Massachusetts, 279 U.S. 620, 625 (1929).

[123] Northwestern Mutual Life Ins. Co. v. Wisconsin, 275 U.S. 136 (1927).

[124] 22 U.S. (9 Wheat.) 738 (1824).

[125] 22 U.S. at 867.

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

[127] 302 U.S. 134 (1937).

is laid upon the governmental instrumentality, and there is only a remote, if any, influence upon the exercise of the functions of government.'" [128] A state-imposed sales tax upon the purchase of goods by a private firm having a cost-plus contract with the Federal Government was sustained, it not being critical to the tax's validity that it would be passed on to the government.[129] Previously, it had sustained a gross receipts tax levied in lieu of a property tax upon the operator of an automobile stage line, who was engaged in carrying the mails as an independent contractor [130] and an excise tax on gasoline sold to a contractor with the government and used to operate machinery in the construction of levees on the Mississippi River.[131] Although the decisions have not set an unwavering line,[132] the Court has hewed to a very restrictive doctrine of immunity. "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." [133] Thus, *New Mexico* sustained a state gross receipts tax and a use tax imposed upon contractors with the Federal Government which operated on "advanced funding," drawing on federal deposits so that only federal funds were expended by the contractors to meet their obligations.[134] Of course, Congress may

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[128] 302 U.S. at 150 (quoting Willcuts v. Bunn, 282 U.S. 216, 225 (1931)).

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

[130] Alward v. Johnson, 282 U.S. 509 (1931).

[131] Trinityfarm Const. Co. v. Grosjean, 291 U.S. 466 (1934).

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

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

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

statutorily provide for immunity from taxation of federal contractors generally or in particular programs.[135]

Taxation of Salaries of Federal Employees.—Of a piece with *James v. Dravo Contracting Co.* was *Graves v. New York ex rel. O'Keefe*,[136] handed down two years later. Repudiating the theory "that a tax on income is legally or economically a tax on its source," the Court held that a state could levy a nondiscriminatory income tax upon the salary of an employee of a government corporation. In the opinion of the Court, Justice Stone intimated that Congress could not validly confer such an immunity upon federal employees. "The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes; and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments." [137] Chief Justice Hughes concurred in the result without opinion. Justices Butler and McReynolds dissented and Justice Frankfurter wrote a concurring opinion in which he reserved judgment as to "whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State governments under which they live." [138]

That question is academic, Congress's having consented to state taxation of its employees' compensation as long as the taxation "does not discriminate against the . . . employee, because of the source of the . . . compensation." [139] This principle, the Court has held, "is

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

[136] 306 U.S. 466 (1939), followed in State Comm'n v. Van Cott, 306 U.S. 511 (1939). This case was overruled by implication in Dobbins v. Erie County, 41 U.S. (16 Pet.) 435 (1842), and New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937), which held the income of federal employees to be immune from state taxation.

[137] 306 U.S. at 487.

[138] 306 U.S. at 492.

[139] 4 U.S.C. § 111. The statute, part of the Public Salary Tax Act of 1939, was considered and enacted contemporaneously with the alteration occurring in constitutional law, exemplified by *Graves*. That is, in Helvering v. Gerhardt, 304 U.S. 405 (1938), the Court had overruled precedents and held that Congress could impose

coextensive with the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity." [140]

Ad Valorem Taxes Under the Doctrine.—Property owned by a federally chartered corporation engaged in private business is subject to state and local *ad valorem* taxes. This was conceded in *McCulloch v. Maryland* [141] and confirmed a half century later with respect to railroads incorporated by Congress.[142] Similarly, a property tax may be levied against the lands under water that are owned by a person holding a license under the Federal Water Power Act.[143] However, when privately owned property erected by lessees on tax-exempt state lands is taxed by a county at less than full value, and houses erected by contractors on land leased from a federal Air Force base are taxed at full value, the latter tax, solely because it discriminates against the United States and its lessees, is void.[144] Likewise, when, under state laws, a school district does not tax private lessees of state and municipal realty, whose leases are subject to termination at the lessor's option in the event of sale, but does levy a tax, measured by the entire value of the realty, on lessees of United States property used for private purposes and whose leases are terminable at the option of the United States in an emergency or upon sale, the discrimination voided the tax collected from the latter. "A state tax may not discriminate against the government or those with whom it deals" in the absence of significant differences justifying levy of higher taxes on lessees of federal property.[145] Land con-

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nondiscriminatory taxes on the incomes of most state employees, and the 1939 Act had as its primary purpose the imposition of federal income taxes on the salaries of all state and local government employees. Feeling equity required it, Congress included a provision authorizing nondiscriminatory state taxation of federal employees. *Graves* came down while the provision was pending in Congress. *See* Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 810–14 (1989). For application of the Act to salaries of federal judges, *see* Jefferson County v. Acker, 527 U.S. 423 (1999) (upholding imposition of a local occupational tax).

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

[141] 17 U.S. (4 Wheat.) 316, 426 (1819).

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

[143] Susquehanna Power Co. v. Tax Comm'n (No. 1), 283 U.S. 291 (1931).

[144] Moses Lake Homes v. Grant County, 365 U.S. 744 (1961).

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

veyed by the United States to a corporation for dry dock purposes was subject to a general property tax, despite a reservation in the conveyance of a right to free use of the dry dock and a provision for forfeiture in case of the continued unfitness of the dry dock for use or the use of land for other purposes.[146] Also, where equitable title has passed to the purchaser of land from the government, a state may tax the equitable owner on the full value thereof, despite retention of legal title;[147] but, in the case of reclamation entries, the tax may not be collected until the equitable title passes.[148] In the pioneer case of *Van Brocklin v. Tennessee*,[149] the state was denied the right to sell for taxes lands which the United States owned at the time the taxes were levied, but in which it had ceased to have any interest at the time of sale. Similarly, a state cannot assess land in the hands of private owners for benefits from a road improvement completed while it was owned by the United States.[150]

In 1944, with two dissents, the Court held that where the government purchased movable machinery and leased it to a private contractor the lessee could not be taxed on the full value of the equipment.[151] Twelve years later, and with a like number of Justices dissenting, the Court upheld the following taxes imposed on federal contractors: (1) a municipal tax levied pursuant to a state law which stipulated that when tax exempt real property is used by a private firm for profit, the latter is subject to taxation to the same extent as if it owned the property, and based upon the value of real property, a factory, owned by the United States and made available under a lease permitting the contracting corporation to deduct such taxes from rentals paid by it; the tax was collectible only by direct action against the contractor for a debt owed, and was not applicable to federal properties on which payments in lieu of taxes are made; (2) a municipal tax, levied under the authority of the same state law, based on the value of the realty owned by the United States, and collected from a cost-plus-fixed-fee contractor, who paid no rent but agreed not to include any part of the cost of the facilities furnished by the government in the price of goods supplied under the contract; (3) another municipal tax levied in the same state against a federal subcontractor, and computed on the value of materials and work in process in his possession, notwithstanding that

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[146] Baltimore Shipbuilding Co. v. Baltimore, 195 U.S. 375 (1904).

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

[148] Irwin v. Wright, 258 U.S. 219 (1922).

[149] 117 U.S. 151 (1886).

[150] Lee v. Osceola Imp. Dist., 268 U.S. 643 (1925).

[151] United States v. Allegheny County, 322 U.S. 174 (1944).

title thereto had passed to the United States following his receipt of installment payments.[152]

In sustaining the first tax, the Court held that it was imposed, not on the government or on its property, but upon a private lessee, that it was computed by the value of the use to the contractor of the federally leased property, and that it was nondiscriminatory; that is, it was designed to equalize the tax burden carried by private business using exempt property with that of similar businesses using taxed property. Distinguishing *Allegheny County*, the Court maintained that in that older decision, the tax invalidated was imposed directly on federal property and that the question of the legality of a privilege on use and possession of such property had been expressly reserved. Also, insofar as the economic incidents of such tax on private use curtails the net rental accruing to the government, such burden was viewed as insufficient to vitiate the tax.[153]

Deeming the second and third taxes similar to the first, the Court sustained them as taxes on the privilege of using federal property in the conduct of private business for profit. With reference to the second, the Court emphasized that the government had reserved no right of control over the contractor and, hence, the latter could not be viewed as an agent of the government entitled to the immunity derivable from that status.[154] As to the third tax, the Court asserted that there was no difference between taxing a private party for the privilege of using property he possesses, and taxing him for possessing property which he uses; for, in both instances, the use was private profit. Moreover, the economic burden thrust upon the government was viewed as even more remote than in the administration of the first two taxes.[155]

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

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

[154] United States v. Township of Muskegon, 355 U.S. 484 (1958).

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

Federal Property and Functions.—Property owned by the United States is, of course, wholly immune from state taxation.[156] No state can regulate, by the imposition of an inspection fee, any activity carried on by the United States directly through its own agents and employees.[157] An early case, the authority of which is now uncertain, held invalid a flat rate tax on telegraphic messages, as applied to messages sent by public officers on official business.[158]

Federally Chartered Finance Agencies: Statutory Exemptions.—Fiscal institutions chartered by Congress, their shares and their property, are taxable only with the consent of Congress and only in conformity with the restrictions it has attached to its consent.[159] Immediately after the Supreme Court construed the statute authorizing the states to tax national bank shares as allowing a tax on the preferred shares of such a bank held by the Reconstruction Finance Corporation,[160] Congress enacted a law exempting such shares from taxation. The Court upheld this measure, saying: "When Congress authorized the states to impose such taxation, it did no more than gratuitously grant them political power which they theretofore lacked. Its sovereign power to revoke the grant remained unimpaired, the grant of the privilege being only a declaration of legislative policy changeable at will."[161] In *Pittman v. Home Owners' Corp.*,[162] the Court sustained the power of Congress under the necessary and proper clause to immunize the activities of the Corporation from state taxation; and in *Federal Land Bank v. Bismarck Lumber Co.*,[163] the like result was reached with respect to an attempt by the state to impose a retail sales tax on a sale of lumber and other building materials to the bank for use in repairing and improving property that had been acquired by foreclosure or mortgages.

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

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

[158] Telegraph Co. v. Texas, 105 U.S. 460, 464 (1882).

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

[160] Baltimore Nat'l Bank v. Tax Comm'n, 297 U.S. 209 (1936).

[161] Maricopa County v. Valley Bank, 318 U.S. 357, 362, (1943).

[162] 308 U.S. 21 (1939).

[163] 314 U.S. 95 (1941).

The state's principal argument proceeded thus: "Congress has authority to extend immunity only to the governmental functions of the federal land banks; the only governmental functions of the land banks are those performed by acting as depositories and fiscal agents for the Federal Government and providing a market for government bonds; all other functions of the land banks are private; petitioner here was engaged in an activity incidental to its business of lending money, an essentially private function; therefore § 26 cannot operate to strike down a sales tax upon purchases made in furtherance of petitioner's lending functions."[164] The Court rejected this argument and invalidated the tax, writing: "The argument that the lending functions of the federal land banks are proprietary rather than governmental misconceives the nature of the Federal Government with respect to every function which it performs. The federal government is one of delegated powers, and from that it necessarily follows that any constitutional exercise of its delegated powers is governmental. It also follows that, when Congress constitutionally creates a corporation through which the federal government lawfully acts, the activities of such corporation are governmental."[165]

Similarly, the lease by a federal land bank of oil and gas in a mineral estate, which it had reserved in land originally acquired through foreclosure and thereafter had conveyed to a third party, was held immune from a state personal property tax levied on the lease and on the royalties accruing thereunder. The fact that at the time of the conveyance and lease, the bank had recouped its entire loss resulting from the foreclosure did not operate to convert the mineral estate and lease into a non-governmental activity no longer entitled to exemption.[166] However, in the absence of federal legislation, a state law laying a percentage tax on the users of safety deposit services, measured by the bank's charges therefore, was held valid as applied to national banks. The tax, being on the user, did not, the Court held, impose an intrinsically unconstitutional burden on a federal instrumentality.[167]

Royalties.—In 1928, the Court went so far as to hold that a state could not tax as income royalties for the use of a patent issued by the United States.[168] This proposition was soon overruled in *Fox Film Corp. v. Doyal*,[169] where a privilege tax based on gross income and applicable to royalties from copyrights was upheld. Like-

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[164] 314 U.S. at 101.
[165] 314 U.S. at 102 (citations omitted).
[166] Federal Land Bank v. Kiowa County, 368 U.S. 146 (1961).
[167] Colorado Bank v. Bedford, 310 U.S. 41 (1940).
[168] Long v. Rockwood, 277 U.S. 142 (1928).
[169] 286 U.S. 123 (1932).

wise a state may lay a franchise tax on corporations, measured by the net income from all sources and applicable to income from copyright royalties.[170]

Immunity of Lessees of Indian Lands.—Another line of anomalous decisions conferring tax immunity upon lessees of restricted Indian lands was overruled in 1949. The first of these cases, *Choctaw & Gulf R.R. v. Harrison*,[171] held that a gross production tax on oil, gas, and other minerals was an occupational tax, and, as applied to a lessee of restricted Indian lands, was an unconstitutional burden on such lessee, who was deemed to be an instrumentality of the United States. Next, the Court held the lease itself a federal instrumentality immune from taxation.[172] A modified gross production tax imposed in lieu of all ad valorem taxes was invalidated in two *per curiam* decisions.[173] In *Gillespie v. Oklahoma*,[174] a tax upon net income of the lessee derived from sales of his share of oil produced from restricted lands also was condemned. Finally a petroleum excise tax upon every barrel of oil produced in the state was held inapplicable to oil produced on restricted Indian lands.[175] In harmony with the trend to restricting immunity implied from the Constitution to activities of the government itself, the Court overruled all these decisions in *Oklahoma Tax Comm'n v. Texas Co.* and held that a lessee of mineral rights in restricted Indian lands was subject to nondiscriminatory gross production and excise taxes, so long as Congress did not affirmatively grant him immunity.[176]

Summation and Evaluation

Although *McCulloch v. Maryland* and *Gibbons v. Ogden* were expressions of a single thesis, the supremacy of the national government, their development after Marshall's death has been sharply divergent. During the period when *Gibbons v. Ogden* was eclipsed by the theory of dual federalism, the doctrine of *McCulloch v. Mary-*

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[170] Educational Films Corp. v. Ward, 282 U.S. 379 (1931).

[171] 235 U.S. 292 (1914).

[172] Indian Oil Co. v. Oklahoma, 240 U.S. 522 (1916).

[173] Howard v. Gipsy Oil Co., 247 U.S. 503 (1918); Large Oil Co. v. Howard, 248 U.S. 549 (1919).

[174] 257 U.S. 501 (1922).

[175] Oklahoma v. Barnsdall Corp., 296 U.S. 521 (1936).

[176] 336 U.S. 342 (1949). Justice Rutledge, speaking for the Court, sketched the history of the immunity lessees of Indian lands from state taxation, which he found to stem from early rulings that tribal lands are themselves immune. *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867); *The New York Indians*, 72 U.S. (5 Wall.) 761 (1867). One of the first steps taken to curtail the scope of the immunity was Shaw v. Oil Corp., 276 U.S. 575 (1928), which held that lands outside a reservation, though purchased with restricted Indian funds, were subject to state taxation. Congress soon upset the decision, however, and its act was sustained in Board of County Comm'rs v. Seber, 318 U.S. 705 (1943).

land was not merely followed but greatly extended as a restraint on state interference with federal instrumentalities. Conversely, the Court's recent return to Marshall's conception of the powers of Congress has coincided with a retreat from the more extreme positions taken in reliance upon *McCulloch v. Maryland*. Today, the application of the Supremacy Clause is becoming, to an ever increasing degree, a matter of statutory interpretation; a determination whether state regulations can be reconciled with the language and policy of federal enactments. In the field of taxation, the Court has all but wiped out the private immunities previously implied from the Constitution without explicit legislative command. Broadly speaking, the immunity which remains is limited to activities of the government itself, and to that which is explicitly created by statute, *e.g.*, that granted to federal securities and to fiscal institutions chartered by Congress. But the term "activities" will be broadly construed.

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

OATH OF OFFICE

Power of Congress in Respect to Oaths

Congress may require no other oath of fidelity to the Constitution, but it may add to this oath such other oath of office as its wisdom may require.[177] It may not, however, prescribe a test oath as a qualification for holding office, such an act being in effect an *ex post facto* law,[178] and the same rule holds in the case of the states.[179]

National Duties of State Officers

Commenting in *The Federalist* on the requirement that state officers, as well as members of the state legislatures, shall be bound

[177] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 416 (1819).

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

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

by oath or affirmation to support the Constitution, Hamilton wrote: "Thus the legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government *as far as its just and constitutional authority extends*; and it will be rendered auxiliary to the enforcement of its laws."[180] The younger Pinckney had expressed the same idea on the floor of the Philadelphia Convention: "They [the states] are the instruments upon which the Union must frequently depend for the support and execution of their powers. . . ."[181] Indeed, the Constitution itself lays many duties, both positive and negative, upon the different organs of state government,[182] and Congress may frequently add others, provided it does not require the state authorities to act outside their normal jurisdiction. Early congressional legislation contains many illustrations of such action by Congress.

The Judiciary Act of 1789[183] not only left the state courts in sole possession of a large part of the jurisdiction over controversies between citizens of different states and in concurrent possession of the rest, and by other sections state courts were authorized to entertain proceedings by the United States itself to enforce penalties and forfeitures under the revenue laws, examples of the principle that federal law is law to be applied by the state courts, but also any justice of the peace or other magistrates of any of the states were authorized to cause any offender against the United States to be arrested and imprisoned or bailed under the usual mode of process. From the beginning, Congress enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[184] Pursuant to the same idea of treating state governmental organs as available to the national government for administrative purposes, the act of 1793 entrusted the rendition of fugitive slaves in part to national officials and in part to state officials and the rendition of fugitives from justice from one state to another exclusively to the state executives.[185]

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

[181] 1 M. Farrand, The Records of the Federal Convention of 1787 404 (rev. ed. 1937).

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

[183] 1 Stat. 73 (1789).

[184] *See* Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); Holcomb, *The States as Agents of the Nation*, 3 Selected Essays on Constitutional Law 1187 (1938); Barnett, *Cooperation Between the Federal and State Governments*, 7 Ore. L. Rev. 267 (1928). *See also* J. Clark, The Rise of a New Federalism (1938); E. Corwin, Court Over Constitution 148–168 (1938).

[185] 1 Stat. 302 (1793).

With the rise of the doctrine of states' rights and of the equal sovereignty of the states with the National Government, the availability of the former as instruments of the latter in the execution of its power came to be questioned.[186] In *Prigg v. Pennsylvania*,[187] decided in 1842, the constitutionality of the provision of the act of 1793 making it the duty of state magistrates to act in the return of fugitive slaves was challenged; and in *Kentucky v. Dennison*,[188] decided on the eve of the Civil War, similar objection was leveled against the provision of the same act which made it "the duty" of the chief executive of a state to render up a fugitive from justice upon the demand of the chief executive of the state from which the fugitive had fled. The Court sustained both provisions, but upon the theory that the cooperation of the state authorities was purely voluntary. In *Prigg*, the Court, speaking by Justice Story, said that "while a difference of opinion has existed, and may exist still on the point, in different states, whether state magistrates are bound to act under it, none is entertained by this Court, that state magistrates may, if they choose, exercise that authority, unless prohibited by state legislation." [189] Subsequent cases confirmed the point that Congress could authorize willing state officers to perform such federal duties.[190] Indeed, when Congress in the Selective Service Act of 1917 authorized enforcement to a great extent through state employees, the Court rejected "as too wanting in merit to require further notice" the contention that the Act was invalid because of this delegation.[191] State officials were frequently employed in the enforcement of the National Prohibition Act, and suits to abate nuisances as defined by the statute were authorized to be brought, in the name of the United States, not only by federal officials, but also by "any prosecuting attorney of any State or any subdivision thereof." [192]

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

[187] 41 U.S. (16 Pet.) 539 (1842).

[188] 65 U.S. (24 How.) 66 (1861).

[189] 41 U.S. (16 Pet.) 539, 622 (1842). *See also* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 108 (1861). The word "magistrates" in this passage does not refer solely to judicial officers but reflects the usage in that era in which officers generally were denominated magistrates; the power thus upheld is not the related but separate issue of the use of state courts to enforce federal law.

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

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

[192] 41 Stat. 314, § 22. In at least two States, the practice was approved by state appellate courts. Carse v. Marsh, 189 Cal. 743, 210 Pac. 257 (1922); United States v. Richards, 201 Wis. 130, 229 N.W. 675 (1930). On this and other issues under the

In *Dennison*, however, the Court held that, although Congress could delegate, it could not require performance of an obligation. The "duty" of state executives in the rendition of fugitives from justice was construed to be declaratory of a "moral duty." Chief Justice Taney wrote for the Court: "The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it. . . . It is true," the Chief Justice conceded, "that in the early days of the Government, Congress relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the General Government, and were accustomed to receive it, [but this, he explained, was] upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the Constitution." [193]

Eighteen years later, in *Ex parte Siebold*,[194] the Court sustained the right of Congress, under Article I, § 4, paragraph 1 of the Constitution, to impose duties upon state election officials in connection with a congressional election and to prescribe additional penalties for the violation by such officials of their duties under state law. Although the doctrine of the holding was expressly confined to cases in which the National Government and the states enjoy "a concurrent power over the same subject matter," no attempt was made to catalogue such cases. Moreover, the outlook of Justice Bradley's opinion for the Court was decidedly nationalistic rather than dualistic, as is shown by the answer made to the contention of counsel "that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned . . . ." [195] To this Justice Bradley replied: "As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal appli-

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Act, *see* Hart, *Some Legal Questions Growing Out of the President's Executive Order for Prohibition Enforcement*, 13 VA. L. REV. 86 (1922).

[193] 65 U.S. (24 How.) 66, 107–08 (1861).

[194] 100 U.S. 371 (1880).

[195] 100 U.S. at 391.

cation. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." [196]

Conflict thus developed early between these two doctrinal lines. But it was the *Siebold* line that prevailed. Enforcement of obligations upon state officials through mandamus or through injunctions was readily available, even when the state itself was immune, through the fiction of *Ex parte Young*,[197] under which a state official could be sued in his official capacity but without the immunities attaching to his official capacity. Although the obligations were, for a long period, in their origin based on the United States Constitution, the capacity of Congress to enforce statutory obligations through judicial action was little doubted.[198] Nonetheless, it was only recently that the Court squarely overruled *Dennison*. "If it seemed clear to the Court in 1861, facing the looming shadow of a Civil War, that 'the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it,' . . . basic constitutional principles now point as clearly the other way." [199] That case is doubly important, because the Court spoke not only to the Extradition Clause and the federal statute directly enforcing it, but it also enforced a purely statutory right on behalf of a Territory that could not claim for itself rights under the clause.[200]

Even as the Court imposes new federalism limits upon Congress's powers to regulate the states as states, it has reaffirmed the principle that Congress may authorize the federal courts to compel state officials to comply with federal law, statutory as well as constitutional. "[T]he Supremacy Clause makes federal law paramount over the contrary positions of state officials; the power of federal courts to enforce federal law thus presupposes some authority to order state officials to comply." [201]

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[196] 100 U.S. at 392.

[197] 209 U.S. 123 (1908). *See also* Board of Liquidation v. McComb, 92 U.S. 531, 541 (1876).

[198] Maine v. Thiboutot, 448 U.S. 1 (1980).

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

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

[201] New York v. United States, 505 U.S. 144, 179 (1992). *See also* FERC v. Mississippi, 456 U.S. 742, 761–765 (1982); Washington v. Washington State Commercial

No doubt, there is tension between the exercise of Congress's power to impose duties on state officials [202] and the developing doctrine under which the Court holds that Congress may not "commandeer" state legislative or administrative processes in the enforcement of federal programs.[203] However, the existence of the Supremacy Clause and the federal oath of office, as well as a body of precedent, indicates that coexistence of the two lines of principles will be maintained.

Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979); Illinois v. City of Milwaukee, 406 U.S. 91, 106–108 (1972).

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

[203] New York v. United States, 505 U.S. 144 (1992).